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QUANTUM OF SENTENCE

IN

CANADIAN FEDERAL LAW

R. Paul Nadin-Davis

Thesis submitted to the School of Graduate Studies and Research of the University of Ottawa in partial fulfillment of the requirements for the Degree of Doctor of Laws.

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ABSTRACT

Sentencing in Canada follows a distinct, logical pattern. The primary decision is as to whether the offender should be sentenced with reference to his offence, taking mitigating circumstances into account (the tariff) or with reference to his "treatment" needs (individualization). An analysis of sentencing precedents fully confirms the existence of this framework, despite occasional disavowals by the Judiciary themselves. The substance of this framework is illustrated by, and itself illuminates, the entire field of sentencing law.

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It has been a tremendous personal privilege to be associated with each and every one.

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Auxillou, [unreported] May 11th, 1981 (B.C.C.A.).
Axworthy (1974), 6 N. & P.E.I.R. 113 (P.E.I.C.A.).
Ayling et al. (1978), 6 B.C.L.R. 125 (Co. Ct.).
Aylward (1978), 43 C.C.C. (2d) 455 (Ont. C.A.).
Azure (1978), 15 A.R. 457 (T.D.).

B. (1975), 31 C.R.N.S. 59 (Ont. Co. Ct.).
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Babiak and Stefaniuk (1974), 21 C.C.C. (2d) 464, [1975] 3 W.W.R. 615 (Man. C.A.).
Babineau, Johnson and Parent (1979), 24 N. & P.E.I.R. 271, 65 A.P.R. 271 (P.E.I.C.A.).
Badenoch (1968), 4 C.R.N.S. 293 (B.C.C.A.).
Bagnell (1974), 9 N.S.R. (2d) 351 (C.A.).
Baigent (1973), 74 D.T.C. 6467 (Ont. Co. Ct.).
Bailey (1979), 35 N.S.R. (2d) 341, 62 A.P.R. 341 (C.A.).
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Balaszy (1980), 54 C.C.C. (2d) 346 (Ont. Prov. Ct.).
Baldhead, [1966] 4 C.C.C. 183, 48 C.R. 228, 55 W.W.R. 757 (Sask. C.A.).
Ball and Parro (1971), 14 C.R.N.S. 238 (Ont. C.A.).
Bang, [unreported] April 27th, 1981 (B.C. Co. Ct.).
Barker (1967), 3 C.R.N.S. 58 (Y.T. Mag. Ct.).
Bartkow (1978), 1 C.R. (3d) S-36, 24 N.S.R. (2d) 518, 35 A.P.R. 518 (C.A.).
Bartlett (1979), 20 N. & P.E.I.R. 530, 53 A.P.R. 530 (Nfld. C.A.).
Barton Tubes Ltd. et al. (1978), 3 W.C.B. 29 (Ont. H.C.).
Basha et al. (1979), 23 N. & P.E.I.R. 286, 61 A.P.R. 286 (Nfld. C.A.).
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Beacon and Modney (1976), 31 C.C.C. (2d) 56 (Alta. T.D.).
Beals (1973), 6 N.S.R. (2d) 551 (C.A.).
Beam (1954), 19 C.R. 367 (Ont. C.A.).
Bear, 13 C.C.C. (2d) 570, 24 C.R.N.S. 393, [1974] 1 W.W.R. 283 (Sask. C.A.).

Beardy (1980), 4 W.C.B. 491 (Man. C.A.).
Beaudin, [unreported] March 24th, 1981 (Ont. C.A.).
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Beaulieu (1980), 21 A.R. 120 (N.W.T.S.C.).
Beaumier, [unreported] March 31st, 1981 (B.C.C.A.).
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Beauvais (1978), 5 C.R. (3d) S-27 (Ont. C.A.).
Beckwith (1979), 31 N.B.R. (2d) 698, 75 A.P.R. 698 (Co. Ct.).
Bedard (1972), 22 C.R.N.S. 230 (Que. C.A.).
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Belanger (1979), 46 C.C.C. (2d) 266, 8 C.R. (3d) S-10 (Ont. C.A.).
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Bell (1976), 18 Crim. L.Q. 402 (Ont. C.A.).
Bell (1979), 23 A.R. 398 (N.W.T.S.C.).
Bell and Neveu (1978), 3 C.R. (3d) S-21, 6 Alta. L.R. (2d) 80, 11 A.R. 564 (T.D.).
Belleville and Chabot (1975), 18 Crim. L.Q. 21 (Que. C.A.).
Ben Moss Jewellers Ltd. (1972), 8 C.C.C. (2d) 509, 7 C.P.R. (2d) 184 (Man. Prov. Ct.).
Benedek (1973), 15 Crim. L.Q. 259 (B.C. Co. Ct.).
Bengert (No. 14) (1979), 15 C.R. (3d) 97, 52 C.C.C. (2d) 100 (B.C.S.C.).
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Bennett, [unreported] March 3rd, 1981 (Nfld. C.A.).
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Benning (1979), 21 N. & P.E.I.R. 393, 56 A.P.R. 393 (Nfld. C.A.).
Berger, 2 C.C.C. (2d) 492, [1971] 1 O.R. 765 (C.A.).
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Bernier (1939), 71 C.C.C. 380 (Que. K.B.).
Bessette, [1974] C.A. 148.
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Birt (1974), 6 N. & P.E.I.R. 249 (P.E.I.C.A.).
Black (1978), 23 N.B.R. (2d) 92, 44 A.P.R. 92 (C.A.).
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Blake (1978), 4 C.R. (3d) 328, 39 C.C.C. (2d) 138, 15 N. & P.E.I.R. 53, 38 A.P.R. 53 (P.E.I.C.A.).
Blashfield (1972), 5 B.C.L.R. 344 (C.A.).
Blazek (1976), 14 N.B.R. (2d) 260 (C.A.).
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Boisvert (1970), 13 Crim. L.Q. 153 (Que. C.A.).
Bolduc (1973), 16 C.C.C. (2d) 280 (Que. C.A.).
Bond (1977), 1 W.C.B. 300 (Que. C.A.).
Bonhomme (1979), 22 Crim. L.Q. 435 (B.C.C.A.).
Bonin, Murphy and Newcombe, [unreported] March 16th, 1981 (N.S.C.A.).
Boomhower (1974), 20 C.C.C. (2d) 89, 27 C.R.N.S. 188 (Ont. C.A.).
Borden (1979), 39 N.S.R. (2d) 357, 71 A.P.R. 357 (Co. Ct.).
Borland (1968), 5 C.R.N.S. 251 (N.W.T. Terr. Ct.).

Borowski, 3 C.C.C. (2d) 402, [1971] 3 W.W.R. 434 (sub nom. Anger v. Borowski), 19 D.L.R. (3d) 537 (Man. Q.B.).
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Boucher (1978), 21 Crim. L.Q. 160 (Que. C.A.).
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Bourgeois (1978), 29 N.S.R. (2d) 596, 45 A.P.R. 596 (C.A.).
Bouzane, [unreported] January 31st, 1977 (B.C.C.A.).
Bowersock (1977), 10 A.R. 372 (T.D.).
Bowles (1974), 16 C.C.C. (2d) 425 (Ont. C.A.).
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Brookes, [1970] 4 C.C.C. 377 (Ont. C.A.).
Brown (1972), 8 C.C.C. (2d) 13 (Ont. C.A.).
Brown (1976), 13 N. & P.E.I.R. 1 (Nfld. Prov. Ct.).
Brown (1976), 36 C.R.N.S. 246 (Ont. Co. Ct.).
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Bulger, Mann and Arsenault (1978), 16 N. & P.E.I.R. 275, 42 A.P.R. 275 (P.E.I.C.A.).
Bulleyment (1979), 46 C.C.C. (2d) 429 (Ont. C.A.).
Bundon (1975), 8 N. & P.E.I.R. 403 (Nfld. Prov. Ct.).
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Burden (1973), 11 C.C.C. (2d) 491 (Ont. C.A.).
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Bussiere (1973), 6 N.B.R. (2d) 440 (C.A.).
Butkans, [1972] 4 W.W.R. 262 (Man. Co. Ct.).

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Caja and Billings (1977), 36 C.C.C. (2d) 401 (Ont. C.A.).
Calder (1956), 114 C.C.C. 155 (Man. C.A.).
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Cameron, [unreported] March 12th, 1981 (B.C.C.A.).
Camp (1979), 7 Sask. R. 197 (Dist. Ct.).
Campbell (1977), 18 N.S.R. (2d) 547 (C.A.).
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Campbell (1979), 51 C.P.R. (2d) 284 (B.C. Co. Ct.).
Campbell (1980), 4 W.C.B. 339 (Que. S.C.).
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Campbell and Mlynarchuk (1972), 10 C.C.C. (2d) 26, 21 C.R.N.S. 273, [1973] 2 W.W.R. 246 (Alta. Dist. Ct.).
Campbell and The Queen, [1975] 3 W.W.R. 593, 22 C.C.C. (2d) 65 (B.C.C.A.).
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Canada General Electric Co. (1977), 35 C.P.R. (2d) 210, 2 B.L.R. 230 (Ont. H.C.).
Canada Metal Co. Ltd. (1980), 5 W.C.B. 297 (Ont. Co. Ct.).
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Canada Safeway Ltd. (1971), 4 C.P.R. (2d) 217 (Sask. Mag. Ct.).
Canadian Cellulose Ltd. (1979), 3 W.C.B. 412 (B.C. Co. Ct.).
Canadian Professional Golfers' Association et al. (1980), 5 W.C.B. 77 (B.C.S.C.).
Canning, [1966] 4 C.C.C. 379, 56 W.W.R. 456, 49 C.R. 13 (B.C.C.A.).
Capitan et al. (1981), 6 W.C.B. 119 (Ont. Dist. Ct.).
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Carroll (1980), 27 N. & P.E.I.R. 159, 74 A.P.R. 159 (P.E.I.C.A.).
Carter (1974), 7 N. & P.E.I.R. 290 (Nfld. C.A.).
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Celebrity Enterprises Ltd. (1977), 1 W.C.B. 383 (B.C. Co. Ct.).
Centennial Pharmacy Ltd. (1970), 64 C.P.R. 87 (B.C. Prov. Ct.).
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Chaisson (1976), 16 N.B.R. (2d) 404 (C.A.).
Chaisson (1979), 31 N.S.R. (2d) 115, 52 A.P.R. 115 (C.A.).
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Chamberlain (1974), 22 C.C.C. (2d) 361 (Ont. C.A.).
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Chiasson (1975), 24 C.C.C. (2d) 159, 10 N.B.R. (2d) 696 (C.A.).
Chinn (1977), 38 C.C.C. (2d) 45, [1978] 1 W.W.R. 418 (Alta. Dist. Ct.).
Chiovitti (1950), 96 C.C.C. 177 (B.C.C.A.).
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Chislholm (1974), 8 N.S.R. (2d) 231 (C.A.).
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Christmas (1975), 12 N.S.R. (2d) 489 (C.A.).
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Clark (1979), 48 C.C.C. (2d) 440, 33 N.S.R. (2d) 636, 57 A.P.R. 636 (C.A.).
Clarke (1976), 11 N. & P.E.I.R. 251 (Nfld. Prov. Ct.).
Clarke (1979), 48 C.C.C. (2d) 440 (N.S.C.A.).
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Clements (1974), 17 C.C.C. (2d) 574, 6 N. & P.E.I.R. 130 (P.E.I.C.A.).
Cleveland (1977), 1 W.C.B. 609 (Ont. C.A.).
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Coady (1977), 14 N. & P.E.I.R. 274 (Nfld. Dist. Ct.).
Cock (1976), 11 N. & P.E.I.R. 431, 22 A.P.R. 431 (P.E.I.S.C.).
Colby, [1976] B.N. 575 (Ont. C.A.).
Collier (1971), 6 C.C.C. (2d) 438, 17 C.R.N.S. 315 (N.S. Co. Ct.).
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Connor and Hall (1957), 118 C.C.C. 237 (Ont. C.A.).
Constant (1978), 5 C.R. (3d) S-19 (Man. C.A.).
Consumers' Distributing Co. (1973), 12 C.P.R. (2d) 34 (Ont. Prov. Ct.).
Container Materials Ltd. (1940), 4 D.L.R. 293, 74 C.C.C. 113 (Ont. S.C.).
Cooper (1979), 3 W.C.B. 466 (P.E.I.S.C.).
Cooper (1980), 22 Crim. L.Q. 440 (Ont. C.A.).
Cooper (No. 2) (1977), 35 C.C.C. (2d) 35 (Ont. C.A.).
Cope (1973), 15 Crim. L.Q. 371 (Ont. C.A.).
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Cormier (1974), 9 N.S.R. (2d) 687, 22 C.C.C. (2d) 235 (C.A.).
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Costain (1975), 7 N. & P.E.I.R. 148 (P.E.I.S.C.).
Costanzo (1980), 23 Crim. L.Q. 168 (B.C. Co. Ct.).
Cote, [1967] 3 C.C.C. 97 (Sask. C.A.).
Cottrelle (1972), 7 C.C.C. (2d) 30, 18 C.R.N.S. 230 (Ont. Prov. Ct.).
Courchene (1980), 5 W.C.B. 140 (Man. C.A.).
Courty (1976), 15 N.B.R. (2d) 57, 18 A.P.R. 57 (C.A.).
Couture, [1975] R.L. 527 (Que. C.S.P.).
Couture et al., [1970] C.A. 1185.
Craig (1975), 28 C.C.C. (2d) 311 (Alta. C.A.).
Crane (1972), 5 N.S.R. (2d) 37 (C.A.).
Creighton (1980), 3 Man. R. (2d) 60, 22 Crim. L.Q. 295 (C.A.).
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Crothers (1978), 43 C.C.C. (2d) 27 (Sask. C.A.).
Cudmore, [1972] 1 O.R. 812, 5 C.C.C. (2d) 536 (C.A.).
Culetta (1977), 1 W.C.B. 115 (Ont. C.A.).
Culleton (1976), 10 N. & P.E.I.R. 355, 17 A.P.R. 355 (P.E.I.C.A.).
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Cunningham Drug Stores Ltd. (1973), 17 C.C.C. (2d) 279, 13 C.P.R. (2d) 244 (B.C.C.A.), affirming 12 C.C.C. (2d) 4, 8 C.P.R. (2d) 127 (B.C. Prov. Ct.).
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Cusack (1977), 14 N. & P.E.I.R. 181, 33 A.P.R. 181 (P.E.I.C.A.).
Cusack (1978), 41 C.C.C. (2d) 289, 26 N.S.R. (2d) 379, 6 C.R. (3d) S-48, 40 A.P.R. 379 (C.A.).
Cuthbert (1975), 18 Crim. L.Q. 148 (Ont. C.A.).
Cuzner, [1970] 5 C.C.C. 187, [1970] 3 O.R. 222 (C.A.).
Cviyanovich (1974), 10 N.S.R. (2d) 549 (C.A.).
Cyr, [1970] C.A. 1096.
Cyr (1979), 12 C.R. (3d) 108 (Sask. Dist. Ct.).

D.L. (1978), 5 C.R. (3d) S-29 (Ont. C.A.).
Dalton (1977), 18 N.S.R. (2d) 555, 20 A.P.R. 555 (C.A.).
Dalton (1979), 26 N.B.R. (2d) 142, 55 A.P.R. 142 (Q.B.).
Danells (1979), 10 C.R. (3d) S-8, 31 N.S.R. (2d) 579, 52 A.P.R. 579 (C.A.).
Dare to Be Great of Canada Ltd. (1972), 8 C.C.C. (2d) 105 (Alta. Prov. Ct.).
Darrach (1978), 18 N. & P.E.I.R. 81, 47 A.P.R. 81, 1 M.V.R. 130, 21 Crim. L.Q. 426 (P.E.I.C.A.).
Dashner (1974), 15 C.C.C. (2d) 139 (B.C.C.A.).
Dass (1979), 47 C.C.C. (2d) 194 (Man. C.A.).
Davidson (1978), 23 N.B.R. (2d) 21, 44 A.P.R. 21 (C.A.).
Davis, [unreported] June 4th, 1974 (B.C.C.A.).
Davis (1978), 24 N.B.R. (2d) 193, 48 A.P.R. 193 (C.A.).
Dawdy (1973), 12 C.C.C. (2d) 477 (Ont. C.A.).
Dawes (1975), 19 Crim. L.Q. 155 (B.C.S.C.).
Deal (1964), 44 C.R. 282 (B.C. Co. Ct.).
DeBaie (1972), 5 N.S.R. (2d) 24 (C.A.).
Decoste (1974), 10 N.S.R. (2d) 94 (C.A.).
DeCoste (1979), 36 N.S.R. (2d) 466, 64 A.P.R: 466 (C.A.).
de Haan, [1967] 2 All E.R. 618 (C.A.).
Deihl (1972), 5 N.S.R. (2d) 21 (C.A.).
DeJong (1970), 1 C.C.C. (2d) 235 (Sask. C.A.).
Delay (1976), 25 C.C.C. (2d) 575 (Ont. C.A.).
Delorme (1977), 1 W.C.B. 295 (Que. C.A.).
Demedeiros (1979), 12 C.R. (3d) 113 (B.C.C.A.).
Demeter and Whitmore (1976), 32 C.C.C. (2d) 379 (Ont. C.A.).
Deneau et al. (1980), 5 W.C.B. 114 (Alta. C.A.).
Denholm (1970), 11 C.R.N.S. 380 (Sask. C.A.).
Denis, [1970] C.A. 954.
Derkosh (1979), 21 A.R. 243 (C.A.).
Derksen (1972), 20 C.R.N.S. 129, 9 C.C.C. (2d) 97 (B.C. Prov. Ct.).
Deschenes Construction Ltd. (1967), 51 C.P.R. 255 (Que. Q.B.).
Desjarlais, [1980] 4 W.W.R. 676 (Alta. C.A.).
Desmarais (1971), 3 C.C.C. (2d) 523 (Que. C.A.).
Desmarais, [1972] C.A. 868.
Deveau (1977), 18 N.S.R. (2d) 341 (C.A.).
Deviller (1975), 14 N.S.R. (2d) 1 (C.A.).
de Vito (1977), 19 C.W.B. 177 (Que. C.A.).
Devlin and Marentette, [1971] 2 O.R. 359, 3 C.C.C. (2d) 20 (Ont. C.A.).
DeYoung (1976), 38 C.R.N.S. 236, 18 N.S.R. (2d) 84 (Co. Ct.).
Diamond, [unreported] April 7th, 1981 (Nfld. Dist. Ct.).
Dickey (1979), 7 C.R. (3d) S-13 (Que. C.A.).
Dickie (1979), 14 C.R. (3d) 105 (Que. C.S.P.).
Dickinson (1976), 14 N.S.R. (2d) 269 (C.A.).
DiGiovanni, 10 C.C.C. (2d) 392, [1973] 2 O.R. 156 (Ont. C.A.).
Dilivio (1970), 14 C.R.N.S. 185 (Ont. C.A.).
Dion (1977), 1 W.C.B. 331 (Que. C.A.).
Dion, [unreported] April 8th, 1981 (Alta. C.A.).
Diotte (1977), 1 W.C.B. 178 (Que. C.A.).
DiSensi (1977), 5 C.R. (3d) S-13 (B.C.S.C.).
Doane (1980), 41 N.S.R. (2d) 340 (C.A.).
Dobell (1978), 5 C.R. (3d) 233 (B.C.S.C.).

Dobson (1975), 11 N.S.R. (2d) 81 (C.A.).
Dochniak (1980), 25 A.R. 187 (C.A.).
Doescher, [unreported] March 23rd, 1981 (B.C.C.A.).
Doherty (1972), 9 C.C.C. (2d) 115 (Ont. C.A.).
Doiron (1972), 9 C.C.C. (2d) 137 (B.C.S.C.).
Dominion Stores Ltd. (1979), 4 W.C.B. 207 (Ont. Co. Ct.).
Doran, [1972] 1 O.R. 405, 5 C.C.C. (2d) 366, 16 C.R.N.S. 9 (C.A.).
Doucet, [1971] 1 O.R. 705, 2 C.C.C. (2d) 433 (C.A.).
Doucet (1977), 18 N.B.R. (2d) 137 (C.A.).
Doucette (1974), 6 N. & P.E.I.R. 100 (P.E.I.S.C.).
Douglas (1977), 1 C.R. (3d) 238, 33 C.C.C. (2d) 395 (Ont. C.A.).
Doughty (1978), 40 C.C.C. (2d) 224, 4 C.R. (3d) S-29 (P.E.I.S.C. in banco).
Dow (1976), 1 C.R. (3d) S-9 (B.C.C.A.).
Downe, Smith and Dow (1978), 44 C.C.C. (2d) 468 (P.E.I.S.C. in banco).
Downey (1979), 7 C.R. (3d) S-33 (N.S.C.A.).
Doyle and 10 others (1970), 2 C.C.C. (2d) 82 (Alta. T.D.).
Doyle et al. (1970), 13 C.R.N.S. 80 (Alta. C.A.).
Doyon (1979), 11 C.R. (3d) 188 (Que. C.A.).
Draisey (1978), 20 Crim. L.Q. 442 (Ont. Prov. Ct.).
Draper (1978), 4 C.R. (3d) S-20 (Ont. C.A.).
Drew (1979), 45 C.C.C. (2d) 212, 7 C.R. (3d) S-21, [1979] 1 W.W.R. 530 (B.C.C.A.).
Dube (1976), 32 C.C.C. (2d) 536 (Ont. C.A.).
Dube (1977), 1 W.C.B. 630 (Que. C.A.).
Dubois (1977), 3 A.R. 445 (T.D.).
Dubuc (1978), 20 Crim. L.Q. 294 (Que. Sup. Ct.).
Ducharme (1979), 12 C.R. (3d) 111 (Ont. Dist. Ct.).
Ducharme (1980), 8 M.V.R. 183 (Que. C.S.P.).
Duczminski et al. (1979), 4 W.C.B. 206 (Man. C.A.).
Duggan et al., 32 C.C.C. (2d) 558, 38 C.R.N.S. 25, 22 N.S.R. (2d) 531, 31 A.P.R. 531 (Co. Ct.).
Duguay (1979), 9 C.R. (3d) S-30 (B.C.C.A.).
Dumont and Dumont (1978), 41 C.C.C. (2d) 492 (Ont. C.A.).
Dunkley (1976), 3 C.R. (3d) S-51, 19 Crim. L.Q. 277 (Ont. C.A.).
Dunlop (1981), 44 N.S.R. (2d) 277 (C.A.).
Dunton (1973), 24 C.R.N.S. 116 (Ont. C.A.).
Duval (1970), 15 C.R.N.S. 14 (Que. C.A.).
Dwyer, [1977] 2 W.W.R. 704, 3 A.R. 96, 34 C.C.C. (2d) 293 (T.D.); leave to appeal to S.C.C. refused, 34 C.C.C. (2d) 293 (S.C.C.).

Eakins, [1978] 5 W.W.R. 112 (B.C. Co. Ct.); appeal dismissed without reasons [unreported] February 24th, 1981 (B.C.C.A.).
Earle (1975), 8 N. & P.E.I.R. 390, 8 A.P.R. 390 (Nfld. Magis. Ct.).
Earle (1975), 8 N. & P.E.I.R. 488, 8 A.P.R. 488 (Nfld. Dist. Ct.).
Eby (1979), 49 C.C.C. (2d) 27 (N.S.C.A.).
Eccles, [1974] C.A. 23.
Eccleston and Gianiorio, 24 C.C.C. (2d) 564, [1975] 5 W.W.R. 141 (B.C.C.A.).
Edwards, [1979] 4 W.W.R. 751 (Sask. Prov. Ct.).
Ekson (1978), 14 A.R. 25 (Dist. Ct.).
Elliot (1976), 19 Crim. L.Q. 25 (Ont. C.A.).
Empey (1978), 4 C.R. (3d) S-59 (Ont. C.A.).

Emsley (1980), 21 A.R. 145 (C.A.).
Engel (1981), 6 W.C.B. 107 (Man. C.A.).
England (1925), 43 C.C.C. 11 (Sask. C.A.).
England (1976), 15 N.S.R. (2d) 686 (C.A.).
Erbstein, [1970] C.A. 346.
Ermineskin (1980), 23 A.R. 377 (C.A.).
Eustace (1977), 23 N.S.R. (2d) 524, 32 A.P.R. 524 (C.A.).
Evans (1975), 24 C.C.C. (2d) 300 (N.S.C.A.).
Evans (1979), 30 N.S.R. (2d) 188, 49 A.P.R. 188 (C.A.).
Everton (1980), 22 Crim. L.Q. 294 (Man. C.A.).
Ewanchuk, [unreported] March 28th, 1977 (B.C.C.A.).
Ewing (1977), 7 A.R. 218 (T.D.).

F.W. Woolworth Co. Ltd. (1974), 16 C.P.R. (2d) 272, 46 D.L.R. (3d) 345, 18 C.C.C. (2d) 23 (Ont. C.A.).
Faber (1973), 16 Crim. L.Q. 16 (Sask. C.A.).
Fairn (1973), 12 C.C.C. (2d) 423, 22 C.R.N.S. 307 (N.S. Co. Ct.).
Falkenberg (1973), 13 C.C.C. (2d) 562 (Ont. Co. Ct.); rev'd 25 C.R.N.S. 374, 16 C.C.C. (2d) 525 (Ont. C.A.).
Fallofield, [1973] 6 W.W.R. 472, 22 C.R.N.S. 342 (B.C.C.A.).
Family Tire Centres Ltd. (1975), 28 C.C.C. (2d) 474, 25 C.P.R. (2d) 219 (Ont. C.A.).
Farley, [1976] W.W.D. 128 (Man. C.A.).
Farmer (1978), 30 N.S.R. (2d) 79, 49 A.P.R. 79 (C.A.).
Farmer (1978), 21 Crim. L.Q. 273 (Ont. C.A.).
Farrar (1980), 27 N. & P.E.I.R. 179, 74 A.P.R. 179 (P.E.I.C.A.).
Faulkner (1971), 2 N. & P.E.I.R. 20 (P.E.I.C.A.).
Faust, [1971] C.A. 253.
Fera (1976), 32 C.C.C. (2d) 219 (Ont. Prov. Ct.).
Ferguson (1971), 14 Crim. L.Q. 271 (Ont. C.A.).
Ferland, [1970] C.A. 831.
Fernandez, [1976] 6 W.W.R. 522 (B.C.C.A.).
Fieldman (1970), 13 Crim. L.Q. 14 (Ont. C.A.).
Fifield (1978), 5 C.R. (3d) S-9, 25 N.S.R. (2d) 407, 36 A.P.R. 407 (C.A.).
Finamore, [unreported] March 16th, 1981 (B.C.C.A.).
Findley (1980), 4 W.C.B. 317 (Ont. C.A.).
Finlayson (1976), 11 N. & P.E.I.R. 524 (P.E.I.S.C.).
Fiorillo (1980), 22 Crim. L.Q. 437 (Ont. Prov. Ct.).
Fireman, [1971] 3 O.R. 380, 4 C.C.C. (2d) 82 (C.A.).
Firestone Tire and Rubber Co. of Canada Ltd. (1953), 107 C.C.C. 286, 20 C.P.R. 8, 17 C.R. 401 (Ont. H.C.).
Firth (1976), 1 W.C.B. 15 (N.W.T.S.C.).
Fisher (1975), 23 C.C.C. (2d) 449 (Ont. C.A.).
Fitzgerald (1980), 40 N.S.R. (2d) 199, 73 A.P.R. 199 (C.A.).
Flaman (1978), 43 C.C.C. (2d) 241 (Sask. C.A.).
Flamond, [1971] 4 W.W.R. 479 (Sask. C.A.).
Fleming (1980), 25 N. & P.E.I.R. 341 (Nfld. C.A.).
Flemming (1979), 30 N.S.R. (2d) 142, 1 M.V.R. 230, 49 A.P.R. 142 (C.A.).
Fleury (1971), 23 C.R.N.S. 164 (Que. C.A.).
Flynn (1975), 9 N. & P.E.I.R. 1 (P.E.I.S.C.).

Foote, Cone and Belding Advertising Ltd. (1974), 34 C.P.R. (2d) 26 (Ont. Co. Ct.).
Forbes (1976), 13 N.B.R. (2d) 279 (C.A.).
Ford (1973), 9 C.C.C. (2d) 515 (B.C. Co. Ct.).
Ford Motor Co. of Canada (1979), 49 C.C.C. (2d) 1 (Ont. C.A.).
Foster (1980), 32 N.B.R. (2d) 597, 78 A.P.R. 597 (C.A.).
Fotti, [1980] 6 W.W.R. 216 (Man. C.A.).
Fougere (1979), 31 N.S.R. (2d) 100, 52 A.P.R. 100 (C.A.).
Fournier, [1975] C.A. 29.
Fraser, [1944] 2 D.L.R. 461 (P.E.I.S.C.).
Fraser (1979), 28 N. & P.E.I.R. 175 (P.E.I.S.C.).
Freedman (1975), 25 C.C.C. (2d) 58 (Ont. C.A.).
Froese and British Columbia Television Broadcasting System Ltd. (No. 3); Bannerman and Radio N.W. Ltd. (No. 2) (1971), 50 C.C.C. (2d) 119 (B.C.S.C.).
Fuchs (1978), 21 Crim. L.Q. 424 (Ont. Co. Ct.).
Fudge (1979), 49 C.C.C. (2d) 63, 26 N. & P.E.I.R. 76, 72 A.P.R. 76 (Nfld. C.A.).
Fuller, 67 W.W.R. 78, [1969] 3 C.C.C. 348, 2 D.L.R. (3d) 27 (Man. C.A.).
Fuller, [unreported] March 13th, 1981 (B.C.C.A.).
Fung (1973), 11 C.C.C. (2d) 195 (Alta. C.A.).

Gabovic (1975), 18 Crim. L.Q. 19 (Ont. C.A.).
Gadway (1978), 17 A.R. 219 (T.D.).
Galbraith, [1972] 1 W.W.R. 586, 5 C.C.C. (2d) 37 (B.C.C.A.); aff'd [1972] 2 W.W.R. 80, 6 C.C.C. (2d) 188n (S.C.C.).
Gall, [unreported] March 19th, 1981 (Sask. Dist. Ct.).
Gallant (1971), 2 N. & P.E.I.R. 518 (P.E.I.S.C.).
Gamester (1978), 38 C.C.C. (2d) 548 (P.E.I.S.C.).
Garcia and Silva, [1970] 3 C.C.C. 124, [1970] 1 O.R. 821 (C.A.).
Gaudet (1976), 9 N. & P.E.I.R. 434, 12 A.P.R. 434 (P.E.I.C.C.A.).
Gehue (1975), 12 N.B.R. (2d) 564 (C.A.).
Genaille (Man. C.A.), cited in LaPierre, post.
Geoffroy, [1970] C.A. 772.
George, [unreported] March 9th, 1976 (B.C.S.C.).
Germaine (1980), 39 N.S.R. (2d) 177, 71 A.P.R. 177 (C.A.).
Ghislieri, [1981] 2 W.W.R. 303 (Alta. C.A.).
Gibson, [unreported] January 24th, 1973 (B.C.C.A.).
Gibson and Riezebos (1974), 26 C.R.N.S. 253 (Ont. S.C.).
Giftwares Wholesale Co., 36 C.C.C. (2d) 330, 32 C.P.R. (2d) 243, [1977] 4 W.W.R. 326 (Man. Co. Ct.).
Gignac and Newman (1976), 30 C.C.C. (2d) 40 (Ont. C.A.).
Giguere, [1973] C.A. 364.
Gileno (1972), 15 Crim. L.Q. 255 (Ont. Mag. Ct.).
Gillard (1979), 20 N. & P.E.I.R. 185, 53 A.P.R. 185 (Nfld. C.A.).
Gillen (Hanoum) (1979), 8 C.R. (3d) S-5 (B.C.C.A.).
Gillis (1980), 26 N. & P.E.I.R. 269 (Nfld. C.A.).
Gilpin (1975), 36 C.R.N.S. 363 (Ont. C.A.).
Gionet (1977), 1 C.R. (3d) S-16, 22 N.S.R. (2d) 316, 31 A.P.R. 316 (C.A.).
Girard (1980), 8 M.V.R. 213 (Que. Sess. Ct.).
Giroux (1979), 55 C.C.C. (2d) 375 (Que. Sup. Ct.).

Giroux (1980), 23 A.R. 727 (N.W.T.C.A.).
Gladstone (1978), 40 C.C.C. (2d) 42 (B.C. Co. Ct.).
Glubisz (No. 3) (1979), 9 C.R. (3d) S-42 (B.C.C.A.).
Goldwarg (1973), 15 Crim. L.Q. 371 (Que. C.A.).
Gollop (1980), 28 N. & P.E.I.R. 443, 79 A.P.R. 443 (Nfld. C.A.).
Gonidis, McCullough and Stevenson (1980), 57 C.C.C. (2d) 90 (Ont. C.A.).
Goodale (1974), 21 C.C.C. (2d) 471 (Ont. C.A.).
Goodwin (1981), 43 N.S.R. (2d) 106, 81 A.P.R. 106 (C.A.).
Goodwin and Cunningham (1976), 15 N.S.R. (2d) 459 (C.A.).
Gorman (1971), 4 C.C.C. (2d) 330 (Ont. C.A.).
Gouchie (1975), 1 C.R. (3d) S-33, 11 N.S.R. (2d) 100, 5 A.P.R. 100 (C.A.).
Gould and Gould (1978), 15 N. & P.E.I.R. 30, 38 A.P.R. 30 (Nfld. C.A.).
Gourgon and Knowles (No. 2) (1979), 9 C.R. (3d) S-33 (B.C.S.C.); upheld [unreported] March 30th, 1981 (B.C.C.A.) (sub nom. R. v. Gourgon).
Gower (1973), 10 C.C.C. (2d) 543 (N.S. Co. Ct.).
Gowland (1978), 45 C.C.C. (2d) 303 (Ont. C.A.).
Grady (1973), 5 N.S.R. (2d) 264 (C.A.).
Grady (1974), 10 N.S.R. (2d) 90 (C.A.).
Graham (1975), 27 C.C.C. (2d) 475 (Ont. C.A.).
Grant, [unreported] April 2nd, 1981 (N.S.C.A.).
Graveline, Bezaire and Cassidy (1958), 27 C.R. 287 (Ont. C.A.).
Graves (1979), 31 N.S.R. (2d) 469, 52 A.P.R. 469 (C.A.).
Gravino (1971), 13 Crim. L.Q. 434 (Que. C.A.).
Greely (1978), 26 N.S.R. (2d) 122, 40 A.P.R. 122 (C.A.).
Greer (1969), 13 Crim. L.Q. 12 (Ont. C.A.).
Green (1980), 4 W.C.B. 431 (Ont. C.A.).
Gregoire (1972), 72 D.T.C. 6219 (Que. Q.B.).
Gregor (1980), 4 W.C.B. 503 (Ont. C.A.).
Gregory, (1978), 1 M.V.R. 270 (Man. C.A.).
Gregory, Choquette and Hebert (No. 2) (1974), 20 C.C.C. (2d) 509 (Que. C.A.).
Gribble, [1979] 4 W.W.R. 659 (Alta. T.D.).
Griffin (1975), 23 C.C.C. (2d) 11, 7 N. & P.E.I.R. 139 (P.E.I.C.A.).
Grimaldi (1978), 3 W.C.B. 43 (Alta. C.A.).
Grossman (1980), 53 C.C.C. (2d) 143 (Ont. C.A.).
Groves (1975), 26 C.C.C. (2d) 468 (Ont. Prov. Ct.); rev'd in part 37 C.C.C. (2d) 429, 39 C.R.N.S. 366, 17 O.R. (2d) 65, 79 D.L.R. (3d) 561 (H.C.).
Guatto, MacInnis and Tobin (1977), 21 N.S.R. (2d) 361 (C.A.).
Guenot, Kocsis and Lukacs (1979), 51 C.C.C. (2d) 315 (Ont. C.A.).
Guillemette (1979), 4 M.V.R. 59 (Que. S.C.).
Guindon (1980), 4 W.C.B. 241 (Ont. C.A.).
Guptill and McCrum (1975), 11 N.B.R. (2d) 477 (C.A.).
Gushue (1976), 32 C.C.C. (2d) 189, 35 C.R.N.S. 304, 14 O.R. (3d) 620, 74 D.L.R. (3d) 473, conviction aff'd (1979), 50 C.C.C. (2d) 417, 106 D.L.R. (3d) 152, 30 N.R. 204 (S.C.C.).
Guthrie and Guthrie (1978), 5 C.R. (3d) S-33, 7 Alta. L.R. (2d) 90, 11 A.R. 177 (C.A.).
Gyulay, [unreported] February 13th, 1981 (B.C.C.A.).

Hall (1978), 7 C.R. (3d) S-1 (Ont. C.A.).
Haig (1974), 26 C.R.N.S. 247 (Ont. C.A.).
Haines (1975), 29 C.R.N.S. 239 (Ont. C.A.).

Halcraft Printing Ltd. et al. (1977), 1 W.C.B. 179 (N.S. Co. Ct.).
Hammond (1975), 8 N. & P.E.I.R. 464 (Nfld. Dist. Ct.).
Haran (1976), 12 N. & P.E.I.R. 406 (Nfld. Prov. Ct.).
Harder (1980), 21 A.R. 102 (C.A.).
Hardy (1976), 29 C.C.C. (2d) 84, 33 C.R.N.S. 76 (Que. S.C.).
Hargie (1975), 23 C.C.C. (2d) 240 (Ont. Co. Ct.).
Harrell (1973), 12 C.C.C. (2d) 480 (Ont. C.A.).
Harrington (1976), 10 N. & P.E.I.R. 288 (Nfld. Dist. Ct.).
Harris (1977), 1 W.C.B. 126 (Ont. C.A.).
Harrison (1977), 22 Crim. L.Q. 436 (B.C.C.A.).
Harrison and Garrison, [1978] 1 W.W.R. 162 (B.C.C.A.).
Harnett, [unreported] September 23rd, 1974 (Ont. C.A.).
Harrington (1976), 10 N. & P.E.I.R. 288 (Nfld. Dist. Ct.).
Hart (1978), 21 Crim. L.Q. 274 (Ont. Co. Ct.).
Harvey (1978), 6 C.R. (3d) S-26 (Ont. C.A.).
Harvey (1978), 15 N. & P.E.I.R. 358 (Nfld. C.A.).
Hashem (1978), 38 N.S.R. (2d) 301, 69 A.P.R. 301 (Co. Ct.).
Haskins (1978), 5 C.R. (3d) S-17 (B.C.C.A.).
Hatch (1979), 31 N.S.R. (2d) 110, 52 A.P.R. 110 (C.A.).
Hatchwell (1975), 21 C.C.C. (2d) 201 (S.C.C.).
Hatfield (1980), 40 N.S.R. (2d) 192 (C.A.).
Hatton (1978), 39 C.C.C. (2d) 281 (Ont. C.A.).
Havers (1975), 18 Crim. L.Q. 400 (C.A.).
Hawkins (1978), 29 N.S.R. (2d) 618, 45 A.P.R. 618 (C.A.).
Hawley (1973), 15 Crim. L.Q. 258 (Ont. C.A.).
Hawryluk (1976), 14 N.B.R. (2d) 538, 15 A.P.R. 538 (C.A.).
Head (1970), 1 C.C.C. (2d) 436 (Sask. C.A.).
Healy (1972), 7 C.C.C. (2d) 129, [1972] 3 O.R. 1 (C.A.).
Heasley, [unreported] November 19th, 1981 (B.C.C.A.).
Heckley, [1976] C.A. 802.
Hedberg (1978), 15 A.R. 181 (T.D.).
Hefford (1980), 4 W.C.B. 409 (B.C. Co. Ct.).
Heighton (1980), 5 W.C.B. 8 (B.C. Co. Ct.).
Hemstad; Rhodes (1978), 40 C.C.C. (2d) 474 (B.C.C.A.).
Hemsworth (1971), 2 C.C.C. (2d) 301 (N.S.C.A.).
Henderson, [1976] 5 W.W.R. 119 (B.C. Co. Ct.).
Henderson (1979), 8 C.R. (3d) S-19 (B.C.C.A.).
Henein (1980), 53 C.C.C. (2d) 257 (Ont. C.A.).
Hennessey; Bowers (1970), 55 Cr. App. R. 148.
Henry (1975), 11 N.B.R. (2d) 24 (C.A.).
Henry (1977), 39 C.R.N.S. 45 (Que. C.A.).
Henry, [unreported] April 13th, 1981 (Man. C.A.).
Hergert (1977), 3 A.R. 552 (Dist. Ct.).
Hermann (1974), 18 C.C.C. (2d) 255 (N.S.C.A.).
Herring, [unreported] April 8th, 1981 (Sask. C.A.).
Herzog and McLeod (1978), 17 A.R. 91 (T.D.).
Hewitt (1971), 55 Cr. App. R. 433.
Hewson, [1979] 2 S.C.R. 82, 5 C.R. 155, 42 C.C.C. (2d) 507, 89 D.L.R. (3d) 573, 24 N.R. 224.
Hickey (1977), 14 N. & P.E.I.R. 271, 33 A.P.R. 271 (Nfld. C.A.).
Higginbotham (1980), 40 N.S.R. (2d) 635, 73 A.P.R. 635 (C.A.).

Hill (1974), 15 C.C.C. (2d) 145, 16 Crim. L.Q. 245 (Ont. C.A.); aff'd 23 C.C.C. (2d) 231, [1977] 1 S.C.R. 827, 6 N.R. 413, 58 D.L.R. (3d) 697.
Hill, 25 C.C.C. (2d) 348, [1975] 6 W.W.R. 395, 62 D.L.R. (3d) 692, conviction aff'd (1976), 37 C.R.N.S. 380, 33 C.C.C. (2d) 60, 73 D.L.R. (3d) 621 (B.C.C.A.).
Hill (1979), 3 W.C.B. 369 (B.C. Co. Ct.).
Hill-Tout, [1981] 2 W.W.R. 91 (Alta. Q.B.).
Himmelspeck (1980), 22 A.R. 406 (Alta. C.A.).
Hinch and Salanski, [1968] 3 C.C.C. 39, 2 C.R.N.S. 350, 62 W.W.R. 205 (B.C.C.A.).
Hingley (1977), 19 N.S.R. (2d) 541 (C.A.).
Hinks, [unreported] June 25th, 1974 (Ont. C.A.).
Hinton (1980), 5 W.C.B. 22 (Alta. C.A.).
Hiram Saindon Inc, [1979] R.L. 257 (Que. C.A.).
Hodgkins; Wedge (1962), 132 C.C.C. 223 (N.B.C.A.).
Hodson (1927), 20 Cr. App. R. 11.
Hoffman-LaRoche Ltd. (1980), 16 C.R. (3d) 13, 53 C.C.C. (2d) 1, 48 C.P.R. (2d) 145, 109 D.L.R. (3d) 5 (Ont. H.C.).
Holhauser, [unreported] May 7th, 1975 (B.C.C.A.).
Holland, [unreported] June 8th, 1981 (Ont. C.A.).
Hopkins (1977), 23 N.S.R. (2d) 550, 32 A.P.R. 550 (C.A.).
Horowitz (1971), 71 D.T.C. 5350 (Ont. Co. Ct.).
House (1980), 28 N. & P.E.I.R. 26, 79 A.P.R. 26 (Nfld. S.C.).
Howie (1977), 3 Alta. L.R. (2d) 367, 6 A.R. 603 (T.D.).
Huard (1970), 13 C.R.N.S. 386, 13 Crim. L.Q. 150 (Que. C.A.).
Hudson (1980), 24 A.R. 361 (N.W.T.S.C.).
Hughes (1980), 7 M.V.R. 228 (B.C.C.A.).
Hughes (1980), 27 N. & P.E.I.R. 415, 74 A.P.R. 415 (P.E.I.S.C.).
Hughes 1.11.73, 1187/C/73 (C.A. Crim. Div.).
Hull (1976), 18 N.S.R. (2d) 343 (C.A.).
Humes (1978), 21 Crim. L.Q. 26 (Ont. C.A.).
Hunt (1977), 13 N. & P.E.I.R. 184, 29 A.P.R. 184 (Nfld. C.A.).
Hunt, [1979] 2 S.C.R. 73, 7 C.R. (3d) S-38, 45 C.C.C. (2d) 257, [1979] 3 W.W.R. 661, 26 N.R. 257, 94 D.L.R. (3d) 321.
Hunter (1970), 17 C.R.N.S. 12 (Ont. C.A.).
Hurtubise (1979), 22 Crim. L.Q. 164 (B.C. Co. Ct.).
Huskins (1974), 10 N.S.R. (2d) 553 (C.A.).
Hutchin (1980), 6 M.V.R. 225 (Que. C.A.).
Hutton (1977), 13 A.R. 557 (Dist. Ct.).
Hutton (1977), 21 N.S.R. (2d) 32 (C.A.).
Hutton (1980), 43 N.S.R. (2d) 541 (C.A.).

Igoe (1979), 30 N.S.R. (2d) 186, 49 A.P.R. 186 (C.A.).
Imperial Optical Ltd. (1972), 9 C.C.C. (2d) 328, 7 C.P.R. (2d) 146 (Ont. Prov. Ct.).
Imperial Tobacco Products Ltd., 4 C.C.C. (2d) 423, 3 C.P.R. 178, [1971] 5 W.W.R. 409, 22 D.L.R. (3d) 51 (Alta. C.A.).
Ingram and Grimsdale (1977), 35 C.C.C. (2d) 376 (Ont. C.A.).
Inter Publishing Co. Ltd. (1977), 1 W.C.B. 221 (Alta. Dist. Ct.).
Irwin (1979), 48 C.C.C. (2d) 423, 10 C.R. (3d) S-33, 16 A.R. 566 (C.A.).
Issler (1976), 1 A.R. 27 (C.A.).

Ives (1974), 19 C.C.C. (2d) 104 (Ont. C.A.).
Iwaniw (1959), 127 C.C.C. 40, 32 C.R. 389, 30 W.W.R. 590 (Man. C.A.).

J. Clark & Son Ltd. (1972), 8 C.C.C. (2d) 322, 4 N.B.R. (2d) 596, 6 C.P.R. (2d) 5 (Co. Ct.).
J. Spadafora & Co. (Can.) Ltd. (1972), 10 C.P.R. (2d) 56 (Ont. Prov. Ct.).
Jaasma (1976), 1 A.R. 553 (C.A.).
Jackson, [unreported] May 7th, 1975 (B.C.C.A.).
Jackson (1975), 11 N.S.R. (2d) 154 (C.A.).
Jackson (1977), 21 N.S.R. (2d) 17 (C.A.).
James (1971), 3 C.C.C. (2d) 1, 14 C.R.N.S. 186, 1 N. & P.E.I.R. 398 (P.E.I.S.C.).
Janeway (1978), 2 W.C.B. 207 (Ont. C.A.).
Janssen (No. 2) (1975), 28 C.C.C. (2d) 515 (Man. C.A.).
Jemmett (1980), 22 Crim. L.Q. 297 (Man. C.A.).
Jimmo (1973), 16 C.C.C. (2d) 396 (Que. C.A.).
Joanisse, [1975] C.S.P. 306.
Johnson, 4 C.C.C. (2d) 226, [1971] 3 O.R. 744 (C.A.).
Johnson (1971), 5 C.C.C. (2d) 541 (N.S.C.A.).
Johnson (1972), 6 C.C.C. (2d) 380 (B.C.C.A.).
Johnson (1978), 2 W.C.B. 243 (S.C.C.).
Johnson (1979), 21 N. & P.E.I.R. 359, 56 A.P.R. 359 (Nfld. C.A.).
Johnston (1976), 1 W.C.B. 107 (Man. C.A.).
Johnston (1976), 18 Crim. L.Q. 286 (Ont. C.A.).
Johnston (1976), 19 Crim. L.Q. 284 (Ont. C.A.).
Johnston (1978), 30 N.S.R. (2d) 421, 49 A.P.R. 421 (C.A.).
Johnston and Tremayne, [1970] 4 C.C.C. 64, [1970] 2 O.R. 780 (C.A.).
Johnstone (1980), 38 N.S.R. (2d) 313, 69 A.P.R. 313 (Prov. Ct.).
Jones (1971), 3 C.C.C. (2d) 153 (Ont. C.A.).
Jones (1974), 6 N. & P.E.I.R. 48, 17 C.C.C. (2d) 31, 27 C.R.N.S. 107 (P.E.I.C.A.).
Jones (1975), 25 C.C.C. (2d) 256 (Ont. Co. Ct.).
Jones 12.5.75, 318/B/75, [1975] Crim. L.R. 203 (C.A. Crim. Div.).
Jones, [unreported] January 26th, 1976 (Ont. C.A.).
Jones (1980), 32 N.B.R. (2d) 606, 78 A.P.R. 606 (C.A.).
Jones, [unreported] March 11th, 1981 (B.C.C.A.).
Joves (1977), 41 C.C.C. (2d) 24 (Ont. Prov. Ct.).
Julian (1973), 24 C.R.N.S. 289, 6 N.S.R. (2d) 504 (C.A.).
Jung (1976), 1 C.R. (3d) S-1 (B.C.C.A.).
Juvenile J. (1978), 2 Can. J. Fam. L. 196 (Ont. Prov. Ct.).

K., (1978), 1 Can. J. Family Law 297 (Alta. Juv. Ct.).
K.C. Irving Ltd. and 3 other Corporations (No. 2); K.C. Irving Ltd. et al. (No. 2) (1974), 22 C.C.C. (2d) 281 (N.B.Q.B.).
Kanagarajah (1980), 4 Sask. R. 149 (C.A.).
Kanester, [1968] 1 C.C.C. 351 (B.C.C.A.).
Kanhai (1981), 6 W.C.B. 123 (Sask. Dist. Ct.).
Kapoor (1978), 39 C.C.C. (2d) 326 (B.C.C.A.).
Karas (1976), 17 N.S.R. (2d) 72 (C.A.).
Kastercum (1972), 56 Cr. App. R. 298.
Kavanaugh (1960), 128 C.C.C. 267 (N.B.C.A.).

Keast (1979), 22 Crim. L.Q. 431 (Ont. C.A.).
Keats (1980), 26 N. & P.E.I.R. 226 (Nfld. C.A.).
Keeble (1977), 1 C.R. (3d) S-21 (P.E.I.S.C. in banco).
Keefe (1979), 44 C.C.C. (2d) 193 (Ont. C.A.).
Kehoe, [1970] 1 C.C.C. 123 (Ont. C.A.).
Kehoe (1974), 21 C.C.C. (2d) 544 (Ont. Prov. Ct.).
Keisser (1977), 3 C.R. (3d) S-4 (B.C. Co. Ct.).
Keller (1971), 14 C.R.N.S. 234 (Sask. C.A.).
Keller and Schofield, [1972] 6 W.W.R. 364 (Sask. C.A.).
Kelly (1979), 4 W.C.B. 103 (B.C. Co. Ct.).
Kelly, [unreported] February 13th, 1981 (B.C.C.A.).
Kelly and Lauzon (1979), 48 C.C.C. (2d) 560 (Ont. C.A.).
Kelly v. O'Brien, [1942] O.R. 691 (C.A.).
Kemp, [unreported] March 23rd, 1981 (B.C.C.A.).
Kempton (1980), 21 A.R. 212 (C.A.).
Kenaston Drilling (Arctic) Ltd. (1973), 12 C.C.C. (2d) 383, 41 D.L.R. (2d) 252 (N.W.T.S.C.).
Kenitex Canada Ltd. et al. (1980), 51 C.P.R. (2d) 103 (Ont. Co. Ct.).
Kennedy, 5 C.C.C. (2d) 373, [1972] 2 W.W.R. 547 (Sask. C.A.).
Kennedy, [unreported] February 24th, 1976 (B.C.C.A.).
Kennedy (1976), 15 N.S.R. (2d) 470 (C.A.).
Kenney (1979), 2 M.V.R. 309 (B.C.C.A.).
Kenny and Tatelman, [1979] 1 W.W.R. 292 (Man. C.A.).
Kienapple (1974), 26 C.R.N.S. 1, 15 C.C.C. (2d) 524, [1975] 1 S.C.R. 729, 44 D.L.R. (3d) 351, 1 N.R. 322.
King (1975), 10 N. & P.E.I.R. 456 (Nfld. Dist. Ct.).
King (1975), 61 Cr. App. R. 316.
Kinrade, Labonte and Taylor (1970), 13 Crim. L.Q. 148 (Ont. C.A.).
Kirby (1976), 24 N. & P.E.I.R. 260, 65 A.P.R. 260 (Nfld. Prov. Ct.).
Kirzner (1976), 32 C.C.C. (2d) 76, 14 O.R. (2d) 665, 74 D.L.R. (3d) 351 (Ont. C.A.), appeal against conviction dismissed 38 C.C.C. (2d) 131, 1 C.R. (3d) 138, [1978] 2 S.C.R. 487, 18 N.R. 400, 81 D.L.R. (3d) 229.
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Kitching and Adams, 32 C.C.C. (2d) 159, [1976] 6 W.W.R. 697 (Man. C.A.).
Kito Canada Ltd., 30 C.C.C. (2d) 531, 25 C.P.R. (2d) 145, [1976] 4 W.W.R. 189 (Man. C.A.).
Kitto (1969), 8 C.R.N.S. 277 (B.C. Prov. Ct.).
Kjeldsen (1980), 53 C.C.C. (2d) 55 (Alta. C.A.).
Klassen, [1977] 4 W.W.R. 561 (Sask. Dist. Ct.).
Klippenstein (1981), 26 A.R. 568 (C.A.).
Kloot (1975), 11 N.S.R. (2d) 440 (C.A.).
Kloschinsky, [1980] 6 W.W.R. 355 (Alta. Q.B.).
Klymkiw (1980), 53 C.C.C. (2d) 350 (Man. C.A.).
Knight (1975), 27 C.C.C. (2d) 343 (Ont. H.C.).
Knippleberg et al. (1979), 4 W.C.B. 210 (B.C. Co. Ct.).
Knowel (1979), 3 W.C.B. 175 (Ont. Co. Ct.),
Knowlton (1973), 5 N. & P.E.I.R. 209 (Nfld. S.C.).
Ko (1979), 11 C.R. (3d) 298, 50 C.C.C. (2d) 430, [1980] 1 W.W.R. 577 (B.C.C.A.).
Kobierski, [1974] 6 W.W.R. 519 (B.C.S.C.).
Kobzey (1979), 1 Sask. R. 7 (C.A.).

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Kolega (1970), 13 Crim. L.Q. 151 (Sask. C.A.).
Kolbuc (1978), 11 A.R. 105 (Dist. Ct.).
Konig, 45 C.R. 272, 50 W.W.R. 289, [1965] 3 C.C.C. 152 (B.C. Co. Ct.).
Konzelman (1980), 5 Man. R. (2d) 165 (C.A.).
Koodrin et al. (1980), 25 B.C.L.R. 1 (C.A.).
Kopach (1980), 22 A.R. 497 (C.A.).
Kopuk (1980), 19 A.R. 412 (N.W.T.S.C.).
Koscot Interplanetary of Canada Ltd., [1973] R.L. 239 (C.M.M.).
Kosh (1970), 1 C.C.C. (2d) 290, 13 Crim. L.Q. 154 (Sask. C.A.).
Kotrbaty (1978), 5 C.R. (3d) S-13 (B.C.S.C.).
Krenbrink, [unreported] March 17th, 1981 (B.C.C.A.).
Krentz (1976), 31 C.C.C. (2d) 450 (B.C.S.C.).
Krilow (1980), 5 Sask. R. 210 (Dist. Ct.).
Kroh (1975), 24 Chitty's L.J. 345 (Ont. Prov. Ct.).
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Lahey (1977), 13 N. & P.E.I.R. 167 (Nfld. C.A.).
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Lambert, [1979] C.S.P. 1028.
Lambert et al. (1978), 20 N. & P.E.I.R. 458, 53 A.P.R. 458 (Nfld. C.A.).
Lamoureux, [1973] C.A. 660.
Lamoureux and Hall, [unreported] March 23rd, 1981 (Man. C.A.).
Lampinen et al. (1980), 5 W.C.B. 220 (Ont. Dist. Ct.).
Landers (1980), 31 N.B.R. (2d) 113 (Q.B.).
Landry (1980), 31 N.B.R. (2d) 383 (Q.B.).
Langevin (1979), 47 C.C.C. (2d) 138, 10 C.R. (3d) 193 (Ont. C.A.).
LaPierre (1976), 17 N.S.R. (2d) 34 (C.A.).
Larivier (1979), 3 W.C.B. 201 (Ont. Co. Ct.).
Larkin (1979), 3 W.C.B. 466 (P.E.I.S.C.).
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LaSaga (1977), 13 N. & P.E.I.R. 164 (Nfld. C.A.).
Latta (1978), 29 N.S.R. (2d) 295, 45 A.P.R. 295 (C.A.).
Lauzon (1977), 19 Crim. L.Q. 285 (Que. C.A.).
Lavhey (1976), 15 N.S.R. (2d) 683 (C.A.).
Lawley (1977), 1 W.C.B. 346 (B.C.S.C.).
Leahy (1978), 44 C.C.C. (2d) 479 (Ont. C.A.).
Leamont (1977), 21 N.S.R. (2d) 251 (C.A.).
Leaver (1980), 42 N.S.R. (2d) 543 (C.A.).
LeBlanc (1980), 39 N.S.R. (2d) 527, 71 A.P.R. 527 (C.A.).
LeBlanc, [unreported] February 16th, 1981 (B.C.C.A.).
LeBlanc; Long, [1939] 2 D.L.R. 154 (N.B.C.A.).
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Leech (1972), 10 C.C.C. (2d) 149, 21 C.R.N.S. 1, [1973] 1 W.W.R. 744 (Alta. S.C.).
Lees (1979), 46 C.C.C. (2d) 385 (S.C.C.).
Lefebvre (1977), 2 B.C.L.R. 89 (Prov. Ct.).
Lefebvre, [unreported] Mar 25th, 1976 (B.C.S.C.).
Legare (No. 2) (1978), 48 C.C.C. (2d) 281 (Que. C.A.).
Legault (1980), 33 N.B.R. (2d) 481 (C.A.).
Leger (1979), 10 C.R. (3d) S-25 (Ont. C.A.).
Legere (1980), 32 N.B.R. (2d) 129, 78 A.P.R. 129 (C.A.).
Legilloux (1979), 51 C.C.C. (2d) 99 (B.C.C.A.).
Leonard (1973), 11 C.C.C. (2d) 527 (Ont. C.A.).
LeSarge (1975), 26 C.C.C. (2d) 388 (Ont. C.A.).
Lesperance (1979), 3 W.C.B. 273 (B.C. Co. Ct.).
Letendre, 25 C.C.C. (2d) 180, [1975] 6 W.W.R. 360 (Man. C.A.).
Leveille (1973), 16 Crim. L.Q. 255 (Ont. C.A.).
Levesque (1980), 5 W.C.B. 234 (Ont. C.A.).
Levesque (1980), 19 C.R. (3d) 43 (Que. Sup. Ct.).
Lew and Minister of Manpower and Immigration (1975), 20 C.C.C. (2d) 127 (Fed. C.A.).
Leydier (1981), 5 W.C.B. 425 (Man. Co. Ct.).
List (1978), 7 C.R. (3d) S-4 (Ont. C.A.).
Little, [unreported] April 27th, 1981 (N.B.C.A.).
Littler (1975), 27 C.C.C. (2d) 234, 65 D.L.R. (3d) 467 (Que. C.A.).
Lockhart (1976), 14 N.S.R. (2d) 262 (C.A.).
Lockhart (1976), 15 N.S.R. (2d) 512 (C.A.).
Lombardo (1976), 1 W.C.B. 166 (Ont. Co. Ct.).
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Loucks (1979), 2 Sask. R. 174 (C.A.).
Lowden (1979), 10 Alta. L.R. (2d) 108, 16 A.R. 311 (Dist. Ct.).
Lowe (1974), 21 C.C.C. (2d) 193, 6 O.R. (2d) 585 (C.A.).
Loysen (1973), 13 C.C.C. (2d) 202 (B.C.S.C.).
Luciens (1975), 18 Crim. L.Q. 18 (Ont. C.A.).
Lukion and Small (1975), 27 C.C.C. (2d) 11 (Ont. C.A.).
Luknowsky (1976), 19 Crim. L.Q. 18 (B.C.C.A.).
Luther, 5 C.C.C. (2d) 354, [1972] 1 O.R. 812 (Ont. C.A.).
Lyall (1974), 18 C.C.C. (2d) 381 (B.C.C.A.).
Lynns (1976), 6 C.R. (3d) S-29 (N.B.C.A.).

Ma (1974), 44 C.C.C. (2d) 511 (Ont. C.A.).
Ma, Ho and Lai, 44 C.C.C. (2d) 537, 6 C.R. (3d) 325, [1979] 1 W.W.R. 436 (B.C.C.A.).
Maahs and Teleprompter Communications Corp. (1974), 21 C.C.C. (2d) 497, 20 C.P.R. (2d) 117, 6 O.R. (2d) 774 (Dist. Ct.).
MacArthur (1978), 39 C.C.C. (2d) 158, 5 C.R. (3d) S-41, 15 N. & P.E.I.R. 72, 38 A.P.R. 72 (P.E.I.C.A.).
MacArthur (1979), 9 C.R. (3d) S-23 (N.S.C.A.).
MacDonald (1974), 20 C.C.C. (2d) 144, 27 C.R.N.S. 212 (Ont. C.A.).

MacDonald and 15 others (1972), 10 C.C.C. (2d) 1 (Alta. C.A.).
MacDonnell (1980), 42 N.S.R. (2d) 225, 77 A.P.R. 225 (C.A.).
MacDougall (1975), 11 N.B.R. (2d) 473 (C.A.).
MacDougall (1976), 15 N.S.R. (2d) 178 (C.A.).
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MacFarlane (1976), 3 Alta. L.R. 341 (C.A.).
MacFarlane (1978), 38 C.C.C. (2d) 538, 14 N. & P.E.I.R. 419, 33 A.P.R. 419 (P.E.I.C.A.).
MacKay (1980), 40 N.S.R. (2d) 616 (C.A.).
MacKay, Thompson and Secord (1970), 16 C.R.N.S. 11 (Ont. C.A.).
MacKenzie (1979), 5 M.V.R. 16 (P.E.I.S.C.).
MacLean (1960), 127 C.C.C. 400 (B.C.C.A.).
MacLean (1978), 24 N.S.R. (2d) 179, 35 A.P.R. 179 (C.A.).
MacLean (1979), 49 C.C.C. (2d) 552 (N.S.C.A.).
MacLeod (1976), 32 C.C.C. (2d) 315, 17 N.S.R. 569, 19 A.P.R. 569 (C.A.).
MacNeill (1972), 15 Crim. L.Q. 17 (Ont. C.A.).
MacNevin (1980), 41 N.S.R. (2d) 628, 76 A.P.R. 628 (C.A.).
MacPhee (1974), 9 N.S.R. (2d) 429 (C.A.).
MacVicar (1980), 37 N.S.R. (2d) 308, 67 A.P.R. 308 (Co. Ct.).
Magliaro, [unreported] May 28th, 1981 (N.S. Co. Ct.).
Mandeville (1980), 22 A.R. 536 (N.W.T.S.C.).
Mailman (1977), 17 N.B.R. (2d) 117 (C.A.).
Mallia (1980), 22 Crim. L.Q. 302 (Ont. C.A.).
Maniscalco (1977), 20 Crim. L.Q. 292 (Ont. C.A.).
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Mantha (1980), 4 W.C.B. 259 (B.C.C.A.).
Marceau (1978), 4 C.R. (3d) S-53 (Ont. Prov. Ct.).
Marcello (1973), 11 C.C.C. (2d) 302 (Ont. C.A.).
March (1978), 25 N. & P.E.I.R. 53, 68 A.P.R. 53 (Nfld. Dist. Ct.).
Marchand (1980), 115 D.L.R. (2d) 403 (N.S.C.A.).
Marcon (1974), 18 C.C.C. (2d) 575 (Ont. C.A.).
Marcotte (1976), 11 N. & P.E.I.R. 469 (Nfld. Dist. Ct.).
Marin (1977), 20 Crim. L.Q. 291 (Ont. C.A.).
Markbride (1980), 23 Crim. L.Q. 171 (Ont. Co. Ct.).
Markic and McGovern (1978), 21 Crim. L.Q. 419, 3 W.C.B. 77 (Ont. C.A.).
Markle (1973), 11 C.C.C. (2d) 67 (Ont. C.A.).
Markle (1977), 5 A.R. 251 (T.D.).
Marple (1973), 6 N.S.R. (2d) 389, 16 Crim. L.Q. 254 (C.A.).
Marshall (1977), 23 N.S.R. (2d) 234 (C.A.).
Martichuk, [unreported] September 30th, 1974 (B.C.C.A.).
Martin (1974), 8 N.S.R. (2d) 66, 17 C.C.C. (2d) 66 (C.A.).
Martin (1980), 30 N.B.R. (2d) 297, 70 A.P.R. 297 (C.A.).
Martin (1980), 28 N. & P.E.I.R. 471, 79 A.P.R. 471 (P.E.I.S.C.).
Martin, [unreported] February 27th, 1981 (B.C.C.A.).
Marton (1980), 22 Crim. L.Q. 433 (Ont. C.A.).
Mason (1977), 23 Crim. L.Q. 170 (B.C. Co. Ct.).
Mason (1978), 6 C.R. (3d) S-14 (Ont. C.A.).
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Matthews (1971), 2 N. & P.E.I.R. 30 (P.E.I.C.A.).
Mayer (1979), 18 A.R. 229 (T.D.).
Maynard (1980), 40 N.S.R. (2d) 204 (C.A.).
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McAllister, Lansdowne and Harvey (1976), 1 C.R. (3d) S-46 (Ont. C.A.).
McAmmond, 69 W.W.R. 277, [1970] 1 C.C.C. 175, 7 C.R.N.S. 210, 7 D.L.R. (3d) 346 (Man. C.A.).
McBain (1974), 16 Crim. L.Q. 379 (Ont. C.A.).
McCallum, [unreported] April 10th, 1974 (B.C.C.A.).
McCaw et al. (1974), 15 C.C.C. (2d) 321 (Ont. C.A.).
McColl (1975), 18 Crim. L.Q. 20 (Ont. C.A.).
McCormick (1979), 47 C.C.C. (2d) 224 (Man. C.A.).
McCurdy (1978), 2 W.C.B. 527 (Sask. C.A.).
McCutcheon (1978), 23 N.B.R. (2d) 85, 1 M.V.R. 123 (C.A.).
McDonald; Edwards, [1976] 6 W.W.R. 671 (Y.T.C.A.).
McDow (1974), 10 N.S.R. (2d) 92 (C.A.).
McDowell (1980), 4 M.V.R. 220 (Ont. C.A.).
McEachern (1978), 42 C.C.C. (2d) 189, 7 C.R. (3d) S-8 (Ont. C.A.).
McFee (1970), 13 Crim. L.Q. 151 (Ont. C.A.).
McGarvie (1978), 18 N. & P.E.I.R. 463, 47 A.P.R. 463 (Nfld. C.A.).
McGhie (1979), 1 Man. R. (2d) 169 (C.A.).
McGlone (1974), 10 N.S.R. (2d) 247 (C.A.).
McGowan (1970), 75 W.W.R. 481 (B.C.S.C.); aff'd [1971] 5 W.W.R. 279 (B.C.C.A.).
McGrath, [1962] S.C.R. 739.
McGrath (1980), 25 N. & P.E.I.R. 138 (Nfld. S.C.).
McGuigan (1979), 50 C.C.C. (2d) 306 (Ont. C.A.).
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McInnis (1973), 23 C.R.N.S. 152, 13 C.C.C. (2d) 471, 1 O.R. (2d) 1 (C.A.).
McInnis, [unreported] May 19th, 1981 (N.S.S.C.).
McIntosh (1974), 20 C.C.C. (2d) 33 (Alta. C.A.).
McIvor (1979), 22 Crim. L.Q. 437 (B.C.C.A.).
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McKinney (1963), 40 C.R. 137 (Sask. C.A.).
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McLaughlin (1976), 17 N.S.R. (2d) 604 (C.A.).
McLean (1978), 7 C.R. (3d) S-3 (Ont. C.A.).
McLean et al. (1980), 26 N. & P.E.I.R. 158 (Nfld. Prov. Ct.).
McLean, Legge and Saunders (1981), 29 N. & P.E.I.R. 194, 82 A.P.R. 194 (Nfld. C.A.).
McLeod, [1970] C.A. 568.
McNabb (1979), 1 Sask. R. 47, 49 C.C.C. (2d) 263 (C.A.).
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McNaughton (1976), 43 C.C.C. (2d) 293 (Que. C.A.).

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McPhee (1977), 20 N.S.R. (2d) 570 (C.A.).
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Mearns, [1975] 4 W.W.R. 328, 22 C.C.C. (2d) 457 (Alta. C.A.).
Medical Centre Apartments Ltd. and City of Winnipeg (1969), 3 D.L.R. (3d) 525 (Man. C.A.).
Melanson (1976), 18 N.S.R. (2d) 189 (C.A.).
Mellstrom, 22 C.C.C. (2d) 472, 28 C.R.N.S. 327, [1975] 3 W.W.R. 385 (Alta. C.A.).
Melnyk (1974), 19 C.C.C. (2d) 311 (B.C.S.C.).
Melo (1976), 26 C.C.C. (2d) 510 (Ont. C.A.).
Mendo (1979), 25 A.R. 212 (N.W.T.S.C.).
Meneses (1974), 25 C.C.C. (2d) 115 (Ont. C.A.).
Menkes (1977), 19 Crim. L.Q. 278 (Ont. C.A.).
Mercer (1979), 4 W.C.B. 73 (B.C. Co. Ct.).
Miceli (1977), 36 C.C.C. (2d) 321 (Ont. Prov. Ct.).
Michaud (1974), 9 N.B.R. (2d) 19 (C.A.).
Michaud (1978), 32 N.B.R. (2d) 34, 78 A.P.R. 34 (Prov. Ct.).
Miclette (1980), 16 C.R. (3d) 289 (Que. C.A.).
Mikkelson (1973), 14 C.C.C. (2d) 255 (Sask. C.A.).
Miles (1970), 1 C.C.C. (2d) 564, 2 N.S.R. (2d) 96, 15 D.L.R. (3d) 189 (S.C.).
Miles, 24 C.C.C. (2d) 529, [1975] 5 W.W.R. 126 (Alta. C.A.); aff'd [1977] 1 S.C.R. 195, [1976] 3 W.W.R. 664, 33 C.R.N.S. 265, 8 N.R. 211.
Miller (1973), 13 C.C.C. (2d) 395 (N.S.C.A.).
Miller (1979), 32 N.S.R. (2d) 87, 54 A.P.R. 87 (C.A.).
Miller and Couvreur (1972), 8 C.C.C. (2d) 97 (Man. C.A.).
Miller and Kyling (1971), 13 Crim. L.Q. 431 (Que. C.A.).
Mirovitch (1979), 10 C.R. (3d) S-22 (Que. C.A.).
Misener (1978), 29 N.S.R. (2d) 362, 45 A.P.R. 362 (C.A.).
Mitchell (1978), 20 Crim. L.Q. 420 (Ont. C.A.).
Mitchell (1979), 2 Sask. R. 382 (C.A.).
Mitchell (1981), 29 N. & P.E.I.R. 125, 82 A.P.R. 125 (P.E.I.C.A.).
Mitchell et al. (1978), 2 W.C.B. 270 (Ont. Co. Ct.).
Mochon (1978), 23 N.B.R. (2d) 90, 44 A.P.R. 90 (C.A.).
Moncini (1975), 23 C.C.C. (2d) 452 (B.C.C.A.).
Moore (1979), 30 N.S.R. (2d) 638, 49 A.P.R. 638 (C.A.).
Moore (1981), 6 W.C.B. 77 (Man. C.A.).
Moracci (1977), 20 N.S.R. (2d) 684 (C.A.).
Morelli (1977), 37 C.C.C. (2d) 392 (Ont. Prov. Ct.).
Morgan (1979), 20 N. & P.E.I.R. 187, 53 A.P.R. 187 (Nfld. C.A.).
Morgan (1979), 32 N.S.R. (2d) 69, 54 A.P.R. 69 (C.A.).
Morgan and Morgan (1979), 19 N. & P.E.I.R. 176, 50 A.P.R. 176 (Nfld. C.A.).
Moriarty (1979), 3 M.V.R. 200, 22 Crim. L.Q. 291 (Ont. C.A.).
Morris, [1977] Crim. L. Rev. 231 (C.A. Crim. Div.).
Morrison (1975), 13 N.S.R. (2d) 98 (C.A.).
Morrisette (1980), 5 W.C.B. 141 (Man. C.A.).
Morrissette et al. (1970), 1 C.C.C. (2d) 307 (Sask. C.A.).
Morrissey and Elmore (1979), 19 N. & P.E.I.R. 526 (Nfld. C.A.).
Mort, [unreported] April 13th, 1981 (B.C.C.A.).
Morton (1975), 18 Crim. L.Q. 152 (Ont. C.A.).
Mosher (1975), 12 N.S.R. (2d) 36 (C.A.).

Mota (1979), 8 C.R. (3d) 270, 46 C.C.C. (2d) 273 (Ont. C.A.).
Motherwell v. Motherwell (1977), 7 A.R. 180 (T.D.).
Moulton (1979), 21 Crim. L.Q. 275 (B.C.C.A.).
Mount (1979), 36 N.S.R. (2d) 463, 64 A.P.R. 463 (C.A.).
Mueller (1980), 5 W.C.B. 155 (Ont. Co. Ct.).
Muise (1980), 44 N.S.R. (2d) 324, 83 A.P.R. 324 (C.A.).
Muise (No. 3) (1975), 23 C.C.C. (2d) 440, 11 N.S.R. (2d) 216 (T.D.).
Munn (1977), 22 N.S.R. (2d) 308 (C.A.).
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Munro (1979), 1 Sask. R. 93 (C.A.).
Murchie, [unreported] April 14th, 1981 (Ont. Co. Ct.).
Murdock (1980), 42 N.S.R. (2d) 90, 77 A.P.R. 90 (C.A.).
Murphy (1972), 15 Crim. L.Q. 13 (Ont. C.A.).
Murphy (1976), 11 N. & P.E.I.R. 491 (Nfld. Dist. Ct.).
Murphy (1981), 43 N.S.R. (2d) 676, 81 A.P.R. 676 (C.A.).
Murray (1976), 19 Crim. L.Q. 26 (Ont. C.A.).
Murrin (1980), 27 N. & P.E.I.R. 9 (Nfld. C.A.).
Mutch (1977), 38 C.C.C. (2d) 447, 14 N. & P.E.I.R. 124, 33 A.P.R. 124 (P.E.I.S.C.).
Muttart (1971), 14 Crim. L.Q. 137 (P.E.I.S.C.).
Myers (1977), 37 C.C.C. (2d) 182 (Ont. C.A.).
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Myhaluk (1977), 1 W.C.B. 500 (Ont. C.A.).

Nadeau (1976), 19 Crim. L.Q. 20 (Man. C.A.).
Nadeau (1980), 14 C.R. (3d) 101 (Que. Sup. Ct.).
Nakonechny (1980), 3 Sask. R. 209 (C.A.).
Nantel et al. (1973), 26 C.R.N.S. 359 (Que. C.A.).
Natrall (1972), 9 C.C.C. (2d) 390 (B.C.C.A.).
Naugler, [unreported] June 20th, 1981 (B.C.C.A.).
Naukatsik (1977), 20 Crim. L.Q. 290 (N.W.T.S.C.).
Neath, [unreported] April 27th, 1981 (Man. C.A.).
Negridge (1980), 6 M.V.R. 255 (Ont. C.A.).
Neilson (1978), 5 C.R. (3d) S-36 (Ont. S.C.).
Nelson (1976), 15 N. & P.E.I.R. 230 (Nfld. C.A.).
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Newman (1977), 22 N.S.R. (2d) 488, 30 A.P.R. 488 (C.A.).
Nichol, [1970] 2 C.C.C. 124, [1970] 1 O.R. 579 (C.A.).
Nicholls (1978), 9 A.R. 203 (C.A.).
Nicholson (1979), 2 M.V.R. 99 (P.E.I.S.C.).
Nicholson (1980), 4 W.C.B. 385 (Man. C.A.).
Nickel (1980), 39 N.S.R. (2d) 42, 71 A.P.R. 42 (C.A.).
Nickerson (1975), 7 N. & P.E.I.R. 145 (P.E.I.C.C.A.).
Nilsson, [unreported] April 27th, 1981 (B.C.C.A.).
Niman (1974), 31 C.R.N.S. 51 (Ont. Prov. Ct.).
Nimegeers (1980), 3 Sask. R. 282 (Dist. Ct.), Crown found to have no right of appeal (1980), 6 Sask. R. 45 (C.A.)..
Noble, [1966] 3 C.C.C. 66 (N.B.C.A.).
Noftle (1976), 12 N. & P.E.I.R. 1 (Nfld. Dist. Ct.).

Norman (1976), 17 N. & P.E.I.R. 516, 46 A.P.R. 516 (Nfld. Dist. Ct.).
Normandeau et al. (1975), 10 N.B.R. (2d) 687, 4 A.P.R. 687 (C.A.).
Northern Electric Co. Ltd. et al. (1956), 116 C.C.C. 98, 24 C.R. 201 (Ont. H.C.).
Norton and Melvin (1975), 13 N.S.R. (2d) 681 (C.A.).
Noseworthy (1974), 6 N. & P.E.I.R. 123 (Nfld. C.A.).
Noseworthy (1977), 21 N.S.R. (2d) 17 (C.A.).
Nutter, Collishaw and Dulong (1970), 7 C.C.C. (2d) 224, [1972] 3 W.W.R. 606 (B.C.C.A.).

Oakes (1975), 24 C.C.C. (2d) 211 (Ont. C.A.).
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Oakley, 39 C.R.N.S. 105, 36 C.C.C. (2d) 436, [1977] 4 W.W.R. 716, 4 A.R. 103 (C.A.).
Obado, 11.3.71, 4616/C/70 (C.A. Crim. Div.).
Ocean Construction Supplies Ltd. (1974), 15 C.P.R. (2d) 224 (B.C.S.C.), Ocean Construction Supplies Ltd. and Six Other Corporations (1974), 22 C.C.C. (2d) 340, 18 C.P.R. (2d) 166, 61 D.L.R. (3d) 323 (B.C.C.A.).
O'Brien (1975), 25 C.P.R. (2d) 143 (N.S.C.A.).
O'Brien (1976), 36 C.R.N.S. 84, 31 C.C.C. (2d) 396, 19 Crim. L.Q. 129 (Nfld. Dist. Ct.).
O'Bront (1977), 43 C.C.C. (2d) 524 (Que. C.A.).
O'Connell, [1970] 4 C.C.C. (2d) 162 (P.E.I.S.C.).
O'Connor (1978), 15 N. & P.E.I.R. 226 (Nfld. C.A.).
Odgers, 37 C.C.C. (2d) 554, 7 A.R. 192, [1978] 1 W.W.R. 312 (C.A.).
Ogden, [unreported] May 12th, 1981 (B.C.C.A.).
Ogg-Moss (1980), 4 W.C.B. 267 (Ont. Co. Ct.).
Ogles, [1966] 3 C.C.C. 66, 52 M.P.R. 111 (N.B.C.A.).
Olah, Brooks, Gomes and Fong (1979), 7 C.R. (3d) 273, S-38 (Sask. C.A.).
Oldham (1975), 11 N.S.R. (2d) 312 (C.A.).
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Oliver (1977), 20 Crim. L.Q. 22 (Ont. C.A.).
O'Neill (1973), 13 C.C.C. (2d) 276 (Nfld. S.C. on Appeal).
O'Neill and Cameron (1973), 22 C.R.N.S. 359 (B.C.C.A.).
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Ostrowski (1976), 18 Crim. L.Q. 284 (Ont. C.A.).
Oudie (1976), 1 W.C.B. 107 (Man. C.A.).
Ouellet, 39 C.C.C. (2d) 278, [1978] 2 W.W.R. 378 (B.C.C.A.).
Ouellet (Nos. 1 and 2) (1976), 32 C.C.C. (2d) 149, 36 C.R.N.S. 296, 72 D.L.R. (3d) 95 (Que. C.A.).

Pace (1977), 23 N.S.R. (2d) 7 (C.A.).
Palmer, [unreported] November 18th, 1980 (B.C.C.A.).
Pammer (1979), 1 Man. R. 18 (C.A.).
Papadopoulos and Kalafatis, [unreported] May 7th, 1974 (Ont. C.A.).
Papineau; Varin (1980), 16 C.R. (3d) 56 (Que. S.C.).
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Paquin (1979), 3 W.C.B. 369 (Ont. C.A.).
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Parry (1979), 34 N.S.R. (2d) 85, 59 A.P.R. 85 (C.A.).
Parsons (1977), 16 N. & P.E.I.R. 20 (Nfld. Dist. Ct.).
Pascal Hardware Co. (1972), 8 C.P.R. (2d) 155 (Co. Ct.).
Paul (1978), 39 C.C.C. (2d) 129 (Ont. C.A.).
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Pawliwsky, [unreported] April 22nd, 1981 (Sask. Dist Ct.).
Pawlowski (1972), 5 C.C.C. (2d) 87 (Man. C.A.).
Pearce (1974), 16 C.C.C. (2d) 369 (Ont. C.A.).
Pearcey, [unreported] May 28th, 1981 (N.S. Co. Ct.).
Pearse (1977), 2 W.C.B. 11 (Ont. C.A.).
Pearson (1979), 11 C.R. (3d) 313 (Que. Sup. Ct.).
Pechdo, [1970] C.A. 1073, [1970] R.L. 455.
Peet (1978), 15 N. & P.E.I.R. 3, 38 A.P.R. 3 (Nfld. C.A.).
Peitsch (1980), 3 Man. R. 86 (C.A.).
Pelletier (1974), 4 O.R. (2d) 677, 28 C.R.N.S. 129, 18 C.C.C. (2d) 516 (C.A.), leave to appeal to S.C.C. refused 4 O.R. (2d) 677n.
Pelletier, [1977] 5 W.W.R. 260 (Man. Prov. Ct.).
Perkins, 51 C.C.C. (2d) 369, [1980] 4 W.W.R. 763 (B.C.C.A.).
Perlin (1977), 23 N.S.R. (2d) 66 (C.A.).
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Perry (1979), 25 N. & P.E.I.R. 349 (P.E.I.S.C.).
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Perry and Franks (1977), 36 C.C.C. (2d) 209 (Ont. C.A.).
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Pettigrew (1978), 3 C.R. (3d) S-59 (Ont. C.A.).
Pezzo (1972), 9 C.C.C. (2d) 530 (Ont. C.A.).
Pfeifer (1978), 11 A.R. 237 (Dist. Ct.).
Pharo (1970), 12 C.R.N.S. 151 (Ont. Co. Ct.).
Phillip (1978), 20 Crim. L.Q. 297 (Ont. C.A.).
Phillips (1974), 24 C.R.N.S. 305 (P.E.I.S.C.).
Picard, [unreported] October 30th, 1975 (Que. C.A.).
Piche (1976), 31 C.C.C. (2d) 150 (Sask. Q.B.).
Piche, Caplette and Jones (1978), 21 Crim. L.Q. 25 (Alta. T.D.).
Pilipenko (1971), 13 Crim. L.Q. 294 (Ont. C.A.).
Pineau (1979), 24 A.R. 176 (Q.B.).
Pinkerton, 7 C.R. (3d) 39, 46 C.C.C. (2d) 284, [1979] 3 W.W.R. 241 (B.C.C.A.).
Pion; McClemens (1971), 4 C.C.C. (2d) 224 (Ont. C.A.).
Pitcher (1976), 19 Crim. L.Q. 158 (B.C.C.A.).
Pitchuk (1973), 6 N.S.R. (2d) 426 (C.A.).
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Plummer (1975), 24 C.C.C. (2d) 497, 31 C.R.N.S. 220 (Ont.C.A.).
Poisson, [1975] C.A. 833.

Poitras (1978), 21 Crim. L.Q. 281 (N.B.C.A.).
Poitras; Bodnar, [unreported] May 15th, 1972 (B.C.C.A.).
Ponak and Gunn, 11 C.C.C. (2d) 346, [1973] 4 W.W.R. 206 (B.C.C.A.).
Pontello (1977), 38 C.C.C. (2d) 262 (Ont. C.A.).
Poole (1980), 27 N. & P.E.I.R. 6, 74 A.P.R. 6 (Nfld. C.A.).
Pope (1980), 52 C.C.C. (2d) 538 (B.C.C.A.).
Porter (1976), 33 C.C.C. (2d) 215, 15 O.R. (2d) 103, 75 D.L.R. (3d) 38 (C.A.).
Potter (1978), 3 C.R. (3d) 154, 39 C.C.C. (2d) 538 (P.E.I.S.C.).
Pottie and Keating (1978), 4 C.R. (3d) S-24,26 N.S.R. (2d) 646, 40 A.P.R. 646 (C.A.).
Poynton, 9 C.C.C. (2d) 32, [1972] 3 O.R. 727, 29 D.L.R. (3d) 389, [1972] C.T.C. 412, 72 D.T.C. 6329 (C.A.).
Preshaw; Lutz; LeBlanc; Ball (1976), 31 C.C.C. (2d) 456, 35 C.R.N.S. 331 (Ont. Prov. Ct.).
Pretty (1971), 5 C.C.C. (2d) 332, 5 N. & P.E.I.R. 10 (P.E.I.C.A.).
Price (1970), 12 C.R.N.S. 131 (Ont. C.A.).
Price (1978), 9 C.R. (3d) S-6 (B.C.C.A.).
Prier, [1979] 6 W.W.R. 328 (Alta. C.A.).
Priest (1974), 25 C.R.N.S. 252 (N.S.C.A.).
Primeau, 42 C.R. 228, [1962] Que. Q.B. 972n.
Pruner (1979), 8 C.R. (3d) S-8 (Ont. C.A.).
Purvis (1976), 14 N.S.R. (2d) 94 (C.A.).
Putnam, [1967] 3 C.C.C. 37 (B.C.C.A.).
Pye; Young (1974), 26 C.R.N.S. 175 (N.S.C.A.).

Quantz (1978), 20 A.R. 167 (Dist. Ct.).
Quelle, [unreported] April 18th, 1975 (B.C.C.A.).
Quinn (1977), 1 W.C.B. 410 (Ont. Prov. Ct.).

R.A. Beamish Stores Co. (1970), 63 C.P.R. 152 (Ont. C.A.).
Radigan (1976), 33 C.R.N.S. 358 (Que. C.A.).
Radio OB Ltd, 31 C.C.C. (2d) 1, [1976] 4 W.W.R. 147, 70 D.L.R. (3d) 311 (Man. Q.B.).
Radu (1977), 3 A.R. 602 (Dist. Ct.).
Ramolla (1975), 18 Crim. L.Q. 18 (Ont. C.A.).
Ramsay, 10 A.R. 155, [1978] 5 W.W.R. 382 (C.A.).
Rance (1972), 14 Crim. L.Q. 393 (Ont. Co. Ct.).
Rasper (1978), 1 C.R. (3d) S-45 (Ont. C.A.).
Reddick (1974), 9 N.S.R. (2d) 425 (C.A.).
Reddick (1976), 17 N.S.R. (2d) 369 (C.A.).
Redstar (1981), 7 Sask. R. 192 (Dist. Ct.).
Rees (1977), 13 N. & P.E.I.R. 170 (Nfld. C.A.).
Regan et al., 24 C.C.C. (2d) 225, [1975] 4 W.W.R. 335 (Alta. C.A.).
Rehman Khan 23.10.73, 2784/A/73 (C.A. Crim. Div.).
Reid (1974), 26 C.R.N.S. 292 (Que. C.A.).
Reid (1980), 26 A.R. 300 (C.A.).
Reid et al. (1976), 14 N.S.R. (2d) 92 (C.A.).
Reilly (1974), 18 C.C.C. (2d) 511 (Ont. C.A.).
Reimer, [unreported] June 14th, 1974 (B.C.C.A.).
Rendall (1974), 21 C.C.C. (2d) 253 (Ont. Dist. Ct.).
Renton (1975), 11 N.S.R. (2d) 60 C.A.).

Rhyno and Goodwin (1977), 19 N.S.R. (2d) 359 (C.A.).
Riberdy et al. (1979), 3 W.C.B. 281 (Ont. Co. Ct.).
Rice (1977), 18 N.S.R. (2d) 362 (C.A.).
Richa and Bou-Mourad (1974), 18 C.C.C. (2d) 63 (Ont. C.A.).
Richards (1976), 18 N.S.R. (2d) 124 (C.A.).
Richards (1979), 49 C.C.C. (2d) 517 (Ont. C.A.).
Richardson (1973), 6 N.S.R. (2d) 130 (C.A.).
Riddell (1973), 11 C.C.C. (2d) 493, 24 C.R.N.S. 144 (Que. C.A.).
Ringer (1978), 29 N.S.R. (2d) 639, 45 A.P.R. 639 (C.A.).
Riordan (1973), 15 C.C.C. (2d) 219, 25 C.R.N.S. 265 (N.S.C.A.).
Risby (1975), 24 C.C.C. (2d) 211 (B.C.S.C.).
Ritcey (1976), 32 C.C.C. (2d) 354 (N.S. Co. Ct.).
Ritchie (1974), 9 N.B.R. (2d) 22 (C.A.).
Robert (1972), 16 C.R.N.S. 7 (Ont. C.A.).
Robert et al., [1971] 2 O.R. 558, 3 C.C.C. (2d) 149 (Ont. C.A.).
Roberts, [1963] 1 C.C.C. 27 (Ont. C.A.).
Robertson (1979), 46 C.C.C. (2d) 573, 10 C.R. (3d) S-46 (Ont. C.A.).
Robertson (1981), 5 W.C.B. 337 (B.C. Co. Ct.).
Robinet (1971), 14 Crim. L.Q. 10 (Ont. C.A.).
Robinson (1974), 19 C.C.C. (2d) 193 (Ont. C.A.).
Robinson (1978), 11 A.R. 450 (T.D.).
Robinson (1979), 49 C.C.C. (2d) 464 (Ont. C.A.).
Robinson, [unreported] March 12th, 1981 (B.C.C.A.).
Roche (1975), 10 N. & P.E.I.R. 229 (Nfld. Dist. Ct.).
Rockert et al. (1976), 1 W.C.B. 29 (Ont. C.A.).
Rodgers (1972), 2 N. & P.E.I.R. 371 (P.E.I.S.C.).
Roestad, [1972] 1 O.R. 814, 5 C.C.C. (2d) 564, 19 C.R.N.S. 190 (Co. Ct.); leave to appeal refused, 19 C.R.N.S. 235n (Ont. C.A.).
Rogers (No. 2) (1972), 6 C.C.C. (2d) 107, 17 C.R.N.S. 294, 2 N. & P.E.I.R. 371 (P.E.I.C.C.A.).
Rohr (1978), 44 C.C.C. (2d) 353 (Ont. C.A.).
Rolex Watch Co. of Canada Ltd. (1980), 53 C.C.C. (2d) 445 (Ont. C.A.).
Rose (1979), 5 Man. R. (2d) 211 (Co. Ct.).
Rosenberg (1979), 4 W.C.B. 104 (Ont. C.A.).
Ross, [unreported] October 26th, 1976 (B.C.C.A.).
Ross (1977), 34 C.C.C. (2d) 483 (B.C.C.A.).
Ross (1979), 1 Man. R. (2d) 242 (C.A.); leave to appeal to S.C.C. refused 3 Man. R. (2d) 270n, 31 N.R. 360n.
Rowan, [1981] 2 W.W.R. 89 (Alta. Q.B.).
Rowbotham (1980), 22 Crim. L.Q. 434 (Ont. C.A.).
Rowe and Taylor (1980), 25 N. & P.E.I.R. 104, 68 A.P.R. 104 (Nfld. C.A.).
Rowter (1981), 4 N.S.R. (2d) 403 (C.A.).
Roy (1975), 18 Crim. L.Q. 17 (Que. C.A.).
Roy, [1976] R.L. 159 (Que. C.S.P.).
Rubin (1978), 23 Crim. L.Q. 169 (Ont. Co. Ct.).
Ruddock (1978), 39 C.C.C. (2d) 65, 25 N.S.R. (2d) 77, 36 A.P.R. 77 (C.A.).
Rudyk (1975), 1 C.R. (3d) S-26 (N.S.C.A.).
Ruez (1979), 4 W.C.B. 89 (Ont. Prov. Ct.).
Ruggles and Kirton (1978), 21 Crim. L.Q. 158 (Man. C.A.).
Rukavina (1973), 16 Crim. L.Q. 18 (Sask. C.A.).
Ruiz and Gonzales (1974), 8 N.B.R. (2d) 46 (C.A.).

Rushton (1975), 13 N.S.R. (2d) 628 (C.A.).
Russell (1974), 26 C.R.N.S. 248 (N.S.C.A.).
Ryan 18.6.73, 1074/B/73 (C.A. Crim. Div.).
Ryan, 1 A.R. 355, [1976] 6 W.W.R. 668 (Alta. C.A.).

S.C. Johnson & Son Ltd. (1975), 21 C.P.R. (2d) 206 (Man. Prov. Ct.).
S.S. Kresge Co. Ltd. (1975), 24 C.C.C. (2d) 357, 20 C.P.R. (2d) 96, 7 N. & P.E.I.R. 305, 61 D.L.R. (3d) 295, sentence overruled in part 27 C.C.C. (2d) 420, 25 C.P.R. (2d) 16, 65 D.L.R. (2d) 628 (P.E.I.C.A.).
Sabean (1979), 35 N.S.R. (2d) 35, 65 A.P.R. 35 (C.A.).
Sabloff, [1979] C.S. 1077.
Salamon, [1972] 2 O.R. 247, 6 C.C.C. (2d) 165 (C.A.).
Salmon (1972), 10 C.C.C. (2d) 184 (Ont. C.A.).
Salvador et al., [unreported] April 2nd, 1981 (N.S.C.A.).
Samaras (1971), 16 C.R.N.S. 1 (Ont.C.A.).
Sampson (1975), 23 C.C.C. (2d) 65, 7 O.R. 582 (C.A.).
Sampson (1979), 31 N.S.R. (2d) 177, 52 A.P.R. 177 (C.A.).
Sanchez-Pino, [1973] 2 O.R. 314, 22 C.R.N.S. 350, 11 C.C.C. (2d) 53 (C.A.).
Sangster (1973), 21 C.R.N.S. 339 (Que. C.A.).
Saumer, [1977] 3 W.W.R. 385 (B.C.C.A.).
Savage (1979), 2 Man. R. (2d) 292 (C.A.).
Savard (1979), 11 C.R. (3d) 309 (Que. C.A.).
Scarrow (1977), 1 W.C.B. 531 (Ont. C.A.).
Schwartz, [unreported] 30th April, 1981 (B.C.C.A.).
Scott (1976), 9 N. & P.E.I.R. 340 (Nfld. Dist. Ct.).
Scott (1976), 17 N.S.R. (2d) 70 (C.A.).
Scott (1980), 56 C.C.C. (2d) 111 (Alta. C.A.).
Sears (1978), 39 C.C.C. (2d) 199, 2 C.R. (3d) S-27 (Ont. C.A.).
Selamio (1979), 23 A.R. 403 (N.W.T.S.C.).
Seltzer (1970), 64 C.P.R. 77 (Que. C.S.P.).
Shanab, [unreported] November 22nd, 1973 (Ont. C.A.).
Shanahan (1977), 1 W.C.B. 177 (Ont. C.A.).
Shand (1976), 30 C.C.C. (2d) 23, 35 C.R.N.S. 202, 13 O.R. (2d) 65, 70 D.L.R. (3d) 395 (C.A.).
Shanower, [1972] 3 O.R. 722, 8 C.C.C. (2d) 527 (C.A.).
Shaver (1977), 38 C.C.C. (2d) 545 (B.C. Co. Ct.).
Shaw and Brehn (1977), 36 C.R.N.S. 358; 20 Crim. L.Q. 27 (Ont. C.A.).
Shea (1976), 16 N.S.R. (2d) 706 (C.A.).
Shea (1980), 42 N.S.R. (2d) 218, 77 A.P.R. 218 (C.A.).
Shea (1981), 44 N.S.R. (2d) 176, 83 A.P.R. 176 (C.A.).
Shearing (1979), 11 C.R. (3d) 297, 21 N. & P.E.I.R. 395, 56 A.P.R. 395 (C.A.).
Shecter (1973), 15 Crim. L.Q. 263 (Ont. Co. Ct.).
Sheer (1932), 59 C.C.C. 180, [1933] 1 D.L.R. 310, [1932] 3 W.W.R. 555 (Alta. C.A.).
Sheppard (1976), 12 N. & P.E.I.R. 129 (Nfld. Dist. Ct.).
Sheridan (1980), 3 Man. R. (2d) 83 (C.A.).
Sherwood (1976), 13 N.B.R. (2d) 118 (C.A.).
Shirran (1978), 22 N.B.R. (2d) 530, 39 A.P.R. 530 (C.A.).
Short (1979), 30 N.S.R. (2d) 181, 49 A.P.R. 181 (C.A.).
Short and Landry (1980), 41 N.S.R. (2d) 622, 76 A.P.R. 622 (C.A.).
Shorten and Shorten, 29 C.C.C. (2d) 528, [1976] 3 W.W.R. 187 (B.C.C.A.).

Shukster (1979), 23 A.R. 242 (Q.B.).
Sigouin, [1970] C.A. 569.
Sigouin (1977), 1 W.C.B. 556 (Que. C.A.).
Sihler (1976), 31 C.C.C. (2d) 73, 13 O.R. (2d) 285, 70 D.L.R. (3d) 616 (C.A.).
Simard, [1979] C.A. 101.
Simmons, Allen and Bezzo (1973), 13 C.C.C. (2d) 65 (Ont. C.A.).
Simms (1975), 10 N. & P.E.I.R. 242 (Nfld. Dist. Ct.).
Simon (1975), 25 C.C.C. (2d) 159 (Ont. C.A.).
Simpson, [unreported] March 27th, 1981 (Ont. C.A.).
Simpson-Sears Ltd. (1976), 28 C.P.R. (2d) 249 (Ont. Co. Ct.).
Sinasac (1977), 35 C.C.C. (2d) 81 (Ont. C.A.).
Sinclair (1972), 6 C.C.C. (2d) 523 (Ont. C.A.).
Singh (1979), 3 W.C.B. 369 (Ont. C.A.).
Singh, Khandura and Singh, [unreported] March 4th, 1981 (B.C.C.A.).
Siple, [1973] B.N. 88 (Ont. C.A.).
Skedden (1976), 18 Crim. L.Q. 396 (Ont. C.A.).
Skeena Kraft Ltd. v. Pulp and Paper Workers of Canada, Local No. 4 et al. (1970), 17 D.L.R. (3d) 17 (B.C.S.C.).
Skrettas (1970), 13 Crim. L.Q. 149 (Ont. C.A.).
Sleep (1978), 23 N.S.R. (2d) 639 (C.A.).
Smerek (1977), 20 Crim. L.Q. 148 (Ont. C.A.).
Smith (1972), 7 C.C.C. (2d) 174 (Ont. C.A.).
Smith (1972), 7 C.C.C. (2d) 468 (N.W.T. Terr. Ct.).
Smith (1973), 25 C.R.N.S. 350, 16 Crim. L.Q. 139 (Sask. C.A.).
Smith (1974), 16 Crim. L.Q. 255 (Ont. C.A.).
Smith, 25 C.R.N.S. 350, [1974] 1 W.W.R. 635 (Sask. C.A.).
Smith (1975), 12 N.S.R. (2d) 289 (C.A.).
Smith (1977), 3 C.R. (3d) S-53 (Ont. C.A.).
Smith (1977), 1 W.C.B. 609 (Que. C.A.).
Smith (1978), 2 C.R. (3d) S-35 (Nfld. C.A.).
Smith et al. (1980), 40 N.S.R. (2d) 272, 73 A.P.R. 272 (C.A.).
Smith, Thomas and Boyce (1979), 21 N. & P.E.I.R. 17 (P.E.I.C.A.).
Snelgrove (1977), 13 N. & P.E.I.R. 190 (Nfld. C.A.).
Snider (1977), 37 C.C.C. (2d) 189 (Ont. C.A.).
Soble (1978), 3 C.R. (3d) S-1 (Man. C.A.).
Societe de Publication Merlin Ltee. (1978), 43 C.C.C. (2d) 557 (Que. C.A.).
Sommers and Gray (1959), 125 C.C.C. 81 (B.C.C.A.).
Solem (1979), 1 Sask. R. 181 (C.A.).
Sonsalla (1971), 51 C.R.N.S. 99 (Que. C.A.).
Sooley (1977), 17 N. & P.E.I.R. 384, 46 A.P.R. 384 (Nfld. Dist. Ct.).
Soucy (1974), 28 C.R.N.S. 383 (Que. C.A.).
Southam Press (Ont.) Ltd. (1976), 31 C.C.C. (2d) 205 (Ont. C.A.).
Sparkes (1978), 16 N. & P.E.I.R. 363 (Nfld. C.A.).
Spence (1961), 132 C.C.C. 234 (P.E.I.S.C.).
Spencer (1973), 6 N.S.R. (2d) 555, 16 C.C.C. (2d) 29, 27 C.R.N.S. 97 (C.A.).
Sperdakes (1911), 24 C.C.C. 210 (N.B.C.A.).
Spezzano (1977), 34 C.C.C. (2d) 87, 15 O.R. (2d) 489, 76 D.L.R. (3d) 160 (C.A.).
Spicer (1975), 28 C.C.C. (2d) 334, [1976] W.W.D. 32 (Alta. C.A.).
Spiller, [1969] 4 C.C.C. 211, 6 C.R.N.S. 360, 68 W.W.R. 187 (B.C.C.A.).
Sprague et al. (1974), 19 C.C.C. (2d) 513, [1975] 1 W.W.R. 22 (Alta. C.A.).

Spring (1977), 35 C.C.C. (2d) 308 (Ont. C.A.).
Squires (1975), 25 C.C.C. (2d) 202 (Nfld. Prov. Ct.); sentence varied (1977), 35 C.C.C. (2d) 325 (Nfld. C.A.).
St. Croix (1979), 47 C.C.C. (2d) 122 (Ont. Co. Ct.).
St. Laurent (1979), 9 C.R. (3d) S-21 (Ont. H.C.).
St. Lawrence Corp. Ltd. and 19 Other Corporations, [1969] 2 O.R. 305, [1969] 3 C.C.C. 263, 59 C.P.R. 97 (Ont. C.A.).
St. Onge (1977), 17 N.B.R. (2d) 99 (C.A.).
Stafrace (1972), 22 C.R.N.S. 365, 10 C.C.C. (2d) 181 (Ont. C.A.).
Stanford, 27 C.C.C. (2d) 520, [1975] C.A. 532.
Stein (1974), 15 C.C.C. (2d) 376 (Ont. C.A.).
Stennes (1975), 35 C.R.N.S. 123 (B.C. C.A.).
Storey (1976), 11 N. & P.E.I.R. 74 (P.E.I.C.A.).
Sukraj (1980), 23 Crim. L.Q. 162 (Ont. S.C.).
Sullivan (1972), 9 C.C.C. 70 (Ont. C.A.).
Sullivan (1978), 15 N. & P.E.I.R. 271, 38 A.P.R. 271 (Nfld. C.A.).
Sullivan (1979), 35 N.S.R. (2d) 341 (C.A.).
Sumarah et al., [1970] 5 C.C.C. 317 (N.S. Co. Ct.).
Sunbeam Corporation (Canada) Ltd., 56 C.P.R. 242, 1 D.L.R. 161, [1969] 2 C.C.C. 189 (S.C.C.).
Superior Electronics Inc. (1979), 45 C.P.R. (2d) 234 (B.C.C.A.).
Sutherland (1974), 10 N.B.R. (2d) 221 (C.A.).
Swanson (1980), 25 A.R. 197 (N.W.T.C.A.).
Sweitzer (1980), 26 A.R. 208 (C.A.).
Swinimer (1975), 25 C.C.C. (2d) 37, 11 N.B.R. (2d) 138 (C.A.).
Switlishoff et al. (1950), 9 C.R. 428 (B.C.C.A.).
Switzer (1978), 8 C.R. (3d) S-17 (Ont. C.A.).
Szola (1977), 33 C.C.C. (2d) 572 (Ont. C.A.).

Tait (1978), 5 Sask. R. 193 (C.A.).
Tait (1979), 1 Sask. R. 1 (C.A.).
Talbot (1977), 21 N.S.R. (2d) 689, 28 A.P.R. 689 (C.A.).
Tan (1975), 22 C.C.C. (2d) 184 (B.C.C.A.).
Tanguay (1975), 24 C.C.C. (2d) 77 (Que. C.A.).
Tanguay-Dupere (1971), 13 Crim. L.Q. 436 (Que. C.A.).
Tanner (1979), 3 W.C.B. 460 (Man. C.A.).
Taplin (1977), 23 N. & P.E.I.R. 178, 61 A.P.R. 178 (Nfld. C.A.).
Tapp (1976), 13 N.B.R. (2d) 234 (C.A.).
Tarasoff (1979), 2 M.V.R. 313 (B.C.C.A.).
Taylor (1975), 24 C.C.C. (2d) 551 (Ont. C.A.).
Taylor (1977), 19 Crim. L.Q. 279 (Ont. C.A.).
Taylor (1979), 48 C.C.C. (2d) 523 (Nfld. C.A.).
Taylor (1979), 31 N.S.R. (2d) 87, 52 A.P.R. 87 (C.A.).
Tellum (1980), 41 N.S.R. (2d) 626, 76 A.P.R. 626 (C.A.).
Terry, [unreported] February 23rd, 1981 (B.C.C.A.).
Tessier (1957), 21 W.W.R. 331 (Man. Co. Ct.).
The "City of Guildford" (1975), 27 C.C.C. (2d) 212 (Ont. C.A.).
Therrault (1979), 22 Crim. L.Q. 163 (Que. C.A.).
Thibeau (1979), 3 W.C.B. 300 (Ont. C.A.).
Thistle (1974), 74 D.T.C. 6632 (Ont. Co. Ct.).
Thomas, [1968] 1 O.R. 1, [1968] 2 C.C.C. 84 (C.A.).

Thomas, 26.4.71, 4160/B/70 (C.A. Crim. Div.).
Thomas, [unreported] March 11th, 1981 (B.C.C.A.).
Thomas (No. 2) (1980), 53 C.C.C. (2d) 285 (B.C.C.A.).
Thompson, [1974] Crim. L.R. 720 (C.A. Crim. Div.).
Thompson (1976), 9 N. & P.E.I.R. 427 (P.E.I.C.C.A.).
Thoms (1979), 3 M.V.R. 249 (B.C.C.A.).
Thorn (1978), 2 W.C.B. 243 (Ont. C.A.).
Thorne (1980), 27 N. & P.E.I.R. 69 (Nfld. C.A.).
Thornton (1980), 42 N.S.R. (2d) 647, 77 A.P.R. 647 (C.A.).
Thurrott, [1972] 1 O.R. 460, 5 C.C.C. (2d) 129 (C.A.).
Tibbo (1979), 32 N.S.R. (2d) 37, 1 M.V.R. 327, 54 A.P.R. 37 (C.A.).
Tobe (1978), 43 C.P.R. (2d) 51 (Ont. Co. Ct.).
Tober (1979), 39 C.R.N.S. 133 (Man. C.A.).
Tobin (1974), 8 N.S.R. (2d) 598 (C.A.).
Tod (1977), 1 W.C.B. 190 (B.C.C.A.).
Tomigo, [unreported] June 30th, 1981 (Ont. C.A.).
Tomlinson (1971), 2 C.C.C. (2d) 97 (B.C.S.C.).
Trask (1974), 28 C.R.N.S. 321 (Ont. C.A.).
Tremblay, [1970] C.A. 840.
Tremblett (1975), 8 N. & P.E.I.R. 482 (Nfld. Mag. Ct.).
Trenchfield (1978), 9 C.R. (3d) S-1 (Ont. H.C.).
Trow (1977), 38 C.C.C. (2d) 229 (B.C.S.C.).
Truax (1979), 22 Crim. L.Q. 157, 3 W.C.B. 387 (Ont. C.A.).
Tuckey (1977), 34 C.C.C. (2d) 572 (Ont. C.A.).
Tulshi v. Minister of Manpower and Immigration (1976), 14 N.R. 280 (Fed. C.A.).
Turner (1970), 1 C.C.C. (2d) 293, [1971] 1 O.R. 83 (C.A.).
Twitchin (1970), 13 Crim. L.Q. 295 (Ont. C.A.).

United Keno Hill Mines Ltd. (1980), 5 W.C.B. 467 (Y.T. Terr. Ct.).

Valade (1970), 15 C.R.N.S. 42 (Que. C.A.).
Valenzuala (1980), 21 A.R. 96 (Prov. Ct.).
Vallieres (No. 2) (1973), 17 C.C.C. (2d) 361, 47 D.L.R. (3d) 363 (Que. C.A.).
Vance; Christopher (1977), 2 W.C.B. 23 (Ont. C.A.).
Vandale and Maciejewski (1974), 21 C.C.C. (2d) 250 (Ont. C.A.).
Vandecasteyen (1980), 22 A.R. 7 (Q.B.).
Vanryckegham, [1976] 4 W.W.R. 454 (Alta. Prov. Ct.).
Van's Gifts and Books Ltd. (1977), 1 W.C.B. 556 (Ont. C.A.).
Varbeff (1974), 8 N.S.R. (2d) 586 (C.A.).
Varbeff (1977), 24 N.S.R. (2d) 279, 35 A.P.R. 279 (C.A.).
Vasiliadis, [unreported] March 16th, 1981 (Ont. C.A.).
Veale (1971), 2 N. & P.E.I.R. 37 (P.E.I.C.A.).
Vicente (1975), 18 Crim. L.Q. 292 (Ont. C.A.).
Vidotto (1976), 1 W.C.B. 126 (Ont. C.A.).
Vigeant, [1975] W.W.D. 6, 19 C.C.C. (2d) 512 (Man. C.A.).
Vivian, 1.2.71, 4092/A/70 (C.A. Crim. Div.).
Vrany, Zikan and Dvorak (1979), 46 C.C.C. (2d) 14 (Ont. C.A.).
Vretakos, [1976] C.A. 526.

W. and B.S. (1976), 19 Crim. L.Q. 276 (Ont. C.A.).
Waite (1975), 14 N.S.R. (2d) 103 (C.A.).
Wales (1978), 25 N.S.R. (2d) 628 (C.A.).
Walia (No. 2) (1975), 9 C.R. (3d) S-48 (B.C.C.A.).
Walker, [unreported] March 25th, 1981 (B.C.C.A.).
Walker et al. (1980), 4 W.C.B. 246 (Ont. C.A.).
Wallace (1973), 11 C.C.C. (2d) 95 (Ont. C.A.).
Wallis (1973), 11 C.C.C. (2d) 95 (Ont. C.A.).
Wall (1976), 15 N.S.R. (2d) 359 (C.A.).
Walls (1976), 2 A.R. 263 (T.D.).
Walsh (1977), 1 W.C.B. 106 (Ont. C.A.).
Walsh (1979), 19 C.R. (3d) S-30 (Que. S.C.).
Ward, [unreported] November 5th, 1973 (B.C.C.A.).
Ward (1980), 56 C.C.C. (2d) 15 (Ont. C.A.).
Wardell (1976), 15 N.B.R. (2d) 488 (C.A.).
Warner (1975), 7 N. & P.E.I.R. 79, 3 A.P.R. 79 (Nfld. C.A.).
Warner et al., [1946] O.R. 808 (C.A.).
Watson (1975), 26 C.C.C. (2d) 150 (Ont. Prov. Ct.).
Watters and Duplessis (1977), 18 N.B.R. (2d) 274 (C.A.).
Webb (1975), 28 C.C.C. (2d) 456, 39 C.R.N.S. 314, 9 N. & P.E.I.R. 136 (P.E.I.C.A.).
Weber, 9 C.C.C. (2d) 49, 20 C.R.N.S. 398, [1973] 1 W.W.R. 262 (B.C.C.A.).
Weber (1980), 52 C.C.C. (2d) 468 (Ont. C.A.).
Webster (1978), 20 Crim. L.Q. 430 (Ont. C.A.).
Weisdorn and Weisdorn, [unreported] March 25th, 1981 (B.C.C.A.).
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PREFACE

This thesis has one central point to make: that, despite disavowals by the only major author in the sentencing field and occasional Judges (documented in Chapter 1), there is in Canada a consistent, logical scheme of sentencing law and practice. It is based on a dichotomous framework, which encompasses sentencing according to "tariff" principles and "individualized" sentencing. There are settled rules which establish the appropriate occasions on which to sentence according to either methodology: within each scheme, there are principles governing the choice of the exact sentence to be imposed.

Following a brief documentation of the few direct judicial statements for and against this contention, the thesis attempts to demonstrate its validity by an exploration of sentencing law and practice. The analysis is based on, and refers continually back to, this central tenet. Part I puts the case in more detail, discusses practice relating to the choice between tariff and individualized measures, and explains some general principles relating to their operation. Part II analyzes the case-law on factors affecting, or not affecting, sentence, while Part III shows the content of the tariff for the main offences under Canadian federal law. Part IV, finally, discusses the use of the major types of disposition available under the Criminal Code: imprisonment, the fine, suspended sentence/probation, and discharge.

The coverage of the thesis is largely limited to decisions with certain key characteristics: they are Canadian, fully reported, and decided in or since 1970. Inevitably, some material from other Commonwealth jurisdictions has had to be included, as have some important, but unreported, cases. The temporal element has been breached only where cases from the last decade do not satisfactorily "cover the field".

An examination of the precedents since 1970 has confirmed the validity of an initial assumption that there is, extant in Canada, a body of recent authority sufficient to illuminate, at least in principle, virtually every area of sentencing law. The reader will quickly discover, despite the temporal limitation, that the coverage of many issues is much fuller than the

treatment of the same issues in Ruby's Sentencing, hitherto the leading Canadian text, which has no such limitation: If this were not justification enough, however, it may be added that recent authority is frequently the most useful, particularly so in an area which develops and changes as quickly as Canadian sentencing law.

Within the limitations just expressed, the text does not mention every case. It is, however, based on a complete review of over 2,000 cases reported in the period, and selective inclusion of unreported, foreign and other cases. Throughout, cases which do not "fit" into the scheme proposed above have been scrupulously noted and discussed, and frequently criticised on this ground or others. Yet, as will be observed, there is very little which does not fit neatly into the postulated analytical framework. This, it is submitted, is the only real test of the validity of the tariff/individualization dichotomy.

The law is stated as at

August 1st, 1981

PART I: PROLEGOMENON TO THE PRINCIPLES OF SENTENCING

CHAPTER 1: TARIFF AND INDIVIDUALIZED SENTENCING

A. THE FIRST DECISION

This introductory Part has an exciting purpose: to attempt to portray a logical scheme or framework arising from the mass of Canadian decisions on sentencing matters. This task is, at the outset, fraught with numerous frustrating factors. Not least of these is the number of diverse jurisdictions, each with its own appellate sentencing court, and each with local and regional differences of environment, culture and opinion. Nevertheless, it is the view of the author that we have, indeed, a logical sentencing law in Canada. It matters not that occasional discord may be found: this is inevitable where the basic scheme lies unwritten and the modus operandi of the sentencing Judge is still, perhaps too frequently, a matter of personal whim and inclination.

Today, however, we have law reports, editorial comment, and conferences on the issues of sentencing. Judges do communicate with each other, and appellate courts have of late become increasingly aware of the need to set guidelines for lower tribunals in sentencing matters. Judges in first instance courts have, for their part, paid increasing attention to the guidance provided by precedents, and thus while individuality may still be exercised to some degree, a greater consensus has emerged.

What, then, is this consensus? It is not so simple as the bland notion that there is an appropriate, fixed or fixable, sentence for each offence. Neither is it, however, any longer the case that there is no "tariff" or "normal range" of sentence, as Ruby avers.[1] Instead, a body of juris-

prudence has emerged which suggests a proper approach for sentencing particular types of cases, and which determines how relevant factors are to be dealt with, according to the outcome of a primary decision. That primary decision is essentially the same as that found in the English Court of Appeal by Thomas: a choice between an individualized sentence and a tariff sentence:

> The sentencer is presented with a choice: he may impose, usually in the name of general deterrence, a sentence intended to reflect the offender's culpability, or he may seek to influence his future behaviour by subjecting him to an appropriate measure of supervision, treatment or preventive confinement.[2]

The choice between an individualized and a tariff sentence is, at its clearest, a choice between different types of sentence; each being designed to fulfill a different objective. Imprisonment and financial penalties are forms of punishment typically associated with tariff principles. Other measures such as the suspended sentence or conditional discharge accompanied by conditions attached to a probation order are designed to assist the offender to regulate his future conduct.

The recognition that the range of sentencing alternatives offered by the Criminal Code is used by the judiciary on the basis of an election (between treating and punishing the offender) allows one to analyze effectively the numerous precedents for quantum of sentence which are available in most areas of the criminal law. In particular, the realization that the "tariff" or "range of sentence" applies only to cases in which an election is made to measure sentence by the offence, excludes from consideration of the extent of uniformity in sentence those cases where treatment of the offender was in issue. As a consequence, for most offences a clear "range of sentence" may be found in the case law and is an effective guide for counsel and courts

alike. It also illuminates, as will be shown, the rationale and effect of the various "mitigating", "aggravating" and "irrelevant" considerations in sentencing.

The principles governing the direction of the Court's choice will be discussed below. It should be noted first, however, that the evolution of this pattern has rarely been openly acknowledged by the Courts; it has come about more as a result of general practice and occasional consideration of the aims and purposes of sentencing. For example, the Saskatchewan Court of Appeal in R. v. Morrissette et al.[3] considered that the question was of the relative weight to be assigned to elements of punishment, deterrence, "protection of the public", and reformation of the offender in each case. The Chief Justice went on to point out that societal change results in a constant re-assessment of which of these aims should underlie an appropriate sentence.[4]

The debate on assignment of relative weights went through a strange metamorphosis in the 1970s. Despite the clarity of Morrissette,[5] cited on innumerable occasions, it was necessary for the Nova Scotia Court of Appeal in R. v. Grady[6] forcefully to reject the notion that there was no primacy of order between these objectives. Even then, it was already 1977 before the same Court produced what may be regarded as the seminal statement on the issue:

> I suggest that the relative weight or mix of the three basic factors —deterrence of the offender, deterrence of others and rehabilitation and reform — varies not only with reference to the nature, history and character of the offender, but also with the kind of offence. And to the mixture in any given case must often be added a fourth factor often similar in its influence but by no means identical to "deterrence", namely, the need to express social repudiation and abhorrence of a particular crime by, to use a largely outmoded word, "punishment" of the offender. Some crimes by their nature, and the nature of

> the offender, require little element of deterrence or punishment when it comes to sentence; many so-called crimes of passion may fall in this category ....
>
> Conversely, other crimes, and, I respectfully include the hit and run offence in this category when personal injury or death has occurred, are recognized by Parliament and society as requiring a large measure of imprisonment, even though, almost always, the offender requires no reform from criminal ways and where the horror of the event and trial alone largely deters him from any repetition.[7]

This choice between individualized and tariff sentencing may be phrased in a number of ways: treatment v. punishment, subjective sentencing v. objective sentencing,[8] or sentencing the offender v. sentencing the offence. It is an unsophisticated view which leads to the conclusion that sentencing in Canada "combines a strange liaison of both the moral [punishment] and utilitarian [treatment or deterrence] positions".[9] Where the sentencer does, in fact, attempt to combine elements of individualized and tariff sentencing, he runs the risk that his attempts to accommodate both aims will lead to the achievement of neither. Haines J. expressed his fears on this issue in 1970:

> ...the law places on its Judges an almost impossible task. It requires them by their sentences to protect the public by deterring those tempted to commit a similar offence. At the same time it looks to its Judges to impose a sentence that will rehabilitate the accused. Thus, for the same offence society and its victims are treated to an exhibition of sentences that vary all the way from suspended sentence to a term of years for the same offence. This confuses the public who lose confidence in the object of the criminal law because it feels that, instead of consistently protecting their persons and property, the law discharges that function only occasionally. Actually, the real problem is created by the judiciary being placed in the position of serving these conflicting interests. Being required to be all things to all men, sentences vary widely and really serve no one interest adequately. Sentences bear the character of compromise and often hurt those they are intended to serve.[10]

B. CONSISTENCY AND THE RANGE

The first two parts of this thesis will be devoted to an analysis of sentencing principles and factors affecting sentence in light of the individualized/tariff sentencing distinction. It is hoped that this will be the most convincing support of the propositions just offered. It is, however, possible to appeal to statements made by the Courts to demonstrate the existence of a "range of sentence", or "tariff", for those cases where sentencing is carried out with reference to the offence committed rather than, specifically, the offender's needs. Courts do not always speak openly of the range of sentence. However, they have been increasingly willing in recent years to lay down normal ranges of sentence for particular offences, and to require justification for any decisions which transgress those boundaries. At the general level, Tysoe, J.A., of the Court of Appeal in British Columbia, stated in 1968 that

> The lower Courts must have all due regard to the policy that has been laid down by this Court concerning punishment of particular types of offences and the severity of punishment that would be appropriate in the absence of special circumstances.[11]

McQuaid, J., in the Prince Edward Island Court of Appeal, similarly stated in R. v. Cusack:

> The sentence should be within the range of sentences imposed for similar offences within a period reasonably contemporaneous with the time of the commission of the offence.[12]

The law reports for the last decade provide numerous examples of the Courts indicating proper ranges of sentence[13] and deciding the outcomes of appeals with reference to such ranges.[14]

Other Courts have been more cautious. The Nova Scotia Court of Appeal, substituting terms of three years' imprisonment for terms of eight and 24 months respectively in a case of armed robbery, emphasized

> the danger of trying to put any specific price-tag or tariff of sentence on any particular type of offence or type of offender; the best one can do, and it may be questioned whether it is wise even to try to do that, is to specify a range of sentences for a particular offence by a particular class of offender.[15]

Despite its caution, the Court went on to specify a range of imprisonment for armed robbery from three years upwards. In 1981, finally, the Court, including MacKeigan, C.J.N.S. (who delivered the judgment containing the above warning) reduced sentences on three housebreakers from seven, six and six years' imprisonment to four, three and three, stating

> In our opinion the sentences imposed by the Magistrate exceeded the range normally imposed....[16]

A more consistent concern underlying many appellate and lower court decisions on sentencing is that of uniformity, or consistency, in sentencing. While there is no shortage of statements applauding the notion of uniformity, an abundance of cases expressing concern over the use of too rigid an approach may also be found.

The conflicting judgments on the issue of uniformity contain nothing more than semantic disputes. Uniformity, so far as desirable, means uniformity of approach, or approximate equality of treatment. Wide disparity is repugnant to our notions of justice.[17] The basic premise, as expressed by the Ontario Court of Appeal in R. v. Wood,[18] is that while absolute uniformity of sentence is not possible, nevertheless sentences upon like offenders for like offences should not be widely disparate.[19] Culliton, C.J.S., outlining the role of the appellate Courts in sentencing, put the matter thus:

> A provincial Court of Appeal, being the final Court in dealing with appeals in respect of sentences, has a duty to give some guidance to trial Judges in this field. Upon the Court of Appeal, rests the responsibility of stating the principles underlying the imposition of a sentence so that at least unformity of approach to this problem may be achieved. Also, while there can be no such thing as uniform sentences, it is incumbent upon the appellate Court to see that the disparity in sentence for the same or similar offences can be rationalized.[20]

Particular emphasis is placed on conformity with previous decisions in certain special situations. Such a case occurs, for example, where a court is faced with a type of offence relatively new in its locality. In R. v. Squires,[21] the Newfoundland Magistrate found it necessary to point out that the jurisdiction had, historically, been relatively free of serious offences of group violence. It was thus important to be guided by decisions of other courts in their handling of such cases.

Similarly, where the Court perceives a problem as being of nationwide significance, uniformity may be sought with particular zeal. In R. v. Hemsworth[22] the Court was faced with a case of trafficking in marijuana. Pointing out that the statute concerned was in force throughout the whole country, and that there had been a grave increase of late in the incidence of such offences, the Court emphasized the need for "some measure of uniformity" in dealing with the problem.[23]

The dampers which have occasionally been cast out by courts apparently do little to affect this basic notion of consistency. Often, the appellate Court finds it necessary to point out that a sentence is correct, though out of line with precedents, because of special circumstances. In R. v. Thompson[24] counsel for the accused urged upon the Court that lower courts in the same province, and superior courts in other provinces, had given lower sentences than the fine and imprisonment imposed on his client. The Chief Justice replied in his judgment:

> We agree with the idea that, where possible, effort should be made to have some uniformity for similar offences against a particular statute. But on that question it must be noted that the facts and circumstances of each offence must be fully considered on the passing of sentence.[25]

A similar point was made by the Chief Justice of Nova Scotia in R. v. Grady:[26]

> It would be a grave mistake, it appears to me, to follow rigid rules for determining the type and length of sentence in order to secure a measure of uniformity, for almost invariably different circumstances are present in the case of each offender. There is not only the offence committed but the method and manner of committing; the presence or absence of remorse, the age and circumstances of the offender, and many other related factors. For these reasons it may appear that lesser sentences are given for more serious offences and vice versa, but the court must consider each individual case on its own merits, even if the different factors involved are not apparent to those who know only of the offence charged and the penalty imposed.[27]

It is significant, however, that in 1979, after citing this passage, the Court felt obliged to add: "Some measure of uniformity is, however, desirable in the interests of justice, and for that reason I shall now refer to a few judgments of this Court."[28]

Such criticisms as exist of the use of precedents and the notion of uniformity seem essentially to be directed at undesirable methods of achieving consistency, rather than its validity as an end. A good example is the case of R. v. Webb,[29] in which the Provincial Court Judge fined a shoplifter $50, stating that this was the standard penalty which he customarily imposed for that type of offence. The Prince Edward Island Court of Appeal, condemning the practice, found it

> contrary to all well recognized principles which should govern a Court in considering the appropriateness of a discharge.... Each case must be considered separately and upon its own circumstances. Minimum or maximum or "standard" penalties are the exclusive prerogative of Parliament and where no such penalties are prescribed, a

> Court is in error in following self-imposed minimum or maximum standards without giving consideration to the individual accused being sentenced.[30]

As already indicated, consistency or uniformity of sentence does not require a rubber-stamp penalty to be applied to all convictions for the same offence.

Occasionally, a Judge faced with an unusual or uncommon case will cast aspersions upon the use of precedents. By its very nature this does not affect the value of precedent and the range generally: the Courts are simply saying that for some offences, fact-situations are so diverse that no range has been evolved, or, possibly, can be. An example is a recent decision of the Newfoundland Court of Appeal. In reviewing sentences of six years' imprisonment imposed on three accused convicted of conspiring to traffic in cannabis resin, the appeal Court noted that the trial Judge had accepted Crown Counsel's submission that the range of sentence for "like offences" was six to seven years' imprisonment. The sentences imposed at the trial were reduced to four years' imprisonment, the Court stating that it is difficult, if not impossible, to arrive at a uniform tariff for conspiracy offences. "It is a misnomer to refer to other conspiracies as 'like offences' in the context of sentencing." Numerous factors may be present in varying degrees and tend to aggravate or mitigate the appropriate sentence to be imposed.[31] Similarly in R. v. Glubisz (No. 3)[32] McFarlane, J.A. stated that he found

> very little assistance in comparing one case with another, especially where the crime is ... a serious one.[33]

In Glubisz, however, the Court was considering a case of procuring to commit murder. Only one reported precedent for sentence since 1970 was available. In both the precedent, R. v. Walia (No. 2)[34] and Glubisz, the facts involved a man attempting to hire another to kill his wife to solve family problems. It is

indeed remarkable, given McFarlane, J.A.'s comment, that an identical sentence was passed in each case!

The use of judicial statistics to indicate the appropriateness of a disposition has found cautious support in recent years, underlying the growing acceptance of the notion of a "range". In R. v. Sabloff,[35] for example, the Court quoted statistics issued by the Bureau of Dangerous Drugs for 1977 and 1978. These indicated that "92 sentences out of a recorded total of 217 (42.4%) for heroin trafficking ... fell between one year and three years' imprisonment".[36] While it was important to treat each case on its own merits, it was useful to note these figures as indicating that the two years less one day imposed here was in line with precedent.

Statistics may also be relied upon in support of the outcome of the primary decision. In R. v. Richards[37] the Ontario Court of Appeal had before it a non-custodial sentence imposed on a "pop" star for possession of a narcotic. In discussing whether an individualized measure was appropriate for such an offence, the Court found the high percentage of similar cases in which such sentences were imposed to be "a fact of some significance which the learned trial Judge was entitled to take into account".

C. THE TARIFF SENTENCE

Most frequently, if a tariff sentence is to be imposed, it will be the offence committed which dictates this choice. The offence of trafficking in a narcotic is a prime example. Imposing a sentence of three years' imprisonment on a conviction for heroin trafficking, the Alberta Court of Appeal states:

> This Court, as has every other appellate court in Canada who has considered the matter, said that in sentencing for trafficking in what are called the hard drugs, the main effect must be the deterrent effect of the sentence on the offender and, what is probably more important, the deterrent effect on others who might otherwise be encouraged to engage in this nefarious activity.[38]

There are exceptions to the general rule that the choice of a tariff sentence flows from the nature of the offence. Breach of trust by a person in a responsible position, such as a lawyer, policeman or treasurer, will normally attract a severe deterrent sentence even where the sum involved or harm done is relatively little. In R. v. Cusack[39] a policeman stole money from the wallet of a motorist. Setting aside a sentence of one day in jail and two years' probation (a "treatment" measure), the appeal Court sentenced him to nine months' imprisonment and noted the unanimous finding of courts considering offences committed by police officers that

> their sentence should be more severe than that of an ordinary person ... because of the position of public trust which they held at the time of the offence....[40]

Similarly in R. v. Gorman[41] the accused was treasurer of a Sick Benefit Fund. His breach of trust in diverting over $16,000 to his own use, was held to call for the imposition of a "substantial" sentence as a deterrent to other so placed. The appeal Court virtually doubled the sentence imposed at trial, to two years less a day definite and one year indeterminate.

In other cases, a tariff sentence may be imposed as a last resort. In R. v. Gilpin[42] the accused at trial received a conditional discharge for assault causing bodily harm. He had committed a "vicious and unprovoked" attack on an acquaintance, but the trial Judge had been concerned that he not lose his association with Alcoholics Anonymous. The appeal Court, noting several previous convictions for assaults and thefts, felt that the public interest would be better served by a sentence of three months' incarceration.[43]

Finally, a tariff sentence may be dictated by local circumstances, despite the particular needs or difficulties of the offender, where the judiciary feels a need to "crack down" on a particular type of offence. M.J. McQuaid, J., in a judgment concurred in by the majority except as to the final disposition, best phrased this point in R. v. Carroll.[44] His Lordship simply stated that where a crime has become particularly prevalent, so that the Court must punish severely in order to assist in bringing it under control, rehabilitation of the offender becomes a secondary consideration. In R. v. Belleville and Chabot[45] the Court increased sentences for robbery from two years' to five years' imprisonment, indicating that exemplary sentences were needed in light of the prevalence of such offences in the region. Similarly, in A.G. Que. v. Sigouin[46] the Crown appealed a sentence of three months' imprisonment for an offence of possession of counterfeit money. Increasing the penalty to two years, the Court took the view that an exemplary sentence was needed because the problem of counterfeiting in Quebec was caused in part by the lighter sentences imposed there in previous years than in other provinces.[47]

D. THE INDIVIDUALIZED DISPOSITION

The notion of uniformity of approach is, of course, equally viable in the context of the alternative to a tariff sentence, the individualized measure. This will be called for by circumstances of or surrounding the offender, either generally or at the time of his offence. Commonplace examples are the shoplifter shown to have committed the offence during a period of emotional disturbance or upset;[48] the person who kills a spouse after prolonged provocation[49] and the destitute widow who cashes N.S.F. cheques at a time of dire need.[50]

Typically, although the individualized sentence may involve a short period of incarceration, the emphasis will be on supervision, training or attempts to remove the circumstances which led to the offence. Treatment-oriented measures generally, and probation in particular, are sentences handed down with the needs and future of the offender much to the fore.

Individualization, however, does not necessarily imply leniency, or "easier" sentences. Into this category also fall cases where incarceration is imposed in order that a drug-user be removed from his supply (for his own benefit),[51] and lengthy terms of incarceration imposed upon the offender simply to remove him from the public for as long as possible due to his dangerousness.. Life imprisonment, where not mandatory, is frequently used as an individualized measure to ensure that the offender is released when "safe" or "cured".[52]

Individualized sentences appear, in Canada, to be favoured most frequently for three of the four classes identified by Thomas in England:[53] young offenders, mentally disordered persons and intermediate offenders. One searches in vain for Canadian reports giving individualized treatment to Thomas' fourth class, inadequate recidivists.[54] Some documentation of each of these may prove useful, although it must be remembered that these are <u>not</u> the only classes who may receive individualized treatment.

i) Young Offenders

> In considering what an appropriate sentence is for the very young, the paramount consideration must be their immediate rehabilitation.[55]

This statement of the Ontario Court of Appeal represents the policy of all Canadian Courts of Appeal. In cases since 1970 which have

discussed the effect of youth, the Courts have repeatedly reached not only this conclusion, but also have stated that where a tariff sentence is in order, youth is a substantial mitigating factor.[56]

ii) Mentally Disordered Persons

Common sense dictates that, in dealing with an offender suffering from mental disorder, special handling is needed. Any notion of commensurate punishment strikes one as unjust for a person who commits a criminal act by reason of an affliction of the mind, and the imposition of a regular prison term would hold little prospect of rehabilitative success if specific medical treatment is required. Mentally disordered offenders are discussed at considerable length below.

iii) Intermediate Recidivists

This term is used by Thomas to describe

> an offender in his twenties or early thirties who has acquired a substantial history of convictions and findings of guilt as a juvenile, has undergone various individualized measures, and is now steadily adding terms of imprisonment to his record. Faced with the prospect of his developing into an institutionalized habitual offender, the Court will frequently seek to interrupt the sentence by the use of probation or whatever other measure may offer some chance of success.[57]

An example is the case of R. v. Catlin.[58] Catlin was charged with offences of breaking and entering, theft and possession of a dangerous weapon. Aged 34, his record contained convictions of similar offences ranging over some 17 years, and he had served several jail terms. As a result of a long remand period following his not guilty plea, he was able to demonstrate before

sentence a new potential for rehabilitation, including attempts to control his alcohol problem, finding steady employment and improvement of his social skills. In view of the accused's new-found rehabilitation, the Court after considerable debate decided that it would not incarcerate Catlin, and imposed instead a probation term.

In R. v. MacFarlane,[59] the Prince Edward Island Court of Appeal took a similar approach. MacFarlane stole $400 from a service station and robbed a motel of $1,000 while armed with a knife. At trial a tariff sentence of six years' imprisonment was imposed. From 1962 to 1974, MacFarlane had been convicted of 25 Criminal Code offences ranging in seriousness from obstruction of a peace officer to rape. His jail sentences totalled 26 1/2 years, and he had invariably returned to criminal life almost immediately following his release. At the appeal hearing, a psychiatrist testified that MacFarlane, aged 35,[60] was now motivated not to go to prison again, and that there was an excellent chance that he would not re-offend. Several incidents including a church attendance and reporting of an open jail door to the warden led the jail Superintendent to comment in Court on a marked change of behaviour and attitude. Finally, the accused had married, was the father of a child, and there were indications that he might have overcome an alcohol problem. The "seeds of hope" having been sown, the Court reduced MacFarlane's sentence to two years less one day plus probation, with seven months already served to count as part of the term.

The intermediate recidivist will not necessarily receive an individualized sentence. By the time one court does give him this chance, there must by definition have been many previous dispositions regarding this offender which were determined on tariff principles. An indication that success is a real possibility will help, such as evidence of a change in life

style, associations, or a determined effort at reform.[61] Even these, however, will not guarantee individualized treatment. In R. v. Tarasoff[62] the accused was convicted on two counts of driving while under suspension and one count of impaired driving. He had eight prior convictions for impaired driving and two for driving while suspended. The Court took account of the fact that he showed some real possibility of reform.

> It does appear, to his credit, that he at last has seen the error of his ways and he states that he is now going to Alcoholics Anonymous and proposes to carry on with that. He says that he can stop drinking because he has done so once before ... that is in his favour, ... and we sincerly hope that that attitude will continue.[63]

Notwithstanding Tarasoff's apparent potential for rehabilitation, the appeal Court upheld a sentence of one year's imprisonment on each count, to be served concurrently with each other but consecutive to sentences imposed on the same day with respect to two similar offences which occurred a month earlier. The Court stated that the public must be protected from drunk drivers and that Tarasoff was a "menace". While his efforts at reform must be commended and despite his hopes for rehabilitation, a reduction in sentence was not justified.

In R. v. Mearns,[64] a 23-year-old male who had three previous convictions of theft and 13 of breaking and entering, was sentenced by the trial Judge to one day in jail and two years' probation for possession of heroin for the purpose of trafficking. The trial Judge had been impressed by very favourable reports which indicated that Mearns had overcome his drug dependency, had become involved with his wife, children and in-laws to a greater degree, was actively seeking employment and had removed himself from his former associates "in the drug sub-culture". The trial Judge had expressed a need to consider Mearns' own good in preference to deterrence of

the drug culture. To this end, the sentence imposed was designed to facilitate Mearns' desire "to straighten up and fly right". The appeal Court, however, substituted a sentence of three years' imprisonment, in line with its policy that deterrence should be a major consideration in imposing sentences in drug trafficking cases. Notwithstanding Mearns' progress with respect to reform, the Court stated that the range of sentences imposed for trafficking in heroin normally ran from three to 10 years' imprisonment. Evidence of reformation should only affect whether "a sentence should be in the lower or higher range of sentences imposed for similar offences".

It is, further, clear that such chances come but once to most offenders. A failure to reform given the opportunity will almost inevitably doom any future request for further treatment-oriented measures.[65]

E. CONSISTENCY BETWEEN OFFENDERS INVOLVED IN THE SAME INCIDENT

i) General Rules

A particular concern for objective judgment and uniformity of approach is found where two or more offenders are involved in the same incident. As Schultz, J. pointed out in R. v. Iwaniw,[66]

> while the facts of each case and the characters of the offenders concerned may vary, the principles of punishment recognized by this Court should not vary, for in no other way can a uniform pattern of punishment be demonstrated or followed nor can the decisions of a court of appeal be of assistance to trial courts.[67]

In R. v. Sheer[68] the Court dealt with an accused who received five years' imprisonment, while his co-accused had sentence suspended. The

Chief Justice referred with approval to the headnote to R. v. Vivian,[69] an English case:

> Where defendants are tried together, discrimination in the respective sentences must be founded on good reason.[70]

The principle is sufficiently simple as not to require further documentation except as regards its use in appeals, as discussed below. The circumstances in which the Courts have made exceptions are as follows.

ii) Exceptions

a) Different Mitigating or Aggravating Circumstances

It not infrequently occurs that two persons of differing backgrounds and temperaments commit an offence in concert. Typically one will be an older person, anti-social and with a record, while the other will be a younger, perhaps gullible and easily led man. In such cases, the Courts will uphold disparate sentences. In R. v. McAllister, Lansdowne and Harvey,[71] three accused conspired to traffic in drugs to a value of $6 million. Harvey was a professional trafficker with five previous convictions for drug offences. He was sentenced to 10 years' imprisonment. McAllister, however, showed good chances for rehabilitation and did not have a record showing dedication to a life of crime. The Court compared the two to arrive at a correct sentence of seven instead of nine years' imprisonment for McAllister.

Similarly, in R. v. Wright[72] the two co-accused beat to death a victim whom they had set out to rob. The trial Judge set sentences of life imprisonment, with 15 years before eligibility for parole. Wright was aged 18, illiterate, with a very unfortunate background. However, he had displayed no

previous violent temper or aggression. He had a good record, but suffered from an alcohol problem. His co-accused, a half-brother, was aged 31 with an extensive record "closely aligned" with robbery. The appeal Court held that disparate sentences were due in the circumstances, and reduced Wright's non-eligibility period to 10 years.[73]

Widely differing personal circumstances could possibly result in an election to award a tariff sentence to one co-accused, but an individualized sentence to the other. In R. v. LeBlanc[74] the British Columbia Court of Appeal upheld a sentence of one year's imprisonment upon a young man of 19 who was found, with three others, stripping parts from a stolen van. While the others had received suspended sentences and probation, the Court felt that LeBlanc, who had received an unfavourable presentence report and failed to appear for the original trial, needed to be "brought up smartly".

Despite the apparent practice some years ago, a difference in sex as between two co-accused is not a valid ground for disparity.[75] As regards the mitigating circumstance of dependent children, it was stated in R. v. Cossette-Trudel and Cossette-Trudel[76] that, so far as parenthood is concerned, no distinction is to be made between the roles of male and female parents.[77]

b) Different Extent of Involvement or Role in Offence

Where two offenders are implicated in different ways in an offence, or play different or disparate roles, the Courts will uphold disparate sentences. Perhaps the most common case is the distinction between the instigator of an offence and those whom he leads into folly. In R. v. Kwasowsky[78] the Crown appealed a sentence of three years' imprisonment

imposed on an accused RCMP officer who trafficked in heroin stolen from police seizures. A principal ground of appeal was the sentence imposed on his co-accused, who received 10 years. The appeal Court refused to disturb the sentence, pointing out inter alia that the co-accused had probably had a considerable amount of influence upon his younger companion, Kwasowksy. Similarly in R. v. Freedman[79] the Court upheld a sentence approximately three times heavier than those imposed on the two co-accused. Though the Court knew nothing of the background or circumstances of the others, it held that sufficient reason for differential treatment existed in the finding that this accused was the instigator of the crime.[80]

Disparity is also justifiable on grounds of differential involvement where one accused is a professional, scheming criminal while others are merely "side-kicks" or "aides". In R. v. McAllister, Lansdowne and Harvey,[81] for example, three accused conspired to traffic in drugs to a value of $6 million. Lansdowne's involvement in the crime was considerably less than that of his associates, and he was influenced by McAllister. He had a record indicating that he was a petty thief, not a professional drug dealer. The Court held that his sentence should be considerably less than that of his associates. It was set at five years' imprisonment, in contrast to the seven and 10 years imposed on them. Similarly in R. v. Kwasowsky,[82] one further factor noted in justifying Kwasowsky's lesser sentence was that he had withdrawn from the transactions before the completion of a second sale of heroin, while his co-accused had continued.

The authorities conflict on the culpability of the "lookout man". In R. v. Fitzgerald,[83] a Nova Scotia case, the Court refused to agree that in robbery cases he should receive a lighter sentence than his companion. Certainly, the Court avowed, this is not the case where he knows that the

companion is armed. By way of contrast, in R. v. Piche, Caplette and Jones[84] three accused committed a "homosexual rape" on a fourth prisoner. This lookout man's offence was viewed as less serious than that of the two who participated in the physical act, and his sentence of six months' imprisonment was one-half of that imposed on the other two.

c) Different Charges

Occasionally it happens that two accused are implicated in the same incident, but are convicted of different offences. A stark example is R. v. LeSarge.[85] LeSarge and a companion, Lunn, were involved in the theft of a tractor-trailer unit and its valuable cargo. LeSarge, convicted of theft and various other offences, received a sentence of seven years' imprisonment. Lunn pleaded guilty to possession of the cargo, and was sentenced to 90 days' intermittent and probation. The appeal Court held that Lunn's sentence could not be taken into account for three reasons: (a) the conviction was for a different offence, (b) the Court was not fully apprised of Lunn's circumstances, and (c) there was "such a tremendous disparity".

d) Influence of One Offender over Another

Disparate sentences have frequently been upheld where one offender was shown to have had a strong influence over the other. Such was the case in R. v. Kwasowsky[86] and R. v. McAllister, Lansdowne and Harvey.[87] In R. v. Misener[88] the accused, Misener, and one Webber carried out a break, enter and theft from a private home. They kicked in the door during the afternoon and caused the occupant, a lone female, to flee.

Misener had a very bad record of some 10 offences from 1971 to 1978. He was sentenced to four years' imprisonment. Webber was sentenced to only one year. He had a record more serious than that of Misener, but was of dull-normal intelligence, required psychiatric treatment, and had no "ability to direct or control his own actions". His ability to resist the influence of his friends was "impaired when his mental state [was] not up to par". The trial Judge in sentencing made special mention of the fact that Webber was "led around" by Misener, and this element was held on appeal to justify the action of the trial Judge in imposing different sentences.

iii) Disparity as a Ground of Appeal

Disparity of sentence often finds a sympathetic ear on appeal Court benches, most usually as part of an appeal for reduction of sentence by the accused.[89] It may, however, as in Kwasowsky,[90] be argued by the Crown in an attempt to persuade the Court to increase sentence.[91]

Appeal Courts are often cautious in lowering sentences in light of disparity in order not to bind themselves to do so on future occasions. In R. v. Dawdy[92] the accused was convicted of theft of merchandise worth over $100. Before the trial took place the maximum sentence for this amount was lowered from 10 to two years' imprisonment, and the trial Judge's sentence of three years was illegal. The operation was sophisticated and well-planned. The accused had a substantial record of previous convictions. However, it was not the worst example imaginable and the maximum was not warranted. Sentence was varied to 1 1/2 years' imprisonment.

> We recognize that a co-accused, James Edward Bush, who was the prime mover in the theft, pleaded guilty and was sentenced to six months' imprisonment plus 18 months'

> probation. We have difficulty understanding why such a lenient sentence was imposed on Bush, particularly in view of his serious criminal record. While we are not bound to sentence Dawdy by reference to Bush's sentence, we do think that the sentence should not be so disparate as to cause bitterness or resentment on the part of Dawdy.[93]

In R. v. Nickerson[94] the accused, convicted of theft over $200, was sentenced to two years' imprisonment. He had no previous record, and was not the principal offender, but was "associated in some manner with another person who was also charged and convicted of the same offence and sentenced to imprisonment ... for ... six months." The principal offender had a criminal record. The accused was, however, awaiting sentence of pleas of guilty to other offences when he committed the present offence. It was held that there was no good basis for the discrepancy, and that the term imposed should have been closer to that of the principal offender. Taking into account five months already served, a term of one month further, followed by probation, was imposed.

The motivating factor behind such reductions of sentence appears usually to be the removal of a sense of injustice from the offender receiving the greater sentence. On occasions this means adjusting the longer sentence to exactly the same length as the lesser. In R. v. Emsley,[95] two women, Fehr and Emsley, murdered one Skoreiko. Following Emsley's unsuccessful appeal against conviction, the Court reduced her minimum period for parole eligibility to 10 years, from 15. Fehr was previously convicted of the same offence, was involved in the initiation of the altercation which culminated in death (Emsley was not), and delivered the first wound. The eligibility period for parole in her case was not increased. The Court acceded to the Crown's concession that, in fairness to Emsley and to ensure equal justice, her period should be reduced to ten years.[96]

In other cases, however, the Court will maintain a substantial difference between the two sentences, while reducing the greater sentence to some extent to alleviate some of the "sense of injustice". Frequently this occurs where the Court feels that some disparity is justified, but that the difference between the sentences imposed at trial was too great. In R. v. Doughty,[97] for example, the accused, aged 19, took part in an armed robbery, instigated by one Morris, of Morris' parents. Morris' desire was to gain revenge on his parents, from whom he was estranged. Before trial Morris, aged 16, became reconciled with his parents and the family moved to Florida to allow him to start a new life. Morris was given a suspended sentence, the trial Judge giving great weight to his rehabilitation. The accused Doughty was sentenced to seven years' imprisonment. He had a previous record, which was not significant in relation to the present offence, and was three years older than Morris. The appeal Court, casting some doubt on the propriety of the sentence imposed on Morris, held that sentence on Doughty must be reduced to three years' imprisonment. There must be some correlation between the sentences received by co-accused, although in this case, in view of the seriousness of the offence, an absolute equalization of sentences was not desirable.[98]

The Courts react particularly sharply to a disparity of sentence which was justified at trial on the basis of a discriminatory, and impermissible, reason. In R. v. McNaughton[99] the Court reduced substantially the fine imposed on the accused, who would also have to face one year's imprisonment. The three co-accused had conspired to affect the public market price of shares by fraudulent means. One co-accused, Brawley, received only a fine of $10,000, without imprisonment. The sentence was justified on the basis that Brawley lived in the United States, and was on the

verge of being deported. Further it was urged upon the Court that "nothing would have been gained to sentence him to prison in Canada and to impose upon Canadian taxpayers the burden of paying his stay".[100] Turgeon, J.A. thought otherwise:

> These explanations are far from convincing and I am unable to accept that an American citizen should be treated with less sterness before a Canadian Court than a Canadian citizen. Here there is more than a disparity of sentences, there is discrimination with regard to McNaughton. Obviously, such a disparity might be explained by the record. However, on reading the record, I can see no factor able to justify this disparity.[101]

A less complex example occurred in R. v. Grossman.[102] The accused was convicted of conspiracy to commit theft, and sentenced to one day's imprisonment and a fine. The Crown appealed. Increasing sentence to three months' imprisonment, the Court noted that the co-conspirator, who had received a sentence of four months' imprisonment, "might reasonably feel a sense of injustice in receiving [such] sentence ... while his co-accused, a man of substantial means, was given only one day's imprisonment, and was allowed to satisfy the remainder of his sentence by paying a fine".

The authorities also disclose numerous examples of refusals by appellate courts to heed significant disparities. A reduction may be refused where the Court is not sufficiently apprised of the co-accused's circumstances to make a reasoned decision, as in R. v. LeSarge.[103] In R. v. Bateman,[104] similarly the Court found that Bateman's sentence of three years' imprisonment was not excessive. He, in the company of two others, entered a drug store and intimidated the pharmacist using a starter pistol and at least one knife. They stole a quantity of drugs including methadone and morphine. The accused had no previous record. One of his co-accused, Nantau, was sentenced to three years' imprisonment. Nantau had a criminal

record of one conviction for break, enter and theft and three for possession of a narcotic. Bateman's sentence of three years' imprisonment was nevertheless upheld, the Court stating that it was not known what particular considerations led the trial Judge in thus sentencing Nantau.

Appellate courts have often affirmed that excessive leniency, or severity, of one court towards an accused does not bind a second court to repeat the error with the co-accused.[105] Where the appeal Court is of the opinion that a serious error was made by the Court sentencing one offender, it may be unswayed by arguments based on disparity. An example is R. v. Hunter,[106] where the accused was convicted of conspiracy to rob and robbery. The trial Judge sentenced him to 10 years' imprisonment on each charge, to be served concurrently. On appeal, it was pointed out that there was a disparity of sentence between that of the accused and those of his co-conspirators. The Court decided, however, that this was not a substantial reason to reduce the accused's sentences and upheld them accordingly.

> ...Mr. O'Driscoll quite properly draws our attention to the fact that Harmer, who actually executed the robbery, had the gun in his possession at the time, and had a record for an offence in the United States, received only five years for the substantive offence, and that Woods, who came into the picture rather later than the other two but who did supply the gun and a car for Harmer, received only two years' imprisonment. It will be seen, therefore, that there was a great disparity in the three sentences. However, we are not satisfied that Martin, Co. Ct. J. or this Court should reduce what would otherwise be a proper sentence simply because a Provincial Court Judge, in our opinion, imposed completely inadequate sentences.[107]

A slight adjustment may nevertheless be made either at trial or on appeal in view of appellate courts' repeated statements that, even in such situations, the Court should not be unmindful of the sentences received by other co-accused.[108]

Occasionally, the Court may choose to disregard the injustice that might be felt by the offenders, preferring to maintain a semblance of justice

in the mind of the victim. In R. v. Henderson,[109] for example, the accused and an accomplice committed three armed robberies in a parking-lot. The co-accused received a light sentence: it was argued on appeal that a significant disparity might cause resentment "between criminals". The Court, refusing to interfere with sentence, stated that that was "only one side of the coin". There was also to be considered, the resentment of the victims, where the sentence in the co-accused's case might have been inappropriate.

F. PHILOSOPHICAL AIMS AND THE PRACTICE OF SENTENCING

It appears almost customary to preface a discussion of sentencing with an abstract discourse on the philosophy of sentencing, or at least a list of its aims.[110] An emphasis on what courts do, however, relegates such analysis to the second level of importance, as courts infrequently involve themselves in any real examination of the aims of the sentencing process. Where they do venture into these murky waters, their statements are often misleading and confusing.

The oft-quoted case of R. v. Morrissette et al.,[111] despite its many merits, provides a good example of this confusion. Chief Justice Culliton there said:

> As has been stated many times, the factors to be considered are:
> (1) punishment;
> (2) deterrence;
> (3) protection of the public; and
> (4) the reformation and rehabilitation of the offender.[112]

The problem lies in point (3), "protection of the public". If the phrase is being used in the sense of incapacitation, that is locking the offender away until he

is "safe", then the only problem is the terminology. If, however, as seems more likely, the Chief Justice was using the phrase in the sense of the overall aim of sentencing, then factors (2), deterrence, and (4), reformation and rehabilitation of the offender, are not commensurate considerations but means of achieving the end expressed in the phrase, "protection of the public".

There seems to be little doubt that the aim of protecting the public is the true rationale for most sentencing.[113] The means of achieving this aim, however, poses once again the "primary question" — tariff or individualized sentence? Where philosophical concepts are called in aid, this decision is characterized instead as a choice between deterrence and rehabilitation. In R. v. Grady[114] the Nova Scotia Court of Appeal analyzed protection of the public thus:

> "It has been the practice of this court to give primary consideration to protection of the public, and then to consider whether this primary objective could best be obtained by (a) deterrence, or (b) reformation and rehabilitation of the offender, or (c) both deterrence and rehabilitation.[115]

The law reports are, indeed, replete with examples of courts attempting to compromise deterrence and rehabilitation in the same sentence. A classic statement is the following, again from the Saskatchewan Court of Appeal in Morrissette:

> Both trial and appellate Judges must be ever mindful of the fact that the principal purpose of the criminal process, of which sentencing is an important element, is the protection of society....
>
> In my view, the public can best be protected by the imposition of sentences that punish the offender for the offence committed; that may deter him and others from committing such an offence and that may assist in his reformation and rehabilitation. If the offender is one for whom reformation is beyond question, then the public can be protected only by depriving him of his freedom. In the

> case of other offenders, and particularly young offenders, the principal element for consideration, consonant with the maintenance of public confidence in the effective enforcement of the criminal law, should be the offender's reformation and rehabilitation.[116]

Unfortunately the Chief Justice did not indicate what kind of sentence would achieve all the purposes outlined in the second paragraph. His analysis is, however, instructive in its clear statement that incapacitation (by imprisonment) — a "tariff" choice — is the only alternative to individualization in the case of offenders for whom reform is beyond question. It is also unequivocal that the individualized measure, in the name of reformation, is the correct choice for young offenders.

By far the most concise analysis in the last decade or more, however, was made by Judge O'Hearn in a Nova Scotia County Court case, R. v. Fairn.[117] The following lengthy passage is abstracted from some ten pages of judgment, and in the author's view correctly analyzes the various components of the term "protection of the public". For this reason it is quoted at length:

> [S]ome people employ the expression ... "protection of the public", in various senses, some of which in my opinion are mistaken. For example, I have heard it used as the equivalent of long-term imprisonment so as to render the prisoner incapable of doing public harm. The protection of the public may, but does not necessarily, require such a sentence.
>
> Criminal sanctions are enacted by Legislatures and imposed by Courts. The purpose of the Legislature is obviously to prevent crime, a purely prospective end....
>
> [I]n R. v. Adelman, [1968] 3 C.C.C. 311 at p. 313, 63 W.W.R. 294, Tysoe, J.A., for the British Columbia Court of Appeal held: "The primary purpose of sentences is through punishment to control the incidence of crime. The sole concern of Judges and Magistrates in imposing sentences is to act in the public interest." He goes on to show how the public interest may be advanced by measures of deterrence or rehabilitation, thus indicating that he is not using "punishment" in any narrow sense....

> His Lordship's mention of "the public interest" takes for granted that the purpose of the Legislature in enacting criminal law and sanctions is to further the public interest or, as MacKinnon, C.J.N.S., put it in the Grady case, the "protection of the public". History indicates that this assumption as to the legislator's purpose is not necessarily true, but in a parliamentary democracy such as Canada, we take it for granted that the Legislature intends to promote the interest of the community, and it is not the function of the Courts to say whether those enactments do actually promote the public interest, or not. The public interest or the interests of the community (a term ... which I personally would favour), require that the protection of the public should take precedence over the welfare of any one individual, including the accused or defendant.
>
> This background indicates that "protection of the public" is not a phrase picked out of the air, but that it is in our constitutional circumstances, an immediate corollary of the obvious primary purpose of criminal sanctions, i.e., the prevention of crime....
>
> The protection of the public may be achieved in various ways. One obvious way is by the exercise of social disapproval, although this is not often mentioned in the case law....
>
> The protection of the public may also be sought by the deterrent effect of the sanctions provided by law, including fines, imprisonment, lesser limitations of freedom such as probation, even apprehension and trial, publicity, or discharge, whether absolute or conditional. In some countries capital and corporal punishment, loss of civil rights, and even outlawry, may be included in their repertory of deterrents....
>
> Reformation and rehabilitation can also prevent crime, not only in the case of the offender concerned, but also in the case of others who may be influenced by his change of outlook....
>
> The last category of crime-prevention measure is incapacitation, i.e., physically depriving the convict of life, bodily parts, or liberty, so that he is unable to do the public any harm. Typical measures are execution, cutting off of a hand or hands, life or long-term imprisonment, and various forms of surgery such as pre-frontal lobotomy, or castration....[118]

An overall view of the occasional judicial forays into the area of penal philosophy indicates that a short-list of justifications, or motivations,

for sentences would contain the following elements: retribution (also called "vengeance" or simply "punishment"); deterrence (general and individual); denunciation; incapacitation; and rehabilitation (or reform). These concepts are almost invariably invoked, however, as leading to the selection of either a tariff or individual measure. Each may be examined more closely in this light.

i) Retribution

Retribution, or "making the punishment fit the crime", plays an important role in the fixing of tariff sentences. Pure retribution, or vengeance, is rarely invoked as the only motivation for a particular sentence. Both the Alberta[119] and British Columbia[120] Courts have declared that "It is no longer an object of sentencing to wreak vengeance on the offender."[121] The Ontario Court in several judgments since the 1940s[122] has similarly played down its role, although the Quebec Court appears still to be more open to the suggestion that the visitation of vengeance upon the offender may be considered.[123] But it would be wrong to conclude, as does Ruby, that "this concept is of small significance across the country in sentencing policy".[124] On the contrary, the notion of retribution is essential to the determination of tariff sentences.

It is, however, in a more sophisticated form that retribution today plays its role, which the noted jurist Nigel D. Walker has termed "limiting retribution".[125] It is frequently to be seen that courts attempt to fix sentence by reference to the severity of the crime: even in the case of an individualized measure involving treatment or an exemplary sentence, the punishment inflicted must not be more than proportionate to the crime

committed. Immanuel Kant is the most noted historical proponent of this concept:

> What kind and degree of punishment does public legal justice adopt as its principle and standard? None other than the principle of equality (illustrated by the pointer on the scales of justice), that is, the principle of not treating one side more favourably than the other. Accordingly, any undeserved evil that you inflict on someone else among the people is one that you do to yourself. If you vilify him, you vilify yourself; if you steal from him, you steal from yourself; if you kill him, you kill yourself. Only the law of retribution (jus talionis) can determine exactly the kind and degree of punishment.[126]

Generally, and almost universally, courts across the country recognize this principle in silence. It was, however, eloquently phrased by Judge O'Hearn in R. v. Sumarah et al.,[127] a tax evasion case:

> ...the measure of punishment must be the harm that the offender has actually committed. That, no doubt, is why parliament has allotted different maximum penalties for different offences. No matter how large a penalty it thinks would actually be required to deter any specific individual in any particular case, a Court is not justified in going beyond the magnitude of penalty that is prescribed for the harm done. This indicates that however much retribution is out of favour these days as a concept, it remains part of the law because of the persistent demand for it, not only by the public and the injured party, but by the criminal himself.[128]

In Fairn,[129] similarly, it was said that:

> [R]etribution still has an effective role to play in sentencing. It is the light in which the public and prisoners alike look at the sanction in determining whether it is just or not. It is, indeed, bound up with notions of doing justice and making recompense and restitution, but it goes beyond recompense and restitution for actual damages in that the public seek satisfaction over and above these for the wrong done....
>
> It is the retrospective element in sentencing, and its main function today is to determine the maximum sentence that may be justly imposed upon this particular offender, notwithstanding that it might appear that deterrence would require a greater one. It is because of the element of satisfaction that Courts take into account both mitigating and aggravating circumstances.[130]

ii) Deterrence

The concept of deterrence encompasses two distinct ideas: that of discouraging others from committing similar crimes, and that of discouraging the offender himself.

> Deterrence is also an important factor. The problem is different if the purpose of sentence is to deter the offender from repeating the offence from that if the the purpose is to deter others who may be inclined to commit the same offence. In neither case does it necessarily follow that a long sentence is required to achieve the purpose. Deterrence should be considered from an objective view if the purpose is to deter others who may be inclined to commit the same offence. In such case, the gravity of the offence, the incidence of the crime in the community, the harm caused by it either to the individual or to the community and the public attitude toward it are some of the matters to be considered. If the purpose is to deter the offender from repeating the offence, then greater consideration must be given to the individual, his record and attitude, his motivation and his reformation and rehabilitation.[131]

A sentence imposed to deter the offender himself, then, is an individualized measure based on the idea that the offender himself will benefit, by the operation of fear of future sanctions, from a punitive sanction imposed. Cases are few and far between, however, where this is the dominant factor. One example is the Ontario case of R. v. Hall.[132] Hall, aged 17, broke, entered and stole from a school. A second charge related to possession of stolen identification and personal papers belonging to a person at the school. His pre-sentence report was optimistic about his prospects under further supervision, even though the present offences had been committed while on probation for three previous offences of theft. The appeal Court reduced sentences totalling six months to two months' imprisonment, a probation order remaining untouched. Martin, J.A. explained:

> In the case of a youthful offender who has not previously received a custodial sentence, we are all of the view that the primary thrust of the sentence should have been the individual deterrence of the appellant to teach him a lesson which he had not learned from the previous conviction, and it appears to us that the trial judge excessively emphasized the aspect of general deterrence in the sentence he imposed. While the trial judge did not err in imposing a custodial sentence, we are all of the view that a shorter sentence would have sufficed.[133]

Another example of a short, sharp shock as individual deterrence for a young criminal with a record is the decision of the Nova Scotia Court of Appeal in R. v. Igoe.[134] The accused broke and entered a mill from which he stole a gasoline container. Although the theft "was not a serious one" and under ordinary circumstances would not call for such a harsh sentence, the appeal Court upheld a sentence of two years' imprisonmnent to be followed by probation for twelve months.

> From 1975 up to and including 1978, the list of criminal convictions for this young man is astounding. It is obvious that the trial judge must have felt that something substantial was required by way of sentence to bring this young man to his senses.[135]

There is also judicial authority to support the imposition of a "jolt of imprisonment" on older offenders with clear or inconsequential records.[136]

Where general deterrence (deterrence of others) is invoked, invariably it is to justify the imposition of a tariff sentence. The reports are replete with examples of cases in which general deterrence has been held to take precedence over individual deterrence. The effect was depicted in Fairn[137] as follows:

> The chief problem in dealing with deterrence, is to reconcile what is needed to deter the convict with what is needed to deter others. In most cases, mitigating circumstances with respect to the individual accused or defendant will suggest a sentence that is much less than what the public, looking at the case generally and in a somewhat abstract way, would consider adequate....

> Because of the dilemma posed by the frequent conflicts between general and particular deterrence, i.e, deterrence of others and deterrence of the convict, the Courts must often impose sentences well in excess of what would be required to deter the particular accused from repeating his crime. Where deterrence alone is in issue, there is not much question but that general deterrence must take precedence over individual deterrence, if only to maintain the credibility of the law....[138]

A typical situation in which general deterrence, usually in the form of a prison sentence, takes pride of place over the minimal disposition needed to deter the individual is exemplified in R. v. Grossman.[139] In Grossman the accused, a hitherto respectable businessman aged 48, was convicted of theft over in respect of a scheme to defraud a supplier of substantial quantities of meat. The appeal Court was of the view that a substantial fine, as imposed at trial, would probably serve as a sufficient deterrent to the individual. However, the Court had "taken the view that in cases of serious commercial fraud or theft ... there must be a custodial sentence in the absence of special circumstances."[140] Only a term of imprisonment could bring home to would-be offenders the seriousness of such actions and accordingly sentence was varied to three months' imprisonment in addition to the fine.

More often, the Courts do not consider individual deterrence, or do so simply as an aspect of "rehabilitation".[141] Instead, a policy statement will be made, or relied upon, to the effect that a certain type of offence requires a sentence deterrent to others. This is the tariff sentence or, occasionally, an exemplary sentence which, as explained later,[142] imposes a term more severe than would be necessary in the absence of such need.[143] Examples of the former include cases like Gorman[144] (abuse of a position of trust), R. v. Murphy[145] (rape), R. v. Sullivan[146] (in cases of armed robbery, a heavy sentence is required "to act as a deterrent to others"), R. v.

McKeachnie[147] (in relation to offences of indecent assault, the deterrent factor must be the primary consideration in the interests of the protection of the public, particularly young children), R. v. Keisser[148] (a major consideration in sentencing a person who defrauds the public by abusing the welfare system is deterrence to others), and R. v. Moriarty[149] (in cases where a drunken motorist kills an innocent third party, general deterrence is the primary factor to be considered).

In cases where particularly great emphasis is laid on general deterrence, the tariff sentence may disregard mitigating factors in order to have the maximum impact, and is known as an "exemplary" sentence. Nevertheless, in such cases the principle remains that the sentence imposed must be proportionate to the crime committed.[150]

While the offender for whom a general deterrent sentence is prescribed may usually expect a substantial jail sentence to follow, this is not always the case. The courts recognize, as depicted in the following passage from R. v. Ruddock,[151] that occasionally the discovery and prosecution of an offence will be sufficient deterrence to others.

> The purpose of general deterrence is to bring home to others the serious consequences attendant upon certain criminal conduct. Such deterrence can be accomplished, or achieved, in some cases without the imposition of a custodial sentence. In R. v. Morrissette (1970), 1 C.C.C. (2d) 307 at p. 310, 12 C.R.N.S. 392, 75 W.W.R. 644, Culliton, C.J.S., said: "It may be in exceptional cases that the effects which result from the prosecution itself constitute sufficient punishment." If that be so then surely in some cases the prosecution itself and the effects thereof will meet the need for general deterrence.[152]

This policy was followed in R. v. Meneses,[153] where the accused appealed from the imposition of a $100 fine following her conviction for shoplifting. Conviction might disqualify her from practising dentistry. In substituting a conditional discharge, the Court stated:

> The argument that a conviction and fine against this accused must stand to effect a more apparent deterrent to others must give way when other considerations are more paramount, and when the broad view of the public interest is considered. In our opinion, the knowledge of speedy apprehension, arrest and trial should be an effective deterrent to persons such as the accused who may be tempted to commit such an offence. A conviction and a fine would not be a deterrent to a professional shoplifter, but, of course, such a person would not receive either an absolute or conditional discharge.[154]

Occasionally a more subtle process of general deterrence is recognized. Quite apart from keeping potential offenders cognizant of the penalties incurred for specific offences, there is a subliminal process by which sentencing educates the public to realize that criminal acts are unhealthy and bad.

> In general, however, the deterring affect [sic] of the penalty is more indirect and subtle. It sets up an atmosphere by which society exhibits its disapproval of the conduct and thus works on the criminal by his tendency to pay deference to the opinion of his fellows in the community in which he lives....[155]

In cases where conduct is not particularly abhorrent, the line between general deterrence, in this form, and denunciation, is difficult to draw. In the more severe cases considered under the next heading, however, pure denunciation is involved to a much greater extent.

iii) Denunciation

Since 1970, few courts to the knowledge of the author have expounded on the "purely denunciatory" aspect of sentencing. Occasional reference is, however, made to the need to "express society's abhorrence" of certain types of conduct, particularly sexual crimes against children.

In R. v. W. and B.S.,[156] the two accused were convicted of several offences relating to a business run from their home, in which outsiders were invited to participate in sexual deviations. The acts took place in front of, and sometimes involved, their daughter and ward, aged 8 and 13 respectively. The Court stated that in such cases, the sentences should reflect fairly both "the revulsion of society" and "its condemnation of conduct such as that displayed".

An even starker case is R. v. Antone and Antone.[157] The accused husband and wife kept two of their children, girls aged 6 and 5, in a separate, unheated room in their home. They fed them only intermittently. The two girls were taken into hospital, where one was pronounced dead and the other suffered from malnutrition and frostbite. She weighed 22.5 lb. On conviction of offences of manslaughter and failing to provide the necessaries of life for a child, the male accused was sentenced to a total of two years less one day, plus two years' probation. Mrs. A. received an indefinite term not to exceed two years less a day, followed by two years' probation. The appeal Court, varying sentences to a total of five years for each accused, held that the trial Judge had erred in failing to give sufficient weight to the gravity of the crime and society's abhorrence of such conduct. Had it not been for the unique combination of personality defects found in the parents, even greater sentences would have been imposed.

A mention by the Court of denunciation leads, inevitably, to the imposition of a tariff sentence in disregard of the needs of the particular offender. It amounts, where an appellate court increases the trial sentence substantially, either to a decision that the trial Judge gave undue effect to the individual's circumstances or, as in Antone and Antone, to a pronouncement that the trial sentence placed the penalty too low on the tariff in light of the seriousness of the offence.[158]

iv) Incapacitation

In its more extreme forms, incapacitation has largely disappeared from the scope of the penal system. No longer do we decapitate, castrate, or cut off hands to remove or decrease the possibility of further offending.

In less severe measures, however, incapacitation is still involved in several forms of sanctions. Leaving aside all questions of efficacy, the suspension of driving privileges, firearms prohibitions and curfew provisions in probation orders are all at times used to remove the offender from situations in which re-offending may occur.

Incapacitation is also found, frequently, as a justifying factor in the awarding of prison sentences, as the discussion below[159] of dangerous offenders demonstrates. The simple notion of protecting the public, at least for a while, from a repeated offender by incarceration also is frequently to be found. This aspect was taken into consideration, for example, in R. v. Gallant:[160]

> ...the record shows that reform is very improbable, so that the balance is heavily weighted towards the protection of the public. Under that heading, I shall consider the public being protected by a deterrent to others from crime and secondly, by placing the accused where he will be unable for a time to victimize other persons. Persons who commit crimes of violence are a danger to the lives of others.[161]

v) Rehabilitation

It has already been maintained that a decision to impose a "rehabilitative" sentence is an election to use an individualized measure.[162]

Where rehabilitation is taken into account in modifying a deterrent sentence, it is the offender's prospects or prognosis that is being used as a mitigating circumstance to leave the offender some hope of a reform despite the application of tariff principles. It is worth noting, however, the growing disillusionment of the Courts with the notion of prison having any rehabilitative value. Reducing the penitentiary term imposed on an accused convicted of armed robbery, MacDonald, J. in the Prince Edward Island Court stated that "A seven-year sentence can have little reformation or rehabilitation aspect attached to it...."[163] Similarly in considering whether to impose a custodial term on an accused convicted of gross indecency and buggery respecting his 9-year-old step-daughter, McDermid, J.A. stated that so far as rehabilitating him was concerned, the prison had nothing to offer.[164] This position was further developed, with some mention of alternatives, in Fairn:[165]

> Recent research seems to indicate that reformation is very dependent upon the convict's own choice and that retraining, probation, parole, and other rehabilitative regimes are merely means that he can use to achieve his purpose. Some attempt has been made to argue from this that these measures really contribute little to the result, but most such arguments overlook the factor of initial selection of this individual as a good risk for rehabilitaiton, based usually on an investigation of his background and comparison with other cases. The other advantages of probation, day parole, and parole are well known: e.g., they cut down the costs of imprisonment, enable the convict to become a productive member of society, and take or keep him from the corrupting influences of prison life. In addition (a note I have not often remarked in the literature), reformation to the extent that the offender achieves it, is much more certain and much more measurable than deterrence.[166]

Footnotes to Chapter 1

1. Ruby, C.C., Sentencing (2nd ed. 1980, Toronto: Butterworths).

2. Thomas, D.A., Principles of Sentencing (2nd ed. 1979, London: Heinemann Books Ltd.) at 8.

3. (1970), 1 C.C.C. (2d) 307 at 309-10 (Sask. C.A.) per Culliton, C.J.S.

4. For example, see the growing judicial disillusionment with "rehabilitation" expressed in R. v. Wood (1975), 26 C.C.C. (2d) 100 (Alta. C.A.); R. v. Doughty (1978), 40 C.C.C. (2d) 224 (P.E.I.S.C. in banco).

5. Supra note 3.

6. (1973), 5 N.S.R. (2d) 264 at 266 (C.A.).

7. R. v. Jackson (1977), 21 N.S.R. (2d) 17 at 20 (C.A.) per MacKeigan, C.J.N.S.

8. R. v. Levesque (1980), 19 C.R. (3d) 43 (Que. Sup. Ct.).

9. Ruby, supra note 1 at 5.

10. R. v. Turner (1970), 1 C.C.C. (2d) 293 at 296 (Ont. S.C.) per Haines, J.

11. R. v. Adelman, [1968] 3 C.C.C. 311 at 322, 63 W.W.R. 294 at 305 (B.C.C.A.). See further R. v. Broadhead, [1966] 4 C.C.C. 183 at 187, 48 C.R. 228 at 231, 55 W.W.R. 757 at 761 (Sask. C.A.) where Culliton, C.J.S. stated: "I think the principle ... is 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 apprized 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 encumbent 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."

12. (1977), 14 N. & P.E.I.R. 181 at 184 (P.E.I.C.A.).

13. See e.g. R. v. Mearns, [1975] 4 W.W.R. 328 at 331, 22 C.C.C. (2d) 457 at 461 (Alta. C.A.); R. v. Spencer (1973), 6 N.S.R. (2d) 555, 16 C.C.C. (2d) 29, 27 C.R.N.S. 97 (C.A.).

14. E.g. R. v. McNabb (1979), 1 Sask. R. 47 at 62, 49 C.C.C. (2d) 263 at 276 (C.A.); R. v. Doughty (1978), 14 N. & P.E.I.R. 452, 33 A.P.R. 452, 4 C.R. (3d) S-29, 40 C.C.C. (2d) 224 (P.E.I.S.C. in banco); R. v. Jones (1974), 6 N. & P.E.I.R. 48 at 53, 17 C.C.C. (2d) 31 at 35, 27 C.R.N.S. 107 at 112 (P.E.I.C.A.).

15. R. v. Brennan and Jensen (1975), 11 N.S.R. (2d) 84 at 88, 23 C.C.C. (2d) 403 at 408 (C.A.) per MacKeigan, C.J.N.S.

16. R. v. Bonin, Murphy and Newcombe [unreported] March 16th, 1981 at 2 (N.S.C.A.) per Hart, J.A.

17. See e.g. R. v. McLean et al. (1980), 26 N. & P.E.I.R. 158 at 168 (Nfld. Prov. Ct.): "[T]he notion of uniformity of sentence ... is an essential consideration in the fair and just administration and enforcement of the criminal law in any democratic society." Per Reid, P.C.J.

18. (1979), 21 Crim. L.Q. 423 (Ont. C.A.).

19. See also R. v. Carroll (1980), 27 N. & P.E.I.R. 159, 74 A.P.R. 159 (P.E.I.C.A.): "We ... recognize the importance of uniformity in sentences ... For various reasons, of course, complete uniformity is virtually impossible but an effort should be made to avoid serious disparity." Per M.J. McQuaid, J. at 164-65, in a judgment concurred in by the majority except as to the sentence suggested.

20. R. v. Morrissette et al., supra note 3 at 311; following R. v. Baldhead, [1966] 4 C.C.C. 183, 48 C.R. 228 sub. nom. Re Baldhead, 55 W.W.R. 757 (Sask. C.A.). See also R. v. DeJong (1970), 1 C.C.C. (2d) 235 at 237 (Sask. C.A.) per Culliton, C.J.S.

21. (1975), 25 C.C.C. (2d) 202 (Nfld. Prov. Ct.); sentence varied on other grounds (1977), 35 C.C.C. (2d) 325 (Nfld. C.A.).

22. (1971), 2 C.C.C. (2d) 301 (N.S.C.A.); following R. v. O'Connell, [1970] 4 C.C.C. (2d) 162 (P.E.I.S.C.).

23. For an almost identical dictum to the same effect see R. v. O'Neill (1973), 13 C.C.C. (2d) 276 (Nfld. S.C. on Appeal).

24. (1976), 9 N. & P.E.I.R. 427 (P.E.I.C.C.A.).

25. Ibid. at 432.

26. Supra note 6.

27. Ibid. at 266.

28. Downey v. The Queen (1979), 7 C.R. (3d) S-33 at S-35 (N.S.C.A.); see also R. v. Rowter (1981), 44 N.S.R. (2d) 403 (C.A.).

29. (1975), 28 C.C.C. (2d) 456, 39 C.R.N.S. 314 sub. nom. Webb v. The Queen, 9 N. & P.E.I.R. 136 (P.E.I.C.A.).

30. Ibid., 28 C.C.C. (2d) 456 at 463. But see R. v. Cock (1976), 11 N. & P.E.I.R. 431 at 433 (P.E.I.S.C.) where Darby, J., reviewing a fine of $200 imposed on a 16-year-old convicted of possession of a small amount of marijuana, stated: "... the local Courts of this province in dealing with possession have invariably imposed the same minimum fine as in this case ... There would appear to be no particularly extenuating circumstances in this case to indicate that a variation is called for in the interests of justice."

31. R. v. McLean, Legge and Saunders (1981), 29 N. & P.E.I.R. 194, 82 A.P.R. 194 (Nfld. C.A.).

32. (1979), 9 C.R. (3d) S-42 (B.C.C.A.).

33. Ibid. at S-42.

34. (1975), 9 C.R. (3d) S-43 (B.C.C.A.).

35. [1979] C.S. 1077.

36. Ibid. at 1082.

37. (1979), 49 C.C.C. (2d) 517 (Ont. C.A.).

38. R. v. McIntosh (1974), 20 C.C.C. (2d) 33 at 34 (Alta. C.A.) per McDermid, J.A.

39. (1978), 41 C.C.C. (2d) 289 (N.S.C.A.).

40. Ibid. at 293.

41. (1971), 4 C.C.C. (2d) 330 (Ont. C.A.).

42. (1975), 36 C.R.N.S. 363 (Ont. C.A.). See also R. v. Talbot (1977), 21 N.S.R. (2d) 689 at 690, 28 A.P.R. 689 at 690 (C.A.), where MacKeigan, C.J.N.S. affirmed a sentence of one year's imprisonment on an 18-year-old male convicted of wilfully damaging a shop window. The trial Court had taken note of his four previous convictions and stated that while the accused was quite young, he had not benefited from previous sentences: "As other alternatives to imprisonment have already been explored with Talbot, I had no other alternative than to imprison him ... unless Talbot's attitudes change and his lifestyle improves his prospects for the future are not bright." Also, in R. v. Morgan (1979), 32 N.S.R. (2d) 69, 54 A.P.R. 69 (C.A.), a term of imprisonment was imposed because the trial Judge felt that he had no alternative.

43. See also R. v. Swinimer (1975), 25 C.C.C. (2d) 37 (C.A.).

44. (1980), 27 N. & P.E.I.R. 159, 74 A.P.R. 159 (P.E.I.C.A.).

45. (1975), 18 Crim. L.Q. 21 (Que. C.A.).

46. [1970] C.A. 659.

47. Principles applicable to "exemplary" sentences are further discussed in Chapter 2.C.i, post.

48. R. v. Hergert (1977), 3 A.R. 552 (Dist. Ct.).

49. R. v. Cormier (1974), 9 N.S.R. (2d) 687, 22 C.C.C. (2d) 235 (C.A.); R. v. Bessette, [1974] C.A. 148.

50. R. v. Botten (1974), 8 N.S.R. (2d) 553 (C.A.).

51. R. v. Spicer (1975), 28 C.C.C. (2d) 334 at 335-36, [1976] W.W.D. 32 at 32 (Alta. C.A.) per McGillivray, C.J.A.

52. See again Thomas, supra note 2 at 24.

53. Ibid. at 17-25.

54. Thomas (ibid. at 22) states: "The term 'inadequate recidivist' is used to describe an offender, middle-aged or older, who has over a long period of years committed numerous offences, not in themselves in the first rank of seriousness, and has served many terms of imprisonment as well as experiencing an extensive selection of other penal measures."

55. R. v. Demeter and Whitmore (1976), 32 C.C.C. (2d) 379 at 381-82 (Ont. C.A.) per Dubin, J.A. See also R. v. McLean (1978), 7 C.R. (3d) S-3 (Ont. C.A.).

56. R. v. Hingley (1977), 19 N.S.R. (2d) 541 (C.A.).

57. Supra note 2 at 20.

58. (1978), 6 C.R. (3d) S-17 (Man. Prov. Ct.). See also R. v. Castonguay (1978), 20 Crim. L.Q. 439 (Que. C.A.).

59. (1978), 14 N. & P.E.I.R. 419, 33 A.P.R. 419 (P.E.I.C.A.).

60. Mr. George E. McMillan, Clerk, P.E.I.C.A., Personal Communication June 11, 1981.

61. As exemplified in R. v. Catlin, supra note 58, R. v. McFarlane, supra note 59, and R. v. Richards (1976), 18 N.S.R. (2d) 124 (C.A.). See also R. v. Parnell (1978), 29 N.S.R. (2d) 551, 45 A.P.R. 551 (C.A.) where the appeal Court upheld a sentence of 30 days' imprisonment followed by a lengthy period of probation on a 35-year-old accused convicted of forgery. He had 34 previous convictions for related offences, but faced with positive evidence of Parnell's potential for reform, the appeal Court refused to "quench this spark of hope" by sending him back to jail.

62. (1979), 2 M.V.R. 313 (B.C.C.A.).

63. Ibid. at 314 per Bull, J.A.

64. (1975), 22 C.C.C. (2d) 457 (Alta. C.A.).

65. See e.g. R. v. Colvin (1976), 1 Alta. L.R. (2d) 123 (C.A.); R. v. Bennett [unreported] March 3rd, 1981 (Nfld. C.A.).

66. (1959), 127 C.C.C. 40, 32 C.R. 389, 30 W.W.R. 590 (Man. C.A.).

67. Ibid., 127 C.C.C. at 62, 32 C.R. at 408, 30 W.W.R. at 608.

68. (1932), 59 C.C.C. 180, [1933] 1 D.L.R. 310, [1932] 3 W.W.R. 555 (Alta. C.A.).

69. 1.2.71, 4092/A/70 (C.A. Crim. Div.).

70. See also R. v. Alfs (1974), 17 Crim. L.Q. 247 (Ont. C.A.); R. v. Dunlop (1981), 44 N.S.R. (2d) 277 (C.A.).

71. (1976), 1 C.R. (3d) S-46 (Ont. C.A.).

72. (1979), 52 C.C.C. (2d) 81 (P.E.I.S.C. in banco).

73. See also R. v. Reid (1980), 26 A.R. 300 (C.A.).

74. [Unreported] February 16th, 1981 (B.C.C.A.). Another example occurred at trial in R. v. Rudyk (1975), 1 C.R. (3d) S-26 (N.S.C.A.). Rudyk was sentenced to 14 days' imprisonment to be served intermittently, and fined $500, on conviction on two charges of robbery. A co-accused was sentenced to four years on each count, to run concurrently. Both robberies involved a small shopkeeper being relieved of a sum of money at knifepoint. In each case, it was the co-accused who had entered the store, with the accused serving as driver and lookout. Both accused were in their mid-twenties; the accused had a good family and employment background and no criminal record. The co-accused was unemployed, had an alcohol problem, had been in a mental hospital, and had a criminal record. However, the appeal Court, while considering that the accused showed himself to be a more favourable prospect for rehabilitation, sentenced him to two years' imprisonment on each charge, the fine to be refunded. It would appear that in this case, the Court's fear of a lingering sense of injustice in one accused overrode what might have been be considered a proper sentence if awarded in isolation.

75. Ruby, supra note 1 at 32-33, citing R. v. Williams and Williams (1953), 37 Cr. App. R. 71.

76. (1979), 11 C.R. (3d) 1 (Que. Sup. Ct.).

77. But see comments of this author, post, Chapter 9.F, "Effect on Accused's Family".

78. [1971] C.A. 596.

79. (1975), 25 C.C.C. (2d) 58 (Ont. C.A.).

80. See also R. v. Kinrade, Labonte and Taylor (1970), 13 Crim. L.Q. 148 (Ont. C.A.). In R. v. Singh, Khangura and Singh, [unreported] March 4th, 1981 (B.C.C.A.), the Court upheld sentences of 16 months' imprisonment for the older Singh, who had led an assault and beaten the victim with a golf club, in contrast to nine months for the other two, who beat the victim with "two by fours" when he was on the ground. In R. v. Finamore, [unreported] March 16th, 1981 (B.C.C.A.), the Court reduced sentence on the accused, an accomplice in a "loan-sharking" operation. It was quite apparent that he was the lesser villain in the operation, one Romano having been the key figure in the whole transaction. As Romano had received a sentence of two years less a day, a similar sentence on Finamore was reduced to one year, a fine of $10,000 remaining undisturbed. In R. v. Martin, [unreported] February 27th, 1981 (B.C.C.A.) the accused had been sentenced to one year's imprisonment for committing mischief, arising out of a "riot of sorts" in a provincial institution. There was, the Court held, nothing exceptional about the sentence. However, as the ringleaders had been charged with assault and received only 10-1/2 months, and some of his brother inmates had received six months on summary conviction, the Court felt that justice would be done by a reduction in the accused's sentence to six months.

81. (1976), 1 C.R. (3d) S-46 (Ont. C.A.).

82. Supra note 78.

83. (1980), 40 N.S.R. (2d) 199, 73 A.P.R. 199 (C.A.).

84. (1978), 21 Crim. L.Q. 25 (Alta. T.D.).

85. (1975), 26 C.C.C. (2d) 388 (Ont. C.A.).

86. Supra note 78.

87. Supra note 81.

88. (1978), 29 N.S.R. (2d) 362, 45 A.P.R. 362 (C.A.).

89. In addition to the cases discussed in the text, see e.g. R. v. Greer (1969), 13 Crim. L.Q. 12 (Ont. C.A.); R. v. Kupec (1972), 14 Crim. L.Q. 272 (Ont. C.A.); R. v. Goldwarg (1973), 15 Crim. L.Q. 371 (Que. C.A.).

90. Supra note 78.

91. For an example of a case in which the Crown succeeded on this ground, see R. v. Grossman (1980), 53 C.C.C. (2d) 143 (Ont. C.A.), discussed below.

92. (1973), 12 C.C.C. (2d) 477 (Ont. C.A.).

93. Ibid. at 477-78 per Gale, C.J.O.

94. (1975), 7 N. & P.E.I.R. 145 (P.E.I.C.C.A.).

95. (1980), 21 A.R. 145 (C.A.).

96. See also R. v. Reid (1980), 26 A.R. 300 (C.A.).

97. (1978), 40 C.C.C. (2d) 224 (P.E.I.S.C. in banco).

98. See also R. v. Caissie (1980), 29 N. & P.E.I.R. 244, 84 A.P.R. 244 (P.E.I.C.A.), where a sentence of six months' imprisonment was reduced on appeal to two months for trafficking in marijuana, on the basis of the co-accused's suspended sentence.

99. (1976), 43 C.C.C. (2d) 293 (Que. C.A.).

100. Ibid. at 308 per Turgeon, J.A.

101. Ibid.

102. Supra note 91.

103. Supra note 85. See also R. v. Dunlop, supra note 70. In R. v. Klippenstein (1981), 26 A.R. 568 (C.A.) the Court, extending this principle, refused to decrease the accused's sentence to create a proper disparity where sentences previously imposed on the (more culpable) co-accused were too lenient.

104. (1977), 23 N.S.R. (2d) 70 (C.A.).

105. R. v. Hunter (1970), 17 C.R.N.S. 12 (Ont. C.A.).

106. Ibid.

107. Ibid. at 13 per Gale, C.J.O.

108. R. v. LeBlanc (1980), 39 N.S.R. (2d) 527, 71 A.P.R. 527 (C.A.). See also R. v. Lockhart (1976), 14 N.S.R. (2d) 262 (C.A.).

109. (1979), 8 C.R. (3d) S-19 (B.C.C.A.).

110. See e.g. the first chapters of Ruby, supra note 1; Walker, N.D., Sentencing in a Rational Society (1969, London: Allen Lane, The Penguin Press).

111. Supra note 3.

112. Ibid. at 309.

113. Ruby, supra note 1 at 1.

114. Supra note 6.

115. Ibid. at 266.

116. Supra note 3 at 309-11 per Culliton, C.J.S.

117. (1973), 12 C.C.C. (2d) 423 (N.S. Co. Ct.).

118. Ibid. at 428-37 per O'Hearn, Co. Ct. J.

119. R. v. Wood (1975), 26 C.C.C. (2d) 100 (Alta. C.A.).

120. R. v. Hinch and Salanski, [1968] 3 C.C.C. 39, 2 C.R.N.S. 350, 62 W.W.R. 205 (B.C.C.A.).

121. Supra note 119 at 106 per McDermid, J.A.

122. R. v. Warner et al., [1946] O.R. 808 (C.A.); R. v. Willaert (1953), 105 C.C.C. 172 (Ont. C.A.); R. v. Roberts, [1963] 1 C.C.C. 27 (Ont. C.A.); see also R. v. Calder (1956), 114 C.C.C. 156 (Man. C.A.), where this philosophy was adopted by the Manitoba Court.

123. A.G. Que. v. Charbonneau (1972), 13 C.C.C. (2d) 226 (Que. C.A.).

124. Ruby, supra note 1 at 8.

125. Supra note 110 at 30-31.

126. The Metaphysical Elements of Justice 102 (Ladd trans., 1965).

127. [1970] 5 C.C.C. 317 (N.S. Co. Ct.).

128. Ibid. at 325 per O'Hearn, Co. Ct. J.

129. Supra note 117.

130. Ibid. at 437 per O'Hearn, Co. Ct. J.

131. Supra note 3 at 310 per Culliton, C.J.S.

132. (1978), 7 C.R. (3d) S-1 (Ont. C.A.).

133. Ibid. at S-2.

134. (1979), 30 N.S.R. (2d) 186, 49 A.P.R. 186 (C.A.).

135. Ibid. at 187 per Coffin, J.A.

136. See R. v. Norton and Melvin (1975), 13 N.S.R. (2d) 681 at 682 (C.A.), where short sentences of imprisonment were imposed on two accused, aged 21 and 43, following their conviction on charges of theft under $200. "[B]oth men need a jolt of imprisonment, which, hopefully, might help them realize that their life-style and habits have to be changed if they are to become useful citizens." Per MacKeigan, C.J.N.S.

137. Supra note 117.

138. Ibid. at 432-33 per O'Hearn, Co. Ct. J.

139. Supra note 91.

140. Ibid. at 145 per Howland, C.J.O.

141. See e.g. R. v. Gorman (1971), 4 C.C.C. (2d) 330 (Ont. C.A.).

142. Post, Chapter 2.C.i.

143. See e.g. R. v. Carroll, supra note 19.

144. Supra note 141; see also R. v. MacEachern (1978), 42 C.C.C. (2d) 189 (Ont. C.A.).

145. (1972), 15 Crim. L.Q. 13 (Ont. C.A.).

146. (1972), 9 C.C.C. (2d) 70 (Ont. C.A.); followed in R. v. Dube (1976), 32 C.C.C. (2d) 536 (Ont. C.A.).

147. (1975), 26 C.C.C. (2d) 317 (Ont. C.A.).

148. (1977), 3 C.R. (3d) S-4 (B.C. Co. Ct.). See also R. v. Thurrott, [1972] 1 O.R. 460, 5 C.C.C. (2d) 129 (C.A.); R. v. Leveille (1973), 16 Crim. L.Q. 255 (Ont. C.A.).

149. (1979), 22 Crim. L.Q. 291 (Ont. C.A.).

150. For further discussion see post, Chapter 2.C.i.

151. (1978), 39 C.C.C. (2d) 65 (N.S.C.A.).

152. Ibid. at 73 per MacDonald, J.A.

153. (1974), 25 C.C.C. (2d) 115 (Ont. C.A.).

154. Ibid. at 117 per Dubin, J.A.

155. Supra note 127 at 326 per O'Hearn, Co. Ct. J.

156. (1976), 19 Crim. L.Q. 276 (Ont. C.A.). See also R. v. Danells (1979), 10 C.R. (3d) S-14 at S-16 (N.S.C.A.), where MacDonald, J.A., sentencing a 20-year-old mother of two to eight years' imprisonment stated: "Another relevant consideration in the sentencing process, particularly in cases like the present one, is that of punishment reflecting retribution. I hasten to add that in referring to 'retribution' I do so really in the sense of 'repudiation'." In this case the accused was convicted of criminal negligence causing death after abandoning an infant she had agreed to care for, and letting it starve to death. The trial Judge imposed a sentence of three years' imprisonment but on appeal, considering that there were no mitigating factors and in order to reflect society's abhorrence of the "stark horror" of the crime, the sentence was found inadequate.

157. (1977), 20 Crim. L.Q. 143 (Ont. C.A.).

158. See also R. v. Bennett [unreported] March 3rd, 1981 (Nfld. C.A.) - 45 days increased to six months to show abhorrence of society and denunciation by the Court of enforced gross indecency with 14-year-old boy.

159. Post, Chapter 2.C.ii.

160. (1971), 2 N. & P.E.I.R. 518 (P.E.I.S.C.).

161. Ibid. at 522 per Trainor, C.J. The decision of the British Columbia Court of Appeal in R. v. Nilsson, [unreported] April 27th, 1981 (B.C.C.A.) is remarkable in this respect. The accused was convicted on counts of possession of a restricted weapon, breaking and entering, mischief, theft of an automobile, and theft of licence plates. At trial he was sentenced to terms of two and three years on these counts, all concurrent. The appeal Court noted that all the offences arose out of a desire by the accused to wreak vengeance for some real or imagined act of a family called Richardson. The acts were directed against the Richardsons, and the accused had previously been convicted of sending a threat to cause death or injury to one of them by letter. His entry into the city of Port Moody to damage the Richardson home was in breach of a recognizance not to enter the city, apparently imposed to protect the Richardsons. Sentence was increased to a total of 10 years, the primary concern of the Court being "the protection of the public from this dangerous young man, and in particular the family against whom he has such strong feelings". (Per MacFarlane, J.A.).

162. See supra, Section D.

163. R. v. Doughty, supra note 14 at 233.

164. R. v. Wood (1975), 26 C.C.C. (2d) 100 (Alta. C.A.).

165. Supra note 117.

166. Ibid. at 436-37 per O'Hearn, Co. Ct. J.

CHAPTER 2: THE NATURE AND USE OF THE TARIFF

A. INTRODUCTION

The only major Canadian text on sentencing, Ruby's book, seeks to deny the existence of a tariff system in Canada.

> In Canada, the appropriate sentence is determined by a weighing of all the relevant principles and the circumstances of the offence and the offender. Regard is also had to other sentences for the same or similar crimes. Thus, partially because of the judicial effort to achieve some uniformity in sentence, certain patterns or ranges of sentence emerge, despite the fact that no single factor or principle is always pre-eminent. The strength of the idea of a range of sentence flows from the fact that criminal statutes apply throughout Canada - though not uniformly.
>
> In England, this indirect approach to uniformity of sentence is not taken. The Court of Appeal (Criminal Division) has approved a "tariff" or normal range of sentence for a particular type of offence. Thus, it seems that one of the operative principles, namely, the sentence customarily imposed for similar offences, has there achieved pre-eminence. Within that range or "tariff", the sentencing court then adjusts upward or downward to accommodate the particular offence and individual offender. ...
>
> No appellate court in Canada has chosen to adopt this system. It is submitted that though our system permits greater divergence in sentence it retains the undoubted virtue of placing the particular offence and the particular offender first in priority. This helps to keep sentencing human and minimize any tendency to devolve into a mechanical enterprise. It would be wrong, in our sentencing system, to make any single factor more important than the principle that sentence be appropriate to the particular offence and the individual offender. Sensitivity and flexibility in sentencing requires that the approach to be taken should flow from the facts of the case and not from any single rule, however useful or certain that rule may be.[1]

It is respectfully submitted that the learned author, in this passage, misinterprets both the English system and the current Canadian situation. In the

first place, the Court of Appeal Criminal Division has not, as Ruby suggests, "approved" a tariff or normal range. Rather it is Thomas, the academic commentator, who has identified the range or tariff in an after-the-fact analysis. Courts do not, generally speaking, refer to a tariff as such: instead, they use several different phrases related to the use of precedents, as exemplified in the following passage:

> ... a sentence may be described as being 'outside the permitted range for the circumstances of the cases',[2] ... 'really out of pattern with the sentencing practice of this Court'[3] or 'out of line with the normal sentences passed for such ... offences'[4]. In other cases the Court may refer to 'the general level of sentences'[5] or 'the general scale of penalties imposed for offences of this character',[6] or may explain the concept more fully. In Ladd[7] the Court observed that 'we have to look at the sentences in relation to the various incidents for which the sentences had to be passed ... and we have to keep the sentences in perspective with sentences that have been passed on other occasions for offences involving criminal activity of this kind, though, of course, varying in their gravity'.[8]

As already explained, Canadian precedents are replete with examples of such phrases being used.[9]

Ruby continues:

> Nevertheless, for many offences, a range of sentence can be observed after the fact and analyzed. It can be seen from a study of the range that some factors take on more importance than others in particular offences. The information in this chapter must not be seen as a "tariff" against which individual cases are measured; rather, it reflects individual cases, but does not govern them.[10] In Canada, what uniformity in sentencing we have or want is achieved through uniform application of principles - not by "fiat" from above. Canada is far more diverse in culture, geography and way of life than the United Kingdom and uniformity of the sort achieved there would in the long run not be helpful here. As long as the Supreme Court of Canada has no jurisdiction over quantum of sentence it is not constitutionally possible to impose a Canada-wide tariff.[11]

The point that we do not have a Canada-wide tariff imposed by one Court is well taken. The author's assertion that the tariff discernable "reflects individual cases, but does not govern them" does not square, however, with the way in which Canadian judges decide on appropriate sentences. Do they, as Ruby would suggest, take a global view of all the factors he mentions, then arrive at a figure, as it were, out of the blue? Indeed not. Rather, as already illustrated, an election will be taken as to whether to punish the offence or treat the offender. In the former situation (Ruby does not take cognizance of the fact that in the latter, the tariff is not heeded), the Court will take note of the approximate sentence applicable to the facts of the case before it, based either upon experience generally or following a review of other decisions,[12] and allow for mitigating factors. An appellate Court, upon review, will go through the same examination of precedent in determining whether the sentence imposed was reasonably consistent with those meted out in similar cases.[13] This looks remarkably like Thomas' description of the tariff system in England:

> The process consists of three stages, which may be called 'defining the range within the scale', 'fixing the ceiling', and 'allowing for mitigation'. The overriding principle is that the sentence must not be more severe than is justified by the gravity of the offence for which it is imposed, whatever other considerations might suggest a longer term.[14]

Thomas is quick to point out that the term "tariff" is an unfortunate misnomer. "It suggests", he says, "a process of relating penalties to offences by the application of an inflexible scale and without consideration of the circumstances of the individual offender." This author will readily agree that such is not the mode of use of the tariff system in Canada, any more than it is in England. Rather, as in England, "The principles of the tariff constitute a

framework by reference to which the sentencer can determine what factors are relevant to a case and what weight should be attached to each of them".[15]

Occasionally, appellate Court judges themselves seek to deny the existence or use of the tariff.[16] Such cases, which are to be found in English jurisprudence also,[17] do not negate the effect of the generality of practice in sentencing cases. The remainder of this Chapter is concerned with the use of the tariff in general; its substance will be described in Part III.

B. THE TARIFF IN PRACTICE

i) Determining the Range

In Canada, for some crimes there is little coincidence between maximum sentences permitted by law and the size of sentences commonly passed. This has been a matter of some concern in recent years, particularly to the Law Reform Commission,[18] which has pointed out the existence of very high and scarcely-used maxima for many offences.[19] In these cases the maximum sentence permitted has little role to play in determination of the normal sentences imposed for breach of a particular provision.

For a large number of other offences lower maxima are specified in the Criminal Code and other penal statutes. Here the chances of the maximum sentence being imposed in an appropriate case are greatly increased, and the statutory maximum has a much greater relevance to the general level of sentence. The general principle is that the maximum sentence should be reserved for the most serious cases. Consequently, when a maximum sentence has been imposed at trial in a case not of this nature, it will be.

reduced on appeal. An example is R. v. Pruner[20] in the Ontario Court of Appeal. Pruner, a first offender, caused an explosion in his house followed by a major fire, in order to collect the insurance money. He had some physical health problems which had caused him to become unemployed, and was separated. At trial the Judge emphasized the harm to others which might have resulted from the offences, and imposed a maximum five-year jail term. The appeal Court cited Halsbury to the effect that:

> As regards most offences, the policy of the law is to fix a maximum penalty, which is intended only for the worst cases, and to leave to the discretion of the judge the determination of the extent to which in a particular case the punishment awarded should approach to or recede from the maximum limit.[21]

Further, the Court noted, the words "only for the worst cases" have been interpreted as referring to both the worst cases of the particular offence, and the worst offenders.[22] As Pruner had several personal mitigating factors and was by no means the worst type of offender, a maximum sentence was excessive. Sentence was reduced to three years' imprisonment.

Pruner was extensively quoted and explained in Ko v. R.,[23] where the British Columbia Court reduced a life sentence to 12 years in respect of sales of a sample and a one-pound package of heroin.

> The interpretation of the rule stated in Halsbury ... does not, in my respectful view, mean, nor in my view was it intended to mean, that the issues of whether the case is one of the worst cases and the convicted person one of the worst offenders are to be considered as if unrelated and, so to speak, in separate compartments.
>
> The heinous circumstances of a crime may in appropriate circumstances outweigh other considerations and require that the convicted person be classified as one of the worst offenders. Likewise, the criminal record and incorrigibility of a convicted person may be such as to justify the imposition of a maximum sentence to defer the convict and protect the public, although the circumstances of the particular crime committed do not justify categorizing it as one of the worst of its kind.[24]

It was not, the Court concluded, to say that the crime was other than very serious to decide that it was not one of the worst cases. Ko, aged 33, was a first offender. It could not reasonably be concluded that he was incorrigible, beyond rehabilitation, or that a lesser sentence would be inadequate to reform or deter him.

These cases, do not, however, indicate that the maximum may never be imposed. In appropriate cases the appeal Courts have upheld maximum sentences, in light of findings that the offences committed were, for example, "of the utmost gravity",[25] "unparalleled in the history of importation of drugs into Canada",[26] or "truly terrible".[27] The use of such phrases indicates, importantly, that the Court does not have to use a vivid imagination to dream up unlikely examples worse than the crime before it; merely the crime committed must be in the first order as regards offences in that category which come before the Courts. The case for a maximum sentence will, of course, be particularly compelling if ever imagining a worse case is difficult.[28]

Apart from "worst possible" cases, by definition unusual, the vast majority of crimes are roughly comparable to a pattern of events and circumstances in innumerable previous cases.[29] The recurring incidence of similar cases will, over time, establish a series of precedents for sentencing such cases. By a process of continual reference to such precedents, a pattern, or normal range, of sentences will be created. In the final step, the range will begin to govern particular cases as the precedents are used by trial Courts for sentencing and, ultimately, appeal Courts to determine the appropriateness of sentences under appeal. In this final stage, a sentence found to be within the range will not be disturbed, even though the appeal Court might have imposed a different sentence had it been the trial Court.[30] A sentence

which falls outside the normal pattern, however, will have to be justified or modified.

Appellate use of the range is exemplified by R. v. Kanagarajah[31] and R. v. Moracci.[32] In Kanagarajah, the accused was convicted of rape and was sentenced to six years' imprisonment at trial. On appeal however, Culliton, C.J.S. reduced the sentence to one of three years' imprisonment since

> ...[t]he sentence imposed by the trial judge... cannot be reconciled with sentences usually imposed in this jurisdiction for rape committed under similar circumstances.[33]

Since the trial disposition was beyond the normal range, Culliton, C.J.S. felt that it was incumbent upon the appeal Court "to alter the sentence so it can be so reconciled."[34]

In Moracci, the accused, who had been left to care for the 2-year-old son of his common-law wife, beat the child to death. Moracci had no previous record and had an excellent record of service in the Armed Forces. In upholding a sentence of five years' imprisonment, the appeal Court discussed the normal range of sentence in such cases:

> [T]he appropriate sentence for a manslaughter arising out of circumstances such as the present is somewhere between five and ten years. The sentence imposed by the trial judge, although on the low end of the scale, was within the appropriate range and, consequently, should not, in my opinion, be disturbed. I may say that in cases of manslaughter arising out of child deaths, if there was evidence of a systematic course of violence toward such child culminating in a final beating, then, in my opinion the bare minimum sentence should be one of at least ten years. That type of situation has not been shown to exist here.[35]

Occasionally, the incidence of a particular type of offence will increase, either in fact or in the public's mind. A legislative increase of the maximum penalty may cause the typical sentence to shift upward.

Perhaps the clearest example of a shift in range, although in relation to fines rather than imprisonment, occurred when the sizes of mandatory fines under s. 236(1) of the Criminal Code (driving "over .08") were increased in the mid-1970s.[36] Formerly, the specified fine was $50 to $1,000 for a first offender; pursuant to statutory changes, the upper limit was increased to $2,000. In R. v. McDonald; R. v. Edwards[37] the Yukon Court of Appeal imposed fines of $1,500 on two offenders who drove with blood-alcohol levels of .26 and .24, recognizing Parliament's view that driving "over 80" is dangerous criminal conduct, as reflected in the increased penalties. Similarly in R. v. Ayling et al.[38] the Crown appealed fines ranging from $100 to $250 imposed on several accused. McMorran, Co. Ct. J. criticised the lower courts involved for not altering their scale of penalties with the alteration of the law, and stated:

> In the light of these considerations it seems to me that the average range of penalties from $200 to $300 should be substantially increased in order to reflect the doubling of the maximum mandatory penalty, and to recognize the consistently high increase in the incidence of the crime.
>
> Accordingly, subject to each individual circumstance, in my view the range of penalties for this class of offence, at this time, should be substantially increased by two and three times that imposed herefore.[39]

ii) The Second Step: Placing This Case Within the Range

Having established in general the appropriate range for the type of offence before it, the Court's next step is to determine where in that range the offence should be placed. Thomas calls this step "fixing the ceiling", with accounting for mitigation a third stage, to follow. With gravity of the offence as the governing principle, the upper limit of sentence

in this particular case will be fixed. While Thomas is able to cite a number of examples of this three-step process clearly occurring in British Courts, the more general practice in Canada is for the Court, at least in its reasons for sentence, to combine Thomas' second and third steps. That means, having decided where the appropriate range of sentence lies, the questions of just exactly where on the range the offence lies, and how much mitigation is to be allowed, are discussed prior to fixing a final sentence. However, no intermediate figure is generally named prior to the accounting for mitigating factors; aggravating and mitigating features, alongside considerations relating to disparity, are cumulated to draw a final figure from the range.[40] It is because of this tendency to treat aggravating factors and mitigating circumstances as part of one calculation that Part II of this thesis treats the whole group of "factors affecting (or not affecting) sentence" as one element in the sentencing process.[41]

C. "INFLATED" TARIFF SENTENCES

In England, the ceiling having been fixed for the offence and offender, it is the general rule that other penal objectives as discussed above,[42] such as general deterrence, incapacitation and rehabilitation, will not be permitted to increase the sentence beyond the ceiling. Thomas found,[43] however, that there are a small number of areas in which a departure from this principle may occur. It is instructive, in conclusion, to examine these categories here, for guidance as to whether there is Canadian authority for inflation of sentences beyond the desert of the offence and/or offender in similar instances.

i) The Exemplary Sentence

As indicated earlier,[44] the exemplary sentence is normally one which, while it falls within the range for the particular offence, does not take account of mitigating factors particular to the accused. This accords with Thomas' description of the correct form of exemplary sentence in England. The aim of such a sentence is, of course, general deterrence, and it may be imposed in view of the particularly serious nature of the crime,[45] the need to protect particularly vulnerable victims such as children, taxi drivers or jail inmates,[46] or in view of the prevalence of the offence in a particular locality.[47]

While Thomas was able to point to occasional departures from principle, where the appeal Court has approved a sentence above the ceiling on grounds of exemplarity, such examples are extremely rare in Canada.[48] Appellate courts considering exemplary sentences outside the range have reduced them to accord with the proper level for the offence.[49] The basic pressure was laid down by the Ontario Court of Appeal in R. v. Simmons, Allen and Bezzo:[50]

> We are of the view that if four years is adequate punishment for their crime it would be wrong to justify a sentence of six years on the basis of deterrence and so to sacrifice the appellants for that purpose. It is our opinion that the object of the principle of deterrence to others like the appellants lies in the fact that for this crime a penitentiary term will be imposed, the length of which depends upon the circumstances.[51]

The exemplary sentence will, nevertheless, be more severe than might otherwise have been imposed due to the Court's refusal to consider mitigating factors. Imposing sentences of 14 and 20 years' imprisonment on heroin traffickers in R. v. Bengert (No. 14),[52] Berger, J. exemplified this process:

> Character evidence has been submitted on behalf of all the accused, and reference has been made to the difficulties which many of the accused have encountered in various aspects of life, and to their family ties and obligation. But this is of no consequence in a case where there is planned, deliberate and continuing criminal activity extending ... over a period of a year or more ...[53]

ii) The Dangerous Offender

Not infrequently offenders appear before the Courts, charged with serious offences and having previous records and prognoses indicating a significant risk of further serious offending. Typically, psychiatric testimony indicates personality disorder or mental illness and little possibility of definite cure. As mentioned previously, incapacitation or the removal of the offender from the public for as long as possible may become an issue.

In such cases, life imprisonment may be imposed as an individualized measure, its inherent flexibility being used to ensure that the offender will be released when he is "cured". An example of this approach is R. v. Leech,[54] where the accused in one protracted session kidnapped, raped, indecently assaulted and buggered a young woman. Expert evidence established that he was psychopathic, and apt to act out irresistible impulses. The Court found that it should give the longest sentence possible. It imposed, inter alia, a life sentence with the recommendation that no clemency or reduction be considered, except on strong and convincing evidence that the accused had ceased to be a dangerous person at large.

A life sentence was imposed, similarly, in R. v. Hill.[55] Hill, who had raped his 14-year-old babysitter, suffered from a personality disorder manifested in impulsiveness, low stress tolerance, uncontrollable anger and difficulty in knowing his own sexual identity. A possibility existed that his

aggression would "die down" in middle age, between the ages of 35 and 60. In R. v. Oliver,[56] however, the Ontario Court of Appeal stated that in the case of dangerous offenders the Courts should not rely on R. v. Hill. More protection is given to the accused by the provisions of s. 689 of the Criminal Code.[57] Had not the time for Oliver's appeal run out, his request for reduction of a sentence of 12 years' imprisonment for rape, imposed because it was justified in the case of a dangerous and certified offender, would have been granted.

Later decisions of the Ontario Court seem, however, to have disregarded this statement and returned to the imposition of life sentences for dangerous, serious offenders. An example is R. v. Pontello.[58] Pontello raped two women at knife point and stabbed and attempted to rape a third. He was convicted on counts of rape and causing bodily harm. At the time of the offences he was aged 27, married with two small children and employed. He had no prior criminal record, a good work record, a good relationship with his immediate family and was regarded as a responsible member of the local community. Following conviction he was assessed at a mental health centre. The first psychiatrist found him to possess a high degree of "over-controlled" hostility which could be ventilated very occasionally by an intense explosive reaction. Since the accused maintained his innocence, it would be very difficult to treat him. The second psychiatrist felt that there remained a very significant potential for further violent behaviour. Both psychiatrists agreed that the accused had anti-social features in his personality which represented a potential continuing danger to the physical safety of women. The Court of Appeal upheld a sentence of life imprisonment.

> In a case of rape accompanied by acts of unusual violence, brutality or cruelty, the evidence of a psychiatrist, however eminent, with respect to the accused's continuing or

> potential danger to the physical safety of others, would not justify a court in categorizing the offence as one calling for a sentence outside the usual range of sentences for such offences. However, in this case, the cumulative effect of three separate attacks, the use of knife and the appellant's readiness to inflict injury with it to achieve his purposes, clearly indicate a serious personality disorder which required the expert opinion evidence to be taken into consideration in arriving at an appropriate sentence.[59]

Before the Court will impose a life sentence on account of dangerousness it will require clear evidence of a continuing, severe danger. In the absence of such testimony, a departure from the range will not be permissible. In R. v. Keefe,[60] for example, the accused was hitch-hiking through Orillia, and asked for a ride at the house of the victim. Sometime later he returned, wounded the victim with a knife, hit her across the face and chest, and following her escape, attempted to cut his wrists with an electric saw. He had a long history of offending, mental illnesses and admittance to hospitals for psychological treatment. A sentence of life imprisonment was reduced on appeal to 12 years. As the facts of the case did not follow the category of a crime of stark horror, or a pattern of violent behaviour, a life sentence was not appropriate and could not be imposed merely in view of the accused's mental deficiencies or retardation.

Cases can also be found where the Court virtually ignores psychiatric evidence of dangerousness, preferring instead to adjust the trial sentence to conform with tariff principles. Perhaps the clearest instance of this was the case of Jones,[61] who was sentenced at trial to life imprisonment for an offence of choking with intent to commit rape. A psychiatric report indicated that, while having average intelligence, he had personality features of impulsiveness, suspiciousness and dependency, with underlying aggressiveness. He was also alcoholic, and potentially dangerous to others. The prog-

nosis was poor, with little suitability for any form of treatment. While the accused probably had adequate control over his impulses in a sober state, there was a great likelihood of aggressive outbursts in the disinhibited state which resulted from intoxication. On appeal, the majority virtually ignored the psychiatric aspect and reduced sentence to 12 years' imprisonment to bring the punishment closer to that imposed in recent cases of violent rape.

Where the option of a life sentence is not available as an individualized measure, the setting of an inflated definite term constitutes a clear departure from the normal tariff. Examples do exist of the Courts imposing lengthy sentences for no other reason than a desire to keep the offender out of the way for a long period. In R. v. Fisher[62] the accused stabbed a reformatory guard three times, and was convicted of wounding. He had been institutionalized since the age of eight, and had spent 20 years in a reformatory with respect to three attempted murders. Psychiatric evidence showed that he suffered from a personality disorder, and was a danger to the community. It was uncertain if he might ever be cured. On Crown appeal, the Court increased sentence from two years' imprisonment to 14 years, consecutive to time being served, on the ground that the accused was dangerous to the community at large.

A similar result occurred in R. v. Draper.[63] Draper, aged 19, met a fellow patient while under psychiatric treatment, and became involved with her. When the complainant made an attempt to sever the relationship, he became extremely distraught and attempted suicide. The next morning he went to her home, entered without her knowledge and raped her at knife-point. He had a long history of serious psychiatric disturbance and a minimal criminal record. Prior to sentence, he was examined by psychiatrists and found to be suffering from an underlying psychotic process, a danger to

himself and others and in need of psychiatric treatment. At first instance he was sentenced to four months definite and nine months indefinite. On appeal the Court increased the sentence to four years' imprisonment, as he was "a danger to himself and others",[64] and was in need of treatment in a secure setting.

While the matter of imposing a custodial sentence to permit treatment is discussed separately below, it is worth noting that from time to time the needs for confinement for treatment and incapacitation are, as in Draper, combined in a symbiotic relationship. The accused is dangerous, says the Court, and requires lengthy treatment. He must also be kept away from the public: a lengthy sentence will achieve both aims. This reasoning prevailed in R. v. Bradbury,[65] where the Ontario Court upheld a maximum 14-year sentence imposed on an accused who wounded a young girl with a knife, on grounds of "public protection". A psychiatrist who had been professionally associated with Bradbury over a long period, and post-sentence reports, indicated that the accused suffered from a severe personality disorder, such that he was capable of future behaviour dangerous to himself and to others. He had abnormally weak control of his emotions, and few social values to assist in control. A lengthy period of treatment was required, perhaps in the vicinity of five years or longer.

The dual purpose of such sentences was outlined by Brooke, J.A. in R. v. Robinson.[66] The accused was convicted on four counts of rape, attempted rape and indecent assault. At the time of the offences he was in a state of psychosis, and although he knew what he was doing and that it was wrong, he had lost touch with reality. He had great difficulty in relating realistically to women, and in his psychotic state was certainly a potential danger to them. The psychiatric evidence was that he was certifiably

mentally ill, and required lengthy intensive psychiatric therapy, group therapy and family therapy for a period of at least two years with a follow-up of five years. The Court upheld sentences of eight years' imprisonment, to run concurrently. Psychiatric treatment would be available to the accused during incarceration.

> The case poses special problems for us which really distinguishes it from most cases. This is a case where it is not really accurate to say that the sentence should be a deterrent because others like him lose touch with reality and as such the deterrence of this sentence is of course meaningless to them. Further, the sentence should not proceed on the basis of punishment because the Court should not punish people who commit crimes because of mental illness. The important purposes of the sentence are the protection of the public so long as this man remains in this dangerous state and his early return to the community when he is cured or, to put it another way, rehabilitated. The emphasis must be on the protection of the public, and of course this may be first achieved by his cure, and so the sentence must be of sufficient length to ensure full treatment but of course conversely, if that is not successful, that the public must be protected as best can be accomplished.[67]

iii) The Social Nuisance

Thomas describes the social nuisance thus:

> [F]requently suffering from a mild form of personality disorder with a history of intermittent stays in mental hospitals, [he] will usually have made many demands on social service departments and will generally have proved unco-operative and unresponsive to any assistance offered in the past. In addition to a record of minor criminal offences, there will often be a history of disturbing behaviour such as threatened or attempted suicide.[68]

After a review of the authorities, Thomas concludes that the correct principle in such cases is to sentence within the range, rather than increasing the sentence to reflect the nuisance features of the accused.

Canadian authority, such as there is on the issue, generally reflects this principle and indeed tends, more so than in England, to suggest that the mental inadequacies of an accused of this nature may be used to mitigate sentence.[69]

An example is the case of Gouchie v. The Queen.[70] Gouchie, a 17-year-old female, pleaded guilty to three charges of petty offences; theft under, possession of marijuana, and causing damage under $50 by destroying a screen window. The theft charge related to her having stolen about $60 from a nurse at a hospital where she had been a temporary patient under treatment for addiction to barbituates. Her previous record included three minor shoplifting offences, forgery of a small cheque, and possession of marijuana. The trial Judge imposed a sentence of one year's imprisonment on the theft charge. On appeal the sentence for the theft charge was the only one in respect of which leave was given. Pointing out that the sentence was "high" for a petty theft, despite the previous record, the Court reduced it to three months' imprisonment followed by 18 months' probation.

In the period covered by this review, no stark examples of departures from the principle are reported.

iv) Persistent Offenders

A fourth situation in which the Court may be tempted to impose a disproportionately long sentence is that of the repeated offender who, over a long period of time, has continually returned to crime as a way of life. Faced with no possibility of reformation or treatment, the Court may feel that a long sentence would, at least, postpone the date of the next offence.

Generally speaking, appellate Courts have disallowed attempts to impose a sentence outside the range in such cases. For deterrent or

incapacitatory reasons a sentence at the high end of the scale may be imposed, the record disallowing any entitlement to leniency. The record, however, may not be treated as justifying an addition to the tariff sentence.

The rule was stated as follows in Lynns v. The Queen[71] by Hughes, C.J.N.B:[72]

> Courts of appeal have on many occasions commented that courts imposing sentences for criminal offences must guard against imposing a disproportionate sentence for an offence merely because the accused has been previously convicted of offences of a different nature which bear no relation to the offences being considered.[73]

As in Lynns, sentence was reduced to conform with the gravity of the incident in R. v. Young.[74] The accused had a long record, including 19 convictions of theft-under, when he was again convicted in respect of the theft of a shirt worth $13.99. The appeal Court noted that while the record of the accused disentitled him to leniency, the sentence of one year's imprisonment imposed at trial was based more on his record than on the offence. The record, however, "should not be used as 'double punishment', i.e. a sentence for the offence plus something more for the record." The term was reduced to six months.[75]

There are, however, occasional departures from this rule. Two of the five appellate judges in Young would not have disturbed the sentence in view of his record. In R. v. Fleming[76] the Newfoundland Court of Appeal was called upon to consider a sentence of 10 years' imprisonment, imposed on an accused who broke into a fishing club-house, stole liquor, and caused a fire which resulted in considerable damage. A record for 20 years was before the Court, and disclosed 17 convictions for break, enter and theft and related offences. The accused had escaped custody twice, fired at a police officer to prevent arrest, and had twice been convicted of illegal possession of fire-arms. In short, there appeared little possibility of reformation.

The nature of the crime itself, however, gave the appeal Court considerable difficulty. It involved property, not a dwelling house, and no violence was used. The Court concluded that the offence "could not be considered at the higher level of the scale in terms of gravity". A "heavy" sentence for the offence would be four years. Nevertheless, in view of the accused's record and the need "to protect the public" from him, the Court substituted a sentence of six years' imprisonment. While the 10 years imposed at trial could not be justified, the Court was nevertheless prepared to impose a disproportionate sentence in light of the record.

v) Offenders Likely to Benefit from Treatment in Prison

Thomas, analyzing the English authorities, was able to cite cases in which a period of incarceration was imposed or inflated in order to secure to the offender a full course of treatment for alcoholism and drug addiction. Since 1970, there has been no reported case of inflation outside the range for such reasons in Canada. The Ontario Court of Appeal in 1971 took a strong stand on the matter, stating unanimously that "it is not the function of the Criminal Court to order confinement solely for the purpose of treatment of a physical or mental disorder."[77] It was an error in principle for the trial Judge to impose a sentence quite unrelated to the nature of the crime (assault causing bodily harm) in order that the accused would receive treatment for her addiction to heroin. The Nova Scotia Court similarly has stated,

> [I]t is wrong in principle to imprison a man purportedly for treatment purposes for a period longer than would be imposed if no treatment of any sort were proposed or contemplated. Especially this is so where ... there is no medical evidence that any psychiatric treatment is required or would be helpful.[78]

The correct principle was stated in R. v. Phillip[79] where the accused, convicted of attempted theft under $200, was sentenced to one year's imprisonment. The trial Judge consciously did not take into consideration three months time served. Also, eight months' parole was forfeited as a result of the conviction. It appeared that the trial Judge had imposed the maximum sentence, in a case which was not of the worst kind, in order that the accused could receive psychiatric treatment. The Court, reducing sentence to six months' imprisonment, stated that where a sentence is within the appropriate range, the Judge may select a term which will promote treatment, but it is an error in principle to impose a longer term to facilitate treatment. The authorities provide numerous examples of treatment facilities and possibilities being taken into account within the range, discussed herein in relation to the difficulties being treated.[80] Much more frequent than the increased sentence is a reduction on appeal in view of the availability of, or prognosis for, treatment.[81]

Footnotes to Chapter 2

1. Ruby, C.C., Sentencing (2nd ed. 1980, Toronto: Butterworths) at 423-24.

2. R. v. White 3.7.72, 1319/C/42; see also R. v. Hughes 1.11.73, 1187/C/73 (sentence 'beyond the limit of the range of sentences normally imposed.').

3. R. v. Ryan 18.6.73, 1074/B/73 (wounding with intent).

4. R. v. King (1975), 61 Cr. App. R. 316 (tax fraud).

5. R. v. Rehman Khan 23.10.73, 2784/A/73 (fraudulently importing cannabis).

6. R. v. Andrew 27.1.75, 2377/B/74 (obtaining by deception, forgery).

7. 14.10.74, 1260/C/74, [1975] Crim. L.R. 50.

8. Thomas, D.A., Principles of Sentencing (2nd ed. 1979, London: Heinemann Books Ltd.) at 32-33.

9. Supra Chapter 1, notes 14 & 15. See e.g. R. v. Phillip (1978), 20 Crim. L.Q. 297 (Ont. C.A.); Lynns v. The Queen (1976), 6 C.R. (3d) S-29 at S-32, "out of line with sentences generally imposed in such cases". See further R. v. Camp (1979), 7 Sask. R. 197 (Dist. Ct.) where the accused was convicted of possession of marijuana and the unlawful sale of liquor. The appeal Court substituted fines with periods of imprisonment in default for the custodial sentences imposed at trial. In reducing the sentences the Court noted that those imposed at trial were "not consistent" with sentences ordinarily imposed in the jurisdiction for similar offences.

10. R. v. Brennan and Jensen (1975), 23 C.C.C. (2d) 403 (N.S.C.A.).

11. Supra note 1 at 424.

12. A very clear example of this form of review in the trial Court is to be found in R. v. Levesque (1980), 19 C.R. (3d) 43 (Que. Sup. Ct.) where Greenberg, J. lists some 13 precedent cases on sentence, mainly from the Quebec Court of Appeal, before imposing a penetentiary sentence within the range thus indicated.

13. Support for these propositions is found, remarkably, amidst Ruby's denial of the existence of the tariff system."In R. v. Jones, [(1974), 17 C.C.C. (2d) 31 (P.E.I.C.A.)], the Prince Edward Island Court of Appeal assigned to the trial judge the error that 'no comprehensive view' of penalties imposed for similar offences was taken. The Court of Appeal reviewed cases from across Canada and revised sentence to accord with that information. The same approach was taken by a county court judge who specifically noted the anomaly that 'if a man is charged in North Kamloops, and found guilty of impaired driving, for his first

offence he goes to jail; if he is found guilty in the city of Kamloops for the same offence, the practice is to fine him about $200. Now, that is an anomaly that should be done away with if possible....' [Deal v. The Queen (1964), 44 C.R. 282 at 285 (B.C. Co. Ct.)] Accordingly, after a survey of penalties for this offence throughout the country he imposed a fine. The principle is that especially where a statute such as the Criminal Code is in force thoughout Canada, some measure of uniformity is desirable. [R. v. O'Connell, [1970] 4 C.C.C. 162 (P.E.I.C.A.); see also R. v. O'Neill (1973), 13 C.C.C. (2d) 276 (Nfld. C.A.)]." Supra note 1 at 426.

14. Supra note 8 at 29.

15. Ibid.

16. See supra Chapter 1, text accompanying notes 31-34.

17. Thomas, supra note 8 at 34, cites R. v. Jones 12.5.75, 318/B/75, [1975] Crim. L. R. 203, where "the Court upheld a sentence of twelve years' imprisonment for rape with the comment that 'it would be quite wrong to seek to deduce from the facts of individual cases a "pattern" or what is sometimes called a "tariff" of sentences', but then went on to distinguish between cases 'at the one extreme' involving grave violence and the infliction of varying forms of sexual interference, and cases 'at the other extreme ... in which a young man may perhaps genuinely for a while have thought that the girl was consenting, and then though she has clearly shown she was not, has gone too far'." The latter comments, Thomas goes on to note, suggest that the Court was prepared to accept the existence of a tariff as that term is used in his work.

18. Law Reform Commission of Canada, Working Paper 11, included in Studies in Imprisonment (1976, Ottawa: Supply and Services Canada) at 23-25.

19. Examples include: Perjury - maximum 14 yrs., sentences over 2 yrs. rare; Robbery - maximum life imprisonment, sentences over 15 yrs. rare; Breaking and entering a dwelling house - maximum life imprisonment, sentences over 7 yrs. rare; Fraud over $200 - maximum 10 years, sentences over 5 yrs. rare

20. (1979), 8 C.R. (3d) S-8 (Ont. C.A.).

21. 11 Hals. (4th ed.) 287, para. 481; approved in R. v. Willaert, [1953] O.R. 282, 16 C.R. 138, 105 C.C.C. 172 (C.A.).

22. R. v. Phillip, supra note 9.

23. (1979), 11 C.R. (3d) 298 (B.C.C.A.).

24. Ibid. at 306-07 per Aikins, J.A.

25. R. v. Richa and Bou-Mourad (1974), 18 C.C.C. (2d) 63 (Ont. C.A.).

26. R. v. Zizzo et al. (1975), 23 C.C.C. (2d) 319 (Ont. C.A.).

27. R. v. Gillen (Hanoum) (1979), 8 C.R. (3d) S-5 at S-10 (B.C.C.A.) per Seaton, J.A.

28. See e.g. R. v. Hedberg (1978), 15 A.R. 181 at 200 (T.D.) per McClung, J.; R. v. Wood (1976), 1 A.R. 35 at 35-36 (C.A.) per Clement, J.A.

29. There are, of course, exceptional cases where the crime is of a novel nature - see for example R. v. Balaszy (1980), 54 C.C.C. (2d) 346 (Ont. Prov. Ct.) in which the Court granted an absolute discharge to an accused who, after paying his bill, stood outside the window of the restaurant "pulled his pants down and wiggled his naked buttocks in front of the ... window" to taunt another patron and his friends. Considering the novelty of the case and the lack of precedents in this matter, the Court felt that the arrest, detention and subsequent finding of guilt against the accused would be an ample deterrent.

30. R. v. Cormier (1975), 22 C.C.C. (2d) 235 (N.S.C.A.); approving R. v. Simmons, Allen and Bezzo (1979), 15 C.R. (3d) 97 (B.C.C.A.); R. v. Campbell (1977), 18 N.S.R. (2d) 547 (C.A.); R. v. Ayling et al. (1978), 6 B.C.L.R. 125 (Co. Ct.).

31. (1980), 4 Sask. R. 149 (C.A.).

32. (1977), 20 N.S.R. (2d) 684 (C.A.).

33. Supra note 31 at 156.

34. See also, R. v. Rowter (1981), 44 N.S.R. (2d) 403 (C.A.).

35. Supra note 32 at 703 per MacDonald, J.A.

36. S.C. 1974-75-76, c. 93, s. 12.

37. [1976] 6 W.W.R. 671 (Y.T.C.A.).

38. (1978), 6 B.C.L.R. 125 (Co. Ct.).

39. Ibid. at 128-29 per McMorran, J.

40. See e.g. R. v. Jones, supra note 13; R. v. MacArthur (1979), 9 C.R. (3d) S-23 (N.S.C.A.); R. v. Deveau (1977), 18 N.S.R. (2d) 341 (C.A.).

41. It is worth noting, however, that even Canadian Courts do from time to time segregate the elements of range, ceiling and adjustment. A clear example occurred in Doughty v. The Queen (1978), 4 C.R. (3d) S-29 at S-45 (P.E.I.S.C. in banco), where, after a review of sentencing precedents, the Court considered that the appropriate sentence for a first offender in this type of offence (armed robbery) was three years' imprisonment. MacDonald, J.A. continued: "... the question then arises whether or not there are any factors which would justify a higher or lower sentence." See also R. v. Gonidis, McCullough and Stevenson

(1980), 57 C.C.C. (2d) 90 at 95-96 (Ont. C.A.) where the Court, having found that an appropriate sentence would have been at least 18 months' imprisonment, took account of mitigating factors and imposed 15 months.

42. Supra, Chapter 1.F.

43. Supra note 8 at 37ff. I must acknowledge once again my indebtedness to Thomas for his accurate and useful labels for the various categories of occasional departures adopted herein.

44. Supra Section 1, text accompanying note 142.

45. R. v. Darrach (1978), 18 N. & P.E.I.R. 81, 47 A.P.R. 81, 1 M.V.R. 130 (P.E.I.C.A.); R. v. Bennett [unreported] April 2nd, 1981 (N.S.C.A.).

46. See e.g. R. v. Cudmore, [1972] 1 O.R. 812, 5 C.C.C. (2d) 536 (C.A.); R. v. McGlone (1974), 10 N.S.R. (2d) 247 (C.A.); R. v. Piche, Caplette and Jones (1978), 21 Crim. L.Q. 25 (Alta. T.D.). See also R. v. Vigeant, [1975] W.W.D. 6, 19 C.C.C. (2d) 512 (Man. C.A.).

47. R. v. Belleville and Chabot (1975), 18 Crim. L.Q. 21 (Que. C.A.).

48. They do exist, however. In R. v. Collier (1971), 6 C.C.C. (2d) 438 (N.S. Co. Ct.), the Court pointed out that due to changes in the conditions of modern life, the concept of deterrence has become greatly attenuated except for either major offences attracting great publicity, or the kinds of situations where notoriety results from transmission by word of mouth. O'Hearn, Co. Ct. J. added that unfortunately, this means that if the Court wishes to deter others in sentencing, it must largely ignore mitigating factors because it can be certain that they will not be communicated to the public effectively. This may militate against justice in individual cases because the retributive factor should determine the maximum sentence which may be imposed. It is respectfully submitted that the latter part of this dictum is in error and should not be followed.

49. See e.g. R. v. Pitchak (1973), 6 N.S.R. (2d) 426 (C.A.) where a two-year total for theft under $200 was reduced to eight months as the magistrate had "unduly emphasized general deterrence".

50. (1973), 13 C.C.C. (2d) 65 (Ont. C.A.).

51. Ibid. at 72-73 per Brooke, J.A. See also, R. v. Bailey and Protheroe, [1970] 3 O.R. 138 at 152, 10 C.R.N.S. 87 at 101, [1970] 4 C.C.C. 291 at 305 (C.A.) per Brooke, J.A.

52. Supra note 30.

53. Ibid. at 111-12. See also R. v. Longeuay (1977), 18 N.S.R. (2d) 574 (C.A.) where a sentence of one year's imprisonment was upheld on a 24-year-old female convicted of a first offence of trafficking in heroin. While some authorities would indicate that a suspended sentence would

have been permissible, the trial Judge did not err in emphasizing general deterrence.

54. (1972), 10 C.C.C. (2d) 149 (Alta. C.A.).

55. (1974), 15 C.C.C. (2d) 145 (Ont. C.A.); aff'd 23 C.C.C. (2d) 231 (S.C.C.).

56. (1977), 20 Crim. L. Q. 22 (Ont. C.A.).

57. Dangerous offenders provisions of the Criminal Code are dealt with separately below (Chapter 26).

58. (1977), 38 C.C.C. (2d) 262 (Ont. C.A.).

59. Ibid. at 268 per MacKinnon, J.A. See further R. v. McGrath (1980), 25 N. & P.E.I.R. 138 (Nfld. S.C.) where the accused committed a particularly brutal murder, assaulting and choking to death one Walters. A leather belt was tied around the neck of the victim and he was tied to a pipe affixed to a building. His wallet was taken, as the motive was robbery. The accused then picked up a female companion and took her to a hotel overnight. He intended to kill her, but did not because she remained awake. The accused was not insane, but was aggressive, anti-social, and suffered from a sociopathic personality disorder, severe and of a long-standing aggressive type. He acted impulsively, and was subject to irresistible impulses. He had a total lack of regard for himself and others. Treatment for the type of illness suffered by the accused would be extremely difficult, prolonged and was usually characterized by failure. There was some possibility that the accused would "burn out" in middle age, but that was not certain. The accused had been admitted to mental institutions 16 times, but his condition had progressively worsened. The Court held, in imposing a life sentence, that the accused's illness was reason to extend the minimum period before eligibility for parole beyond the usual 10 years to 20 years.

60. (1979), 44 C.C.C. (2d) 193 (Ont. C.A.). See also R. v. Hatton (1978), 39 C.C.C. (2d) 281 (Ont. C.A.).

61. (1971), 3 C.C.C. (2d) 153 (Ont. C.A.).

62. (1975), 23 C.C.C. (2d) 449 (Ont. C.A.).

63. (1978), 4 C.R. (3d) S-20 (Ont. C.A.).

64. See further R. v. Mitchell (1978), 20 Crim. L. Q. 420 (Ont. C.A.) where the accused picked up a boy aged 9, took him to a dirt road, and began to choke him. He released his grip at the last moment, after a blood vessel had burst in the boy's face. Seven months later, he took an 11-year-old boy, wrapped a cloth around his neck and applied pressure. Again, the boy suffered a burst blood vessel in his eye and severe neck abrasions. He then threatened to kill the boy unless the incident was covered up. He was on probation for a similar offence at the time of commission. On conviction of two counts of assault causing bodily harm, a total of 14 months' imprisonment was imposed at trial, but

increased to a total of five years on appeal. The accused was found to be suffering from homosexual paedophilia with strong sadistic tendencies. He presented a continuing danger, especially to male children, and had only slight chances of successful treatment as he refused to admit his sexual problems. The Court felt that, in these circumstances, protection of the public could best be served by a long penitentiary term.

65. (1973), 14 C.C.C. (2d) 139 (Ont. C.A.). See also R. v. Luknowsky (1976), 19 Crim. L. Q. 18 (B.C.C.A.).

66. (1974), 19 C.C.C. (2d) 193 (Ont. C.A.).

67. Ibid. at 197.

68. Thomas, supra note 8 at 39.

69. See e.g. R. v. Rhyno and Goodwin (1977), 19 N.S.R. (2d) 359 (C.A.); R. v. England (1976), 15 N.S.R. (2d) 686 (C.A.).

70. (1975), 1 C.R. (3d) S-33 (N.S.C.A.).

71. (1976), 6 C.R. (3d) S-29 (N.B.C.A.).

72. Dissenting in part.

73. Supra note 71 at S-31.

74. (1979), 22 Crim. L. Q. 35 (Man. C.A.).

75. See also e.g. R. v. Melanson (1976), 18 N.S.R. (2d) 189 (C.A.) where a sentence for unlawfully causing bodily harm was reduced from two years' imprisonment to one as the "trial judge placed too much emphasis on the previous criminal record of the appellant and on the factor of deterrence".

76. (1980), 25 N. & P.E.I.R. 341 (Nfld. C.A.).

77. R. v. Luther (1971), 5 C.C.C. (2d) 354 (Ont. C.A.).

78. R. v. Chaisson (1975), 11 N.S.R. (2d) 170 at 173 (C.A.) per MacKeigan, C.J.N.S.

79. (1978), 20 Crim. L.Q. 297 (C.A.).

80. See e.g. R. v. Wallace (1973), 11 C.C.C. (2d) 95 (Ont. C.A.); R. v. Menkes (1977), 19 Crim. L. Q. 278 (Ont. C.A.); R. v. Burhof (1978), 15 A.R. 133 (T.D.).

81. See e.g. R. v. Munn (1977), 22 N.S.R. (2d) 308 (C.A.) and cases cited in Chapter 3.C exemplifying dispositions involving various mental illnesses.

PART II: FACTORS AFFECTING (OR NOT AFFECTING) SENTENCE

INTRODUCTION

It is usual to the few texts on sentencing extant in the common-law world to devote a discreet section to the subject of "mitigating factors", or "the plea in mitigation".[1] Perhaps, also, elsewhere will be chapters dealing with "aggravating" and "irrelevant" considerations.

This format is not adopted herein. On the basis of the case law, many factors cannot be placed squarely into one of the above groups. There may be exceptions to the general rule; there may be contradictory cases. Some so-called mitigating factors have two possible effects: indicating that an individualized measure is required, or mitigating a tariff sentence. For this reason, all factors which have been the subject of judicial comment since 1970 are treated here as segments of one whole area, factors which may or may not affect sentence. For organization of the parts within this section the author has adopted, with considerable amplification to take account of the aforementioned wider scope, a division of factors into groups similar to that developed by David Thomas in his Principles of Sentencing.[2]

Within each segment, the complexity or triteness of the case law has dictated somewhat differing organization. The use of past criminal record, for example, is subject to a number of well-recognized rules and principles. Each of these is treated separately. In some areas it would be wasteful to set out details of all cases which simply exemplify use of a particular circumstance: there, only cases in which comment is made upon the appropriateness or methodology of use of the factor concerned are fully discussed. In other areas, such as the "test case" category, the examples are so sparse and specialized that it has been found worthwhile to give fuller details of all cases containing illustrative treatment of a factor.

No separate heading is given, in general, to absence of a particular factor, as opposed to its presence. For example, authorities dealing with the absence of remorse are digested with those commenting on its presence, under the general heading "Remorse".

Footnotes to Introduction to Part II

1. Ruby, C.C., Sentencing (2nd ed. 1980, Toronto: Butterworths) ch. 7; Thomas, D.A., Principles of Sentencing (2nd ed. 1979, London: Heinemann Books Ltd.) ch. 4; Kress, J.M., Prescription for Justice: The Theory and Practice of Sentencing Guidelines (1980, Cambridge, Mass: Ballinger Publishing Co.) ch. 8.

2. Thomas, ibid.

CHAPTER 3: FACTORS RELATING TO THE OFFENDER OR HIS HISTORY

A. AGE

i) Youth

As previously mentioned,[1] the most common effect of youth of the offender is to indicate that individualized treatment will be appropriate. General deterrence is de-emphasized in sentencing youthful offenders: the preferred aims are rehabilitation and individual deterrence. Many cases can be cited in support of these propositions. In R. v. Turner[2] a 16-year-old boy appealed his sentence of 10 years' imprisonment for a violent rape and robbery at knife-point. His antecedents were reasonably good, as was the evidence as to his chances of rehabilitation. The appeal Court found that the interests of the community would be better served by imposing a sentence with particular reference to rehabilitation. Age was a dominant feature in the reduction of the sentence to six years' imprisonment: MacKay, J.A. found it "perhaps unnecessary to say that, had this boy, in spite of his age, had a bad prior record or had [he] been older, the sentence [imposed] would ... have been ... very lenient."[3]

Considerations of individual deterrence and rehabilitation play a particularly strong role in the sentencing of youthful offenders with no previous criminal record. In R. v. Vandale and Maciejewski[4] the Ontario Court cited a decision of the English Court of Appeal, R. v. Curran,[5] to the effect that, as a general rule, first sentences of imprisonment should not be long. They should be governed by considerations of individual, rather than general, deterrence. Approving Curran, the Court held that these principles were particularly applicable in the case of a youthful first offender.[6]

As a corollary of the emphasis on rehabilitation, Courts are very reluctant to impose penitentiary terms on young offenders. In R. v. Elliot,[7] the accused, aged 16, pleaded guilty to four charges of robbing small stores while armed. On one occasion, shots were fired, and on another he and a clerk scuffled over possession of a starter pistol. The appeal Court reduced a sentence of eight years' imprisonment to a total of two years less one day, stating that while such crimes almost invariably require penitentiary terms, in the case of youthful offenders this principle should yield to the long-term benefit to society resulting from possible reformation of the offender. Such rehabilitation would not be likely to occur in a penitentiary.[8] In R. v. Chamberlain,[9] a boy aged slightly over 15 years shot a police officer three times and was convicted of attempted murder. In reviewing his case, the appeal Court stated that while the juvenile should receive "aid, encouragement, help and assistance", these could not subordinate the general principles of sentencing which guide the adult Court. However, a sentence which would accomplish the purpose of deterrence in a youth of 15 should not be nearly so long or under the same circumstances as one imposed on a mature adult. Although a sentence of two years' imprisonment would be appropriate, the Court felt that incarceration of a young offender in a penitentiary should only be imposed in very rare cases. A sentence of 18 months' imprisonment was imposed in order that the accused could serve his sentence in a reformatory, where he would receive psychiatric attention. Two years' probation would follow.

Where a tariff sentence is found to be appropriate, despite the youth of the offender, his age will nevertheless normally be treated as a mitigating circumstance. In R. v. Hingley,[10] the accused, a young man of 16, was convicted of four bank robberies. He had used firearms, and in one case

physical violence. On Crown appeal a total sentence of eight years' imprisonment was increased to 15. The Court was somewhat loathe to mitigate the sentence, pointing out that armed robbery and robbery with violence require strongly deterrent sentences. Only where such offences are isolated, minor and committed, perhaps impulsively or drunkenly, by a very young person or one of previously good character, should sentences as low as two or three years' imprisonment be considered. Nevertheless, the Court had to recognize the extreme youth of the accused and his possible mental and emotional instability. These factors should not affect the "stern, logical application of sentencing principles", but they did force the Court to conclude that, notwithstanding those principles, "humanity and mercy just make it impossible to sentence a mere sixteen-year-old as severely as [if] he were a few years older."[11]

There are, also, occasional indications that even offenders in their early 20s may receive some consideration for their relative youthfulness. An example is MacKenzie v. The Queen,[12] where a 22-year-old accused pleaded not guilty to dangerous driving and driving while disqualified. He was summarily convicted after an unsuccessful attempt to establish an alibi by perjuring himself and calling untruthful witnesses. The Court commented that his attitude after commission of the offences would have justified the trial Judge's admittedly severe sentence of five months' imprisonment. However, in view of his age, a total sentence of five months could be seen as unfair, and was varied so as to constitute a total of four months.

Until recently, there was little dissent from the proposition that youth is virtually always a mitigating factor. The case of R. v. Nutter, Collishaw and Dulong,[13] a British Columbia Court of Appeal case in which Tysoe, J.A. held that "Young men who persist in committing crimes [such as

armed robbery] cannot expect that their ages will be regarded as mitigating circumstances" stood alone. However, in the recent case of R. v. Gillis[14] the Newfoundland Court of Appeal adopted this policy. Gillis, a 17-year-old male, broke into the home of a young woman, tied her up, attempted indecently to assault her, robbed her, and took her with him in his car. The Court reaffirmed that,

> Normally, the fact of a person being a youthful first offender is a most relevant consideration for a sentencing court, and courts will attempt to avoid incarceration in such instances, or, at least, incarcerate for a shorter period if possible. This as well has been the consistent policy of this Court.[15]

However, this policy did not apply in light of the grave circumstances of this case.

ii) Old Age

Only rarely are the Courts called upon to consider old age as a mitigating factor in isolation. More frequently, it is discussed in connection with illnesses[16] or age-related degeneration of the brain.[17] The two reported cases in the period under review which have specifically considered this factor conveniently cover its treatment in relation to non-custodial and custodial sentences. In R. v. Knowlton,[18] the accused was charged with criminal negligence causing death, but convicted of dangerous driving. At trial he was fined $300, and prohibited from driving for three years. While at first glance the sentence appeared lenient, after considering his age (which was about 60), and also taking into account his ill-health, the appeal Court refused to interfere with the trial disposition.

In the Ontario case of R. v. Bulleyment,[19] the accused appealed his sentence of nine years' imprisonment for trafficking in methamphetamine.

The Court, dismissing his appeal, held that his age was more properly a matter for the consideration of the Parole Board.[20] The accused's precise age was not given; however, it was stated that he was receiving a veteran's pension.

It will be noted that the above two cases are not in conflict. In the case of a fine, the Court is the final arbiter of the quantum of sentence. In the case of a lengthy penitentiary term, however, the Parole Board is able to take into account the age of the accused.

B. CRIMINAL RECORD

i) Absence of Previous Criminal Behaviour

It is trite law that the accused's previous character is a proper factor to be taken into consideration in sentencing.[21] While it is not normally permissible to increase sentences beyond the tariff on the basis of long criminal records,[22] the absence of such a record is frequently cited in mitigation of such a disposition. Further, the fact of an offender being before the Court for his first time will press the sentencer firmly toward an individualized measure. As Huband, J.A. stated in R. v. McCormick:[23]

> The punishment should be tempered by virtue of a clear record. Punishment of the individual is intended to so impress the accused that he is unlikely to run foul of the law again. Having no prior experience to determine its effectiveness, the benefit of the doubt should go to the accused, and this is doubly so when the accused is young in years.[24]

The Ontario Court of Appeal has, similarly, stated that in considering sentence for a first offender the sentencer should explore all other dispositions, and incarcerate only when no other sentence is appropriate.[25]

There are certain well-established exceptions to the general principle that previous good character mitigates a tariff sentence. In the case of planned, deliberate continuing activity extending over some time, the Courts' reactions to previous good record have ranged from mild admonition that the accused "ought to have known better"[26] (in 1970) to a more consistent refusal to recognize previous good character and reputation in such instances (towards the end of the decade). In particular, well-organized, large-scale schemes for the trafficking of drugs are frequently penalized heavily, disallowing credit for previous good character on the part of the operators. The rationale for this policy was stated in R. v. Devlin and Marentette,[27] where the Court pointed out that absence of a criminal record is a necessary qualification for employment as a "link" in a drug distribution chain. A similar result has been reached in several recent cases involving large-scale trafficking activities, including R. v. Basha et al.[28] In Basha, the 10 accused appealed against sentences imposed in respect of an extensive scheme for trafficking in marijuana. Some defence counsel pointed to the exemplary antecedents of their clients. The Court found that such considerations carry little weight in circumstances where numerous criminal acts have been deliberately planned and carried out over a lengthy period of time. The previous good record of an offender is, rather, a prime consideration in cases where an isolated criminal act occurs, or where an uncharacteristic act occurs suddenly because of personal need or on the spur of the moment.

While the majority of recent cases which have applied this principle relate to drug trafficking, the language used by the Judges is generally wide enough to cover any consistent scheme of offending. An example of its use other than in the field of drug control occurred in R. v. Rogers (No. 2).[29] Rogers was a welfare officer who unlawfully obtained

money for the alleged purpose of paying welfare recipients, but in fact pocketed it himself. His total gain was in the region of $50,000. The Court of Appeal increased a trial sentence of one year's imprisonment and a fine to four years' imprisonment, and upheld an order for compensation, refusing to make any allowance for the good reputation of the accused in the community at large.[30]

Occasionally, a court may find reason to doubt the validity of the accused's previous good record in the commission of the offence itself. In R. v. Oliver[31] the British Columbia Court of Appeal upheld a sentence imposed, without mitigation for the accused's good repute, on a lawyer convicted of converting over $300,000 from his trust account. It was held that the facts before the Court placed his entitlement to that good reputation in doubt.

ii) Prior Offences: Special Categories

In the vast majority of cases, consideration of a previous criminal record is simply a matter of determining the weight to be accorded to it in light of its content and the surrounding circumstances. Before discussing these considerations, however, a small number of types of previous convictions or offences, to which technical rules apply, will be discussed.

a) Offences Committed as a Juvenile

Records of delinquencies committed as a juvenile are, Ruby alleges,[32] rarely given "much or any" weight. His contention does not square with the jurisprudence, for there are some older[33] and many unreported[34] authorities for the imposition of a heavier sentence in light of a juvenile

record, and the issue has been considered at the appellate level in recent years. The best-known reported case on this issue, R. v. Beacon and Modney,[35] is applicable only in Alberta. By virtue of the Alberta Juvenile Court Act,[36] the Court decided that the record of a juvenile could only be disclosed to an adult court for sentencing, or other purposes, in those cases where the consent of the Attorney-General had been obtained. It was the responsibility of the Attorney-General, not of the Courts, to determine where such information ought to be provided in the interest of the public and the offender.

The Alberta statute provided as follows:

> 14. (1) No person shall disclose or make public the contents of a report, or any part thereof, relating to a juvenile delinquent without the consent of the Attorney-General.

There is no corresponding provision pertaining to the rest of Canada in the Juvenile Delinquents Act.[37] The question for the rest of Canada is therefore one of principle rather than statutory regulation.

In R. v. Bouchard,[38] Kaufman, J.A., delivering a unanimous judgment of the Quebec Court of Appeal, held that a sentencing Judge could refer to Bouchard's juvenile record, subject to the usual safeguards.[39] This decision was repeated in the later case of R. v. Picard,[40] before the same Court. It is submitted that it is entirely consistent with the predominant rehabilitative aim in sentencing juveniles or young adults that such records should be considered. A telling argument to this effect was put forward by Kaufman, J.A. in Bouchard:

> If we expect our Judges - and we do - to consider, in passing sentence, not only the crime, but also the criminal, we must give them the greatest latitude in the pre-sentence process. Much time is spent in the preparation of reports which, not infrequently, trace an accused's life from his earliest childhood. Is it not relevant, then, to include past brushes with the law, the dispositions made,

> and the effect - insofar as that is possible - these dispositions had on the subject?
>
> To keep from the Judge this type of information, would, in my view, deprive him of information which is not only relevant, but necessary. In short, it would negate all that has been said and written about the need to know the person so that whatever chance there might be for rehabilitation should not be lost.[41]

In the case of a much older offender, if a juvenile record stands alone, little weight will be accorded to it by virtue of the "gap" principle.[42] If it forms part of a continuous criminal history, then in consideration of a rehabilitative sentence the words of Kaufman, J.A. would appear to have continuing relevance. In the case of a tariff sentence, whatever safeguards the Juvenile Delinquents Act may have intended in order to rehabilitate the juvenile while he was still of tender years, by the time an older offender comes back before the Court with a continuing criminal history stretching back to his juvenile years, all necessity for those safeguards would appear to have been lost. It is not only consistent with rehabilitative sentencing, but also tariff sentencing, that the Judge should have the fullest information possible regarding the history of the offender.[43]

b) Offences in Respect of Which a Discharge was Granted

An absolute or conditional discharge under s. 662.1 of the Criminal Code is deemed not to be a conviction.[44] As such, it may not be tendered in evidence of a past conviction to increase sentence. However, it was held by the British Columbia Court of Appeal in R. v. Tan[45] that a previous discharge may be tendered in evidence as to whether a further discharge would be in the public interest.

c) Offences in Respect of Which a Pardon has been Granted

Pursuant to the Criminal Records Act,[46] the granting of a pardon "vacates the conviction in respect of which it is granted ...".[47] Although there is some dispute as to the precise effect of such a pardon,[48] it was held by the Ontario Court of Appeal in R. v. Spring[49] that the Act gives to the Court the discretion to treat a pardoned offender as a first offender.

d) Offences in Respect of Which the Accused Took Part in a Diversion Programme

Where an accused agrees to take part in a diversion programme, in lieu of trial, there is no admission of guilt and, of course, no conviction.[50] In R. v. Drew[51] an offender came before the Court having previously taken part in such a programme. The British Columbia Court of Appeal held that the trial Judge should be told that the person to be sentenced has formerly taken part in a diversion programme. He should put the allegation of guilt aside as deserving of no weight. The programme, however, ought to be taken into consideration as part of the history of the offender, and is particularly relevant if probation is being considered. Whereas, in Drew, a conditional discharge would have been appropriate in the absence of prior diversion, an additional six months added onto the probation period was sufficient to account therefor.

Taking into account such matters as diversion in awarding an individualized sentence would appear consistent with the principle that the sentencing Judge should have the fullest information possible.[52] However, it may be deduced from the reasoning in Drew that where a tariff sentence is

under consideration, because the allegation of guilt is deserving of no weight, the offence in respect of which the diversion programme was undertaken should not be treated as a previous offence.

e) Offences Subject to Pending Appeal

There is Supreme Court of Canada authority to the effect that, notwithstanding any appeal pending therefrom, a conviction and sentence stand and must be given full effect in future sentencing until such time as they may be altered or affected by the judgment of an appellate court.[53]

f) Offences in Respect of Which the Accused was on Bail at the Time of the Present Offence

The precedents are consistent to the effect that commission of the offence before the Court while on bail for other offences is an aggravating factor. In R. v. Brooks,[54] for example, the accused pleaded guilty to offences of possession of stolen property, and break and enter. The offence relating to possession of goods was committed while he was on bail pending disposition of the other charge. This was held, in sentencing, to be a circumstance which must "tell against him".

A degree of caution must, however, be exercised in taking account of this factor. In R. v. Morrissey and Elmore[55] the trial Magistrate, sentencing a first offender for theft over, was heavily influenced by the fact that the offence occurred while the accused was on bail for another unrelated offence. On appeal, the Court held that while this is a factor to be taken into consideration in assessing the character of an offender, it should not

influence a trial Judge to the extent of his increasing a custodial sentence so as to contain punishment for breach of bail conditions.

g) Offences in Respect of Which the Accused was on Parole at the Time of the Present Offence

The accused's being on parole at the time of his offence is quite consistently treated as an aggravating factor.[56] In R. v. McColl,[57] the accused committed several offences just a few days prior to the expiry of his parole. It was held, on appeal, that counsel "ought to have informed the trial Judge of this fact, as it was relevant to the determination of the quantum of the sentence with respect to the totality of time to be served". The Court went on to state that the accused's being on parole would count against him in the decision as to sentence. His record and this fact made appropriate a penitentiary term, as opposed to the reformatory term intended by the trial Judge.

It appears somewhat difficult to reconcile those cases in which it has been held that being on parole is an aggravating factor with a number of cases in which sentences have been reduced to take account of forfeiture of parole. In R. v. Evans,[58] for example, the accused assaulted, kicked and rendered unconscious a waiter in a bar. As a result of his conviction of assault causing bodily harm, he would forfeit at least 433 days of parole. A proper sentence in the absence of parole forfeiture was held by the Court to be one year: taking into account the forfeiture, the Court held that "a sentence reduction of three months or approximately 91 days, because of such forfeiture, could or should [not] be classified as unwarranted." Accordingly, a sentence of nine months' imprisonment was imposed. MacDonald, J.A., for

the majority, further stated that in taking account of the parole forfeiture he had kept in mind that the accused knew, or ought to have known, that if he were convicted while on parole for an indictable offence his parole might be forfeited.

In the later case of R. v. Hutton,[59] Evans was followed. MacDonald, J.A., however, qualified his remarks in the precedent case as follows:

> I would but add that parole forfeiture is but one circumstance and the weight or effect to be given to it will of course vary from case to case. I can visualize cases where little or no weight should be given to it ...[60]

In Evans, Cooper, J.A. delivered a strong dissent, suggesting that to reduce a sentence to take account of forfeiture of parole would be to circumvent the provisions of the Parole Act.[61] This opinion has found considerable support outside Nova Scotia.[62] Coffin, J.A. in R. v. LaPierre[63] pointed out that in a Manitoba Court of Appeal case, R. v. Genaille,[64] four Judges of that Court preferred the dissenting judgment in Evans. Matas, J.A. stated:

> In the case at bar, it would be wrong, in my respectful opinion, to follow the dicta of MacDonald, J.A., in Evans and Jackson,[65] and reduce what would otherwise be a fit sentence because of the forfeiture provisions of the Parole Act. I adopt the comment made by Cooper, J.A. ...[66]

Similarly in Keeble v. The Queen[67] the Prince Edward Island Court of Appeal was faced with an appeal based on the decision in Evans. The accused, convicted on two charges of possession under, was sentenced to two terms of two years, concurrent. He had a substantial criminal record and felt that the sentence imposed had not taken into account forfeiture of parole which he would suffer as a result of the offences. The Court preferred the reasoning of Cooper, J.A. in the minority in Evans. It would be an easy matter, the Court stated, to reduce the sentence of two years, "mitigate the effect of

forfeiture of parole", and therby "circumvent the provisions of ... the Parole Act". To do so, however, would involve a departure from proper principles of sentencing.

It is submitted that a proper application of the principles of tariff and individualized sentencing to this problem would resolve the difficulties in which Courts have repeatedly found themselves in relation to forfeiture of parole. In a case where an individualized disposition is warranted, despite the previous record of the offender, the effect of forfeiture of parole should be taken into account because the aim of the Court will be to arrive at a total disposition best suited to the needs of the offender. Thus the Court should look at the total actual time to be served, including forfeited parole time. However, in the case of a tariff sentence, the task of the Court is to match the penalty to the seriousness of the offence. The breach of parole conditions as such will be punished by the loss of parole. If, however, as in McColl and Giroux,[68] the Court feels that the offence presently before it is rendered more serious in nature by the fact that it was committed while the offender was on parole, then the finding of the appropriate ceiling on the tariff will be affected by the breach of parole. Where the combined effect of the new sentence and forfeiture of parole is then disproportionate to the total penalty constituted by forfeited time and the new sentence, the new sentence may be reduced in accordance with the principle of totality[69] to arrive at a just result. It follows that the judgment in Evans, as qualified by Hutton,[70] is the preferred policy. However, the results reached in Genaille and Keeble[71] may not necessarily have been incorrect, if these were cases in which the combined effect of forfeiture of parole and the new sentence was not disproportionate to the total gravity of the offence committed, taking into account its commission while on parole.[71A]

h) Offences for Which the Accused had not Been Convicted at the Time of the Present Offence

A degree of caution must be exercised in considering offences which, while committed earlier than the offence before the Court, were not the subject of convictions at the time of commission of the later offence. The situation arose, and the applicable law was neatly stated, in R. v. Sparkes.[72] Sparkes was sentenced at the same sitting for two offences of trafficking in cannabis substances. The offences were committed on consecutive days. In determining an appropriate sentence for the second offence, the trial Judge took into account as an aggravating factor the previous record of the accused, which consisted of two convictions. One was for possession some years earlier, the other was the conviction which the trial Judge had himself entered earlier in the sitting. Relying upon these two convictions, he imposed a consecutive prison term of 14 months. On appeal, Morgan, J.A. stated:

> It was clearly within the trial Judge's discretion to direct that the terms of imprisonment be served consecutively even though he found that the offences formed part of a series of transactions. However, in determining an appropriate sentence for the second offence, in my view, he placed undue emphasis on the conviction that he himself had recorded at the same court sittings. When he committed the July 22nd offence, the appellant had not even been charged with the offence of July 21st, and, while the learned trial judge, in imposing sentence, was certainly entitled to take [the accused's] continuing proclivity to criminal acts into consideration, he should not in my view have regarded the July 21st conviction as part of the appellant's criminal record.[73]

Reference to that conclusion apparently led the trial Judge to impute to the accused a degree of criminality accorded to an offender who repeats an offence in defiance of a previous conviction. In doing this, the Court held

that he had failed to give sufficient weight to the circumstances favourable to the accused.

iii) Prior Offences: Factors Affecting Weight Accorded Thereto

a) Types of Previous Convictions

It has already been explained,[74] and it appears trite law, that the accumulation of a substantial criminal record will, absent a final attempt by the Court to rehabilitate the offender, disentitle him to leniency.[75] However, the precise weight to be attached to an offender's previous record depends on a number of circumstances.

Generally, only criminal offences of the same or a similar nature as that before the Court will have a serious aggravating effect,[76] unless a long and generalized pattern of lawlessness is revealed.[77] Prior offences of an unrelated nature, or which are very minor in relation to the offence before the Court, will often be disregarded. In R. v. Trask,[78] for example, the accused pleaded guilty to a charge of indecent assault, the Crown undertaking to call no evidence on a charge of kidnapping. Trask's previous record consisted of a conviction of theft under, six years previously, and attempted theft, four years previously. Since these offences were "obviously petty, and [were] totally unrelated to the matter under appeal", the question of sentencing was approached as if the accused had no previous record, in view of his otherwise exemplary past. Similarly, in R. v. Moncini[79] a three-year-old offence of theft under $50 was held to be of no significance in considering sentencing for a bank robbery. In R. v. White and Clark[80] the sentence imposed on two accused convicted of trafficking in a large quantity of

phencyclidine took no account of their criminal records, which contained no indication of a prior involvement with drugs.

A special case in which the offender may receive an individualized, treatment-oriented measure despite a record occurs when the accused has a compelling illness, or other problem such as addiction, which has been responsible for most of the previous crimes. Here, the Court may not attach substantial importance to the record, other than as indicating the seriousness of the underlying problem and the need for its resolution.[81]

A particular concern is with the existence of prior offences involving violence. This rule appears to apply whether the accused is being sentenced for a violent or non-violent offence. In sentencing for second violent offences, the general rule of previous similar offences carrying greater weight is applied. Thus, for example, in R. v. Melanson[82] the Nova Scotia Court of Appeal stated that where an accused is being sentenced for a violent crime, a previous record of non-violent crimes cannot be ignored. However, it does not carry the same weight as if it involved crimes similar to that in question or crimes involving violence generally. Similarly, in R. v. Evans,[83] the accused was convicted of assault causing bodily harm. In reducing his sentence from 18 to nine months' imprisonment, the appeal Court noted that his record did not reveal any crimes of violence, and thus weighed less heavily against him than it would have had he had a previous conviction or convictions involving violent crime.

Previous violent crimes are also, as just noted, a source of concern to courts sentencing for non-violent offences. The most extreme logical extension of this concern was evidenced in R. v. LeSarge.[84] In reducing sentence for theft of a tractor-trailer and cargo from seven years' imprisonment to five, the Ontario Court took into account, inter alia, that

although the accused had a lengthy record of offences against property, he had never been convicted of a crime involving violence.

b) The Gap Principle

Where an accused before the Court has a record of previous offences, but there has been an intervening period in which he kept out of trouble, the Court will normally take into account the crime-free period in assessing sentence for the present offence. While this principle has been described as nothing more than the converse of the notion that the ordinary practice is to treat harshly an offence committed shortly after a release from custody,[85] the taking into account of a gap may in fact represent different considerations according to whether a 'tariff or individualized sentence is appropriate.

Where a tariff sentence is in order, the period of good behaviour serves to counter the proposition that the criminal record should disallow mitigating factors and call for a substantial tariff term. An example of this type of consideration occurred in R. v. Riordan.[86] The accused, convicted on two charges of fraud for selling used hearing aids represented as new to elderly people, had seven previous convictions for theft and false pretences. However, he had not been convicted for 13 years.

> ... [T]his record of good behavior should be taken into account. The record, however, makes it impossible to consider merely a substantial fine or suspended sentence, such as might be appropriate for this type of offence in the case of a first offender.[87]

A sentence of 30 days' imprisonment on each charge, to run concurrently, was substituted for the six months imposed by the trial Judge. Similarly in R. v. Harrell,[88] the accused broke and entered a dwelling house, stealing approx-

imately $70, a pistol and ammunition. The complainant was held at gunpoint as Harrell escaped. Although he had previous convictions, they had occurred in 1954-58, and he had not further been convicted of any serious offence for a period of 11 years. Following the English case of R. v. Hodson,[89] sentence was assessed on the basis that "This long interval, free from serious convictions, is entitled to due weight."[90]

In other cases, however, the reason for giving effect to the gap may be vastly different. Whereas an offender with a long continuous record of convictions is disentitled to leniency and individualized treatment, such is not necessarily the case with an offender whose convictions occurred some time ago. Indeed the Courts, recognizing the possibility of human change, will come to regard the offender who is possibly eligible for an individualized sentence as more closely akin to a first offender. Thus, for example, in R. v. McKeachnie[91] the Court was able to impose a sentence of six months' imprisonment, followed by two years' probation, on an accused convicted of indecent assault on a 9-year-old girl. A conviction for indecent assault on a male, 12 years previously, was held not to influence the sentence in light of the good record of the accused in the intervening years. This principle was even more clearly stated in the case of R. v. St. Croix.[92] St. Croix and the victim were engaged in an amateur hockey game where no protective equipment was worn. During the course of a dispute between them, the accused struck his opponent in the mouth and caused the loss of four teeth. The trial Judge, holding that any requirement of general deterrence in this case would be fulfilled by arrest and the undergoing of a trial, imposed a discharge conditional upon restitution being made to the victim. The County Court Judge further stated that to sentence the offender in light of an offence which occurred when he was 16 years of age (his present age was not given)

would run counter to the principles of rehabilitation. Where the offender had, since a previous offence, taken upgrading at a college and other voluntary steps to improve himself, that was the best kind of rehabilitation, and a course with which the Court ought not to interfere unless the public interest demanded it.

In either event, as Ruby notes, for the gap principle to come into effect, the period under consideration need not be totally crime-free. Occasional minor instances, different in quality and gravity from the offences under consideration, will not totally remove the benefit to be gained from a crime-free period.[93]

iv) Offences Committed After the Offence Before the Court

Offences committed by the accused after the offence for which he stands before the Court may properly be taken into consideration as evidence of the accused's nature and/or his behaviour between the offence and trial.[94] However, occasionally it happens that conviction and sentence for a subsequent offence will be recorded before trial or sentence on an earlier offence. In such cases, care must be taken by the sentencing Judge not to treat the subsequent offence and conviction as a criminal record per se. This principle was stated in R. v. Reddick,[95] where the accused appealed his sentence for robbery with violence. He had previously been convicted of possession of stolen property and of assault causing bodily harm, for which he had received sentences of a fine and intermittent imprisonment respectively. However, these convictions occurred after the present offence: technically, he was a first offender when convicted of robbery. The Court stated that the previous record, while relevant in considering the accused's character and

propensities, thus did not carry the weight it might otherwise possess in requiring a very substantial term of imprisonment. Similarly in R. v. Jung[96] the accused was convicted at two separate trials of trafficking in heroin. He was sentenced on one day for the second offence, and on the following day for the first offence. The trial Judge, in sentencing him for the first offence, said "... you were sentenced yesterday for trafficking in one pound of heroin sometime prior to the present offence. In that sentence you were treated as a first offender. In the sentence I now impose, I am treating you as a second offender." The appeal Court, noting that the trial Judge was under a misapprehension as to the relative times when the two offences had occurred, reduced sentence for the second offence in order that the accused would be treated in that sentence also as a first offender.

The logic behind these rules is clear. While it is perfectly desirable that the trial Judge have before him as much information as possible regarding the character and behaviour of the accused when sentencing, he should not ascribe to the accused who has previously been convicted of offences committed subsequently to that before the Court, that degree of culpability which attaches to one who has re-offended in spite of a previous conviction and sentence.

v) Previous Sentences

Where an accused appears to the Court to have persisted in committing a certain type of crime, despite previous convictions and sentences, it will be very reluctant to impose a lesser sentence than was previously determined. In Valade v. The Queen[97] the accused was found at 9:00 a.m. on a commercial street with a loaded revolver, gloves, dark glasses and a mask.

He had obviously been planning a robbery. The Court noted that his last sentence, for a completed robbery, had been eight years' imprisonment. It was not appropriate that he should receive less than this; accordingly, his total sentence was increased to 10 years' imprisonment. Similarly in R. v. Denholm[98] an accused came before the Court for possession of illegally obtained copper wire. He had recently been sentenced to three years' imprisonment for similar offences. The Court stated that the circumstances would be "most unusual and extenuating" where it would order a period of imprisonment for a related crime of less duration than was previously imposed. Accordingly, a sentence of 3 1/2 years' imprisonment was appropriate.

A related principle is that the Court should not normally impose a sentence for an offence similar to those previously committed which is vastly more severe than the last sentence served. This is sometimes referred to as the "jump" principle. Except where an exemplary sentence is to be imposed for the first time, or the "short, sharp shock" treatment of a youthful offender is contemplated, the Courts prefer to have gradually increasing increments to sentences imposed in respect of continuing criminal conduct of a similar kind. An example occurred in R. v. Duguay[99] where the accused, aged 34, was convicted of obtaining $900 by false pretences and possession of cocaine for the purpose of trafficking. The effect of the two sentences was a total term of two years' imprisonment, which the accused would have to serve in a penitentiary. He had a substantial criminal record going back over 10 years: it contained at least 10 offences, although there was a five-year gap from 1972 to 1977. The longest term of imprisonment he had served so far was two months. The Court held that despite the accused's bad record, having regard for his greatest term so far, it was not yet time to impose upon

him a sentence the effect of which would be to put him into the penitentiary. Sentence was accordingly varied to a total of 18 months' imprisonment.[100]

As previously noted, a criminal history may also have the effect of disentitling an accused to leniency or an individualized disposition. In particular, the Court will from time to time look at the nature of sanctions imposed on an accused in the past for guidance as to whether an individualized disposition is still appropriate. In R. v. Salamon[101] the Crown appealed from a sentence of six months definite and six months indeterminate plus one year's probation, all of which had been imposed on convictions of possession of marijuana and morphine for the purpose of trafficking. The appeal Court increased sentence on the second charge to five years' imprisonment, to be served concurrently with the sentence for possession of marijuana. It was noted that, although the accused was only 20 years old, he already had two prior convictions and had been released only a few months before he was detected attempting to sell morhpine. The Court of Appeal stated that the trial Judge had not given sufficient consideration to the element of deterrence, and that the accused "was prepared to pay little attention, if any, to the probation orders that had been made against him". It was also noted that "the period of probation and incarceration to which the respondent was subjected has had little effect on him."[102]

C. MENTAL ILLNESS

The presence of a mental health factor in sentencing dispositions has been accorded varying weight by the Courts, generally depending on the outcome of the Court's election between rehabilitation of the offender, protection of the public by confinement (particularly in cases where the offender

is thought to be "incurable"), or general deterrence (rarely). Concentration on any one of these aspects will produce a result usually intelligible only in the context of that particular purpose. Thus, emphasis on protection of the public by confinement of the offender, most frequently employed in the case of the psychopathic or sociopathic offender, tends to lengthen the sentence considerably.[103] Protection of the public may be used in a further sense, that is, by cure of the disorder: this, together with general concerns for rehabilitation, will lead to a moulding of the sentence, both in type and length, to assist his or her cure.[104]

At first blush, the distinction between three roles of mental illness seems important. Mental illness or disorder may

1. cause, or contribute to, the offence;
2. exist at the time of the offence and trial; or
3. develop subsequent to the offence.

In each of these circumstances, the Courts may and often do have regard to the circumstance and its relation to the offence, and the illness or disorder may play a role in shaping punishment or treatment. An example where a severe disorder developed subsequent to the offence is R. v. Boudreau[105] where the accused became psychotic and was in danger of death. The Court in that case took into account the condition as a mitigating circumstance of the offender. Most counsel will, similarly, be aware of cases in which a court has dealt extremely leniently with an offender who, during a period of depression, stole from a shop or store. Here, the accused's mental condition is a mitigating circumstance existing at the time of the offence.[106]

In the large majority of cases, however, these distinct roles of mental disorder do not come into question: almost invariably, the illness or disorder existed at the time of the offence and is intimately related to it.

The cases discussed relating to particular illnesses, below, will give an impression of the typical approach, or range of approaches, accorded by the Courts to such disorders.

i) As a Mitigating Factor

Numerous cases have referred to the possibility of mental illness or disorder being treated as a mitigating factor. A review indicates, however, that when sentence is mitigated because of a mental disorder this may be for one or more of several reasons.

In the case of a tariff sentence, the fact that the accused was in some way mentally disturbed at the time of the offence may simply mitigate the gravity of the offence, and therefore call for a lesser sentence. In R. v. Brown[107] the accused picked up a young girl, attempted to choke her, drove her in the trunk of his car to a dump, threw her into it and, believing her to be dead, covered her with garbage. She survived the ordeal, however, and the accused was convicted of kidnapping. At trial, psychiatrists testified that his state of mind at the time was "fluctuating, waxing and waning". He had a history of depression and inadequacy, and at the time of choking had "a crisis of the mind, a depression". The discharge of an aggressive impulse brought temporary relief. The Court, in reducing a sentence of 15 years' imprisonment to seven years, felt that the sentence imposed at trial had been "too severe" in view of the accused's mental condition at the time of the offence. Similarly, in R. v. Sabean[108] the Court of Appeal upheld a sentence of two months' imprisonment followed by 18 months' probation for indecent assault. In so doing, the Court stated that the accused's mental age of 12, despite his physical age of 17, was a mitigating circumstance.

In other cases, the accused's continuing mental condition may create a situation in which a term of imprisonment is more severe for him than it would be for an offender without mental difficulties. Here, the Court may reduce a tariff sentence as the severity of a shorter sentence served by this accused will be commensurate with that of a longer sentence served by a "normal" accused. Thus in R. v. Boudreau[109] the Court of Appeal upheld a "light" sentence of 12 months' imprisonment upon an accused convicted on four charges relating to payments of money and gifts to government employees. Aged 59, he was aging prematurely and suffered from diabetes, arteriosclerosis, and hypertension. At trial the evidence of his psychiatrist was that he was suffering from a severe case of reactive depression, and required psychotherapy. On appeal, leave was granted to introduce further evidence as to his condition, and the psychiatrist testified that he was becoming psychotic. There was a real problem that if he was sentenced to imprisonment this would be the "culmination of humiliation", and that he might very well give up and die, being unresponsive to treatment. The Court of Appeal, while being of the view that the overriding consideration in sentence should be deterrence to others, was prepared to uphold this light sentence, and stated that the accused's illness had already been taken into account as a mitigating circumstance.[110]

A third instance in which mental illness may appear to mitigate sentence is the case in which an individualized disposition is chosen to ensure that treatment will be given to the accused.[111] This may take the form either of shortening a custodial sentence, or imposing a non-custodial measure where in other circumstances a tariff sentence might have been appropriate.

Modification of periods of incarceration may take the form either of reducing a penitentiary sentence, or substituting a term of imprisonment

in a reformatory. An example of the former is R. v. Wallis.[112] The accused, who had a lengthy history of convictions for violent crimes, was sentenced to eight years' and two years' imprisonment consecutive, for robbery and assault. Before the appeal Court, his psychiatrist gave evidence based on numerous reports of classification officers, jailers, doctors and the psychiatrist herself. While in custody, the accused was severely depressed, suicidal, and in a state of fear that he would be attacked by other inmates or staff. Medication and electric shock therapy had been administered. The long sentence imposed had demoralized the accused, and was perceived by him as being a period culminating in his death. After admittance into a psychiatric hospital, a period of treatment was administered and the accused began to respond. The appeal Court varied sentence to four years and two years concurrent, in order to make possible the rehabilitation of the accused through psychiatric treatment during a "moderate" term of imprisonment.

More frequent are cases in which a reformatory term is substituted. Often, this is predicated on the unavailability of psychiatric treatment facilities in federal penitentiaries.[113] In R. v. Gionet[114] the accused shot his estranged girlfriend in the head with a rifle. The psychiatric testimony was that he was psychotically unstable, with paranoid tendencies. He had been under, and still needed, psychiatric care. The Judge indicated that ordinarily a penitentiary term would have been imposed as societal denunciation but, in the circumstances, two years less a day's imprisonment would permit the accused to continue to receive psychiatric help (this being unavailable in any Maritime penitentiary). On Crown appeal, the Court varied the sentence only so that it would include two years' probation, with mandatory psychiatric treatment. Similarly in R. v. Marcello[115] the accused was convicted of trafficking in heroin, and sentenced at trial to three years'

imprisonment. Aged 16, he had been a heroin addict for at least two years. The Court felt that while the term in itself was appropriate to the offence, the needs of the accused and the ends of society would be better served by a shorter prison term, followed by a period of probation with conditions of abstention and treatment. Sentence was accordingly varied to two years less a day, followed by two years' probation. In R. v. Menkes[116] the accused was convicted on two counts of arson, one of possession of a weapon for a purpose dangerous to the public peace, and one of theft under. He was sentenced at trial to a total of seven years' imprisonment. Following arrest he had been remanded to a mental health centre for assessment. He suffered from certifiable mental illness, paranoid schizophrenia, and could be treated appropriately at the centre. A post-sentence report substantially confirmed these opinions. The Court, noting that he had been imprisoned in a maximum security institution to provide greater protection from other inmates, who were intolerant of him, found that non-penitentiary terms were within the proper range of sentence for his offences. Because of his illness and vulnerability in prison, consideration could be given to the institution in which his sentence was to be served. It was thus reduced to two years less a day definite and two years less a day indeterminate on each charge, to run concurrently.

Substitution of non-custodial treatment is exemplified by the cases of R. v. England[117] and Leger v. R.[118] In England the accused, a young man of 16, was convicted on one count of break and enter. He and his companion had been sniffing glue for much of the day. He had one previous conviction of committing mischief, upon which sentence had been suspended with two years' probation. The Court of Appeal felt that the term of one year's imprisonment overemphasized deterrence. It would be more conducive

to rehabilitation and reform to impose a shorter term of imprisonment, followed by probation, with conditions designed to ensure that the accused would take and respond to treatment for his addiction to glue and other solvents. Accordingly, sentence was varied to time served (slightly over two months), followed by probation for two years. In Leger, a misguided individual set fire on three occasions to a garbage can and newspapers inside an apartment building. He owned several fire extinguishers, and put out the fires to show his heroism. On conviction of three counts of arson, he was sentenced to three months' imprisonment and two years' probation. Psychiatric examination showed him to be in a depressive state, and to be a danger to the public unless he received help. On appeal, the Court decided that treatment could better be administered in a private clinic, and substituted a probation order of three years' duration. A condition was included that the accused attend private therapy sessions for one to three years.

Occasionally, where the Court finds that a penitentiary term is inevitable for an offender, it will nevertheless reduce the term to a minimum and substitute for the remainder an individualized measure, usually probation. In R. v. Sleep[119] the accused pleaded guilty to 13 charges of theft of automobiles. He had a lengthy previous record of break and enter, theft, joy riding and possession of narcotics, was aged 18, and had been expelled from grade 9 because he "caused too much trouble". He was unmarried and had been unemployed for nearly two years. Psychiatric evaluation showed him to be, inter alia, suffering from anxiety and depression, and to have a poor self-image. He was also highly impulsive, unassuming and irresponsible, anti-social, rebellious and law-breaking. His prognosis was poor: left to himself or placed in penal institutions, he was bound to become more psychopathic and might commit suicide. Long term psychiatric treatment with a major

commitment by his family and health professionals was required. A probation order would be inappropriate because the accused would manipulate the situation. The Court of Appeal found that a total sentence of four years' imprisonment would not have been excessive in the absence of mental health difficulties. Although available federal institutions were not equipped to give the accused the treatment he needed, this did not justify the Court in ignoring the accused's mental condition. The custodial sentence was therefore varied to a total of two years, followed by probation for three years with conditions including compulsory psychiatric treatment.

ii) Dangerousness

A dominant feature of the types of mental illness capable of being mitigating factors is "curability", or at least "controllability". Where a mental disorder, typically a psychopathic or sociopathic disorder, has gone beyond control to the extent that the accused represents a continuing danger if at large, then his disorder may become an aggravating factor, or, at least, call for a sentence of life imprisonment as an individualized measure. The concept of dangerousness having been discussed above,[120] it remains only to note that virtually all of the cases discussed in that analysis are cases in which an uncontrollable psychopathic or sociopathic personality was diagnosed. Indeed, so intrinsically related are the concepts of psychopathy and dangerousness that at times the matter of definition becomes circular. This is clearly evident in the following quotation from the Ontario Court of Appeal:

> However, in this case, the cumulative effect of three separate attacks, the use of a knife and the appellant's readiness to inflict injury with it to achieve his purposes, clearly indicate a serious personality disorder...[121]

iii) Modification of Sentence to Permit Treatment

For discussion of the propriety of modification of sentence to permit treatment, see above, Chapter 2.C.v, "Offenders Likely to Benefit from Treatment in Prison" and Chapter 3.C.i, "Mental Illness" - "As a Mitigating Factor."

iv) Dispositions in Cases Involving Specific Illnesses

a) Depression

Depression, in varying degrees of intensity, affects a large segment of the population. Generally, the severity of the illness depends on the depth and duration of the emotional imbalance. Two broad categories, mild depression and manic depression, are commonly used.

Mild depression, unlike many other forms of mental illness, does not result in a deterioration of a person's intellectual capacities. Nor does it cause a persistent degeneration of his or her contact with reality. Instead, people who suffer from mild depression find themselves lapsing into extended periods of melancholia, despair and dejection. They may experience feelings of unworthiness, guilt and hopelessness, and physical activity is usually greatly reduced. Suicidal thoughts and impulses are common, depending of course on the severity of the depression. The emotions of persons suffering from depression are highly influenced by their external environment. Variations in mood, usually as a result of stress, occur according to a person's

emotional stability at the time. Depressed persons normally do not exhibit serious criminal behaviour, but shoplifting is very common, particularly among women. Such compulsive shoplifting behaviour has been linked to menstrual or menopausal imbalances exhibited by otherwise law-abiding women.

Manic depression, while it is a form of depression, is a psychotic disorder and will be dealt with under the appropriate heading below.

In sentencing offenders suffering from mild depression, the Court will often prescribe an individualized measure. In R. v. Taylor,[122] for example, the accused stole a pair of sunglasses from a department store. Taylor was in the midst of a separation from his wife, was under psychiatric care and the offence had been precipitated by his mental state. The appeal Court substituted a conditional discharge with six months' probation for the absolute discharge granted at trial. In R. v. Hergert,[123] the Court granted an absolute discharge to a young female who stole a jar of Ovaltine from a store, on impulse, during a period of emotional upset caused by false allegations of another crime.

In cases involving more serious simple depression, the mental condition of the accused may equally render a tariff sentence inappropriate. In R. v. Marceau[124] the accused, aged 79, was convicted of manslaghter after he murdered his wife of 53 years. The problem was originally triggered by their son who had experienced psychiatric problems of a depressive nature and increasing severity, attempted to commit suicide a number of times and finally succeeded. In the meantime, the accused had developed a serious depressive illness, probably triggered by his concern over his son's psychological and physical problems. He tried to take his own life. His illness, despite treatment, persisted, causing symptoms such as sleeplessness, guilt

feelings, pre-occupation and agitation aroused by trivial matters. His wife began to deteriorate, suffering from hypertension, melancholia, diabetes, psychotic depression, thought disorder, negativism and other problems. She could not properly care for herself physically or mentally and her placement in an institution was proposed. The accused did not want to be separated from his wife and took on complete care of her. Pre-occupied by problems, he began to neglect household duties, hygiene and nutrition, and malnutrition set in. Eventually he reached such a point of desperation that he murdered his wife, planning to take his own life afterwards. Considering the mental and physical condition of the accused, the Court suspended sentence subject to a probation period of three years.

More severe depression may also call for the imposition of an individualized measure in the sense that the term of imprisonment imposed is reduced in order to facilitate treatment. The Courts have pointed out that in sentencing mentally disordered offenders, general deterrence is not a paramount consideration.[125] In Leger v. R.,[126] the facts of which appear above, the appeal Court substituted a period of probation, with the condition that the accused attend private therapy sessions, for the sentence of three years' imprisonment imposed at trial. The case offers a crystal-clear example of an individualized measure, a probation order with non-custodial treatment being a measure designed "to assist the offender to regulate his behaviour in the future" and to facilitate his adoption of a mentality which is in conformity with the law.[127]

The existence of depression does not, however, guarantee that the accused will receive an individualized disposition. The accused's mental condition may also be considered as a mitigating factor in imposing a tariff sentence. In R. v. Brown[128] the accused's "crisis of the mind, ... depression"

made a sentence of 15 years' imprisonment, as imposed at trial for kidnapping, too severe, and it was reduced to seven years. This case may be distinguished from Marceau,[129], where an individualized measure was imposed, as follows: in Marceau the accused was an elderly man whose victim was a major cause of his misery. In Brown, a dangerous young man picked up a stranger and attempted to murder her.

Although depression is often treated as a mitigating factor in sentencing, only the mental state of the accused which existed at the time the offence was committed can be taken into consideration. In R. v. Doherty[130] the Ontario Court of Appeal ruled that severe depression brought on by pending charges subsequent to the arrest cannot be considered an exceptional circumstance since it is a common reaction of many people accused of serious crimes.

b) Psychosis

The label "psychosis" encompasses a multitude of serious mental problems characterized by a loss, or serious impairment, of a person's contact with reality. This inability to distinguish between reality and fantasy frees a psychotic individual from any desire or inclination to pay heed to constraints placed upon his or her behaviour by law or otherwise. Psychosis is much more than an aggravated form of neurosis. Neurotics generally recognize that their behaviour is abnormal and they worry about it or try to justify their actions. Psychotics, on the other hand, usually do not acknowledge that their behaviour is out of the ordinary, may tend to associate themselves with objects, and often fail to comprehend the most elementary notions of causation. Generally, to the psychotic mind, there is "a dissolving boundary

between self and object, and between subjective and objective reality".[131] Metaphorically, neurotics build castles in the air and psychotics live in them.[132] Not all psychotic persons are criminally dangerous, although some may suffer from delusions or hallucinations resulting in involuntary compliance with voices commanding them to kill or commit other types of crime.

Manic depression is a serious psychotic disorder characterized by extreme distortions of mood. It is one of the commonest forms of mental illness and varies greatly in severity. Typically, "this psychosis is characterized by attacks of depression with inactivity ... [and] by attacks of mental exaltation with over activity."[133] Generally, sufferers from manic-depression experience drastic "swings" of behaviour although some experience only manic or depressive episodes without these cyclic variations. When experiencing the "depressive phase" the symptoms described in the previous section are present, often to a very serious degree. A person's physical activity may be arrested to such an extent that he is mute and may need to be fed or cared for like a child.[134] Serious threats of suicide are common manifestations of severe feelings of unworthiness and guilt. This "down-swing" is often associated with murder/suicide behaviour or cases of women killing their children.

In the manic phase, melancholy is replaced by elation and hyper-activity. Over-confidence, aggression, indiscretion and excitement are common symptoms. A person experiencing this emotional "up-swing" is often loud, domineering and unable to concentrate. This phase may be connected to sudden, uncharacteristic outbursts of violent behaviour. Criminal conduct such as killing one's entire family or brutally attacking an innocent victim may occasionally occur. Manics often become reckless and may commit less serious crimes, such as sexual indiscretions, during this phase. Overin-

dulgence in alcohol is also common and may result in a lack of self-control. Various firearms infractions and other sexual offences have been linked to such "blunting of the finer moral sentiments".[135] Criminal behaviour during the manic phase is frequently of an outrageous nature, perhaps with an air of the "practical joke" about it, owing to the sufferer's restlessness, excitability and loss of social inhibitions.

In sentencing psychotic offenders, the Court must satisfy two objectives. First, the needs of the offender must be accommodated. Again, the purpose of sentencing a mentally disturbed person is not to punish him for his actions, and general deterrence is not an important consideration. Instead, a sentence must be imposed which is tailored towards the accused's rehabilitation and cure.[136] However, in many situations the second objective, the protection of the public, will be of compelling importance. Violent or dangerous psychotics will have to be confined for their own good and for the safety of the public. In R. v. Draper[137] the accused, aged 19, met a fellow patient while undergoing psychiatric treatment and became involved with her. When the girl made an attempt to sever the relationship, he became extremely distraught and attempted suicide. The next morning he went to her home, entered without her knowledge and raped her at knife-point. Draper had a long history of psychiatric disturbance and a minor criminal record. Prior to sentencing, psychiatrists found him to be suffering from an underlying psychotic process and in need of psychiatric treatment in a secure place. At trial, he was sentenced to four months definite and nine months indeterminate. On appeal, however, since he was a danger to himself and to others, the Court increased the sentence to four years' imprisonment. A further example is found in R. v. Robinson,[138] where the Ontario Court of Appeal stated that emphasis must be on the protection of the public. This

may be accomplished by cure of the offender, so the sentence must be of sufficient length to ensure full treatment. If a cure is not possible, then the public must be protected as best possible and for as long as necessary. In view of these considerations, the Court upheld sentences totalling eight years' imprisonment, with psychiatric help to be made available during incarceration.

The mental condition of the accused may have very little mitigating effect where the Court is dealing with conduct which it considers most reprehensible. In R. v. Gillen (Hanoum)[139] the accused, a resident of the United States, travelled to British Columbia. She gained employment in a hospital, and befriended a woman in the maternity wing. Subsequently she visited the woman at her home, threatened her with violence, tied her securely, gagged her and stole her newborn baby. She then fled to the United States. Extensive psychiatric evidence indicated that her mental state was analogous to that of a psychotic due to loneliness and depression, from a "most unhappy and deprived life", loss of her children three years previously to her divorced husband, physical incapacity to bear children, her honest love for children, and excessive drug use, particularly of amphetamines. The Court of Appeal, taking the view that this case was of the very worst kind of kidnapping, upheld a sentence of life imprisonment. In the case of such a serious crime, the reports of the accused's mental condition would have very valid application and relevance to the National Parole Board but had little relevance to the propriety of the sentence under appeal.

Cases where dangerous psychotic offenders receive individualized sentences are extremely rare. One example, however, is the case of R. v. Gionet,[140] discussed in Chapter 3.C.i, "Mental Illness: As a Mitigating Factor."

c) Drug Dependency

Various studies have revealed a strong and direct link between criminal behaviour and drug addiction. While some psychologists claim that the myth that addiction spawns criminal behaviour is a self-fulfilling prophecy,[141] there is evidence that an overwhelming majority of addicts have criminal records.[142] Typical criminal activities engaged in by those suffering from drug dependencies are theft, robbery, vagrancy, breaking and entering (particularly of pharmacies), illegal gambling and, naturally enough, drug offences. While under the influence of drugs, a user may occasionally become reckless or violent resulting in suicide, murder or various forms of assault. Female addicts often resort to prostitution and shoplifting in order to support their habit.

In sentencing an addict, the Court will often find an individualized measure to be appropriate, and an attempt will be made to subject him to treatment. In R. v. Vasiliadis,[143] for example, the accused addict broke into a drug store by breaking the window with a concrete slab. Vasiliadis had a substantial criminal record, but the Ontario Court of Appeal reduced a sentence of nine months' imprisonment imposed at trial to time served (eight weeks) and 18 months' probation. While on probation he was to take treatment for his drug dependency. In reducing the sentence, the Court stated:

> We are not satisfied that the interests of general deterrence towards those who might be inclined to break and enter drug stores is to be given as much importance in this case as the need to rehabilitate the appellant and we are of the view that there now appears on the horizon, for the first time, some real reason to hope that if he maintains his resolve and behaves himself he can be rehabilitated as a useful member of society....

> We are not satisfied that his continued incarceration will have any effect towards relieving him of his craving for drugs and we are disposed therefore to give him the chance which is available to put an end to his predilection towards criminality with the object of furthering his drug habit.[144]

Recently, in R. v. Richards,[145] the Ontario Court of Appeal rejected the view held by the majority in an older case, R. v. Spicer,[146] that it is generally desirable to imprison an addict. In Spicer, the Court felt that incarceration was necessary since addicts inevitably turn to crime to support their habit and secondly, if an addict is removed from access to drugs, he may at least "attempt to make a decision with regard to his future". In response to these two assertions, the Court in Richards stated that:

> Both reasons given by the learned Chief Justice are, it seems to us, essentially different aspects of the same problem. If the addict can be cured of his drug dependency, either with or without incarceration, both aspects of the problem have been resolved.[147]

Many examples of individualized sentences imposed on drug addicts may be found. In R. v. Luther,[148] a female heroin addict was convicted of assault causing bodily harm. On appeal, the Court substituted a sentence of three months indeterminate for the 12 months' imprisonment imposed at trial, and added a period of one year's probation with the attached condition that Luther obtain treatment at the Drug Addiction Foundation. In R. v. England,[149] a 16-year-old glue sniffer was convicted of breaking and entering. The appeal Court reduced his sentence from one year's imprisonment to time served followed by two years' probation. The Court felt that it would be more conducive to England's rehabilitation and reform to impose a period of probation accompanied by treatment for his addiction to glue and other solvents.

In cases involving drug traffickers, however, the rehabilitation of the offender usually becomes a secondary consideration, and emphasis is placed on general deterrence. In R. v. Sabloff,[150] a 30-year-old female, convicted on two counts of trafficking in morphine, was sentenced to two concurrent terms of imprisonment of two years less one day. Although Sabloff had voluntarily enrolled in a rigid behaviour modification programme in order to attempt to overcome her heroin addiction, the Court noted that she had failed to complete a similar programme some years earlier, and imposed a tariff sentence.

d) Personality Disorder (Psychopathy, Sociopathy)

Personality disorders, such as psychopathy and sociopathy, are characterized by impulsive, aggressive, guiltless and often suicidal behaviour patterns dating from adolescence. The emotional abnormalities which plague those suffering from personality disorders are severe but usually do not involve the break with reality that is symptomatic of psychosis. Psychopaths find it difficult, if not impossible, to establish close relationships, tend to be suspicious, affectionless, show a clear disregard for community or social standards, and often a long record of anti-social behaviour.

Suicide is much more common amongst persons suffering from personality disorders than in the general population. Suicidal behaviour amounts to a direction of aggression or violence towards one's self and expresses "the individual's inability to adapt to the conditions of life".[151] Dangerous, unprovoked assaults and murder are also characteristic of persons severely afflicted with mental disorders of this kind. Sexual offences, often involving extreme violence and brutality, are not uncommon since the

psychopath feels neither anxiety nor guilt if he hurts someone else in the gratification of his aggressive impulses.

Generally, the most dangerous criminal offenders are psychopaths. (Dangerous offenders are discussed in Chapter 2, above). In sentencing such offenders, the Court may choose to impose a life sentence as an individualized measure, the offender being released when he is cured. The determinate parole ineligibility period will offer a certain measure of protection to the public in the meantime. In R. v. Kjeldsen,[152] for example, the accused raped a female taxi-driver at knifepoint. He tied her up, drove a short distance and attempted to abandon her. However, she was able to free herself and a fight ensued. He struck her several times with a rock and stuffed a stocking down her throat. Psychiatric evidence showed Kjeldsen to be psychopathic. In order to balance the need for treatment and protection of the public, a life sentence with the unaltered 10-year parole non-eligibility period was imposed.

If a psychopathic accused is not considered dangerous, a tariff sentence may be imposed with the mental condition considered as a mitigating factor. In R. v. Selamio,[153] the accused, who had a history of sexual offences, raped a woman using a minimum of violence. The two had been sitting on her bed playing cards, drinking, and smoking drugs. A psychiatric report indicated that he suffered from an explosive type of personality disorder with episodic behavioural discontrol. His deficiencies put him in a borderline psychotic state, and his behavioural controls would become further impaired with consumption of alcohol. After indicating that without mental disorder the appropriate sentence would be four or five years, taking into account 6 1/2 months served as remand time, Tallis, J. imposed a sentence of three years' imprisonment.

e) Retardation

Mental defectiveness, or retardation, has been defined as "a condition of arrested or incomplete development of mind existing before the age of eighteen years whether arising from inherent causes or induced by disease or injury."[154] Several degrees of mental deficiency exist. It may be noted that, unlike mental illness or insanity where the mind may become disordered after reaching maturity, the mental development of a deficient is stunted and intellectual maturity is not reached. The causal relationship between mental retardation and criminal behaviour is very slight: low mentality is not a paramount cause of delinquency. Mental deficiency does not directly make a person more likely to indulge in criminal behaviour, but a lack of education, failure to adjust socially, and ignorance of "social taboos" may result in anti-social conduct.

Three levels of mental deficiency are commonly recognized,[155] and the degree of retardation affects the typical behaviours engaged in by each group. Those with a mental age under three years are generally classified as idiots. Due to their severe mental handicap it is not surprising that they very rarely commit crimes. Persons in this category are often restrained and must be fed and cared for as children.

The second category, imbeciles, are also not in trouble with the law very often since they lack the intellectual capacity to plan crimes. Minor offences, such as indecent exposure, are not unheard of, but they are due more to a failure to appreciate social standards than a reflection of criminal intent.[156]

Feebleminded persons, those with mental ages somewhere between nine and 12, sometimes commit minor offences of a sexual nature or

those related to theft or vagrancy. Violent crimes or fraud-related offences are very rare among this group also. However, violence is not unheard of. In R. v. Ostrowski,[157] the accused, a defective with the mental powers of a 12-year-old boy, was under emotional stress at the imminent loss of his wife and home. He fired a shot at her, killing her instantly, and superficially injured his son with a second shot. The trial Judge accepted a plea of guilty to manslaughter, and heard evidence that psychological testing did not reveal any tendency toward habitual aggression or destructiveness. The sentence imposed at trial was 12 years' imprisonment, reflecting strongly the element of deterrence. The appeal Court found that, having regard to the accused's retardation and background, a sentence of eight years' imprisonment would not depreciate the gravity of the crime, and contained adequate elements of individual and general deterrence.

The effect of retardation in Ostrowski was to mitigate a tariff sentence.[158] This is often the effect of retardation in cases involving recidivists or violent crimes with grave results. In R. v. MacArthur,[159] for example, the accused set fire to a henhouse and $10,000 damage resulted. MacArthur was a slow learner who had reached grade 6 at age 17, had an I.Q. close to borderline and a mental age between 7 and 8. In all probability, he was "childish in his attitude to setting fires". On appeal MacDonald, J.A., for the Court, indicated that the sentence of four years' imprisonment imposed at trial was "not one [he] would expect to be imposed on a person who was nearly mentally defective". In view of the accused's intelligence and other factors, sentence was reduced to 2 1/2 years' imprisonment. Likewise, in R. v. Sabean,[160] the accused was aged 17, had a low intelligence level and was unable to read or write. He had forced a young girl into his car where he indecently assaulted her. The Court upheld a sentence of two months'

imprisonment followed by 18 months' probation on condition that he receive psychiatric treatment. The Court clearly stated that the accused's good record and his mental age of 12 were treated as mitigating factors.

Mental deficiency of the offender in appropriate cases may also move the Court to impose an individualized measure, rather than imposing a sentence designed to reflect his culpability. In R. v. Munn,[161] the accused stole a 3/4 ton truck in Nova Scotia and drove it to New Brunswick, where he was apprehended by the police following a "hit and run" accident. Damage exceeded $1,000. Aged 18, he had a criminal record extending back over two years. Following the laying of the charge he was remanded to hospital for observation. Psychiatric reports indicated that he was a mildly retarded individual (I.Q. 70) probably with temporal lobe epilepsy. His retardation probably had an organic basis as his mother had a difficult delivery and he was delivered by Caesarean section. He displayed no evidence of psychosis or thought disorder, but presented a management problem in that he was very demanding of attention and easily frustrated if his demands were not immediately met. His mild retardation in company with his inconsistent discipline and upbringing (his parents had neglected him for long periods) appeared to be responsible for his disruptive behaviour. The accused had in the past been found employment by his mother, but gave it up after four days. He had been evicted from a group home and from the Y.M.C.A. for bad behaviour, and had committed an offence while living at the Salvation Army hostel. Approximately one year previously he had been diagnosed as suffering from mild mental retardation and a sociopathic personality disorder. While in prison pursuant to a prevoius offence, he had been segregated for his own protection: he was very manipulative and there were few controls or limits on his behaviour. The Court of Appeal stated that in the absence of the mental

condition a penitentiary term would have been in order. However, in this case that course would not benefit the accused or society: it appeared that the accused was deteriorating mentally. He was therefore sentenced to six months' imprisonment in the County Correctional Centre, with a recommendation that he be psychiatrically examined with a view to transferring him to an institution for mentally incompetent persons..

In rarer cases, the Court will virtually ignore the mental condition of the offender and impose a tariff sentence along the usual guidelines. In R. v. Himmelspeck[162] the accused, a man of 34 with a relatively minor previous record, attacked a woman at night in a laundromat with the intention of stealing $10 from her. Her screams attracted two passers-by, and the accused ceased his assault. The accused began to leave but was told by the two men to return, which he did. The police arrived thereafter and assumed control. Himmelspeck was found to be mentally defective, with an I.Q. of only 63. He had no history of violence or propensity towards violence, and had never before served a term of incarceration. He had been awaiting trial for approximately seven months, in custody. The majority of the Court found that the above circumstances did not indicate that the accused was a person violent by nature. It was fair to suppose that one instance of violence did not necessarily mean that he was likely to re-offend. Despite a psychiatric report indicating that the accused had an organic brian dysfunction, a schizoid personality, and drank to excess, the majority virtually ignored the psychiatric aspect and imposed a term of three years' imprisonment in substitution for the trial term of three months, indicating that it was not out of line with sentences frequently imposed for a first offence involving violence, and that the accused's age and past history were factors favourable to him.

f) Schizophrenia

Schizophrenia, in a general sense, is characterized by a distortion or lack of contact with reality.

Schizophrenic disorders fall into four broad types. Hebephrenia is commonest among young people and is characterized by disorganized thought patterns and an inability to concentrate. Shallow depression, apathy and impulsiveness are also common symptoms. Often sudden flare-ups of intense emotions, such as anger or fear, will occur and in more advanced stages a person may experience hallucinations and delusions of grandeur or persecution.

Catatonia is a more acute form of the illness: a state of severe depression in which the sufferer is apathetic and intellectually inaccessible, often followed by a period of impulsive, frenzied hyper-activity. In the depressive phase, a person may lie still for a period of several weeks without talking, eating or doing anything for himself. In the frenzied state he may attempt suicide, try to mutilate his body or, if hospitalized, engage in unprovoked attacks upon nurses and visitors. Hallucinations and delusions, particularly of a religious nature, are common in this phase, and a person may act involuntarily upon commands issued by strange voices.

Paranoia, a variety of schizophrenia which is most common among middle-aged and elderly women, is characterized primarily by persecutory delusions. Paranoids are often aggressive, hostile, suspicious and may, as a result of their personality disorganization, suffer from delusions of grandeur or invincible powers. Persecutory delusions experienced by paranoiacs are often of a sexual nature so that a woman may constantly accuse her husband of infidelity, or imagine that the most innocent words are really indecent suggestions.

Apathy, withdrawal, detachment and a lack of animation are symptomatic of simple schizophrenia. Emotions tend to be shallow and lack of self-discipline or responsibility is common. Persons with mild symptoms may be able to remain at home but their behaviour makes it hard for them to hold a job and they may be led easily into crime. In more severe cases, the sufferer may be something of a social hermit, but exhibit sudden bursts of aggression which are often directed at family members. Overindulgence in sex or alcohol is common and a sufferer, in advanced stages, may experience delusions, hallucinations or hypochondria.

Many schizophrenics are not dangerous and commit crimes of a petty nature, such as theft. In such cases, the Court will often impose an individualized measure, usually involving a short period of incarceration accompanied by treatment and followed by probation. An example of such a disposition is found in R. v. DeCoste,[163] where the accused, aged 19 and of previous good record, was walking along a lane toward two young women. He asked them for a cigarette and was refused. He then proceeded to grab both girls by the breast. When they began to protest he walked away laughing. He was convicted on two charges of indecent assault and sentenced to 18 months concurrent on each. The psychiatric pre-sentence report indicated that he was schizophrenic, and had been admitted to hospital on two previous occasions. He had exhibited violent tendencies. His outbursts of aggression were not predictable. He was further handicapped by a low level of education, lack of skills and an absence of meaningful family ties. The Court of Appeal reduced sentence to three months' imprisonment followed by two years' probation, with conditions of treatment. In all the circumstances, the protection of the public could best be served by imposing a sentence which would ensure continuance of psychiatric treatment as soon as possible.

In cases involving more serious offences, where the offender is not considered as posing a continuing danger to the public, the Court may choose simply to impose a tariff sentence, but regard the accused's mental condition as a mitigating factor and acknowledge the need for treatment. In R. v. Menkes[164] the accused, a paranoid schizophrenic, was convicted on two counts of arson, one of possession of a weapon for a purpose dangerous to the public peace, and one of theft under. While he was certifiably mentally ill and required hospitalization, he was not a continuing danger to others. At trial he had been sentenced to seven years' imprisonment. Taking into account his mental illness and the fact that he needed protection from other inmates who were intolerant of him, the appeal Court reduced sentence to two years less a day definite and two years less a day indeterminate on each charge, to run concurrently. Likewise, in R. v. Johnstone[165] the accused was convicted of manslaughter. Aged 53, she was at home when her sister and the deceased, both of whom were drunk, pounded on the door. She told them to leave and threatened to shoot through the door. She then fired through the side of the house close to the door, hitting the sister's friend. Psychiatric evidence indicated that she was

> suffering from a schizophrenic illness of paranoid type which was characterized by grandiose and paranoid delusional ideas, misinterpretation of external events, hallucinations and possibly other abnormal experiences.[166]

Medication was being administered but the prognosis was uncertain. In view of all the circumstances, including absence of a previous record, absence of intention to shoot anyone, and the "pestering" of the accused's sister, as well as the psychiatric disorder, the Court imposed a sentence of 18 months' imprisonment followed by two years' probation. The Correctional Centre was further directed to provide any medical or psychiatric assistance that might be helpful to the accused.

- When the Court is dealing with a dangerous schizophrenic offender, a substantial term of imprisonment will often be imposed for no other reason than to segregate the offender from the public. In R. v. Osachie,[167] the accused pleaded guilty to five charges relating primarily to theft of ammunition and explosives from armed forces and limestone company premises. The trial Judge imposed a total of nine years' imprisonment and stated that:

> ... the circumstances reveal that this accused is a danger to society, and ... is a security risk for having so obtained such things as ammunition and dynamite ... and should be removed from society for a period of time for the protection of the society.[168]

The trial Judge did not have before him a psychiatric report indicating a long history of undue interest by the accused in guns and explosives, and diagnosing him as a paranoid schizophrenic in need of continuing psychiatric observation and help. In view of this the appeal Court substituted a term of seven years' imprisonment and stated that the trial Judge had overemphasized the element of deterrence, a consideration which is not important in sentencing mentally disordered offenders. The Court quoted with approval a portion of the Ouimet Report:[169]

> The overall views of the Committee may be summed up as follows: segregate the dangerous, deter and restrain the rationally motivated professional criminal, deal as constructively as possible with every offender as the circumstances of the case permit, release the harmless, imprison the casual offender not committed to a criminal career only where no other disposition is appropriate. In every dispostion the possibility of rehabilitation should be taken into account.

and expressed the hope that while Osachie was segregated from the public, the authorities responsible for his incarceration would make special efforts to ensure that psychiatric treatment be given to him.

As mentioned earlier, in cases involving dangerous offenders the Court may impose a sentence of life imprisonment as an individualized measure, its inherent flexibility allowing the accused to be released when he is "cured". In R. v. Woods and Gruener, Woods v. R.,[170] Woods and three others had been jointly indicted for the murder of a 12-year-old shoeshine boy, who was first indecently assaulted in the accused's bedroom by two of the three. Woods returned every 10 minutes or so. While he stood outside the door to the bedroom, another tried to strangle the boy. An argument ensued as to whether he was dead, so the two who had committed the assault put his head in a sinkful of water, where he drowned. Woods was convicted of second degree murder. The trial Court acknowledged the fact that Woods was dangerous and that he required psychiatric treatment. However, an 18-year minimum period was attached to the life sentence, to segregate him from the public for a determined period. Psychiatric evidence indicated that Woods was suffering from simple schizophrenia with paranoid and psychopathic elements. While he was of normal intelligence he was unconcerned with the welfare of others and had not developed any moral standards. He was a heavy user of drugs and had an uncertain sexuality. One psychiatrist suggested that he was asexual, while another felt that his sexual drive was subliminated to other drives, such as his desire for drugs. Woods also tended to submit to his own impulses without concern for others. On appeal against his parole ineligibility period, the trial disposition was left undisturbed. Although Woods had no prior record and suffered from a serious mental disorder, the public had to be protected.

g) Senile Dementia and other Age-Related Degeneration

Senile dementia and other age-related mental illnesses are organic in origin. Senile dementia is characterized by a systematic deterioration of the physical and mental capabilities of the victim. The tissues of the nervous system degenerate, resulting in lapse of memory, disorientation, confusion, and rambling, incoherent speech. These symptoms are also accompanied by an impairment of the powers of comprehension and concentration and various physical symptoms. Mental deterioration that is characteristic of senility is frequently found related to the commission of sexual offences of various types, particularly indecent exposure and assaults on young girls.

Sexual offences in elderly people may also be symptomatic of arteriosclerotic brain disease. This disorder may result in "persecutory delusions of a transient character, accompanied by explosive outbursts of rage".[171] Assaults of various kinds may be precipitated by this frame of mind but they are most often directed at family members and infrequently result in criminal charges.

In sentencing, such degenerative diseases are generally considered mitigating factors, but protection of the public is an important consideration if the offence is a serious one. In R. v. Boyd,[172] the accused was convicted at trial of murder, but on appeal a conviction for manslaughter was substituted. A psychiatric report showed that from age 60 onwards (he was almost 76 at this date) narrow, obsessive compulsive thought patterns had controlled the accused's behaviour in increasing degrees. Any break in his organization resulted in explosive, poorly directed, aggressive outbursts. He would have great difficulty in living in society with any degree of flexibility, but functioned well in the prison environment.

> The predominant aim of sentencing in the unusual circumstances of this case is the protection of the public by providing the necessary degree of control over the appellant without imposing on him any greater deprivation of liberty than is necessary to achieve that aim. The factors of general deterrence and societal denunciation of the crime are ... not predominant in the particular circumstances of this case.[173]

Taking into account the six months of pre-trial custody and 18 months of imprisonment served following the original conviction, the appeal Court imposed a sentence of four years, to commence from the date of the appeal decision.

h) Paedophilia

Paedophilia involves the use of a child to achieve sexual arousal or gratification, usually by touching or oral contact. While paedophilic behaviour is engaged in by adults of both sexes, social and cultural determinatives have made such conduct primarily the domain of "deviant men" who are impotent or have other difficulties in relationships with adult women.[174]

In sentencing paedophilic offenders, the Courts primarily emphasize the elements of treatment, denunciation and sometimes incapacitation. Individualized measures will be tried wherever possible, especially for first offenders. In R. v. Doran[175] the Ontario Court of Appeal stated that since paedophiles suffer from a form of mental illness, deterrence is not an important consideration. The Court reduced a punitive sentence of 12 months definite and six months indeterminate (concurrent on each of two charges of indecent assault on students) to time served and two years' probation. Doran was a competent school teacher who, prior to the

commission of the offence, had voluntarily commenced treatment for his paedophilic tendencies. The appeal Court ordered mandatory psychiatric treatment during Doran's period of probation and stated:

> If such treatment outside the prison is likely to effect such a cure, ... we think that it is in the general interest of society to have him treated rather than imprisoned.[176]

The Court was quick to point out, however, that if the accused were to repeat this sort of offence, he would be dealt with quite differently since it would then be demonstrated that the public welfare would best be served by segregating him from society.[177]

A decision involving a repeated offender was made in R. v. Pammer.[178] The accused was working as a painter in the home of a 3-year-old child. While her mother was in another room he put his hand inside the child's panties. He was convicted of indecent assault, and a sentence of six months' imprisonment and a year's probation was upheld on appeal.

In the majority of cases, even involving first offenders, an element of denunciation will be combined with the individualized treatment in order to reflect society's abhorrence at sexual offences against children. In R. v. Beaudin[179] the accused, who had severe personality problems, forced his 5-year-old daughter to perform acts of fellatio and submit to cunnilingus. He threatened to throw her over a cliff if she told anyone. Several similar incidents followed. The appeal Court substituted a term of nine months' imprisonment for the fine and suspended sentence imposed at trial, on the ground that the trial Judge's disposition had not adequately reflected the need for general deterrence. Furthermore, the Court felt that a crime of such a serious and abhorrent nature required a custodial sentence.[180]

Protection of victims is also an important consideration in sentencing paedophiles, although such considerations generally call for incapacitatory, rather than deterrent, sentences. An apparent departure is the decision in R. v. McKeachnie,[181] where the accused took a 9-year-old girl into the men's washroom at a public arena, put his hand on her stomach and attempted to pull down her pants. The child escaped. At trial, McKeachnie was convicted of indecent assault on a female and fined $150. On appeal, however, the Court substituted a term of six months' imprisonment to be followed by probation for two years. Howland, J.A. stated that the "deterrent factor must be the primary consideration in the interests of the protection of the public, and particularly of young children".[182]

The more usual, incapacitatory from of protection of the public was emphasized in R. v. Mochon.[183] The accused was found guilty of four counts of indecent assault on girls aged 10 to 13. The acts were described as "highly imaginative, bizarre and grotesque". Mochon had a lengthy record involving several sexually motivated offences, and suffered from a form of behaviour disorder. While he was not violent, a sentence of 18 months, consecutive on each count, was upheld on appeal since a substantial custodial sentence was required for protection of the public.[184]

Incapacitation will be a particularly compelling aim where the accused presents a continuing "danger" to young children, and the prognosis for cure is poor. In R. v. Mitchell,[185] the accused picked up a boy, aged 9, took him to a dirt road and began to choke him. He released his grip at the last moment, after a blood vessel had burst in the boy's face. Seven months later, he took an 11-year-old boy, wrapped a cloth around his neck, and applied pressure. Again, the boy suffered a burst blood vessel in his eye and severe neck abrasions. He then threatened to kill the boy unless the incident

was covered up. Mitchell was found to be suffering from homosexual paedophilia with strong sadistic tendencies. As he presented a continuing danger, particularly to male children, and had only a slight potential for successful treatment, a lengthy penitentiary term was called for. A sentence of five years' imprisonment was substituted on appeal for the 14 months imposed at trial.

D. PHYSICAL HEALTH

i) In General

Poor physical health or serious medical complications suffered by the accused when considered, are almost invariably taken into account as mitigating factors. While such difficulties will rarely of themselves indicate that an individualized, as opposed to a tariff, sentence is to be imposed, substantial reductions in tariff sentences are frequently allowed to take account of the additional hardship which penal sanctions impose on such offenders. Reported cases since 1970, with one exception, have indicated the propriety of reducing prison sentences, imposing non-custodial sentences where jail terms would normally have been appropriate, and making concessions with respect to time for payment of fines.

Reduction in a custodial sentence is exemplified in Campeau v. R.[186] The accused, convicted of municipal corruption, was sentenced at trial to four years' imprisonment. The Quebec Court of Appeal reduced this sentence to 18 months, basing its decision upon the deterioration of the accused's health and the fact that this would make detention more difficult for him than for a man in good health. Similarly in R. v. Boudreau[187] the

Court acknowledged the propriety of such action. The accused, aged 59, was sentenced at trial to 12 months' imprisonment on convictions of influence peddling and conferring benefits on government employees. At the appeal, further evidence was led as to his poor mental and physical health. In particular, he had arteriosclerosis, and there was a possibility that if sent to jail he might lose all hope, fail to respond to treatment and die. The Court, considering a number of strong mitigating factors, thought that the most important of these were the mental and physical health of the accused. However, as the sentences imposed by the trial Judge already indicated that he had taken into account the health of the accused as a mitigating circumstance, the appeal against sentence was dismissed.

A number of provincial appeal Courts have approved refusals to implement jail sentences, where they would otherwise have been proper, in light of medical difficulties. In R. v. Doyle et al.[188] the accused Weyman was convicted of possession of hashish and possession of LSD for the purpose of trafficking. The Court noted that he had a very serious liver ailment resulting from the use of dirty hypodermic needles to inject LSD. This was probably a permanent condition. On purely compassionate grounds, because of the accused's state of health, the Court did not consider that it should impose a jail sentence. Instead, a fine was imposed. In R. v. Knowlton[189] the Newfoundland Court of Appeal approved the use of a fine for an offence of dangerous driving. In upholding the trial Judge's disposition, it took into account in particular that it would be harsh to imprison the accused in view of his physical condition: he was aged 60, diabetic and suffering from angina.

A further case which effectively falls into this category is the Quebec Court of Appeal's decision in R. v. Therrault.[190] The accused had been convicted in mid-1977 of defrauding the public of over $13,000. The

offence had occurred in September and October 1969. The charge was laid in 1970, and the trial started in April 1971. The case was adjourned 33 times in the ensuing six years. Eight adjournments resulted from illness of the trial Judge, seven from serious heart attacks suffered by the accused, and still others from requests by the Crown. The accused was under constant medical care, unable to work and on welfare. The stress of the proceedings had contributed to his condition. A sentence of six months' imprisonment and a fine of $2,000 would ordinarily have been correct. However, in view of the accused's health and the strain under which he had lived for so long, sentence could be mitigated to one day's imprisonment and a year's probation.[191]

In R. v. Gregoire[192] the Quebec Court of Queen's Bench had before it an accused convicted of tax evasion. While the only extenuating circumstance was the state of his health, the Court held that this could be taken into account in determining the delay which would be allowed to pay the fine imposed.

In the matter of custodial sentences, it seems logical that the Court should make allowance where poor health makes service of a sentence of imprisonment more difficult for the accused. Other things being equal, the relative proportions of parole and remission for offenders in good and poor health will be equal. Nevertheless, in R. v. Bulleyment[193] the Appeal Court refused to disturb a sentence of nine years' imprisonment imposed on an accused convicted of trafficking in methamphetamine, holding that the accused's poor state of health (not elaborated) was more properly a matter for the consideration of the Parole Board.[194] It is submitted that this case is out of line with both logic and the overwhelming weight of persuasive authority, and should be overruled at the next available opportunity.

ii) Alcoholism

The role which alcoholism plays in crime is notorious.[195] For the purpose of the present discussion, a distinction is to be drawn between cases where the accused, being an alcoholic, is sentenced with that fact in mind, and cases where alcohol merely contributed to the commission of the offence. The latter type of case is discussed later.[196]

Alcoholism, rather like mental illness, may manifest itself in different roles as regards sentence: it may, occasionally, be merely an aspect of the offender which requires consideration. More frequently, alcohol dependency and the abuse of alcohol play a large part in putting the offender into the state in which he commits the offence, or in motivating the offence. Perhaps not surprisingly, liquor stores seem to be favourite targets of alcoholic offenders with a disposition toward breaking and entering.[197]

The need to treat an alcoholic offender frequently plays a predominant role in indicating that an individualized measure is in order. An example is R. v. MacDougall[198] where the accused, aged 26, was convicted of break, enter and theft. While under the influence of liquor he broke into a store and stole gloves and cigarettes. It appeared from the pre-sentence report and his counsel's remarks that his criminal history was largely alcohol-influenced. Any hope of rehabilitation lay in overcoming his alcohol problem. Sentence was therefore reduced from two years' imprisonment in a federal penitentiary to 15 months in the Cape Breton County Correctional Centre, which had available facilities for treatment of alcoholism. In R. v. Beauvais[199] the accused was convicted of breaking and entering a store, and taking nine or 10 cases of beer. He had three prior convictions which had resulted in a fine and probation. A sentence of one year definite and one

indefinite, as imposed at trial, was held to be disproportionate. Sentence was reduced to time served, followed by one year's probation. In light of a psychiatrist's recommendation of treatment for alcoholism, a term was included that the accused attend at an outpatients' clinic for treatment if so required by an institution or his probation officer.

As is the case with mental illness,[200] it should be noted that an inflated period of imprisonment cannot be imposed merely in order to secure treatment of alcohol dependency. In R. v. Harvey[201] a 17-year-old first offender broke into the premises of the Liquor Commission on two occasions and stole liquor. She had a serious drinking problem, and was also a user of drugs. She had been living away from home, as her parents were separated, and she had been keeping company with "the wrong type of people". At trial she was sentenced to two years' imprisonment as facilities for treatment were not available in Newfoundland. On appeal this sentence was held excessive, and reduced to three months' imprisonment followed by two years' probation.

It will be noted that in the above cases the Court was clearly convinced that there was at least a possibility of treating the accused's alcoholism. Where, however, the Court is not so convinced and the additional factor exists that the accused becomes dangerous under the influence of alcohol, then the principles applicable to dangerous offenders in general may be applied. Two recent decisions of the Ontario Court of Appeal illustrate. In R. v. Empey[202] the accused was sentenced at trial to eight years' imprisonment on conviction of manslaughter, following his plea of guilty thereto on an indictment charging first degree murder. Aged 40, he had been drinking heavily at the time of the offence and was also under the influence of phencyclidine. His history showed a lengthy criminal record including

many convictions for crimes of violence. He had been addicted to alcohol over a prolonged period, but had not responded to repeated efforts at treatment. There was considerable medical opinion that he presented a serious danger to himself and to society when under the influence of alcohol. He was capable of extreme violence, and in the previous year his probation and parole officers had concluded that unless his addiction were cured he would continue to be a danger to himself and to the community. The Court was unanimously of the view that a sentence of eight years' imprisonment did not adequately protect society from him. Accordingly, it was increased to 12 years' imprisonment. In R. v. Carey[203] a 52-year-old accused coerced a female into his car, drove to an isolated spot and commenced a sexual attack upon her. He pleaded guilty to offences of attempted rape, attempt to render insensible, and assault causing bodily harm. The trial Judge imposed a sentence of two years less a day definite, two years less a day indeterminate, and three years' probation. The accused had a record of serious offences dating back to 1951, and a pattern of alcohol abuse and sexual misconduct appeared. There was repeated evidence that he might be a "danger to the public, and particularly women" if he was at large without some check on his alcohol consumption. Also, medical evidence suggested that urges and drives such as those shown in the behaviour of the accused tend to diminish as a person enters his late 50s and early 60s. Although the sentence imposed at trial was illegal, the Court held that the trial Judge had been correct in regarding the offences as serious and in attempting to impose a long period of control. A term of six years' imprisonment was substituted.[204]

E. POSITION OF TRUST

> It has long been established that the most important principle in sentencing a person who holds a position of trust is that of general deterrence.[205]

So spake the Chief Justice of Ontario as recently as 1978. His words summarize the overwhelming consensus of innumerable Canadian judges who have been called upon to sentence unworthy employers, bank managers, lawyers, physicians, policemen and many others over a long period. To place the law in the context of the individualization/tariff analysis, breach of a position of trust will almost invariably call for a tariff sentence, may disentitle the fallen person to the benefit of mitigating factors, and will almost certainly disallow any credit for the good reputation which led to his elevation to that position. In some cases, as will appear, it is only abuse of the position which will lead to such aggravation. In others, merely holding the position will aggravate any criminal conduct, committed in the course of duty or otherwise.

Who is in a position of trust? The Courts have rarely been called upon to discuss this question in the abstract. Rather, a number of well-established categories, outlined below, has been established and the common practice of the Courts is to acknowledge, frequently without reference to authority, that the particular accused falls into a class generally held to constitute a position of trust. An exception is the Newfoundland decision in R. v. Sullivan.[206] Sullivan, a maritime entrepreneur, was in the business of supplying fishing gear. He was convicted of defrauding the government by submission of invoices, inflated by some $83,000, to a subsidy programme. Before the appeal Court, counsel for the Crown argued that the trial Magistrate had failed to give consideration to the accused's breach of trust,

consequently imposing a sentence that was inordinately low. Contrasting R. v. Rodgers[207] and R. v. Warner[208] in which the accused were, respectively, a welfare officer and a bank manager, the appeal Court held that the accused in this case was not in a position of trust. He was in the same position as any other businessman who had dealings with the government.

> The fact that he was able to benefit from his unlawful acts, because of the Department's failure to satisfy itself of the validity of the invoices presented, does not justify a finding that he was in breach of trust by presenting inflated invoices.[209]

The established categories, as confirmed over the last decade, will now be discussed individually.

i) Employers

In R. v. A.[210] Haines, J. suspended sentence on an accused convicted of indecent assault on a female employee, in view of particularly exigent circumstances. He pointed out, however, that:

> This accused as an employer owed a duty to his female employees. If another employee or an intruder attacked a female employee, the employer would be expected to come to her defence. How much more must an employer restrain his own impulses for the protection of his female employees, especially where their duties often bring them in close bodily proximity, often alone. Employers have a position of trust. They owe it to their employees and it is expected they will discharge it not only by the female employee herself but also by the members of the family who permit them to work there in confidence.[211]

ii) Financial Managers

The general deterrent purpose in sentencing is uniformly stressed by appellate courts considering the sentencing of accused persons who abuse

a position of financial trust. This principle applies not only to persons employed by finance companies and banks, but also to those trusted with the management of funds for other organizations. In R. v. Gorman,[212] for example, the accused was treasurer of the Ottawa Professional Fire Fighters' Association Sick Benefit Fund. His breach of trust in diverting over $16,000 to his own use was held to call for the imposition of a substantial sentence as a deterrent to others so placed. The trial sentence, imprisonment for 12 months definite, plus six months indeterminate, was therefore varied to two years less one day definite and one year indeterminate. Similarly, in R. v. Smerek[213] the accused was employed by a hospital. His responsibilities included processing cheques. In a period of just over one month, he defrauded the hospital of over $5,600 by issuing payments to a fictitious person. Convicted of fraud, he received a suspended sentence at trial. Notwithstanding an impeccable background and full resititution, the appeal Court felt that the sentence entirely failed to reflect the principle of general deterrence, and increased it to nine months' imprisonment. In R. v. List[214] the accused was a long-time employee in the special contracts division of a company. He had wide authority and produced numerous, large and profitable contracts for his employer. However, he defrauded it of approximately $53,000 and another company of an amount exceeding $200. In increasing sentence from three months' imprisonment to nine, the Court held that having been entrusted with wide responsibilities by his employer, the accused was in a position of trust. Again, it was stressed that the most important principle in sentencing persons in positions of trust is that of general deterrence.[215]

A finance company employee came before the Court for sentence in R. v. Hurtubise.[216] He was convicted of obtaining credit by fraud, having

made loans to himself under fictitious names. Virtually all of the payments on the loans were made on time, and the employer suffered no loss. The accused had found new employment, remarkably, with another finance company, and had a good reference from his new employer. He had been elected to the board of an internationally known air show, a very responsible position. Rehabilitation was clearly not required. However, it was held that a discharge should not be granted as the public was entitled to know that the accused, while holding positions of trust, had surreptitiously abused that trust on two occasions. Sentence was suspended for two years. Hurtubise appears almost to be a departure from principle in one respect: that almost invariably, financial managers who abuse their position are sentenced to substantial terms of imprisonment. However, the lenient sentence imposed may perhaps be justified by reference to the fact that the employer in this case had suffered no loss.

Not only trust to the charge of money, but also reliance upon the accused to take care of valuable objects, will create a position of trust. In R. v. Freedman[217] the accused was general manager of a music centre, and became involved with the Allied Arts Council in his community. He took advantage of this position to instigate and plan the theft of items, including paintings to a value of $8,000,- from Algoma University College. The paintings had once been loaned by the University to a city for display, which had been sponsored by the Arts Council managed by the accused. The trial Judge stated:

> As highly regarded and trusted as he was by those who have testified to this and by others he took advantage of the prestige of his position and of the trust placed in him and of his associations to commit a crime that would hurt the very purpose of the worthwhile causes of the artistic groups and society of this city and in this position he probably thought he would never be suspected of the

> commission of this offence. He betrayed both those who trusted him and the purpose of his efforts with all of the group he was associated with.[218]

The appeal Court held that this fact, and the fact that the accused had been the instigator of the events, were sufficiently aggravating factors to justify his receiving a more severe sentence than his co-accused.

iii) Lawyers and Judges

Elevation to the coveted status of lawyer carries with it a double prejudice, should the legal mind be turned to breaking the law instead of assisting in its administration. Not only will the lawyer who abuses that position be severely dealt with should he come before the Courts, but should he commit an offence essentially unrelated to his law practice, the Court, acutely aware of the need to uphold the image of the lawyer in society, may be expected to deal harshly with him.

The most commonly reported type of lawyerly misbehaviour involves practitioners who divert money from their trust accounts. The authorities conflict as to whether a lawyer who breaches his financial trust should be treated more severely than others in positions of financial responsibility who likewise take advantage of their appointments. The view that the lawyer should be treated similarly to other trustee defaulters was taken in R. v. Ryan.[219] Ryan, a member of the Alberta Bar, stole over $2,000 from his firm's trust account in an impulsive attempt to save his marriage. On Crown appeal against a suspended sentence, his counsel argued that disbarment itself had been a severe punishment. The Court stated:

> The wages of a breach of trust are severe, but this must be so in order to contain the offence. A great deal of confidence has been reposed in the legal profession by the

> public and by the Legislature; they are entrusted with large sums of money and with large matters where integrity is most necessary. It is imperative the reputation of the profession be maintained and, although I do not think a longer prison sentence is called for than in other similar cases of the misappropriation of trust funds, it must be made clear that a lawyer receives no more favorable treatment than the general public.[220]

In R. v. Oliver[221] a similar argument with respect to disbarment was put forward. Oliver had converted over $300,000 to his own use from his trust account. The Court disregarded his submission, and pointed out that the law in question, s. 296 of the Criminal Code, applies to all trustees. The penalty varies according to the circumstances, one of which here was that the trustee was a lawyer. This was an aggravating factor due to the need to uphold the integrity and reputation of the legal profession.

The question of which of these interpretations is correct in principle depends upon one's view of the legitimacy of taking the need to uphold the integrity and reputation of the profession into account as a factor in sentencing recalcitrant lawyers. If it is, as Oliver would suggest, an additional consideration applicable only to the legal profession, then indeed it will be an aggravating factor indicating the need for a more severe sentence than those imposed on mere trustees convicted of similar breaches of trust. If, however, there is a commensurate need to deter both lawyers and other trustees from abandonment of their principles, then the aggravation involved in an unlawyerly breach of trust will be no greater than that in a simple breach of trust. Indeed, in view of the added punishment of disbarment, it is arguable that a lesser deterrent effect would be required from the sentence imposed.

An indication of the extent of aggravation may be gleaned from R. v. Tober.[222] Tober received two cheques, $200 for professional services

and $7,000 for the purchase price of a client's property. He deposited the cheque for $7,000 in his personal account and spent it over the following months. At the time, he was under investigation by the Law Society and could not draw cheques on his clients' accounts without the signature of an official of that body. Notwithstanding his previous good character and a medical problem which may have had some bearing on his actions, the appeal Court felt that a sentence of six months' imprisonment did not reflect the serious nature of an offence committed by an officer of the Court. A sentence of 18 months' imprisonment was substituted, a probation term with restitution continuing as imposed at trial. In R. v. Klymkiw,[223] the extent of aggravation was further discussed. The Manitoba Court upheld concurrent sentences of two years' imprisonment imposed on a lawyer convicted of theft and breach of trust. The Chief Justice stated:

> Emphasis is placed on the accused's status as a lawyer, as a person therefore in whom the public reposes trust. I agree that this is a relevant point. But I do not agree that because the accused is a lawyer he must face a serious penitentiary term if he falls from grace. Each case will depend on its particular facts.[224]

In the course of their work, lawyers are routinely entrusted not only with clients' money, but also with confidential information. An abuse of this information will, equally attract severe censure from the Court, as indicated by the judgment of MacKeigan, C.J.N.S. in R. v. Morrison.[225] The accused, a Nova Scotia lawyer, was in serious financial difficulties and planned frauds totalling nearly $50,000. In the course of his attempt to defraud one corporate victim, he used information obtained while he was acting for it. However, the corporation did not lose any money. His counsel argued that his offences were not committed qua lawyer. This suggestion was rejected by the Court. The Chief Justice added:

> Furthermore, even had no client been involved, we must especially denounce crimes of fraud and forgery committed by a member of the Bar, a sworn officer of this Court. Such a man has a special duty. We must deal with a breach of that duty temperately, mercifully and without undue righteousness, but at the same time firmly and to warn others.[226]

Other offences which lawyers may commit in the course of their activities include the payment of bribes (perhaps in overzealous pursuit of a client's interests) and contempt of Court. An example of the former instance is R. v. Atkinson (No. 2).[227] In sentencing a lawyer convicted of "corruptly paying a reward" contrary to s.383(1)(a)(i) of the Criminal Code, the New Brunswick Court stated that the accused should have been fully aware that his actions were illegal. "The criteria used in sentencing a member of the legal profession should not be or even appear to be, different from that [sic] considered appropriate to the public at large." In this case the Court felt that an absolute discharge would be inadequate and contrary to the public interest, and imposed a fine of $10,000 with 6 months' imprisonment in default. In Re Papineau; R. v. Varin[228] the accused lawyer was cited for contempt of court, found guilty, and sentenced to two days' imprisonment plus a fine of $1,000. Aged 25, he was a member of a law firm which was representing an accused in a jury trial. During that trial, he met a young lady who was sitting as a juror; they discussed the testimony of a Crown witness. The woman was discharged as a juror. After her dismissal, the accused again contacted her and discussed the case. The Superior Court held that he had been guilty of one of the most serious acts of contempt, in that such acts destroy the very basis of one of our sacred democractic institutions. Interestingly, the Court took note that while his status as a lawyer, whose role was to maintain the law, was an aggravating factor, the aggravation was mitigated by the fact that the accused was a young lawyer, newly admitted

to the Bar, who acted through inexperience and stupidity, rather than through hope of benefit or for a deliberate unlawful purpose. Nevertheless, the Court averred, society must make an example of those who abuse its trust. It must show that justice does not spare the wealthiest, and that protection of society may be provided through exemplary dissuasion and stigmatization.

Less frequently reported are cases in which an accused lawyer has committed an offence other than in the course of his duties. Two clear examples, indicating the Court's concern that lawyers serve as "a model for all their co-citizens",[229] are R. v. Joanisse[230] and Desmarais v. The Queen.[231] In Joanisse, the accused lawyer attacked two policemen who came to his home to arrest him in connection with driving offences. In sentencing him to one day's imprisonment, a fine and probation, the Court took into particular account that his status as a lawyer made a breach of the law all the more serious. His role in society compelled a need for exemplary behaviour. Desmarais involved a Quebec lawyer who was convicted of taking part in a riot. He was sentenced to four months' imprisonment, fined, and placed under a peace bond. In upholding this severe sentence, the Quebec Court noted that he was an "avocat" at the Montreal Bar. Because of this, his offence constituted a defiance of authority.

Fortunately, in keeping with the dignity of the office, Judges rarely come before the Courts charged with serious criminal offences. One reported exception, which establishes that when they do they are to be treated in light of their prominent public position, is R. v. Gregoire.[232] The Quebec Court of Queen's Bench, increasing sentence on an accused convicted of tax evasion, took into account, inter alia, "the social ranking of the [accused], who holds, amongst others, the position of Judge of the Municipal Court...".

iv) Other Court Officers

In R. v. Dickey[233] a clerk of the Montreal Municipal Court was convicted of bribery, conspiracy and forgery. He had altered official records of the Court. While not interfering with the sentence of a fine, 45 weekends' imprisonment and 2 years' probation, the Court stated that the offences were extremely serious. "The offences are grave enough in themselves, but when committed by an officer of a Court with a view to impeding the course of justice, they are even more reprehensible."

v) Police Personnel

Like lawyers, policemen who commit offences are liable to be subjected to exemplary sentences whether their misdeeds take place in the course of their duty or away from police activities.

In R. v. Cusack,[234] the accused policeman stopped a motorist and asked for his licence. The motorist handed over his whole wallet and Cusack removed $425 before returning it. At trial he was sentenced to one day in jail and 24 months' probation. On Crown appeal, sentence was increased to nine months' imprisonment. Referring to the unanimous finding of numerous courts that sentences imposed on policemen should be more severe than those set for ordinary persons who commit similar offences, the Court gave two justifications for this policy. First is the position of public trust held by a police officer; secondly, a policeman certainly will have full knowledge of the consequences of his perpetration of the offence.[235]

In keeping with the principle that an exemplary sentence disallows consideration of at least some mitigating factors, the case of R. v.

Kwasowsky[236] clearly indicates that a good previous record is not to be considered in the case of a criminal policeman. Indeed, there is some suggestion that the longer a policeman's service, the more culpable he will become if he commits a serious offence. In Kwasowsky, the accused and an older officer had participated in the sale of heroin, stolen from police seizures, back into the underworld. Kwasowsky received a three-year sentence at trial, while his companion received a 10-year sentence. This was a principal ground in the Crown's appeal against Kwasowsky's sentence. The Quebec Court of Appeal refused to interfere:

> [Translation] ... [The co-accused] entered the service several years before Kwasowsky. It is reasonable to conclude that he had a certain influence upon his younger companion ... It is also true that Kwasowsky ceased his criminal activities before the conclusion of the second sale ... ".[237]

An isolated exception to the principle espoused in the foregoing cases appears in the Prince Edward Island Court of Appeal's decision in R. v. Griffin.[238] Griffin, in the course of an arrest assaulted a prisoner causing him to lose an eye. The trial Judge suspended sentence for two years. The appeal Court substituted an absolute discharge, to enable Griffin to regain his former employment. While this decision may appear to be in conflict with the overwhelming majority of cases dealing with offending police officers, it may be distinguished on the basis that Griffin's crime was committed in over-zealous pursuit of his official activities, rather than in direct contravention of them.

Decisions regarding police officers who commit offences outside the course of their duty demonstrate that the principle of exemplarity is to be applied to a wide variety of criminal activities. In R. v. Pretty,[239] the accused, a member of the Royal Canadian Mounted Police, was convicted on

two counts of fraud. He had endorsed signatures on the backs of cheques, and defrauded the Province of a total of $235. In sentencing him to concurrent one month terms of imprisonment on each of the two charges, plus fines of $250 on each, Nicholson, J. emphasized the role of the second rationale in Cusack:[240]

> The appellant was a trained and experienced policeman who must have fully appreciated the enormity of his crime.[241]

The importance of general deterrence toward persons in positions of public trust, conversely, was emphasized by the Nova Scotia Court of Appeal in R. v. Auger.[242] As Auger had breached the public trust reposed in him due to his membership of the city police force, a sentence of three months' imprisonment for breaking and entering a closed-up summer cottage was upheld.

Where a policeman uses his knowledge of the criminal justice system in an attempt to avoid criminal liability, having already committed one offence, the offence is further aggravated. In R. v. Jackson,[243] the accused was a 38-year-old policeman with an excellent record. He struck and killed a 15-year-old girl while driving on the highway. Instead of reporting the accident, he left the scene and attempted to avoid culpability by reporting his car stolen. The trial Judge was upheld in his statement that

> ... you were an officer sworn to uphold the law and to enforce the law ... there is a greater degree of moral fault, of moral turpitude, in that you have betrayed the trust which was imposed in you by the public.[244]

The Court further held that the trial Judge could properly have emphasized the additional feature that the offence was aggravated, and the accused further breached his police duty, by the attempt to conceal his complicity in the offence.

vi) Medical Practitioners

In relation to the criminal law, doctors and pharmacists have a unique privilege: that of dispensing drugs which would otherwise be illicitly trafficked. Any abuse of this privilege will be treated severely, as indicated by the decision in R. v. Burke.[245] Burke, a physician, was convicted of trafficking in narcotics, commonly known as morphine and demerol. The trial Judge sentenced him to 10 months' imprisonment, considering that he had breached a professional trust — that is, the privilege of dispensing controlled and restricted drugs to patients under treatment. The appeal Court, approving the trial Judge's philosophy, upheld the sentence.

Although there appears to be no recent Canadian authority on the matter, it is also reasonable to postulate that a doctor who criminally took advantage of his confidential relationship with a patient, or abused his control over those in his care, would be regarded as having breached a position of trust and sentenced in light of that consideration.

vii) Parents and Others in Loco Parentis

Both parents and others in positions of control over young persons are severely punished if they abuse this trust. In R. v. Cudmore[246] a 4-year-old girl was taken to the hospital in critical condition, unconscious and covered with bruises. After a lengthy trial the accused, her father, was placed on probation for three years. The Judge was of the opinion that the injuries were, in large part, caused by a woman with whom the accused was living. In substituting a term of imprisonment for one year, the Court noted that the accused was present and permitted the grave injuries to be inflicted.

> Little children are entitled to look for protection to their parents and to those to whose care they are entrusted, and brutality of the kind involved in the present case cannot and will not be tolerated.[247]

Similarly in R. v. Wood,[248] offences of gross indecency and buggery with the accused's 9-year-old stepdaughter were held to require a prison sentence as a the behaviour was "flagitious". The accused was in a position of trust toward the child, who had no defence against a person with parental authority over her.

School teachers, the classic example of persons in loco parentis, are also liable to be punished on this basis. The only case reported in recent years is R. v. Couture,[249] where a teacher received a particularly severe sentence for trafficking drugs to students. A similar position, however, is that of the scout master or youth leader. In R. v. Webster[250] the accused scout master sexually assaulted young boys aged 9 and 10 who came to his house in pursuance of cub scout activities. Notwithstanding many mitigating circumstances, the Court held that a custodial sentence should have been imposed, to reflect the gravity of the offences and the public abhorrence of such conduct. The gravity of the acts was aggravated by the accused's breach of the trust placed in him by the boys' parents.

viii) Others

A decision which falls into no special category is that of the Quebec Court of Appeal in R. v. Savard.[251] The accused, a taxi-driver, raped a passenger late at night. The incident lasted over a period of almost two hours. The Court held that taxi drivers occupy positions of trust. Citizens must feel safe in hailing cabs, especially at night when this might be

the only means of transport. That by itself warrants sentencing so as to deter others.

F. NATIONALITY

It seems unanimous among the authorities that nationality is a factor which may not be considered in sentencing. In R. v. McNaughton,[252] the appeal Court refused to accept that an American citizen should be treated less severely than a Canadian in a Canadian court, despite his impending deportation. Similarly, in R. v. Haran,[253] in sentencing an accused convicted of possession of marijuana for the purpose of trafficking, Anstey, Mag. stated:

> It makes no difference in this case whether you are from Newfoundland or from another Province of Canada, or in your case, from the community of St. Pierre, Republic of France ... the Court must sentence in line with sentences elsewhere in Canada....[254]

G. STATION IN LIFE

While the financial means of an accused may persuade the Court that a fine should be reduced so that it is not unduly onerous, there is no converse principle that the rich man should be fined more severely than those less successful in their pursuit of affluence. Insofar as possession of liquid capital may be equated with "class", then it is also true that a higher social status will not permit the Court to impose a disproportionately high penalty. These principles were elaborated in the decision of Feehan, D.C.J. in R. v. Wells.[255]

> It is considered to be unfair that different people living within the same community, having committed the same

> offence under the same circumstances, should be treated differently. Furthermore, income alone is not a fair yardstick to measure the relative effect of the punishment.
>
> The law has always accepted the principle that the poor should not be fined in excess of their ability to pay so that a fine becomes tantamount to a jail sentence. However, the law has never accepted as principle that the rich should be more severely punished merely because they are more able to pay.[256]

An extension of this principle was applied in R. v. Johnson.[257] The accused was convicted at trial of impaired driving, and sentenced to seven days' imprisonment. The County Court Judge stated that the sentence of imprisonment was being imposed because the imposition of a fine on the accused, a man of means, would probably be ineffective to deter him and others in like stations of life. The appeal Court disavowed this notion, saying that all persons, whether paupers or rich men, should receive equality of treatment before the law. A court should not discriminate according to class: if it could, then there would be nothing to prevent it from imposing punishment based on race, creed, or social status of the accused.

A distinction may be made between these cases, and cases where the status of the offender indicates that he should have been particularly aware of the consequences of his conduct. An example of a case where a distinction based on status was justifiably made is R. v. Sumarah et al.,[258] which arose out of offences related to tax evasion. The Court stated:

> The status of the offenders appears to have been reasonably high, not of the real leaders of the community but that of substantial businessmen of mature years who were looked upon as respectable and reputable. This kind of bad example calls for exemplarity in the sentence....
>
> With reference to the offenders' social status, this seems particularly pertinent to the fact that they cannot plead ignorance of business affairs or of the necessity of taking advice on income tax matters and it adds to the gravity of the offence when men of good reputation and well established position do this sort of thing. They have not the

excuse of ignorance or want of uncertain moral upbringing that sometimes has to be allowed for in matters of sentence.[259]

Footnotes to Chapter 3

1. See supra Chapter 1.D.i.

2. (1970), 1 C.C.C. (2d) 293 (Ont. C.A.).

3. Ibid. at 299. See also R. v. Demeter and Whitmore (1976), 32 C.C.C. (2d) 379 (Ont. C.A.); R. v. Hall (1978), 7 C.R. (3d) S-1 (Ont. C.A.); R. v. McLean (1978), 7 C.R. (3d) S-3 (Ont. C.A.); R. v. Naukatsik (1977), 20 Crim. L.Q. 290 (N.W.T.S.C.); R. v. Marin (1977), 20 Crim. L.Q. 291 (Ont. C.A.); R. v. Cope (1973), 15 Crim. L.Q. 371 (Ont. C.A.); R. v. Lamoureux and Hall, [unreported] March 23rd, 1981 (Man. C.A.).

4. (1974), 21 C.C.C. (2d) 250 (Ont. C.A.).

5. (1973), 57 Cr. App. R. 945.

6. See also R. v. Rohr (1978), 44 C.C.C. (2d) 353 (Ont. C.A.).

7. (1976), 19 Crim. L.Q. 25 (Ont. C.A.).

8. See also R. v. Dunkley (1976), 19 Crim. L.Q. 277 (Ont. C.A.).

9. (1974), 22 C.C.C. (2d) 361 (Ont. C.A.).

10. (1977), 19 N.S.R. (2d) 541 (C.A.).

11. Ibid. at 546 per MacKeigan, C.J.N.S.

12. (1979), 5 M.V.R. 16 (P.E.I.S.C.).

13. (1970), 7 C.C.C. (2d) 224 (B.C.C.A.).

14. (1980), 26 N. & P.E.I.R. 269 (Nfld. C.A.).

15. Ibid. at 269 per Gushue, J.A.

16. See post, Chapter 3.D.i.

17. See post, Chapter 3.C.iv.g.

18. (1973), 5 N. & P.E.I.R. 209 (Nfld. S.C.).

19. (1979), 46 C.C.C. (2d) 429 (Ont. C.A.).

20. Following R. v. Zimmerman (1925), 46 C.C.C. 78, [1926] 2 W.W.R. 882, 37 B.C.R. 277 (C.A.).

21. Lees v. The Queen (1979), 46 C.C.C. (2d) 385 (S.C.C.).

22. R. v. Young (1979), 22 Crim. L.Q. 35 (Man. C.A.); Kavanaugh v. The Queen (1960), 128 C.C.C. 267 (N.B.C.A.); R. v. Wilson, [1944] 3 D.L.R. 671 at 672-73 (B.C.C.A.).

23. (1979), 47 C.C.C. (2d) 224 (Man. C.A.); following R. v. Vandale and Maciejewski, supra note 4; R. v. Demeter and Whitmore, supra note 3.

24. Ibid. at 230 per Huband, J.A.

25. R. v. Stein (1974), 15 C.C.C. (2d) 376 at 377 (Ont. C.A.).

26. R. v. Johnston and Tremayne, [1970] 4 C.C.C. 64 at 68 (Ont. C.A.) per Gale, C.J.O.

27. (1971), 3 C.C.C. (2d) 20 (Ont. C.A.); see also R. v. Bonhomme (1979), 22 Crim. L.Q. 435 (B.C.C.A.).

28. (1979), 23 N. & P.E.I.R. 286 (Nfld. C.A.); see also R. v. Kotrbaty (1978), 5 C.R. (3d) S-13 (B.C.S.C.); R. v. Bengert (No. 14) (1979), 15 C.R. (3d) 97 (B.C.S.C.). See by way of contrast R. v. Fiorillo (1980), 22 Crim. L.Q. 437 (Ont. Prov. Ct.), in which previous good character was considered to be an important mitigating factor by the Judge, who imposed a sentence of two years less a day on an offender who wholesaled, in bulk, at least 100 lb. of marijuana and 100 lb. of hashish.

29. (1972), 6 C.C.C. (2d) 107 (P.E.I.C.C.A.).

30. Following the comments of Robertson, J.A. in R. v. Spiller, [1969] 4 C.C.C. 211, 6 C.R.N.S. 360, 68 W.W.R. 187 (B.C.C.A.).

31. [1977] 5 W.W.R. 344 (B.C.C.A.).

32. Ruby, supra note 32 at 98.

33. R. v. Connor and Hall (1957), 118 C.C.C. 237 (Ont. C.A.).

34. R. v. Bouzane, [unreported] January 31st, 1977 (B.C.C.A.); cited by Ruby, supra note 32 at 98; R. v. Mort, [unreported] April 13th, 1981 (B.C.C.A.); R. v. Gyulay, [unreported] February 13th, 1981 (B.C.C.A.). Ruby also cites R. v. Andrejeczuk (1976), 19 Crim. L.Q. 152 (Man. C.A.), but the report does not indicate that the juvenile record was relief upon, only that it existed. In R. v. Henry, [unreported] April 13th, 1981 (Man. C.A.), the Court took note of the accused's juvenile record in sentencing him for two break-and-enters and a minor theft. As he was now an adult, but barely so, the Court reduced sentences on the break and entry convictions from 20 to 14 months concurrent, indicating that the 20-month terms were too serious. This was the first time he had been dealt with after attaining his majority, and the sentences were much more severe than any he had received as a juvenile. He was entitled to "one last chance". In R. v. Schwartz, [unreported] April 30th, 1981 (B.C.C.A.), a case remarkably similar to R. v. Henry, the Court upheld severe terms of 15 months' imprisonment, in light of evidence that the sentences appeared to be "working" - the

accused was progressing well and could, if progress was maintained, soon be a good candidate for temporary absence.

35. (1976), 31 C.C.C. (2d) 56 (Alta. T.D.).

36. R.S.A. 1970, c.195. Since rep. and sub. The Provincial Court Act, 1978, S.A. 1978, c.70, which re-enacts substantially the same provisions.

37. R.S.C. 1970, c.J-3, as am. by S.C. 1972, c.17, s.2(2); 1978-79, c.11, s.10(1). Section 12(3), perhaps enacted with the same intent as s.14(1) of the Alberta statute, is restricted to forbidding publication.

38. [Unreported] January 8th, 1975 (Que C.A.).

39. I.e. delivery of the documentation to Bouchard, or his counsel, for examination, and the opportunity given to contradict any errors.

40. [Unreported] October 30th, 1975 (Que. C.A.).

41. Supra note 38. See also R. v. Girard (1980), 8 M.V.R. 213 (Que. Sess. Ct.) which held that convictions registered against an accused as a juvenile are to be considered "previous convictions" for the purpose of sentencing an adult under the escalating scheme of penalties for alcohol-related driving offences.

42. See post, Chapter 3.B.iii.b..

43. See the judgment of Ritchie, J. in R. v. McGrath, [1962] S.C.R. 739 at 744-75, 133 C.C.C. 57 at 62.

44. Criminal Code, R.S.C. 1970, c.C-34, s.662.1(3).

45. (1975), 22 C.C.C. (2d) 184 (B.C.C.A.).

46. R.S.C. 1970, c.12 (1st Supp.), as am. by S.C. 1972, c.13, s.72.

47. Ibid. s.5(b).

48. See Nadin-Davis, R.P., "Canada's Criminal Records Act: Notes on How Not to Expunge Criminal Convictions," (1981) Sask. L. Rev. (in press).

49. (1977), 35 C.C.C. (2d) 308 at 309 (Ont. C.A.).

50. See generally, Law Reform Commission of Canada, Studies on Diversion (1975); Aubuchon, J., "Model for Community Diversion," (1978) 20 Can. J. Criminol. 296. See also R. v. Drew (1979), 45 C.C.C. (2d) 212 (B.C.C.A.).

51. Ibid.

52. See supra, text accompanying and notes 40 and 43.

53. Hewson v. The Queen, [1979] 2 S.C.R. 82, 5 C.R. (3d) 155, 42 C.C.C. (2d) 507, 89 D.L.R. (3d) 573, 24 N.R. 224; followed in R. v. Pearson

(1979), 11 C.R. (3d) 313 (Que. S.C.).

54. [1970] 4 C.C.C. 377 (Ont. C.A.). See also R. v. Pearson, ibid.

55. (1979), 19 N. & P.E.I.R. 526 (Nfld. C.A.).

56. See e.g. R. v. Giroux (1980), 23 A.R. 727(N.W.T.C.A.); R. v. McColl (1975), 18 Crim. L.Q. 20 (Ont. C.A.); R. v. Benedek (1973), 15 Crim. L.Q. 259 (B.C. Co.Ct.); R. v. Gibson, [unreported] January 24th, 1973 (B.C.C.A.).

57. Ibid.

58. (1975), 24 C.C.C. (2d) 300 (N.S.C.A.).

59. (1977), 21 N.S.R. (2d) 32 (C.A.).

60. Ibid. at 40.

61. R.S.C. 1970, c.P-2, as am. by R.S.C. 1970, c.31 (1st Supp.); S.C. 1972, c.13, s.74; 1973, c.48; 1974-75-76, c.93, ss.99-101; 1976-77, c.28, s.33; 1976-77, c.53, ss.17-34; 1977-78, c.22, ss.16(2), 19.

62. Although it was conceded in R. v. LaPierre (1976), 17 N.S.R. (2d) 34 (C.A.) that the ruling in Evans, supra note 58, will stand in that province until specifically overruled by a higher court.

63. Ibid.

64. Cited in R. v. LaPierre, supra note 62 at 38 per Coffin, J.A.

65. R. v. Jackson (1975), 11 N.S.R. (2d) 154 (C.A.).

66. R. v. Genaille, quoted in R. v. LaPierre, supra note 62 at 38.

67. (1977), 1 C.R. (3d) S-21 (P.E.I.S.C. in banco).

68. Supra note 56.

69. See post, Chapter 26.

70. Supra note 59.

71A. Shortly after this passage was written, the Nova Scotia Court delivered a judgment from which it may be inferred that their Lordships have arrived at the same conclusion. In R. v. Myers (1981), 6 W.C.B. 118 (N.S.C.A.), considering sentences for break and enter and consecutive sentences for firearms infractions, all consecutive to time being served, the Court indicated that tariff sentences were in order by comparing them to the "range normally imposed". Then, (Pace, J.A. dissenting) it was held that forfeiture of parole was a factor irrelevant to sentencing, except in accordance with the totality principle.

71. Supra notes 64 and 67.

72. (1978), 16 N. & P.E.I.R. 363 (Nfld. C.A.).

73. Ibid. at 371.

74. Supra Chapter 2.C.iv.

75. See Ruby, supra note 32 at 99-101.

76. Ibid. See also R. v. Murrin (1980), 27 N. & P.E.I.R. 9 at 11 (Nfld. C.A.) per Morgan, J.A.: "A factor that calls for an even more severe sentence is the proclivity of the offender to commit similar criminal acts." But see discussion below (text accompanying note 84) as to the effect of previous violent offences in sentencing for non-violent crimes.

77. E.g. R. v. Bennett, [unreported] March 3rd, 1981 (Nfld. C.A.) - the Court, increasing a tariff sentence for gross indecency, took note that a long record of dissimilar offences showed that the accused had a lack of regard for the law and a general propensity for criminality.

78. (1974), 28 C.R.N.S. 321 (Ont. C.A.).

79. (1975), 23 C.C.C. (2d) 452 (B.C.C.A.).

80. (1978), 21 N. & P.E.I.R. 279 (Nfld. Prov. Ct.).

81. In R. v. Sabloff, [1979] C.S. 1077, the accused 20-year-old female was convicted on two counts of trafficking in morphine and sentenced to two years less a day's imprisonment. Her record consisted of a conviction of theft of a bottle of vitamins, for which she was fined $25, and a conviction for soliciting for the purpose of prostitution. In assuming that the soliciting offence was related to her heroin habit, as a means of raising money to meet her drug needs, and noting that she also engaged in go-go dancing for the same purpose, the Court did not consider her previous record to be of any consequence for the purpose of determining the sentence.

82. (1976), 18 N.S.R. (2d) 189 (C.A.).

83. (1975), 24 C.C.C. (2d) 300 (N.S.C.A.).

84. (1975), 26 C.C.C. (2d) 388 (Ont. C.A.).

85. Ruby, supra note 32 at 103.

86. (1973), 15 C.C.C. (2d) 219 (N.S.C.A.).

87. Ibid. at 222 per MacKeigan, C.J.N.S.

88. (1973), 12 C.C.C. (2d) 480 (Ont. C.A.).

89. (1927), 20 Cr. App. R. 11.

90. Supra note 88 at 482 per Martin, J.A. See also R. v. Rukavina (1973), 16 Crim. L.Q. 18 (Sask. C.A.); R. v. Kennedy (1972), 5 C.C.C. (2d) 373 (Sask. C.A.) - after five years, previous record "should not be a too material factor" in determining sentence for manslaughter.

91. (1975), 26 C.C.C. (2d) 317 (Ont. C.A.).

92. (1979), 47 C.C.C. (2d) 122 (Ont. Co. Ct.).

93. See R. v. Graveline, Bezaire and Cassidy (1958), 27 C.R. 287 (Ont. C.A.); R. v. Harnett, [unreported] September 23rd, 1974 (Ont. C.A.), cited in Ruby, supra note 32 at 100.

94. See post Chapter 7.E, 7.F.

95. (1976), 17 N.S.R. (2d) 369 (N.S.C.A.).

96. (1976), 1 C.R. (3d) S-1 (B.C.C.A.).

97. (1970), 15 C.R.N.S. 42 (Que. C.A.).

98. (1970), 11 C.R.N.S. 380 (Sask. C.A.).

99. (1979), 9 C.R. (3d) S-30 (B.C.C.A.).

100. See also R. v. Alfs (1974), 17 Crim. L.Q. 247 (Ont. C.A.). For an example of a case in which the "jump" principle was ignored see R. v. Dunlop (1981), 44 N.S.R. (2d) 277 (C.A.).

101. (1972), 6 C.C.C. (2d) 165 (Ont. C.A.).

102. See also R. v. Robinet (1971), 14 Crim. L.Q. 10 (Ont. C.A.).

103. See post Chapter 3.C.ii, 3.C.iv..

104. See supra Chapter 1.D.ii; see generally post Chapter 3.C.

105. (1978), 39 C.C.C. (2d) 75 (N.S.C.A.).

106. See e.g. R. v. Hergert (1977), 3 A.R. 522 (Dist. Ct.).

107. (1972), 8 C.C.C. (2d) 13 (Ont. C.A.).

108. (1979), 35 N.S.R. (2d) 35 (C.A.)

109. Supra note 105; see also R. v. Menkes (1977), 19 Crim. L.Q. 278 (Ont. C.A.).

110. See further R. v. Brown, supra note 107.

111. Note, however, that the custodial term may not be lengthened beyond the range to secure this objective. See supra Chapter 2.C.ii, 2.C.v and post, Chapter 3.C.

112. (1973), 11 C.C.C. (2d) 95 (Ont. C.A.).

113. See e.g. R. v. Gionet (1977), 1 C.R. (3d) S-16 (N.S.C.A.).

114. Ibid.

115. (1973), 11 C.C.C. (2d) 302 (Ont. C.A.).

116. Supra note 109.

117. (1976), 15 N.S.R. (2d) 686 (C.A.).

118. (1979), 10 C.R. (3d) S-25 (Ont. C.A.).

119. (1978), 23 N.S.R. (2d) 639 (C.A.).

120. See supra Chapter 2.C.ii.

121. R. v. Pontello (1977), 38 C.C.C. (2d) 262 (Ont. C.A.).

122. (1975), 24 C.C.C. (2d) 551 (Ont. C.A.). See also R. v. McInnis (1973), 23 C.R.N.S. 152, 13 C.C.C. (2d) 471, 1 O.R. (2d) 1 (C.A.).

123. Supra note 106.

124. (1978), 4 C.R. (3d) S-53 (Ont. Prov. Ct.).

125. R. v. MacNevin (1980), 41 N.S.R. (2d) 628, 76 A.P.R. 628 (C.A.); R. v. Gionet, supra note 113. See however R. v. Boudreau (1978), 39 C.C.C. (2d) 75 (N.S.C.A.) where a sentence of 12 months' imprisonment was upheld on appeal since the seriousness of the crime (conferring gifts on government employees) dictated that the overriding consideration be deterrence. The accused, aged 59, was suffering from serious organic disorders as well as reactive depression which was developing into psychosis. Psychiatrists testified that a period of imprisonment would be the "culmination of humiliation" and that the accused might very well fail to respond to treatment and give up and die if sent to prison. The appeal Court refused to disturb the trial disposition and stated that the trial Judge had already adequately taken into account as a mitigating circumstance the condition of the accused.

126. Supra text accompanying note 118.

127. See also R. v. Wallace (1973), 11 C.C.C. (2d) 95 (Ont. C.A.) where the appeal Court reduced consecutive terms of eight and two years' imprisonment for robbery and assault to four years and two years concurrent in order to make possible the rehabilitation of the accused through psychiatric treatment during a moderate term of imprisonment. The accused, who had a lengthy record of violent crimes, was severely depressed, suicidal and in a state of fear that he would be attacked by other inmates and staff. The Court also noted that a total sentence of 10 years' imprisonment was a very much more severe punishment for Wallace than for a normal person.

128. (1972), 8 C.C.C. (2d) 13 (Ont. C.A.); for facts see supra, text accompanying note 107.

129. Supra note 124.

130. (1972), 9 C.C.C. (2d) 115 (Ont. C.A.).

131. Zimbardo, P.G. and Ruch, F.L., Psychology and Life (9th ed. 1975, Glenview, Ill: Scott, Foresman & Co.) at 485.

132. Ibid.

133. MacNiven, A. "Psychoses and Criminal Responsibility," in Radzinowicz, L. and Turner, J.W. (eds), Mental Abnormality and Crime (1968, Nendeln, Liechtenstein: Kraus Reprint) at 9-72.

134. Ibid. at 11.

135. Ibid. at 14.

136. See R. v. Robinson (1974), 19 C.C.C. (2d) 193 at 197 (Ont. C.A.) where Brooke, J.A. stated that sentencing mentally ill offenders "... poses special problems ... the sentence should not proceed on the basis of punishment because the Court should not punish people who commit crimes because of mental illness. The important purposes of the sentence are the protection of the public so long as this man remains in this dangerous state and his early return to the community when he is cured or, to put it another way, rehabilitated."

137. (1978), 4 C.R. (3d) S-20 (Ont. C.A.).

138. Supra note 136; for facts see supra, Chapter 2.C.ii, text accompanying note 66.

139. (1979), 8 C.R. (3d) S-5 (B.C.C.A.).

140. Supra note 113.

141. Coleman, J.W. "The Myth of Addiction," (1976) 6 J. Drug Issues 135.

142. Chambers, C.D. and Inciardi, J.A., "Unreported Criminal Involvement of Narcotic Addicts," (1972) 2 J. Drug Issues 57; Stephens, R.C. and Voss, H.L., "Criminal History of Narcotic Addicts," (1973) 2 Drug Forum 191.

143. [Unreported] March 16th, 1981 (Ont. C.A.).

144. Ibid. at 2-3 per Arnup, J.A.

145. (1979), 49 C.C.C. (2d) 517 (Ont. C.A.).

146. (1975), 28 C.C.C. (2d) 334 (Alta. C.A.).

147. Supra note 145 at 522 per curiam.

148. (1971), 5 C.C.C. (2d) 354 (Ont. C.A.).

149. (1976), 15 N.S.R. (2d) 686 (C.A.).

150. Supra note 81. See also R. v. Mearns, [1975] 4 W.W.R. 328, 22 C.C.C. (2d) 457 (Alta. C.A.); R. v. Lebovitch, [1979] C.A. 462, 48 C.C.C. (2d) 539, 8 C.R. (3d) S-41, where the appeal Court made a distinction between the non-user of drugs who traffics and the addict who does so to support his habit. Incarcerating a trafficker who is also a user is not to emphasize deterrence but to neutralize his dangerousness. In this case the accused, who had been found guilty of conspiring to traffic in narcotics, had overcome his addiction so incarceration was no longer necessary to protect the public. A suspended sentence with three years' probation was substituted for the original sentence of two years less one day.

151. Henderson, D.K., "Psychopathic Constitution and Criminal Behaviour," in Radzinowicz and Turner, supra note 133 at 109.

152. (1980), 53 C.C.C. (2d) 55 (Alta. C.A.).

153. (1979), 23 A.R. 403 (N.W.T.S.C.).

154. Lewis, E.O., "Mental Deficiency and Criminal Behaviour," in Radzinowicz and Turner, supra note 133 at 95.

155. For a further discussion of these categories, see Lewis, ibid. at 95-99.

156. Supra note 154 at 98.

157. (1976), 18 Crim. L.Q. 284 (Ont. C.A.).

158. See also R. v. Beaudin, [unreported] March 24th, 1981 (Ont. C.A.) where the accused's sentence of nine months' imprisonment for indecent assault would have been much longer but for, inter alia, his "limited intelligence and ... personality defects ...".

159. (1979), 9 C.R. (3d) S-23 (N.S.C.A.).

160. (1979), 35 N.S.R. (2d) 35, 65 A.P.R. 35 (C.A.).

161. (1978), 29 N.S.R. (2d) 476 (C.A.). See also R. v. McDow (1974), 10 N.S.R. (2d) 92 (C.A.) where a 17-year-old accused stole goods of a value under $200. He had two previous convictions for similar offences and had physical and psychological abnormalities which made him immature. On appeal, the Court substituted a period of two years' probation for the two years' imprisonment imposed at trial. The Court felt that McDow would have a better opportunity for rehabilitation if placed on probation.

162. (1980), 22 A.R. 406 (Alta. C.A.).

163. (1974), 10 N.S.R. (2d) 94 (C.A.).

164. (1977), 19 Crim. L.Q. 278 (Ont. C.A.).

165. (1980), 38 N.S.R. (2d) 313 (Prov. Ct.).

166. Ibid. at 315.

167. (1973), 24 C.R.N.S. 285 (N.S.C.A.).

168. Ibid. at 287 per MacKeigan, C.J.N.S.

169. Report of the Canadian Committee on Corrections (The Ouimet Report), 1968, at 185.

170. (1980), 19 C.R. (3d) 136 (Ont. C.A.).

171. Supra note 133 at 44.

172. (1979), 47 C.C.C. (2d) 369 (Ont. C.A.).

173. Ibid. at 374 per Martin, J.A.

174. Fox, V., Introduction to Criminology (1976, Englewood Cliffs, N.J.: Prentice-Hall Inc.) at 316.

175. [1972] 1 O.R. 405, 5 C.C.C. (2d) 366, 16 C.R.N.S. 9 (C.A.).

176. Ibid. at 10 per Gale, C.J.O.

177. See also R. v. Robertson (1979), 46 C.C.C. (2d) 573, 10 C.R. (3d) S-46 (Ont. C.A.).

178. (1979), 1 Man. R. 18 (C.A.). But see R. v. McKeachnie, supra note 91, where a conviction for indecent assault on a male, which occurred 12 years previously, was ignored.

179. [Unreported] March 24th, 1981 (Ont. C.A.).

180. See further R. v. Hopkins (1977), 23 N.S.R. (2d) 550, 32 A.P.R. 550 (C.A.); R. v. Doucet, [1971] 1 O.R. 705, 2 C.C.C. (2d) 433 (C.A.); R. v. Deihl (1972), 5 N.S.R. (2d) 21 (C.A.); R. v. Andrews (1978), 15 N. & P.E.I.R. 1 (Nfld. C.A.).

181. Supra note 91.

182. Ibid. at 319 per Howland, J.A.

183. (1978), 23 N.B.R. (2d) 90, 44 A.P.R. 90 (C.A.).

184. See also R. v. Irwin (1979), 48 C.C.C. (2d) 423, 10 C.R. (3d) S-33, 16 A.R. 566 (C.A.), where a sentence of 18 months' imprisonment was upheld for a 49-year-old first offender convicted of engaging in group

activities with young girls aged 8 to 12. The gravity of the crime, society's abhorrence and protection of the public were factors taken into account.

185. (1978), 20 Crim. L.Q. 420 (Ont. C.A.).

186. [1976] C.A. 511.

187. (1978), 39 C.C.C. (2d) 75 (N.S.C.A.).

188. (1970), 13 C.R.N.S. 80 (Alta. C.A.).

189. (1973), 5 N. & P.E.I.R. 209 (Nfld. C.A.).

190. (1979), 22 Crim. L.Q. 163 (Que. C.A.).

191. See also R. v. Paul [unreported] April 8th, 1981 (Ont. C.A.) where a sentence of six months' imprisonment was reduced to time served solely in view of the accused's state of health.

192. (1972), 72 D.T.C. 6219 (Que. Q.B.).

193. (1979), 46 C.C.C. (2d) 429 (Ont. C.A.).

194. Following R. v. Zimmerman, supra note 20.

195. A nationwide American survey involving over 191,000 subjects who were being held in custody by state authorities indicated that 43% admitted that they had been drinking at the time of the offence which resulted in their imprisonment. See Stephan, J.J., "Survey of Inmates of State Correctional Facilities," (1974) National Prisoner Statistics Special Report No. SD-NPS-SR-R. See also Blum, R.H., "Mind-Altering Drugs and Dangerous Behaviour: Alcohol," Drunkenness (1967), Task Force Report of the President's Commission on Law Enforcement and Administration of Justice (Washington, D.C.).

196. See post Chapter 4.A.

197. See e.g. R. v. Harvey (1978), 15 N. & P.E.I.R. 358 (Nfld. C.A.); R. v. Beauvais (1978), 5 C.R. (3d) S-27 (Ont. C.A.).

198. (1976), 15 N.S.R. (2d) 178 (C.A.).

199. Supra note 197.

200. See supra Chapter 2.C.v.

201. Supra note 197.

202. (1978), 4 C.R. (3d) S-59 (Ont. C.A.).

203. (1978), 21 Crim. L.Q. 148 (Ont. C.A.).

204. See also R. v. Gileno (1972), 15 Crim. L.Q. 255 (Ont. Mag. Ct.); R. v. Empey (1978), 4 C.R. (3d) S-59 (Ont. C.A.); R. v. Carey (1978), 21 Crim. L.Q. 148 (Ont. C.A.).

205. R. v. McEachern (1978), 42 C.C.C. (2d) 189 at 191 (Ont. C.A.) per Howland, C.J.O.

206. (1978), 15 N. & P.E.I.R. 271 (Nfld. C.A.).

207. (1972), 2 N. & P.E.I.R. 371 (P.E.I.S.C.).

208. (1975), 7 N. & P.E.I.R. 79, 3 A.P.R. 79 (Nfld. C.A.).

209. Supra note 206 at 277 per Morgan, J.A.

210. (1974), 26 C.C.C. (2d) 476 (Ont. H.C.).

211. Ibid. at 475 per Haines, J.

212. (1971), 4 C.C.C. (2d) 330 (Ont. C.A.).

213. (1977), 20 Crim. L.Q. 148 (Ont. C.A.).

214. (1978), 7 C.R. (3d) S-4 (Ont. C.A.).

215. See also R. v. Little [unreported] April 27th, 1981 (N.B.C.A.) where a period of probation was varied to 12 months' imprisonment on an accused who stole betwen $25,000 and $45,000 from his employer, an insurance company.

216. (1979), 22 Crim. L.Q. 164 (B.C. Co.Ct.).

217. (1975), 25 C.C.C. (2d) 58 (Ont. C.A.).

218. Quoted ibid. at 60 per Brooke, J.A.

219. (1976), 1 A.R. 355 (Alta. C.A.). See also R. v. Rogers (No. 2) (1972), 6 C.C.C. (2d) 107 (P.E.I.C.C.A.) where it was stated that theft of funds by a solicitor is always regarded as a serious crime because of the breach of trust involved. There is no reason why those employed for the purpose of administering welfare funds should be held less responsible for their breaches of trust than solicitors.

220. R. v. Ryan, ibid. at 357 per McDermid, J.A.

221. [1977] 5 W.W.R. 344 (B.C.C.A.).

222. (1979), 39 C.R.N.S. 133 (Man. C.A.).

223. (1980), 53 C.C.C. (2d) 350 (Man. C.A.).

224. Ibid. at 351 per Freedman, C.J.

225. (1975), 13 N.S.R. (2d) 98 (C.A.).

226. Ibid. at 101 per MacKeigan, C.J.N.S.

227. (1980), 33 N.B.R. (2d) 169, 80 A.P.R. 169 (C.A.).

228. (1980), 16 C.R. (3d) 56 (Que. S.C.).

229. R. v. Joanisse, [1975] C.S.P. 306 per Chaloux, J.

230. Ibid.

231. [1972] C.A. 868.

232. (1972), 72 D.T.C. 6219 (Que. Q.B.).

233. (1979), 7 C.R. (3d) S-13 (Que. C.A.).

234. (1978), 41 C.C.C. (2d) 289 (N.S.C.A.).

235. See also R. v. Kwasowsky, [1971] C.A. 596.

236. Ibid.

237. Ibid. at 597 per Tremblay, C.J.

238. (1975), 23 C.C.C. (2d) 11, 7 N. & P.E.I.R. 139 (P.E.I.C.A.).

239. (1971), 5 C.C.C. (2d) 332 (P.E.I.C.A.).

240. Supra note 234.

241. Supra note 239 at 341 per Nicholson, J.A.

242. (1972), 20 C.R.N.S. 220 (N.S.C.A.).

243. (1977), 21 N.S.R. (2d) 17 (C.A.).

244. Ibid. at 19 per MacKeigan, C.J.N.S.

245. (1978), 44 C.C.C. (2d) 33 (P.E.I.S.C. in banco).

246. (1972), 5 C.C.C. (2d) 536 (Ont. C.A.).

247. Ibid. at 538 per Schroeder, J.A.

248. (1975), 26 C.C.C. (2d) 100 (Alta. C.A.).

249. [1975] R.L. 527 (Que. C.S.P.).

250. (1978), 20 Crim. L.Q. 430 (Ont. C.A.).

251. (1979), 11 C.R. (3d) 309 (Que. C.A.).

252. (1976), 43 C.C.C. (2d) 293 (Que. C.A.).

253. (1976), 12 N. & P.E.I.R. 406 (Nfld. Prov. Ct.).

254. Ibid. at 409 per Anstey, Mag.

255. (1977), 7 C.R. (3d) S-17 (Alta. Dist. Ct.).

256. Ibid. at S-18 per Feehan, D.C.J.

257. (1971), 5 C.C.C. (2d) 541 (N.S.C.A.).

258. [1970] 5 C.C.C. 317 (N.S. Co. Ct.).

259. Ibid. at 328-29 per O'Hearn, Co. Ct. J.

CHAPTER 4: FACTORS RELATING TO CIRCUMSTANCES IMMEDIATELY PRIOR TO COMMISSION OF THE OFFENCE

A. INTOXICATION BY ALCOHOL OR DRUGS

Intoxication is the clearest example of a factor with a wide range of effects, depending upon the precise circumstances of the case. Nevertheless, the reported decisions on sentencing of inebriated offenders do form a logical pattern, indicating where inebriation mitigates or aggravates sentence and where it should be ignored.

In 1970, delivering the trial judgment in R. v. Turner,[1] Haines, J. put forward his view that:

> ... where an accused person intentionally uses some mind-expanding substance, the result in law is that he must accept responsibility for the consequences of that substance when it affected his conduct. If our citizens, young or old, see fit to impair their faculties, they must accept the consequences. Otherwise, the law would be providing an escape hatch for self-induced irresponsibility.[2]

It is fortunate that this comment has the status of an obiter dictum. Just as substantive criminal lawyers will be quick to point out that this statement is flawed as regards liability to conviction of some offences,[3] it also does not square with the weight of authority on the effects of intoxication in the sentencing process. Where an accused has established a reasonable doubt as to whether he knew what he was doing, his inebriation will serve as a mitigating factor. An example occurred in R. v. Pharo,[4] where the accused committed an indecent assault on his housekeeper. There was a reasonable doubt as to whether, at the time of the offence, he was able to appreciate, by reason of the consumption of alcohol, that she was not consenting. Stating that this fact bore "heavily" on the sentence which he imposed, the trial

Judge suspended sentence, with terms of the probation order to include forbearance of alcoholic beverages, attendance at Alcoholics Anonymous for two years and a psychiatric examination. Similarly in R. v. Chown,[5] the accused, an alcoholic, shot six times at various members of his family, injuring his wife and son. The Court stated that while intoxication is not an excuse for such crimes, in some instances it is a factor to be considered in the imposition of sentence. In view of the accused's alcohol problems, tariff sentences of ten years concurrent on two charges of attempted murder were reduced to sentences of six years concurrent.[6]

The accused must, in order to take advantage of his inebriation in securing a reduction of sentence, establish that he was intoxicated at the time of the commission of the offence, not merely that he had been drinking or using drugs. This, in fact, was the substantial finding in R. v. Turner.[7] Haines, J., sentencing the accused for rape, refused to take notice of evidence that they had been sniffing nail polish remover. The evidence showed clearly that they were in possession of their faculties. On further appeal to the Ontario Court of Appeal,[8] sentence was reduced but without comment on this aspect of the case. Numerous other decisions bear out this proposition. In R. v. MacKay, Thompson & Secord,[9] the three accused committed an assault upon a police officer in a public bar. The Provincial Judge mentioned as a mitigating circumstance that they had been drinking to the point where they were "reasonably heavily impaired" although they were not intoxicated. The appeal Court in increasing sentence, stated that "a condition of inebriation short of actual intoxication with respect to an assault in a public bar is not a mitigating circumstance." In R. v. Sheppard,[10] the accused was found having broken into a store. He fired a shotgun at two police officers who attempted to arrest him. In an attempt to establish a

lack of specific intent, evidence was called that he had consumed at least seven and one half bottles of beer and four eight-ounce glasses of whiskey or rum. Having found intent to discharge the gun was established, the accused's being "moderately drunk, impaired" was ignored in considering sentence.

There are, of course, a number of offences where the establishment of drunkenness or intoxication from the use of drugs is an integral element in the securing of the conviction. Examples include impaired driving and some cases of manslaughter. As to offences where drunkenness is an integral element of the offence, it will not of itself be a mitigating or aggravating factor, although the extent of intoxication will naturally be a relevant factor in consideration of the precise gravity of the offence.[11] Where an accused is convicted of manslaughter, having benefited from a reduction of the charge from murder by reason of being under the influence of intoxicants, it has been held that the Court will naturally not consider intoxication in further mitigation of sentence.[12] The contrary view, that intoxication remains a relevant feature of the entire picture and may mitigate the seriousness of a manslaughter,[13] is preferable in principle, however.

It was previously mentioned[14] that an accused alcoholic who displays propensities toward violent crimes when under the influence of alcohol may be regarded by the Court as "dangerous" and expose himself to the possibility of a life sentence on that basis. The same principle applies to non-alcoholics who, when under the influence of alcohol, are liable to commit serious offences. In R. v. Head,[15] the accused, aged 44, committed a brutal sexual attack on a 6-year-old girl. Her injuries were sufficient to require surgery: it was fortunate that she was not killed. The accused had previously served four years for indecent assault arising out of a similar offence.

Psychiatric evidence showed that he was likely to repeat this type of offence, particularly if he consumed any alcohol. That being so, the prime factor to be considered was protection of the public. It was held that this was sufficient to justify a life sentence.

B. PERSONAL OR FINANCIAL DIFFICULTIES

Where the Court is faced with a case in which mitigating circumstances can be considered (i.e., one which does not call for an exemplary tariff sentence), the fact that the accused was in personal or financial difficulties which were in part responsible for the commission of the offence may be considered an extenuating factor. This is particularly so in the case of property offences committed out of necessity, as was demonstrated in R. v. Stein.[16] Stein, a female first offender, pleaded guilty to 13 charges of obtaining property by false pretences. In holding that a custodial sentence was inappropriate, the Court noted that the accused was at the time of the offences unable to work because of the serious illness of one of her children. It also took account of the fact that her life had been "beset with difficulties". She had to separate from her husband because of his excessive drinking: her sole means of support at the time of the offences was a sum received as mother's allowance and $7 per week which she was receiving from her husband for the support of her children. Similarly, in R. v. Johnston and Tremayne,[17] the Ontario Court of Appeal reduced sentence on one of two accused convicted of offences in relation to trafficking in marijuana. Their Lordships took into account, inter alia, that he had been under severe financial pressure at the time of the offence.

In contrast to Stein and Johnston and Tremayne stand the decisions in R. v. Clarke,[18] and R. v. MacLeod.[19] Clarke was found in

possession of marijuana for the purpose of trafficking, and pleaded in mitigation that he became involved in the drug culture as an economic venture, because he was in debt. The Court held that that could not mitigate his sentence. MacLeod, also a trafficking case, involved phencyclidine and one pound of marijuana. Psychiatric evidence showed that the accused, aged 20 and with a previous record, had suffered greatly at the hands of his father. His father had been a chronic alcoholic who brutally ill-treated the accused and his mother. Approximately five months after commission of the offences, the accused's father murdered his wife, then committed suicide. In light of these circumstances, the trial Judge was as lenient as he could be, and imposed sentences of 90 days intermittent and a year's probation, and one year's imprisonment with a fine of $100. On appeal it was held that insufficient weight had been given to the element of general deterrence; sentence was increased to nine months' and five months' imprisonment consecutive.

The decisions in Johnston and Tremayne, on the one hand, and Clarke and MacLeod on the other, are not irreconcilable. Both Clarke and MacLeod are decisions in which, in the particular circumstances, an exemplary sentence was called for, and accordingly mitigating factors were not taken into consideration. Johnston and Tremayne, although an equal or more serious offence was committed, was held by the Court to be a case in which mitigating circumstances could be considered. Leaving aside the question of the correctness of this preliminary option, it did follow inexorably that the accuseds' financial difficulties could be taken into account.

C. NECESSITY

A very recent Canadian decision provides support for the proposition, already established in England,[20] that a situation of necessity, not valid as a defence to the substantive issue may nevertheless act as a mitigating factor in sentence. In Salvador et al. v. The Queen,[21] four men, on a boat containing $25 million worth of cannabis, entered Canadian waters and were convicted of importing. Dismissing a Crown cross-appeal against a minimum seven year sentence for each accused, the Nova Scotia Court of Appeal stated that the amount of the drug involved would normally have required much longer terms. However, the men had not originally intended to enter Canadian waters: they were forced to take the decision to do so by inclement weather and damage to their boat. Although this did not help them in their appeals against conviction, it was a mitigating factor which convinced all five Justices of Appeal that the minimum terms did not require variation.

Footnotes to Chapter 4

1. (1970), 1 C.C.C. (2d) 293 (Ont. C.A.).

2. Ibid. at 295 per Haines, J.

3. See Gold, A.D., "An Untrimmed 'Beard': The Law of Intoxication as a Defence to a Criminal Charge," (1977) 19 Crim. L.Q. 34.

4. (1970), 12 C.R.N.S. 151 (Ont. Co. Ct.).

5. (1977), 18 N.B.R. (2d) 514 (C.A.). See also R. v. Shanower (1972), 8 C.C.C. (2d) 527 at 528 (Ont. C.A.) where Gale, C.J.O. stated: "so far as the offence itself is concerned, the only thing that can be said in mitigation is that he had consumed a large quantity of alcohol before embarking on the attack on this young girl."

6. See further R. v. McBain (1974), 16 Crim. L.Q. 379 (Ont. C.A.).

7. Supra note 1.

8. Ibid.

9. (1970), 16 C.R.N.S. 11 (Ont. C.A.).

10. (1976), 12 N. & P.E.I.R. 129 (Nfld. Dist. Ct.).

11. See e.g. R. v. Cairns (1974), 15 C.C.C. (2d) 130 (B.C. Co.Ct.).

12. R. v. Salmon (1972), 10 C.C.C. (2d) 184 (Ont. C.A.).

13. R. v. Smith (1973), 16 Crim. L.Q. 139 (Sask. C.A.).

14. See supra Chapter 2 note 61.

15. (1970), 1 C.C.C. (2d) 436 (Sask. C.A.).

16. (1974), 15 C.C.C. (2d) 376 (Ont. C.A.).

17. [1970] 4 C.C.C. 64 (Ont. C.A.).

18. (1976), 11 N. & P.E.I.R. 251 (Nfld. Prov. Ct.).

19. (1976), 32 C.C.C. (2d) 315 (N.S.C.A.).

20. R. v. Hennessey; R. v. Bowers (1970), 55 Cr. App. R. 148.

21. [Unreported] April 2nd, 1981 (N.S.C.A.).

CHAPTER 5: ASPECTS OF THE OFFENCE COMMITTED

A. ACTING IN CONCERT WITH, OR INVOLVING, OTHERS

There is limited authority to the effect that the commission of certain offences in concert with others of equal culpability is regarded more gravely than similar offending by a single person. In R. v. Morrissette et al.,[1] the Saskatchewan Court of Appeal, after stating that rape is always a serious offence, added that it is more serious when two or more men, together, sexually assault a girl. Where the offence takes on the character of a "gang rape", this is considered to be much more serious than the same offence when only one man is involved.[2] Different considerations apparently apply to offences of trafficking in drugs. In R. v. Robert et al.,[3] the Ontario Court of Appeal stated that there should be no difference in principle in the sentencing of those who act alone and those who participate in a joint venture.

As pointed out in the earlier discussion of disparity in sentencing, an accused who instigates or plays a leading role in an offence involving others, may be treated more seriously than his co-accused.[4] In Morrissette,[5] the Court was called upon to consider the sentence of one of three brothers who took part in the rape of a single female. The Court stated that his offence was aggravated by his being the cause of his two brothers being involved. He was the instigator, as he had his brothers join him and gave them instructions. Under the circumstances, his offence could not be viewed leniently. Similarly in R. v. Soble,[6] the accused pharmacist was convicted of

obtaining roughly $24,000 by false insurance claims. Sentence was increased, in part, because the offences had involved a great number of people in the relatively small city of Thompson, Manitoba. The accused had invited innocent members of society to practice fraud for profit.

The involvement of others may also be cause for disregarding factors which might otherwise have mitigated sentence. In R. v. Rogers (No. 2),[7] the accused was convicted of defrauding the welfare authorities of an amount probably in the vicinity of $50,000. The Court refused to give "much consideration" to the fact that he was well regarded in the community and had no previous record. The evidence showed that, while refusing to forge cheques himself, the accused would use others to do criminal acts not readily traceable to him.

Involving others in offending is viewed particularly seriously where those encouraged to commit criminal acts are young and impressionable. In R. v. Salamon,[8] the accused was convicted of possession of morphine for the purpose of trafficking and sentenced to five years' imprisonment. The Court stated:

> It is clear ... that the respondent was in the business of attempting to sell morphine, and that he was prepared to endeavour to sell it to teenagers. This type of person is, in the Court's opinion, not entitled to any substantial consideration so far as his or her own future and welfare is concerned.[9]

A similar result was reached in R. v. Couture.[10] The accused, a teacher, trafficked drugs including cannabis, LSD and cocaine in the vicinity of a polyvalente (high school) of 3,000 students. He "fronted" quantities of drugs to about 15 student pushers, charging them to resell to other students for a profit. In imposing severe sentences of seven years' imprisonment concurrent on six counts, the Court noted in particular the age and impression-

able character of the youths, aged 14 to 18, involved, and the accused's breach of his responsibility towards them. In R. v. Cviyanovich,[11] the Court treated as an aggravating factor the use of a 16-year-old boy as a lookout during a break and entry of a drug store. With other factors, this served to take the accused's offence out of the normal category of a first offence by a young offender, which could normally be dealt with by means other than imprisonment.[12]

Where the youth brought into criminality has previously been to some extent involved in similar behaviour, the factor of his or her involvement, while still an aggravating factor, will not be regarded so seriously. In R. v. Creighton,[13] the accused was convicted on two counts of gross indecency. He had "picked up" juvenile homosexuals and taken them to his home for the night. The Crown appealed from suspension of sentence on both counts. The appeal Court held that in view of, inter alia, the complainants being juvenile, a custodial sentence was required. On the other hand, as they were already homosexuals, the accused's actions had not affected their future habits or propensities.

Section 33(1) of the Juvenile Delinquents Act[14] creates an offence of contributing to the delinquency of a child. An important and logical exception to the above principle is that, where the accused is subject to charges of contributing to a delinquency, he should not be further penalized for that aspect of his conduct in the sentence for the offence committed in company with the juvenile. Thus, in R. v. Jimmo,[15] in imposing sentence for possession of LSD, the Court of Appeal held:

> [I]t is of the utmost importance that no notice be taken of the fact that the appellant's companion was a young girl 14 years of age. Revolting as this conduct ... may be it was the subject of another charge of contributing to juvenile deliquency for which another sentence has been imposed.[16]

B. MOTIVE

The fact that the commission of an offence was sparked by considerations of financial gain shades into the broader question of the profitability of a crime, which is discussed below.[17] In cases at the extreme end of the spectrum, however, offences committed with no expectation of profit, and offences committed through pure greed, the aspect of financial motivation takes on a distinct role. The cases of R. v. Burchnall and Dumont[18] and R. v. McLean et al.[19] may usefully be contrasted in this regard.

In Burchnall and Dumont, the appeal Court upheld an extremely lenient sentence imposed on an accused convicted of possession of a narcotic for the purpose of trafficking. The Court took into account, inter alia, that the accused came into possession of the drug unwillingly, and as temporary custodian on behalf of another, rather than for reasons of profit.[20] In McLean, on the other hand, severe sentences of 6 years' imprisonment and fines of $2,000 were imposed on three accused convicted of conspiracy to traffic in large amounts of cannabis resin. The Court, under the heading "Aggravating Circumstances" stated:

> Neither [sic] of the accused were [sic] under any great necessity to engage in this illegal activity. They are all healthy, bright individuals capable of lawful vocations who, no doubt, succumbed to the age-old motive of greed. They have deliberately chosen to pursue this unlawful occupation over legitimate means of earning a living ... I am sure they appreciated that the risks were great and the potential penalty severe if detected.[21]

A racial motivation has also been held to aggravate an offence of violence. In R. v. Ingram and Grimsdale,[22] the Court stated that while the Criminal Code makes no distinction as to the colour or the race of a person, a

racial motivation for an attack renders the offence more heinous. It is an aggravating factor in sentence, just as it would be if the victim were elderly, feeble or retarded. It may be remarked that there is a subtle difference between the case of a racially motivated attack and the other situations posed by the Ontario Court of Appeal in this case. While elderly, feeble and retarded victims are unusually vulnerable, thus justifying an aggravated sentence, in the Ingram type of case the dominant factor is not simply that the victim is black, oriental or otherwise different in race from the accused. Rather, it is this fact combined with the specific racial motivation of the attack which leads to aggravation of the offence.

A rare motive in criminal behaviour is religious zeal. In Koodrin et al. v. R.,[23] nine Doukhobors, were convicted of arson, having burnt down a house to prevent it from becoming a religious shrine. An appeal against sentences from one to seven years' imprisonment, based on this unique circumstance, was dismissed. The British Columbia Court of Appeal held firmly to its view of the expectations of the public, that the right to freedom of religion should be exercised in accordance with the general law. Thirty years before Koodrin, in the same Court, it was recognized that while not a mitigating factor, religious zeal could alter the Court's approach to sentencing. Convicted Doukhobors and their fellows having viewed harsh sentences as a form of martyrdom, and misunderstanding of severe sentences having led to further offending, the Court reached the conclusion that leniency might achieve those ends previously sought from exemplarity, and acted accordingly.[24]

C. PLANNING, METHOD OF EXECUTION OF OFFENCE

A question of extreme importance in deciding where the particular offence before the Court falls within the appropriate range, is that of premeditation and planning. Numerous cases may be cited as authority for the proposition that premeditation or the systematic perpetration of an offence over a period renders the crime more serious, and may call for an exemplary sentence. In R. v. Hemsworth,[25] the accused was sentenced to 6 months' imprisonment for trafficking in cannabis resin. The Court took into account that from the evidence it could properly be inferred that this was not the only instance in which the accused had trafficked in marijuana. It could be inferred "that he had organized a systematic arrangement to facilitate contact with consumers and potential purchasers". In A. G. Can. v. Gregoire,[26] the Court increased sentence upon an accused convicted of tax evasion. It took into account, inter alia, that "the repetition of the offences committed by the respondent and to which he pleaded guilty, proves the existence of a system deliberately used by him to willfully evade [sic] the payment of the federal tax which was required him."[27] In Lamoureux v. The Queen,[28] the accused kidnapped an 11-month-old baby and demanded a ransom from the father. In upholding a sentence of 20 years' imprisonment, the Court took note of evidence of the accused's premeditation and deliberation: he was disguised as a police officer, had purchased guns and a saw, and had used ether on the infant. A final example which demonstrates the use of exemplary sentences in such cases is Nantel et al. v. The Queen.[29] In dismissing appeals against sentence for conspiracy to defraud the public of a sum in excess of $124,000, the Court took into account that the offence was one involving lengthy premeditation and methodical planning. The actions of

the accused were reprehensible, and accordingly, an exemplary sentence was required both to punish them and to deter others who might contemplate similar schemes.[30]

The converse proposition, that an offence committed without premeditation or planning is regarded less severely, is also valid. The distinction is neatly outlined in R. v. Froese and British Columbia Television Broadcasting System Ltd. (No. 3); R. v. Bannerman and Radio N.W. Ltd. (No. 2).[31] In imposing sentence on radio stations and their personnel for publication of matter which might have prejudiced the fair trials of persons charged with criminal offences, the Chief Justice drew a distinction with regard to penalty between

a) unthinking and contumacious statements made in the course of a news broadcast, and

b) unthinking and contumacious statements made in the course of editorial comment.

The former, he stated, is not so serious because news broadcasts are made contemporaneously, or nearly contemporaneously. The latter type of comment is made after there has been an opportunity for mature consideration.

Examples of this principle are also found in decisions on sentence for more conventional crimes. In R. v. Evans,[32] the Court reduced a sentence of 18 months' imprisonment to nine months on a count of assault causing bodily harm. One reason was that "the assault was an emotional spur of the moment flare-up as contrasted to a planned and deliberate assault carried out after careful pre-meditation."[33] Similarly in R. v. Ryan,[34] the Court had to consider whether a sentence of imprisonment was appropriate for a lawyer convicted of theft from his firm's trust account. McDermid, J.A. stated:

> Thirdly, in favour of the accused, although there were three acts on two widely separated occasions, it does not appear to us it was a deliberate scheme repeated over and over again but really two separate impulsive acts. That is clearly in favour of the accused.[35]

The mode of perpetration of the offence is also a relevant consideration in deciding where within the range the sentence should be fixed. Courts generally comment on this aspect only when there is a particularly repugnant aspect to the crime committed, although there are exceptions. Examples of the former type include R. v. Roy,[36] and R. v. Eby.[37] In Roy the accused, aged 18, shot a man with whom he lived in his father's cabin. Both were quite drunk. Upholding a sentence of 15 years' imprisonment on conviction of manslaughter, the Court stated that there "is something particularly repugnant about the killing of a sleeping victim". It was not surprising that severe sentences had commonly been imposed in such cases. Similarly in Eby, the accused was sentenced to three years consecutive for a firearm violation, arising out of an armed robbery. The Court noted that the circumstances of the offence were particularly serious. "The degree of planning coupled with the literal imprisonment and intimidation of the victim must be considered."

The converse situation is exemplified by R. v. Johnston.[38] There the Court pointed out that it counts in the offender's favour where, although he intimidates the people he robs with a weapon, it is, in fact, an imitation which does not expose employees or customers to danger of direct injury. The same principle applies in rape cases: in R. v. Selamio,[39] Tallis, J. stated that:

> ... one of the mitigating factors ... centers around the fact that no weapon was used. The amount of violence was minimal compared with many rapes.[40]

D. PREVALENCE OF OFFENCE

It was indicated above that the unusual prevalence of a particular offence in an area, province, or the nation at large, may call for exemplary sentences.[41] Such sentences will ignore mitigating factors, concentrating on the deterrent effect of punishment.[42] In recent years, heavy sentences have been upheld for this reason in instances of counterfeiting,[43] bank robbery,[44] mugging,[45] breaking and entering,[46] armed robbery[47] and shoplifting,[48] demonstrating that the principle can be applied to a range of criminal behaviour. It was cautioned, however, in R. v. Sears,[49] that an unusual amount of a particular type of crime in a community "can never be more than one of the factors which is to be taken into account".[50]

Most frequently, the Court will take judicial notice of the prevalence of a particular offence, or glean such notice from the remarks of Crown Counsel.[51] Evidence can, however, be taken on the point: in R. v. Clarke,[52] evidence was given by a detective from the town police force at the sentencing hearing following conviction.

E. MAGNITUDE, IMPACT AND PROFITABILITY

A natural and obvious consideration in assessing the seriousness of an offence, and thus its placing on the range, is the size and effect of the crime committed. Profitability, where not treated as a mitigating factor due to pressing personal need,[53] or an aggravating factor due to the greed of the accused,[54] is part of the general question of the magnitude of the offence. Generally, comment is made on this aspect of behaviour where the offending has been committed on a particularly large scale or a large number of victims

has been involved. Such circumstances will justify severe sentences. In R. v. Johnston and Tremayne,[55] while reducing sentence on two accused convicted of possession of large amounts of marijuana for the purpose of trafficking, the Court stated:

> However, one cannot be blind to the enormity of the offences which they have committed. They were extremely grave offences against the law as it then stood and as it still stands.[56]

Similarly, in R. v. Soble,[57] the accused pharmacist had his sentence increased to 18 months' imprisonment by the appeal Court. One factor in the increase was that the offence contained thousands of individual frauds and involved a great number of people in a relatively small city.

A particularly large-scale operation or victim population may occasionally justify the imposition of a maximum sentence. In R. v. Wells,[58] the accused was convicted of numerous offences under the Immigration Act,[59] relating to his assisting illegal entry into Canada by students from Hong Kong. As to the penalty, the Judge stated that he could not overlook the magnitude of the accused's unlawful operations and the number of students who were adversely affected by them. In view of the circumstances, anything less than a maximum penalty would be inadequate.

Footnotes to Chapter 5

1. (1970), 1 C.C.C. (2d) 307 (Sask. C.A.).
2. R. v. Simmons, Allen and Bezzo (1973), 13 C.C.C. (2d) 65 (Ont. C.A.).
3. (1971), 3 C.C.C. (2d) 149 (Ont. C.A.).
4. Supra Chapter 1, text accompanying notes 81, 82, 88.
5. Supra note 1.
6. (1978), 3 C.R. (3d) S-1 (Man. C.A.).
7. (1972), 6 C.C.C. (2d) 107 (P.E.I.C.C.A.).
8. (1971), 6 C.C.C. (2d) 165 (Ont. C.A.).
9. Ibid. at 166 per Gale, C.J.O.
10. [1975] R.L. 527 (Que. C.S.P.).
11. (1974), 10 N.S.R. (2d) 549 (C.A.).
12. See further R. v. Rowter (1981), 44 N.S.R. (2d) 403 (C.A.).
13. (1980), 22 Crim. L.Q. 295 (Man. C.A.).
14. R.S.C. 1970, c.J-3, as am. by S.C. 1972, c.17, s.2(2); 1978-79, c.11, s.10(1).
15. (1973), 16 C.C.C. (2d) 396 (Que. C.A.).
16. Ibid. at 398 per Owen, J.A.
17. See post Chapter 5.E. See also R. v. Marcot (1976), 11 N. & P.E.I.R. 469 (Nfld. Dist. Ct.).
18. (1980), 24 A.R. 17 (C.A.).
19. (1980), 26 N. & P.E.I.R. 158 (Nfld. Prov. Ct.).
20. To the same effect see R. v. Kosh (1970), 13 Crim. L.Q. 154 (Sask. C.A.).
21. Supra note 19 at 163 per Reid, P.C.J.
22. (1977), 35 C.C.C. (2d) 376 (Ont. C.A.).
23. (1980), 25 B.C.L.R. 1 (C.A.).
24. R. v. Switlishoff et al. (1950), 9 C.R. 428 (B.C.C.A.).

25. (1971), 2 C.C.C. (2d) 301 (N.S.C.A.).

26. (1972), 72 D.T.C. 6219 (Que. Q.B.).

27. Ibid. at 6223-24 per Mignault, J.

28. [1973] C.A. 660.

29. (1973), 26 C.R.N.S. 359 (Que. C.A.).

30. See further R. v. Dawdy (1973), 12 C.C.C. (2d) 477 at 478 (Ont. C.A.) where Gale, C.J.O. stated: "This was a sophisticated, well-planned operation which called for a substantial sentence"; R. v. Axworthy (1974), 6 N. & P.E.I.R. 113 (P.E.I.C.A.) where the trial Judge took into account that "the entire transaction indicated a planned, deliberate and premeditated programme to defraud the individual in question" and R. v. Soble (1978), 3 C.R. (3d) S-1 (Man. C.A.) where the facts of the case indicated "continued, pre-meditated fraud".

31. (1971), 50 C.C.C. (2d) 119 (B.C.S.C.).

32. (1975), 24 C.C.C. (2d) 300 (N.S.C.A.).

33. Ibid. at 306 per MacDonald, J.A. Premeditation need not take place over a long period of time to aggravate the offence. In R. v. Singh, Khangura and Singh, [unreported] March 4th, 1981 (B.C.C.A.), the Court upheld sentences of 16, nine and nine months' imprisonment on three men who beat their victim with a golf club and "two by fours", causing a skull fracture, lacerations and bruises. MacFarlane, J.A. for the Court stated: "I agree with the argument ... that this is an entirely different matter from the position of one who assaults in a moment of excitement or following a fight or an argument, and especially where drinking may be involved. There is nothing of that sort involved in this case. It appears to me to be a deliberate, not necessarily planned for any considerable period of time, but a deliberate decision by these three men to inflict injuries on the victim."

34. (1976), 1 A.R. 355 (C.A.).

35. Ibid. at 358 per McDermid, J.A.

36. (1975), 18 Crim. L.Q. 17 (Que. C.A.).

37. (1979), 49 C.C.C. (2d) 27 (N.S.C.A.).

38. (1976), 18 Crim L.Q. 286 (Ont. C.A.).

39. (1979), 23 A.R. 403 (N.W.T.S.C.).

40. Ibid. at 422 per Tallis, J.

41. See supra Chapter 2.C.i.

42. See e.g. R. v. Adelman, [1968] 3 C.C.C. 311 (B.C.C.A.); R. v. Carroll (1980), 27 N. & P.E.I.R. 159 (P.E.I.C.A.).

43. A.G. Que. v. Sigouin, [1970] C.A. 569.

44. R. v. Belleville and Chabot (1975), 18 Crim. L.Q. 21 (Que. C.A.).

45. R. v. Henderson (1979), 8 C.R. (3d) S-19 (B.C.C.A.).

46. R. v. Marshall (1977), 23 N.S.R. (2d) 234 (C.A.); R. v. Coady (1977), 14 N. & P.E.I.R. 274 (Nfld. Dist. Ct.).

47. R. v. Clarke (1979), 48 C.C.C. (2d) 440 (N.S.C.A.).

48. R. v. Sears (1978), 39 C.C.C. (2d) 199 (Ont. C.A.).

49. Ibid.

50. Supra note 48 at 200 per Arnup, J.

51. See e.g. cases cited supra notes 43-46.

52. Supra note 47.

53. See supra Chapter 4.B.

54. See e.g. R. v. McLean et al., supra note 19.

55. [1970] 4 C.C.C. 64 (Ont. C.A.).

56. Ibid. at 68 per Gale, C.J.O.

57. Supra note 6.

58. (1972), 7 C.C.C. (2d) 480 (Ont. Prov. Ct.).

59. R.S.C. 1970, c.I-2, since rep.

CHAPTER 6: FACTORS RELATING TO THE VICTIM

A. CHARACTER

The character or life-style of the victim of an offence is most frequently brought into the sentencing question where sexual offences are committed against women whose behaviour is, in the eyes of the Court, somewhat less than puritanical. There are, however, occasional exceptions: in recent years the effect on sentence of the victim being a criminal or a homosexual has been considered. In R. v. Winters, Knox and Palmer,[1] three men robbed a seller of hashish of some of his merchandise and approximately $200. It was held on appeal that the trial Judge should not have suggested that the sentence could be any less severe merely because the victim was himself a criminal. "The character of a victim of a crime does not affect his right to be protected from robbery and possible violence."[2] In R. v. Atkinson, Ing and Roberts,[3] the three accused set out to beat up homosexuals in a public park known to be frequented by such persons. The appeal Court held, in increasing sentence, that the motive for the assaults should be an aggravating factor.

The three reported decisions regarding the character of women victims of sexual offences since 1970 conveniently cover rather different aspects of the question. First, where the victim's lifestyle has little or no relevance to the actual offence committed, it will not be considered. Thus in R. v. Savard,[4] the accused taxi driver was sentenced for the rape of a passenger without reference to the lifestyle of the victim. The fact of her concubinage with another taxi driver in no way affected her right to be protected from assaults of this kind.

Different considerations apply where the character and life-style of the victim are, to some extent, implicated in the commission of the offence. The most common situation in which this occurs is an offence of intercourse with a female under legal age. Where consensual intercourse is involved, clearly the offence is regarded more seriously if the accused has seduced a young girl of previously chaste character, and less seriously where he has merely consorted with a young woman already well-versed in the ways of the world. In R. v. Kirby,[5] the accused teenager was to be sentenced for an offence of sexual intercourse with a 13-year-old girl. The Judge noted that she had visited at least one nightclub, had been associating with girls who were at least three years older than she, was getting drunk twice a week and was regularly smoking cannabis. It also appeared that she had enjoyed the two acts of intercourse, although she later realized that what she had involved herself in was wrong.

> If this evidence, bearing on the unpuritanical character of the girl, was the only evidence before me, I might have considered a non-custodial sentence... If there had been any evidence of violence or previous chaste character of the girl, I would have imposed a lengthy period of incarceration.[6]

In cases such as Kirby, the question of the general character of the complainant often is closely allied to her role in the offence. Such may also be the case in offences involving the rape of mature women. In R. v. Simmons, Allen and Bezzo,[7] the three accused were convicted of rape following a heavy drinking session with the complainant in a bar. The trial Judge found that she had "put herself in a position where these three must have assumed that the end of this evening was to result in sexual intercourse for everyone...". The appeal Court further said that:

> The complainant's character is not without significance in the total picture. She was 29 years old, married and

separated and living in a common law relationship.,. She admitted to having relations with men with whom she met at bars and with whom she would dance.[8]

B. CONSEQUENCES TO, OR EFFECT ON, VICTIM

The extent of ill effects upon the victim of a crime is another consideration pertaining to its overall gravity. This proposition in its simplest form is illustrated in a contrasting pair of rape cases, R. v. Shanower[9] and R. v. Sweitzer.[10] In Shanower, the accused raped a 15-year-old girl who had been engaged as his baby-sitter. In reviewing sentence, the Court noted extenuating circumstances, including the fact that to the date of the appeal there had been no serious ill effect upon the mental health of the victim. Conversely, in Sweitzer, the Court increased sentence for the rape of a lone woman, in her apartment, from five years to seven. The Court pointed out and took into consideration that the offence might "remain with [the victim] all her life" - "for the rest of her life [she] may be concerned with every creak or rattling of a window which she hears at night."[11]

These propositions are simple enough. A more complex question arises where the Court is called upon to consider serious consequences to the victims, intended or unintended, of a crime where the precise extent of harm to them is not intrinsically related to the substantive fact of the offence. The classic example of such a situation occurs in the case of a motor vehicle offence which results in death or serious injury. Death may have occurred, but not be crucial to a conviction of, for example, dangerous driving or leaving the scene of an accident. In such cases, although the harm resulting to victims can be taken into account, it is important that the Court bears in

mind its central purpose of imposing a punishment for the offence committed, rather than for the death of the victim.[12] Similarly, where an accused drives negligently and causes death, it is largely incidental whether one death or more is the result. In R. v. Mellstrom,[13] the Alberta Court was called upon to review sentence imposed on an accused convicted on several counts of causing death and bodily harm by criminal negligence. Allen, J.A. stated:

> While the enormity of the tragic consequences of an offence is a factor to be taken into consideration it must not be permitted unduly to distort the consideration of the Court as to the appropriate sentence for the offence committed. In other words, applying this line of reasoning to the case under consideration, the fact that three people were killed should not be permitted to magnify the offence in the mind of the Judges over its sufficiently serious nature if only one person had been the victim.[14]

A similar result ensues in assault cases, where, although he does not die, the victim incurs injuries much more serious than those intended by the assaulter. In R. v. Griffin,[15] the accused police officer struck an arrestee with his nightstick during the course of an arrest. He caused such damage to the arrestee's eye that it had to be removed. The blow clearly was not premeditated. At trial, the Judge refused to grant a discharge because of this serious result. It was held on appeal that the trial Judge had given undue weight to the actual result of the assault, rather than the probable result. A discharge was granted in order that the accused could regain his employment as a police officer.

C. SUBMISSIONS BY THE VICTIM OR THE VICTIM'S FAMILY

It is commonplace in cases of domestic violence that the recipient of spousal blows has, by the time of sentencing, modified somewhat his or her attitude to the criminal proceedings. While there is little authority on this

matter, it appears clear that although the wishes of the victim cannot determine the question of sentence, they may certainly be taken into consideration. In R. v. MacArthur,[16] the accused, who had shot his common-law wife, came before the Court with evidence that cohabitation had since resumed. In view of this positive development, the Court imposed only a suspended sentence and three years' probation. A more unusual situation arose in R. v. Hardy.[17] The accused received a suspended sentence for manslaughter of his wife. The Judge stated that what had impressed him "the most by far, [was] the evidence presented by ... a sister of the victim". A document was prepared by her at the request of her mother, and signed by the mother, the three sisters and the brother of the victim, with their respective spouses. The document requested the minimum charge and sentence permissible in light of the extreme extenuating factors of the case (mental illness of the victim) and the patience, kindness and understanding which the accused had exhibited over many years.

Different considerations apply in cases arising out of labour relations difficulties. Although comment on this area is rare, a 1970 decision is unequivocal on the point. In Skeena Kraft Ltd. v. Pulp and Paper Workers of Canada, Local No. 4 et al.,[18] the Court imposed a fine for disobedience of a labour injunction by a union. The Court stated that it was unimpressed by the fact that the plaintiff did not ask that any fine be imposed. Where an employer has settled with a union, it is common for it to abandon thereafter the punitive attitude which it bore at the commencement of the proceedings. However, the Court stated, once contempt is proven, the matter and manner of punishment is entirely in the hands of the Court.

D. ROLE OF THE VICTIM IN THE OFFENCE

As previously mentioned,[19] the fact that the victim, typically a complainant in a rape case, has contributed to the circumstances leading up to the offence or behaved in a way which the accused might have conceived as inviting its commission, may be considered a mitigating circumstance. An example occurred in R. v. Gehue.[20] The accused was convicted of indecent assault. Examination of the circumstances of the offence revealed that the complainant had supplied the accused with beer and liquor from the morning until about midnight, and had invited him into her house. The trial Judge was held properly to have taken into account that the complainant had contributed to the intoxication of the accused.[21]

Police officers who make errors of judgment in relation to violent offenders are apparently exempt from categorization as perpetrators of a mitigating circumstance. In R. v. MacKay, Thompson and Secord,[22] the three accused assaulted a police officer in a public bar. The trial Judge mitigated sentence because a police officer, going to the hotel in the circumstances of the case, faced an occupational hazard. "Discretion being the better part of valour, he might have waited for some additional police company before going into the hotel."[23]. The appeal Court found this principle to be "wholly wrong". It was not to be expected that a police officer in the execution of his duty should be subject to physical assault.

A matter still subject to conflicting judicial opinion is whether the victim of a negligent offence, who would in a civil court be penalized by a reduction of damages for contributory negligence, is to be treated as having mitigated the offence. In R. v. Mitchell[24] the accused, with a group of young people, started driving around quite recklessly at approximatley 7 p.m. At

about 11 p.m. the group went to a bar where alcohol was consumed. About half an hour later, with the accused driving, they all re-entered the vehicle. Shortly thereafter an accident occurred and one passenger was killed. The accused was convicted of criminal negligence causing death, and the Court of Appeal upheld his sentence of four months' imprisonment. The Court divided, however, on the issue of whether the contributory negligence of the deceased should be taken into account in sentencing, since the deceased had known that the accused had been drinking and driving recklessly, and had had ample opportunity to leave the car. The final resolution of the case was determined by a 2:1 majority; however, the majority Judges divided on the contributory negligence question, leaving the law unclear. MacDonald, J., in the majority, stated that:

> The apparent reason why an accused charged with criminal negligence, is in some cases treated more leniently where his passenger is killed, is because there may be imputed to the deceased some element of assumption of risk. Although contributory negligence by the deceased is not a defence in criminal law ... there are a number of cases which have indicated that the deceased's negligence may be considered in sentencing the accused ... Similarly, in cases of manslaughter although the defence of self-defence could not be relied upon, circumstances involving the aggressive nature of the deceased have been considered in sentencing.[25]

M.J. McQuaid, J., also in the majority, dissented on this point.

> With respect, however, I cannot subscribe to the view of MacDonald, J., that an accused may be treated more leniently if the person killed as a result of the accused's criminal negligence was himself negligent. Contributory negligence of a deceased ... should not be a factor influencing the severity of the punishment imposed on a convicted person. Prudence, good judgement and plain ordinary horse-sense should have dictated to the deceased that he get out of that car at his first opportunity. It was an error of judgement on his part not to have done so, but that error is not a mitigating circumstance insofar as the accused is concerned.[26]

Finally C.R. McQuaid, J., dissenting as to the result, concurred on this issue with M.J. McQuaid, J.

> [T]he volenti principle ... has no application, whether in mitigation or otherwise. The crux of the offence is to cause the death of another by an act which is criminally negligent. If criminal negligence is established, and if a death is a direct consequence, the offence is complete.[27]

It is respectfully submitted that the McQuaid view is to be preferred. While the fact of death as opposed to injury is an integral element of the offence committed, it is a mere incidental consequence of the criminal negligence rather than a matter of the accused's choosing or preference. It is thus the act of criminal negligence which falls to be punished, on a scale dependent upon whether or not death was accidentally caused. The death playing only a secondary role, it cannot be said that the fact of the victim's contributory negligence as regards the result of the act should in any way affect sentence. The essential question remains, how serious was the act of criminal negligence committed by the accused?

Although there is no authority on this point, it is further submitted that different considerations may apply if the contributory negligence of the victim is an act, rather than an omission. Hypothetically, it is possible that a case may arise in which the accused committed a criminally negligent act, which could not of itself have caused death. The victim, however, himself committed a negligent act which, when combined with the act of the accused, resulted in his death. In such a case, it can clearly be seen that it would be unjust to punish the accused as severely as one who had committed a criminally negligent act which, without more, could foreseeably have caused death. The whole area, however, as already noted, remains open for further judicial discussion.

E. PROVOCATION

Where the victim provokes the commission of an offence, ordinarily this will affect the Court's general consideration of the gravity of the offence.[28] This is so even where, in manslaughter cases, the accused has already benefited from a reduction of the charge from murder to manslaughter on the ground of provocation.[29] Manslaughter being an offence which covers a very wide range of behaviour, the extent of provocation will be vital in determining the gravity of the homicide committed. In R. v. Hardy,[30] the accused was a 53-year-old computer systems analyst. His wife of 30 years died at his hands. The victim had never been a mature, normal person. Shortly before the homicide she became physically violent, hitting the accused and clawing at him. She would refuse to go home and then telephone for him to collect her. On the night of the killing she insisted on going out for a drink, then on returning home continued to abuse her husband and announced that she was going to stay at the Y.W.C.A. She left, telephoned home at 2 a.m. and asked the accused to collect her. He did, but when she came home she accused him of "having someone in" during the short time she had been away. The two finally lay down to sleep at 5 a.m., but the wife woke at 7 a.m. and shouted "get out of my bed you nigger-lover", pushing the accused with her foot. The accused took a hammer from the closet and began striking her. Then, still in a rage, he grabbed a towel and held it over her face. In light of these facts and the excellent previous record of the accused, the Court considered the case exceptional and suspended sentence.

F. STATUS

While the rich and the poor are equally entitled to protection of the law, there is occasional authority to the effect that offences committed against persons of particularly high standing are to be treated as more severe than similar offences committed against "ordinary" persons. The two reported cases since 1970 dealing with this aspect are, admittedly, very unusual in nature. The more famous is the decision of the Quebec Court of Sessions of the Peace in R. v. Cossette-Trudel and Cossette-Trudel.[31] Mayrand, C.J.S.P., sentencing the two accused for kidnapping and other offences, stated that the choice of a foreign diplomat as a victim was an aggravating factor. The crime committed had an international dimension, and had amounted to a violation of international law.

An incident with similar ramifications was perpetrated by one Matrai.[32] During a visit of the Soviet Premier to Canada the accused lunged and grabbed him. No injuries were sustained: however, the appeal Court upheld an exceptionally severe sentence of three months' imprisonment followed by two years' probation based solely on the position of the victim, a visiting head of state.

G. MEMBER OF VULNERABLE CLASS

The fact that the victim of the offence falls within the definition of a "vulnerable class" may lead the Court to impose a deterrent or exemplary sentence.[33] The commonest victim to appear in this category is the taxi-driver. In R. v. McGlone,[34] the Court upheld a sentence of six months' imprisonment imposed upon an accused who stole money from the

changer of a taxi driver, having regard to "the need to protect taxi drivers who are especially vulnerable to offences such as this".[35]

Other miscellaneous victims recently considered in this light include bar employees and prison inmates. In R. v. Evans[36] the accused punched, kicked and rendered unconscious a waiter in a bar. The waiter had simply asked him not to use a fire exit door. While reducing sentence from 18 months to nine months' imprisonment, the Court stated that the "factor of deterrence is of great importance in cases of this kind where the victim of the assault is by the very nature of his employment exposed to the dangers of violence. Such people must be protected." In R. v. Piche, Caplette and Jones,[37] the Court had before it three accused who participated in a "homosexual rape" of a fellow inmate. It was stated that the Court should take note of the vulnerability of persons such as the victim, and afford protection by imposing a deterrent sentence.

As noted earlier, sentences imposed on offenders who abuse children are frequently harsh in view of the breach of trust involved and the vulnerability of youngsters.[38]

Footnotes to Chapter 6

1. (1974), 16 C.C.C. (2d) 551 (N.S.C.A.).

2. Ibid. at 555 per MacKeigan, C.J.N.S.

3. (1978), 43 C.C.C. (2d) 342 (Ont. C.A.).

4. (1979), 11 C.R. (3d) 309 (Que. C.A.).

5. (1976), 24 N. & P.E.I.R. 260 (Nfld. Prov. Ct.).

6. Ibid. at 261-62 per Luther, P.C.J.

7. (1973), 13 C.C.C. (2d) 65 (Ont. C.A.).

8. Ibid. at 70 per Brooke, J.A.

9. (1972), 8 C.C.C. (2d) 527 (Ont. C.A.).

10. (1980), 26 A.R. 208 (C.A.).

11. See also R. v. Beaumier, [unreported] March 31st, 1981. The Court upheld a sentence of four years, "while it may be a bit on the high side", upon an accused convicted of indecent acts and gross indecency with his daughter and stepdaughter. Medical evidence had been tendered as to the substantial effects on the children, and the Court concluded that the accused was "the principal cause of these girls' difficulties and the psychological problems which they now face". (Per Nemetz, C.J.B.C.).

    Consequences which might have occurred for potential victims may also be considered. In R. v. Sabloff, [1979] C.S. 1077, the Court considered as an aggravating factor that the accused morphine trafficker entered into transactions believing that the purchasers, while users, were not yet addicts. She knew full well that the quantities involved, if used, would probably hasten or result in their addiction.

12. See R. v. Collier (1971), 6 C.C.C. (2d) 438 at 442 (N.S. Co. Ct.) where the accused was convicted of failing to stop at the scene of an accident which resulted in the death of the victim. O'Hearn, Co. Ct. J. stated: "In considering retribution, all the circumstances of the case have to be taken into account. In this case those include, not only the fact that a person was involved in the collision but that the person was injured. I think it can even be taken into account that the boy involved died, as indicating how serious the injury was, although of course, it is clear that the defendant cannot be punished for causing the death in this proceeding and that that factor must be excluded." See also R. v. Rance (1972), 14 Crim. L.Q. 393 (Ont. Co. Ct.) and E.L. Greenspan's annotation to R. v. Huard (1970), 13 Crim. L.Q. 150 (Que. C.A.).

13. (1975), 22 C.C.C. (2d) 472 (Alta. C.A.).

14. Ibid. at 486-87 per Allen, J.A.

15. (1975), 23 C.C.C. (2d) 11 (P.E.I.C.C.A.).

16. (1978), 39 C.C.C. (2d) 158 (P.E.I.C.A.).

17. (1976), 29 C.C.C. (2d) 84 (Que. S.C.).

18. (1970), 17 D.L.R. (3d) 17 (B.C.S.C.).

19. Supra text accompanying notes 5-8.

20. (1975), 12 N.B.R. (2d) 564 (C.A.).

21. See also R. v. Simmons, Allen and Bezzo, supra note 7.

22. (1970), 16 C.R.N.S. 11 (Ont. C.A.).

23. Ibid. at 12 per Jessup, J.A., quoting from the trial judgment.

24. (1981), 29 N. & P.E.I.R. 125, 82 A.P.R. 125 (P.E.I.C.A.).

25. Ibid. at 128 per MacDonald, J.

26. Ibid. at 134 per M.J. McQuaid, J.

27. Ibid. at 135-36 per C.R. McQuaid, J.

28. See e.g. R. v. Hardy (1976), 29 C.C.C. (2d) 84 (Que. S.C.); R. v. Kirby, supra note 5.

29. See R. v. Herring [unreported] April 8th, 1981 (Sask. C.A.).

30. Supra note 28.

31. (1979), 11 C.R. (3d) 1 (Que. C.S.P.).

32. R. v. Matrai (1972), 6 C.C.C. (2d) 574 (Ont. C.A.).

33. For a discussion of offences involving policemen qua victims who are members of a vulnerable class, see post Chapter 10.A.

34. (1974), 10 N.S.R. (2d) 247 (C.A.).

35. See also R. v. Keast (1979), 22 Crim. L.Q. 431 (Ont. C.A.); R. v. Doughty (1978), 40 C.C.C. (2d) 224 (P.E.I.S.C. in banco).

36. (1975), 24 C.C.C. (2d) 300 (N.S.C.A.).

(1978), 21 Crim. L.Q. 25 (Alta. T.D.).

38. Supra Chapter 3.E.vii.

CHAPTER 7: FACTORS RELATING TO THE PERIOD BETWEEN OFFENCE AND SENTENCE, PENDING APPEAL, AND THE ACCUSED'S BEHAVIOUR THEREIN

A. PASSAGE OF TIME

Sentencing courts frequently recognize that a long, drawn-out trial, series of trials or appeal process may cause a great deal of suffering to the accused, and often take into account such suffering as a mitigating factor. Indeed, in the majority of cases in which this factor has been taken into consideration, it has had dramatic effects. In R. v. Carmanico[1] the accused, convicted of perjury, had caused a conspirator in a robbery to be acquitted. The Court, although increasing his sentence, held that had the Crown's appeal been more expeditious, the appropriate sentence would have been nine to 12 months' imprisonment. In view of the tardiness of the appeal, a sentence of six months was imposed. In R. v. Cooper (No. 2),[2] the accused was convicted of conferring a benefit on a government employee. Following a trial in June 1974, he was sentenced in August of the same year to 18 months' imprisonment. On his appeal a new trial was directed in March 1975, but two years later the Supreme Court of Canada set aside the judgment of the Court of Appeal and restored the original conviction. On appeal against sentence in June 1977, the "long period of great anxiety" suffered by the accused and his family was taken into account, inter alia, in reducing the sentence by one-third to twelve months' imprisonment. Even more dramatic was the reduction in R. v. Legare (No. 2).[3] The accused was convicted at

trial of misappropriation of money held under direction. Subsequently, the Quebec Court of Appeal entered an acquittal, and the Supreme Court of Canada restored the conviction. In reducing the sentence of imprisonment from seven years to 30 days, the Court of Appeal took into account the financial and moral suffering occasioned to the accused by a trial stretching over a period of 12 years.

A recent decision of the Nova Scotia Court of Appeal, R. v. Murdock,[4] discussed the position of the accused following one lengthy trial as opposed to a series of hearings. The Court refused to reduce sentence with regard to the length of the trial. It was held that a necessary delay in completing a trial, for a purpose such as taking evidence abroad in a country where a part of the fraudulent transaction occurred, will not justify a reduction in sentence. Further, if such action was necessary at the time it was taken, it will not be relevant that it later became unnecessary to pursue that course of action.

Occasional cases may be found in which lengthy delays and worrisome proceedings have seriously impaired the health of the accused. In such cases the Courts normally take full notice of the two mitigating circumstances thus occasioned. An example is R. v. Therrault[5] where proceedings lasted over a total of ten years and involved 33 adjournments. Cause and effect became somewhat locked into a circle as the length of the proceedings contributed to the accused's heart condition, and his heart condition was responsible for many of the adjournments. To complicate matters, the trial Judge was also unwell on several occasions. In light of the substantial mitigating factors, a sentence of six months' imprisonment and a $2,000 fine was reduced to one day's imprisonment and one year's probation.

The case of the offender who avoids capture for a number of months or years demands somewhat different treatment. In R. v. Miller and

Couvreur,[6] the two accused had committed an armed robbery involving great violence some six years before their arrest. The Court held that to suggest that their lives had been relatively law-abiding since the offence and that no purpose would be served by incarcerating the accused now, would be giving them "good marks" for not being caught immediately and pleading guilty at the end of the lengthy investigation.

While the logic in Miller and Couvreur is sound, it would appear to apply only to cases in which a tariff sentence is demanded. Where rehabilitation of the accused is under consideration, then of course any signs of a positive modification in the accused's behaviour will be just as relevant as signs to the contrary. Although the decision in R. v. Cossette-Trudel[7] is somewhat exceptional in view of the unusual facts of that instance, it provides a clear illustration of this exception. After committing various offences including kidnapping, the two accused had gained safe conduct by their threats and spent approximately nine years in Cuba and France. The Court felt that it was necessary to prevent threats and extortion from becoming a profitable means to obtain delays to postpone punishment. The line of conduct chosen by the accused should not be rewarded by a reduction in sentence, otherwise it would incite other criminals in similar circumstances to try to do the same. The accused, in gaining safe conduct passes by threatening the life of the diplomatic hostage, took advantage of the time gained by their threats. It would be an aberration if they were to benefit twice from the same criminal acts, and escape imprisonment. On the other hand, the accused had suffered greatly as a result of their absence. Since their return to Canada, their conduct had been irreproachable. They had avoided a long and difficult trial, often costly and painful for those who must relive events they try to forget. The Court held that their manifest

willingness to start a new life was not to be stifled: they were to be allowed to do so within a reasonably short time period.

A factor not mentioned in Cossette-Trudel is the desirability of having voluntary exiles return to Canada to face up to their obligation under the law. While it seems logical not to reward criminals who gain safe conduct and live abroad for a number of years, once they are there they are not likely to return if they feel that no credit will be given for their efforts to abide by the law during exile, or their taking the initiative to return to face their punishment.

B. CHANGE OF SOCIAL OR LEGISLATIVE POLICY, OR LAW[8]

An apparent change in the legislative or governmental policy with respect to a particular offence may cause precedents on quantum of sentence to become outdated. A consistent example of such a change in policy has been the government's attitude to possession of marijuana, which was recognized in the decision in A. G. Can. v. Fairn.[9] Reducing the accused's sentence from five months to 21 days' imprisonment, the Court relied upon a lengthy review of case law, literature and trends in sentencing for drug abuse to declare that in light of changes in policy, some earlier precedents were of less relevance than previously.

An actual change in the law regarding sentence for an offence is dealt with in Section 36(e) of the Interpretation Act,[10] which provides:

> Where an enactment (in this section called the "former enactment") is repealed and another enactment (in this section called the "new enactment") is substituted therefor, ...
> (e) when any penalty, forfeiture or punishment is reduced or mitigated by the new enactment, the penalty, forfeiture or punishment if imposed or adjudged after the repeal shall be reduced or mitigated accordingly....[11]

C. TIME SPENT IN CUSTODY

The Criminal Code provides:

> 649.(2.1) In determining the sentence to be imposed on a person convicted of an offence, a justice, magistrate or judge may take into account any time spent in custody by the person as a result of the offence.

While the common practice of sentencing Courts is simply to mention that time served awaiting trial has been taken into account, the matter has been discussed in detail on sufficient occasions for a number of rules and general practices to emerge.

While the section is clearly permissive and not mandatory, it has been fairly generally agreed that credit against sentence should be given for more time than that actually served pending trial: the true rationale for this view is that time served pending trial does not attract remission and is therefore equivalent to a longer term of post-sentence custody.[12] Thus, in R. v. Chrun,[13] the Court of Appeal reduced a sentence for rape from 3-1/2 years to 2-1/2 years' imprisonment to take account of a period of six to eight months the accused had spent in custody awaiting trial. The six to eight-month period was said to be about equal to the time he would ordinarily serve on a one-year sentence. Similarly, in R. v. Arellano and Sanchez,[14] without wishing to lay down any definite rule, the Quebec Court regarded a term of nearly eight months in preventive detention as approximately the equivalent of one year's sentence time.

Although there are occasional comments to the contrary,[15] most appellate Courts have agreed that it would be unwise to lay down a definite formula for the computation of allowable time. In R. v. Regan et al.,[16] the

trial Judge adopted what he referred to as a "rule of thumb", by which imprisonment awaiting trial was treated as equivalent to a sentence of twice that length. The appeal Court stated:

> In our view, no such rule of thumb has ever been recognized by the Courts of this Province, and, furthermore, such a rule ought not to be recognized in the future. Each instance of sentencing has to be considered on its own merits, and, no doubt, in proper cases time already spent in custody, and the circumstances thereof, may be taken into account as provided by the Criminal Code. Beyond that, we do not believe any rule in this regard can be laid down.[17]

A similar statement was made in R. v. Aikens,[18] where the New Brunswick Court, while denouncing the notion of a "rule of thumb", nevertheless stated that in some cases time served pending trial may be treated as double. The Court went on to point out that there should be a number of exceptions to this rule.

One such exception occurred in R. v. McIvor.[19] The accused and his partner, large-scale drug traffickers, were arrested in Alberta with 316 lb. of marijuana. The partner was tried, convicted and sentenced in Alberta. The accused asked to have his charges waived from Alberta to Vancouver which caused a delay, ultimately of about a year, before sentencing. His submission through counsel that he ought to be credited more than a year for the year spent "in a state of limbo" was rejected. There is a hint in McIvor that at least part of the reason for disallowing the accused any increased effect for his year in jail was that the technical circumstances leading to this long pre-sentence detention were occasioned by himself. There is, however, contrary authority to the effect that even if the length of pre-trial detention was caused largely by the accused himself, it does not change the fact of his having served a period of imprisonment. In R. v. Pearson,[20] the accused had been detained for almost a year before sentence as a result of his offences.

The trial had been delayed many times because of an "avalanche" of procedures instituted by the accused. These included habeas corpus, certiorari (twice), prohibition and four appeals. The Court categorically rejected Crown Counsel's submission that the Judge should not give "the customary degree of consideration" to the period of pre-trial detention. Accordingly, the customary allowance (unstated) was made.

One principle that does appear to be common ground relates to the relationship of short periods of pre-trial detention to lengthy custodial sentences. The general principle was stated in R. v. Squires,[21] where the accused, after being ejected from a party, returned with a gang and brutally beat the three men who had expelled him. He was sentenced to a total of ten years' imprisonment. As a mitigating circumstance, defence counsel suggested that the Court consider that the accused had already spent more than one month in jail pending trial. The Court, while agreeing with this submission, stated that where the time already served is such a small percentage of the time to be served, it cannot practically be taken into account. A similar result was reached in R. v. McLean et al.,[22] the accused receiving only "minimal benefits" from short remand periods in respect of six-year prison sentences for conspiracy to traffic in narcotics.

Further controversy is encountered in respect of the effect of s.649(2.1) upon statutory minimum sentences. In R. v. Brown,[23] it was held that a Judge imposing the mandatory minimum sentence of seven years' imprisonment provided by s.5(2) of the Narcotic Control Act[24] is precluded by the minimum from taking into account time spent in custody. Unfortunately, precisely the opposite result was reached in an earlier case at the same level, R. v. Shecter.[25]

A final question is as to whether, in those cases held to require imprisonment as a matter of policy, pre-trial custody may be taken as

satisfying this need. The answer given by the Ontario Court of Appeal in R. v. Wooff[26] was clearly in the negative. Cognizant of the policy of the Court of Appeal that offences of trafficking in narcotics normally required imprisonment, Wooff's counsel argued on appeal that time spent in custody prior to sentence could be regarded as a custodial sentence, and a mere term of probation would be appropriate. While Gale, C.J.O., for the majority, was prepared to take the time spent in custody into consideration, that was as far as the Court was prepared to go. If countenance were given to the argument put forward by defence counsel, pre-sentence custody abuse would soon occur.

Time spent in custody pending appeal is a different matter. Here, the sentence imposed at trial has commenced to run, and accordingly will attract statutory remission and the possibility of parole. Accordingly, there appears to be little justification for taking any exaggerated notice of pre-appeal custody in sentencing reviews, although of course, time already served will be taken into account where a new sentence is set by the Court of Appeal. In R. v. Thorne,[27] the accused was charged with an offence under s.4(2) of the Narcotic Control Act,[28] but convicted of an offence under s.3(1). He was sentenced to two months' imprisonment. On appeal, the conviction under s.3(1) was quashed and a conviction under s.4(2) entered. The two-month sentence had been served. An appropriate sentence for the conviction under s.4(2) would have been about 14 months' imprisonment at the time of trial: taking into account the two months served, a sentence of 12 months was imposed.

A novel approach to the calculation of the value of service of non-custodial sentence was exhibited by the Prince Edward Island Court of Appeal in R. v. Smith, Thomas and Boyce.[29] The three accused were

convicted of offences in relation to the fraudulent burning of a car. The trial Judge suspended sentence and ordered, inter alia, restitution of investigation expenses and community service. After substituting sentences of imprisonment, the Court of Appeal reduced their lengths as follows:

> Using as a base figure the minimum wage of $2.75 per hour, we would equate the amount of restitution paid [$350.00] in each case as equivalent to 16 days; each 8 hours of community work we would equate as being equivalent to 1 day.[30]

D. ACTS OF ACCUSED

i) Cooperation with Police

Cooperation of an accused with the police may take several forms. It may amount simply to a frank confession of the crime and ready admission of guilt before the Court. On the other hand, it may involve informing on others and/or testifying at their trials.

The former situation frequently takes on the appearance of a mitigating factor. The accused's readiness to acknowledge his guilt, in some cases apologize, and not infrequently his willingness to make amends, may be taken by the Court as indicative of a good prognosis for rehabilitative measures and lead to the imposition of an individualized sentence.[31] Where a tariff sentence is to be imposed, a full confession will also be to the accused's advantage;[32] it would appear a sensible policy to allow some credit, as the cooperation of the accused has long-term benefits for the community in the form of better deployment of police resources, saving of public funds and police time, and saving of the Court's time. The rationale is, indeed, similar to that for taking into consideration a guilty plea, discussed below.[33] There

are occasional exceptions: from time to time a Judge will refuse to allow substantial credit in view of the accused's having had no alternative but to cooperate. In R. v. Sullivan[34] Furlong, C.J.N. stated that he felt

> ... bound to observe that this is not a factor which should weigh very heavily in his favour with the trial Judge; it is easy enough to be contrite and repentant and co-operative when you have been discovered in criminal activity.[35]

Allowing credit on sentence to an informer is more difficult. In England there appear to be two reasons for such practice: one is the practical benefit of allowing some reduction of sentence of one offender in order to apprehend others; the second is the realization that life in prison for an informer will be very much harder than it would have been had he kept his information to himself.[36] While these arguments would appear equally valid in Canada, there have been dissents. In R. v. Atkinson (No. 2)[37] the New Brunswick Court of Appeal stated that it was improper to impose a less severe punishment where the accused agreed to supply information to the police to assist them in investigating the unlawful activities of others. The Court cited with approval the words of Nicholson, J. in Phillips v. The Queen:[38]

> The suggestion that a convicted person might receive a less severe punishment if he gives evidence implicating another accused person is repugnant to all the guiding principles to be followed in sentencing ... The suggestion that a more severe punishment has been given because his evidence has failed to implicate another accused person is equally repugnant.[39]

The case of Phillips was in fact decided with reference to the failure of the accused to implicate another person at trial, a different matter altogether from the question of assisting the police with their inquiries. It is

submitted that Atkinson wrongly applied Phillips to arrive at a result not desirable in principle.

If credit is to be allowed for assisting the police with their inquiries,[40] it does not follow that failure to assist the police will be an aggravating circumstance. Rather, while any assistance given should mitigate sentence from what would normally be imposed, no additional penalty should be imposed for failure to identify accomplices or other offenders. It is thus submitted that the recent decision of the Quebec Superior Court in R. v. Levesque[41] is also wrongly decided in this respect. There, the Court considered as an aggravating circumstance, inter alia, the fact that the accused had refused to identify his two accomplices.

It would appear that assistance given to the police need not relate directly to the offence for which the accused now stands before the Court. In R. v. Pearson[42] the accused was to be sentenced for possession of large amounts of stolen money orders. The Court took into account that on a previous occasion he had given information to the R.C.M.P. to the effect that he had been asked by persons, residing in a communist country, to assist them in illicitly obtaining Canadian passports so that they could enter Canada illegally.

Despite the words quoted above from Phillips, there is authority to the effect that an accused who assists the police by testifying in trials of others is entitled to some credit for his performance. Thus in R. v. Doyle and 10 others[43] the Court, while substituting a term of one year's imprisonment for a fine and probation imposed in respect of trafficking in hashish, did comment that the sentence might have been longer had not the accused assisted the police in convicting another offender. Similarly in R. v. Doucet,[44] while a penitentiary term would normally have been appropriate

for the accused armed robber, his having served over four months awaiting trial, cooperation with the police in investigating the crime and his having testified as a Crown witness in one case justified a reduction of the term to eight months' imprisonment followed by probation.

ii) Compensation or Restitution Voluntarily Made

There is ample authority that the voluntary payment of compensation or restitution before the trial is a factor in the accused's favour.[45] The payment of restitution may indicate some motivation on the part of the accused towards rehabilitation, and consequently indicate that an individualized disposition is in order.[46] Where a tariff sentence is in question, payment of restitution is a mitigating factor simpliciter and, while never a complete answer, does "go to the length of the sentence...".[47] In appropriate circumstances reimbursement may be particularly compelling where made before the laying of charges.[48] More care must be exercised in the Court's comment on failure of the accused to make restitution. It is submitted that the correct principle in tariff sentencing is that, while mitigation may be effected for payment of compensation, the sentence may not be increased beyond what is appropriate for the offence to reflect a failure to make such payment. The author has found no examples of courts directly disagreeing with this proposition. More frequently, where a court has taken notice of the failure to compensate the victim, it has been as indicating an absence of remorse or rehabilitative intent on the part of the accused. In these circumstances, the proper role of the failure to compensate is to preclude an individualized measure in favour of a tariff sentence. As already explained, such a step is not equivalent to aggravating sentence.

A clear example is the decision of the Prince Edward Island Court of Appeal in R. v. Axworthy.[49] Axworthy was convicted on 14 counts of forgery and uttering. The trial Judge in imposing sentences totalling 25 consecutive months of imprisonment, stated that her failure to give any accounting for $4,900 of the funds realized

> weighed heavily against her, as indicating ... a complete absence of remorse or rehabiliation, but rather an intention to profit, ultimately, from her own wrongdoings.[50]

This reasoning was held on appeal to disclose no error in principle.[51]

iii) Further Offending

Where an accused commits further offences while awaiting trial, such behaviour will almost inevitably remove his chances of receiving leniency in a tariff disposition, or an individualized sentence. Each of these results has ensued in recent decisions. In R. v. Waite[52] the accused was convicted of armed robbery. As noted earlier,[53] this is an offence which almost always requires a tariff sentence. His counsel submitted that his background, youth and slight involvement were extenuating circumstances which should result in a lesser sentence. The appeal Court, upholding the sentence, noted to the contrary that while on bail on the present charge, the accused was found in possession of stolen property, charged, convicted and sentenced.

Removal of the accused's eligibility for an individualized measure was demonstrated in R. v. Shea.[54] The accused, 11 days after appearing before the trial Judge on breaking and entering charges, committed another similar offence. As the accused himself had thwarted the trial Judge's attempts to rehabilitate him following his first offence, the appeal Court

held that in respect of that offence, a substantial deterrent sentence of imprisonment should be imposed.

iv) Good Behaviour

The precise opposite of the man who continues to offend after being charged is the accused who behaves in an exemplary manner. The general rule is well established that whether remanded in custody or released, pending trial or appeal, the accused's good behaviour cannot be taken into account in sentencing. The rationale is equally simple: as was stated in Bedard v. The Queen[55] an accused would be stupid to fail, during this interim period, to behave in an exemplary and irreproachable fashion.[56] Similarly in R. v. Palmer,[57] the Court found of little help evidence that the accused was a model, hard working prisoner. Such evidence "is sometimes useful" but here was "material for the Parole Board".

One exception to this principle may be found where the trial Judge, giving the offender the benefit of a doubt, imposes an individualized measure where a tariff sentence should have been imposed. An appeal Court faced with evidence that the measure appears to be working, may be persuaded to uphold the original sentence, even though without the benefit of its knowledge of the accused's behaviour since conviction, it might have done otherwise.[58]

There are other occasional exceptions. An example is R. v. Moncini[59] where the accused, convicted of robbery, was sentenced to 8 years' imprisonment. His conviction was set aside in the Court of Appeal and he was released on bail pending a Crown appeal to the Supreme Court of Canada. During this period he lived with his parents in the United States and

he adhered to the strict conditions which they imposed on him. When his conviction was restored by the Supreme Court of Canada, he returned without difficulty and without any compulsion from the authorities. It was held to be "indeed a mark in his favour" that at all times he lived up to all the conditions of his bail and made no default. In view of the exceptional circumstances of the case, including Moncini's voluntary return from the United States, it is submitted that the decision does not lay down a general principle, and should be confined to its facts.

v) Refusal of Treatment

The notion of treatment is in many cases almost synonymous with that of rehabilitation. It follows that, while an accused should not be punished more severely for refusal to undertake treatment, certainly that refusal will indicate a decreased potential and motivation toward rehabilitation, and strongly suggest the appropriateness of a tariff sentence. Thus in R. v. X.[60] the Court took into consideration as a "strongly aggravating factor" the categorical refusal of the accused, who had locked his 8-year-old son in a closet for 45 days, to take part in any form of family therapy. A clearer demonstration was the decision of the Ontario Court of Appeal in R. v. Henein.[61] The Court in that case set aside a suspended sentence imposed on an accused convicted of acts of gross indecency with young boys. Although the accused had been motivated to take treatment because of the criminal proceedings, he nonetheless was refusing to take certain types of treatment which his psychiatrist thought might be helpful to him. A term of imprisonment was substituted.

E. ATTITUDE OF ACCUSED

i) Remorse

In addition to the not unusual finding of sentencing courts that remorse is expressed in a plea of guilty,[62] the accused's repentance has often been considered in isolation. The principles applicable to the treatment of remorse were outlined in R. v. MacArthur.[63] The accused was joking when sitting in Court during his trial for arson. The trial Judge, in sentencing, noted his lack of remorse as indicated by his behaviour. On appeal, it was held that if the Judge did in fact impose a harsher sentence because of lack of remorse, he was in error. While the presence of genuine remorse indicates rehabilitation, the converse is not necessarily true. A more severe sentence should not be imposed for lack of remorse.

Occasionally a strongly defiant accused will come before the Court, refusing to cooperate in his trial, assist in it, or show any remorse or regret for his acts. Such a case will call for a severe sentence, perhaps of an exemplary nature. An example is the decision of the Ontario Court of Appeal in R. v. Johnston.[64] The accused, called as a defence witness at a murder trial, testified under protection of the Canada Evidence Act[65] that he and another, not the accused, had killed the deceased. The case related to a killing at the Millhaven Penitentiary, where all were inmates. Johnston repeatedly refused to name his associates or the source of his weapon. After consultation with his counsel, he continued to refuse and eventually was convicted of contempt of court. The trial Judge stressed that the accused showed little remorse, had little in his background to call for leniency, and was the kingpin in a conspiracy to defeat justice by testifying falsely. He

was called a killer, a psychopath and an executioner. The trial Judge further stated that he would have sentenced the accused to life for contempt if the jury had believed his evidence. On appeal, a sentence of 10 years' imprisonment was reduced to two years, consecutive to time being served. The Court impressed that the accused was not convicted of perjury, murder or conspiracy, and that these were matters wrongly stressed by the trial Judge. However, the conduct of the accused and his defiant attitude called for a severe sentence, to demonstrate the role of legal standards in the prison.

ii) Reformation

The reported cases in which substantial reformation while awaiting trial has been considered follow a consistent pattern. The story in virtually all such cases is as follows: the accused commits an offence for economic gain (typically drug trafficking or fraud) for which the Court would normally impose a substantial sentence of incarceration. For reasons relating to the criminal justice process, he is out in the community for a substantial period before his trial. During this period, the accused will do one or several of various acts indicating his rehabilitition. These acts may include giving up drugs or joining a rehabilitation programme; joining Alcoholics Anonymous; volunteer work; upgrading education; marrying; attending church regularly; obtaining employment, and going into business.[66] In such cases, the Court is faced with the difficult question of whether to stand by its principle of awarding jail sentences, or to make an exception in the case of the accused. The making of an exception if the jail term is foregone altogether will have the effect of transferring the sentence from the tariff to an individualized measure: on the other hand, if some term must

still be served in prison, then the effect of prior reformation may be to mitigate substantially the length of that term. A perfect example of the "switch" from tariff to individualization is the Ontario Court of Appeal's decision in R. v. Humes.[67] The accused, aged 22, was manager of a T.V. dealership. He defrauded his employer of over $4,000 by taking commissions on fictitious sales. He reached a settlement with the company whereby they disclaimed their rights against him. He was acquitted at trial, but convicted on appeal. He showed significant rehabilitation since the offence: he had completely refrained from excessive alcohol use for two years, become a good church member, married and had a good relationship with his wife, had obtained steady and responsible employment, and was living frugally to meet his restitutionary obligations. The Court held that a suspended sentence could be granted. Although this crime would normally attract a custodial term, the requirements of general deterrence could be balanced against other aims of sentencing in this case. No public interest would be served by undoing the rehabilitation that had already occurred.

In R. v. Mearns[68] the accused was observed picking up a deposit of 50 capsules of heroin, and convicted of possession for the purpose of trafficking. At trial the Judge placed a great deal of reliance on a final report of the probation officer, indicating that the accused had married, foregone drugs, was actively seeking employment and was supporting his wife and her three children by a previous relationship. A sentence of one day's imprisonment and two years' probation was imposed. On appeal, the Court stated that the conduct of the accused while a "sword of Damocles" was hanging over him was not a fair criterion to apply in determining the extent to which reformation had taken place. It could, however, be a factor to be taken into consideration in determining whether a sentence should be in the

lower or higher range of sentences imposed for similar offences. Thus, while an individualized measure was not appropriate in view of the seriousness of the offence, a term of only three years' imprisonment was substituted.

In light of the numerous precedents for mitigation[69] and removal[70] of custodial sentence in the circumstances described above, it has recently become a very legitimate and obvious concern of the Courts that counsel may advise their clients to take such steps as those described, and manoeuvre to extend the period until trial, in order to secure a substantial reduction of sentence. The dilemma was exactly stated in R. v. Burchnall and Dumont.[71] Repeating that a court is entitled to take into account rehabilitation or reformation of the offender while awaiting trial, the Court referred to the inherent danger in giving this effect to delay in bringing a case to its conclusion. The Court, it was stated, must be conscious that delay may frequently be used as a defence tactic in order that such an argument may be made in an otherwise unmeritorious case. Mitigating effect, therefore, should only be given to an argument based on delay where there is no evidence whatsoever of such a manoeuvre.

It may be that the end of the 1970s heralded a trend toward increased caution in this area. While cases in which such reformation could substantially change sentence have always been by definition unusual in nature, there is an increased tendency, as evidenced by the decision in Burchnall and Dumont, to lay down guidelines for the application of mitigating effect in such cases. This development is further illustrated by contrasting two recent cases from Quebec.

In R. v. Lebovitch[72] the accused was convicted on six counts relating to trafficking in narcotics. At the time of the offences he was addicted, and trafficked to obtain funds to support his habit. While on bail

pending trial, he entered a rehabilitation programme. Despite the programme's failure rate of 80% during the first stage, Lebovitch successfully completed it and entered a "probation period" to see if he could stay off drugs voluntarily. He was sentenced at trial to two years less one day's imprisonment. On appeal, it was held that as the accused had overcome his habit, it was not necessary to incarcerate him to protect the public. In view of his success hitherto in the rehabilitation programme, he was placed on probation for three years so that he could continue therein. A different result was reached in R. v. Sabloff,[73] decided soon after Lebovitch. Sabloff, a 30-year-old female, was convicted on two counts of trafficking in morphine. In sentencing her to concurrent terms of two years less a day, the Court noted that she had enrolled in the "Portage" programme, an exceptional and rigorous programme for overcoming drug addiction. However, she had enrolled in a similar programme previously and did not complete it. The Judge suggested that by identifying herself with the programme, she was attempting to benefit from the decision in Lebovitch. However, since her past history had not demonstrated an ability to succeed, the exceptional circumstances of Lebovitch could not be found and a period of incarceration was required.

Footnotes to Chapter 7.

1. (1976), 19 Crim. L.Q. 160 (Ont. C.A.).

2. (1977), 35 C.C.C. (2d) 35 (Ont. C.A.).

3. (1978), 48 C.C.C. (2d) 281 (Que. C.A.).

4. (1980), 42 N.S.R. (2d) 90, 77 A.P.R. 90 (C.A.).

5. (1979), 22 Crim. L.Q. 163 (Que. C.A.).

6. (1972), 8 C.C.C. (2d) 97 (Man. C.A.).

7. (1979), 11 C.R. (3d) 1 (Que. C.S.P.).

8. As to the effect of a possibility of future changes in the law see post, Chapter 8.G.

9. (1973), 22 C.R.N.S. 307 (N.S. Co.Ct.).

10. R.S.C. 1970, c.I-23, as am. by R.S.C. 1970, c.10 (2nd Supp.), s.65; R.S.C. 1970, c.29 (2nd Supp.), s.1; S.C. 1972, c.17, s.2(2); 1974-75-76, c.16, s.4; 1974-75-76, c.19, s.2; 1978-79, c.11, s.10(1).

11. For an application see R. v. Dawdy (1973), 12 C.C.C. (2d) 477 (Ont. C.A.).

12. See R. v. Selamio (1979), 23 A.R. 403 (N.W.T.S.C.); R. v. Arellano and Sanchez (1975), 30 C.R.N.S. 367 (Que. C.A.).

13. (1979), 1 Sask. R. 257 (C.A.).

14. Supra note 12. In the absence of a different rule, the Courts of course diverge in practice according to the circumstances before them. In R. v. Auxillou, [unreported] May 11th, 1981 (B.C.C.A.), the trial Judge was inclined to impose a sentence of five years imprisonment, and had he done so would have deducted one year for the six months spent in custody awaiting trial. However, being impressed by the remorse of the accused, he imposed a sentence of two years. On appeal, the Court found that the initial determination that five years was the appropriate term was the correct one. Varying sentence accordingly, their Lordships deducted just six months for the time served awaiting trial.

15. See e.g. R. v. Gravino (1971), 13 Crim. L.Q. 434 (Que. C.A.).

16. (1975), 24 C.C.C. (2d) 225 (Alta. C.A.).

17. Ibid. at 226 per Sinclair, J.A.

18. (1981), 33 N.B.R. (2d) 630, 80 A.P.R. 630 (C.A.).

19. (1979), 22 Crim. L.Q. 437 (B.C.C.A.).

20. (1979), 11 C.R. (3d) 313 (Que. Sup.Ct.).

21. (1975), 25 C.C.C. (2d) 202 (Nfld. Prov. Ct.).

22. (1980), 26 N. & P.E.I.R. 158 (Nfld. Prov. Ct.).

23. (1976), 36 C.R.N.S. 246 (Ont. Co. Ct.).

24. R.S.C. 1970, c.N-1, as am. by S.C. 1972, c.17, s.2(1); 1974-75-76, c.48, s.25(1); 1978-79, c.11, s.10(1).

25. (1973), 15 Crim. L.Q. 263 (Ont. Co. Ct.).

26. (1973), 14 C.C.C. (2d) 396 (Ont. C.A.).

27. (1980), 27 N. & P.E.I.R. 69 (Nfld. C.A.).

28. Supra note 24.

29. (1979), 21 N. & P.E.I.R. 17 (P.E.I.C.A.).

30. Ibid. at 20 per McQuaid, J.

31. See e.g. R. v. Doyle and 10 others (1970), 2 C.C.C. (2d) 82 (Alta. T.D.); R. v. Stein (1974), 15 C.C.C. (2d) 376 (Ont. C.A.); R. v. Legare (No. 2) (1978), 48 C.C.C. (2d) 281 (Que. C.A.); R. v. Chagnon (1980), 42 N.S.R. (2d) 236, 77 A.P.R. 236 (C.A.).

32. See e.g. R. v. B. (1975), 31 C.R.N.S. 59 (Ont. Co. Ct.); R. v. Doucet (1977), 18 N.B.R. (2d) 137 (C.A.).

33. See post Chapter 8.C.

34. (1978), 15 N. & P.E.I.R. 271 (Nfld. C.A.).

35. Ibid. at 273 per Furlong, C.J.N.

36. See further Davis, R.P. "Sentencing the Informer," (1980) 144 Justice of the Peace 249.

37. (1980), 33 N.B.R. (2d) 169, 80 A.P.R. 169 (C.A.).

38. (1974), 24 C.R.N.S. 305 (P.E.I.S.C.).

39. Ibid. at 308 per Nicholson, J.

40. R. v. Doyle and 10 others, supra note 31.

41. (1980), 19 C.R. (3d) 43 (Que. Sup. Ct.).

42. (1979), 11 C.R. (3d) 313 (Que. Sup. Ct.).

43. Supra note 31.

44. Supra note 32.

45. R. v. Stein, supra note 31; R. v. Ryan (1976), 1 A.R. 355 (C.A.); R. v. Legare (No. 2), supra note 31; R. v. Superior Electronics Inc. (1979), 45 C.P.R. (2d) 234 (B.C.C.A.); R. v. Chagnon, supra note 31.

46. R. v. Stein, supra note 31.

47. R. v. Ryan, supra note 45 at 358 per McDermid, J.A.

48. See e.g. R. v. Chagnon, supra note 31. A sentence of one day's imprisonment and a fine of $5,000 was imposed for theft of $95,000 as, inter alia, full reimbursement had been made as soon as accountants discovered the offence.

49. (1974), 6 N. & P.E.I.R. 113 (P.E.I.C.A.).

50. Ibid. at 121 per McQuaid, Mag.

51. See further R. v. Lavhey (1976), 15 N.S.R. (2d) 683 (C.A.).

52. (1975), 14 N.S.R. (2d) 103 (C.A.).

53. Supra, Chapter 1, text accompanying and note 146.

54. (1980), 42 N.S.R. (2d) 218, 77 A.P.R. 218 (C.A.).

55. (1972), 22 C.R.N.S. 230 (Que. C.A.).

56. As to disregarding good behaviour in prison see R. v. Bonhomme (1979), 22 Crim. L.Q. 435 (B.C.C.A.); contra, R. v. Gonidis, McCullough and Stevenson (1980), 57 C.C.C. (2d) 90 (Ont. C.A.).

57. [Unreported] November 18th, 1980 (B.C.C.A.).

58. For examples see post Chapter 7.E.ii.

59. (1975), 23 C.C.C. (2d) 452 (B.C.C.A.).

60. [1975] C.S.P. 261.

61. (1980), 53 C.C.C. (2d) 257 (Ont. C.A.).

62. See e.g. the comments of Graburn, Co. Ct. J. in R. v. Wisniewski (1975), 29 C.R.N.S. 342 (Ont. Co. Ct.). For discussion see post, Chapter 8.C.

63. (1979), 9 C.R. (3d) S-23 (N.S.C.A.); following R. v. Campbell (1977), 18 N.S.R. (2d) 547 at 552 (N.S.C.A.).

64. (1976), 19 Crim. L.Q. 284 (Ont. C.A.).

65. R.S.C. 1970, c.E-10, as am. by S.C. 1974-75-76, c.14, s.57; 1976-77, c.28, s.14.

66. For various combinations see e.g. R. v. Mearns (1975), 22 C.C.C. (2d) 457 (Alta. C.A.) - marriage, foregoing drugs, seeking employment; R. v. Shaw and Brehn (1977), 20 Crim. L.Q. 27 (Ont. C.A.) - education, volunteer work; R. v. Humes (1978), 21 Crim. L.Q. 26 (Ont. C.A.) - giving up alcohol, marriage, church attendance, employment; R. v. Pottie and Keating (1978), 26 N.S.R. (2d) 646 (C.A.) - business, church attendance, abstention from alcohol, education.

67. Ibid.

68. Supra note 66.

69. See e.g. R. v. Smith (1972), 7 C.C.C. (2d) 174 (Ont. C.A.); R. v. Mearns, supra note 66; R. v. Castonguay, [1980] C.A. 469.

70. See e.g. R. v. Goodale (1974), 21 C.C.C. (2d) 471 (Ont. C.A.); R. v. Shaw and Brehn, supra note 66; R. v. Humes, supra note 66; R. v. Catlin (1978), 6 C.R. (3d) S-17 (Man. C.A.); R. v. Harvey (1978), 6 C.R. (3d) S-26 (Ont. C.A.); R. v. Lebovitch (1979), 48 C.C.C. (2d) 539 (Que. C.A.); R. v. Burchnall and Dumont (1980), 24 A.R. 17 (C.A.); R. v. Doyle (1979), 22 Crim. L.Q. 293 (Ont. C.A.); R. v. Fuchs (1978), 21 Crim. L.Q. 424 (Ont. Co. Ct.).

71. Ibid.

72. Supra note 70.

73. [1979] C.S. 1077.

CHAPTER 8: FACTORS RELATING TO THE TRIAL, CRIMINAL PROCESS, OR APPLICABLE LAW

A. CONDUCT OF DEFENCE

The Supreme Court of Canada has held that the attitude of the offender at his trial, regarding both the offence and the criminal process, is a legitimate factor to be taken into account in sentencing.[1] From time to time the Court will encounter individual accuseds who persist in law-defiant behaviour in the face of the Court: they may commit perjury in an attempt to escape liability, attempt to put the blame on others, or tender false alibis. The temptation is strong, in the face of such behaviour, to increase the sentence in light of the offender's attitude and behaviour.

It is submitted that the correct principle is that such behaviour, while it may cause the Court to disregard other mitigating factors, should not increase the sentence beyond the maximum which would be possible on the facts of the offence. In a tariff disposition, additional punishment should not be imposed on the accused for his court-room behaviour: it will simply disallow credit for other factors. In cases where a non-custodial, individualized measure might otherwise have been appropriate, it may be precluded in favour of a tariff disposition by the accused's continued wrongdoing.

Whether this position is borne out by the case-law is a matter of interpretation.[2] The few recent authorities on this point speak of "increasing" the penalty[3] and "aggravating" the sentence.[4] Of course, the

mere use of such phrases is not determinative of the true effect given by the Court to the behaviour of the accused. What the Judges appear to mean is that the offender who behaves defiantly in the face of the Court deserves little consideration for his own welfare, having indicated that he is not prepared to admit his complicity and commence the internal decision-making process that accompanies rehabilitation. This reasoning is particularly evident in the decision of the Cour Superieure in R. v. Sabloff.[5]

Sabloff, an adult female, was convicted on two counts of trafficking in morphine. Testifying at length on her own behalf, she claimed to have been entrapped by Shannon, a police informer. Sabloff stated that Shannon had phoned her repeatedly in great need of heroin and morphine and claiming to be physically ill as a result of her need. The accused swore that while she had been a heroin addict herself for seven years, she had never before trafficked in narcotics. Wiretap evidence showed that she had deliberately attempted to mislead the jury, by testifying about a fictitious entrapment. The telephone conversations recorded indicated that she was a willing participant, and that her evidence was "at worst perjury and at best a heavy shading of the truth". In sentencing her to imprisonment for a term of two years less a day, the Court stated:

> Now, this Court obviously does not have the right nor the function to punish her for being untruthful in her evidence before the jury. However, it is certainly one factor to be considered as indicative of a need for incarceration for the purposes of rehabilitation.[6]

The decision in Sabloff nevertheless spoke of rehabilitation, although it was concluded from her behaviour at trial that a jail term was needed to subject the accused to strict control. In MacKenzie v. The Queen[7] all question of rehabilitation was abandoned as the accused's conduct of his untruthful defence left the Court a tariff sentence as the only alternative.

The Prince Edward Island Supreme Court found that the accused's calling "a bunch of liars" (as the Provincial Court Judge labelled his witnesses) to swear a false alibi would, of itself, warrant and justify an increase beyond what was normal for summary conviction offences. Nevertheless, in view of the accused's age (22), a sentence of five months' imprisonment for dangerous driving and driving while disqualified was reduced to four months.

MacKenzie would appear to be out of line with previous authority, and, it is submitted, was wrongly decided in this respect. It stands alone as suggesting that it is the function of the Court to punish the accused, beyond what is appropriate for the offence committed, because he indulged in further offensive behaviour at trial. The proper remedy for such behaviour lies, where necessary, in further criminal proceedings. The Court should treat the accused's presentation of his case as no more than evidence of his potential for rehabilitation, perhaps justifying the denial of an individualized measure or the denial of credit for circumstances otherwise indicating that a reduction of tariff sentence would be appropriate. As was clearly stated in R. v. Johnston,[8] it is not the function of the sentencing Court to administer punishment for offences which the accused might have committed in the course of his defence.

B. POLICE OR PROSECUTORIAL IMPROPRIETIES, ENTRAPMENT

Where the Court finds that improprieties, usually on the part of the police, were responsible for putting the offender in a position to commit the crime, or that he was encouraged by law enforcement officers or their allies, this may be taken into account to the accused's benefit. In R. v. Kirzner[9] the accused was convicted of possession of heroin and cocaine for

the purpose of trafficking. He was a former addict who had attempted a cure, but was pressed back into service by the police in order to infiltrate the drug market on their behalf. The appeal Court, reducing the sentence imposed at trial, criticized the police severely for exposing the accused to drugs and the opportunity to use them. To the surprise of the Court, at the time of arrest and, subsequently, during his release on bail, the police had continued to use the accused. The extent of the trial Judge's failure to take due account of these circumstances was indicated in a reduction from 3 1/2 years' imprisonment to two years.

Kirzner is, of course, a very stark example of police involvement in the offence. A much more familiar situation to counsel will be the petty trafficker who makes the mistake of supplying an undercover agent. While there is occasional authority that the instigation of a police agent should be considered in sentencing,[10] a substantial majority of reported cases with similar facts indicate that sentence was passed without consideration of this element.[11]

In the unusual case of R. v. Perry,[12] this principle was taken a step further. Perry's offence was not instigated by the investigators, but was allowed to continue in a manner found unwarranted by the Court. The accused woman began cohabiting with an income-earning man, but continued to draw local welfare assistance, to an eventual total of some $9,000, to which she was not entitled. She was interviewed at least twice in her home over a 16-month period, but was alleged to have denied her cohabitation. However, it was open and notorious in the small community, and even on casual observation of the living accommodation it would have been apparent that her income was considerably greater than basic welfare. To compound matters, although the accused was informed of the allegation in January

1978, and benefits were discontinued, the charge was not laid until February 1979. The Court stated that the delay verged on abuse of process. While six months' imprisonment would have been appropriate in other circumstances, in view of the investigators' lack of diligence in allowing the offences to continue, and the state of uncertainty in which the accused had been left for so long, sentence was suspended.

A number of cases have established that substantial, unjustifiable delays in the prosecution of proceedings may justify a reduction in sentence. The reasons for delay range from oversight through incompetence to deliberate attempts to prejudiee the accused. In all such cases, where the accused is severely disadvantaged by the passage of time, the Court will ameliorate the situation. An example of mere oversight occurred in R. v. Harvey,[13] where the accused, while on trial in Alberta, requested that a charge outstanding against him in Ontario be transferred to that Court. Due to an administrative oversight this was not done. Almost two years after serving sentence for the offence in Alberta, his case came on for trial in Ontario. In the interval between release from custody in Alberta and the date of imposition of the Ontario sentence, the accused had made a heroic effort to rehabilitate himself, and had been largely successful. A sentence of six months, which would otherwise have been appropriate, was reduced to time served and a fine.

Rehabilitation need not be an issue. Mere passage of time will render it less just that the accused suffer a severe sentence. Thus in R. v. Simon,[14] the Court allowed the accused's appeal from a sentence of three years' imprisonment for break and enter. The offence had taken place in October 1971, yet, though he remained in the vicinity, Simon was not arrested or brought to trial for 2 1/2 years. There was no explanation of the

delay, but the accused had been apprehended and held in custody for several months during the second half of the period. A further delay had then occurred before the case was brought on for trial. Pointing out that it would be unjust to impose a severe sentence at this late date, the Court substituted a term of one year's imprisonment.

A practice found particularly repugnant by the Courts is the holding of an outstanding warrant by the prosecutor until release from imprisonment for an earlier offence, in order to ensure that a complete sentence will have to be served. While the Court will rarely be in a position to determine that such action was taken deliberately, its impropriety should nevertheless be stressed, and the totality of past and present sentences considered as though the warrant had been executed in a timely manner.[15] The accused, if he is showing signs of rehabilitation or found otherwise meritorious, may be entitled to further mitigation in view of the passage of time since his offence or other factors related to the delay.[16]

C. GUILTY PLEA

The fact of the accused's having pleaded guilty is a versatile actor in the sentencing process. It may indicate remorse on the part of the accused, a desire to save witnesses the pain of going though testimony, a willingness to save the expense of a full trial, or the realization by the accused that he is inescapably caught. According to the Court's interpretation of the plea, its treatment may vary.

It seems to be fairly generally accepted that a plea of guilty engendered by remorse is an indication of possibilities for rehabilitation and entitled to mitigating credit as such.[17] Where, however, as in R. v. Hutton[18]

the Court finds that the only sorrow the accused feels is because he was caught, policy questions become paramount.

It has been felt desirable by a number of courts to allow credit to an accused who feels guilty, even if not remorseful, in order to encourge guilty pleas and thus save the expense of public trials and the agony of witnesses. In recent years, allusion has been made to the saving of witnesses' embarrassment, particularly in cases involving sexual crimes,[19] but also in other instances. In R. v. Pineau[20] the accused was convicted of criminal negligence in the operation of a motor vehicle. The Court noted his guilty plea, which had saved the victim "the agony of going through all the evidence that would be brought out, had [he] pleaded not guilty ...", in mitigation of sentence.

The policy question of saving of public expense has been more controversial. It is noteworthy that the offence in relation to which most discussion has arisen is trafficking in narcotics. In R. v. Johnston and Tremayne[21] and R. v. Hutton,[22] both cases of this nature, guilty pleas were taken into consideration due to the saving of public expenditure.[23] By contrast, in R. v. Basha et al.,[24] R. v. Spiller[25] and R. v. Squires,[26] credit for the plea was disallowed in view of findings that it had been made only because the accused was inescapably caught. This rationale did not convince Graburn, Co. Ct. J. in R. v. Wisniewski,[27] who found that even though the accused was inescapably caught he should receive credit for his plea as he had saved the community a great deal of expense.

Are these authorities reconcilable? It is submitted that they are, though not on the grounds offered by the judgments as reported. R. v. Squires involved a serious, brutal gang beating of three men. R. v. Basha and R. v. McLean involved major conspiracies to traffic in narcotics. As

mentioned earlier, such offences attract exemplary sentences, calculated without regard to mitigating factors generally. Thus, it would be consistent with normal principles of tariff sentencing to allow credit for a guilty plea in cases deserving ordinary tariff penalties, but disallow such credit in cases like Squires, Basha and McLean where all mitigation is disalloweed. While this rationale is not stated in these decisions, even a quick perusal of the judgments will quickly indicate that the Judges were, indeed, heavily disposed by the nature of the crimes committed to allow little credit to the accused for any factors which might in lesser crimes have counted in their favour. The offence committed in Wisniewski, causing death by criminal negligence, certainly fits into the "plain-tariff" category. It remains finally to remark that Johnston and Tremayne, while an offence of drug trafficking, was an exceptional instance in which the appeal Court did not impose exemplary sentence, but instead gave considerable weight to mitigating factors particular to the accused.

D. JURY RECOMMENDATION

In the occasional case in which the jury recommends leniency for the accused, the recommendation should be taken into account.[28] Similarly, the sentence should be in keeping with the jury verdict: if, for example, the jury finds a verdict of manslaughter by reason of provocation, the sentence should reflect the fact of provocation.[29]

E. MISTAKE OR IGNORANCE OF LAW

"[I]gnorance of the law, while it does not excuse from guilt, may be a mitigating factor."[30] If one rule in sentencing law is clear, then it is

this qualified adage. While the Courts naturally impose requirements that the accused's mistake be honest and reasonable,[31] and can do nothing where he has already received the minimum permissible penalty,[32] the precedents are overwhelmingly in favour of the view that "honest" criminal action should not be treated so severely as criminality undertaken in full knowledge that the law forbids the act.

Mitigation of sentence has been allowed in cases where the accused has proved to the Court simply that he was mistaken as to the law. Thus, for example, in R. v. Everton[33] an accused who mistakenly believed that an 18-year-old homosexual was old enough to consent, and was subsequently convicted of buggery, received a mitigated sentence because of his mistake.[34] A more convincing case can be made, however, where counsel can show that the accused acted upon legal advice, either taken from a lawyer or an official in the area concerned. In R. v. Whitehouse[35] the accused was principal officer of a company which carried out an illegal advertising scheme. His evidence was that he had discussed the plan with other members of his company and a solicitor, and that it was instituted only after further consultation with his finance company. Legally, of course, he was still guilty, and was not entitled to rely on the advice of others. However, in the circumstances the Court was inclined to look with a little more leniency on the question of fine. Similarly in R. v. Potter[36] an absolute discharge was imposed on an accused who imported gambling punch boards not legally receivable, after evidence that a Canadian customs representative had failed to answer an inquiry, and the R.C.M.P. had taken no action until some 30 shipments had been cleared.

Where the law is unclear or inaccessible to the public at large, justice demands that such punishments as must be inflicted be tempered. In

R. v. Campbell and Mlynarchuk[37] the accused, relying on a decision of the Supreme Court of Alberta, performed a dance totally nude in a theatre. The decision on which she had relied was overruled, however, with the result that she was charged and pleaded guilty to the offence under s. 163(2) of the Criminal Code. The case was not surprisingly found to be an appropriate instance for an absolute discharge. In R. v. McNaughton[38] the accused was not quite so fortunate; nevertheless, having been convicted of affecting the public market price of stocks and shares his sentence was reduced by the appeal Court from one year's imprisonment and a fine of $25,000 to a day and $10,000. The Court noted in particular that there was no case-law under the relevant section of the Code, and thus there was no way in which he could have known that his manipulation of the market was prohibited.

F. REMISSION AND PAROLE

It would be consistent with the thesis of this introduction to suggest that the possibility of remission and parole, being after-the-fact modifications of punishments meted out on an established tariff, should not be taken into account in tariff sentencing. It would also follow that in the case of individualized dispositions, the question being what is best for the offender, the Court should look at the true nature of a prison term to determine whether it would fulfill the requirements of the offender. This proposition would be further qualified by a statement that, having looked at the needs of the offender (e.g. two years of actual incarceration to permit him to take an addiction programme) the Court would not be permitted to increase an individualized sentence of imprisonment beyond that permitted by the tariff in order to secure his treatment.

Such arguments on principle are a useful test of the validity of the tariff/individualization distinction, as they are borne out rather exactly by the case-law. The leading case of R. v. Wilmott[39] established the first proposition: that the existence of parole does not permit the sentencer to lengthen the actual term of imprisonment imposed. Further, a qualification to the Wilmott principle is to be found in the decision of the same Court in R. v. Pearce,[40] where Jessup, J.A., for the majority, held that in considering the rehabilitation aspect of sentencing, it is proper to take into account the actual length of time the accused will have to serve. The third proposition is borne out by those cases cited earlier to the effect that the Court cannot imprison for a longer period merely in order to secure the treatment of the accused.[41]

G. TEST CASE

Test cases are, almost by definition, rare. Usually, where a test case is pursued, it will be indicative that the law is unclear, thus bringing the offender, if he is found so to be, within that group which receives substantial mitigation of sentence by virtue of that fact.[42] In the case expressly "set-up" in order to determine the law, the Court will recognize the higher motive of the accused (i.e. to clarify the law, not gain illegal advantages) and impose a nominal tariff sentence accordingly.

An illustration is the decision in R. v. Appleby (No. 2).[43] Appleby, the publisher of the New Brunswick Reports (Second Series) failed to provide the National Librarian with two copies of a book which he had published, contrary to the National Library Act.[44] At trial he was fined $100 with 10 days in default, and ordered to comply fully with the Act. On appeal, the

Court further recognized that the case had been contested solely for the purpose of having determined the validity of the provision under which the accused was charged. Accordingly, the portion of the sentence directing compliance with the Act was struck out.

A case which approximates to the test case is the first "real" prosecution under a disused or little-comprehended provision. In R. v. Foote, Cone and Belding Advertising Ltd.[45] the Court imposed a nominal fine upon the accused, apparently the first advertising agency to be charged with misleading advertising. Inter alia, the Court noted, the mere fact of an agency having been found guilty under the relevant section[46] would serve the deterrent purposes of punishment without more. The adverse publicity the firm had suffered was an additional severe punishment which was taken into account.

H. POSSIBILITY OF FUTURE CHANGES IN THE LAW

It is uncontroversial that a court cannot take account of possible future changes in the law when determining sentence for an offence. Such arguments have repeatedly been raised without success for more than a decade as lawyers and politicians alike have looked forward to a loosening of marijuana laws. General agreement seems further to exist upon the rationale for this rule: the Courts have a duty to apply the law as it stands,[47] and to sentence in order with the intention of Parliament as expressed in the legislation currently in force.[48] For the Court to modify sentence in light of possible future changes would be an encroachment upon the proper field of the legislature.[49]

Footnotes to Chapter 8

1. Lees v. The Queen (1979), 46 C.C.C. (2d) 385 (S.C.C.).

2. Although it is clear that the accused may not be punished for offences committed in the course of a perjured or contemptuous defence in the absence of laying of specific charges - see R. v. Johnston (1976), 18 Crim. L.Q. 286 (Ont. C.A.).

3. MacKenzie v. The Queen (1979), 5 M.V.R. 16 (P.E.I.S.C.).

4. R. v. Levesque (1980), 19 C.R. (3d) 43 (Que. Sup. Ct.).

5. [1979] C.S. 1077.

6. Ibid. at 1079 per Greenberg, J.

7. Supra note 3.

8. Supra note 2.

9. (1976), 32 C.C.C. (2d) 76 (Ont. C.A.).

10. R. v. Price (1970), 12 C.R.N.S. 131 (Ont. C.A.); R. v. Zatwarnicki (1981), 6 W.C.B. 119 (Man. C.A.).

11. See e.g. R. v. Cuzner, [1970] 5 C.C.C. 187, [1970] 3 O.R. 222 (C.A.); R. v. Healy (1972), 7 C.C.C. (2d) 129, [1972] 3 O.R. 1 (C.A.); R. v. Sutherland (1974), 10 N.B.R. (2d) 221 (C.A.).

12. (1979), 25 N. & P.E.I.R. 349 (P.E.I.S.C.).

13. (1978), 6 C.R. (3d) S-26 (Ont. C.A.).

14. (1975), 25 C.C.C. (2d) 159 (Ont. C.A.).

15. R. v. Reilly (1974), 18 C.C.C. (2d) 511 (Ont. C.A.).

16. R. v. Parisien (1971), 3 C.C.C. (2d) 433 (B.C.C.A.).

17. For comments to this effect see e.g. R. v. Wisniewski (1975), 29 C.R.N.S. 342 (Ont. Co. Ct.); R. v. Basha et al. (1979), 23 N. & P.E.I.R. 286 (Nfld. C.A.).

18. (1977), 13 A.R. 557 (Dist. Ct.).

19. See e.g. R. v. Shanower (1972), 8 C.C.C. (2d) 527 (Ont. C.A.) - rape; R. v. Truax (1979), 22 Crim. L.Q. 157 (Ont. C.A.) - incest.

20. (1979), 24 A.R. 176 (Q.B.).

21. [1970] 4 C.C.C. 64 (Ont.C.A.); following R. v. de Haan, [1967] 2 All E.R. 618 (C.A.).

22. Supra note 18.

23. See also R. v. Tanguay-Dupere (1971), 13 Crim. L.Q. 436 (Que. C.A.).

24. Supra note 17; followed in R. v. McLean et al. (1980), 26 N. & P.E.I.R. 158 (Nfld. Prov. Ct.).

25. [1969] 4 C.C.C. 211, 68 W.W.R. 187, 6 C.R.N.S. 360 (B.C.C.A.).

26. (1975), 25 C.C.C. (2d) 202 (Nfld. Prov. Ct.).

27. Supra note 17.

28. R. v. McCormick (1979), 9 C.R. (3d) 248 (Man. C.A.); R. v Miller and Kyling (1971), 13 Crim. L.Q. 431 (Que. C.A.); R. v. Muttart (1971), 14 Crim. L.Q. 137 (P.E.I.S.C.).

29. See Kwok Yau Shing v. The Queen, [1968] Crim. L.Rev. 175 (Hong Kong S.C. App. Jur.).

30. R. v. Sumarah et al., [1970] 5 C.C.C. 317 (N.S. Co. Ct.).

31. R. v. Martin (1980), 28 N. & P.E.I.R. 471, 79 A.P.R. 471 (P.E.I.S.C.).

32. R. v. Giroux (1979), 55 C.C.C. 375 (Que. Sup. Ct.).

33. (1980), 22 Crim. L.Q. 294 (Man. C.A.).

34. See further R. v. Michaud (1978), 32 N.B.R. (2d) 34, 78 A.P.R. 34 (Prov. Ct.); R. v. Beaudoin (1975), 17 Crim. L.Q. 248 (Que. C.A.).

35. (1972), 8 C.P.R. (2d) 96 (Alta. Dist. Ct.).

36. (1978), 3 C.R. (3d) 154 (P.E.I.S.C.).

37. (1972), 10 C.C.C. (2d) 26 (Alta. Dist. Ct.).

38. (1976), 43 C.C.C. (2d) 293 (Que. C.A.).

39. [1967] 1 C.C.C. 171 (Ont. C.A.).

40. (1974), 16 C.C.C. (2d) 369 (Ont. C.A.). The decision of the majority has since been repeated in Nova Scotia in R. v. Tobin (1974), 8 N.S.R. (2d) 598 (C.A.); following R. v. Wilmott, supra note 39.

41. Supra, Chapter 2.C.v.

42. See supra, text accompanying notes 37 and 38.

43. (1976), 35 C.C.C (2d) 94 (N.B.C.A.).

44. R.S.C. 1970, c.N-11, as am. by S.C. 1976-77, c.24, s.73; 1976-77, c.20, s.30; 1980, c.17, s.18.

45. (1977), 34 C.P.R. (2d) 26 (Ont. Co. Ct.).

46. Combines Investigation Act, R.S.C. 1970, c.C-23, as am., s.37(1)(a).

47. R. v. Johnston and Tremayne, [1970] 4 C.C.C. 64 (Ont. C.A.).

48. R. v. Carroll (1980), 27 N. & P.E.I.R. 159, 74 A.P.R. 159 (P.E.I.C.A.).

49. R. v. Thompson (1976), 9 N. & P.E.I.R. 427 (P.E.I.C.C.A.); R. v. Doyle and 10 Others (1970), 2 C.C.C. (2d) 82 (Alta. T.D.); R. v. Bosley and Duarte, [1970] 1 C.C.C. 328 at 332 (Ont. C.A.).

CHAPTER 9: FACTORS RELATING TO OTHER EFFECTS OF THE CRIME, CONVICTION OR SENTENCE

A. OTHER LIABILITIES OR PENALTIES INCURRED

i) Civil Liability and Administrative Penalties

The civil liability of the accused to his victim, although its existence is common in cases such as theft, commercial crime, and wilful damage, is rarely considered in light of its effect upon the criminal sentence.[1] Such occasional authority as there is indicates that it is not normally a matter to be considered in sentencing. In R. v. Anderson & Friends, Ltd.[2] the accused company quoted the words of one Mrs. Heading in a highly misleading context, and was convicted of misleading advertising. In considering sentence, the Court stated summarily that it need not be concerned with the fact that she might have recourse to civil damages.

Two recent decisions, however, indicate that the propriety of such consideration may in commercial cases be related to the probability, as opposed to the possibility, of civil suit against the accused. In R. v. Murdock,[3] the appeal Court increased sentence on an accused convicted of fraudulent sales of commodity options. It was held that the trial Judge had been wrong to take into account the accused's civil liability. A large number of small investors were involved, and the situation may well have been one where it was impractical for them to proceed against the accused.

The Murdock decision raises only an oblique implication that, had the victims been able to sue, the matter of sentence might have been decided

otherwise. Vague support may also be found for this implication in the case of R. v. Munro.[4] Munro was convicted of misappropriating money from her employer, a bank. As a condition of probation she was directed to make restitution of $5,000. The appeal Court struck out the condition, pointing out that the Bank had recourse to a civil action for any sum which it could establish, and that the accused could not possibly pay the sum. However, the second element, the accused's inability to pay, may well be regarded as the primary consideration. It is a well-established principle in the area of financial penalties that the Court should not impose impossible conditions upon the accused.[5] In any event, had the Bank's recourse to civil action been the major consideration, recent authority would indicate that the case would have been wrongly decided. If the Bank were able to establish to the satisfaction of the Court the amount owing to it, it would have been illogical and contrary to common sense notions of the due administration of justice to require it to pursue a further action against the accused.[6]

It is submitted that, as indicated by the overwhelming majority of cases in which civil liability is not even mentioned, this should be at best only an occasional consideration in the deliberations of the sentencing Court. An occasional departure from the general practice might be justified in those cases where a civil action has already been pursued, and the accused has suffered from an award of exemplary or punitive damages.

A special situation arises with respect to prosecutions for income tax evasion. Pursuant to s.239 of the Income Tax Act,[7] tax evaders are liable to administrative penalties in addition to criminal proceedings. Authority exists at the lower court level that, while the Court should not be unduly influenced by administrative penalties already suffered, they should be taken into account to some extent.[8] The correct principle, it is submitted, is akin

to the notion of totality of sentence;[9] in the consideration of an appropriate fine for the accused, the Court should take into account financial penalties already suffered by the accused in order to arrive at a just total penalty to take account of both civil and criminal liability.

ii) Forfeiture of Parole

Forfeiture of parole is discussed in Chapter 3.B.2.g, "Criminal Record" — "Offences in Respect of Which the Accused was on Parole at the Time of the Present Offence," above.[10]

iii) Forfeiture of Property

Orders for substantial forfeiture of property are comparatively rare in the jurisprudence. Recent authority from the Newfoundland Court of Appeal respecting forfeiture of conveyances under the Narcotic Control Act[11] would, however, indicate a dual relationship between sentence and forfeiture. In R. v. Smith,[12] the accused forfeited his motor vehicle pursuant to s.10(9) of the Act. While it was held that the forfeiture was not part of the sentence imposed, the trial Judge was confirmed in his taking into consideration the fact of a prior forfeiture. It was further held that if a forfeiture order is requested after sentencing, the sentence already imposed may be considered as relevant to the propriety of such an order.[13]

iv) Penalties in Respect of Same Incident, But Other Crimes Committed

For a variety of reasons it may happen that separate trials or sentencing hearings are held in respect of different offences committed,

arising substantially out of the same transaction or scheme. In such cases, the Court may take into account penalties previously imposed, or the effect of prospective proceedings. In R. v. MacDonald and 15 others,[14] two accused were each fined $500 on conviction of conspiracy to commit bookmaking offences. While substantial sums of money had been involved, a Crown appeal against sentence was dismissed. The Court below had properly taken into account that the accused had already been fined $10,000 on conviction of substantive offences included in the list of charges against them. In R. v. Gregory, Choquette and Hebert (No. 2),[15] the appeal Court held that the trial Judge, sentencing on a misleading advertising conviction, had properly considered and taken account of pending fraud charges. The trial Judge had stated that he was considering the anguish that the accused would suffer as a result of this "sword of Damocles" hanging over their heads.

v) Foreign Criminal Liability for Same Incident

In R. v. Arellano and Sanchez,[16] two Bolivian nationals were convicted of trafficking and importing cocaine. The Court refused to take into account in sentencing that upon release the accused would be deported to Bolivia, where they would have to face a further trial in connection with the same incident.

> ... I have decided that this is not a matter which I could properly put into the scales even if the evidence on it were more satisfactory than it is. My concern is and must be only with the administration of the laws of Canada and if the laws of another country may result in their being punished twice for the same offence that is a matter for the courts of that country to take into account.[17]

B. LOSS OF REPUTATION

In cases involving commercial crime, tariff sentencing being the normal practice for corporate accuseds, the Court may take account of the effect of the prosecution on the accused's reputation and, consequently, loss of business. In R. v. Foote, Cone and Belding Advertising Ltd.[18] the Court imposed a relatively nominal fine upon an advertising agency convicted of false advertising.

> I think the very laying of the charge would give the advertising agency involved, great concern. I am satisfied that word of this matter gets around within the profession, and by 'profession' I mean the advertising profession. If this is the first charge laid under such a matter, I am of the opinion that the conviction and the publicity are a great deterrent.[19]

Similarly in its decision in R. v. Hoffman-LaRoche Ltd.,[20] the Ontario High Court took into account, in sentencing a corporate accused for predatory pricing, the negative publicity attracted by the accused as a result of its illegal campaign, and the considerable damage to its reputation occasioned by the prosecution.[21]

C. DEPORTATION

In the case of relatively minor offences, the possibility of deportation pursuant to a conviction may be weighed in the balance as to whether sentence may be mitigated to the extent of granting a discharge.[22] Where a discharge is not under consideration, the balance of authority favours the view that deportation may be considered as a mitigating factor. The virtual certainty of deportation of both accused was considered among

the mitigating factors in R. v. Johnston and Tremayne,[23] a case involving trafficking in large amounts of marijuana.

In R. v. Sullivan,[24] the Court reduced a sentence for armed robbery from 10 years' imprisonment to eight. It stated that the fact that undoubtedly upon the expiration of the sentence the accused would be deported from Canada was a mitigating factor.

The Chief Justice of Nova Scotia was less convinced in his decision in R. v. Bratsensis.[25] In increasing sentence of imprisonment imposed on an American citizen, found guilty of robbery, from 90 days to three years' imprisonment, his Lordship stated that the probability of deportation of an accused should not affect sentence, except, perhaps, to permit a slight reduction of what would otherwise be proper. His Lordship's reasoning was that deterrence of the criminal himself becomes less important as a factor if he leaves Canada, and thus ceases to be a potential law-breaker here, although the need remains to set an example and deter others. It is respectfully submitted that this dictum is incorrect in two respects, and should not be followed. First, the true rationale for reduction of a tariff sentence to take account of deportation is a simple matter of fitting the penalty to the gravity of the crime: an offender who is deported is thus punished more severely than one who is not, and to redress the balance a decrease of custodial term is in order. Secondly, it seems somewhat parochial to suggest that the purpose of individual deterrence becomes less important if the accused is to leave Canada upon the expiration of his sentence. It would be more in keeping with international comity to give this factor due weight wherever the accused may end up: it is, in utilitarian terms, to the benefit of all mankind that an accused ceases to behave in a criminal manner. The fight against crime is an international, not national,

concern, and it is a short step from Bratsensis to suggest that an accused who will leave the province on the expiration of his sentence does not need to be deterred!

D. LOSS OF EMPLOYMENT OR PROFESSIONAL LICENCE

In the case of relatively minor crimes, potential loss of employment may weigh in the balance in the decision as to whether a discharge should be granted.[26] Similarly, in other cases where an individualized sentence is imposed with a view to securing the rehabilitation of the accused, his continuing employment is a major concern and sentence may be tempered in order to secure this object. In R. v. Mitchell,[27] for example, the accused was convicted of the theft and killing of a calf. He owned a half section of land and had rented a further quarter section: he was running 15 head of cattle on his farm. He did all the work there, and was required to care for his cattle. In view of his family circumstances and the problems which would result to his farm, it would not be in the interest of the public or the accused to take him away from his home and farm for a substantial period. Accordingly, a sentence of six months' imprisonment was reduced to time served and a probation order. A similar result ensued in R. v. A.,[28] where sentence was suspended upon an accused convicted of indecent assault on an employee. The Court took into account that "imprisonment would be of no assistance to the accused. It is likely it would ruin his one-man business."[29]

Similarly, in cases where a non-exemplary tariff sentence is appropriate, the term of incarceration may be reduced to take acount of the additional suffering which the accused will inevitably suffer as a result of loss of his job or career. In R. v. McCormick,[30] the accused received a

sentence of only three months' imprisonment for an armed robbery. The Court stated that:

> ... the criminal record itself, and the consequences which it carries, becomes [sic] part of the punishment, and should be considered by the Judge imposing the sentence. In this instance, it is likely that the conviction will lead to discharge from the United States Air Force. That is a factor, which in my view, should temper the severity of the punishment that otherwise might be imposed.[31]

Similarly in R. v. Ruddock,[32] the Court imposed only a fine on a civil servant convicted of accepting a benefit from a person having dealings with the government. While at first sight a term of imprisonment might have appeared necessary, the aim of general deterrence was held to have been fulfilled by the publicity surrounding the apprehension and conviction of the accused, and his resulting loss of employment.

A further instance in which sentence may be mitigated due to loss of employment is exemplified in R. v. Wells.[33] In refusing to disturb suspension of sentence upon a school teacher convicted of indecent assault of a 13-year-old girl, the Court noted that the trial Judge had given due regard to all relevant circumstances, including "... that he had been suspended from his teaching position". Not only is the sentence made more severe by loss of employment, but the element of protection necessarily considered in sentencing such an offender may become irrelevant where the accused has been removed from his position of temptation.

Different considerations apply where the Court finds that an exemplary sentence is required. Here, the need for general deterrence will override the consideration of individual mitigating circumstances. Thus, in cases involving a treasurer,[34] a lawyer[35] and a pharmacist,[36] the Courts have refused to give effect to the loss of employment and professional standing. Similarly, in R. v. Whitney-Griffiths[37] the Court, having held that

the factor of general deterrence was paramount in sentencing for a case of attempted robbery and having face masked, was unable to give effect to a submission that the accused's apprenticeship would be terminated unless the period of incarceration imposed at trial was set aside.

E. IMPRISONMENT EXCEPTIONALLY DIFFICULT OR DANGEROUS FOR ACCUSED

Imprisonment as a punishment does not mean the same to all offenders. Indeed, while to one offender a term of incarceration may be a well-trodden path signifying nothing out of the ordinary, to another it may mean a complete isolation from his way of life, or a virtual certainty of abuse at the hands of other inmates. There has in recent years been substantial discussion of these difficulties.

It is well known that offenders convicted of crimes, particularly offences of a sexual nature, against children are "outcasts" in the prison community.[38] Other sexual aberrations may also cause difficulties. Judicial opinion on the extent to which factors may be considered has varied. In R. v. Piche, Caplette & Jones,[39] the three accused committed a homosexual rape on a fellow inmate. In sentencing them to one year's imprisonment (active participants) and six months (lookout man) the Court stated, inter alia, that the sentences would have been much longer but for the fact that these accused would suffer indignities and additional punishment at the hands of other prisoners, and would have to serve their sentences "in the hole" (segregated from the main prison population) for their protection. Similarly, in R. v. Carvery,[40] the accused, convicted of false pretences, had transvestite tendencies and obvious psychological problems. The Court stated:

> These facts should not affect sentence but they must be taken into account in considering the rehabilitation and adjustment of this man to be a useful member of society. We cannot overlook that incarceration with other males will necessarily make any prison sentence much harsher for this individual than for others.[41]

While taking into account possible difficulties to be faced by the accused may have a small effect on sentence, it is clear that it will not justify the imposition of a reformatory term where a penitentiary term is clearly called for. In R. v. Farmer,[42] the trial Judge imposed a total sentence of two years less a day's imprisonment on the accused, who pleaded guilty to three counts of having sexual intercourse with his 13-year-old step-daughter. He was primarily concerned with what would happen to the accused if incarcerated in a penitentiary. The appeal Court held this consideration to be a reversible error, and increased the total sentence to three years. A similar result occurred in R. v. Campbell,[43] where the accused abducted a female under 14 from her home and raped her. The trial Judge, out of fear that the respondent would suffer physical harm and deteriorate in a penitentiary, imposed a sentence of 23 months' imprisonment. The appeal Court held that this was an improper consideration: it was the responsibility of Parliament to provide adequately for the safeguarding of inmates. The sentence was increased to five years' imprisonment, an appropriate penalty for the crime.[44]

Linguistic and cultural difficulties, on the other hand, have been considered substantial mitigating factors. In R. v. Fireman[45] the accused, a native Indian, was convicted of manslaughter. He came from a remote settlement, where there was little contact with the rest of the world. He was sentenced at trial to 10 years' imprisonment. On appeal, the Court held

that even a short term of imprisonment in a penitentiary would be substantial punishment for him. In particular, "every sense by which he had lived in the north" would be dulled by removal from his environment. He spoke no English and there was no necessity for him to learn it. He would have difficulties of communication and great loneliness. In the circumstances, the sentence was too severe, and was reduced to two years' imprisonment. In R. v. Arellano and Sanchez,[46] two Bolivian nationals were to be sentenced for importation and trafficking of cocaine. The Court considered in mitigation that both accused spoke little or no English or French and that therefore detention for them in a Canadian penitentiary would be much more difficult than for a Canadian or foreigner who spoke one of the official languages. In addition, due to the great distances involved, the possibility of visits from family or friends was extremely remote.

Occasionally, administrative considerations with respect to the incarceration of females may substantially affect the severity of the term of imprisonment. In particular, the distance from a community to the nearest female penitentiary or even reformatory is frequently greater than the corresponding distance for males. That this fact may justify a change of sentence was confirmed by the Quebec Court of Appeal in R. v. Faust.[47] The accused was convicted of manslaughter of her husband. Though resident in Quebec, if sentenced to a penitentiary term, she would have to be moved to Kingston, Ontario. This would make it difficult, if not impossible, for her three daughters to visit her. Taking into account that she had already served 13 months, the trial Judge had imposed a sentence of two years less one day's imprisonment so that she could serve her sentence in a provincial institution. On appeal, this disposition was held to be correct.[48]

Substitution of a non-custodial penalty for a jail term in somewhat similar circumstances was instanced in R. v. Sooley.[49] The accused, a

female aged 18, was convicted of offences under the Unemployment Insurance Act, 1971.[50] The only jail accommodation available was a police "lock-up" in which there was one cell containing four beds. It was likely that she would have to share the cell with male prisoners if her sentence were served there, and it was doubtful whether cells in police detachments were ever intended for the incarceration of offenders of both sexes during the terms of their sentences. Substituting a fine of $300, the Court held that the practical aspect of the punishment imposed made it inappropriate in the circumstances, even though it would otherwise have been a fit and proper sentence.

F. EFFECT ON ACCUSED'S FAMILY

In the case of short terms of imprisonment, difficulties which may accrue to the family of an accused are often cited in support of an order for intermittent service of imprisonment. This matter is dealt with later.[51]

The authorities to date on consideration of the welfare of an accused's family indicate that children who may be severely prejudiced are entitled to a good deal more consideration than spouses, although where rehabilitation is in issue the Court may express a reluctance to interfere with the marital status of the accused by imposing a term of incarceration. In R. v. Mitchell[52] the accused, who had five children aged 3 to 16, had a sentence of six months reduced to time served plus probation in view of his family circumstances and the problems which would result to his farm if the full term of incarceration were to be served.

A submission deserving of note was made by Crown counsel in R. v. McLaughlan:[53]

> [I]f the fact of marriage and family is used as the overriding consideration in imposing a penalty of fine rather than imprisonment, then in effect a double standard is created because a single person convicted of the same offence, would, on the basis of [this] approach, be sentenced to a term of imprisonment.[54]

MacDonald, J.A. for the Court found that there was some merit to this submission. The trial Judge had said in effect that were it not for the fact that the respondent was a married man with a family, he would not hesitate to sentence him to a term of imprisonment in the penitentiary. The appeal Court cautioned that while the fact of the accused's responsibility to provide for a wife and family is a factor to be considered in determining a proper sentence, it is but one of many. It should not be elevated to a consideration of such importance or influence that its presence would make proper the imposition of a fine and its absence make proper a penitentiary term.

It is noticeable that the decisions in Mitchell and McLaughlan, respecting husbands and fathers, were phrased in terms of "providing for" young families. This has also been a consideration in cases relating to single mothers, although the added factor of emotional detriment due to maternal deprivation will add increased weight to submissions regarding the welfare of young children. In R. v. Henry,[55] the accused was convicted of manslaughter for the slaying of her common-law husband. He had severely provoked her and was under the influence of alcohol, as was she. The trial Judge suspended sentence, paying particular regard to the probable consequences to the accused's two children if she were imprisoned. The Court ofAppeal upheld this decision, stating that the welfare of the two children in this case justified putting limited weight on the principle of deterrence. In R. v.Dochniak,[56] a 24-year-old female who at the time of sentence was married, had a daughter and was expecting another baby, was sentenced to two years

less a day's imprisonment for trafficking in heroin. In reducing the sentence to 90 days intermittent, the appeal Court noted her exceptional circumstances. While the first child had been born out of wedlock and her past was otherwise blemished, she had recently married, set up a home and become "happily occupied as a housewife and mother". Weighing the need for general deterrence against the destruction of a happy family unit and the future of the unborn child, the Court "went beyond the normal principles of sentencing" to exercise a measure of compassion.

The extent of mitigation accorded to a mother with young or sick children was quantified in R. v. Perry.[57] The accused was convicted of defrauding public welfare funds of over $9,000, Ordinarily a term of six months' imprisonment would have been appropriate. However, she had two children at home, one of whom required continuing medical treatment. An older daughter required periodic psychiatric treatment. Absence of the mother would work a hardship upon all three children without any offsetting benefits to society. Accordingly, sentence was suspended for two years.

As the effect on children may be taken into consideration in sentencing either parent, it follows quite logically that in the rare instance where both parents are to be sentenced, the effect upon children of the family will be a salient consideration. In R. v. Cossette-Trudel and Cossette-Trudel,[58] a unique combination of circumstances brought the two accused before the Court to be sentenced for kidnapping and related offences after a nine-year period of exile. While abroad they had had two children, aged 7 and 5 at the time of sentencing. The Court bore in mind the fate of the children: the impact on them of their parents' imprisonment was to be minimized. While to narrow the issue to the children would in the Court's opinion have been simplistic, their presence led it to impose a "decent minimum" of incar-

ceration. It was further commented that there was no distinction to be made in considering parenthood between the role of the father and that of the mother.

This last comment, while perhaps correct in the circumstances of Cossette-Trudel, is of limited application. While there is no consideration which attaches invariably to either fatherhood or motherhood, it is submitted that the Court should look at all the circumstances of each parent in order to consider the effect of his or her incarceration upon children. Nothing turns upon whether one is a father or mother in the abstract: on the other hand, a great deal turns on the question of who, whether father or mother, is the income-earning parent in a one-income family. Similarly, the Court faced with submissions regarding emotional attachment should examine carefully the precise relationship between the accused and his or her children: it seems fair to postulate that, for example, the imprisonment of the mother of a 2-week-old baby could be significantly more detrimental to its welfare than the imprisonment of its father. Different considerations would, of course, apply if it were clear that the entire family would become destitute in the absence of a single father, or one who provided all of its income.

Consistently with principle, effect on family as a mitigating factor is ignored in those cases where an exemplary sentence is imposed. In R. v. Keisser,[59] Fisher, J. sentenced a married woman convicted of welfare fraud, and with a long criminal record of similar offences, to 15 months' imprisonment. His Lordship stated:

> I regret very much this may well cause a permanent rupture of your marital position, but that, I am sure, is something that I have no control over.[60]

Similarly, in R. v. Bengert (No. 14),[61] nine accused were convicted of conspiracy to traffic in cocaine. Some submitted evidence as to their family

ties and obligations. It was held that such matters could not extenuate on the part of those who had taken roles in planned, deliberate and continuing criminal activity over a period of a year or more. It could extenuate, however, in the case of those accused whose participation extended over a period of six months, and in the case of one accused whose participation may not have been continuous.

Financial penalties call for separate consideration. The Courts have from time to time recognized that a severe fine will have a detrimental effect on the welfare of an entire family, rather than punishing an accused. In R. v. Lauzon,[62] the Court of Appeal refused to increase the fine imposed on an accused convicted of public mischief because, in view of his financial situation, it would punish his family more than himself. In R. v. Thistle,[63] the appeal Court reduced the fine imposed on an accused convicted of tax evasion. Grossberg, J. stated:

> But the Court should not crush the accused and his family. I have an uneasy feeling that, in this case, the effect of what has happened has been to impose a tremendous financial burden on the accused.[64]

G. PUBLIC REACTION

While, as suggested earlier, the public abhorrence or disgust at an accused's behaviour may from time to time be expressed in the form of the sentence imposed,[65] such considerations should be treated with caution. Certainly, a sentence otherwise improper should not be imposed out of fear of public criticism. In R. v. Porter,[66] the trial Judge in sentencing the accused for an offence of criminal negligence causing death referred to "the reaction of the public if excessively light sentences are given" and "the

general satisfaction of the public". These words were held "inappropriate" on appeal, although in the event such a finding did not affect the adequacy of the sentence. In Re Gamester and The Queen[67] it was held, not surprisingly, that it is improper for a Judge to request submissions from the public before sentencing an accused.

Footnotes to Chapter 9

1. As to the inclusion of an order for restitution in a probation order generally, see post, Chapter 28.

2. (1973), 11 C.C.C. (2d) 398 (Ont. Co. Ct.).

3. (1980), 42 N.S.R. (2d) 90, 77 A.P.R. 90 (C.A.).

4. (1979), 1 Sask. R. 93 (C.A.).

5. R. v. Fera (1976), 32 C.C.C. (2d) 219 (Ont. Prov. Ct.); R. v. Ward (1980), 56 C.C.C. (2d) 15 (Ont. C.A.); R. v. Rasper (1978), 1 C.R. (3d) S-45 (Ont. C.A.).

6. R. v. Ghislieri, [1981] 2 W.W.R. 303 (Alta. C.A.).

7. R.S.C. 1952, c.148, as am.

8. R. v. Sumarah et al., [1970] 5 C.C.C. 317 at 327-28 (N.S. Co. Ct.); R. v. Horowitz (1971), 71 D.T.C. 5350 (Ont. Co. Ct.).

9. See post Chapter 26.

10. Supra, Chapter 3.B.ii.g.

11. R.S.C. 1970, c.N-1, as am. by S.C. 1972, c.17, s.2(1); 1974-75-76, c.48, s.25(1); 1978-79, c.11, s.10(1).

12. (1978), 2 C.R. (3d) S-35 (Nfld. C.A.).

13. See also R. v. Andrews (1979), 24 N. & P.E.I.R. 475 (Nfld. Dist. Ct.).

14. (1972), 10 C.C.C. (2d) 1 (Alta. C.A.).

15. (1974), 20 C.C.C. (2d) 509 (Que. C.A.).

16. (1975), 30 C.R.N.S. 367 (Que. Sup. Ct.).

17. Ibid. at 371 per Hugessen, A.C.J.

18. (1974), 34 C.P.R. (2d) 26 (Ont. Co. Ct.).

19. Ibid. at 34 per Hogg, Co. Ct. J.

20. (1980), 16 C.R. (3d) 30 (Ont. H.C.).

21. See also R. v. Sumarah et al., supra note 8 - in a case of tax evasion by men of social standing, it must not be fogotten that such men are likely to feel the disgrace of a prosecution much more keenly.

22. See post Chapter 29.

23. [1970] 4 C.C.C. 64 (Ont. C.A.).

24. (1972), 9 C.C.C. (2d) 70 (Ont. C.A.).

25. (1974), 31 C.R.N.S. 71 (N.S.C.A.).

26. See post Chapter 29.

27. (1979), 2 Sask. R. 382 (C.A.).

28. (1974), 26 C.C.C. (2d) 474 (Ont. H.C.).

29. Ibid. at 475 per Haines, J.

30. (1979), 47 C.C.C. (2d) 224 (Man. C.A.).

31. Ibid. at 231 per Huband, J.A.

32. (1978), 39 C.C.C. (2d) 65 (N.S.C.A.).

33. (1977), 7 A.R. 311 (Alta. C.A.).

34. R. v. Gorman (1971), 4 C.C.C. (2d) 330 (Ont. C.A.).

35. R. v. Ryan (1976), 1 A.R. 355 (C.A.).

36. R. v. Soble (1978), 3 C.R. (3d) S-1 (Man. C.A.).

37. (1980), 22 Crim. L.Q. 430 (B.C.C.A.).

38. Davies, R.P. and Steadman-Allen, R.J., "The Psychology of Rule 43," (1979), 34/2 Prison. Serv. J. 7.

39. (1978), 21 Crim. L.Q. 25 (Alta. T.D.).

40. (1976), 14 N.S.R. (2d) 643 (C.A.).

41. Ibid. at 643-44 per MacKeigan, C.J.N.S.

42. (1978), 21 Crim. L.Q. 273 (Ont. C.A.).

43. (1978), 4 C.R. (3d) S-18 (N.S.C.A.).

44. See further Neilson v. R. (1978), 5 C.R. (3d) S-36 (Ont. S.C.).

45. (1971), 4 C.C.C. (2d) 82 (Ont. C.A.).

46. Supra note 16.

47. [1971] C.A. 253.

48. A similar result was reached in R. v. Grant [unreported] April 2nd, 1981 (N.S.C.A.), also to save the accused's removal from family and fiance, in Nova Scotia, to Ontario.

49. (1977), 17 N. & P.E.I.R. 384 (Nfld. Dist. Ct.).

50. S.C. 1970-71-72, c.48.

51. See post, Chapter 26. See also R. v. Roche (1975), 10 N. & P.E.I.R. 229 (Nfld. Dist. Ct.); R. v. Dochniak (1980), 25 A.R. 187 (C.A.).

52. (1979), 2 Sask. R. 382 (C.A.).

53. (1976), 17 N.S.R. (2d) 604 (C.A.).

54. Ibid. at 613.

55. (1977), 39 C.R.N.S. 45 (Que. C.A.).

56. (1980), 25 A.R. 187 (C.A.).

57. (1979), 25 N. & P.E.I.R. 349 (P.E.I.S.C.).

58. (1979), 11 C.R. (3d) 1 (Que. C.S.P.).

59. (1977), 3 C.R. (3d) S-4 (B.C. Co. Ct.).

60. Ibid. at S-7 per Fisher, Co. Ct. J.

61. (1979), 15 C.R. (3d) 97 (B.C.S.C.).

62. (1977), 19 Crim. L.Q. 285 (Que. C.A.).

63. (1974), 74 D.T.C. 6632 (Ont. Co. Ct.).

64. Ibid. at 6634 per Grossberg, Co. Ct. J.

65. See supra, Chapter 1.F.iii. See also R. v. Henein (1980), 53 C.C.C. (2d) 257 (Ont. C.A.).

66. (1976), 15 O.R. (2d) 103 (C.A.).

67. (1978), 38 C.C.C. (2d) 548 (P.E.I.S.C.).

CHAPTER 10: OTHER OFFENCES NOT THE SUBJECT OF CONVICTIONS

A. TAKING INTO ACCOUNT

In the English sentencing system, a common practice is the taking into account in sentencing of other outstanding charges. As Thomas indicates,

> The practice of taking offences into consideration is 'a convention under which, if a court is informed that there are outstanding charges against a prisoner who is before it for a particular offfence, the court can, if the prisoner admits the offences and asks that they should be taken into account ... give a longer sentence than it would if it were dealing with him only' on the charge mentioned in the indictment'.[1]

While this convention is not used very frequently in Canada,[2] there is authority for its implementation in appropriate cases.

> We agree that frequently it is a sensible and proper thing for a Judge to take into consideration other convictions and on occasions and under proper safeguards other charges laid against a convicted person. If other charges are taken into consideration, it seems to us those safeguards should at least include the conditions that they are charges with respect to which the accused will plead guilty or will otherwise be proved guilty and that the Crown commits itself not to proceed with those other charges in the event that they are taken into consideration in sentencing on the conviction before the Court.[3]

The application of this principle was limited in the later decision of the Ontario Court of Appeal in R. v. Robinson,[4] where it was stated that the rule in Garcia should not be followed in respect of offences of a different class, even with the consent of Crown counsel, where the public interest may

require a separate prosecution. Robinson had threatened people with a shotgun, fired it while being pursued by the police, entered a house containing a young girl and her parents, ordered the parents into the bathroom at gunpoint, and raped the young girl. While disapproving of the trial Judge's action in taking into account the rape charge, as it was in the public interest that the accused be prosecuted separately for the offence of rape, the Court of Appeal nevertheless gave effect to his action in so doing.

Untried offences may also be considered, not in the above sense, but rather as a general indication of the accused's personality and propensities. This is particularly so where the accused leads evidence, contested by the Crown, of previous good behaviour, or that the offence was an isolated instance. In R. v. Sabloff,[5] which involved a female accused convicted of trafficking in morphine, the Court took account of the fact that taped telephone calls indicated that the accused served as an "information centre" or "clearing house" in the drug trafficking milieu. She would also act as an intermediary to complete a transaction between a retailer and a drug user, thus acquiring money for her own use and to help support her own drug habit. This evidence contradicted the accused's testimony to the effect that she had never participated in trafficking before and that she had been the target of an illegal entrapment.

In R. v. Gourgon and Knowles (No. 2)[6] the accused, convicted of second degree murder, had at the time of the offence intentionally stabbed and seriously injured two defenceless women, one of whom was elderly and infirm. In considering whether the eligibility period for parole should be increased beyond 10 years, the Court discussed a contention of counsel for the accused that the two stabbings which did not result in death could not, as a matter of law, be taken into consideration.

> ... I have made it clear that I have given consideration to the other crimes committed by this accused ... which have resulted in very serious injuries to those persons. In my opinion, legal theory must give way to reality in cases of this kind. To compel [the victims] to testify at further trials would cause them great pain. Likewise, the accused would suffer and would not know his fate for months or years hence. The public would be put to great expense.[7]

The three rationales put forward in Gourgon and Knowles (No. 2), including the factor of saving of public expense, would appear to be true justifications for the practice of "taking into account" generally.

B. OFFENCE MORE SERIOUS THAN THAT CHARGED, WHICH THE ACCUSED MAY HAVE COMMITTED

The general principle is that in fixing sentence for a criminal offence a court should not allow itself to be influenced by the belief, however well-founded, that the accused has in fact committed a more serious offence than that charged.[8] The Crown, having elected to charge the accused with a specific offence, is bound by its election to the appropriate sentence for the offence charged.[9] R. v. James,[10] a decision of the Prince Edward Island Court of Appeal, correctly stated this principle but, in a useful demonstration of its limitations, misapplied it. The accused was charged with assault, having attacked a police officer. The Court refused to take into account that the victim was a policeman, stating that if the Crown wished account to be taken of that fact, it could have laid a charge of assaulting a peace officer. It is submitted that the Court should, in fact, have taken into account the victim's status: however, its effect should have been merely to place the sentence for common assault higher on the range. What the Court would not have been permitted to do would have been to impose a sentence based on the

range for assaulting a peace officer. In R. v. Luciens,[11] the Ontario Court of Appeal correctly applied the principle and increased sentence on an accused convicted of causing bodily harm with intent to wound from 30 days intermittent to six months' imprisonment. The Court stated that the trial Judge had erred in failing to give sufficient weight to the fact that the victim was a police officer.

There are occasional subtle dissents from the rule. In R. v. Harrison,[12] the accused, a respectable 30-year-old businessman with a teak-importing concern, arranged to bring 500 lb. of marijuana into Canada for reasons characterized as "pure greed". The value was $1-1/2 million, and a profit of $70,000 would have been made. He was convicted of trafficking and conspiracy to traffic in a narcotic, and sentenced to nine years' imprisonment. In upholding this sentence, the Court appears to have relied upon the idea that the facts would have supported a charge of importing, which bears a minimum sentence of seven years. Had this charge been laid, a sentence more than the minimum would have been appropriate.

Due to the close similarity of certain types of offence in the Criminal Code, cases can arise in which the Court may refer to sentencing precedents for one in order to determine the appropriate range for the other. In R. v. Danells,[13] the Court looked to manslaughter cases for an indication of the appropriate sentence for criminal negligence causing death. There appears to be no objection in principle to such reference where, as here, the statutory penalties are identical and the fact situations are closely similar, neither offence being regarded, for sentencing purposes, as more serious than the other.

C. OFFENCES PLANNED BUT NOT EXECUTED

The Court may properly rely upon evidence of further offences planned by the accused, either as evidence of a continuing scheme, which will aggravate the offence[14] or as general evidence of the accused's character and proclivities. An example of the former type of use is R. v. Soble,[15] where the Manitoba Court, in increasing sentence on a pharmacist convicted of defrauding a life assurance company of approximately $24,000 by false claims, took into account that the accused still had, at the date of the investigation, 2,150 pre-signed claim cards in his office. Such cards had been the instrument of his fraud.

Supreme Court of Canada authority is conclusive on the latter proposition. In Lees v. The Queen[16] the accused was arrested one year after commission of a robbery. After he had led evidence on his good character and potential for rehabilitation, the Crown led evidence that at the time of his arrest he had been in possession of weapons and disguises, and stated that he was planning a further robbery. The accused's appeal on the basis that the trial Judge had relied unduly upon this evidence was dismissed. The Court stated that such evidence was properly admissible on the issue of the accused's character, conduct and attitude, despite being evidence only of a potential offence.

D. OFFENCES NOT PROVEN

The general rule, well established by precedent, is that the Court must always exclude evidence of controverted, untried charges from adjudication upon sentence for a particular offence.[17] An exception may, however,

be made in the review of an individualized sentence which, in light of previous conduct, may pose a danger to others. In R. v. Moulton,[18] a "straight" period of imprisonment was substituted for an intermittent sentence imposed at trial on conviction of incest. The Court stated that the trial Judge had "properly" concerned himself with the period in the indictment only, but itself reviewed the entire circumstances of the accused's family history in order to check the appropriateness of the sentence imposed at trial.

Footnotes to Chapter 10

1. Thomas, D.A., Principles of Sentencing (2nd ed. 1979, London: Heinemann Books Ltd.) at 374, citing R. v. Batchelor (1952), 36 Cr. App. R. 67.

2. Ruby, C.C., Sentencing (2nd ed. 1980, Toronto: Butterworths) at 71.

3. R. v. Garcia and Silva, [1970] 3 C.C.C. 124 at 126, [1970] 1 O.R. 821 at 823 (C.A.) per Gale, C.J.O.

4. (1979), 49 C.C.C. (2d) 464 (Ont. C.A.).

5. [1979] C.A. 1077.

6. (1979), 9 C.R. (3d) S-33 (B.C.S.C.).

7. Ibid. at S-41 per Anderson, J.

8. Flamond v. The Queen, [1971] 4 W.W.R. 479 (Sask. C.A.); following R. v. Cote, [1967] 3 C.C.C. 97 (Sask. C.A.). See also R. v. Kolega (1970), 13 Crim. L.Q. 151 (Sask. C.A.); R. v. Johnston (1976), 19 Crim. L.Q. 284 (Ont. C.A.).

9. R. v. James (1971), 3 C.C.C. (2d) 1 (P.E.I.S.C.); contra R. v. Hodgkins, R. v. Wedge (1962), 132 C.C.C. 223 (N.B.C.A.).

10. Ibid.

11. (1975), 18 Crim. L.Q. 18 (Ont. C.A.).

12. (1977), 22 Crim. L.Q. 436 (B.C.C.A.). A very similar decision is that delivered for the Court by Freedman, C.J.M. in R. v. Neath, [unreported] April 27th, 1981 (Man. C.A.). Dismissing an appeal against a sentence of two years less a day for conspiracy to traffic in about 66 lb. of marijuana, the Chief Justice stated: "The marijuana was brought in from Grand Forks, North Dakota. Had a charge of unlawful importation been laid the accused might have faced a minimum sentence, by statute, of seven years."

13. (1979), 10 C.R. (3d) S-8, 31 N.S.R. (2d) 579, 52 A.P.R. 579 (C.A.).

14. Supra, Chapter 5.C.

15. (1978), 3 C.R. (3d) S-1 (Man. C.A.).

16. (1979), 46 C.C.C. (2d) 385 (S.C.C.).

17. R. v. Morelli (1977), 37 C.C.C. (2d) 392 (Ont. Prov. Ct.); following R. v. Spence (1961), 132 C.C.C. 234; R. v. Whepdale (1927), 49 C.C.C. 62, [1927] 3 W.W.R. 704, 22 S.L.R. 148 (C.A.).

18. (1979), 21 Crim. L.Q. 275 (B.C.C.A.).

PART III: THE CONTENT OF THE TARIFF

INTRODUCTION

This Part explains sentencing practice in respect of a wide range of criminal behaviour, applying the principles enumerated in Part I in an analysis of dispositions for specific offences. Emphasis is placed on determination of range of sentence for each offence discussed, for cases where a tariff (as opposed to invidivualized) sentence is found to be appropriate. However, the extent to which tariff sentences are used for each offence is also indicated.

The analysis proceeds primarily through discussion of reported and unreported appellate decisions on sentencing. This approach was also used by Ruby, in his book Sentencing.[1] At least one reviewer was quick to criticise Ruby's first edition on the basis that an analysis of sentencing statistics was not conducted collaterally, as an indication of what courts generally are "doing" with offenders.[2] Ruby himself has acknowledged the possibility of thus creating a misleading impression.[3]

Ruby need not have been so concerned. Essentially, determination of the proper range of sentence lies in the hands of appellate courts: the lower courts may adopt a specific approach for years, without creating any constraints up on an appellate court to ratify their policy. It is only to the provincial appellate courts, the final arbiters in matters of quantum of sentence, that the lower Courts can look for authoritative statements on practice and policy. Perhaps the most efficacious way of achieving a modicum of consistency, too, is through careful observation by lower courts of statements from the Courts of Appeal.

Nevertheless, an attempt has been made to incorporate, where possible, an overview of relevant sentencing statistics. The usage of, and

reliance placed upon, national figures is extremely limited for several reasons. The most serious problems with existing data are as follows:

1. The last available national statistics on sentencing dispositions are for the calendar year 1973 (published in 1978).[4] This obviously affects their utility for 1981 and later, as statutory maxima, legislative policies, and forensic attitudes to many offences have all changed substantially in the intervening eight-year period. In addition, the 1973 Criminal Statistics do not include figures for Alberta and Quebec.

2. Available statistics, even for 1973, are grouped in rudimentary classifications which do not easily lend themselves to a detailed analysis of sentencing for specific offences. For example, all firearms offences are dealt with in one row of figures: so too are all break and entries, all manslaughters, and all Narcotic Control Act offences. Clearly such blanket classifications are of limited utility to a discussion of specific offences; dispositions for possession of marijuana and importing heroin, while enumerated together, are hardly comparable!

3. Statistics do not analyse cases according to factual classifications. For example, abduction and kidnapping covers every act from the taking by a separated father of his own child in contravention of a custody order to seizure of a diplomat by terrorists for political reasons. Statistics which combine dispositions for these offences, and everything in between, are hardly of great utility in determining the appropriate sentence for any other offender convicted under the relevant sections of the Code. Similarly, blanket statistics for "manslaughter" do not adequately

express the differences in sentencing policy between sentencing for provoked, negligent and diminished responsibility manslaughters.

Care should, therefore, be taken when basing submissions on, or reviews of, sentence on criminal statistics. With their limitations borne clearly in mind, nevertheless, a basic utility may be derived from them, as will be indicated.

Within the following chapters, organization follows roughly the Criminal Code, then offences in various other areas of law: Drugs, Taxation, Commerce, Environment, and Inchoate Offences. The last-mentioned is a general discussion covering principles applicable to inchoate offences in respect of all criminal provisions. Naturally, not every offence the subject of a conviction in the last decade will be mentioned; a complete absence of reported or semi-reported decisions for one offence will preclude any worthwhile discussion. Nevertheless, wherever authority exists an attempt has been made to illuminate sentencing policy for the offence concerned; if the content of the following chapters seems unduly detailed as regards their main purpose, the illumination and application of the principles of sentencing, the explanation lies in the author's attempt to be as comprehensive as possible as to quantum dispositions at large.

Footnotes to Introduction to Part III

1. Ruby, C.C., Sentencing (2nd ed. 1980, Toronto: Butterworths) at 423-500.

2. Mandel, M., "Review of Sentencing, by C.C. Ruby," (1977), 55 Can. Bar Rev. 385 at 388.

3. Supra note 1 at 425.

4. Statistics Canada, Justice Statistics Division, Statistics of Criminal and Other Offences 1973 (1978, Ottawa: Statistics Canada). A government source indicates that "The only adult criminal court data which have been released by Statistics Canada since then are for the years 1978 and 1979. Data for 1978 cover only the Territories and parts of Quebec and British Columbia. Data for 1979 cover only parts of Quebec and British Columbia, and individual courts in other provinces. Data for 1980 is being compiled but again covers only limited areas. Statistics Canada has recognized that the state of justice statistics is less than satisfactory and has given this area high priority, establishing on June 1st, 1981, the Canadian Centre for Justice Statistics. The Criminal Courts programme is being redeveloped and its goal is to provide complete and comparable national court data as soon as possible." Ms. Margaret J. Mathews, Analyst, Criminal Courts Program, Statistics Canada, Personal Communication July 20th, 1981.

References to statistics in this part are to the author's abridgements of the abovementioned publication, Tables 6A-total, 6B-total, and 13-total.

CHAPTER 11: PUBLIC ORDER AND WEAPONS OFFENCES

A. RIOT

Riot, as Thomas notes,[1] is an offence which covers a wide variety of situations: it may involve three or four persons or it may involve several hundred. While the English jurisprudence is quite well-developed, covering a range of situations from "gang wars" to spontaneous disturbance, riot is rarely charged in Canada[2] and as a result there are few reasoned decisions available.

The penalty provided for riot is two years' imprisonment, on conviction on indictment.[3] This may explain in part the small number of convictions recorded, as for any offence involving moderately serious group violence, prosecutors may well prefer to charge under other provisions carrying higher maxima.

For tumultuous assemblies involving minor violence, a short term of incarceration is normally imposed. In Bedard v. The Queen,[4] for example, an accused who was seen throwing a bottle toward the police during St Jean Baptiste day was originally sentenced to two months, reduced to 15 days time served on appeal as he had clearly demonstrated his rehabilitation and good will. A somewhat longer term, four months, plus a fine of $200 was imposed on a 25-year-old St. Jean Baptiste day rioter whose offence was aggravated by his being a member of the Quebec Bar.[5]

Of great importance in sentencing for riot is the degree of partication of each accused. In R. v. Lockhart,[6] seven men created a disturbance at police cells after the arrest of one of their number, some continuing to cause damage to their cells after arrest. The two instigators of

the disturbance received sentences of one and two years' imprisonment, while two others received only three months, and three minor participants were fined $400.

B. HIJACKING

Hijacking, confined in the Criminal Code to offences against aircraft, is a relatively new offence. It was added to the Code in 1972[7] to fill a lacuna created by the rising popularity of hijacking in the world at large.[8] Prosecutions are extremely rare. However, by its very nature it is always a serious offence, and when committed against a civil passenger craft will attract a substantial tariff penalty, the statutory maximum being life imprisonment.[9] In R. v. Stanford,[10] the Quebec Court upheld a term of 20 years for seizure of control of a Quebecair BAC 1-11, stating that the offence was exceptionally grave and called for an exemplary term.

It is possible to envisage offences which might fit the definition of hijacking, but be much less serious in nature than interference with passenger airliners. There are, however, several lesser charges which are more appropriately laid in cases of minor interference.

A related, and betimes preparatory, offence to hijacking is that of taking a firearm or explosive on board a civil aircraft without consent. This is penalized by up to 14 years' imprisonment by s. 76.3(1) of the Criminal Code. This offence, like most firearms infractions, should always call for a deterrent sentence, but the term fixed will of course depend on the intent and circumstances of the illegal boarding. Among the more serious cases is that of the hijacker who takes a weapon on board an aircraft; a term of 10 years concurrent was imposed in these circumstances in Stanford.[11]

C. EXPLOSIVES AND EXPLOSIONS

Section 79 of the Criminal Code penalizes the commission of any act with intent to cause an explosion, which is likely to cause serious bodily harm, death, or serious damage to property, by life imprisonment. Possession of explosives, bombs, grenades or explosive weapons is punishable by five years' imprisonment.[12] Prosecutions under these sections are very rare; the decision in Geoffroy v. The Queen,[13] however, would indicate that very severe custodial terms are appropriate for terrorist-like activities. Geoffroy, aged 24, well-educated and with no record, was convicted on 129 counts relating to making and setting bombs. The explosions had mostly taken place late at night, causing no injury. To set an exemplary standard, and in view of the possibility that the accused could have killed many people, Geoffroy was sentenced to life imprisonment. By analogy with the penalty for murder, life would also be an appropriate sentence where persons were killed by an explosion.

D. USING FIREARM DURING COMMISSION OF OFFENCE, ETC.

Deliberate, as opposed to careless, misuse of a firearm virtually always calls for a deterrent sentence of imprisonment. That Parliament views the use of firearms in the commission of other offences particularly seriously is indicated by legislation enacted in the 1976-77 session.[14] Pursuant to s. 83 of the Criminal Code, everyone who uses a firearm while committing or attempting to commit an indictable offence, or during his flight thereafter, is liable to imprisonment. The terms specified are: for a first offence, 14 years and not less than one year, and for a second or

subsequent offence, or in the case of a person who before the provisions came into force has been convicted of an indictable offence (or attempt), during which or during flight from which he used a firearm, 14 years and not less than three years.[15] The penalties thus imposed are, further, to be served consecutively to sentences for other offences arising out of the same event or series of events.[16]

Parliament's clear intention to punish users of firearms has not gone unnoticed by the Courts, which have accorded a severe interpretation to the "second and subsequent offence" and consecutive service provisions of s.83. In R. v. Nicholson[17] the Manitoba Court held that an accused was liable to be sentenced as a second offender where he had merely been a party to the use of a firearm on an earlier occasion. In R. v. MacLean,[18] the accused was sentenced at the same time to five consecutive terms of three years on "second and subsequent" counts, upheld on appeal as in accordance with the express terms of the statute. A similar disposition as to consecutive service was upheld on three counts in R. v. Cheetham,[19] although all the terms were fixed with reference to the one-year minimum for a first offence, the Court holding that the "second and subsequent" provisions apply only to offences committed after conviction for a first offence. The potential severity of s. 83 may, in appropriate cases, be mitigated by application of the principle of totality.[20]

The normal range of sentence for first offences under s. 83 appears to be from one to 2-1/2 years' imprisonment. One-year sentences were upheld in R. v. Langevin,[21] R. v. McGuigan[22] and R. v. Cheetham,[23] all armed robberies or attempted armed robberies of stores. More serious offences, where the victims were a credit union,[24] police officers[25] or a number of employees in a beverage room[26] have attracted two-year terms.

In another credit union robbery, in R. v. Cameron,[27] the use of a firearm was penalized by 2 1/2 years' imprisonment. In an extremely severe case, R. v. Ogden,[28] a term of one year was increased to four by the British Columbia Court of Appeal. Ogden had fired 20 to 30 shots at random objects and persons, including a police officer, private citizens and cars. Some persons had been injured, and the accused was convicted of attempted murder and other offences.

It is unlikely that the Courts would uphold sentences much in excess of four years even in the gravest of cases, for reasons pertaining to the totality principle. To merit a sentence greater than this, the accused would need to commit a substantive indictable offence of the gravest nature. In such an event, the sentence for the firearms offence would surely not be permitted unduly to extend an already lengthy sentence.

For second and subsequent offences, for similar reasons, the normal sentence will be at or very close to the statutory minimum. Both instances reported since the enactment of s. 83 have resulted in three-year terms.[29]

E. POINTING A FIREARM

In its general review of firearms offences in the 1976-77 session, Parliament increased the maximum penalty on conviction of pointing a firearm from two to five years (indictable conviction).[30] The offence remains punishable also on summary conviction.[31]

Pointing a firearm covers a very broad range of behaviour, but will not normally be charged where the firearm is deliberately fired. It is charged principally in two types of situation: accidental shooting, and where

more severe offences (e.g. robbery, attempted murder) have not been fully committed.

In the case of accidental shooting, unless the accused's negligence was gross or highly culpable, an individualized sentence will normally be imposed. Such offences are frequently accompanied by great personal grief and/or loss, which serves to obviate the need for specific deterrence and often, the accused's need to be "taught" any more about the need for care in the handling of firearms. Thus, for example, in R. v. Joves[32] a conditional discharge was granted to the accused boy who, in a simulated chase, shot ant killed his friend with a gun he thought he had unloaded. The probation term was imposed to allow the accused to resolve his feeling of guilt through communication with a probation officer.[33]

Where pointing a firearm is charged in addition to other offences, there is no requirement as in s. 83 that the sentence be consecutive. A concurrent term may be imposed within a "package" reflecting the accused's overall culpability,[34] or a short consecutive term may be added to express the Court's condemnation of the firearms aspect. In such cases, the normal range will be similar to that for s.83 offences, although in the absence of a statutory minimum the lower end of the range may be a little lower.[35]

No reported or semi-reported cases since 1970 deal with a deliberate pointing of a firearm in isolation. General firearms considerations would presumably apply in such a case. Questions as to whether the firearm was loaded and as to the accused's intent would be important in setting penalty within the range, which probably extends up to two years' imprisonment. If the firearm was discharged (a circumstance which might arise on a negotiated plea of guilty in return for the dropping of a more serious charge), this also would be relevant, although the accused could not be sentenced as if convicted for firing the weapon.

F. USING, ETC. FIREARM, AMMUNITION IN CARELESS MANNER

Section 84(2) of the Criminal Code creates a multitude of offences relating to careless and dangerous use of firearms.

> 84.(2) Everyone who, without lawful excuse, carries, handles, ships or stores any firearm or ammunition in a careless manner or without reasonable precautions for the safety of other persons
>
> (a) is guilty of an indictable offence and is liable to imprisonment
>
> (i) in the case of a first offence, for two years, and
>
> (ii) in the case of a second or subsequent offence, for five years; or
>
> (b) is guilty of an offence punishable on summary conviction.

As with pointing firearms, such charges frequently reflect only part of a much larger transaction.

Intentional, or highly negligent, misuse of firearms under this section attracts a custodial term, usually between six months and two years. In R. v. Weber[36] the accused, while out hunting, saw what he thought was a moose and shot it. In fact, it was three men in a boat, one of whom was killed and a second wounded. Noting the need to impose substantial sentences to discourage hunting carelessness, the Court imposed a term of six months concurrent.[37] A more serious, deliberate offence occasioned a sentence of two years in R. v. Scott,[38] where the accused, who had five previous convictions, entered a high school and discharged a rifle into the ground near a teacher's feet.[39]

Accidental shootings may be charged under s. 84(2). The same considerations apply as to such incidents charged under s. 84(1). In R. v. Shukster[40] the accused was handling a rifle in his army barracks room, completely confident that his roommate had cleared the breach. It fired and

killed his roommate. An absolute discharge was granted. A similar event in R. v. Vandecasteyen,[41] where the accused carelessly handled a rifle after an evening of heavy drinking, and accidentally shot his sleeping girlfriend, incurred a fine of $1,000.

Careless storage is apparently not regarded as a particularly serious matter if no actual damage ensues. In Pawliwsky v. The Queen,[42] the accused who left a loaded Pellgun in his car. The window was partly open and the weapon was in full view of passers-by, including school children. A fine of $200, with 30 days in default, was imposed.

G. POSSESSION OF WEAPON FOR PURPOSE DANGEROUS TO PUBLIC PEACE

Possession of a weapon or imitation for a purpose dangerous to the public peace, or for the purpose of committing an offence, is punishable on indictment by imprisonment for 10 years.[43] The maximum penalty was increased from five years by the 1976-77 revisions to the Criminal Code.[44]

This pair of offences relates to many instruments besides fire-arms, as Mewett and Manning point out: "What is a weapon depends ... either on its inherent character, such as a sword or bayonet, or upon the use of [sic] which the accused intends to put something that, in itself is not necessarily a weapon — for example, a penknife or baseball bat."[45]

Indeed, the section is often used to charge offenders who use knives or other implements in a threatening manner. The normal range of sentence for such instances is one month to one year's imprisonment. In R. v. Janssen (No. 2)[46] the accused's companion was striking a Datsun truck with a bullwhip when a passer-by intervened. The accused threatened him with a

baseball bat with a rope thong attached. A sentence of 30 days' imprisonment was upheld. Three months was the sentence imposed on an accused who held a knife to the throat of a neighbour during a fight;[47] 60 days and a $50 fine were upheld for a man who, enraged by a police inspection of his car, drove off at speed and upon reaching home emerged waving a club.[48] No distinction emerges between blunt and sharp instruments; an accused with a lengthy record received a sentence of nine months for threatening to "open up" a bar employee with a pair of scissors during a fight.[49] Terms of six months' consecutive have been imposed on offenders who threatened police officers[50] and a former girlfriend[51] with a knife and bayonet respectively.

A second situation which frequently results in a charge under s. 85 involves the accused on his way to commit an offence, apprehended too soon to be charged with attempt. The normal range here, it is suggested, is about six to 18 months' imprisonment, though there are few authorities decided under the new legislation. In R. v. McLaughlin,[52] a 1974 decision, 12 months' definite and six indeterminate were imposed on an accused who was found in possession of a pistol, pursuant to a conspiracy to commit robbery. In R. v. Richards,[53] an accused who had a loaded shotgun under the seat of his car while searching for an alleged debtor, was sentenced to nine months' imprisonment followed by 12 months' probation. His sentence was mitigated, despite a bad record, by a "remarkable and largely successful" attempt to reform, including establishment of a business and marriage to a reputable lady. A sentence of one month for an accused found in possession of a revolver after an altercation in a tavern, also with domestic mitigating factors,[54] would appear to be unusually lenient.

Actual use of weapons in the commission of offences or to threaten others is occasionally the subject of a charge under this section.

Sentences similar to those for use in the commission are generally imposed; in R. v. Varbeff,[55] for instance, a term of two years was imposed on an accused who threatened others, including peace officers, with a rifle. In R. v. Bailey[56] a term of three years concurrent was set for possession of a machete and rifle: the accused had broken into an apartment, rendered one of the occupants unconscious, and accidentally discharged the rifle during a struggle.[57]

H. RESTRICTED WEAPONS OFFENCES

Mere possession of an unregistered restricted weapon renders the accused liable to summary conviction, or five years' imprisonment on indictment. Without more, it has been held, possession merits a short demonstrative prison term. In R. v. Auerswald[58] the accused, a member of a Nazi-oriented group, had two loaded pistols in a drawer in his home. The Court of Appeal reduced nine-month jail sentences to two month concurrent terms. It justified its decision as follows:

> Despite the fact that the appellant has no criminal record, and has been an industrious worker and has supported his family, we are, nevertheless, of the view that the trial Judge in all the circumstances did not err in imposing a custodial sentence. Parliament has enacted s.91 of the Code to suppress the possession of restricted weapons for which a registration certificate has not been issued because of the potential danger that the possession of such weapons represent to the public, and the consequent necessity for their control. In this case, it is clear from the evidence that the appellant knew that he was committing an offence in possessing these weapons without having a registration certificate for them and there was consequently a deliberate violation of the law by him. In those circumstances, the sentence imposed ought to reflect general deterrence as a major consideration.[59]

Possession in more direct connection with serious offences will of course carry longer terms:[60] conversely, in an unusual case, R. v. Derkosh,[61] where the accused inherited two handguns and was prosecuted when they turned out to be unregistered, a conditional discharge was granted.

Where an automobile contains several persons planning an offence, and a weapon, there may be difficulty in attaching liability for possession to any one person. Section 89(3) is a useful device in such situations: it creates an offence of being an occupant of a motor vehicle in which the accused knows there is an unregistered restricted weapon. Sentences are on summary conviction or up to five years on indictment. Invariably, if an offence has been planned, a short period of imprisonment, from one month to one year, will be imposed whenever a tariff sentence is in order. In R. v. Watters and Duplessis[62] two accused were apprehended while following a vehicle containing some $4,000, apparently planning to rob it. Their vehicle contained, inter alia, a sawed-off rifle and ammunition, which brought them terms of nine months. In R. v. Riberdy et al.[63] three accused were seen in a car at the time a store window was shot out. A sawn-off shotgun was thrown out of the window during a high-speed chase by the police. Riberdy, aged 18 with a minimal record, received sentences totalling 30 days and a $350 fine; D, of the same age but with a more serious record received 45 days in addition to his pre-trial custody of four months, and C, the ringleader, aged 21 with a substantial motor vehicle record and a conviction for obstructing a police officer, received a total of 60 days and a $1,500 fine for this offence and private mischief.

Footnotes to Chapter 11

1. Thomas, D.A. Principles of Sentencing (2nd ed. 1979, London: Heinemann Books Ltd.) at 110-112.

2. In 1973, only two convictions were sustained: Statistics Canada, Statistics of Criminal and Other Offences 1973 (1978, Ottawa: Statistics Canada) [hereinafter cited as "1973 Criminal Statistics] Table 6A.

3. Criminal Code, s.66.

4. (1972), 22 C.R.N.S. 230 (Que. C.A.).

5. Desmarais v. The Queen, [1972] C.A. 868.

6. (1976), 15 N.S.R. (2d) 512 (C.A.).

7. S.C. 1972, c.13.

8. See generally Crelinsten, R.D., Alberge-Altmejd, D., and Szabo, D. Terrorism and Criminal Justice (1978, Lexington: D.C. Heath & Co.).

9. Criminal Code, s.76.1.

10. 27 C.C.C. (2d) 520, [1975] C.A. 532.

11. Ibid.

12. Criminal Code, s.80.

13. [1970] C.A. 772.

14. S.C. 1976-77, c.53, s.3.

15. Criminal Code, s.83(1)(c) and (d).

16. Ibid. s.83(2).

17. (1980), 4 W.C.B. 385 (Man. C.A.).

18. (1979), 49 C.C.C. (2d) 552 (N.S.C.A.).

19. (1980), 53 C.C.C. (2d) 109 (Ont. C.A.).

20. R. v. Langevin (1979), 47 C.C.C. (2d) 193 (Ont. C.A.).

21. Ibid.

22. (1979), 50 C.C.C. (2d) 306 (Ont. C.A.).

23. Supra note 19.

24. R. v. MacDonnell (1980), 42 N.S.R. (2d) 225, 77 A.P.R. 225 (C.A.).

25. R. v. Foster (1980), 32 N.B.R. (2d) 597, 78 A.P.R. 597 (C.A.).

26. R. v. Shea (1981), 44 N.S.R. (2d) 176, 83 A.P.R. 176 (C.A.).

27. [Unreported] March 12th, 1981.

28. [Unreported] May 12th, 1981 (B.C.C.A.).

29. R. v. Eby (1979), 49 C.C.C. (2d) 27; 33 N.S.R. (2d) 80 (C.A.); R. v. Matheson, 50 C.C.C. (2d) 92, 13 C.R. (3d) 62, 1 Man. R. (2d) 111, [1979] 6 W.W.R. 738 (C.A.).

30. Criminal Code, s.84(1), enacted S.C. 1976-77, c.53, s.3.

31. Ibid.

32. (1977), 41 C.C.C. (2d) 24 (Ont. Prov. Ct.).

33. See also R. v. Firth (1976), 1 W.C.B. 15 (N.W.T.S.C.) - six months' probation with 20 hours' community service for 21-year-old with previous record (decided under old legislation).

34. See e.g. R. v. MacNevin (1980), 41 N.S.R. (2d) 628, 76 A.P.R. 628 (C.A.) - one year concurrent for accused who pointed an unloaded gun at police officer after a kidnapping.

35. See e.g. R. v. Foster (1980), 32 N.B.R. (2d) 597, 78 A.P.R. 597 (C.A.).

36. 9 C.C.C. (2d) 49, 20 C.R.N.S. 398, [1973] 1 W.W.R. 262 (B.C.C.A.).

37. See also R. v. Clements (1974), 17 C.C.C. (2d) 574, 6 N. & P.E.I.R. 130 (P.E.I.C.A.) - six months plus five alrady served for unlawfully discharging firearm with intent to endanger life.

38. (1976), 17 N.S.R. (2d) 70 (C.A.).

39. Strong mitigating circumstances may occasion lighter custodial sentences with probation to follow: see R. v. Nelson (1976), 15 N. & P.E.I.R. 230 (Nfld. C.A.) - distraught, drunken accused involved in domestic quarrel pointed empty shotgun at policeman and threatened to kill him - two years reduced to four months time served and probation. See also R. v. Storey (1976), 11 N. & P.E.I.R. 74 (P.E.I.C.A.).

A decision which appears at first sight to be out of line is the four-year consecutive term imposed in R. v. Burhof (1978), 15 A.R. 131 (T.D.). Burhof had broken into the house of his former mistress and refused to let the woman or her daughter leave for several hours, threatening the daughter with a rifle. In the report, no Code sections are cited, so it is quite possible that "unlawful use of a firearm" is a casual reference to use while committing an indictable offence. Even if not, that is the true nature of Burhof's infraction, and the sentence is in line with those for serious offences of use while committing.

40. (1979), 23 A.R. 242 (Q.B.).

41. (1980), 22 A.R. 7 (Q.B.).

42. [Unreported] April 22nd, 1981 (Sask. Dist. Ct.).

43. Criminal Code, s.85.

44. S.C. 1976-77, c.53, s.3.

45. Mewett, A.W. and Manning, M. Criminal Law (1978, Toronto: Butterworths) at 389.

46. (1975), 28 C.C.C. (2d) 515 (Man. C.A.).

47. R. v. Chaisson (1976), 16 N.B.R. (2d) 404 (C.A.).

48. R. v. Ringer (1978), 29 N.S.R. (2d) 639, 45 A.P.R. 639 (C.A.).

49. R. v. Evans (1979), 30 N.S.R. (2d) 188, 49 A.P.R. 188 (C.A.).

50. R. v. Legere (1980), 32 N.B.R. (2d) 129, 78 A.P.R. 129 (C.A.). See also R. v. Organ (1979), 2 Man. R. (2d) 211 (C.A.) - six months concurrent for attacking police officer with metal rod during scuffle.

51. R. v. Leaver (1980), 42 N.S.R. (2d) 543, 77 A.P.R. 543 (C.A.).

52. (1974), 15 C.C.C. (2d) 562, 25 C.R.N.S. 362, 2 O.R. (2d) 514 (C.A.).

53. (1976), 18 N.S.R. (2d) 124 (C.A.).

54. R. v. Hawkins (1978), 29 N.S.R. (2d) 618, 45 A.P.R. 618 (C.A.). The decision is all the more remarkable as it ws imposed in the same jurisdiction as Richards, after the increase in the statutory maximum penalty.

55. (1974), 8 N.S.R. (2d) 586 (C.A.).

56. (1979), 35 N.S.R. (2d) 341, 62 A.P.R. 341 (C.A.).

57. See also R. v. Bird (1979), 5 Sask. R. 208 (C.A.) - 18 months for use of weapon to threaten and forcibly confine prison guards during escape. "Silly" use of firearms may also be penalized by a short term of imprisonment: see R. v. Cardinal (1980), 22 A.R. 241 (C.A.) - three months for hunter who fired rifle into air in presence of others. The decision in R. v. Cheung (1977), 5 A.R. 356 (T.D), in which two accused received suspended sentences and probation for discharging a BB gun at the windows of automobiles and a showroom, is explainable on the basis that the accused were aged 16, thus meriting individualized sentences.

58. (1976), 28 C.C.C. (2d) 177 (Ont. C.A.).

59. Ibid. at 179 per Martin, J.A.

60. See e.g. Valade v. The Queen (1970), 15 C.R.N.S. 42 (Que. C.A.) - six months concurrent for possession in preparation for robbery.

61. (1979), 21 A.R. 243 (C.A.).

62. (1977), 18 N.B.R. (2d) 274 (C.A.).

63. (1979), 3 W.C.B. 281 (Ont. Co. Ct.).

CHAPTER 12: OFFENCES AGAINST THE ADMINISTRATION OF LAW AND JUSTICE

A. CONTEMPT OF COURT

Contempt of court is a unique offence in many ways. First, it is the only remaining common law offence in Canadian criminal law.[1] Although ss. 472, 533 and 636 of the Criminal Code provide for specific instances of contempt by witnesses who refuse to be examined, persons who refuse to release exhibits, and those who fail to attend or remain in attendance for the purpose of giving evidence, the substantial power to deal with most contempt lies in the inherent jurisdiction of the Court. Secondly, while some inferior courts have maximum sentences for contempt fixed by statute,[2] there is no limit to the contempt powers of superior courts.

The philosophy of sentencing in contempt cases also appears to be unique. While some contempts, especially those involving overt defiance of court orders or offensive behaviour in the court room, are punished with reference to the severity of the offence and the need for future deterrence, a more pressing judicial aim can be seen in most decisions. The Court is not only involved in the trial: it is the victim. Accordingly, it must not be seen to act harshly or vindictively in light of the immediacy of its involvement. On the other hand, it is essential that its dignity be maintained, and that the trial process be restored to a position of equilibrium. The effect of these considerations can be seen in those cases where the Court has been content with an apology, a mere verbal cancellation of the offence. A non-retributive basis is also apparent in s. 472 of the Criminal Code, where a witness who refuses to be sworn, answer questions, produce documents or sign

his deposition is liable, not to be imprisoned for a set term, but to be imprisoned for successive eight-day periods following each adjournment of the inquiry until he changes his mind.

Ruby states that there are two categories apparent in reported contempt cases: contempt in the face of the Court and contempt committed not in the face of the Court.[3] With respect, a somewhat more sophisticated analysis assists greatly in understanding the scheme of sentencing in this area. The schematization adopted herein is that developed by C.J. Miller in his text, Contempt of Court.[4]

i) Contempt in the Face of the Court

Two main types of behaviour are involved in contempt in the face. The first, being unavailable or unfit for proceedings in defiance of the Court's instructions, is usually punished by a fine. The quantum of fines being governed to some extent by the means of the offender, no definite range can or should be established. A case in which a relatively large fine was imposed is R. v. Hill,[5] where a lawyer failed to attend Court on behalf of two clients. He sent an employee to represent them, but they declined his services. The employee, however, was told to instruct Hill to appear the same afternoon. Not only did Hill fail to appear, but he did not come into Court on the following two days to explain his non-appearance. The Judge was informed that the accused was ill, but despite a request for a medical certificate none was obtained. Finding as a fact that the accused was not too ill too attend, the Judge imposed a fine of $1,000, with four months in default.

Unintentional unfitness or non-appearance is usually punished in a more nominal fashion. In R. v. Perkins,[6] the accused attended for trial

having already consumed a quantity of alcohol, and on finding out that his case was postponed until the afternoon, carried on drinking "to pass the time". As he did not intend to obstruct the proceedings, the British Columbia Court of Appeal lowered a fine of $350 to $25, taking into account one night already spent in jail.

The second type of contempt in the face, inappropriate behaviour in Court, may involve a fine or imprisonment. Isolated spontaneous instances will normally incur fines, as in Leclaire v. The Queen,[7] where the accused lawyer was fined $500 for accusing the Judge of bias towards the defence. More serious behaviour, such as fighting in the courtroom, will incur a short demonstrative jail term.[8] Premeditated, scandalous verbal assaults directed toward the presiding Judge or the Court rightly incur substantial terms of imprisonment, at least at trial. In R. v. Chartrand[9] the accused, who had been detained under the War Measures Act, was brought at his own request before a Judge. An exchange took place in which Chartrand stated that he wished the Judge to withdraw from the case because he was "prejudieed, partial and fanatic". The Judge replied that the accused was in contempt. Chartrand then called him "a real comic ... much smaller and lower than I thought". The Judge made a second finding of contempt whereupon the accused called him a "stinking, lousy character". On appeal, a fine of $1,000 was substituted for 12 months' imprisonment imposed at trial. The Court stated that the Judge had been right to make an example of the accused, but held that no useful purpose would be served by sending him back to prison. He was a labour leader who would be able to "pose as a martyr" if returned to prison, no trial was in progress and the accused had already spent over three months in prison.

Chartrand aptly demonstrates the nature of most contempt proceedings. The trial Judge had correctly imposed an exemplary term on the

accused, to stop his action and restore the orderly process of the criminal justice system. However, three months after the event, when the case was no longer possessed of any great immediacy, there was no continuing need to imprison the accused for punishment or deterrent reasons. A similar decision was reached in R. v. Vallieres (No. 2).[10] The accused, following a long period of pre-trial detention and a conviction for manslaughter, made an inflammatory speech in court, insulting the Judge, condemning the system of justice, and accusing the Crown and Judge of complicity in irregularities. He appealed against several sentences of imprisonment imposed in respect of his various contempts. While the Court declined to consider the appropriateness of the sentences at the time they were imposed, it again looked to the present and decided that no useful purpose would be served by continuing imprisonment. Accordingly, sentences of time served were substituted.

ii) Infringing the Sub Judice Rule

Most cases of infringing the sub judice rule arise out of unlawful publication of details regarding the accused in a criminal trial. Offenders are most frequently publishers or broadcasting companies and their journalists or other employees. The normal sentence is a fine, its size determined by the magnitude of the infringement and its effect on the trial at hand.[11]

An important distinction was drawn in R. v. Froese; R. v. Bannerman.[12] In that case, the two accused were a television broadcaster and a radio broadcaster who gave out highly prejudicial information about one Bengert during his trial for drug trafficking. While the television company and its owner were each fined $500 and costs, the radio company and its owner were required to pay fines of $4,000 and costs. Justifying the

distinction, the Court pointed out that the television company's offence had been committed in the course of a news broadcast. Such broadcasts are made contemporaneously, and without time for mature reflection and thought. The offence of the radio company, however, was much more serious. Not only was the language used more inflammatory, but the offending statements were made in the course of editorial comment. Here, there had been time for reflection and consideration of the statements. The Court stated that the owner of the station would have been sentenced to imprisonment had he known about the charges against the television company before committing the offence.

A case with unusual facts, but which indicates the severity with which a lawyer who infringes the sub judice rule should be treated, is Re Papineau; R. v. Varin.[13] The accused's firm was acting for a party in a jury trial. During the trial he became acquainted with a juror and discussed the testimony of a Crown witness. She was discharged as a juror, after which he again contacted her and discussed the case. Making strong comments as to the seriousness of the accused's acts, in that "such acts destroy the very basis of one of our sacred democratic institutions", the Court imposed a sentence of two days' imprisonment and a fine of $1,000. The crime was aggravated by the accused being a lawyer; his sentence was mitigated, however, by his being young, newly admitted to the bar, and having acted through inexperience and stupidity rather than with unlawful intent.

iii) Scandalizing the Court

A remarkable feature of reported cases on scandalizing the Court is the high standing of persons accused. Presumably this arises because only

persons of high standing will have occasion to make public comments about the judicial system to a wide audience. Remarks made by such persons are likely to be published, and thus draw the attention of the Court. Here again, the major emphasis in sentencing is upon restoring the status quo: an apology is frequently required if not already made, and any punitive sentence will usually be of a token nature. In Re Borowski,[14] the accused was the Manitoban Minister of Transport. He was accused of an offence, and an application to quash the information was refused by a Magistrate. In a subsequent interview broadcast on a radio station, Borowski criticized the Magistrate, referred to his membership in the Conservative Party and his appointment by that same party, and alleged that the decision on the application to quash had been so judicially improper that it must have been based on politics. He went on to say, "If that bastard hears the case I will see to it that he is defrocked and debarred." In a restrained and careful judgment, the Court suspended sentence conditioned upon an open apology in Court within 60 days. In Re Landers,[15] a city councillor was widely published as stating, with reference to a civil action with which he was involved, "It was quite obvious from the very beginning that the answer was going to be 'no', and I wished that [the Judge] would have said so at the start and saved us a lot of time and money .... What prevailed in that courtroom over the last two weeks was what I call injustice. The whole thing stinks from the word go." On citation for contempt, it was held that a full apology tendered by the accused was sufficient to purge his offence.[16]

iv) Civil Contempts

The two major classes of civil contemnors are unions or union executives who breach injunctions, and individuals who wilfully disobey court

orders. For the latter type there is little reported jurisprudence, but it may be drawn from the decision of the Alberta Court in Motherwell v. Motherwell[17] that serious and continuing disobedience is likely to incur a term of imprisonment. In Motherwell the accused was party to a civil action involving other members of her family. She had harassed them with telephone calls over a period of two years. On previous contempt citations, hundreds of instances of disobedience to court orders had been proved. Since reprimands and attempts to secure the accused's undertaking to stop this behaviour had failed, a sentence of six months' imprisonment was imposed.

Deterrent sentences, of fines against unions and imprisonment for union leaders,[18] are common sanctions for wilful disobedience of injunctions against picketing or striking. In Re A.G.N.S. and Miles,[19] 13 of 14 named respondents to a citation had continued picketing an employer's premises after receiving notice of a court order forbidding such action. Cowan, C.J., stating that retribution and deterrence were not in issue, imposed sentences of 20 days' and 30 days' imprisonment to deter them from continuance of their disobedience. The longer sentences were fixed for those whose picketing had continued after receipt of notice of the contempt citation.

For defendant unions, the usual principles relating to fines for corporate bodies apply. Thus in Skeena Kraft Ltd. v. Pulp and Paper Workers of Canada, Local No. 4,[20] a $25,000 fine was imposed on a union which engaged in illegal secondary picketing. The Court pointed out that the fine would not be a great hardship when distributed over all its members. In New Brunswick Electric Power Commission v. I.B.E.W. AFL-CIO-CLC, Local No. 1733,[21] Hughes C.J.N.B., upholding a fine of $15,000 for an illegal strike, stated that "No fine imposed in contempt proceedings is adequate unless it is of sufficient magnitude to provide a deterrent."[22]

B. BRIBERY, CONFERRING OR ACCEPTING BENEFITS, MUNICIPAL CORRUPTION

The Criminal Code contains several provisions relating to corrupt payments and bestowal of benefits upon judicial and government officers. Section 108 provides a penalty of up to 14 years' imprisonment for giving or offering money or favours to a person holding a judicial office, a member of the Parliament of Canada or of a legislature. Section 109 creates a similar offence respecting justices, police commissioners, police officers, public officers, juvenile court officers, or other criminal law administrators who accept, obtain, agree to accept, or attempt to obtain money or favours with intent to interfere with the administration of justice, procure or facilitate the commission of an offence, or protect from detection or punishment an offender or potential offender. Further, the giver of such money or favours is liable to a 14-year term.[23] Subsection 110(1) penalizes a person who, having dealings with the government, confers benefits or rewards upon a government employee, member of his family, or anyone else for the benefit of the employee. The recipient is liable to the same penalty.[24] Section 363 makes dealings with secret commissions punishable by up to two years' imprisonment; municipal corruption is also penalized under s.112 by imprisonment for up to two years. All are indictable offences.

While statutory penalties are widely different for these offences, they are not widely different in their inherent criminality. Nevertheless, sentencing practice appears to vary between givers and recipients, and also with the position of the recipient.

In R. v. Arseneau,[25] the accused lawyer remitted money to the provincial Minister of Tourism in an attempt to influence a decision on a

building contract. On appeal the Court substantially upheld a fine of $20,000, merely adding a sentence of one day's imprisonment to make the sentence legal. Relatively light sentences have also been imposed upon offenders against s.109, bribery of officers with duties relating to criminal justice. In R. v. Dickey,[26] the accused court clerk accepted a bribe to alter official documents at the Court. Noting his loss of employment and suffering in his family life, the Court of Appeal upheld a sentence of three months' intermittent, a $2,000 fine and two years probation. Similarly, in R. v. Cooper,[27] a first offender who offered a bribe to a police officer during a breathalyzer test received, on appeal, a sentence of 90 days' intermittent.

The sentences imposed in these cases contrast sharply with those reported for cases charged under s. 110(1), conferring benefits on government employees. Although the statutory penalty is substantially lower than for bribery of judicial officers, a range of sentence from one to three years is disclosed for instances of "influence peddling". In R. v. Cooper (No. 2)[28] the accused conferred benefits upon a government employee, including return air fares to Florida and lodging at his ranch. He was seeking a grant from the recipient's department. On appeal the trial Judge's view that a custodial sentence was required was upheld, although the term of 18 months, imposed at trial, was reduced to 12.

> It has been urged by counsel for the Crown that the paramount consideration in this case is one of general deterrence. We agree with that submission. In our view, it is important for the business community to realize the seriousness of the offence which s. 110(1)(b) creates. It is equally important that the public at large should understand that the law stands ready to punish severely persons who breach the section, and in appropriate cases to punish those officials or employees of the Government who accept benefits of the kind prohibited, and thereby contravene the provisions of s. 110(1)(c).[29]

A similar term, despite substantial mitigating circumstances, was upheld in R. v. Boudreau[30] where the accused had given gifts of money to the administrator of the Liquor Licensing Board and to the chief collections officer of the Health Services Tax Division. In R. v. Achtem,[31] a lawyer who paid $50,000 to the Director of the Alberta Housing Corporation to secure a contract had his sentence raised from 18 months to 3 years' imprisonment by the Court of Appeal.[32]

A similar pattern of sentencing is revealed in municipal corruption cases. In Bergeron v. The Queen,[33] the Court upheld a year's imprisonment and a fine of $5,000 for a mayor who arranged to accept a bribe from a man looking for employment as a police constable. In Campeau v. The Queen,[34] a term of 4 years' imprisonment was reduced to 18 months on account of failing health for an urban planner convicted of breach of trust by a public officer, municipal corruption and conspiracy.

In principle, it would seem appropriate that givers and acceptors of illegal benefits should be penalized similarly. One reason for the increase in sentence in Arseneau[35] was that the receiver of the benefit had already received a much higher sentence than the accused. It is submitted that this does represent the sentencing policy of the Courts, although a misleading impression could arise from a review of cases against acceptors over the last ten years. Reported instances have, in temporal sequence, resulted in an absolute discharge,[36] total fines of $1,000,[37] a $2,000 fine,[38] and a conditional discharge with one year's probation.[39] In each of these cases, however, a relatively minor offence had been committed and there were substantial mitigating factors. R. v. Tanguay[40] (absolute discharge) involved the receipt of a colour television from a contractor by a man who had faithfully served the Central Mortgage & Housing Corporation for 25 years

before the offence. In R. v. Sinasac,[41] ($1,000 fine) the accused was a tax auditor who had prepared claims for businesses required to submit returns to his department. Although this was in breach of his duties, the claims were in no case irregular or corrupt, and Sinasac had not audited them. R. v. Williams,[42] which resulted in a conditional discharge with one year's probation, involved an accused tax collection officer who had accepted a gift of an air hockey game from a business which was in arrears with its payments. He was, however, in no position to grant favours and could not alter the financial situation of the debtor.

An important consideration applicable largely to acceptors of benefits is that they generally lose their jobs. In R. v. Ruddock,[43] where the chief administrator of the Nova Scotia Liquor Licensing Board accepted benefits of $1,000 over a 4-year period, the Court found that general deterrence was an important consideration. However, this goal had already been successfully accomplished without the necessity of imprisoning the accused. His adverse publicity and the common knowledge that he would never have government work again were seen by the Court as effective deterrents to other public employees,[44] and justified the decision to impose only a fine.

C. OBSTRUCTING PUBLIC OR PEACE OFFICER

Section 118 of the Criminal Code sets a penalty, on indictment, of up to two years' imprisonment for obstructing a public or peace officer in the execution of his duty. Such infractions are also punishable upon summary conviction. The majority of offenders tried under this section are convicted summarily for relatively minor interference with police investigation, such as

refusing to hand over a driving licence or destroying evidence of drinking while driving. Sentence for such offences normally range from a fine to nine months' imprisonment.[45] Typical examples are R. v. White,[46] where two 18-year-olds with previous good records resisted arrest and had sentences varied to 38 days and 47 days time served on appeal, and R. v. Mendo,[47] where the accused, found defying the Liquor Prohibition Regulations[48] took a bottle from a case of liquor and taunted a police officer with it. He received a term of two months' imprisonment followed by six months' probation. In R. v. Dobell,[49] an accused who refused to hand over his driving licence for inspection suffered a fine of $200.[50]

D. PERJURY, CONTRADICTORY EVIDENCE

Perjury, being an offence committed in defiance of the Court and aimed at diverting the course of justice, is viewed seriously. A demonstrative jail term aimed principally at deterrence is almost inevitable, even for perjury committed in the course of trials for minor offences.[51] Although the statutory penalty pursuant to s. 120 of the Criminal Code is 14 years' imprisonment, the normal range of sentence covers reformatory terms under 15 months. Other dispositions are reserved for extremely serious or massively attenuated cases. In R. v. Williams,[52] the accused, convicted of perjury, had given false evidence during a show cause pending trial on a charge of assault against a third party. His offence was deliberate, and the Ontario Court increased his sentence from one month to three months' imprisonment, consecutive to sentence on another charge. Martin, J.A. commented that the offence of perjury in show cause hearings is difficult to detect, adding that if it became prevalent the pre-trial release system would be completely undermined.[53]

A common form of perjury is the giving of testimony that another party, not the accused, was driving a motor vehicle in a criminal manner. The Newfoundland Court has upheld terms of three months' imprisonment with $500 fines for first offenders convicted of giving such evidence,[54] while the Saskatchewan Court has upheld a term of nine months for an accused who avoided conviction upon a charge of driving while disqualified by giving perjured evidence that he was not driving a motor vehicle at the relevant time.[55] In R. v. Martin,[56] a term of 30 days intermittent was imposed on a 33-year-old female accused who gave perjured evidence at the trial of two persons for wilfully setting fire to motor vehicles.[57]

Sentences in excess of a year's imprisonment are reserved for very serious cases. An example is R. v. Sigouin,[58] in which a two-year term was upheld for perjury during the course of a murder trial. A sentence of two years consecutive, imposed in R. v. Noftle[59] upon an accused who claimed during a voir dire that he was under the influence of LSD when he gave a statement to the police, seems high. It is explainable, however, on the basis that the accused had a record of conflicts with the criminal law since the age of 12. His criminal record was seen by the Court as indicating a complete disregard for the law, and was considered as a factor in determining sentence.

While in some of the cases cited above it would appear that the acquittal gained by perjury has been considered an aggravating factor, it has also been held that failure to influence the Judge by perjured evidence does not mitigate.[60] These findings are not irreconcilable. The true intent of the latter statement is to point out that the seriousness of perjury lies in its commission, not its effect. To give perjured evidence is serious, whether anyone believes it or not. If, however, it is believed to the extent that an

acquittal is secured by the accused or a third party, this can be taken into account in assessing the penalty to be imposed.

Giving contradictory evidence, an offence under s. 124(1) of the Criminal Code, is also punishable by 14 years' imprisonment. It differs from perjury in that two statements are involved, the Crown being required to prove only that they were contradictory and not having to establish which one was false. While reported cases of prosecutions under this section disclose very severe sentences, from two years less one day to six years' imprisonment, it is submitted that there is really no difference in principle in sentencing for perjury and giving contradictory evidence. The above-mentioned sentences were imposed in extremely serious cases. R. v. Falkenberg,[61] in which a sentence of two years less one day was imposed, involved an accused who testified at a preliminary hearing that he had been defrauded of $2,450, but at trial stated that this was not the case. He alleged that he had given perjured testimony at the preliminary inquiry because of threats made against him by three men, spurred on by their presence at the hearing. The most severe case reported in recent years, R. v. Gushue[62] resulted in a sentence of six years on a charge of giving contradictory evidence. The sentence, while substantial, is not surprising in light of the fact that the accused had successfully avoided a conviction for murder by his offence, and had a long previous record of serious crimes including robbery.[63]

E. ATTEMPTING TO OBSTRUCT JUSTICE

Attempting to obstruct, pervert or defeat the course of justice is an indictable offence punishable by imprisonment for 10 years.[64] For minor

criminal behaviour, engendered by attempts to avoid liability for an offence, a fine or short reformatory term is usually imposed. In R. v. Wales,[65] the accused deputy police chief was involved in a motor vehicle accident. He left the scene and persuaded another man to take responsibility for the accident. A fine of $300 was upheld. In R. v. Spezzano,[66] the accused was stopped by a police officer while driving a truck and gave a false name. He had, it turned out, been driving while suspended. A term of 30 days' imprisonment was upheld. In R. v. Zeck,[67] the accused dentist walked along a street removing parking tags from car windshields and destroying them. He was already on probation for assaulting a peace officer and mischief, but his sentence was reduced from 45 days to 14 days' imprisonment.

Terms from 18 months to two years' imprisonment appear correct in principle for offenders who threaten witnesses in an attempt to stifle or change their testimony. A term of two years less a day was upheld in R. v. Ma,[68] where the accused, a member of a Chinese criminal organization, approached the victim and a witness in an extortion trial against one of his associates. With unspoken threats of violence, he "convinced" them to accompany him to see a lawyer, where they would withdraw their statements with regard to the prosecution. In R. v. Williams,[69] a similar case in which the accused threatened a woman with violence in an attempt to dissuade her from testifying against her attacker on his assault charge, a sentence of six months' imprisonment was imposed. Martin, J.A., however, pointed out that the sentence was of this length in view of the accused's age. He was not quite 17 when he committed the first offence, and barely 17 when he committed a second. In addition, he had already served the sentence imposed at trial. Had he been older and the Court not affected by his release before the appeal, a sentence approaching a maximum reformatory term would have been imposed.[70]

F. PRISON BREACH, ESCAPE FROM CUSTODY, BEING UNLAWFULLY AT LARGE

Section 132 of the Criminal Code sets the maximum penalty for forcibly breaking out of prison, or forcibly breaking a prison with intent to set oneself or another at liberty, at 10 years upon conviction on indictment. Escaping custody, which includes non-violent departure from correctional institutions and escape from other forms of custody, is punishable under s.133(1) by two years' imprisonment, as is being unlawfully at large.

The more serious offence, prison breach, was before revisions to the Code in the 1976-77 session[71] punishable by five years' imprisonment. The 1973 Criminal Statistics, for cases decided under the old provisions, indicate that the usual sentence for such offences was a moderate reformatory term (76% of all those convicted received custodial terms under 15 months, terms from three to nine months predominating), with only a small number of offenders (7%) receiving longer sentences and the remainder receiving fines or suspended sentences.

Reported or semi-reported jurisprudence since 1973 is very limited, although some tentative conclusions may be drawn. The first, and most obvious, is that the method of escape is vitally important in determining the length of sentence; thus, in R. v. Bucci,[72] a term of two years was upheld under the old legislation for an accused who, with another, seized a guard by the throat, held a piece of wood over his head, and demanded the keys to the cell. Secondly, the question of consecutive service, and its counterpart the totality principle, are virtually always in issue as escapes are usually committed by persons already serving custodial terms. These matters are considered in Chapter 26.[73] Thirdly, it should be noted that the Court

has power pursuant to s.137 of the Code to order that a sentence of under two years be served in a penitentiary. Accordingly, a factor which might have influenced the length of sentence in the past, the need to have the accused in more secure surroundings, may now be accommodated by exercise of the judicial option under s.137.

A common character in escaping custody suits is the offender who, having been apprehended by a police officer, makes good his escape, often to do away with evidence of his offence. This offender is likely to receive a short term of incarceration, like his counterpart charged with obstructing justice in similar circumstances. In R. v. Andress,[74] for example, the accused's automobile was stopped after he ignored a red traffic signal. He had a partially full case of beer in his car which, with him, was placed in a police cruiser. He escaped from the cruiser, taking the beer with him. He walked home, a distance of some 11 miles, then notified the police of his whereabouts. A term of 20 days' imprisonment was upheld on appeal. In R. v. Bowersock,[75] a somewhat more lenient sentence was imposed in similar circumstances. Bowersock, while accompanying an officer to the police station to give a breath sample, jumped out of the cruiser. He was, however, restrained about 50 feet away. One day's imprisonment and a fine of $1,000 were imposed. In R. v. Higginbotham,[76] in which the accused evaded capture by striking a constable on the side of the head, a four-month term was imposed for this offence. Higginbotham may be regarded as indicative of the upper end of the scale of penalties for conduct in which escaping custody is likely to be charged: increased violence would in many cases result in charges of assaulting police, or other more serious charges.

The second common class of escaping custody offenders is constituted by those prisoners who flee from prisons without violence. The

offence is also, of course, one for which a conviction might be sought in more serious escapes in return for a guilty plea. The normal range of sentence for such escapes is three months to a year's further imprisonment,[77] again subject to variation and departure depending upon any violence used and considerations of totality. In R. v. Laliberte,[78] an accessory after the fact who allowed an escaped convict to hide in his cottage received a term of eight months, consecutive to sentences for possession of stolen goods received from the escapee.

There is no great dissimilarity between offenders charged with being unlawfully at large and those who walk out of low-security institutions. The legal difference is, of course, usually that those charged with being at large usually have failed to return to institutions on the expiry of temporary absence permission. The range of sentence is, accordingly, quite similar. In R. v. Wardell,[79] an alcoholic who failed to return from day parole while serving sentences for driving "over 80" and driving while disqualified received a term of six months, with a direction that it be served in a federal institution, where he would receive treatment for alcoholism. A similar disposition was made in R. v. Blazek,[80] where the accused was aged 19, a poor worker and a slow learner. After his escape from a reformatory, the Court found that his rehabilitation might be benefited if he were confined at the Springhill Institution. A sentence of one year, with a direction for penitentiary service, was substituted for a term of two years concurrent imposed at trial. In its recent decision in R. v. Walker,[81] the British Columbia Court of Appeal upheld a term of one year for an accused who failed to return to a provincial institution after a day pass. He had a criminal record of some length.[82]

G. FAILING TO APPEAR

There is little guidance to be found in the literature for the Judge sentencing on conviction for failing to appear. Ruby[83] does not deal with the offence, and the Criminal Statistics confound the issue by combining failure to appear with being unlawfully at large! The reported authority available confirms a general impression that failure to appear in Court, an offence punishable on summary conviction or with two years' imprisonment on indictment,[84] is not normally treated as serious. Genuine forgetfulness merits a very mild penalty or discharge;[85] negligence of the accused in planning his affairs resulting in his unavailability will occasion a fine as a reminder to him that he should not take court proceedings lightly.[86] Deliberate evasion of proceedings, for which there is no reported precedent in recent years, may be punished by a more severe or short term of incarceration.

Footnotes to Chapter 12

1. Criminal Code, s.8.

2. See e.g. County Courts Act, R.S.O. 1970, c.94, s.27 ($100 fine and/or six months); County Court Act, R.S.N.B. 1974, c.C-30, s.20 ($500 fine and/or one month).

3. Ruby, C.C. Sentencing (1980, Toronto: Butterworths) at 481.

4. (1976, London: Elek Books).

5. 25 C.C.C. (2d) 348, [1975] 6 W.W.R. 395, 62 D.L.R. (3d) 692, conviction aff'd (1976), 37 C.R.N.S. 380, 33 C.C.C. (2d) 60, 73 D.L.R. (3d) 621 (B.C.C.A.).

6. 51 C.C.C. (2d) 369, [1980] 4 W.W.R. 763 (B.C.C.A.).

7. [1975] C.A. 548.

8. See e.g. R. v. Ball and Parro (1971), 14 C.R.N.S. 238 (Ont. C.A.) - 60 days for starting courtroom brawl reduced to 30.

9. (1971), 21 C.R.N.S. 49 (Que. C.A.).

10. (1973), 17 C.C.C. (2d) 361, 47 D.L.R. (3d) 368 (Que. C.A.).

11. See e.g. A.G. Man. v. Radio OB Ltd., 31 C.C.C. (2d) 1, [1976] 4 W.W.R. 147, 70 D.L.R. (3d) 311 (Man. Q.B.) - $750 and $250 fines for interviews with accused's mother during trial of juvenile for murder; R. v. Southam Press (Ont.) Ltd. (1976), 31 C.C.C. (2d) 205 (Ont. C.A.) - $2,000 (company) and $250 (reporter) fines for publishing reports of preliminary issue as to fitness to stand trial for murder, in contravention of court order; R. v. Societe de Publication Merlin Ltee. (1978), 43 C.C.C. (2d) 557 (Que. C.A.) - $12,000 (company) and $2,000 (director and journalist) fines for details of records of persons charged with murder, which led to mistrial.

12. (1979), 50 C.C.C. (2d) 119, 15 C.R. (3d) 215 (sub nom. R. v. Bengert (No. 18); R. v. Bannerman; R. v. Froese (No. 3)) (B.C.S.C.).

13. (1980), 16 C.R. (3d) 56 (Que. S.C.).

14. 3 C.C.C. (2d) 402, [1971] 3 W.W.R. 434 (sub nom. Anger v. Borowski), 19 D.L.R. (3d) 537 (Man. Q.B.).

15. (1980), 31 N.B.R. (2d) 113 (Q.B.).

16. See further R. v. Ouellet (Nos. 1 and 2) (1976), 32 C.C.C. (2d) 149, 30 C.R.N.S. 296, 72 D.L.R. (3d) 95 (Que. C.A.) - $500 fine and costs imposed on federal cabinet Minister for suggestion that a sane Judge

could not have dismissed a particular prosecution brought by his Ministry, as the Judge concerned had.

17. (1977), 7 A.R. 180 (T.D.).

18. Several highly-publicized cases have resulted in imprisonment of prominent labour leaders for short periods. An example is the sentence of 45 days imposed on Grace Hartman, President of C.U.P.E. See "Hartman Sentenced to 45 Days in Prison," Globe & Mail, January 12th, 1981, Page 1.

19. (1970), 1 C.C.C. (2d) 564, 2 N.S.R. (2d) 96 (sub nom. A.G.N.S. v. Miles), 15 D.L.R. (3d) 189 (S.C.).

20. [1971] 1 W.W.R. 515, 17 D.L.R. (3d) 17 (B.C.S.C.).

21. (1976), 16 N.B.R. (2d) 361, 77 C.L.L.C. 14,091, 73 D.L.R. (3d) 94 (C.A.).

22. Ibid., 16 N.B.R. (2d) at 376 per Hughes, C.J.N.B. See also Canada Metal Co. Ltd. v. C.B.C. (No. 2) (1974), 19 C.C.C. (2d) 218, 4 O.R. (2d) 585, 48 D.L.R. 641 (Ont. H.C.) - fines of $700 and $350 for accidental breach of injunction against publication of misleading statements as to pollution from plaintiffs' smelting plant.

23. Criminal Code, s.109(b).

24. Ibid. s.110(1)(c) and 110(3).

25. (1977), 36 C.C.C. (2d) 65, 17 N.B.R. (2d) 292, 23 A.P.R. 292, aff'd 45 C.C.C. (2d) 321, [1979] S.C.R. 136, 25 N.B.R. (2d) 390, 51 A.P.R. 390, 95 D.L.R. (3d) 1, 26 N.R. 226.

26. (1979), 7 C.R. (3d) S-13 (Que. C.A.).

27. (1980), 22 Crim. L.Q. 440 (Ont. C.A.).

28. (1977), 35 C.C.C. (2d) 35, 4 C.R. (3d) S-10 (Ont. C.A.).

29. Ibid. at 37 per Arnup, J.A.

30. (1978), 39 C.C.C. (2d) 75, 25 N.S.R. (2d) 63, 36 A.P.R. 63 (C.A.).

31. (1979), 13 C.R. (3d) 199, 11 Alta. L.R. (2d) 151, 19 A.R. 338 (C.A.).

32. See also R. v. Campbell (1980), 4 W.C.B. 339 (Que. S.C.) - 75-year-old accused conspired to give shares to Senator at a fraction of their true value - jail required as a matter of general deterrence but in this case minimized as great risk to accused's already failing health, fine of $25,000 and one day's imprisonment imposed.

33. (1971), 17 C.R.N.S. 85 (Que. C.A.).

34. [1976] C.A. 511.

35. Supra note 25.

36. R. v. Tanguay (1975), 24 C.C.C. (2d) 77 (Que. C.A.).

37. R. v. Sinasac (1977), 35 C.C.C. (2d) 81 (C.A.).

38. R. v. Ruddock (1978), 39 C.C.C. (2d) 65; 25 N.S.R. (2d) 77, 36 A.P.R. 77 (C.A.).

39. R. v. Williams (1978), 29 N.S.R. (2d) 374, 45 A.P.R. 374 (C.A.).

40. Supra note 36.

41. Supra note 37.

42. Supra note 39.

43. Supra note 38.

44. It is notable, however, that persons convicted of under ss.110, 113 or 376 of the Criminal Code are incapacitated from further contracting with the government or deriving benefits under government contracts: Criminal Code, s.682(3). In an appropriate case, this factor may mitigate in favour of a donor of benefits.

45. In 1973, over half of all offenders convicted of assaulting or obstructing peace officers were fined. A further 27% received jail terms of under nine months, 12% received suspended sentences.

46. (1975), 11 N.S.R. (2d) 547 (C.A.).

47. (1979), 25 A.R. 212 (N.W.T.S.C.).

48. (1979), 2 Consol. Regs. N.W.T. No. 38.

49. (1978), 5 C.R. (3d) 233 (B.C.S.C.).

50. See also Tremblay v. The Queen, [1970] C.A. 840 - two months for accused who resisted police entry to his home, enabling his son, for whom an arrest warrant had been issued, to escape through a back door; R. v. Armstrong (1980), 5 Sask. R. 323 (Dist. Ct.) - absolute discharge for accused who poured contents of soft drink bottle onto ground while his vehicle was being searched for liquor; R. v. Lesperance (1979), 3 W.C.B. 273 (B.C. Co. Ct.) - three months for accused, with record, who physically interfered with officer attempting to make an arrest.

51. The 1973 Criminal Statistics are unhelpful because they combine perjury and false statements. Even so, they disclose that the longest jail term, one in the two-five year category, was imposed on only one offender of 39, all others who received jail sentences being subject to periods of two years or less. For the two offences combined, however, slightly over 50% of offenders received non-custodial sentences. In R. v. Pelletier, [1977] 5 W.W.R 260 (Man. Prov. Ct.), a review of

precedent led the Court to the conclusion that only in highly unusual cases should a convicted perjurer escape incarceration.

52. (1978), 41 C.C.C. (2d) 6 (Ont. C.A.).

53. Ibid. at 8.

54. R. v. Gillard (1979), 20 N. & P.E.I.R. 185, 53 A.P.R. 185 (Nfld. C.A.); R. v. Morgan (1979), 20 N. & P.E.I.R. 187, 53 A.P.R. 187 (Nfld. C.A.).

55. R. v. Kobzey (1979), 1 Sask. R. 7 (C.A.); see also R. v. Lampinen et al. (1980), 5 W.C.B. 220 (Ont. Dist. Ct.) - 12 months for accused who testified that L was not the culprit at a trial for impaired driving.

56. (1980), 30 N.B.R. (2d) 297, 70 A.P.R. 297 (C.A.).

57. See further R. v. Pelletier, supra note 51 - six months for accused who testified that he, not the accused, assaulted and choked the complainant; R. v. Hickey (1977), 14 N. & P.E.I.R. 271 (Nfld. C.A.) -eight months consecutive for counselling to commit perjury on trial for possession of marijuana for the purpose of trafficking; R. v. Williams (1978), 2 W.C.B. 329 (Ont C.A.) - total of nine months for threatening Crown witness and perjured testimony that accused was employed at bail hearing; R. v. Blake (1978), 4 C.R. (3d) 328, 39 C.C.C. (2d) 138, 15 N. & P.E.I.R. 53, 38 A.P.R. 53 (P.E.I.C.A.) - one day and $1,000 fine for police chief who gave evidence of events as though he had seen them, when in fact two private citizens and his deputy were the witnesses (he was found not to have had real dishonest intent, but rather a misapprehension of his duty); R. v. Morgan and Morgan (1979), 19 N. & P.E.I.R. 176, 50 A.P.R. 176 (Nfld. C.A.) - one month for false evidence by accused as to whereabouts at time dangerous driving offence occurred; R. v. Findley (1980), 4 W.C.B. 317 (Ont. C.A.) - nine months for perjured defence which led to acquittal of impaired driving.

58. (1977), 1 W.C.B. 556 (Que. C.A.).

59. (1976), 12 N. & P.E.I.R. 1 (Nfld. Dist. Ct.).

60. R. v. Lampinen et al., supra note 55.

61. (1973), 13 C.C.C. (2d) 562 (Ont. Co. Ct.); reversed on other grounds, 25 C.R.N.S. 374, 16 C.C.C. (2d) 525 (Ont. C.A.).

62. (1976), 32 C.C.C. (2d) 189, 35 C.R.N.S. 304, 14 O.R. (3d) 620, 74 D.L.R. (3d) 473, conviction aff'd (1979), 50 C.C.C. (2d) 417, 106 D.L.R. (3d) 152, 30 N.R. 204 (S.C.C.).

63. See also R. v. Beckwith (1979), 31 N.B.R. (2d) 698, 75 A.P.R. 698 (Co. Ct.) - two years for accused who gave testimony that he did, and did not, meet a third party on a certain day. The Court may have been influenced by the disposition in Falkenberg, supra note 60, as it first had to deal with a substantive issue involving considerable discussion of that case.

64. Criminal Code, s.127(2).

65. (1978), 25 N.S.R. (2d) 628 (C.A.).

66. (1977), 34 C.C.C. (2d) 87, 15 O.R. (2d) 489, 76 D.L.R. (3d) 160 (C.A.).

67. (1980), 4 W.C.B. 444 (Ont. C.A.).

68. (1974), 44 C.C.C. (2d) 511 (Ont. C.A.).

69. (1978), 41 C.C.C. (2d) 6 (Ont. C.A.).

70. Ibid. at 8. In R. v. Myhaluk (1977), 1 W.C.B. 500 (Ont. C.A.) a differently constituted Court had upheld a term of 30 days and 18 months' probation for a similar offence, also on the basis that the original sentence had been served - that accused was also soon to receive a jail term for other offences.

71. S.C. 1976-77, c.53, s.5.

72. (1974), 8 N.S.R. (2d) 675 (C.A.).

73. Text accompanying notes 92-101. See also R. v. Kempton (1980), 21 A.R. 212 (C.A.), where the Court upheld a term of eight years. In light of its concurrency with several life terms, the sentence, while massively out of line with those usually imposed, was of course ineffective to change the accused's position.

74. (1973), 26 C.R.N.S. 61 (Ont. C.A.).

75. (1977), 10 A.R. 372 (T.D.).

76. (1980), 40 N.S.R. (2d) 635 (C.A.).

77. See e.g. R. v. Lukion and Small (1975), 27 C.C.C. (2d) 11 (Ont. C.A.) - six months consecutive for two youths of 17 and 18 years; R. v. Ouellette, 39 C.C.C. (2d) 278, [1978] 2 W.W.R. 378 (B.C.C.A.) - six months consecutive for escape from penitentiary; R. v. Latta (1978), 29 N.S.R. (2d) 295, 45 A.P.R. 295 (C.A.) - six months consecutive, but concurrent to other offences committed while "out"; R. v. Tait (1979), 1 Sask. R. 1 (C.A.) - three months consecutive for escape from correctional centre, youth aged 17; R. v. Laboucane (1979), 1 Sask. R. 23 (C.A.) - nine months consecutive for accused who escaped from correctional centre; he claimed that the escape was perpetrated so that he could be imprisoned in the penitentiary.

78. [1970] C.A. 951.

79. (1976), 15 N.B.R. (2d) 488 (C.A.).

80. (1976), 14 N.B.R. (2d) 260 (C.A.).

81. [Unreported] March 25th, 1981 (B.C.C.A.).

82. See also R. v. Ritchie (1974), 9 N.B.R. (2d) 22 (C.A.) - 15 months for escaping from penitentiary upheld in light of another escape subsequent to recapture for that before the Court; R. v. Bird (1979), 5 Sask. R. 208 (C.A.) - six months consecutive following escape which involved threatening and forcible confinement of two guards. A total of 18 months consecutive was also imposed for possession of a weapon and the unlawful confinements.

83. Supra note 3.

84. Criminal Code, s.133(2).

85. See R. v. Preshaw; R. v. Lutz; R. v. Leblanc; R. v. Ball (1976), 31 C.C.C. (2d) 456 at 465, 35 C.R.N.S. 331 at 343 (Ont. Prov. Ct.): "Naturally in assessing what sentence is to be imposed the fact that none of the accused had any deliberate intention to avoid the process of the Court will be a most important factor and will probably result in the imposition of a conditional or absolute discharge." Per Langdon, Prov. Ct. J.

86. See R. v. Krilow (1980), 5 Sask. R. 210 (Dist. Ct.) - $250 fine for 17-year-old with no previous record who failed to appear for preliminary inquiry.

CHAPTER 13: SEXUAL OFFENCES, DISORDERLY HOUSES, GAMING AND BETTING

A. RAPE, ATTEMPTED RAPE

The maximum penalty for rape is life imprisonment.[1] Rape is the archetype of a tariff offence, individualized measures other than life imprisonment being largely unavailable even to those who would receive them in most other cases.[2] In R. v. Turner,[3] for example, a term of six years' imprisonment was imposed on a mere 16-year-old for a violent rape.[4] Life terms may be imposed on offenders who are "dangerous", in view of their "indefinite" aspect,[5] though there is occasional authority for the imposition of long fixed terms on protective grounds.[6]

For rape not complicated by such considerations, the normal range of sentence is three to eight years, with sentences outside these figures imposed only in exceptional circumstances. Demonstrative of circumstances justifying a higher sentence is R. v. Bell,[7] where the accused was threatened with a knife and raped by several members of a motorcycle gang. The instigator received a term of 12 years, the others 10. Occasional departures below the range may be justifiable for first offenders who "go too far" in pursuit of sexual aims after an initially friendly relationship.[8] The Manitoba Court has in recent years upheld dispositions somewhat more lenient than might have been approved by appeal tribunals in other provinces.[9] Sentences at the lower end of the scale, from three to four years' imprisonment, are generally imposed for rapes carried out by lone offenders using relatively minor violence or threats,[10] on occasion even where a knife is used.[11] Four years appears to represent the bottom of the range for "gang rapes", or those committed by two or three men acting in concert.[12] A term of five years

has been imposed on a taxi-driver who raped a female passenger, in view of his breach of trust.[13]

The Courts have shown a particular aversion to rapes in which the complainant is held for a number of hours, particularly if she is terrorized or a continuing series of indecencies and assaults take place. In R. v. Thornton,[14] for example, the accused drove his victim around central Nova Scotia for some thirteen hours during which time he raped her, tried to strangle her twice and threatened to kill her. Despite his extreme remorse, guilty plea and absence of serious mental illness, the Court imposed a term of six years' imprisonment.[15] More moderate violence is also, of course, a highly relevant factor.[16]

The age of the complainant is normally considered important only in extreme cases. In R. v. Taylor,[17] the accused savagely beat and raped an elderly woman. Expressly justifying a departure from the normal range, Gushue, J.A. found this case to be far more serious than others before the Court in recent years. A sentence of 10 years' imprisonment was upheld. At the other extreme, in R. v. Caldwell,[18] the Nova Scotia Court imposed a term of five years on a 22-year-old man who brutally raped a 10-year-old girl. Rejecting a Crown appeal against sentence, the Court recommended that psychiatric treatment should be administered to the accused for the physiological problem manifested in his attraction to one so young. However, a large number of other cases involving victims aged 12 to 16 display no evidence that the age of the complainant merits considerations any different to those involved in rapes of older women.

The character of the victim was declared irrelevant to sentence in R. v. Savard,[19] where the concubine of one taxi-driver was raped by another driver. In R. v. Simmons,[20] however, the Court took into account

that the complainant frequented bars and was known to "pick up" men with whom she would have sexual relations. Overt acts of the complainant leading toward sexual intercourse, although followed by refusal to consent, may be regarded as mitigating factors.[21]

The effects of the offence upon the victim rarely even receive mention in rape cases, although in a recent decision, R. v. Sweitzer,[22] a sentence of seven years' imprisonment was imposed because, inter alia, the attack had taken place in the victim's apartment, which might cause her to fear noises at night for the rest of her life. Conversely, in R. v. Selamio,[23] the fact that there was no evidence that the complainant was emotionally disturbed was treated as a mitigating factor.

Attempted rape is a separate offence, punishable by imprisonment for 10 years.[24] The factors affecting sentence are largely similar to those for completed rapes.[25] Although it is frequently fortuitous that the rape was not completed, with no credit due to the accused for that fact, the normal range of sentence appears to be from two to five years' imprisonment.[26] An important difference, however, from rape is that the life sentence is not available for dangerous, repeating offenders. Accordingly, a lengthy fixed term will be imposed in such circumstances.[27]

B. SEXUAL INTERCOURSE WITH YOUNG FEMALES

i) Under 14

The Criminal Code provides a maximum penalty of life imprisonment for a male who has sexual intercourse with a girl aged less than 14.[28]

Three widely different situations commonly appear in trials under this section. The first involves a young man, almost invariably under 20 years

old himself who engages in consensual intercourse with an under-aged female. Individualized treatment is virtually always accorded to such offenders, probation being common.[29] In aggravated cases a very short demonstrative term of imprisonment may be imposed.[30] That the girl became pregnant will not necessarily preclude a non-custodial sentence,[31] and previous sexual experience, promiscuity or initiation of the offence by her are considered mitigating factors.[32]

The second type of behaviour commonly charged under this unlawful intercourse provision is closely akin to incest. Although some cases of intercourse with a blood relation have been thus prosecuted,[33] s. 146 is much used for the punishment of offences committed by step-fathers against step-daughters. The normal range of sentence for offences against one child appears to be from 18 months[34] to six years.[35] A typical case in the lower end of the range was R. v. Farmer,[36] where the accused, aged 28, pleaded guilty to three counts of intercourse with his 13-year-old step-daughter. The Nova Scotia Court imposed a sentence of two years' imprisonment for the first count, with six months consecutive on each of the others.

The maximum penalties being the same as for rape, acts of enforced intercourse against young girls are sometimes prosecuted under s. 146. The principles of sentencing and range of sentence here do not differ substantially from those for rape in such circumstances. In R. v. Morrisette[37] a term of two years less one day was imposed for a single offence against a 9-year-old child, while in R. v. Tomigo[38] concurrent terms of 12 years were imposed for brutal rapes of "the most evil type" committed by the accused on his three step-daughters. In Tomigo, the Court noted that the consequences on the children had been "tragic". In R. v Head,[39] a life sentence was imposed upon a dangerous man, with a previous conviction for indecent assault, who committed "an inhuman" attack upon a 6-year-old girl.

ii) 14 - 16

Prosecutions for intercourse with a female aged 14 to 16 years, punishable by five years' imprisonment,[40] are much less commonly reported than those involving younger girls. A series of unreported decisions of the British Columbia Court of Appeal, however, indicates some parallelism with sentencing practice outlined for intercourse "under 14". In R. v. Naugler,[41] the Court refused to interfere with a sentence of four years' imprisonment in light of the use of considerable violence by the accused. In R. v. Terry,[42] where there was no violence but "clearly an abdication of responsibility by [the accused] for his step-daughter", a term of two years less a day was judged appropriate but varied to two years at the request of the accused.[43]

C. INDECENT ASSAULT ON FEMALE

Indecent assault is a generic term for a wide range of behaviour, ranging from the practical joke taken too far almost to attempted rape. The range of sentences, while wide for the offences as a whole, consists of a number of separate spectra within the five-year maximum.[44]

The most minor form of indecent assault is characterized by boisterous behaviour, usually accompanied by drinking, which oversteps the bounds of the law by infringing upon the sexual privacy of a third party. In R. v. Konzelman,[45] the accused, who was drinking in a bar, approached a woman from behind, grabbed her breasts and shook them. The incident was precipitated by a bet with his companion. The Court adopted Crown counsel's suggestion that the offence could be dealt with as a "prank", and granted a discharge conditional upon one year's probation.

A second common class of indecent assault is much more serious, involving deliberate, unwanted sexual interference with an older girl or mature woman. Sometimes the facts of such cases bear close similarity to those for attempted rape, except that the assault has not progressed far enough for such a charge, or the accused has other motives. Such offences usually incur terms of imprisonment from six months to two years,[46] although acts aggravated by extreme violence or threats,[47] long confinement of the victim or responsibility for her[48] may incur longer terms. In R. v. Oakley,[49] the most serious instance fully reported in the last decade, the accused truck driver kidnapped two girls, threatened one with a revolver and choked the other; tied up both, indecently assaulted both and committed an act of gross indecency with one. Sentences of four years, concurrent with longer terms for kidnapping, were upheld for the indecent assaults.

The imposition of probation with compulsory pschiatric treatment, to follow imprisonment, is very common for offenders convicted of this type of assault.[50] There is also very occasional authority for suspension of sentence for such assaulters. In R. v. Pharo,[51] the accused businessman, drunk and alone with his cleaning lady, undressed her and touched various parts of her body. The trial Judge found that, because of his intoxication, there was some doubt that he knew she was not consenting. Sentence was suspended conditional upon two years' probation, with terms that the accused undergo psychiatric evaluation, abstain from alcohol and join Alcoholics Anonymous.[52]

The third common type of indecent assaulter is the paedophile. He may receive individualized consideration if there is a clear indication of his pathology and some hope of effective treatment. In R. v. Doran,[53] for example, a competent and dedicated school teacher received a suspended

sentence and probation, with conditions of treatment, in light of evidence that before the offence he had voluntarily commenced treatment for his undesirable tendencies.[54] Repeated offenders[55] and those who take small girls into secluded places to touch them may receive probation, but usually must serve between three and six months' imprisonment first.[56]

Offenders who involve themselves in debauchery stopping short of actual intercourse with several children, while recognized as being "sick", incur the wrath of society's denunciation and can usually expect much longer jail terms. In R. v. Mochon,[57] for example, a non-violent offender with a long record of sexually motivated offences committed "highly imaginative, bizarre and grotesque" assaults on girls aged 10 to 13. Sentences totalling six years' imprisonment were imposed on four counts.[58]

D. INCEST

Incest, an offence prosecuted only in small numbers each year,[59] is punishable by 14 years' imprisonment.[60] However, the Criminal Code provides that

> 150.(3) Where a female person is convicted of an offence under this section and the court is satisfied that she committed the offence by reason only that she was under restraint, duress or fear of the person with whom she had the sexual intercourse, the court is not required to impose any punishment on her.

Reported dispositions, like prosecutions, are rare. A handful of decisions disclose three main principles. First, incest by a father with a young daughter, living at home, is a serious offence and normally merits a penitentiary term of two to four years' imprisonment[61] on a first conviction. Three to five years appears to be the norm for a father who repeats the offence, or systematically seduces more than one, or all, girls in his family.[62]

It is obvious that incest incurs tariff sentencing on denunciatory grounds in such cases. A second principle, however, is that incapacitation may be considered in the sense that a sentence may be fixed within the range with reference to an aim of keeping the daughter and father apart. In R. v. Moulton,[63] the British Columbia Court of Appeal substituted a term of two years for 90 days intermittent, stating that the victim "must be protected". In relation to the danger involved in allowing the father to be in the home, the Court was even prepared to look at evidence of other acts of incest not charged in the indictment much less seriously.

Thirdly, it appears that intercourse with an older daughter, with previous sexual experience, who is not living with the father, is regarded much less seriously. In R. v. Truax[64] the accused visited his 19-year-old married daughter and "talked her into undressing". They then had intercourse with her consent. In view of, inter alia, a guilty plea which had spared the daughter the indignity of giving evidence, a term of two years less a day was reduced to time served followed by probation, with a condition of submission to psychiatric examinations.

There are no reported cases of incest other than between father and daughter in the last decade.

E. INDECENT ASSAULT ON MALE

The maximum penalty for indecent assault on a male is ten years.[65] It is rarely even approached.

The vast majority of reported indecent assault cases involve acts committed against children. Cases involving adult victims are generally viewed as less serious than most other sexual assaults. This may be inferred

from R. v. Solem,[66] where the accused, aged 34, drank with his victim in a bar. Both, very intoxicated, went back to the victim's apartment, where an offence of indecent assault occurred. The Court of Appeal upheld a "lenient" suspended sentence with two years' probation. In R. v. Marple,[67] four men offered a ride in their car to a 19-year-old. He refused, but was dragged in, taken to a secluded spot and held while one of them attacked his private parts. He was not harmed emotionally or physically. One of the accused was on probation for break and enter; a second had a conviction for failing to stop at the scene of an accident. All were employed. The Court upheld sentences of one day's imprisonment and $500 fines, with six months in default.

Offences against younger victims vary widely in nature. At the lowest end of the scale fall cases like R. v. Murchie[68] where a farmer, aged 48, was convicted on six counts of indecent assault. The victims were employees or potential employees, and the offences consisted of "gooses", momentary grabs at their genitals in a spirit of horseplay or jest. Finding that the publicity and loss of reputation arising from the trial were sufficient to deter further acts, the Court suspended sentence subject to two years' probation.

The primary concern of the Court in sentencing more serious offenders, who force unwelcome sexual attentions on young boys, is to balance the need for cure of the offender and protection of a vulnerable segment of the public. In the context of this offence and gross indecency, these principles have received considerable attention recently. The conclusions are epitomized in the Ontario Court's statement in R. v. Henein[69] that it should not become accepted wisdom that paedophiles need only show remorse and seek treatment, upon being charged, in order to escape incarceration. There are some cases where, notwithstanding the accused's disorder,

the gravity of the conduct and the revulsion of society demand a period of incarceration.

Enforced assaults on young boys generally require weighing of the relative merits of imprisonment and probation in light of these principles. Examples of cases regarded as serious enough to deserve imprisonment include R. v. Hopkins[70] and R. v Caron.[71] In Hopkins a term of one year was imposed on an accused who took a 13-year-old boy into a wood, showed his penis and pulled down the boy's pants. A term of one year was upheld. In Caron a man of 47 took part in a paid encounter with a 12-year-old homosexual prostitute. The majority of the Court, finding a term of 12 months "outside the range for persons with non-aggressive paedophilic tendencies which can be treated or controlled", reduced it to four months followed by probation. Jessup, J.A., dissenting, would have treated the boy's being a prostitute as an aggravating factor. His Lordship apparently felt that deterrence was in order, stating that "homosexuals will have to learn to keep away from boys".

Aggravating factors include breach of a position of trust and the use of violence or prolonged confinement of the victim. In R. v. Webster,[72] the Ontario Court imposed a term of nine months' imprisonment, followed by probation, on a Cub Scout Master who assaulted boys in his charge during a weekend camp. Nine months was found wholly inadequate by the majority in R. v. Zdep,[73] where the accused forced a boy of 14 to perform intimacies, finalized by fellatio, over a period of one hour, then confined him for a further hour. McClung, J.A., for the majority, found that the complainant's age, his random selection and forcible confinement fully justified a Crown appeal, and increased sentence to 18 months. In R. v. Pearse[74] the Ontario Court imposed a year's imprisonment and 2 years' probation on a first offender of 26 who forced a 16-year-old boy to perform fellatio at knifepoint.

F. GROSS INDECENCY

Acts of gross indecency are punishable under the Criminal Code with five years' imprisonment.[75] The offence, like many of those discussed above, cover a wide range of behaviour and the principles of sentencing differ accordingly. At the lower end of the scale of culpability, homosexual acts committed in "public places" by consenting adults may be characterized as gross indecency. In R. v. White,[76] an accused found committing an act of fellatio with another man was fined $200 at trial. The Ontario Court of Appeal, finding that the accused was not a danger to the public, and noting that only a police officer had seen the offence, substituted a suspension of sentence and one year's probation.

The sentencing policy is otherwise when younger victims, who are not old enough to consent to such acts, are involved. As noted in the previous section, the Courts' objective is to balance any possibility of treatment for sexual aberrations with the need for deterrence and expression of abhorrence. As a result, non-violent offenders who participate in sexual activities with children under the age of 14 can expect to go to jail for between three and 12 months,[77] before serving a term of probation if appropriate.[78] In R. v. Irwin,[79] a term of 18 months, recognized as higher than usual, was upheld in view of the gravity of the accused's group debauchery with girls aged 8 - 12. In R. v. Creighton,[80] it was held that even acts with older boys, aged 14 and 16, still required a four-month jail term, despite the "victims" having been practising homosexuals with prior experience.

Acts of gross indecency by a father with young children, especially if coming close to incest, will merit penitentiary terms. In R. v. Wood,[81] while dismissing an application for leave to appeal on procedural

grounds, the Alberta Court indicated that a suspended sentence was inappropriate for a father who buggered his 9-year-old daughter. A substantial term of imprisonment should have been imposed. In R. v. Beaumier,[82] the British Columbia Court, recognizing that the sentence was severe, upheld a term of four years' imprisonment for an accused who committed indecent acts and gross indecency on his daughter and step-daughter, aged 8 and 5.

Also serious is enforced sexual interference of an extreme degree. In R. v. Bennett,[83] an 18-year-old accused who held down a 14-year-old boy while a woman interfered with his genitals received a term of six months' imprisonment. That sentence certainly represents the lower end of the scale, which not uncommonly embraces terms of four years' imprisonment. Terms of four years were upheld for gross indecency in R. v. Oakley,[84] the facts of which were outlined above, R. v. Levesque[85] and R. v. Engel.[86] Levesque involved the supervisor of an apartment building who lured four boys into the sauna area and attempted anal intercourse and fellatio with them; Engel concerned enforced acts with a prostitute in a series of events including rape.

G. BUGGERY

Buggery is punishable by 14 years' imprisonment.[87] The large majority of cases in which the appropriate penalty is discussed are of two types; consensual anal intercourse with young males, and homosexual "rapes". Buggery of women virtually always accompanies rape or other indecencies.[88]

Homosexual "rapes" attract severe penitentiary sentences similar to those for heterosexual rape. The age of the victim, however, appears to be of more moment in homosexual cases; in R. v. Young,[89] a dangerous man committed three acts against boys of 6 to 10 years, one of whom was

extensively bruised and suffered internal bleeding. The Court upheld sentences totalling seven years' imprisonment. A similar term was reduced on appeal to four years in R. v. Culetta,[90] in view of the accused's age (19), and his unfortunate disturbed personality. Substantially shorter terms, of six and 12 months, were imposed in R. v. Piche, Caplette and Jones[91] as the accused, prisoners already, would suffer loss of other privileges and would have to serve their sentences in segregation. It was also likely that they would suffer indignities at the hands of other prisoners.

Widely differing sentences were imposed in the last two semi-reported cases of consensual buggery of young adults. In R. v. Jemmett,[92] the accused provided accommodation for three youths during a weekend, week and two months. For seven or eight buggeries and one or two gross indecencies in all, the Manitoba Court imposed terms of eight months' imprisonment. In R. v. Everton,[93] however, where the accused lived for six weeks with an 18-year-old homosexual, the same Court upheld a suspended sentence but deleted a probation order therefrom. The accused had made a mistake of law in thinking that the "victim" was old enough to consent, and the offences represented a single period of criminal activity in a crime-free life. He certainly had no propensity to encourage juvenile homosexuality, and the crime was not likely to be repeated.

H. OBSCENITY, IMMORAL PERFORMANCES

Section 159 of the Criminal Code creates a large number of offences relating to the publication or distribution of obscene literature and other articles, punishable on indictment by two years' imprisonment, or on summary conviction.

Almost invariably, such offences are dealt with by way of fines, both in the more common case where the accused is a corporation,[94] or when an individual is involved.[95]

Fines are also the most onerous penalties commonly imposed for other offences involving immoralities in entertainment. Reported trials of "strippers" in recent years have often, at the least sign of mitigating factor, resulted in discharges. In R. v. Larivier,[96] for example, a discharge was granted on conviction of a stripper for public nudity under s. 170, as this was the first offence of its kind in the area![97]

I. INDECENT ACTS

Persons who commit indecent acts are liable to be convicted summarily pursuant to s. 169 of the Criminal Code. Indecent acts are the least serious of sexual offences, and rarely result in anything more severe than a fine. Indecent exposers found in need of treatment may be subjected to probation.[98] Discharge is quite common for very minor offences, as in R. v. Miceli[99] where the accused, unaware that he could be seen by others, masturbated himself in a store. Similar dispositions are also often used for offences in the nature of "streaking" — isolated, non-pathological displays of nudity[100] — and "mooning" — similar baring of the buttocks[101] — in the course of juvenile horseplay.

J. DISTURBANCES

A number of offences of causing disturbances are created by the Criminal Code, largely punishable on summary conviction. Fines and

sometimes probation, or discharges in minor cases, are the norm. One of the commonest offences, causing a disturbance by being drunk,[102] was the subject of almost 2,000 convictions in 1973. Seventy-eight per cent of those found guilty were fined, only 16% receiving reformatory sentences.[103]

K. GAMBLING OFFENCES

The Criminal Code creates a wide variety of offences related to gambling and lotteries. For some, such as dealings with gambling apparatus and pool-selling devices, an escalating scheme of penalties including minimum terms of imprisonment for second and subsequent offences is provided.[104] Dealings relating to lottery schemes are simply punishable on indictment by two years' imprisonment.[105]

In the absence of a record rendering a minimum term of imprisonment inevitable,[106] a fine is almost always imposed on gambling offenders.[107] In 1973, of 345 convicted offenders, only 13 (4%) went to prison and 46 (13%) received suspended sentences. Even well-organized, long-standing schemes frequently attract only financial penalties.[108] In cases where technical illegalities are committed due to mistakes of law with regard to the legality of lotteries or equipment, discharges have been found appropriate.[109]

L. PYRAMID SALES SCHEMES

Although culpable under s.189(1) of the Criminal Code, pyramid sales schemes are also illegal under the Combines Investigation Act.[110] They are discussed in Chapter 22: "TRADE OFFENCES".

M. OFFENCES RELATING TO PROSTITUTION

Canadian sentencing policy draws a sharp distinction between the practice and the organization of prostitution. Soliciting, punishable on summary conviction under s.195.1 of the Criminal Code, in 1973 incurred punishment by fine, probation and imprisonment in roughly equal proportions — 38%, 29% and 33% respectively. Keeping a bawdy house, punishable on indictment under s.193 by imprisonment for up to two years, statistically speaking more rarely incurs imprisonment (6.5% on summary conviction, 6% on indictment) and is most frequently punished by a fine (79% and 71% respectively in 1973). However, while "average" cases, such as permitting prostitution to be carried on or in a massage parlour, are thus sanctioned,[111] evidence of organized prostitution may well dispose the Court toward a custodial term. 60 days' intermittent was the sentence imposed on the two principal actors in R. v. Celebrity Enterprises Ltd.[112] in addition to fines of $50,000, for a well-knit, smooth operation directing and controlling the movement of prostitutes.[113]

The distinction is more evident from cases brought under s. 195(1)(j) of the Code, which punishes living off the avails of prostitution by ten years' imprisonment, and the decision in R. v. Harder,[114] where the Alberta Court referred to a sentence of six months for procuring for the purposes of prostitution[115] as "light almost to the point of being inadequate".[116] In R. v. Odgers,[117] the accused, who lived with three females aged 12, 17 and 18 and lived off the avails of their prostitution, received concurrent terms of five years' imprisonment. The Court pointed out that, in addition to the inherent gravity of the offence, this instance was rendered more serious by the ages of the women involved.

Footnotes to Chapter 13

1. Criminal Code, s.144.

2. See R. v. Shanower, 8 C.C.C. (2d) 257, [1972] 3 O.R. 722 (C.A.) -setting aside suspension of sentence, Gale, C.J.O. held such offence must be punished with reference to deterrence of others.

3. 1 C.C.C. (2d) 293, [1971] 1 O.R. 83 (C.A.).

4. See also Amero v. R. (1978), 3 C.R. (3d) S-45, 23 N.S.R. (2d) 646 (sub nom. R. v. Amero), 32 A.P.R. 646 (C.A.) - four years for violent rape of stranger. Haig, who received a life term for a subsequent offence in R. v. Haig (1974), 26 C.R.N.S. 247 (Ont. C.A.), had received a term of five years for his first rape at age 16.

5. See e.g. R. v. Haig, ibid; R. v. Leech, 10 C.C.C. (2d) 149, 21 C.R.N.S. 1, [1973] 1 W.W.R. 744 (Alta. S.C.); R. v. Hill (1974), 15 C.C.C. (2d) 145, 16 Crim. L.Q. 245 (Ont. C.A.), aff'd 23 C.C.C. (2d) 321, [1977] 1 S.C.R. 827, 6 N.R. 413, 58 D.L.R. (3d) 697; R. v. Pontello (1977), 38 C.C.C. (2d) 262 (Ont. C.A.).

6. R. v. Hatton (1978), 39 C.C.C. (2d) 281 (Ont. C.A.); R. v. Robinson (1974), 19 C.C.C. (2d) 193 (Ont. C.A.).

7. (1973), 14 C.C.C. (2d) 225, 28 C.R.N.S. 55, 6 N.S.R. (2d) 351 (C.A.).

8. See e.g. R. v. Rose (1979), 5 Man. R. (2d) 211 (Co. Ct.) - one year's imprisonment and two years' probation for 27-year-old alcoholic who raped the complainant in his car in a parking lot after a prolonged drinking session with her.

9. See e.g. R. v. Anderson (1979), 2 Man. R. (2d) 86 (C.A.) - two years for man who raped and buggered woman with whom he had had previous relationship; R. v. Engel (1981), 6 W.C.B. 107 (Man. C.A.) - four years for enforced fellatio and intercourse with prostitute, picked up in a car and taken to a building by two men.

10. See e.g. R. v. Selamio (1979), 23 A.R. 403 (N.W.T.S.C.) - three years for 35-year-old who raped, with "a minimum of violence", a woman on whose bed the two had been sitting, playing cards and smoking drugs; R. v. Plummer (1975), 24 C.C.C. (2d) 497, 31 C.R.N.S. 220 (Ont. C.A.) - three years for 19-year-old girl who succeeded in having 14-year-old succumb by threats only; R. v. Markle (1977), 5 A.R. 251 (T.D.) - four years for man who raped a woman with whom he had been living for four years about three months after they split up; R. v. Walsh (1979), 10 C.R. (3d) S-30 (Que. S.C.) - four years for rape of 16-year-old girl in light of violence used being "minimal".

11. See e.g. R. v. Draper (1978), 4 C.R. (3d) S-20 (Ont. C.A.) - four years for 19-year-old who raped 23-year-old in her home at knifepoint after she tried to sever their relationship; R. v. Kanagarajah (1980), 4 Sask.

R. 149 (Sask. C.A.) - six years reduced to three for second offender who raped at knifepoint as sentence out of line with those usually imposed in Saskatchewan for rape committed under similar circumstances.

12. See e.g. R. v. Crane (1972), 5 N.S.R. (2d) 37 (C.A.) - four years for man who, with at least two others, forced a woman to have intercourse with them by means of threats; R. v. Simmons (1973), 13 C.C.C. (2d) 65 (Ont. C.A.) - four years for three men who drank with woman in a bar then drove her to an isolated spot where each had intercourse with her; R. v. Bear, 13 C.C.C. (2d) 570, 24 C.R.N.S. 393, [1974] 1 W.W.R. 283 (Sask. C.A.) - five years "in accordance with those usually imposed in this jurisdiction for the same or similar offences" where three men committed gang rape, no mitigating or extenuating circumstances; R. v. White (1974), 16 C.C.C. (2d) 162, 27 C.R.N.S. 66 (Ont. C.A.) - five years and two years consecutive for three men who drove girl to an isolated spot, raped her, then after dropping off one accused took her to a park and raped her again; R. v. Parenteau (1980), 52 C.C.C. (2d) 188 (Man. C.A.) - four years for 18-year-old with good record who forcibly abducted a 15-year-old girl and raped her with two others watching.

13. R. v. Savard (1979), 11 C.R. (3d) 309 (Que. C.A.).

14. (1980), 42 N.S.R. (2d) 647, 77 A.P.R. 647 (C.A.).

15. See also R. v. Craig (1975), 28 C.C.C. (2d) 311 (Alta. C.A.) - eight years' imprisonment for accused who abducted 14-year-old girl, raped her, drove her around for some time and raped her again before releasing her.

16. See e.g. R. v. Sweitzer (1980), 26 A.R. 208 (C.A.) - seven years for attack in victim's apartment, knife used, victim blindfolded.

17. (1979), 48 C.C.C. (2d) 523 (Nfld. C.A.).

18. (1974), 10 N.S.R. (2d) 187 (C.A.).

19. Supra note 13.

20. Supra note 12.

21. See e.g. R. v. Simmons, supra note 12.

22. Supra note 16.

23. Supra note 10.

24. Criminal Code, s.145.

25. See e.g. R. v. Priest (1974), 25 C.R.N.S. 252 (N.S.C.A.), where the Court dealt with deterrence, previous record, lack of dangerousness of accused, absence of serious harm to victim, age of victim, all in similar modes to those described above for completed offence. See further R. v. Miller (1979), 32 N.S.R. (2d) 87, 54 A.P.R. 87 (C.A.).

26. R. v. Priest, ibid. resulted in a three-year term; R. v. Miller, ibid. two years; R. v. McGhie (1979), 1 Man. R. (2d) 169 (C.A.) saw two years consecutive for attempted rape in the apartment of the victim, consecutive to five years for a similar completed offence.

27. See e.g. R. v. Ross (1979), 1 Man. R. (2d) 242 (C.A.), leave to appeal to S.C.C. refused 3 Man. R. (2d) 270n, 31 N.R. 360n, 10 years for savage attack and attempted rape of elderly lady; R. v. Fuller, [unreported] March 13th, 1981 (B.C.C.A.) - eight years for accused with lengthy record of violence, including rape in 1977, who attempted to rape 13-year-old girl.

28. Criminal Code, s.146(1).

29. See e.g. R. v. Kirby (1976), 24 N. & P.E.I.R. 260, 65 A.P.R. 260 (Nfld. Prov. Ct.) - 25 days' imprisonment, 15 days consecutive, two years' probation for youth who engaged in consensual intercourse on two occasions with "unpuritanical" girl of 13; R. v. St. Onge (1977), 17 N.B.R. (2d) 99 (C.A.) - suspended sentence and one year's probation for youth of 17 who participated in intercourse initiated by 13-year-old girl.

30. See e.g. R. v. Skrettas (1970), 13 Crim. L.Q. 149 (Ont. C.A.) - three months and probation for accused of 19 who pleaded guilty to carnal knowledge of girl who had told him she was 17, and willingly engaged in intercourse.

31. See R. v. Belanger (1979), 46 C.C.C. (2d) 266, 8 C.R. (3d) S-10 (Ont. C.A.) - sentence of three years reduced to time served and probation for 17-year-old who had intercourse with 12-year-old girl, who became pregnant.

32. See e.g. R. v. Kirby, supra note 29; R. v. St. Onge, supra note 29.

33. See e.g. R. v. B.A.S. and W.G.S. (1976), 1 W.C.B. 56 (Ont. C.A.) - five years for husband, 2 years less one day indefinite for wife, varied to 10 and four year totals for sexual offences involving daughters; R. v. Johnton (1976), 1 W.C.B. 107 (Man. C.A.) - six years for accused convicted on three counts of intercourse with 12-year-old daughter.

34. R. v. Oudie (1976), 1 W.C.B. 107 (Man. C.A.).

35. There are no applicable Canadian cases reported for over ten years. Relevant English cases cited by Thomas, D.A., in Principles of Sentencing (2nd ed. 1979, London: Heinemann Books Ltd.) at 125 include R. v. Obado, 11.3.71, 4616/C/70 (intercourse and other offences by man, 31, with illegitimate daughters of wife; five years upheld); R. v. Thomas, 26.4.71, 4160/B/70 (intercourse leading to pregnancy with 11-year-old daughter of woman with whom appellant living; five years upheld).

36. (1978), 30 N.S.R. (2d) 79, 49 A.P.R. 79 (C.A.).

37. (1980), 5 W.C.B. 141 (Man. C.A.).

38. [Unreported] June 30th, 1981 (Ont. C.A.).

39. (1970), 1 C.C.C. (2d) 436 (Sask. C.A.).

40. Criminal Code, s.146(2).

41. [Unreported] June 20th, 1980 (B.C.C.A.).

42. [Unreported] February 23rd, 1981 (B.C.C.A.).

43. See also R. v. Delorme (1977), 1 W.C.B. 295 (Que. C.A.) - sentence of 10 weekends' imprisonment plus two years' probation upheld for intercourse with 15-year-old.

44. Imposed by Criminal Code, s.149(1).

45. (1980), 5 Man. R. (2d) 165 (C.A.).

46. See e.g. R. v. Trask (1974), 28 C.R.N.S. 321 (Ont. C.A.) - two years less one day for accused who pulled woman into car, drove her away, parked, fondled her and removed her clothing, threatening to kill her if she escaped; R. v. Mosher (1975), 12 N.S.R. (2d) 36 (C.A.) - two years for "serious" indecent assault on girl of 17, accused had one previous conviction; R. v. Gehue (1975), 12 N.B.R. (2d) 564 (C.A.) - one year for accused who drank all day with woman then, when she was leaving house, grabbed her, tore her dress, knocked her to the ground, but was then found by her friends kneeling over her with his hand under her dress; R. v. O'Brien (1976), 31 C.C.C. (2d) 396, 36 C.R.N.S. 84, 19 Crim. L.Q. 129 (Nfld. Dist. Ct.) - six months' imprisonment, $200 fine, two years' probation for accused aged 25 who was driving complainant home but instead parked and indecently assaulted her; R. v. Pfeifer (1978), 11 A.R. 237 (Dist. Ct.) - two years for accused who was probably guilty of attempted rape, which might have been completed had police not intervened; Shearing v. R. (1979), 11 C.R. (3d) 297, 21 N. & P.E.I.R. 395, 56 A.P.R. 395 (Nfld. C.A.) - 18 months plus probation conditional on psychiatric treatment; R. v. Johnson (1979), 21 N. & P.E.I.R. 359, 56 A.P.R. 359 (Nfld. C.A.) - six months' imprisonment plus probation conditional on treatment for disturbed accused aged 18 who committed non-violent assaults, one on a busy public street in daylight; R. v. Winship (1980), 42 N.S.R. (2d) 541, 77 A.P.R. 541 (C.A.) - two years for accused who, intoxicated, entered apartment where young girl was babysitting, threatened her, removed her clothing, attempted sexual intercourse and committed fellatio; she escaped, he dragged her back and assaulted her again, but became sick whereupon she made good her escape, still naked; accused had previous record for indecent assault and possession of narcotic.

47. See e.g. R. v. Grimaldi (1978), 3 W.C.B. 43 (Alta. C.A.) - total of four years' imprisonment imposed on accused, first offender of good character who, on separate occasions, picked up three young women in his car and threatened each with death if fellatio not performed.

48. See e.g. X. v. The Queen, [1970] C.A. 1093 - 3 years' imprisonment for indecent assault on 13-year-old daughter.

49. 39 C.R.N.S. 105, 36 C.C.C. (2d) 436, [1977] 4 W.W.R. 716, 4 A.R. 103 (C.A.).

50. See e.g. R. v. Wickham (1978), 41 C.C.C. (2d) 42 (Ont. C.A.); R. v. Johnson (1979), 21 N. & P.E.I.R. 359, 56 A.P.R. 359 (Nfld. C.A.).; R. v. Sabean (1979), 35 N.S.R. 35; 65 A.P.R. 35 (C.A.); R. v. Beaudin, [unreported] March 24th, 1981 (Ont. C.A.).

51. (1970), 12 C.R.N.S. 151 (Ont. Co. Ct.).

52. See also R. v. A. (1974), 26 C.C.C. (2d) 474, 17 Crim. L.Q. 115 (Ont. H.C.).

53. 16 C.R.N.S. 9, 5 C.C.C. (2d)366, [1972] 1 O.R. 405 (C.A.).

54. A very similar case and disposition by the Alberta Court are found in R. v. Wells (1977), 7 A.R. 311 (C.A.).

55. See R. v. Pammer (1979), 1 Man. R. (2d) 18 (C.A.) - six months' imprisonment plus one year's probation for man with previous convictions who put his hand inside panties of 3-year-old girl while working in her home.

56. See R. v. Deihl (1972), 5 N.S.R. (2d) 21 (C.A.) - three months for putting hands down pants of small girl in alleyway; R. v. McKeachnie (1975), 26 C.C.C. (2d) 317 (Ont. C.A.) - six months and probation for attempt to pull down pants of small girl in men's washroom at a public arena.

57. (1978), 23 N.B.R. (2d) 90, 44 A.P.R. 90 (C.A.).

58. See also R. v. Thibeau (1979), 3 W.C.B. 300 (Ont. C.A.) - two years less one day plus probation for sexual deviations with girls aged 9 to 11, alcohol abuse involved.

59. The 1973 Criminal Statistics show 20 convictions, excluding Alberta and Quebec, for that year.

60. Criminal Code, s.150(2).

61. R. v. Richardson (1973), 6 N.S.R. (2d) 130 (C.A.) - three years, one daughter; and see dicta of Pace, J.A. in R. v. Moore (1979), 30 N.S.R. (2d) 638 at 654, 49 A.P.R. 638 at 654 (C.A.).

62. R. v. Moore, ibid. - five years imprisonment, daughter aged 14, previous conviction for same offence; R. v. Savage (1979), 2 Man. R. (2d) 292 (C.A.) - 36 months concurrent on two charges, two daughters, aged 12 and 15, acts continued over several months; R. v. Issler (1976), 1 A.R. 27 (C.A.) - five years imprisonment, two daughters, aged 12-14, both became pregnant.

63. (1979), 21 Crim. L.Q. 275 (B.C.C.A.).

64. (1979), 22 Crim. L.Q. 157, 3 W.C.B. 387 (Ont. C.A.).

65. Criminal Code, s.156.

66. (1979), 1 Sask. R. 181 (C.A.).

67. (1973), 6 N.S.R. (2d) 389, 16 Crim. L.Q. 254 (C.A.).

68. [Unreported] April 14th, 1981 (Ont. Co. Ct.).

69. (1980), 53 C.C.C. (2d) 257 (Ont. C.A.).

70. (1977), 23 N.S.R. (2d) 550, 32 A.P.R. 550 (C.A.).

71. (1980), 23 Crim. L.Q. 163 (Ont. C.A.).

72. (1978), 20 Crim. L.Q. 430 (Ont. C.A.).

73. [Unreported] April 30th, 1981 (Alta. C.A.).

74. (1977), 2 W.C.B. 11 (Ont. C.A.).

75. Criminal Code, s.157.

76. (1975), 25 C.C.C. (2d) 172 (Ont. C.A.).

77. See e.g. R. v. Henein (1980), 53 C.C.C. (2d) 257 (Ont. C.A.) - six months imprisonment for five convictions relating to fellatio committed on boys aged 11 to 13.

78. See e.g. R. v. Dimmick, ibid; R. v. Robertson (1979), 46 C.C.C. (2d) 573; 10 C.R. (3d) S-46 (Ont. C.A.) - time served plus two years' probation for scout leader who committed indecencies with three boys during a weekend camp.

79. (1979), 48 C.C.C. (2d) 423, 10 C.R. (3d) S-33, 16 A.R. 566 (C.A.).

80. (1980), 3 Man. R. (2d) 60 (C.A.).

81. (1975), 26 C.C.C. (2d) 100, [1976] 2 W.W.R. 135 (Alta. C.A.).

82. [Unreported] March 31st, 1981 (B.C.C.A.).

83. [Unreported] March 3rd, 1981 (Nfld. C.A.).

84. Supra note 49.

85. (1980), 5 W.C.B. 234 (Ont. C.A.).

86. Supra note 9.

87. Criminal Code, s.155.

88. See e.g. R. v. Anderson (1979), 2 Man. R. (2d) 86 (C.A.) - one year concurrent with two years sentence for rape, minimal violence, no lasting effects on victim.

89. (1980), 4 W.C.B. 428 (B.C.C.A.).

90. (1977), 1 W.C.B. 145 (Ont. C.A.).

91. (1978), 21 Crim. L.Q. 25 (Alta. T.D.).

92. (1980), 22 Crim. L.Q. 297 (Man. C.A.).

93. (1980), 22 Crim. L.Q. 294 (Man. C.A.).

94. See e.g. R. v. Ariadne Developments Ltd. (1974), 19 C.C.C. (2d) 49 (N.S.C.A.) - $7,500 fine for possession for purpose of sale of over 21,000 obscene books; R. v. Van's Gifts and Books Ltd. (1977), 1 W.C.B. 556 (Ont. C.A.) - $7,500 fine for company and $5,000 fine for owner for possession for sale of "hard core" pornography.

95. See e.g. R. v. Tremblett (1975), 8 N. & P.E.I.R. 482 (Nfld. Mag. Ct.) - $400 fine for possession of seven obscene magazines; R. v. Mueller (1980), 5 W.C.B. 155 (Ont. Co. Ct.) - $500 fine for possession of obscene movies.

96. (1979), 3 W.C.B. 201 (Ont. Co. Ct.).

97. See also R. v. Campbell, 10 C.C.C. (2d) 26, 21 C.R.N.S. 273, [1973] 2 W.W.R. 246 (Alta. Dist. Ct.) - absolute discharge as accused had relied on decision, subsequently reversed, of Alberta Supreme Court that nude dancing was legal.

98. No recent reported Canadian cases, but this is common experience of counsel involved in minor criminal work.

99. (1977), 36 C.C.C. (2d) 321 (Ont. Prov. Ct.).

100. See R. v. Niman (1974), 31 C.R.N.S. 51 (Ont. Prov. Ct.) - absolute discharge for accused who accepted a "dare" from his friends to run naked down a main street in Ottawa to a beer store.

101. See R. v. Balaszy (1980), 54 C.C.C. (2d) 346 (Ont. Prov. Ct.) - absolute discharge for accused who left a restaurant then pulled down his pants and wiggled his buttocks at the window, to taunt another patron.

102. Criminal Code, s.171(1)(a)(ii).

103. See further R. v. Parsons (1977), 16 N. & P.E.I.R. 20 (Nfld. Dist. Ct.) - $400 fine and one year's probation for 16-year-old who disrupted high school dance by swearing and using obscene language; R. v. Capitan et al. (1981), 6 W.C.B. 119 (Ont. Dist. Ct.) - $125 fine for causing

disturbance by fighting, absolute discharge for female involved, both had already served probation terms; R. v. Wall (1976), 15 N.S.R. (2d) 359 (C.A.) - absolute discharge for policeman, off duty, who swore at occupants of building when refused entry to girlfriend's apartment late at night.

104. Criminal Code, s.186(2).

105. Ibid. s.189(1).

106. For an example of use of a custodial sentence see Wortzman v. R. (1979), 12 C.R. (3d) 115 (Ont. C.A.) - 30 days intermittent for bookmaker's sheetwriter with long record of offences including bookmaking infractions.

107. See e.g. R. v. Rasper (1978), 1 C.R. (3d) S-45 (Ont. C.A.) - 21 days time served and $5,000 fine for accused with one unrelated previous conviction for recording or registering bets; R. v. Snider (1977), 37 C.C.C. (2d) 189 (Ont. C.A.) - $2,400 fine and probation for accused who participated in large gambling operation, over $1,000,000 in bets recorded in one six-week period, but accused was only a minor figure in a large operation; R. v. Doane (1980), 41 N.S.R. (2d) 340, 76 A.P.R. 340 (C.A.) - $500 fine for accused who ran "elite" bookmaking operation for a circle of affluent friends and business associates; R. v. Bussiere (1973), 6 N.B.R. (2d) 440 (C.A.) - $7,500 fine for printing lottery tickets, six previous offences of same nature; Poisson v. The Queen, [1975] C.A. 833 - $400 fine for advertising a lottery; R. v. Vidotto (1976), 1 W.C.B. 126 (Ont. C.A.) - $2,000 fine for keeping common betting house; R. v. Rockert et al. (1976), 1 W.C.B. 29 (Ont. C.A.) -fines of $1,000 and $1,500 for convictions of keeping a common betting house, offences arose out of one "stag dinner", 108 persons paid $20 each to attend, minimum bet $10, $7,500 seized off tables; R. v. Martin (1979), 3 W.C.B. 461 (Man. C.A.) - total fines of $2,000 for engaging in business of betting and transmitting betting information; R. v. Duczminski et al. (1979), 4 W.C.B. 206 (Man. C.A.) - fines of $300 for bookmaking involving at least $3,652 of bets in one month.

108. See e.g. R. v. Shanahan (1977), 1 W.C.B. 177 (Ont. C.A.) - $5,000 fine plus probation for "well-organized and substantial operation" imposed on appeal on accused with one previous conviction.

109. See e.g. R. v. Potter (1978), 39 C.C.C. (2d) 538, 3 C.R. (3d) 154 (P.E.I.S.C.) - punchboards illegally imported but enquiries had been made of Canada Customs and broker used; R. v. Beaudoin (1975), 17 Crim. L.Q. 248 (Que. C.A.) - illegal lottery scheme, accused stopped participating and paid money back when he learned the activities were illegal.

110. R.S.C. 1970, c. C-23, as am.

111. See e.g. R. v. Harris (1977), 1 W.C.B. 126 (Ont. C.A.) - $2,000 fine in such circumstances.

112. (1977), 1 W.C.B. 383 (B.C. Co. Ct.).

113. For another example involving imposition of a custodial term see R. v. Dion (1977), 1 W.C.B. 331 (Que. C.A.) - 14 days intermittent plus $500 fine.

114. (1980), 21 A.R. 102 (C.A.).

115. Contrary to Criminal Code, s.195(2)(a), punishable by 10 years' imprisonment.

116. See also R. v. Mitchell et al. (1978), 2 W.C.B. 270 (Ont. Co. Ct.) - one year for M, who ran bawdy house in which women worked on shared fee basis, and also organized referrals for prostitutes in apartments; one year indefinite for C, a female, involved in same offence.

117. 37 C.C.C. (2d) 554; 7 A.R. 192, [1978] 1 W.W.R. 312 (C.A.).

CHAPTER 14: OFFENCES RESULTING IN DEATH

A. CAUSING DEATH BY CRIMINAL NEGLIGENCE

Sections 202 and 203 of the Criminal Code create the offence of criminal negligence causing death, by act or omission, and set a maximum penalty of imprisonment for life.

A survey of reported dispositions for this offence almost leads to the conclusion that it should be discussed with "driving offences". Of some 24 appellate dispositions reported since 1970, only two, R. v. Weber[1] and R. v. Danells,[2] did not arise out of motor vehicle accidents. Weber, a family man with no previous convictions, was hunting when he saw what he thought was a moose. After shooting it, he discovered that it was in fact three men in a boat, one of whom he had killed. Emphasizing the need for general deterrence, the British Columbia Court increased a sentence of three months' imprisonment to nine, despite the fact that the original term had already been served.

Danells was an extreme case of neglect of a child. The accused, mother of two children herself, undertook to care for another infant, but instead abandoned it in its father's empty apartment. The accused showed no signs of mental imbalance, and was of average intelligence, though she claimed that she had believed the child would survive its abandonment. Expressing a powerful need to reflect society's abhorrence of such crimes, the Court increased a sentence of three years to eight years' imprisonment.

The large majority of drivers who negligently cause death go to jail. Although there are occasional precedents for lower sentences,[3] the normal range for "motor manslaughter", as it is sometimes called, appears to be from nine months to five years' imprisonment.

The major considerations in determining sentence appear to be the extent of the accused's intoxication (an almost omnipresent phenomenon in some degree), his behaviour after the accident, and his criminal record, especially if it contains offences of drinking and driving.

Reformatory terms, in the range of nine months to two years less a day, are generally imposed on first offenders in the absence of serious aggravating factors. A typical example is R. v. Porter,[4] where the accused after drinking failed to stop at an intersection, collided with another vehicle and caused the death of its two occupants and his own passenger. A term of 18 months, with a recommendation that he be considered for temporary absence, was upheld. In a case which resulted in only one death but was otherwise very similar, R. v. Moriarty,[5] a term of nine months followed by probation was imposed. An additional mitigating factor was that a 90-day intermittent sentence, imposed at trial, had already been served.[6]

A sentence close to the bottom of the scale will be appropriate in the occasional case where alcohol is not a major factor.[7] Extreme intoxication, on the other hand, is an aggravating factor and may move the term into the penitentiary portion of the range. In R. v. Mellstrom,[8] an accused with a previous record of drug offences, ignoring the advice of his friends, drove to buy food at the end of a four-day period of continuous "tripping". He was severly impaired, and caused a series of accidents which culminated in his killing a 7-year-old on the sidewalk, and two persons in a bus queue. Taking into account six months served pending trial, the Court upheld concurrent terms of 3-1/2 years' imprisonment.[9]

Flight from the scene of the accident, though it may also be the subject of a separate charge, is generally regarded as severely aggravating the offence. In R. v. Batz,[10] a term of five years' imprisonment was upheld

in light of the accused's intoxication and flight from the scene of an accident in which he killed two people. He also had been suspended from driving just a week before the accident. A term of four years, consecutive to one year for failing to remain, was upheld in R. v. Noseworthy,[11] where the accused fled in his van after colliding with a motorcycle, fatally injuring two people.

Penitentiary terms are usually imposed on drivers with bad records, especially if they drive while suspended. Batz, just mentioned, is one example. A term of five years was imposed in R. v. Wisniewski,[12] where the accused, fleeing from a pursuing police cruiser at high speed, ignored 13 red lights and a stop sign in a 100 m.p.h. race through the streets of Toronto. At one light, a pedestrian was hit and killed. The accused, who displayed a very callous attitude to his victim's death, had never had a licence and his privilege to obtaining one was suspended.

A recent warning, ignored by the accused, will also increase his sentence. In R. v. Dickinson,[13] a term of two years was upheld for a drunken killer who had been charged with impaired driving just one day before the fatal accident. Three years was found appropriate by the Quebec Court in R. v. Ducharme,[14] where the accused, apparently racing with another vehicle, killed another driver in a head-on collision. In addition to his previous record for impaired driving, the Court noted that he had been involved in another accident a few hours earlier, which "did not serve as a warning".

B. MURDER

The only legal sentence for an offender convicted of first or second degree murder is life imprisonment.[15] The applicable principles and rules are discussed in Chapter 26.E, "LIFE IMPRISONMENT".

C. INFANTICIDE

The Criminal Code provides:

> 216. A female person commits infanticide when by a wilful act or omission she causes the death of her newly-born child, if at the time of the act or omission she is not fully recovered from the effects of giving birth to the child and by reason thereof or of the effect of lactation consequent on the birth of the child her mind is then disturbed.
>
> ...
>
> 220. Every female person who commits infanticide is guilty of an indictable offence and is liable to imprisonment for five years.

In these provisions, Parliament has acknowledged the potentially unbalancing effects of child-birth and lactation. These factors substantially mitigate the culpability of mothers who kill very young children. Though offences of infanticide are rare, it appears from the few reported decisions that it would be necessary to establish that the mother had some high degree of responsibility for her actions before any custodial term would be imposed. Rather, almost by definition infanticide merits individualized treatment, as it can only be committed by temporarily disturbed mothers. In R. v. Szola[16] it was pointed out by Brook, J.A. that the purpose of the criminal process in the case of a very ill woman was to find some way of helping her; the solution here was to grant a discharge conditional upon two years' probation. In R. v. Aoudla,[17] an Inuit woman was seriously disturbed not only by the effects of lactation, but also by the abrupt cultural change involved in a move to Montreal and desertion by her boyfriend at about the time of birth. She was dealt with by suspension of sentence, with one year's probation. The terms required her to reside with her family in the North and report once a month to a social worker.

D. MANSLAUGHTER

The Criminal Code, in s.217, simply defines manslaughter as "culpable homicide that is not murder or infanticide", and in s.219 sets a single maximum penalty of life imprisonment. Perhaps for this reason it is a common mistake of both Judges[18] and the occasional commentator[19] to attempt to discuss manslaughter as one offence. This clouds the reality that, as Thomas notes,

> 'Manslaughter' is a generic term for a group of offences with different definitions, linked only by the common requirement of a death.[20]

As the learned author goes on to point out, however, by careful classification of types of manslaughter a rational sentencing structure may be discerned. Thomas' categorization, based on legal categories of manslaughter, will not be followed in this text. The Canadian cases appear more susceptible to analysis by classification according to the factual scenes presented.

i) Domestic Homicides Under Provocation

The term "domestic homicide" will be used here to mean killing of a family member or an equivalent person, such as a common-law spouse or lover. Within the category of domestic homicides under provocation, often barely distinguishable from drunken homicides, fall several different situations.

Not uncommon is the killing which arises out of a heated argument between family members, usually following a drinking session. The normal range of sentence for manslaughter under these circumstances appears to be between one and five years' imprisonment. There are

occasional departures, apparently where the Court feels that the amount of provocation was only marginally sufficient for a reduction of the charge to manslaughter. In R. v. Jones,[21] following an argument, the accused took a gun from his vehicle and immediately killed his victim. The Court actually noted that the charge had been manslaughter rather than murder because the prosecution thought that a defence of provocation might be successful, and imposed a term of 12 years' imprisonment. Examples of more usual dispositions are the decisions in R. v. Kennedy,[22] where a term of 3-1/2 years was imposed on an accused who shot his brother during a violent argument about hockey, and R. v. Bird,[23] where the drunken accused was clearly provoked by his father and shot him to death. Bird received a sentence of four years' imprisonment.[24]

A second common situation is the killing arising out of a dispute between husband and wife. Often the argument will concern allegations of infidelity or other sexual taunts. The range of sentence for this kind of homicide is from three to 10 years' imprisonment,[25] although there is occasional authority for the suspension of sentence upon females in view of the existence of children in need of care.[26]

A common element of sentencing policy for both husband-wife and other familial slayings is that the degree of provocation, and the immediacy of its effect upon the accused, are important considerations. A term of three years imposed in R. v. Mikkelson,[27] where the accused picked up a shotgun and killed his common-law wife during a quarrel, contrasts with the six-year term imposed in R. v. Trenchfield.[28] Trenchfield overheard a telephone conversation in which his wife stated that she had married him only to get landed immigrant status, and would divorce him as soon as she could. He was not, however, acting under the immediate shock of hearing this. Her

immigration troubles had been known to him long enough for her to have threatened to have him killed if he reported her illegal entry to the immigration authorities, and he had had time to lay criminal charges for the threats, which he subsequently withdrew. Similarly in R. v. Renton,[29] where a sentence of 10 years was imposed, the accused although taunted by mention of his wife's lover immediately before he stabbed her had known of her infidelity for a period of months if not years.

An exceptional but recurring pattern of events is exemplified by the case of R. v. Hardy.[30] Hardy, aged 53, had been married for 30 years. A loving husband, he stayed with his wife despite her severe mental illness, but following severe provocation one day completely lost his self-control, smashed her face with a hammer and smothered her. Sentence was suspended upon Hardy, as it was in R. v. Marceau.[31] Marceau was a similar case in which a 79-year-old man, in a mentally and physically deteriorated state, took on the complete care of his sick wife but eventually killed her, planning to take his own life afterward. Clearly, these cases are of a different order to angry slayings precipitated by drunkenness or imflamed passions, and fully merit the individualized treatment usually accorded to them.

ii) Non-Domestic Homicides Under Provocation

The normal range of sentence for other provoked homicides appears to be from three to nine years, with occasional departures in greatly extenuating circumstances. Again, the operative factors are the degree and effect of the provocation, and the immediacy of its effect on the accused.

A sentence at the high end of the scale was imposed in R. v. Wolejszo.[32] Wolejszo, a youth of 18, was assigned a spot at a goose-shoot,

but became unhappy with it. In a dispute with another older shooter about entitlement to a fallen goose, profanities and insults were exchanged, whereupon the accused shot his adversary. Understandably finding the offence somewhat less provoked than many, the Manitoba Court substituted a term of nine years for the six imposed at trial.

A crime of much less gravity came before the Saskatchewan Court in R. v. Herring.[33] The accused, a 20-year-old with no previous record, married the former girlfriend of another man. For over two years, the "loser" of Mrs. Herring harassed the couple in a number of ways, until one day he was seen by the accused letting the air out of his car's tires. He went out with a knife and in the ensuing exchange stabbed and killed his victim. Emphasizing that no precedent should be established as to the adequacy of such a sentence in other cases, the Court upheld a term of 18 months' imprisonment in view of the many mitigating factors.[34]

iii) Drunken Homicides

While drink is a factor in many killings discussed elsewhere in this Chapter, a special kind of homicide is to be discussed here. This offence has all the other markings of murder, being a seemingly deliberate slaying. However, it results in a conviction of manslaughter because the accused is able to establish that he was too drunk to form an intent to murder, or at least raises a fear of this sufficient to persuade Crown counsel to accept a plea of guilty of manslaughter in return for staying a charge of murder. In R. v. Salmon,[35] it was pointed out that the accused in these circumstances should not receive a reduction of sentence by virtue of his intoxication, as a reduction of the charge from murder has already taken this into account.

Such offences regularly result in much heavier sentences than other forms of manslaughter, frequently from 10 to 20 years' imprisonment. A typical example is R. v. Gowland[36] where the accused, impaired to an undetermined extent, beat his landlord to death in an argument over rent. A 10-year prison sentence was imposed. Similar terms were incurred in R. v. Snelgrove,[37] where the accused, after drinking heavily during the day and at an evening party, shot the owner of the house where his estranged wife and children were living,[38] and in R. v. Johnson,[39] where the accused broke into the house of an elderly woman and beat her to death. A 20-year term was imposed in R. v. Julian,[40] where the accused set fire to his brother-in-law's home and burned three children to death. Life terms have been upheld for dangerous offenders and those convicted of particularly abhorrent manslaughters. In R. v. Hedberg,[41] the maximum penalty was imposed for a drunken murder-rape in which the victim was beaten to death in extremely brutal fashion; a maximum term was also found deserved in Eccles v. The Queen[42] where three men, refused admission to a club, burned it down with gasoline and caused the death by asphyxiation of 30 people.

iv) Involuntary Homicides Arising out of Assaults

(1) Assaults on Adults

Again, the two main classes of manslaughter arising out of assaults are domestic and non-domestic incidents. Non-domestic cases vary greatly in nature, their common element being that the accused intended only to inflict injury, not death, on the accused. The sentence thus will be determined in relation to the culpability of the accused's intent, with an

added element to reflect the resulting death. For example, sentences of two years less a day and three years were imposed on two accused who, expelling a drunk from a discotheque, dropped him head first onto a concrete sidewalk and caused his death.[43] In R. v. Dubois,[44] a term of three years' imprisonment was imposed on a woman who carried out a knife attack on a another in a hotel washroom, after disarming the victim of the weapon.[45] The sentence would not have been inappropriate for a provoked attack with a knife whether death had resulted or not.

The domestic class of assault-manslaughters generally involves one situation: a wife-beating taken too far. Almost invariably, homicidal wife-beaters are intoxicated or nearly so. The normal range of sentence for such offences appears to be from three to eight years' imprisonment.[46] A term of 25 years has been imposed in such circumstances, in R. v. MacDonald,[47] although the Ontario Court in that case commented that it was difficult to "discern upon what precise ground the jury found the accused guilty only of manslaughter".

(2) Assaults on Young Children

Assaults on young children which result in homicide are treated in two different ways. In some cases, the death of a child is symptomatic of depression or other serious illness of the mother; in such circumstances, provided the behaviour leading to death was not too abhorrent, an individualized measure will be imposed. In other cases, an excess of violence, unthinking but nevertheless criminal, will have caused the death, and a jail term of up to about 10 years, depending on the seriousness of the violence inflicted, will be imposed.

The first class of sentence is illustrated by R. v. Bessette[48] and R. v. Sukraj.[49] In Bessette, the accused mother strangled her 6-year-old son. She was ill-educated, had been deserted by two marital or quasi-marital partners, and had just given birth to an unwanted, fifth child, had endured surgery and was suffering both physically and mentally. In view of her erstwhile separation from the other children, to whom she was thus not a danger, the Court suspended sentence and imposed three years' probation, conditional upon the continuation of psychiatric treatment. In Sukraj, the accused was only 20 and had immigrated into Canada at 14, to be married to a family friend at 15. Suffering from cultural isolation and depression, she was further irritated by the demands of caring for two small children without community support. Her 8-month-old son died after being pushed onto a hardwood floor. Finding that counselling and treatment would be more effective than incarceration, which would only result in further isolation, the Court imposed a sentence of 90 days' intermittent and one year' probation, with compulsory psychiatric treatment.

More serious cases, as indicated above, merit custodial terms. In R. v. Desjarlais,[50] the accused, a Metis woman, killed her 14-month-old daughter in an attempt to silence it by dropping it from shoulder height to the floor, twice. There was evidence that she had not provided adequate care for the daughter, was immature, aggressive, unreliable, and used drugs and alcohol in undesirable amounts. Shortly before its death, the child had spent eight months away from her under temporary wardship. Explaining the need to balance rehabilitation and counselling with societal denunciation, the Court substituted a term of two years less a day for the three years' imprisonment set at trial.

In R. v. Moracci,[51] the accused beat to death the son of his common-law wife. While the Court did not know exactly what happened, the

2-year-old had a V-shaped boot mark in his head. The accused had an excellent previous record both civilly, and in his employment with the armed forces. Outlining sentencing practice for such cases, MacDonald, J.A. stated:

> In my opinion the appropriate sentence for a manslaughter arising out of circumstances such as the present is somewhere between five and ten years. The sentence imposed by the trial judge, although on the low end of the scale, was within the appropriate range and, consequently, should not ... be disturbed. I may say that in cases of manslaughter arising out of child deaths, if there was evidence of a systematic course of violence toward such child culminating in a final fatal beating, then in my opinion the bare minimum sentence should be one of at least ten years. That type of situation has not been shown to exist here.[52]

v) Homicides in the Course of Other Offences

Reported cases dealing with manslaughter in the course of other offences, such as robbery, are rare in Canada. That the Courts do not look with much favour on those who set out to commit other serious offence and unintentionally kill during their misdeeds can, however, be seen from the decision of the Alberta Court in R. v. Guthrie and Guthrie.[53] The Guthries, aged 21 and 19, planned with one Trace to rob an apartment. While the three were inside, the female occupant awoke and Trace "went berserk", stabbing her to death with some 42 wounds. While he was convicted of murder the Guthries, as parties, were able to negotiate a plea to manslaughter. Their appeals against sentences of nine years' imprisonment were dismissed, despite their ages and cooperation with the police. The sentences of nine years were held to have been as lenient as possible in the circumstances.

vi) Homicides Caused By Criminal Negligence

Manslaughter by criminal negligence, especially where driving is concerned, is rarely prosecuted for strategic reasons. As Mewett and Manning point out, particularly in "motor manslaughter" cases, it is significantly easier to persuade a jury to convict for causing death by criminal negligence than manslaughter, even though the legal requirements for both are the same.[54]

Sentencing for offences prosecuted as manslaughter corresponds closely to sentencing for causing death by criminal negligence. The range of sentence is from suspension to about five years, reported cases being predominantly in the lowest reaches of the range. Marginal criminality can be involved, as in R. v. MacKay,[55] where the 17-year-old accused, thinking that a shotgun was not loaded, pointed it at a cup being held up by the deceased. It went off, with the unforeseen, unfortunate consequence of the holder's death. Sentence was suspended subject to two years' probation. More careless use of firearms known to be loaded may incur a reformatory term, as in R. v. St. Laurent,[56] where the accused hermit fired toward an intruder on his property to scare him away, and accidentally killed him. In R. v. Johnstone[57] a schizophrenic woman, being harassed by a drunken sister and a companion, carelessly fired a gun at the two and killed one. A term of 18 months' imprisonment, followed by probation, was imposed.

E. ABORTION AND ATTEMPTS

The offence of illegal abortion still carries a maximum penalty under the Criminal Code of life imprisonment, women who attempt to

procure their own miscarriage being liable to imprisonment for two years.[58] Prosecutions for these offences are extremely rare today. The only disposition reported in recent years, R. v. Parent[59] was a case of attempted abortion. The accused, who had a substantial record, but had attempted in more recent years to rehabilitate himself, was sentenced to three months' imprisonment for taking his pregnant girlfriend to his brother, apparently an experienced abortionist, who inserted an instrument into her genital organs several times and caused severe haemorrhaging. The case itself provides little help in indicating the appropriate range of sentence for such abortion and related offences, for the period of imprisonment was apparently imposed after a decision that a fine should not be imposed because the accused had no means to pay one. As will be shown in Chapter 27, such a disposition is an improper use of imprisonment, the implication being that the accused is going to prison because he cannot pay a fine, where a richer man would have received the non-custodial penalty. The Court further clouded the issue by discussion of whether a three-month sentence was "appropriate" in isolation from this issue, in view of the danger to the victim's life.

Footnotes to Chapter 14

1. 9 C.C.C. (2d) 49, 20 C.R.N.S. 398, [1973] 1 W.W.R. 262 (B.C.C.A.).

2. (1979), 10 C.R. (3d) S-8, 31 N.S.R. (2d) 579, 52 A.P.R. 579 (C.A.).

3. See e.g. R. v. Darrach (1978), 18 N. & P.E.I.R. 81, 1 M.V.R. 130, 47 A.P.R. 81 (P.E.I.C.A.) - six months for accused, no previous record, married with five children, whose passenger was killed after his car veered into the path of an oncoming truck, accused had been having Christmas drinks before accident; R. v. Mitchell (1981), 29 N. & P.E.I.R. 125, 82 A.P.R. 125 (P.E.I.C.A.) - four months for accused who, after drinking, caused accident in which passenger was killed.

4. (1976), 33 C.C.C. (2d) 215, 15 O.R. (2d) 103, 75 D.L.R. (3d) 38 (C.A.).

5. (1979), 3 M.V.R. 200 (Ont. C.A.).

6. See also R. v. Simms (1975), 10 N. & P.E.I.R. 242 (Nfld. Dist. Ct.) - 13 months for first offender, aged 19, who after drinking caused accident killing one passenger and injuring others; R. v. Atkinson (1977), 21 N.S.R. (2d) 21 (C.A.) - 18 months for accused, aged 34, who had been drinking and struck and killed lady pedestrian; R. v. Comeau (1979), 33 N.S.R. (2d) 77, 2 M.V.R. 321, 57 A.P.R. 77 (C.A.) - 16 months for accused, aged 48, who killed girl on bicycle while driving, intoxicated, home from work, accused suffered from emphysema and osteo-arthritis, no previous convictions; R. v. Grant, [unreported] April 2nd, 1981 (N.S.C.A.) - two years less a day for 23-year-old first offender who drank before and while driving, lost control of car and struck two cyclists, one of whom was killed. But see R. v. Aalders (1979), 31 N.S.R. (2d) 518 (C.A.) - 2-1/2 years for accused, aged 19, who drove after drinking and caused death of a person in another vehicle.

7. See e.g. R. v. Earle (1975), 8 N. & P.E.I.R. 488 (Nfld. Dist. Ct.) - nine months for first offender, speeding, who killed two passengers, trial took place some 19 months after charges laid.

8. 22 C.C.C. (2d) 472, 28 C.R.N.S. 327, [1975] 3 W.W.R. 385 (Alta. C.A.).

9. See also R. v. DeCoste (1979), 36 N.S.R. (2d) 466, 64 A.P.R. 466 (C.A.) - two years in light of "extremely high" blood-alcohol level; R. v. Hutchins (1980), 6 M.V.R. 225 (Que. C.A.) - two years less a day and probation for drunken driver whose car contained more beer and marijuana, and who had one previous conviction for driving "over 80".

10. (1974), 16 C.C.C. (2d) 156, 26 C.R.N.S. 103, 2 O.R. (2d) 698 (C.A.).

11. (1974), 6 N. & P.E.I.R. 123 (Nfld. C.A.).

12. (1975), 29 C.R.N.S. 342 (Ont. Co. Ct.).

13. (1976), 14 N.S.R. (2d) 269 (C.A.).

14. (1980), 8 M.V.R. 183 (Que. C.S.P.).

15. Criminal Code, s.218(1).

16. (1977), 33 C.C.C. (2d) 572 at 574 (Ont. C.A.).

17. (1979), 21 Crim. L.Q. 270 (Que. S.C.).

18. See e.g. R. v. Magliaro, [unreported] May 28th, 1981 (N.S. Co. Ct.) - "The range of sentences imposed in this province on charges of manslaughter vary considerably ... The sentencing range in manslaughter cases varies greatly in other provinces..."

19. See e.g. the discussion of manslaughter in Ruby, C.C., Sentencing (2nd ed. 1980, Toronto: Butterworths) at 428-433.

20. Thomas, D.A., Principles of Sentencing (2nd ed. 1979, London: Heinemann Books Ltd.) at 74.

21. (1980), 32 N.B.R. (2d) 606, 78 A.P.R. 606 (C.A.).

22. 5 C.C.C. (2d) 373, [1972] 2 W.W.R. 547 (Sask. C.A.).

23. (1979), 2 Man. R. (2d) 355 (C.A.).

24. See further R. v. Zanewich (1973), 11 C.C.C. (2d) 374 (Man. C.A.) - 30 months imprisonment for killing of brother following heated, drunken argument.

25. MacDonald, J.A. in R. v. McPhee (1977), 20 N.S.R. (2d) 520 (C.A.) concluded that the range was from four to 10 years; Sullivan, Co. Ct. J. in R. v. Magliaro, supra note 18, found it to be from two to seven years for a female provoked by sexual degradations.

26. R. v. Cormier (1974), 22 C.C.C. (2d) 235, 9 N.S.R. (2d) 687 (C.A.); R. v. Henry (1977), 39 C.R.N.S. 45 (Que. C.A.).

27. (1973), 14 C.C.C. (2d) 255 (Sask. C.A.).

28. (1978), 9 C.R. (3d) S-1 (Ont. H.C.).

29. (1975), 11 N.S.R. (2d) 60 (C.A.).

30. (1976), 29 C.C.C. (2d) 84, 33 C.R.N.S. 76 (Que. S.C.).

31. (1978), 4 C.R. (3d) S-53 (Ont. Prov. Ct.).

32. (1979), 2 Man. R. (2d) 62 (C.A.).

33. [Unreported] April 8th, 1981 (Sask. C.A.).

34. For a further example of this type of manslaughter see R. v. McPhee, supra note 25 - seven years' imprisonment for accused woman, intoxicated, aged 19, who stabbed a man who made derogatory remarks to her in a tavern.

35. (1972), 10 C.C.C. (2d) 184 (Ont. C.A.).

36. (1978), 45 C.C.C. (2d) 303 (Ont. C.A.).

37. (1977), 13 N. & P.E.I.R. 190 (Nfld. C.A.).

38. See also R. v. Henry (1975), 11 N.B.R. (2d) 24 (C.A.).

39. 4 C.C.C. (2d) 226, [1971] 3 O.R. 744 (C.A.).

40. (1973), 24 C.R.N.S. 289, 6 N.S.R. (2d) 504 (C.A.).

41. (1978), 15 A.R. 181 (T.D.).

42. [1974] C.A. 23.

43. R. v. Kitching and Adams, 32 C.C.C. (2d) 159, [1976] 6 W.W.R. 697 (Man. C.A.).

44. (1977), 3 A.R. 445 (T.D.).

45. See also R. v. Crothers (1978), 43 C.C.C. (2d) 27 (Sask. C.A.) - 3-1/2 years for man who, in course of dispute over drugs, fought with man who threatened to tear his home apart and when approached by assailant's wife shot her.

46. See e.g. R. v. Smith, 25 C.R.N.S. 350, [1974] 1 W.W.R. 635 (Sask. C.A.) - three years for accused, highly intoxicated, who beat wife to death but had no recollection of events, character and behaviour greatly changed since offence but these more properly for consideration of Parole Board; R. v. Wilson (1974), 10 N.S.R. (2d) 629 (C.A.) - five years for 50-year-old who beat common-law wife to death when she refused to leave her friends at a party and accompany her home; R. v. Ermineskin (1980), 23 A.R. 377 (C.A.) - six years for native Indian who beat wife to death while drunk, he was community leader, good previous record, but beating serious, victim had been alive for a considerable period during administration of blows to every part of her body, sentence took into account 18 months already served; R. v. Thorn (1978), 2 W.C.B. 243 (Ont. C.A.) - 12 years reduced on appeal to eight as "outside normal range for domestic homicide.

47. (1974), 20 C.C.C. (2d) 144, 27 C.R.N.S. 212 (Ont. C.A.).

48. [1974] C.A. 148.

49. (1980), 23 Crim. L.Q. 162 (Ont. S.C.).

50. [1980] 4 W.W.R. 676 (Alta. C.A.).

51. (1977), 20 N.S.R. (2d) 684 (C.A.).

52. Ibid. at 703 per MacDonald, J.A.

53. (1978), 5 C.R. (3d) S-33, 7 Alta. L.R. (2d) 90, 11 A.R. 177 (C.A.).

54. Mewett, A.W. and Manning, M., Criminal Law (1978, Toronto: Butterworths) at 466. For an example of a negligent driver prosecuted for manslaughter see R. v. Williams (1980), 7 Man. R. (2d) 67 (Co. Ct.) - three months' imprisonment plus fine and order prohibiting driving (presumably a probation order was drafted) for heavily impaired driver, speeding, who caused death of two others in head-on collision.

55. (1980), 40 N.S.R. (2d) 616 (C.A.).

56. (1979), 9 C.R. (3d) S-21 (Ont. H.C.).

57. (1980), 38 N.S.R. (2d) 313, 69 A.P.R. 313 (Prov. Ct.).

58. Criminal Code, s.251.

59. (1975), 24 C.C.C. (2d) 207 (Que. C.A.).

CHAPTER 15: OFFENCES OF NON-FATAL VIOLENCE

A. CAUSING BODILY HARM BY CRIMINAL NEGLIGENCE

The very small number of appellate decisions on sentence for causing bodily harm by criminal negligence, punishable by life imprisonment,[1] virtually precludes any useful discussion of the range of sentence. Appropriate dispositions can, however, usually be arrived at by comparison with sentencing for other offences. For example, cases where negligent driving causes injury are, mutatis mutandis, punished somewhat less severely than if the victim had died;[2] sentence for negligence involving firearms may be set with reference to cases of criminal negligence causing death and other firearms infractions.[3]

B. ATTEMPTED MURDER

Life imprisonment is the maximum sentence for attempted murder.[4] In the vast majority of cases a tariff sentence is upheld, on one of a number of ranges according to the circumstances. The only individualized disposition normally possible, for very dangerous offenders, is life imprisonment,[5] although instances also exist of long fixed terms to cope with serious cases where the offenders were unstable men.[6] In R. v. Valenzuala[7] and R. v. Chamberlain[8] terms of 30 months and 18 months' imprisonment, respectively, were upheld for very youthful offenders. These sentences, far below those normally imposed for attempted murder, obviously partook of a great deal of individualized consideration.

At the other highest level of culpability lie three types of attempted murder: planned executions which fail, attempted murder of

policemen and attempted murder in the course of robberies. Precedents are rare for the first class, the only recent authority being R. v. Bond,[9] where the Quebec Court upheld concurrent terms of eight and 20 years for conspiring and attempt to murder.

Attempted murder of policemen requires special consideration because, as has often been pointed out, "the police are entitled to special protection".[10] Accordingly, it is submitted that the sentence for such an offence will normally be 10 years' imprisonment or more,[11] although in R. v. Singh,[12] noting that sentencing was most difficult in view of the accused's age (17), a term of only seven years was imposed.

Attempted murder in the course of a robbery is also treated very severely, in light both of the deliberation involved and the accused's apparent willingness to sacrifice the lives of others for his material gain. In R. v. Letendre,[13] for example, a term of 14 years was upheld for the shooting of an employee who appeared to be moving toward the telephone during a robbery of a jewellery store.[14] Where the offence is further aggravated by the intended victim being an intervening police officer, a life sentence imposed on tariff grounds may be appropriate.[15]

A common set of circumstances leading to charges of attempted murder consists of a prolonged period of matrimonial strife, culminating in an attempt by one spouse on the life of the other. The normal range of sentence for such offences, where unpremeditated, appears to be from three[16] to six years' imprisonment. An offence held "grave" of its kind was found to merit a six-year term in R. v. Champagne,[17] where following several hours of argument the accused slashed the throat of his wife. In R. v. Chown[18] the accused, who shot his wife and son after a separation, was found undeserving of a 10-year term and sentenced on appeal to six years' imprisonment.

Premeditation, or a particularly callous course of conduct moves the offence into a higher range, from 10 to 15 years. In R. v. Price[19] a man who drove to his former common-law wife's house with a rifle and fired four shots at her received a sentence of 10 years; 15 years was the term in R. v. Campbell,[20] as bad a case as can be imagined, where the accused shot his wife several times, poured gasoline on her, and set her on fire. The appeal Court felt that a term of 25 years, imposed by the trial Judge, did not give sufficient weight to the accused's previous good character.

In addition to the above classes of attempted murder, there remain a number of less common situations, including serious attacks arising out of arguments, and irrational attempts to kill by intoxicated or irresponsible persons. In sentencing for such offences, much will depend on the Court's subjective assessment of the gravity of the offence and the responsibility of the accused for his actions. Attempts to kill arising out of arguments or disputes generally attract penitentiary terms in the region of five years,[21] although where there is little in the way of mitigation the sentence may be much higher. In R. v. Paradis[22] the accused, refused admission to a club, took out a gun and shot the doorman, causing serious injury. Finding that the case was not of the worst kind, but nevertheless "odious", the Quebec Court substituted a sentence of 15 years for a life term imposed at trial.

Irrational or drunken attempts to murder appear to merit imprisonment for a period between three and eight years. In R. v. Murphy[23] the drunken accused shot at a taxi whose driver was trying to escape from him, and received a term of three years' imprisonment. The same sentence was imposed in R. v. Cadieux et al.[24] on two accused who embarked on a high speed chase of strangers in a truck, riddling it with bullets. Both accused,

regular users of drugs and alcohol, were treated as young offenders, with some effect given to their chances of rehabilitation. In R. v. Ogden[25] the accused, a young man suffering from "anger, hostility and frustration and the effects of the abuse of drugs and alcohol" fired several shots, indiscriminately, at people and objects, including a police officer. The appeal Court upheld a sentence of four years for attempted murder, but increased a consecutive term for use of a firearm to four years from one, in order to reflect more accurately the gravity of the offences.

C. DISCHARGING FIREARM WITH INTENT TO WOUND, ETC. OR PREVENT ARREST

The Criminal Code provides:

> 228. Every one who, with intent
> (a) to wound, maim or disfigure any person
> (b) to endanger the life of any person, or
> (c) to prevent the arrest or detention of any person,
> discharges a firearm, air gun or air pistol at or causes bodily harm in any way to any person, whether or not that person is the one mentioned in paragraph (a), (b) or (c), is guilty of an indictable offence and is liable to imprisonment for fourteen years.

The two most prosecuted offences under s. 228 are wounding, pursuant to s. 228(a), and discharging a firearm with one of the necessary intents. The latter is discussed here.

The line between attempted murder and discharging a firearm with intent to endanger life is a very fine one, the subtle distinction being that in the latter instance no actual intention to kill has been established. As a result, the pattern of sentencing for discharging is similar to that for attempted murder, but the sentence quantums are lower. For example,

discharging a firearm in the course of a robbery attracts a heavy penalty, from five years[26] to the maximum,[27] while a similar act in the course of an argument or fight generally attracts a reformatory term of nine months or more.[28] A life sentence being unavailable, a lengthy fixed term is the normal mode of dealing with a dangerous, mentally ill offender,[29] and those who choose police officers as their victims are dealt with more severely than most others.[30]

D. WOUNDING

Wounding (strictly, causing bodily harm with intent to wound, contrary to s. 228(a) of the Criminal Code) carries a maximum penalty of 14 years' imprisonment.

Though it may confidently be stated that wounding virtually always requires a jail term, three main classes of offending require separate consideration. The first, and most leniently treated, is wounding arising out of an argument or brawl. For such offences the normal sentence is a reformatory term from six months upward, although greater[31] and lesser[32] sentences have been imposed in special circumstances. Typical cases include R. v. Lawley[33] where the accused, aged 34 and married with one child, stabbed a woman with her own knife during a fight which developed when she resisted his advances in a bar. A sentence of two years less a day, and a fine of $2,500, were imposed.[34] Provocation of a violent nature itself renders the offence somewhat less serious; in R. v. Beardy[35] the victim assaulted the accused's parents at a drinking party. The accused, a widow of 20, obtained a shotgun and ordered him to leave, then shot off his hand as he departed. The Court, finding that the use of such excessive force required incarceration, set aside a suspension of sentence and sent the accused to jail for six months.

The second common type of wounding is characterized by previous planning to inflict injury on the victim. Here, the element of premeditation increases the range of sentence somewhat. In R. v. Short and Landry[36] a sentence of three years was imposed on one of two men who inflicted a deliberate beating on a fellow prisoner, culminating in their slamming a steel door against his head and causing a severe laceration. Where the violence is part of a planned robbery, as in cases of attempted murder, this aggravates the sentence still further. In R. v. Hefford[37] a sentence of eight years was imposed for use of a knife to inflict severe cuts on the proprietor during the robbery of a grocery store.

The third class of wounding dispositions is characterized not by the nature of the offence but by that of the accused. Life imprisonment being unavailable, a lengthy fixed term is normally imposed for serious woundings committed by dangerous men, especially those with records of violence. Such dispositions have varied in recent years from five years, for an accused who was a lesser participant in a planned beating[38] through 10 years for a savage sexual attack on an elderly lady[39] to the maximum sentence, 14 years, for psychopathic attacks on a reformatory guard[40] and a young girl.[41]

E. COMMON ASSAULT

Common assault, the least form of interpersonal violence, is punishable only on summary conviction.[42] An essential precondition of common assault in the strict sense is the absence of substantial harm to the victim, although a conviction often results from a negotiated plea of guilty of an included offence where more serious charges were originally laid.[43]

Generally, a custodial term will only be imposed for common assault where there are aggravating factors, such as a record of violence, an especially vulnerable victim or harm to the victim more serious than usual. In R. v. Matrai[44] the Ontario Court felt that a custodial term should be imposed because the victim was a visiting Premier (of the Soviet Union), and in R. v. McNamara; McNamara v. R.[45] a three-month term was upheld, the Court applying the commonly-held view that custodial sentences are appropriate for assaults on young, defenceless children. A maximum sentence of six months was imposed in R. v. Christmas,[46] where blows administered to the victim resulted in the loss of his left eye, leaving him completely blind. Three months intermittent was imposed in R. v. Borden,[47] where the accused had a record indicating some propensity for violence.

Non-custodial terms are generally considered appropriate for first offenders convicted of moderately violent assaults. While fines are often imposed in such cases,[48] it is not uncommon for the Court to grant a discharge. The discharge provisions have been particularly useful in cases involving persons in loco parentis who discipline too harshly,[49] and persons convicted of assaults arising out of fights during sporting events.[50]

F. UNLAWFULLY CAUSING BODILY HARM, ASSAULT CAUSING BODILY HARM

With the important difference that unlawfully causing, and assault causing, bodily harm are punishable on indictment by up to five years' imprisonment, as well as on summary conviction,[51] the principles governing sentencing for these offences are essentially similar to those for common assault. First-time violent offenders who assault, especially if under

provocation, usually receive a non-custodial sentence,[52] and discharges are common for over-violent hockey players.[53]

The normal range of sentence for more serious assaults is wide within the statutory limits, from about three months to three years. While bodily harm is an essential precondition of conviction, its extent will greatly affect sentence. Thus in R. v. Luther[54] a term of three months indeterminate was held sufficient for an accused who assaulted a fellow prisoner by banging her head against a wall, there being no evidence that medical treatment was required for the victim. In R. v. Mailman,[55] however, where a similar assault also involved kicks to the victim's head, a sentence of two years' imprisonment was imposed. The victim in Mailman, also a fellow prisoner, had bled from the ears and nose, and there had been some concern for his life. In R. v. Squires[56] maximum sentences were upheld for an accused who brutally beat the occupants of an apartment with chains and sticks.

Other aggravating factors include the vulnerability of the victim, planning of the assault, and, of course, a previous record of violence. Assaulters of young children who cause serious injuries routinely receive custodial terms.[57] In R. v. Simon[58] a sentence of two years' imprisonment was upheld for an assault on an elderly cripple.

Planned assaults, particularly those committed in the course of other offences such as robbery or extortion, merit severe treatment. In R. v. Regan, Huntley, Hasay and Blenkinsop[59] the Alberta Court upheld two-year sentences for men who engaged in the beating of youths to collect money owed pursuant to some illegal transaction. In R. v. Letendre,[60] where an assault was committed during the robbery of a jewellery store, it was held to merit a term of three years' imprisonment.[61] A past record had aggravating

effect leading to a two-year sentence in R. v. Wallace,[62] where the accused, previously convicted of several violent crimes, hit his landlord over the head with a shotgun.

It has also been held that a period of confinement of the victim, accompanied by terrorizing and assaulting him or her, merits an increased sentence.[63] A more vexed question is whether the victim's being a police officer can aggravate sentence; in R. v. James[64] the Prince Edward Island Court ofAppeal held that it could not. The Court stated that if the Crown wished consideration to be made of such an aspect, it should have laid charges of assaulting a peace officer. It is submitted that this ruling is incorrect; the better view is that, while on a s.245(2) charge a sentence on the scale for assaulting police cannot be levied, a sentence for assault causing bodily harm may certainly be aggravated by the victim's being a constable. This position best explains the otherwise seemingly harsh dispositions in a number of s.245(2) cases involving police victims.[65]

G. ASSAULTING PEACE OFFICER

Assaulting a public or peace officer engaged in the execution of his duty is punishable on summary conviction, or by five years' imprisonment on indictment. The general policy of the Courts was aptly stated by McEwen, J. in R. v. Groves:[66]

> In general, the assault of a police officer is an offence warranting a period of imprisonment. However, the Court ought to explore the possibility of making an appropriate disposition ... without imposing a custodial sentence.[67]

The first part of the statement is important. McEwen, J.'s decision[68] in Groves itself, having been upheld on appeal, was the only reported appellate

decision for some time in which a non-custodial measure was imposed. The more usual range of sentence for unplanned, spontaneous assaults appears to be in the range of one month to two years' imprisonment. Sentences at the lowest end of the range are reserved for very minor technical assaults, such as pushing an officer during a demonstration,[69] while more serious beatings merit sentences in its higher reaches.[70]

H. KIDNAPPING

Kidnapping is an offence punishable by life imprisonment.[71] Despite the popular connotation of kidnapping as abduction followed by ransom demands, in reality the majority of charges of kidnapping which come before the appellate Courts relate to abductions for some ulterior purpose, commonly rape. In such cases, the common practice is to impose a lesser sentence for the kidnapping, concurrent with the sexual or other offence, which itself is aggravated by the fact of abduction.[72] This seems fair, as often a rape or indecent assault committed by luring the victim into a car and driving him or her to a remote place is only marginally, if at all, worse than luring the victim into an apartment or remote place before commencing criminal behaviour. A recent example, typical of such cases, is R. v. Thornton[73] where the accused kidnapped a girl at gunpoint and held her for about 13 hours, during which time he raped, assaulted and attempted to strangle her. Sentences totalling eight years were imposed for the rape and use of the weapon, with a six-year concurrent term for the abduction. In cases where the other offences committed are minor in relation to the abduction, however, the kidnapping term will be the longer, its precise length determined by the nature and length of the abduction and, sometimes, other acts committed during its currency.[74]

The archetypal kidnapping, abduction for ransom, is always a serious offence meriting a lengthy period of imprisonment. A related type of kidnapping, which involves extorting money or goods from the person or persons abducted, is treated similarly. The normal range for kidnapping for ransom is from 10 to 20 years' imprisonment. Bank managers are popular victims; in Lamoureux v. The Queen[75] a term of 20 years' imprisonment was imposed for the taking, followed by ransom demands, of an 11-month-old baby whose father was the manager of a Caisse Populaire; terms of 20 and 12 years were upheld in R. v. Mantha et al.,[76] where the wife of a bank manager was seized and used to make ransom demands. The longer term was imposed on the ringleader, the shorter being held appropriate for a man of 28 with no previous record whatsoever, but who had played a major role in the crime.[77]

Kidnapping in order to extort from the victim also attracts a custodial term, although in a lower range. A case felt to be severe of its kind was R. v. Keller and Schofield,[78] where the two accused, both with substantial records, kidnapped a man and a woman. They drove to a remote area and beat their victims, threatening them with mutilation and death if they did not reveal the whereabouts of 60 lb. of marijuana they were thought to have brought from India. The appeal Court, holding that it was incumbent upon the trial Judge to show that such offences would be dealt with in no uncertain way, upheld terms of 12 years' imprisonment. Somewhat shorter terms, of 30 months and two years less a day, were imposed in R. v. Deneau et al.,[79] where the two accused abducted their victim for some 3-1/2 hours in an attempt to extort $5,000 or explosives from him. In Deneau, however, there were substantial mitigating factors for both accused, including 8-month periods of pre-trial custody, a good previous record for the second accused and, in the case of the first accused, that the sentence would be served consecutively to one already being served.

A third type of kidnapping occasionally brought before the Courts involves abduction in the course of escape from a police chase, usually after commission of some other crime. Here, while the precise nature of the act of kidnapping will have some relevance, the sentence is normally fixed by reference to the overall gravity of the accused's conduct and other sentences imposed. In R. v. Nicholls,[80] for example, an accused who robbed a bank at gunpoint and fled, committing several offences including a hostage-taking in the course of his flight, received a term of 20 years for kidnapping. While the Court held the terms imposed, which with other fixed terms resulted in a total of 27 years, to be correct, their length was largely academic since the accused was also sentenced to life imprisonment for the murder of a police officer.

I. FORCIBLE CONFINEMENT

Forcible confinement is punishable pursuant to s.247(2) of the Criminal Code with five years' imprisonment. The rarity of convictions under this section, coupled with a corresponding lack of reported decisions by appellate courts, precludes any detailed analysis of sentencing quantums. What does appear from the reports, however, is that the majority of cases of unlawful confinement are only part of larger transactions, such as escapes from prison,[81] abductions for political purposes[82] or "kangaroo court" episodes related to accusations of misdoings in the course of other criminal conduct.[83] Almost invariably, such offences involve the use of firearms, and result in custodial sentences.[84]

J. ABDUCTION OF CHILDREN

The abduction of a child under 14 is punishable by up to 10 years' imprisonment.[85] Most of the limited number of such cases reported from appellate courts in recent years concern parents who have taken children in defiance of custody orders, perhaps feeling that the custody order is unjust or that the child is exposed to immorality by virtue of the estranged spouse's having commenced a relationship with a third party. The operative factors appear to be the length of the abduction, the amount of information supplied to the deprived spouse to dissipate some concerns about the child's whereabouts, and what is eventually done with the child. At one extreme, in R. v. Fernandez,[86] a sentence of five years' imprisonment was imposed upon a man who took his child from a car, took it to Spain, and left it in the care of strangers in a covenant, there being no evidence that the child would ever be brought back to Canada. The act was committed not in the interests of the child but to punish the mother. More moderately, a term of 90 days with a recommendation of temporary absence was imposed in R. v. Hart,[87] where the accused took his daughter to the United States after interim access under the belief that her mother's adultery would have an adverse effect upon the child. In R. v. Kehoe,[88] where the accused took his own son in defiance of a custody order but telephoned the mother soon after, albeit to tell her that the child would not be returned, the Ontario Provincial Court granted an absolute discharge.

A rarer type of case is the abduction of a child for sexual purposes. Here the sentence awarded would appear to be governed largely by the fact of sexual abuse, perhaps aggravated by the abduction. In R. v. Taylor,[89] for example, a term of nine months imprisonment was upheld for an

accused who encouraged a 10-year-old boy to indulge in homosexual activities, professing to be "vacationing" with him in Western Canada.

K. ABANDONING CHILD

The Criminal Code provides:

> 200. Every one who unlawfully abandons or exposes a child who is under the age of ten years, so that its life is or is likely to be endangered or its health is or is likely to be permanently injured, is guilty of an indictable offence and is liable to imprisonment for two years.

The rarity of this offence again precludes generalization. In 1973, of nine persons convicted of this offence seven received non-custodial sentences and the remaining two received jail terms of six months or less. The only reported case for some time is R. v. X.[90] where the accused locked his 8-year-old son in a closet for 45 days, allowing him out only at mealtimes. Investigations revealed a history of family problems, but the accused had been intransigent despite attempts to have him pursue family therapy. Taking into account three months served pending trial, a further sentence of three months' imprisonment was imposed.

Footnotes to Chapter 15

1. Criminal Code, s.204.

2. See e.g. R. v. MacPhee (1974), 9 N.S.R. (2d) 429 (C.A.) - three months' imprisonment and probation for driver, intoxicated, who injured two women while fleeing from a police chase. In fact, many cases of causing injury arise out of incidents where death was also caused, and shorter, concurrent terms are imposed for the persons merely injured: see e.g. R. v. Mellstrom, 22 C.C.C. (2d) 472, 29 C.R.N.S. 327, [1975] 3 W.W.R. 385 (Alta. C.A.); R. v. Hutchin (1980), 6 M.V.R. 225 (Que. C.A.).

3. See e.g. R. v. MacArthur (1978), 39 C.C.C. (2d) 158, 5 C.R. (3d) S-41, 15 N. & P.E.I.R. 72, 38 A.P.R. 72 (P.E.I.C.A.) - suspended sentence held inappropriate for husband who shot his wife, intending to scare her but causing some permanent damage, but upheld in view of impropriety of Crown's bringing appeal after failing to make submissions as to sentence at trial.

4. Criminal Code, s.222.

5. See e.g. R. v. Gyulay, [unreported] February 13th, 1981 (B.C.C.A.) -life sentence for attempted murder of policeman by shooting - accused had previous conviction for same offence; R. v. Simpson, [unreported] March 27th, 1981 (Ont. C.A.) - life sentence for "particularly bizarre" stabbing, accused suffered from severe personality disorder, explosive, impulsive, and "quite dangerous". Cf: R. v. Gionet (1977), 1 C.R. (3d) S-16, 22 N.S.R. (2d) 316, 31 A.P.R. 316 (C.A.) - two years less one day plus probation for schizophrenic, treatable, who shot girlfriend in the head with a rifle.

6. See e.g. R. v. Rushton (1975), 13 N.S.R. (2d) 628 (C.A.) - 10 years for accused who raped and stabbed 15-year-old girl, he suffered from personality disorder; R. v. Faber (1973), 16 Crim. L.Q. 16 (Sask. C.A.) - nine years for unprovoked attack with wrench on woman, stranger, Court noted that if he became safe while in penitentiary, could be released before service of full term completed.

7. (1980), 21 A.R. 96 (Prov. Ct.).

8. (1974), 22 C.C.C. (2d) 361 (Ont. C.A.).

9. (1977), 1 W.C.B. 300 (Que. C.A.).

10. R. v. Singh (1979), 3 W.C.B. 369 (Ont. C.A.).

11. See e.g. R. v. Miller and Kyling (1971), 13 Crim. L.Q. 431 (Que. C.A.) - 20 and 15 years upheld for two accused who opened fire when trapped by police in a road-block; R. v. Comeau (1973), 14 C.C.C. (2d) 472, 6 N.S.R. (2d) 238 (C.A.) - 10 years, concurrent on two counts, for firing rifle at moving police car

12. Supra note 10.

13. 25 C.C.C. (2d) 180, [1975] 6 W.W.R. 360 (Man. C.A.).

14. Cf: R. v. Chapman (1978), 3 W.C.B. 125 (Man. C.A.) - total of seven years for shooting of victim in course of robbery. With respect, the dissenting opinion of O'Sullivan, J.A., suggesting a term of 13 years, appears to be more in line with authority from the same Court.

15. R. v. Wood (1976), 1 A.R. 35 (C.A.).

16. See e.g. R. v. Hinton (1980), 5 W.C.B. 22 (Alta. C.A.) - three years for accused who fired rifle through door of home after long period of matrimonial strife, term of seven years imposed at trial found "high in the circumstances".

17. (1980), 5 W.C.B. 22 (Man. C.A.).

18. (1977), 18 N.B.R. (2d) 514 (C.A.).

19. (1978), 9 C.R. (3d) S-6 (B.C.C.A.).

20. (1977), 38 C.C.C. (2d) 6, 1 C.R. (3d) 309, S-49, 17 O.R. (2d) 673 (C.A.).

21. See e.g. R. v. Ewing (1977), 7 A.R. 218 (T.D.); R. v. Legault (1980), 33 N.B.R. (2d) 481 (C.A.).

22. (1976), 38 C.C.C. (2d) 455 (Que. C.A.).

23. (1981), 43 N.S.R. (2d) 676, 81 A.P.R. 676 (C.A.).

24. (1978), 3 W.C.B. 53 (Ont. H.C.).

25. [Unreported] May 12th, 1981 (B.C.C.A.).

26. See e.g. R. v. Ashton, [1970] C.A. 576.

27. See e.g. R. v. Ferland, [1970] C.A. 831.

28. See e.g. R. v. Amos (1978), 21 Crim. L.Q. 278 (Ont. S.C.) - total sentence of 18 months for shooting brother and pointing weapon at two other persons; R. v. Russell (1974), 26 C.R.N.S. 248 (N.S.C.A.) - nine months for shooting incident arisng out of scuffle in a bar; R. v. Hudson (1980), 24 A.R. 361 (N.W.T.S.C.) - 15 months for shooting one of two men who had recently "beaten up" the accused.

29. See e.g. R. v. Boomhower (1974), 20 C.C.C. (2d) 89, 27 C.R.N.S. 188 (Ont. C.A.) - seven years for young man who fired gun at police investigating fire started by him at parents' home, accused found to be suffering from personality disorder.

30. See R. v. Boomhower, ibid; R. v. Green (1980), 4 W.C.B. 431 (Ont. C.A.) - 10 years for shooting one police officer in arm; R. v. Birt (1974), 6 N.

& P.E.I.R. 249 (P.E.I.C.A.) - 3-1/2 years for discharging shots at police car.

31. See e.g. R. v. Moore (1981), 6 W.C.B. 77 (Man. C.A.) - four years reduced to 30 months for accused who reacted excessively to brawl initiated by victim, but accused did have short criminal record.

32. See e.g. R. v. Courchene (1980), 5 W.C.B. 140 (Man. C.A.) - time served (one month) substituted for six month term for accused who was struck by victim with baseball bat in attempt to expel him from apartment building, then pulled out knife and stabbed his aggressor, accused aged 21, no record of violence.

33. (1977), 1 W.C.B. 346 (B.C.S.C.).

34. See also R. v. Mayer (1979), 18 A.R. 229 (T.D.) - 18 months for violent attack on father with bottle or steel-toed boots, accused had harboured resentement against father for years because of "sexual matters between the two", both were drunk at time; R. v. Knowel (1979), 3 W.C.B. 175 (Ont. Co. Ct.) - 15 months for 21-year-old who stabbed younger victim in face, dispute arose over $6 worth of cloth, case took three years to come to trial.

35. (1980), 4 W.C.B. 491 (Man. C.A.). See also R. v. McCurdy (1978), 2 W.C.B. 527 (Sask. C.A.) - reduction of two years less a day to one year on appeal, report states "while offence serious apparent that altercation leading to wounding not instigated by accused."

36. (1980), 41 N.S.R. (2d) 622, 76 A.P.R. 622 (C.A.).

37. (1980), 4 W.C.B. 409 (B.C. Co. Ct.).

38. Pye v. The Queen; Young v. The Queen (1974), 26 C.R.N.S. 175 (N.S.C.A.); both had lengthy records, Pye, leader, received a term of eight years.

39. R. v. Ross (1979), 1 Man. R. (2d) 242 (C.A.), leave to appeal to S.C.C. refused 3 Man. R. (2d) 270n, 31 N.R. 360n.

40. R. v. Fisher (1975), 23 C.C.C. (2d) 449 (Ont. C.A.).

41. R. v. Bradbury (1973), 14 C.C.C. (2d) 139, 23 C.R.N.S. 293 (Ont. C.A.).

42. Criminal Code, s.245(1).

43. See e.g. R. v. Knippleberg et al. (1979), 4 W.C.B. 210 (B.C. Co. Ct.) - supended sentence and probation for accused who assaulted police officers in tavern, originally charged with assaulting police officer in execution of duty.

44. 6 C.C.C. (2d) 574, [1972] 2 O.R. 752 (C.A.).

45. (1979), 12 C.R. (3d) 210, 48 C.C.C. (2d) 201 (Ont. Co. Ct.).

46. (1975), 12 N.S.R. (2d) 489 (C.A.).

47. (1979), 39 N.S.R. (2d) 357, 71 A.P.R. 357 (Co. Ct.); see also R. v. Finlayson (1976), 11 N. & P.E.I.R. 524 (P.E.I.S.C.).

48. See e.g. R. v. Tanner (1979), 3 W.C.B. 460 (Man. C.A.) - $1,500 fine for first offender who drove car into victim.

49. See e.g. R. v. Kanhai (1981), 6 W.C.B. 123 (Sask. Dist. Ct.) - absolute discharge for teacher who "over-disciplined" student by banging his head against door; but see R. v. Ogg-Moss (1980), 4 W.C.B. 267 (Ont. Co. Ct.) - fines to total of $500 for nurse at centre for mentally retarded who hit one patient on head with spoon and another in face with fist.

50. See e.g. R. v. Kelly (1979), 4 W.C.B. 103 (B.C. Co. Ct.) - conditional discharge appropriate for accused who used stick during serious fight in hockey game.

51. Criminal Code, s.245(2).

52. See e.g. R. v. Grady (1974), 10 N.S.R. (2d) 90 (C.A.) - $500 fine for accused who punched manager on learning that he was fired from his job; R. v. Griffin (1975), 23 C.C.C. (2d) 11, 7 N. & P.E.I.R. 139 (P.E.I.C.A.) - absolute discharge for over-violent arrest by police officer, which caused arrestee to lose an eye; R. v. Hargie (1975), 23 C.C.C. (2d) 240 (Ont. Co. Ct.) - two years' probation for man who kicked and punched uncle, overreacting to threats, despite death of victim; R. v. Wood (1975), 24 C.C.C. (2d) 79 (Ont. C.A.) - $300 fine and probation for assault on smaller man. See further R. v. Miles, 24 C.C.C. (2d) 529, [1975] 5 W.W.R. 126 (Alta. C.A.), aff'd [1977] 1 S.C.R. 195, [1976] 3 W.W.R. 664, 33 C.R.N.S. 265, 8 N.R. 211; R. v. Andersen (1976), 1 A.R. 348 (C.A.); R. v. Murphy (1976), 11 N. & P.E.I.R. 491 (Nfld. Dist. Ct.); R. v. Ekson (1978), 14 A.R. 25 (Dist. Ct.); R. v. Perry and Bernard (1980), 25 N. & P.E.I.R. 115, 68 A.P.R. 115 (P.E.I.S.C.).

53. See e.g. R. v. Watson (1975), 26 C.C.C. (2d) 150 (Ont. Prov. Ct.); R. v. Henderson, [1976] 5 W.W.R. 119 (B.C. Co. Ct.); R. v. St. Croix (1979), 47 C.C.C. (2d) 122 (Ont. Co. Ct.).

54. 5 C.C.C. (2d) 354, 16 C.R.N.S. 14, [1972] 1 O.R. 634 (C.A.).

55. (1977), 17 N.B.R. (2d) 117 (C.A.).

56. (1977), 35 C.C.C. (2d) 325 (Nfld. C.A.).

57. See e.g. R. v. Cudmore, 5 C.C.C. (2d) 536, [1972] 1 O.R. 812 (C.A.) - one year for assault on 4-year-old; R. v. McNamara; McNamara v. R. (1979), 48 C.C.C. (2d) 201, 12 C.R. (3d) 210 (Ont. Co. Ct.) - three months for vigorous slapping of child causing bruising; R. v. Bourgeois (1978), 29 N.S.R. (2d) 596, 45 A.P.R. 596 (C.A.) - three years for drunken assault on 5-year-old stepdaughter, accused had previously beaten his son to death.

58. (1975), 25 C.C.C. (2d) 159 (Ont. C.A.).

59. 24 C.C.C. (2d) 225, [1975] 4 W.W.R. 335 (Alta. C.A.).

60. Supra note 13.

61. See also R. v. Atkinson, Ing and Roberts (1978), 43 C.C.C. (2d) 342, 5 C.R. (3d) S-30 (Ont. C.A.) - two years less one day plus probation for accused who deliberately set out to beat up homosexuals in a park known to be frequented by such persons, victims received serious injuries.

62. (1973), 11 C.C.C. (2d) 95 (Ont. C.A.).

63. See e.g. R. v. Lamoureux and Hall, [unreported] March 23rd, 1981 (Man. C.A.) - 18 months for accused who committed assaults arising out of private feud, both were first offenders but assault was "brutal and vicious and of a duration that it was something of a sadistic ritual of punishment"; R. v. Azure (1978), 15 A.R. 457 (T.D.) - two years concurrent for 17-year-old alcoholic who abducted taxi driver for some 20 minutes, cut her with a knife during struggle, and was finally apprehended while in a struggle with the driver, holding the knife close to her chest.

64. (1971), 3 C.C.C. (2d) 1, 14 C.R.N.S. 186, 1 N. & P.E.I.R. 398 (P.E.I.C.A.).

65. See e.g. R. v. Organ (1979), 2 Man. R. (2d) 211 (C.A.) - six months for 25-year-old with no previous record who hit plain-clothes officer with metal rod during scuffle; R. v. Callaghan (1974), 9 N.B.R. (2d) 681 (C.A.) - six months for accused who caused a few minor cuts and bruises to officer attempting to handcuff him, accused had some previous convictions for assault.

66. (1975), 26 C.C.C. (2d) 468 (Ont. Prov. Ct.), condition of probation order that compensation be paid to the constable struck out on appeal (1977), 37 C.C.C. (2d) 429, 39 C.R.N.S. 366, 17 O.R. (2d) 65, 79 D.L.R. (3d) 561 (H.C.).

67. Ibid. at 473 per McEwen, J.

68. Supra note 66.

69. R. v. Dilivio (1970), 14 C.R.N.S. 185 (Ont. C.A.).

70. See R. v. Reid et al. (1976), 14 N.S.R. (2d) 92 (C.A.) - two years for group of men who struck police with broken pool cues; R. v. England; R. v. Bartlett (1979), 20 N. & P.E.I.R. 530, 53 A.P.R. 530 (Nfld. C.A.) - one year plus probation for first offender and man with one minor conviction who assaulted officers trying to arrest their companion, one officer suffered broken leg and rib. For cases involving more moderate violence and sentences see R. v. Bruce (1980), 3 Man. R. (2d) 85 (C.A.) - six months for accused with long record who kicked a store detective in

the throat; R. v. March (1978), 25 N. & P.E.I.R. 53, 68 A.P.R. 53 (Nfld. Dist. Ct.) - two months plus probation for accused who kicked an officer, arresting another, from behind on the knee; R. v. Higginbotham (1980), 40 N.S.R. (2d) 635 (C.A.) - four months concurrent for 16-year-old who escaped capture by striking constable with one blow to the side of the head.

71. Criminal Code, s.247(1).

72. See e.g. R. v. Levesque (1980), 19 C.R. (2d) 43 (Que. Sup. Ct.) - three years concurrent for kidnapping, concurrent with six year terms for gang rape of female abducted.

73. (1980), 42 N.S.R. (2d) 647, 77 A.P.R. 647 (C.A.).

74. See e.g. R. v. Oakley, 39 C.R.N.S. 105, [1977] 4 W.W.R. 716, 36 C.C.C. (2d) 436, 4 A.R. 103 (C.A.) - six years concurrent on two counts, for truck driver who tied up two hitch-hikers in the sleeper part of his vehicle for purposes of committing indecencies on them, shorter sentences for the indecencies imposed to run concurrently; R. v. Azure, supra note 63 - seven years for 17-year-old alcoholic who abducted female taxi driver, concurrent with lesser terms for assault and attempted wounding.

75. [1973] C.A. 660.

76. (1980), 4 W.C.B. 259 (B.C.C.A.).

77. Mention should be made here of the exceptional case of R. v. Cossette-Trudel and Cossette-Trudel (1979), 11 C.R. (3d) 1 (Que. C.S.P.), where a term of two years less a day was imposed for the kidnapping of a diplomat. Of course, the case can not be taken as indicative of sentencing policy for less unique cases not possessed of the incredibly effective mitigating factors extant in that case. Another case in which substantial mitigation brought the sentence out of the range, to seven years' imprisonment, is R. v. Cloutier (1977), 19 Crim. L.Q. 275 (Que. C.A.). Cloutier, a highly educated first offender of 22, with a friend, kidnapped a bank manager's wife and daughters, obtaining $91,000 in cash and $4,000 in cheques by their threats. Cloutier was depressed, led by his friend, deeply remorseful, and had voluntarily confessed the crime. Feeling that an example still had to be made, the Court felt that a sentence of seven years' imprisonment would ensure exemplarity while giving due effect to the many mitigating factors in the case.

78. [1972] 6 W.W.R. 364 (Sask. C.A.).

79. (1980), 5 W.C.B. 114 (Alta. C.A.).

80. (1978), 9 A.R. 283 (C.A.).

81. See e.g. R. v. Bird (1979), 5 Sask. R. 208 (C.A.) - 18 months consecutive for confinement of two guards during escape from prison.

82. See e.g. R. v. Cossette-Trudel and Cossette-Trudel, supra note 77.

83. See e.g. R. v. Perlin (1977), 23 N.S.R. (2d) 66 (C.A.) - 2-1/2 years concurrent with six month term for assault causing bodily harm, for accused who, with others, confined one Bellem, though to have stolen some drugs from the accused, and inflicted minor cuts on him with a razor before forcing him to travel some distance with them in a car; R. v. Krenbrink, [unreported] March 17th, 1981 (B.C.C.A.) - six months for accused who, with members of his motorcycle club, held "kangaroo court" for two men who previously had been in accused's cabaret and pointed shotgun at accused, obvious intent to beat up the victims and 18-month term also imposed for assault causing bodily harm.

84. See also R. v. Burhof (1978), 15 A.R. 131 (T.D.) - five years concurrent for accused, alcoholic, who broke into house of his former mistress and held her and a daughter there at rifle-point for several hours, total sentence of 11 years also imposed for break and enter and unlawful use of firearm; R. v. Armstrong (1974), 16 Crim. L.Q. 377 (N.S.C.A.) - 3-1/2 years for accused with "incredible" long record at age 18 who abducted mother and young baby at knife-point, offence probably drug-related.

85. Criminal Code, s.250(1).

86. [1976] 6 W.W.R. 522 (B.C.C.A.).

87. (1978), 21 Crim. L.Q. 274 (Ont. Co. Ct.).

88. (1974), 21 C.C.C. (2d) 544 (Ont. Prov. Ct.).

89. (1979), 31 N.S.R. (2d) 87, 52 A.P.R. 87 (C.A.).

90. [1975] C.S.P. 261.

CHAPTER 16: DRIVING OFFENCES NOT NECESSARILY RESULTING IN DEATH

A. CRIMINAL NEGLIGENCE IN OPERATION

Pursuant to s.233(1) of the Criminal Code, criminal negligence in the operation of a motor vehicle is punishable summarily, or, on conviction on indictment, by five years' imprisonment. The 1973 Criminal Statistics show that a large majority (82%) of offenders convicted summarily received fines, while only 13% went to jail. By way of contrast, only 33% of offenders convicted on indictment were fined, 42% receiving reformatory terms. Of 72 persons convicted on indictment, only two received terms in excess of two years' imprisonment.

These figures confirm the general impression which may be gathered from the reported cases. Generally, a non-custodial sentence will be imposed in an "ordinary" case of criminal negligence. In R. v. Carroll,[1] for example, the 20-year-old accused was driving with a blood-alcohol level at which there would be some impairment of his co-ordination. Misjudging his distance from the median concrete strip during an overtaking manoeuvre, he came into collision with it and subsequently with a vehicle travelling in the opposite direction. In view of his excellent work record, good previous record generally and voluntary entry into a counselling programme, a sentence of one day's imprisonment, probation and a fine of $1,000 was imposed.[2]

More serious, more likely to result in indictment and more likely to be penalized by imprisonment, are offences of criminal negligence which result in death, although not charged as such. While it would be trite to say that the consumption of alcohol before driving is an aggravating factor, it

would appear that drinking is a predominant feature of most such cases, having figured in every fully reported sentencing for this offence for 10 years ! The normal range of sentence for a conviction of criminal negligence, in which death was a consequence, is a reformatory term of 12 months or less. A first offender may escape with a heavy fine, as in R. v. Pineau,[3] where the accused, after leaving a party intoxicated, killed a stranger. In view of his guilty plea, which saved the victim's widow the agony of a trial, he was sentenced to one day's imprisonment and a fine of $2,000. He was also placed on probation for two years, with conditions prohibiting alcohol use and driving. In R. v. Darrach,[4] however, a first offender, after drinking, caused an accident which killed his passenger. His sentence was raised on appeal to six months' imprisonment.

The sentence in Darrach was imposed following an extensive review of precedent cases, including the decisions in R. v. Scarrow[5] and R. v. Janeway.[6] Scarrow, who had been drinking heavily before his car crossed the road and collided with a motorcycle, received a term of 12 months' imprisonment and three years' probation. Janeway, who went through a radar trap then led the police in a chase at speeds of up to 100 m.p.h., and was only stopped by a collision with a police car, received a term of nine months. In both of these cases, however, the accused had at least one previous conviction for a serious driving offence. A further case considered, R. v. Dickinson,[7] was a case in which the charge was causing death by criminal negligence, not criminal negligence in the operation. It is thus submitted that the sentence imposed in Darrach was one more appropriate to a repeating offender, the first offender normally receiving a sentence at the lower end of the range.[8]

B. FAILING TO STOP

Section 233 of the Criminal Code provides that failing to stop at the scene of an accident is punishable on summary conviction, or, on indictment, by imprisonment for up to two years. The 1973 Criminal Statistics confirm that most offenders convicted of failing to stop after non-fatal accidents receive a fine.[9] The Ontario and Prince Edward Island Courts of Appeal, in R. v. Markle[10] and R. v. Cairns[11] have upheld fines for such offenders, as did the Quebec Court of Appeal in Cyr v. The Queen.[12] Where the accident involves death, however, a short term of imprisonment will normally be imposed. The normal upper limit is about one year, there being very little precedent for the imposition of longer terms.[13] If the accused was drinking before the offence this aggravates;[14] his behaviour after the accident is also of great importance.

In R. v. Collier[15] the accused returned, shortly after an accident, to the place where he had hit and killed a child, approached an officer and let him know that he had passed through the area and the front of his car was damaged. He was sentenced to 15 days' imprisonment plus a fine of $200. By contrast, in R. v. Jackson,[16] an accused who struck and killed a pedestrian then fled the scene of the accident and reported his car stolen, received a term of one year. An aggravating factor in Jackson was that the accused was a police officer. In R. v. Hatfield,[17] a private citizen who killed a pedestrian after drinking and later denied his offence received a term of 10 months' imprisonment.

C. DANGEROUS DRIVING

The pattern of sentencing for dangerous driving is closely similar to that for failing to stop, and indeed carries similar penalties: summary conviction or up to two years on conviction on indictment. Three recurring classes of such offences must be distinguished to clarify sentencing practice.

The first is the "ordinary" offence of dangerous driving, where the accused commits the offence without causing serious injury or damage to other persons. This offender will normally receive a fine. In R. v. Arseneault,[18] for example, an accused who had been drinking drove his vehicle at speeds of 80 to 100 m.p.h., ignoring traffic signals and overtaking on the right hand side. Convicted at the appeal level, he was sentenced to pay a fine of $150. Three years later in R. v. Guillemette,[19] a $250 fine was levied on an accused who veered into the wrong lane, putting other vehicles in jeopardy, and passed at speeds of 70 to 80 m.p.h., despite prohibitive road markings.

Such an offence committed by an accused with a record, or in other aggravating circumstances, may entail a short term of imprisonment. In R. v. Nichol,[20] for example, an impaired accused was approached by a police officer who asked him for his ignition key. He drove away instead, with the officer hanging onto the car and the door still open. He collided with other cars, and attempted to push the officer off. On appeal, a sentence of 30 days' imprisonment was imposed. In R. v. De Young[21] an accused with a lengthy record of driving offences, who struck a police car and a light pole while driving with a high blood alcohol level, received a term of 90 days intermittent, followed by a year's probation. Mitigating factors included his guilty plea, cooperation with the police, and voluntary entry of a hospital treatment program for an alcohol problem.

As will be seen from the above decisions, alcohol consumption is a common feature of dangerous driving prosecutions. There is, however, an abundance of authority dealing with cases where, while no alcohol was consumed, death occurred as a result of an accident. Here, a term of a few months' imprisonment is the norm. In R. v. Gregory[22] the accused was driving a heavy truck through a mixed residential and commercial area. He was not keeping a proper lookout, and killed one child and injured another. He received a term of six months' imprisonment, despite a good background and record. In R. v. Flemming[23] another sober accused who pulled out sharply to overtake and killed the driver of an oncoming car received a term of three months, held by the appeal Court to be "well within the range" of sentences normally imposed for dangerous driving.

Incarceration may be avoided, despite death, in unusual circumstances. In R. v. Knowlton,[24] the accused was aged about 60 and had been driving for 45 years without offending. He had been told by his doctor that he could drive, despite being a diabetic and suffering from angina. On the day of the fatal accident he was also suffering from influenza, and had had a drink. He caused an accident on a main highway, killing one man. Stating that it would be harsh to imprison a person in his condition, the Court upheld a fine of $300. A similar case is R. v. Lowe,[25] where the accused suffered a blackout while driving along a main highway, collided with parked cars and two pedestrians, and killed one of them. A new trial was ordered. However, although it was no longer in issue, the Court suggested that a sentence of one year's imprisonment imposed at trial had been excessive, and would have reduced it to time served, four to five months.

Imprisonment is virtually inevitable for the third common class of dangerous driver, the drinker who causes death. Reported terms since 1970

have varied from 60 days intermittent[26] to six months "straight"[27] where these were the only serious aggravating factors.[28] Imprisonment has occasionally been avoided; an example is R. v. Hammond,[29] where the accused, deeply remorseful, had a family and a difficult financial situation, and over three years had passed between the offence and conviction. It is respectfully submitted that the Alberta District Court's decision in R. v. Butz,[30] where a fine of $1,500 was imposed on an accused with a traffic accident record, is out of line with both precedent and principle.

An aggravating factor for both fatal and non-fatal offences of dangerous driving is the existence of a record. In R. v. Hughes[31] an accused who drove at a speed of at least 56 m.p.h. on a gravel road with a limit of 50 m.p.h. and skidded across the road onto an embankment, endangering another vehicle, was fined $1,500.. He had 30 previous convictions for driving offences, some of which had resulted in accidents. The amount of the fine was substantially higher than in earlier comparable cases, and commensurate with that in Butz, where death of a third party was involved.

Cases exemplifying the Courts' approach where death and a previous record are in issue include R. v. Tibbo[32] and R. v. Fotti.[33] In Tibbo, the accused alcoholic struck and killed a young girl. In view of his previous convictions of breathalyzer offences, the Court of Appeal imposed a sentence of nine months' imprisonment, despite his remorse and efforts to rehabilitate himself. Fotti, who had five previous convictions for motoring offences, failed to obey a red light and killed the driver and passenger on a motorcycle. Again, a sentence of nine months' imprisonment was imposed.[34]

Unusually strong mitigating factors may, of course, remove dangerous drivers from the realm of tariff sentencing, although this is not a common occurrence. Reported examples in the last 10 years include R. v.

Fournier,[35] where a 16-year-old youth, pursuing another young man in the course of a dispute, accidentally ran him over and killed him. Fournier, clearly receiving individualized consideration from the Court in view of his age, was placed on probation. In R. v. McDowell,[36] the accused, a police officer of eight years' standing, drank five bottles of beer before driving. He was, however, under strong medication for pain which he experienced as a result of an old injury. While driving his cruiser he noticed several other police officers, accelerated to speeds of over 100 m.p.h., ignored signs, and finally crashed into a road block. In the highly unusual circumstances of the case, despite his recklessness in consuming medication and alcohol, an absolute discharge was granted.

D. IMPAIRED DRIVING

The Criminal Code provides an escalating scheme of penalties for first, second and subsequent offences of impaired driving:

> 234. (1) ... (a) for a first offence, ... a fine of not more than two thousand dollars and not less than fifty dollars or ... imprisonment for six months or ... both;
> (b) for a second offence, ... imprisonment for not more than one year and not less than fourteen days; and
> (c) for each subsequent offence, ... imprisonment for not more than two years and not less than three months.

In addition, s.234(2) provides:

> Notwithstanding subsection 662.1(1), where an accused pleads guilty to or is found guilty of an offfence under

> subsection (1), the court before which he appears may, after hearing medical or other evidence, if it considers that the accused is in need of curative treatment in relation to his consumption of alcohol or drugs and that it would not be contrary to the public interest, instead of convicting the accused, by order direct that the accused be discharged upon conditions prescribed in a probation order, including a condition respecting his attendance for curative treatment in relation to his consumption of alcohol or drugs, and the provisions of subsections 662.1(2) to (4) apply mutatis mutandis.

Both subsections have been the subject of interpretational questions. The expressions "first offence", "second offence" and "subsequent offence" are deemed by s.236.1 to be calculable not by reference to the number of previous convictions under exactly the same provisions, but the number of previous convictions under s.234, 234.1 or 325 (refusing, etc. to blow) and 236 (driving "over 80"). A recurrent question with reference to both ss. 234 and 236 in the years following the coming into force of the above scheme of penalties (on April 26th, 1976[37]) was whether such calculations should include offences in respect of which convictions were sustained before that date. This question was definitively answered by the Supreme Court of Canada in its decision in R. v. Johnson[38] to the effect that the new provisions operate retroactively. Accordingly, persons convicted of the above offences under the predecessors to the present provisions are liable to the increased penalties now provided.

Subsection (2) has been proclaimed in force only in Alberta and the North West Territories.[39] As a result, it has been the subject of a challenge to its legality in Ontario. In R. v. Negridge[40] the accused, pointing out that s.234(2) does not apply to all of Canada, alleged that it thus did not provide "equality before the law and the protection of the law". Rejecting

this submission, the Court of Appeal stated that the purpose of s. 234(2) is to allow the Court, in appropriate cases, to impose a curative rather than punitive disposition. The purpose of the postponement of coming into effect is to allow the provinces time to implement suitable programmes. Pursuant to the decision in R. v. Burnshine,[41] legislation so enacted in pursuance of a valid federal objective does not contravene s.1(b) of the Bill of Rights[42] by not applying to all of Canada.

The 1973 Criminal Statistics disclose that an overwhelming majority (90%) of offenders convicted summarily in that year were fined for offences of impaired driving, only 7% receiving jail terms. Although the statutory penalties have changed, the practice in this respect is still largely similar, with the majority of "normal" offences of impaired driving incurring fines, coupled with probation where necessary.[43] In R. v. Cairns[44] Dohm, J., discussing the range of sentence for impaired driving, usefully listed those circumstances which might result in imprisonment.

> I think it would be presumptuous for me to try and list those types of circumstances which could precipitate a jail term for a first offender. However, so that there is no misunderstanding, I think it would be appropriate if I were to list a few examples which might, and I underline the word "might" be considered to be grave in nature:
>
> (1) Driving while impaired and having an excessively high reading of alcohol in blood. By "excessive" I am suggesting, for the purposes of argument, that it be over .25%, or;
>
> (2) driving while impaired and becoming involved in an accident which causes death, bodily injury, or property damage to others, or;
>
> (3) driving while impaired and at the time in a reckless or dangerous manner, so as to make an accident inevitable or nearly so. For example, driving on the wrong side of the road or at an excessive rate of speed.[45]

A bad record will also result in imprisonment. This is so not only in light of the mandatory statutory penalties, but also as a result of judicial policy. In R. v. Tarasoff,[46] for example, the accused had a drinking problem and several previous convictions for drinking and driving. Despite his reformed behaviour and his recent membership of Alcoholics Anonymous, the British Columbia Court of Appeal upheld a sentence of one year's imprisonment, concurrent with two similar terms for driving while disqualified.[47]

E. FAILING OR REFUSING TO PROVIDE BREATH SAMPLE

The Criminal Code, in ss.234.1 and 235, provides an escalating scheme of penalties for failing or refusing to provide a breath sample. The penalties are the same in respect of demands for roadside screening devices and demands under s.235(1) that the accused accompany a peace officer for the purpose of enabling samples to be taken. They are as follows:

> (a) for a first offence, ... a fine of not more than two thousand dollars and not less than fifty dollars or ... imprisonment for six months or ... both;
> (b) for a second offence, ... imprisonment for not more than one year and not less than fourteen days; and
> (c) for each subsequent offence, ... imprisonment for not more than two years and not less than three months.

The normal range of sentence is largely similar to that for impaired driving without complications such as an accident - fines for first offenders but demonstrative jail terms for subsequent infringements. In R. v. Landry,[48] for example, the New Brunswick Court imposed a fine of $200 on a first offender: in R. v. Michaud[49] the Provincial Court applied a $150 fine to an accused who failed to comply, under the wrongful impression that he had

already provided sufficient samples to discharge his legal obligation. In that case, the Judge indicated that a first offence usually incurred a fine of $200. Two years after Michaud, in R. v. Martin,[50] the Prince Edward Island Court imposed a fine of $300 upon an accused who, claiming that s.234.1 was not in force on the Island, refused to blow. His belief was based on a copy of Carswell's Pocket Criminal Code which he had with him; however, it had been published on January 1st, 1980 and the offence was committed some nine months later. Understandably, the Court found that the mistake would not have been reasonable even if it might otherwise have afforded a defence: an accused wishing to rely on his own legal research, the implication is, is under a duty to bring his appreciation of the law up to date.

As is the case for impaired driving, the existence of a record of alcohol-related driving offences will render a jail sentence inevitable. Sentencing policy supports the statute in this respect. A recent example is the decision of the Prince Edward Island Court in R. v. Campbell,[51] where a sentence of two months was upheld for an accused aged 25 with seven previous convictions for driving offences. In R. v. McCutcheon[52] the accused, liable only to the range of sentence for a first offence due to the failure of Crown counsel to give notice of increased penalty, had six previous convictions including theft, assaulting police, drinking and driving offences and criminal negligence causing death. In view of his record the Court imposed a sentence of four months' imprisonment.[53]

F. DRIVING "OVER 80"

Section 236 of the Criminal Code provides an escalating scheme of penalties for driving with a blood-alcohol level exceeding 80 mg. of alcohol in 100 ml. of blood, as follows:

> (a) for a first offence, ... a fine of not more than two thousand dollars and not less than fifty dollars or ... imprisonment for six months or ... both;
> (b) for a second offence, ... imprisonment for not more than one year and not less than fourteen days; and
> (c) for each subsequent offence, ... imprisonment for not more than two years and not less than three months.

In addition, provision is made by s.236(2) for discharge upon conditions, including attendance for curative treatment in relation to alcohol, notwithstanding that s.662.1(1) would normally preclude such a disposition due to the minimum penalties in s.236.

The retroactivity of the penalties provided by s.236(1), brought into force on April 26th, 1976, was confirmed by the Supreme Court of Canada in R. v. Johnson,[54] as noted above. Accordingly, offences of impaired driving, refusing to blow or driving "over 80" committed before these penalties came into force still bring into play the mandatory minimum penalties.

The status of sub-s. (2) has been highly controversial due to a drafting error. In the amending statute of 1976,[55] s.12 repealed the then existing s.236 and replaced it with a new equivalent section containing two subsections. Sub-section 102(1) of the same Act provided that, excepting certain provisions, the amendments should come into force by proclamation. Sub-section 102(3) further provided that certain provisions should come into force in each province by proclamation. Included in the list of such provisions is s.17(2). In fact, the Act does not contain a s.17(2): obviously the intended reference is to the new s.236(2), as enacted by s.17. If one reads the provisions as they stand, then s.236(2) came into force throughout Canada on April 26th, 1976.

While the appropriate role of the Court has been considered many times in relation to this error, the large majority of decisions have been for

the view that the Court should correct the error, and hold that s.236(2) is not in force except where proclaimed, in accordance with the obvious intent of Parliament. This position has been adopted, inter alia, by the Courts of Appeal of Ontario,[56] Saskatchewan[57] and British Columbia.[58] The only opposition is a decision of the Nova Scotia County Court, R. v. Ritcey,[59] where it was held that s.236(2) is in force in that province by virtue of Parliament's mistake.

Alberta and the North West Territories have issued proclamations bringing s.236(2) into force.[60] Because of the provision of minimum penalties in s.236(I), wherever it is held that s.236(2) is not in force by virtue of Parliament's mistake, there is other power to grant a discharge.[61]

The timing of convictions and offences was considered in R. v. Heighton,[62] a decision of the British Columbia County Court. It was held that the mandatory minimum penalty for a second offence is incurred wherever the previous conviction was entered before that for the offence before the Court. It is not necessary that the second offence took place after the first conviction. In the circumstances of that case, however, a minimum second-conviction term was imposed.

The constitutionality of s.236(2) was briefly called into question in R. v. Thoms.[63] The British Columbia Court of Appeal unanimously rejected, however, a contention that if in force the subsection would be inoperative under the Bill of Rights,[64] because it provided inequality before the law.

As to quantum, the principles are similar to those for impaired driving. First offenders normally receive fines, in the absence of specially aggravating circumstances. There was judicial comment with regard to the amendments of 1976[65] that fines, even for first offenders, should be substantially increased,[66] but recently reported decisions have not shown

evidence of particularly punitive assessments.[67] Second and subsequent offences will, again, incur jail sentences. In R. v. Nicholson[68] an accused with a record of nine convictions in three years, on a guilty plea, was sentenced to six months' imprisonment. On appeal, in light of a recent religious conversion which included a commitment to abstain from alcohol, the sentence was found excessive but was varied only to 90 days intermittent. In R. v. Redstar,[69] an offender with 21 previous convictions for driving and liquor-related offences in the preceding six years received a term of nine months, to be served concurrently with six months for dangerous driving.

The special provision in s.236(2) was discussed in R. v. Beaulieu[70] where the accused, a status Indian with 14 previous liquor and driving-related convictions, was sentenced at trial to eight months' imprisonment. On his appeal, it was found in light of further evidence that s.236(2) could appropriately be invoked. Tallis, J. made the following comments with respect to its application:

> In most cases, one would expect medical and lay evidence outlining in detail the accused's condition. Furthermore, in considering the public interest there should be evidence before the court, preferably from a medical practitioner, indicating that a careful assessment of the accused has been made and also indicating on the balance of probabilities that the accused is well motivated and has a reasonable chance of overcoming his alcoholism and related problems.
>
> In my opinion parliament intended that the court should carefully consider the medical condition of an accused and his need for curative treatment when an application is made under section 236(2) of the Criminal Code. The public interest must be given careful consideration because legislation such as section 236(1) was passed with a view to protecting the public from the hazards associated with drivers who have been drinking. The right or licence to drive a motor vehicle carries with it certain responsibilities and one of those responsibilities is to refrain from driving a motor vehicle while in violation of section 236 of the Criminal Code.
>
> ...

> Having regard to the plain language of section 236(2) I do not think that a court can now assume that a conditional discharge is not in the best interests of society. Once this section has been proclaimed in a jurisdiction, the court is entitled to assume that adequate facilities will be provided for curative treatment. In some cases the evidence adduced may indicate that appropriate therapy or curative treatment will probably result in the accused overcoming his problems with alcohol. If such is the case it is probably in the best interests of society to take that route because such a solution is clearly preferable to repeated incidents of impaired driving which are not deterred by jail terms imposed on a person suffering from chronic alcoholism. In such cases society is only protected when the offender is in jail. In any given case the public interest may best be served by curative teatment as long as proper safeguards are imposed. Each case must be judged on its own merits. If rehabilitation is accomplished, then the public will be protected in the future.[71]

G. DRIVING WHILE DISQUALIFIED

In view of the recent decision of the Supreme Court of Canada in Boggs v. The Queen[72] that s.238(3) of the Criminal Code, which creates the offence of driving while disqualified, is unconstitutional, further discussion of sentencing for this offence is unnecessary.

Footnotes to Chapter 16

1. (1978), 7 Alta. L.R. (2d) 41, 12 A.R. 378, 1 M.V.R. 38 (T.D.).

2. See also R. v. Claffey (1979), 27 N. & P.E.I.R. 92, 74 A.P.R. 92 (P.E.I.C.A.) - suspended sentence and two years' probation for offence which resulted in bodily harm to two persons.

3. (1979), 24 A.R. 176 (Q.B.).

4. (1978), 18 N. & P.E.I.R. 81, 47 A.P.R. 81. 1 M.V.R. 130, 21 Crim. L.Q. 426 (P.E.I.S.C.).

5. (1977), 1 W.C.B. 531 (Ont. C.A.).

6. (1978), 2 W.C.B. 207 (Ont. C.A.).

7. (1976), 14 N.S.R (2d) 269 (C.A.).

8. See e.g. R. v. Flynn (1975), 9 N. & P.E.I.R. 1 (P.E.I.S.C.).

9. Offenders convicted summarily numbered 3,286: 91.5% were fined, only 5.5% going to jail.

10. (1973), 11 C.C.C. (2d) 67 (Ont. C.A.).

11. (1973), 14 C.C.C. (2d) 417, 5 N. & P.E.I.R. 161 (P.E.I.C.A.).

12. [1970] C.A. 1096.

13. The 1973 Criminal Statistics show no terms on indictment of more than six months; there are, however, occasional reports of longer sentences: see e.g. R. v. Noseworthy (1977), 21 N.S.R. (2d) 17 (C.A.) - one year for accused who failed to stop after crash which killed two people.

14. R. v. Collier (1971), 6 C.C.C. (2d) 438, 17 C.R.N.S. 315 (N.S. Co. Ct.).

15. Ibid.

16. (1977), 21 N.S.R. (2d) 17 (C.A.).

17. (1980), 40 N.S.R. (2d) 192 (C.A.).

18. (1976), 11 N. & P.E.I.R. 527 (P.E.I.S.C.).

19. (1979), 4 M.V.R. 59 (Que. S.C.).

20. [1970] 2 C.C.C. 124, [1970] 1 O.R. 579 (C.A.).

21. (1976), 38 C.R.N.S. 236, 18 N.S.R. (2d) 84 (Co. Ct.).

22. (1978), 1 M.V.R. 270 (Man. C.A.).

23. (1979), 30 N.S.R. (2d) 142, 1 M.V.R. 230, 49 A.P.R. 142 (C.A.).

24. (1973), 5 N. & P.E.I.R. 209 (Nfld. C.A.).

25. (1974), 21 C.C.C. (2d) 193, 6 O.R. (2d) 585 (C.A.).

26. R. v. Roche (1975), 10 N. & P.E.I.R. 229 (Nfld. Dist. Ct.).

27. Huard v. The Queen (1970), 13 C.R.N.S. 386 (Que. C.A.).

28. See also R. v. Boylen (1972), 21 C.R.N.S. 221 (N.S. Co. Ct.) - 90 days intermittent; R. v. Norman (1976), 17 N. & P.E.I.R. 516, 46 A.P.R. 516 (Nfld. Dist. Ct.) - three months straight; R. v. Kenney (1979), 2 M.V.R. 309 (B.C.C.A.).

29. (1975), 8 N. & P.E.I.R. 464 (Nfld. Dist. Ct.).

30. (1977), 6 A.R. 252 (Dist. Ct.).

31. (1980), 7 M.V.R. 228 (B.C.C.A.).

32. (1979), 32 N.S.R. (2d) 37, 1 M.V.R. 327, 54 A.P.R. 37 (C.A.).

33. [1980] 6 W.W.R. 216 (Man. C.A.).

34. See further R. v. MacKenzie (1979), 24 N. & P.E.I.R. 363, 65 A.P.R. 363 (P.E.I.S.C.) - four months concurrent for 22-year-old with three previous convictions.

35. [1975] C.A. 29.

36. (1980), 4 M.V.R. 220 (Ont. C.A.).

37. Canada Gazette Pt. I, 2187 (May 8th, 1976).

38. (1978), 2 W.C.B. 243 (S.C.C.); overruling R. v. Tod (1977), 1 W.C.B. 190 (B.C.C.A.).

39. Subsection (2) was proclaimed in force in Alberta on September 15th, 1977 and in the North West Territories on March 1st, 1977.

40. (1980), 6 M.V.R. 255 (Ont. C.A.).

41. [1975] 1 S.C.R. 693, 25 C.R.N.S. 270, [1974] 4 W.W.R. 49, 15 C.C.C. (2d) 505, 44 D.L.R. (3d) 584, 2 N.R. 53.

42. R.S.C. 1970, App. III.

43. See e.g. R. v. Radu (1977), 3 A.R. 602 (Dist. Ct.) - $400 fine; R. v. Antoine (1979), 19 A.R. 492 (N.W.T.S.C.) - $250 fine; R. v. Kolbuc (1978), 11 A.R. 105 (Dist. Ct.) - $500 fine and two years' probation; R.

v. House (1980), 28 N. & P.E.I.R. 26, 79 A.P.R. 26 (Nfld. S.C.) - $800 fine.

44. (1974), 15 C.C.C. (2d) 130 (B.C. Co. Ct.).

45. Ibid. at 133 per Dohm, J.

46. (1979), 2 M.V.R. 313 (B.C.C.A.).

47. See also R. v. MacDougall (1975), 11 N.B.R. (2d) 473 (C.A.) - two months consecutive for offender with several previous convictions of driving offences, despite substantial mitigating factors.

48. (1980), 31 N.B.R. (2d) 383 (Q.B.).

49. (1978), 32 N.B.R. (2d) 34, 78 A.P.R. 34 (Prov. Ct.).

50. (1980), 28 N. & P.E.I.R. 471, 79 A.P.R. 471 (P.E.I.S.C.).

51. (1981), 29 N. & P.E.I.R. 401 (P.E.I.S.C.).

52. (1978), 23 N.B.R. (2d) 85, 1 M.V.R. 123 (C.A.).

53. See also R. v. Costain (1975), 7 N. & P.E.I.R. 148 (P.E.I.S.C.).

54. Supra note 38.

55. S.C. 1974-75-76, c.93.

56. R. v. Paul (1978), 39 C.C.C. (2d) 129 (Ont. C.A.).

57. R. v. Flaman (1978), 43 C.C.C. (2d) 241 (Sask. C.A.).

58. R. v. Thoms (1979), 3 M.V.R. 249 (B.C.C.A.). See also R. v. Krentz (1976), 31 C.C.C. (2d) 450 (B.C.S.C.); R. v. Nicholson (1979), 2 M.V.R. 99 (P.E.I.S.C.).

59. (1976), 32 C.C.C. (2d) 354 (N.S. Co. Ct.).

60. Alberta - Canada Gazette Part I, 4805 (September 25th, 1976); N.W.T. - Canada Gazette Part I, 1498 (March 16th, 1977).

61. R. v. Bradshaw (1975), 21 C.C.C. (2d) 69 (S.C.C.).

62. (1980), 5 W.C.B. 8 (B.C. Co. Ct.).

63. Supra note 58.

64. Supra note 42

65. Supra note 55.

66. R.v. McDonald; R. v. Edwards, [1976] 6 W.W.R. 671 (Y.T.C.A.) - fines of $1,500 for first offenders; R. v. Ayling et al. (1978), 6 B.C.L.R. 125 (Co. Ct.).

67. See e.g. R. v. Hughes (1980), 27 N. & P.E.I.R. 415, 74 A.P.R. 415 (P.E.I.S.C.) - $150 fine; Gall v. The Queen, [unreported] March 19th, 1981 (Sask. Dist. Ct.) - $200 fine.

68. Supra note 58.

69. (1981), 7 Sask. R. 192 (Dist. Ct.).

70. (1980), 21 A.R. 120 (N.W.T.S.C.).

71. Ibid. at 124-125 per Tallis, J.

72. [Not yet reported] February 3rd, 1981 (S.C.C.).

CHAPTER 17: THEFT AND RELATED OFFENCES

A. THEFT OVER $200

The Criminal Code draws a somewhat arbitrary distinction between thefts over and thefts not exceeding $200. The more serious form, theft over $200, is punishable on indictment by 10 years' imprisonment.[1] A number of distinct categories may be discerned among the many cases of theft over which come before the appellate Courts.

i) Theft by Persons in Positions of Trust

The commission of offences by persons holding positions of trust was discussed in Chapter 3, above. Theft over $200 is, perhaps, the most common offence committed by such persons, as the "trust" most often encountered is to handle large sums of money for an employer or other entity.

Almost universally, the Courts insist on imprisonment for those who abuse positions of trust to deprive their employers of substantial amounts of money. As Howland, C.J.O. stated in R. v. McEachern:[2]

> The public interest requires that it be made very clear to one and all that in the absence of exceptional circumstances a person holding a position of trust who steals from his employer must expect a term of imprisonment.[3]

The normal range of sentence for theft of large amounts committed in breach of trust appears to be from nine months to two years' imprisonment, the minimum penitentiary term being reserved for serious breaches of trust. One example is theft by lawyers,[4] although errant attorneys do not necessarily receive such terms.[5]

In the absence of extreme extenuating circumstances, the term of imprisonment will largely be governed by the Court's conception of the seriousness of the breach of trust and the amount of money involved. The accused's prior record is usually not in issue, as the majority of serious offenders who hold positions of trust do so by virtue of their exemplary past. For a relatively small amount of money, hundreds rather than thousands of dollars, the normal sentence is a year or less.[6] Isolated instances generally attract lesser terms than continuing schemes for the diversion of funds,[7] and the theft of extremely large amounts may aggravate the offence to the extent that a sentence outside the normal range is imposed.[8]

Very occasionally exceptional circumstances will justify a departure from the usual rule of imprisonment in cases of breach of trust. An example is R. v. Munro[9] where the accused 24-year-old woman stole money from her employer, a bank, to make a down payment on a house. The Court affirmed the normal policy that such an offence would warrant some period of incarceration. However, in view of the difficulties that would be caused to the accused's four-month-old son by her imprisonment, their Lordships agreed that Munro's case was sufficiently exceptional to override that principle. A different reason led to the same result in R. v. Chagnon[10] where the accused, while he had stolen some $25,000 from a business, essentially owned the corporate victim himself. The Court of Appeal, agreeing that the circumstances of the offence were "most unusual", and that there were many extenuating personal circumstances, nevertheless felt that some element of deterrence must be incorporated in the sentence. Accordingly, a suspended sentence imposed at trial was varied to one day's imprisonment, a fine of $5,000 and two years' probation.

The Criminal Code also makes special provisions for offences similar in nature to simple theft by persons in positions of trust. Theft is

committed by a person who, having anything for which he is required to account to another person, fraudulently fails to do,[11] and by a person who misappropriates money held under direction.[12] A further offence, of criminal breach of trust, is created by s. 296 of the Code, and is punishable by imprisonment for 14 years. Despite the higher statutory maximum sentence for criminal breach of trust, the sentencing principles and range of sentence for all three specialized offences are essentially similar to those for simple theft by persons in positions of trust.[13]

ii) Thefts of and from Conveyances

A large number of appeals relating to thefts of conveyances, principally automobiles, come before the appeal Courts. The general policy appears to be that in the absence of severe aggravating circumstances, a non-custodial disposition is appropriate for first offenders who steal automobiles, and those with minimal criminal records. Depending upon an assessment of the accused's "treatment" needs, probation[14] or a fine[15] may be imposed. Recidivists, however, particularly if they have previous convictions for stealing motor vehicles, generally go to prison for a term between one and three years.[16]

From time to time, cases come before the Courts where a substantial record of thefts, including taking motor vehicles, is a symptom of a continuing psycho-pathological disorder. The Nova Scotia Court, which has had three occasions in recent years to deal with such offenders, has consistently imposed terms of imprisonment, in each case adding probation or determining the terms with considerable reference to the accused's need for treatment.[17]

Thefts of automobiles committed as part of a course of acquisitive criminal conduct, and major thefts of trucks and their loads for financial gain, generally attract custodial terms. Sentences here reflect, to some extent, the overall gravity of the accused's conduct or, in the case of thefts of cargo, the magnitude of the offence and the degree of planning involved. In R. v. Angel and Perry,[18] for example, terms of 18 months concurrent were imposed on two accused who stole a vehicle on their way to commit an armed robbery.[19] In R. v. LeSarge[20] a term of five years' imprisonment was upheld for theft of a tractor-trailer unit carrying $78,000 worth of liquor. The accused had a lengthy record of property offences. The Court, setting aside a term of seven years imposed at trial, commented that such a sentence would have been appropriate had the accused been the person who engineered and planned the crime.

Theft from automobiles and other conveyances appear normally to be treated no differently than other thefts of property. In R. v. Ansley,[21] for example, a term of one year's imprisonment was imposed upon a 19-year-old with a substantial criminal record who, while on parole in respect of a previous offence, stole records and tapes from a parked car. In the occasional case where theft of equipment from a conveyance creates potential danger for its owner or user, this aggravates the offence. In R. v. Goodwin and Cunningham[22] two accused, one of whom had a lengthy criminal record, stole radios from fishing vessels. In view of the dire consequences which could have been caused to fishermen using the boats, the Court upheld sentences of three years' imprisonment for the accused with a record, and one year for the first offender.

iii) Organized Shoplifting

The majority of charges arising out of shoplifting come before the Courts pursuant to thefts not exceeding $200. With respect to major shoplifting operations, usually involving more than one person, which result in the theft of goods worth a substantial amount of money, the Courts have made it plain that sentences of imprisonment, apparently in the range of six to 18 months, should be imposed. Within these limits, the precise size of the sentence depends on the usual factors including the accused's previous record, the value of goods stolen and the extent of organization. Thus in R. v. Babineau, Johnson and Parent[23] sentences ranging from four months to 15 months' imprisonment were imposed on three accused involved in the same shoplifting operation. The value of goods stolen was in excess of $2,000. Sentences were fixed with primary reference to the extent of participation in the crime and previous records. Babineau, who received a term of 15 months, had prior convictions for theft, trespass, possession of a narcotic and various other offences. Johnson, who received a term of only four months, had just two prior convictions for theft, and had never been imprisoned.

Terms of nine months, consecutive on four counts for a total of three years, were imposed in R. v. Poole.[24] The accused was a member of an organized shoplifting ring, had twelve prior convictions and had stolen goods, money and cheques ranging in value from $1,300 to $12,000.[25]

iv) Other Thefts

Within the residual category lie a large number of cases with less stereotypical fact situations. Generally, the policy of the Courts is in line

with the most general of sentencing principles: first offenders are not imprisoned except where the magnitude of the crime is great or there are other substantial aggravating factors. The exact nature of the non-custodial disposition will vary according to the severity of the crime and needs of the accused; for the least serious cases, where a theft is little more than a practical joke taken too far, a discharge may be appropriate.[26] Where first offenders commit offences involving substantial amounts of property, a jail term may be called for but will be calculated with considerable reference to their rehabilitation. Thus in R. v. Nickel,[27] for example, a term of 90 days was held appropriate for four accused who stole $12,000 worth of musical equipment, but each was allowed to serve his sentence intermittently. Probation, of course, is a useful appendage in many relatively minor cases.[28]

Sentences over three years' imprisonment are rarely seen for simple theft, even where the accused has a substantial record, unless there are serious aggravating factors. Recidivists do, however, more or less routinely receive jail terms in the absence of compelling mitigating circumstances. Again, the length of the term tends to vary with the magnitude of the crime and the precise nature of the accused's record. Thus in two cases, R. v. MacFarlane[29] and R. v. Mount,[30] both involving similar amounts of money ($400 to $500), terms of two years less one day and 15 months' imprisonment were imposed. In MacFarlane the accused had a substantial record and little mitigation other than evidence that he was making good progress in prison. Mount, while she also had a very substantial record, had severe psychiatric and medical problems arising from the abuse of drugs and alcohol. In R. v. Chisholm,[31] where again the accused's mitigating circumstances consisted only of attempts to reform, the amount involved was much higher ($5,000). The Court accordingly felt that a term of three years' imprisonment was appropriate.

B. THEFT NOT EXCEEDING $200

Little can usefully be added to the foregoing discussion relating to theft over $200. The general principles of sentencing for "theft under" are for the most part the same, although the sentencing parameters are necessarily modified both by the different statutory penalties[32] and by the essential fact that the property involved is of low value. First offenders,[33] and those who commit very minor crimes[34] or offend during a period of emotional upset[35] commonly receive non-custodial sentences, varying from absolute discharge to small fines depending on the precise circumstances. Offenders with psychiatric difficulties who commit minor thefts are also usually accorded individualized consideration.[36] Offenders who breach positions of trust, on the other hand, even though the amount involved may be very small, should properly receive a short exemplary jail term.[37]

Shoplifting is a special case. The majority of reported cases involving shoplifting fall into one of three classes; isolated instances involving depressed or momentarily forgetful persons of otherwise good repute, deliberate thefts by young persons, and deliberate thefts by chronic recidivisits with substantial records for similar offences.

For the first class, the forgetful or temporarily disturbed, a nominal sentence or discharge is usually imposed. A typical example is R. v. Marcon[38] where the accused, aged 37, was fined $35 at trial for theft of an article worth just over $1. An affidavit which was filed on appeal testified that he had been steadily employed for 16 years, was married and had one child. The Court, finding that the offence had been committed because of nothing more than a mental lapse, substituted an absolute discharge. A similar case was R. v. Taylor.[39] Taylor, aged 26, went into a Woolco store

and stole a pair of sunglasses worth $7. Typically, the offence had been brought on by the accused's mental state. At the time of the offence, he was separating from his wife and was under psychiatric care for the stress thus engendered. The Ontario Court of Appeal, holding that the trial Judge had been quite wrong to refuse a discharge, substituted such a disposition conditional upon six months' probation.

The first deliberate offence of theft, typically committed by a youthful offender and not infrequently by an impecunious student, merits only slightly more severe treatment. Where mitigating circumstances such as the possibility of deportation or refusal of landed immigrant status are in issue, the grant of a discharge is often found warranted;[40] where such factors are not brought into consideration, it is nevertheless rare for a prison term to be imposed. Depending upon whether the accused is felt to need mild deterrence, guidance, or nothing beyond the deterrence naturally accruing from the trial proceedings, a fine, probation or discharge is commonly imposed.[41]

The third type of shoplifter, the "incurable", receives rather different treatment. Typically such offenders are alcoholic, inadequate, and have built up very substantial records over a period of some years. The normal practice of the Courts in such cases is to impose a term of imprisonment, not disproportionate to the offence, but nevertheless of sufficient length at least to keep the accused out of mischief for a reasonable period. In R. v. Loucks,[42] for example, a term of six months was imposed on an alcoholic with a record of 44 offences over a period of 20 years for theft of shaving lotion from a food store. In R. v. Shea[43] the Court of Appeal imposed a sentence of one year consecutive upon an accused who stole a leather jacket from a Woolco store. He, not unlike Loucks, had a record involving continuous property offences stretching over 23 years, and had

spent much of that time in jail. A term of four months' imprisonment was upheld in R. v. Mandeville[44] where the accused, despite his lengthy record, had managed to keep out of trouble for about three years before the offence.

For other thefts, including those rare cases where the charge respecting goods under $200 is laid by indictment, the sentence imposed will depend largely on principles similar to those enunciated above. Theft from particularly vulnerable victims may attract terms of imprisonment;[45] so too will offences committed by offenders with substantial records[46] or those carried out in circumstances involving the use of threats or implied threats, where the Crown has elected not to charge robbery or an assault and threat are not sufficiently connected to substantiate such a charge.[47]

C. THEFT OF CATTLE

The Criminal Code, in s.298(1.1) creates a special offence of theft of cattle, regardless of value, punishable on conviction on indictment by 10 years' imprisonment. From the handful of reported dispositions under this section, and offences charged under the general theft sections but relating to cattle, it is apparent that theft of cattle is generally viewed by the Courts as more serious than theft of other property of similar value. No doubt this results from the degree of trust necessarily required of farmers who own adjoining land, and because cattle roaming a wide area are a particularly easy target for would-be thieves.

Generally, a term of imprisonment is imposed for theft of cattle. In R. v. Michaud[48] an accused who stole and slaughtered a cow was sentenced to six months' imprisonment and ordered to pay restitution to the owner. In R. v. Bulger, Mann and Arsenault[49] three accused stole a young heifer.

Bulger, who had a previous record of some 16 convictions, received on appeal a sentence of two years' imprisonment, while his accomplices, first offenders, were sentenced to one year's imprisonment. In R. v. Mitchell[50] a sentence of six months' imprisonment for a 37-year-old farmer who stole and killed a steer calf was set aside. The Court agreed that the sentence would, in ordinary circumstances, have been correct, but in view of his having his own farm, five children and 15 head of cattle which needed his attention, the Court substituted a sentence of time served, subjecting the accused to probation for one year with a condition of restitution.

D. CREDIT CARD OFFENCES

The relatively recent massive increase in popularity of the credit card has made possible a somewhat novel field of criminal endeavour: theft, fraudulent use, and forgery of credit cards. To deal with these and related offences, Parliament in an amendment to the Criminal Code has inserted a new section, s. 301.1, which makes such illegalities punishable on indictment by up to 10 years' imprisonment. They are also punishable on summary conviction.

From the limited number of decisions available in this area, it can readily be deduced that the Courts view misdealings with credit cards in much the same way as analogous thefts. In R. v. Johnston[51] terms of 13 months' concurrent were upheld for possession of a stolen card and personation of its owner with intent. The term was found necessary after a review of the accused's lengthy record. In R. v Kenny and Tatelman,[52] where the two accused were convicted on a number of charges relating to a detailed and long-lasting scheme for obtaining both money and property, terms of 30 months' imprisonment were imposed.[53]

E. ROBBERY

The Criminal Code makes robbery punishable by imprisonment for life.[54] Four definitional paragraphs in s. 302 outline the legal ingredients of robbery as follows:

> 302. Every one commits robbery who
> (a) steals, and for the purpose of extorting whatever is stolen or to prevent or overcome resistance to the stealing, uses violence or threats of violence to a person or property;
> (b) steals from any person and, at the time he steals or immediately before or immediately thereafter, wounds, beats, strikes or uses any personal violence to that person;
> (c) assaults any person with intent to steal from him; or
> (d) steals from any person while armed with an offensive weapon or imitation thereof.

For the purposes of analysing sentencing practice, strict legal categorization of the forms of robbery, while helpful, may be improved upon by detailed attention to the nature of the victim, with secondary analysis directed to the details of the act. Such analysis, as will be seen, transcends the legal definitions.

i) Bank Robbery

In R. v. Vigeant,[55] imposing sentences of four years consecutive on each of four counts of bank robbery, Freedman, C.J.M. expressed his opinion that shorter sentences did not adequately reflect the principle of deterrence. The Court could not overlook, His Lordship noted, that "banks are particularly exposed to crimes of this nature". This judgment expresses a highly consistent finding of appellate Courts across Canada that stern sentences of imprisonment are required for bank robbers. The normal range of sentence, it is submitted, is from five to 15 years' imprisonment.

Within the range, and occasionally outside it, a number of factors assist in indicating the precise term which should be imposed. The nature of the weapon or weapons used is always important: bank robbers are almost invariably armed, but credit may be given where a gun is not loaded, showing that the accused was not prepared to shoot anyone.[56] In R. v. Robinson,[57] taking particular note of the fact that no gun was used, Holmes, J. imposed a sentence of only three years' imprisonment on a bank robber with an alcohol problem and no previous record of violent offences.

The extent to which actual violence is used is also influential. In R. v. Hingley[58] a mere 16-year-old, who struck an employee of a savings and loan company on the head with a rifle during one of three robberies, received a total of 15 years' imprisonment. The Courts are also quick to note the fact if a firearm was discharged; such a fact, alongside a lengthy record, resulted in a 10-year term being upheld in R. v. McGrayne.[59]

Apparently armed robberies committed by two or more robbers are more sternly treated than similar acts committed by lone offenders. Five years' imprisonment is not an uncommon sentence for armed robbers who act alone;[60] it is uncommon for offenders who act in concert. Terms of eight years or more are generally imposed for "group" robberies, perhaps reflecting the degree of planning and premeditation usually involved in a joint venture.[61]

The Courts generally are reluctant to afford any serious consideration to the ages of bank robbers. In R. v. Hingley[62] the accused, convicted on three counts of armed robbery of banks, was aged 16. MacKeigan, C.J.N.S., obviously fully cognizant of the general policy but also impressed by the accused's being substantially younger than the vast majority of bank robbers, stated:

> Despite which [sic] I have said about the youth of an offender being largely irrelevant in considering offences of this nature, I must recognize the extreme youth of the respondent at the time of the offence and the possibility, overemphasized by the learned trial judge, that he suffered from mental and emotional instability which may have induced the commission of the offence rather than the irreformable hardness of the professional criminal. These factors should not affect the stern, logical application of sentencing principles in this type of case. They do, however, force me to conclude that, notwithstanding those principles, humanity and mercy just make it impossible to sentence a mere sixteen-year old as severely as we would have to do were he a few years older.[63]

While Hingley was given some consideration for his age, clearly it did not serve to bring his sentence below the normal range, for he received a total sentence of 15 years' imprisonment for the three robberies.

Extreme youth may have an effect, but according to the decision of the British Columbia Court of Appeal in R. v. Nutter, Collishaw and Dulong,[64] relative youth does not. Specifically discounting the relevance of Dulong's age (19), the Court held his sentence of two years less a day "woefully inadequate", and increased it to 12 years' imprisonment. Against this background it is surprising that in a more recent decision, R. v. Hemstad; R. v. Rhodes;[65] the same Court was prepared to uphold sentences of one year's imprisonment, followed by probation, for robbers aged 19 and 17. The facts of that case involved the kidnapping of a third party with the aid of a .38 revolver, and the subsequent use of his car to carry out an armed robbery of a bank. Despite the mitigating circumstances in that case — no previous convictions, the gun was not loaded during the robbery — the decision of the Court to uphold the short terms, on the basis that "rehabilitation would not be facilitated by a longer sentence" is so remarkably out of line with precedent as to defy explanation.

Two further factors not so far mentioned are previous record and amount stolen. As usual, the accused's record, if substantial, will disentitle

him to the more lenient dispositions accorded to those with less errant precedents. The amount stolen, however, is rarely discussed other than in the context of what percentage of the proceeds of a robbery have been recovered.[66] It appears that the mere fact of armed robbery of a bank is the major element in the mind of the sentencer. As most completed robberies involve large sums of money in any event, it would make little sense to attach importance in sentencing to whether the proceeds amounted to $10,000 or $50,000.

ii) Robbery of Merchants

A large number of cases of robbery of merchants come before the provincial Courts of Appeal. The mode of execution is remarkably similar in the majority of cases. Typically, one or two people enter a hotel lobby, store or gas station, armed with knives or a firearm, and demand money from the cashier. The majority of such incidents take place at night, and planned robberies tend to be concentrated around the closing time of the business concerned, to maximize potential cash proceeds from the crime.

There are two marked dissimilarities, here, from appellate Court policy in respect of bank robbery. First, while armed robbery of merchants is naturally still regared as a serious offence, the factor of examplarity is not universally present. Accordingly, the mitigating effect of youth or being a first offender plays its normal role. Secondly, the normal ranges of sentence are different.

The extent to which previous good record and youth may mitigate is shown in the remarkable decision of the British Columbia Court of Appeal in R. v. Harrison and Garrison.[67] The poetic duo in that case, aged 18 and 20

or 21, committed three armed robberies, two of hotel night clerks. They used a sawn-off shot gun to accomplish their purposes, and wore masks. As will be shown below, masking is normally regarded as an aggravating factor. Relatively small amounts of money (in the first two robberies, a total of $290) were stolen. At trial, the Judge suspended sentence and required 200 hours of community service pursuant to a probation order. The Crown appealed, basing submissions upon its position that, while the individuals accused did not need deterrence beyond that already occasioned to them, the need for general deterrence should be catered to by a term of imprisonment. Brushing these contentions aside, the Court held that a jail term was not necessary, except in drug cases, where not required for deterrence of the specific offender.

The decision in Harrison and Garrison is a long way out of line with contemporaneous dispositions in the rest of Canada. In R. v. Pettigrew,[68] for example, a young man with a criminal record who was involved in one masked hold-up of a tire and gas bar received a term of three years' imprisonment, reduced by the Ontario Court from five in view of the mitigating circumstances. Generally speaking, the three-year term imposed in Pettigrew marks the very top of the range for first offenders convicted of robbery of merchants. While a term of imprisonment is usually felt to be necessary, terms as short as three months are not uncommon. This, indeed, was the term imposed in R. v. Demeter and Whitmore[69] upon two youths of 17 and 16. They had robbed a restaurant of about $265, causing no injury and using an unloaded pellet gun. Setting aside terms of two years less one day, it was in this decision that Dubin, J.A. made his oft-quoted policy statement:

> In such a case the principles of general deterrence must be set into a proper context....
>
> In considering what an appropriate sentence is for the very young, the paramount consideration must be their immediate rehabilitation.[70]

The effect is, that while a jail term is needed to cater to the principle of general deterrence, in view of the rehabilitative prospects and antecedents of young offenders it can be made quite short.[71]

A second type of offender normally entitled to a sentence low in this range is the older first offender who carries out a robbery while drunk. While the Courts naturally frown on armed robbery and intoxication does not provide a complete excuse, the element of deliberation or premeditation is lacking. Thus a sentence of three months' imprisonment was imposed in R. v. Sherwood[72] on a 21-year-old who participated in a robbery of a service station, quite intoxicated, and having become involved in the plans of others for the robbery only on the same evening. A similar term was imposed in R. v. McCormick[73] on an accused, aged 20, of previous good character, who held up a service station while apparently impaired by a mixture of valium and alcohol.[74]

For offenders not so young or drunk, the normal range of sentence is from three to eight years' imprisonment. Within, and occasionally outside, the range, the major considerations are the accused's record, the degree of violence, and the weapon and/or other equipment used. The lowest part of this range, from three to four years, is typically used for younger men who nevertheless have severe records,[75] while five years and up is the appropriate region for older robbers with discreditable antecedents.[76]

In the majority of reported cases, no actual violence to the person of any victim is committed. The fact that no violence occurred is frequently mentioned in the accused's favour:[77] where damage is done, however, this may increase the sentence imposed by degrees proportional to its severity. In R. v. Miller and Couvreur[78] sentences of 10 and 15 years' imprisonment were upheld for two accused who, during a robbery, beat a store proprietor so badly that he became a "living vegetable".

As regards weapons and other equipment, no distinction emerges from the jurisprudence between the use of a knife and use of a firearm. It is an important mitigating factor, however, if a firearm is not loaded or contains only blanks. In Doyon v. R.[79] a sentence of five years was reduced to three specifically on the ground that the accused's use of a starter pistol, filled with blanks, indicated that he did not wish to injure anyone. In R. v. Aylward[80] Martin, J.A., reducing sentence from eight to six years for two robberies of stores, stated:

> This Court has always drawn a distinction between armed robbery perpetrated with loaded weapons, and a robbery perpetrated with an imitation of a weapon.

Conversely, if a firearm is not only loaded but also fired, the sentence will be longer. In R. v. Williams[82] specific note was taken of the accused's having fired his gun. The Ontario Court upheld sentences of 10 years' concurrent for three robberies of convenience stores.

Masking, while infrequently discussed, appears to attract some increase in the appropriate penalty. The Quebec Court, in Beaupre v. The Queen,[83] held that it was permissible for the Judge to make sentence on a charge of being masked, arising out of the same incident, consecutive to reflect additional censure of this feature.[84]

Two special classes of "robbery of merchants" merit separate attention. Robbery of taxi drivers, due to the vulnerability of the victim, is always regarded as a serious offence and routinely incurs a substantial penitentiary term between three and six years, regardless of factors personal to the accused. A rare exception was the 15-month term set in R. v. Shirran,[85] where the accused initially participated in a robbery but in the event probably saved the life of the victim through his influence on his less stable companion.

Robberies of pharmacies, while sometimes committed for financial gain, are frequently carried out by drug addicts for the purpose of acquiring narcotics or narcotic substitutes. Typically, addicts who commit such offences already have criminal records. Despite the fact of addiction, the normal practice appears to be to impose an appropriate tariff term in such cases, measured by the circumstances of the accused and the nature of the robbery.[86]

iii) "Violent Burglary"

Thomas has coined the phrase "violent burglary" to describe a distinct category of robbery.[87] He explains:

> In this class of case a gang of men enter a house ... subject the occupants to violence or threats, often tying and gagging them, and steal substantial amounts of cash or valuable property.[88]

This description is also applicable to many Canadian cases, the only real difference being that cases involving more than three men are extremely rare.

The range of sentence for such offences appears to be from three to 10 years' imprisonment, though shorter sentences have been upheld for very young offenders,[89] minor participants[90] and an alcoholic in great need of treatment.[91]

Sentences in the three to four year bracket are normally considered appropriate only for offenders with minimal records who use little violence beyond tying up the occupants of the house.[92] As the degree of violence or previous record increases, so does the sentence. In R. v. Chaisson,[93] where a knife was held to the throat of a church pastor as he

opened his safe and a gun was fired into the floor as a further threat, the Court increased a sentence of three years' imprisonment to five years.

A curious gap in the range of sentence leaves three classes of violent burglary in the nine to 10-year bracket: those accompanied by extreme violence, violent burglaries of the homes of elderly people, and those committed by "incorrigibles". Sentences of nine and 10 years respectively were imposed in R. v. Graves[94] and Cloutier v. The Queen,[95] where elderly women living alone were attacked in their houses. In R. v. DeBaie,[96] though no actual violence was used, threats administered to a partially blind 93-year-old woman to "blow her head off" were sufficient to make a 10-year term appropriate. Seventeen previous convictions justified a similar term in R. v. Greely.[97]

iv) "Mugging"

The popular term "mugging" describes yet another distinct class of robbery. This is a transaction between private individuals, usually in a public bar, street or other place, in which cash or other personal property is taken from the victim with the aid of violence or threats. The precise circumstances vary from bullying by youths to deliberate seizure of a person who has just cashed a cheque or picked up a small company's payroll.

Several distinct categories of mugging and similar incidents can be discerned in the case-law. The least serious, petty behaviour frequently arises out of bullying of younger by older youths, culminating in the taking of property. This type of behaviour may result in a non-custodial sentence[98] or, in slightly more serious cases, a few months' imprisonment.[99] Even quite petty thefts accompanied by violence will, normally, result in imprisonment unless the offender is very young.[100]

The usual range of sentence for more "straightforward" muggings is from two years less a day's imprisonment — that is, the maximum reformatory term — to five years. Offences generally placed lower in the scale include attacks on individuals in public places, often women whose purses are picked up as they recover from a blow or push,[101] and the robbery with moderate violence of persons "befriended" for the purpose, typically in or on the way to drinking establishments.[102]

Three years appears more appropriate to planned muggings for financial gain,[103] while sentences of four years or more require some aggravating circumstance. This may be the weapon or violence used,[104] prevalence of the offence[105] or the vulnerability of the victim. In R. v. Giguere[106] a four-year-sentence was upheld for taking $3,000 from a woman of 60 at gunpoint; terms of five years were upheld in R. v. Ahearn[107] and Duval v. The Queen.[108] Ahearn involved the use of violence toward a pregnant woman; in Duval, the Court found the deliberate abduction and robbery of homosexuals to merit such sentences. A term of six years was upheld for the older offender in R. v. Dumont and Dumont,[109] where keys to a police vehicle and the revolvers of its occupants were the property taken.

v) Drug "Rip-Offs"

A final recurring type of robbery is the drug "rip-off". A pre-arranged sale of drugs is the vehicle for this type of offence: upon meeting in a private place for the purpose of transferring drugs and cash, weapons are produced and one party is relieved of his or her merchandise or money without consideration. The Nova Scotia, Quebec and Ontario Courts of Appeal have all indicated by word or disposition that such an offence is to be

treated as a normal robbery:[110] certainly, no mitigation of sentence accrues from the fact of the victim being a criminal. In R. v. Reid it was stated:

> [T]he fact remains that a premeditated theft took place involving more than $200, which is an offence punishable by imprisonment for ten years, regardless of any circumstances which might make somewhat marginal the distinction between the use of violence or false pretences, in the perpetuation of the offence. I can see no mitigating circumstances either in the purpose for the transaction, nor in the environment in which it took place; on the contrary, I find aggravating circumstances, since it was really the criminal offence of which respondent had been convicted which was being given favourable treatment.[111]

F. EXTORTION

Subsection 305(1) of the Criminal Code sets the maximum penalty for extortion at 14 years' imprisonment.

Very few cases come before the appellate Courts: of those that do, the majority relate to attempts to gain money by threats of damage to property or violence to the victim or some third party.[112]

Sentences in the range of one to five years are normally considered appropriate for such extortion. Loan-sharking enforcers, who attempt to collect inflated interest payments for underworld lenders, have been given terms as low as one year.[113] Where property is given up pursuant to threats of immediate violence, the facts are analogous to robbery and a penitentiary sentence will normally be in order.[114] Similar considerations apply to the extortion of "protection" money.[115] Illustrating a case at the upper end of the scale of liability is R. v. Ramsay,[116] where the accused attempted to extort money from a bank manager by stating that there was a bomb in the building, and issuing threats against the victim's family. The Alberta Court of Appeal upheld a sentence of five years' imprisonment.[117]

G. BREAKING AND ENTERING

Section 306 of the Criminal Code deals with breaking and entering premises, punishable on conviction on indictment whether the offence is committed with intent to commit an indictable offence once inside, or is accompanied by such commission. The statutory maximum is life imprisonment if the premises are a dwelling-house, but only 14 years in other cases.

i) Dwelling-Houses

A very coherent pattern emerges from the many appellate decisions in this area. An important point is that much depends on the nature of the offence committed or intended to be committed. The most common object is the theft of property. The existence of mitigating factors in many cases makes it difficult to discern whether there is any "floor" to the range for breaking and entering, but it can be stated with confidence that a custodial sentence will rarely be found wrong in principle. The upper limit of sentences for breaking and entering to steal, or stealing, moderate amounts of property is apparently around three years, even for offenders with lengthy records. The majority of offenders receive reformatory terms. The major considerations are usually age, record, condition (intoxicated or not) and value of property taken.[118]

Sentences in the next range, up to about five years, are also available for some acquisitive ventures. They are reserved, however, for planned operations in which the amount of property taken is very substantial. Terms of four and two years consecutive were imposed, for example, in R. v. Hertzog and McLeod,[119] where two accused were convicted on a number of

counts relating to a sophisticated scheme for the theft and disposal of property of wealthy homeowners. The property involved — paintings, jewellery and the like — was conservatively estimated to be valued at over $1 million.

A third class of break and enter, that in which violence is used towards an occupant, is closely analogous to "violent burglary", a type of robbery discussed above. Typically, such breaking and entries are characterized by either the use of firearms to threaten the occupants, beating them, or sexual assaults upon females. A range of sentence from three to seven years is disclosed by the case-law, the Courts being reluctant to depart below this range in view of the seriousness with which such invasions of domestic security are regarded. A case typical of the lower end of the scale is R. v. Harrell[120] where the accused, after stealing money from a house, held the occupant at gunpoint to make good his escape. Despite substantial mitigating factors, a term of five years was reduced on appeal only to three.[121] As the level or intent of the violence rises, so too does the sentence. Five years was upheld in R. v. Bagnell[122] for an accused who, having been convicted of "refusing to blow", went to the arresting officer's house and pointed an elephant gun at him. A similar term was upheld in R. v. Rice[123] where a very severe beating was administered to an occupant and other members of the family were assaulted. Terms of four to five years have been upheld or imposed for breaking and entering accompanied by rape or indecent assault.[124] At the highest level of culpability stand cases like R. v. Miller,[125] where a term of eight years was upheld. The accused, wearing a mask, entered the home of an elderly woman, robbed, attempted to rape and assaulted her, and abducted her in her own car for a short period, at the end of which she was injured in an accident.

ii) Other Premises

A very similar pattern to that for entries of dwelling-houses emerges for those of other premises, typically commercial establishments. Sentences from a short reformatory term to about 3 years, with non-custodial dispositions for the most mitigated instances, are imposed in the overwhelming majority of "run-of-the-mill" cases. The major governing factors are, again, the offender's history, age, condition (intoxicated or not) and the value of property taken.[126]

An exceptional type of offence carries a completely separate range of sentence, apparently from about seven to 12 years. This is the professional, sophisticated theft of large sums of money from safes and vaults, characterized by extensive planning and sophisticated "safe-cracking" techniques. In R. v. Lefebvre[127] a 20-year-old accused was found guilty of six premeditated safe-crackings at automobile dealerships, involving many thousands of dollars. Despite some mitigating circumstances and a fairly short record, concurrent terms for a total effective sentence of 12 years were imposed.

iii) Possession of Housebreaking Instruments

Prosecutions for possession of housebreaking instruments ("burglary tools") and related equipment, punishable by a maximum of 14 years' imprisonment,[128] rarely reach the higher Courts on sentence appeals. It may, presumably, be inferred from dispositons for completed housebreakings that mere possession of one or two tools, such as tire levers, with intent, would usually incur a reformatory term. With appropriate mitigation

the offence, not even having reached the status of an attempt, may merit non-custodial disposition.

Reasoning that the offence is less than an attempt does not appear to prevail in more serious cases, where the accused is found close to the target premises with sophisticated tools. A two-year term was imposed in R. v. Arsenault,[129] where the accused had several previous convictions for offences of dishonesty. In R. v. Klippenstein,[130] where three men with substantial records were found behind a restaurant with a large quantity of tools, the Court found in the case of one who appealed that three years was the least sentence possible in the circumstances. Presumably in such cases the Court takes notice of the planning and sophistication of the offence, and the possibility of aggregation clearly evidenced by the possession of special tools.

H. POSSESSION OF PROPERTY OBTAINED BY CRIME

i) Over $200

Possession of property obtained by crime is, where the property is worth more than $200 or is a testamentary instrument, punishable by up to 10 years' imprisonment.[131]

The majority of offenders who come before the appellate Courts charged with possession of such property, usually stolen goods, have been implicated in the theft of the property itself. The charge of possession may be laid due to the Crown not wishing to take the risk of being unable to prove that the accused actually committed the theft, burglary or robbery, or pursuant to plea negotiations.

In such cases, the sentencing patterns are essentially similar for those offences by which the property was obtained, the Courts apparently paying little attention to the fact that the main offence was not charged.[132] However, as Limerick, J.A. pointed out in R. v. O'Neill and Cameron[133]

> A person who purchases an article which he believes to have been stolen should not receive as severe a penalty as one who obtains possession of several thousand dollars' worth of property by actual theft or breaking and entering.[134]

Effect is generally given to this policy; non-custodial dispositions are not uncommon for first offenders,[135] and even recidivists are unlikely to receive penitentiary terms for mere possession.[136] Although there is no recent reported authority on the point, it is submitted that "fencing" — the continuing purchase and sale of stolen goods carried on as a commercial enterprise — would carry more substantial terms, including penitentiary sentences in well-organized, large or aggravated instances.

ii) Not Exceeding $200

The statutory maximum penalties for "possession under" are two years' imprisonment on conviction on indictment, and the normal penalties prescribed in s. 722 of the Criminal Code for offenders convicted summarily.[137]

Where possession is not clearly related to the actual act of stealing goods, the accused's previous record is usually the main factor in determining sentence. Necessarily, the amount of goods stolen will be small. Thus, first offenders commonly receive non-custodial terms, including discharges, where the culpability of the behaviour is low[138] or substantial mitigation is shown.[139] Where the accused's background contains more

convictions, however, he is likely to receive a longer term of imprisonment: in an extreme case, R. v. Shea[140] the maximum permissible, two years, was upheld for possession of one French franc, $64 and a pair of sunglasses. Aged 35, the accused had 12 previous convictions and had already received sentences totalling 32 years.

I. OBTAINING BY FALSE PRETENCES

The Criminal Code sets out maximum penalties for obtaining by false pretences as follows:

> 320.(2) Every one who commits [such] an offence ...
> (a) is guilty of an indictable offence and is liable to imprisonment for ten years, where the property obtained is a testamentary instrument or where the value of what is obtained exceeds two hundred dollars, or
> (b) is guilty
> (i) of an indictable offence and is liable to imprisonment for two years, or
> (ii) of an offence punishable on summary conviction,
> where the value of what is obtained does not exceed two hundred dollars.

The offence of obtaining credit by false pretences is punishable on indictment by 10 years' imprisonment.[141]

Offences of obtaining by false pretences fall largely into two categories: those committed by persons under emotional stress, temporary or long-term, who run out of money, and repeated deliberate schemes by one or a small group of offenders.

Those in the first category are normally given individualized consideration in large degree. A typical case is R. v. Botten[142] where a respectable, middle-aged widow cashed a number of NSF cheques during a period of depression. A period of probation was found appropriate.[143]

Offences involving planned, fraudulent use of cheques, commonly known as "paperhanging", are discussed in the next Chapter.

Footnotes to Chapter 17

1. Criminal Code, s.294.

2. (1978), 42 C.C.C. (2d) 189, 7 C.R. (3d) S-8 (Ont. C.A.).

3. Ibid. at 191 per Howland, C.J.O.

4. R. v. Klymkiw (1980), 53 C.C.C. (2d) 350 (Man. C.A.).

5. See e.g. R. v. Ryan, 1 A.R. 355, [1976] 6 W.W.R. 668 (C.A.) - one year's imprisonment. For an exceptional case see R. v. Nakonechny (1980), 3 Sask. R. 209 (C.A.) - suspended sentence and two years' probation for lawyer who took money from trust account, but was suffering physically and mentally from abusive consumption of drugs and alcohol.

6. See e.g. R. v. Cusack (1978), 41 C.C.C. (2d) 289, 26 N.S.R. (2d) 379, 6 C.R. (2d) S-48, 40 A.P.R. 379 (C.A.) - nine months for policeman who stole $425 from wallet of motorist; see also R. v. Parry (1979), 34 N.S.R. 85, 59 A.P.R. 85 (C.A.) - three months consecutive for accountant who stole $1,894.95.

7. See e.g. R. v. Howie (1977), 3 Alta. L.R. (2d) 367, 6 A.R. 603 (T.D.) - 12 months for head cashier of food store who stole $50,000 over a period of 16 months, despite substantial mitigating factors; R. v. O'Connor (1978), 15 N. & P.E.I.R. 226 (Nfld. C.A.) - 12 months for government clerk who stole a total of $8,000 in 18 instalments over a nine-month period.

8. See e.g. R. v. Jaasma (1976), 1 A.R. 553 (C.A.) - five years concurrent for theft of $300,000 by president of life insurance company, in view of the "magnitude of the crime".

9. (1979), 1 Sask. R. 93 (C.A.).

10. (1980), 42 N.S.R. (2d) 236, 77 A.P.R. 236 (C.A.).

11. Criminal Code, s.290(1).

12. Ibid. s.292(1).

13. For examples of dispositions under these sections see e.g: **THEFT BY PERSON REQUIRED TO ACCOUNT:** R. v. Zelman, [1971] C.A. 424 - two years' imprisonment for theft of $104,000 by employee in tax collector's office; R. v. Zamora (1972), 4 N.B.R. (2d) 421 (C.A.) - three years for accused who received over $100,000 for purchase of shares and misappropriated the funds to his own use; R. v. Plourde; Plourde v. The Queen, [1975] C.A. 33 - 23 months' imprisonment for member of bar who stole nearly $22,000 from clients; R. v. Wyness (1977), 1 W.C.B. 391 (N.W.T.S.C.) - eight months for accused who furnished false return with respect to government monies entrusted to him (prosecution under

s.357(a) of Criminal Code: **MISAPPROPRIATION OF MONEY HELD UNDER DIRECTION:** R. v. Legare (No. 2) (1978), 48 C.C.C. (2d) 281 (Que. C.A.) - 30 days for misappropriation of $1/4 million received from community of sisters for purchase of shares, settlement had been made and trials and appeals took several years to complete; R. v. Lowden (1979), 10 Alta. L.R. (2d) 108, 16 A.R. 311 (Dist. Ct.) - suspended sentence and two years' probation for travel agent who misappropriated $2,000 in deposits, complete restitution made, accused in poor health: **CRIMINAL BREACH OF TRUST:** Campeau v. The Queen, [1976] C.A. 511 - 18 months for accused urban planner who abused his position, concurrent with sentences for municipal corruption and conspiracy, sentence reduced from four years in view of failing health; R. v. Tober, 39 C.R.N.S. 133, [1977] 4 W.W.R. 673 (Man. C.A.) - 18 months plus probation for solicitor who, while under supervision by the Law Society, deposited a client's cheque for purchase of real property in his own account and spent the funds; R. v. Oliver, [1977] 5 W.W.R. 344 (B.C.C.A.) - four years for lawyer who converted $17,000 from trust account, seven other offences taken into account, total diverted over $300,000.

14. See e.g. R. v. Drew, 45 C.C.C. (2d) 212, 7 C.R. (3d) S-21, [1979] 1 W.W.R. 530 (B.C.C.A.) - 12 months' probation; R. v. Myers (1977), 37 C.C.C. (2d) 182 (Ont. C.A.) - conditional discharge and two years' probation for 18-year-old of previous good character led into two offences of auto theft by older person with criminal record.

15. See e.g. R. v. Ghislieri, [1981] 2 W.W.R. 303 (Alta. C.A.) - $500 fine and compensation for accused with minimal record who stole a motorcycle and stripped it of valuable parts.

16. See e.g. R. v. Pezzo (1972), 9 C.C.C. (2d) 530 (Ont. C.A.) - one year for accused who stole motor vehicle, previous convictions included one for joy-riding; R. v. Wilson (1976), 17 N.S.R. (2d) 74 (C.A.) - two years imprisonment for accused with several previous convictions, all recent, for theft-related offences, present offence committed while still on probation for break and enter; R. v. Morgan (1979), 32 N.S.R. (2d) 68, 54 A.P.R. 68 (C.A.) - two years for 19-year-old who stole truck, accused had lengthy criminal record including thefts of vehicles; R. v. Hutton (1980), 43 N.S.R. (2d) 541 (C.A.) - two years consecutive for accused, over 27 previous convictions, who stole Trans-Am while on parole; R. v. Tellum (1980), 41 N.S.R. (2d) 626, 76 A.P.R. 626 (C.A.) - three years for accused who stole motor vehicle during three-day leave of absence from penitentiary, accused had several previous convictions including theft of automobile.

17. R. v. Munn (1977), 22 N.S.R. (2d) 308 (C.A.); R. v. Sleep (1978), 23 N.S.R. (2d) 639 (C.A.); R. v. Munn (1978), 29 N.S.R. (2d) 476, 45 A.P.R. 476 (C.A.).

18. (1980), 25 N. & P.E.I.R. 10, 68 A.P.R. 10 (Nfld. Prov. Ct.).

19. See also R. v. Gould and Gould (1978), 15 N. & P.E.I.R. 30, 38 A.P.R. 30 (Nfld. C.A.) - three months concurrent on two counts for series of break

and entries of service stations which included theft of money, trucks and gasoline.

20. (1975), 26 C.C.C. (2d) 388 (Ont. C.A.).

21. (1974), 22 C.C.C. (2d) 113 (Ont. C.A.).

22. (1976), 15 N.S.R. (2d) 459 (C.A.).

23. (1979), 24 N. & P.E.I.R. 271, 65 A.P.R. 271 (P.E.I.C.A.).

24. (1980), 27 N. & P.E.I.R. 6, 74 A.P.R. 6 (Nfld. C.A.).

25. See further R. v. Oldham (1975), 11 N.S.R. (2d) 12 (C.A.) - seven and 10 months consecutive, plus probation, for offender with two previous convictions who stole a total of 36 diamond rings, value $4,500 - $5,000, from two stores in separate towns.

26. See e.g. R. v. Duggan et al., 32 C.C.C. (2d) 558, 38 C.R.N.S. 25, 22 N.S.R. (2d) 531, 31 A.P.R. 531 (Co. Ct.) - absolute discharge for three men who, after drinking, took a canoe from a compound belonging to the Eaton Company, area was well-lighted, accused easily apprehended, and whole affair was in the nature of a "prank".

27. (1980), 39 N.S.R. (2d) 42, 71 A.P.R. 42 (C.A.).

28. See e.g. R. v. Morrisey and Elmore (1979), 19 N. & P.E.I.R. 526, 50 A.P.R. 526 (Nfld. C.A.) - two months imprisonment plus probation, three months' imprisonment plus probation for accuseds aged 21 and 27 who stole stereo equipment on impulse while attending a party at a Naval Base.

29. (1978), 38 C.C.C. (2d) 538, 14 N. & P.E.I.R. 419, 33 A.P.R. 419 (P.E.I.C.A.).

30. (1979), 36 N.S.R. (2d) 463, 64 A.P.R. 463 (C.A.).

31. (1974), 8 N.S.R. (2d) 231 (C.A.).

32. Criminal Code, s.294, provides that persons convicted of theft of property of a value not exceeding $200 are liable on conviction on indictment to imprisonment for two years, or liable to summary conviction penalties.

33. See e.g. R. v. Beals (1973), 6 N.S.R. (2d) 551 (C.A.) - suspended sentence for 17-year-old who stole $1.65 from bank premises which he was employed to clean; R. v. Croft (1975), 11 N.S.R. (2d) 455 (C.A.) - conditional discharge for theft of $8 by 16-year-old from father.

34. See e.g. Bogner v. The Queen (1975), 33 C.R.N.S. 348 (Que. C.A.) - absolute discharge for accused who, with two others, carried a rocking chair from the front porch of a hotel, his motive being to play a "joke" on its owners.

35. See e.g. R. v. Hergert (1977), 3 A.R. 552 (Dist. Ct.) - absolute discharge for theft of item of low value from a store during period of emotional upset occasioned by false accusations of another crime.

36. See e.g. R. v. McDow (1974), 10 N.S.R. (2d) 92 (C.A.) - two years' probation for accused with "physical and psychological abnormalities", despite previous record for similar offences of shoplifting, as opportunities for rehabilitation would be better on probation than in prison.

37. See R. v. Mercer (1979), 4 W.C.B. 73 (B.C. Co. Ct.) - government (liquor store) employee who stole $4.28 should have been sentenced to imprisonment, but in event conditional discharge allowed to stand as community service term of probation order already performed.

38. (1974), 18 C.C.C. (2d) 575 (Ont. C.A.).

39. (1975), 24 C.C.C. (2d) 551 (C.A.).

40. See e.g. Mason v. R. (1978), 6 C.R. (3d) S-14 (Ont. C.A.) - absolute discharge for accused who stole dress from department store, fine of $75 imposed at trial might affect her immigration status.

41. See e.g. R. v. McInnis (1973), 23 C.R.N.S. 152, 13 C.C.C. (2d) 471, 1 O.R. (2d) 1 (C.A.) - conditional discharge for girl of 16 who stole three sweaters from two different stores on same day; R. v. Sears (1978), 39 C.C.C. (2d) 199, 2 C.R. (3d) S-27 (Ont. C.A.) - conditional discharge for first offender who stole stereo tape worth about $16 from store; Vretakos v. The Queen, [1976] C.A. 526 - conditional discharge for theft of merchadise valued at $125 in company with friend; R. v. Yearwood (1980), 28 N. & P.E.I.R. 463, 79 A.P.R. 463 (P.E.I.S.C.) - $150 fine for theft of merchandise worth $151.90.

42. (1979), 2 Sask. R. 174 (C.A.).

43. (1980), 42 N.S.R. (2d) 218, 77 A.P.R. 218 (C.A.).

44. (1980), 22 A.R. 536 (N.W.T.S.C.).

45. See e.g. R. v. McGlone (1974), 10 N.S.R. (2d) 247 (C.A.) - sentence of six months' imprisonment upheld for accused with record who stole $8-11 from changer of taxi-driver, Court having regard to the need to protect taxi drivers "who are especially vulnerable to such offences".

46. See e.g. R. v. Pitchuk (1973), 6 N.S.R. (2d) 426 (C.A.) - four months, four months consecutive for shoplifting offences, accused had substantial record including break and enter, and his "antisocial attitudes" had been little changed by previous sentences; R. v. Gouchie (1975), 1 C.R. (3d) S-33, 11 N.S.R. (2d) 100 (C.A.) - three months imprisonment plus probation for theft of $60 from nurse by patient, accused had very bad criminal record including three convictions for theft.

47. See R. v. Hull (1976), 18 N.S.R. (2d) 343 (C.A.) - one year consecutive for theft of a radio and battery, accused had long record and had used threats or implied threats to acquire the property; R. v. Maytwayashing

(1979), 1 Man. R. (2d) 23 (C.A.) - one year for accused who grabbed victim, punched him in mouth then, in separate act, picked up victim's sunglasses and kept them, a further six months would be served for the assault.

48. (1974), 9 N.B.R. (2d) 19 (C.A.).

49. (1978), 16 N. & P.E.I.R. 275, 42 A.P.R. 275 (P.E.I.C.A.).

50. (1979), 2 Sask. R. 382 (C.A.).

51. (1978), 30 N.S.R. (2d) 421, 49 A.P.R. 421 (C.A.).

52. [1979] 1 W.W.R. 292 (Man. C.A.).

53. See further R. v. McKay (Kraeker) (No. 2), 2 C.R. (3d) S-37, [1978] 3 W.W.R. 309 (Y.T.C.A.) - three months concurrent on each of nine counts for female convicted of possession of stolen card and several attempts to use it; R. v. Gollop (1980), 28 N. & P.E.I.R. 443, 79 A.P.R. 443 (Nfld. C.A.) - nine months for accused who used stolen credit card to purchase gas while following a truck in order to steal from it.

54. Criminal Code, s.303.

55. 19 C.C.C. (2d) 512, [1975] W.W.D. 6 (Man. C.A.).

56. R. v. Hemstad; R. v. Rhodes (1978), 40 C.C.C. (2d) 474 (B.C.C.A.).

57. (1978), 11 A.R. 450 (T.D.).

58. (1977), 19 N.S.R. (2d) 541 (C.A.).

59. (1979), 46 C.C.C. (2d) 63 (Ont. C.A.).

60. See e.g. R. v. Purvis (1976), 14 N.S.R. (2d) 94 (C.A.); R. v. Deveau (1977), 18 N.S.R. (2d) 341 (C.A.).

61. See e.g. R. v. Nutter, Collishaw and Dulong, 7 C.C.C. (2d) 224, [1972] 3 W.W.R. 606 (B.C.C.A.) - 12 years; R. v. McGrayne, supra note 59 - two men, offence carefully planned, 10 years appropriate; R. v. Dube (1976), 32 C.C.C. (2d) 536 (Ont. C.A.) - two men, accused had minimal previous record, eight years upheld. For an exception see R. v. Leamont (1977), 21 N.S.R. (2d) 251 (C.A.) - two men, six years upheld.

62. Supra note 58.

63. Ibid. at 546.

64. Supra note 61.

65. Supra note 56.

66. See e.g. R. v. Leamont, supra note 55.

67. [1978] 1 W.W.R. 162 (B.C.C.A.).

68. (1978), 3 C.R. (3d) S-59 (Ont. C.A.).

69. (1976), 32 C.C.C. (2d) 379, 3 C.R. (3d) S-55 (Ont. C.A.).

70. Ibid. at 381-82 per Dubin, J.A.

71. See also R. v. Rowe and Taylor (1980), 25 N. & P.E.I.R. 104, 68 A.P.R. 104 (Nfld. C.A.) - nine months' imprisonment and three years' probation for two accused, aged 17 and 18 at trial, who robbed gas bar, beating attendant but not causing serious injury; R. v. Langevin (1979), 47 C.C.C. (2d) 138, 10 C.R. (3d) 193 (Ont. C.A.) - nine months consecutive, reduced in part on totality grounds but also as first sentence of imprisonment for 17-year-old; R. v. Dunkley (1976), 3 C.R. (3d) S-51, 19 Crim. L.Q. 277 (Ont. C.A.) - two years less a day, plus similar term indeterminate, for 16-year-old who robbed five stores, firing shots in the course of one of the robberies, Court felt rehabilitation unlikely if sentence served in penitentiary; R. v. Gonidis, McCullough and Stevenson (1980), 57 C.C.C. (2d) 90 (Ont. C.A.) - 15 months' imprisonment for three accused, all aged 17, two with no previous convictions, one with minor record, who planned and executed robbery of restaurant.

72. (1976), 13 N.B.R. (2d) 118 (C.A.).

73. (1979), 47 C.C.C. (2d) 224 (Man. C.A.).

74. See also R. v. Doucet (1977), 18 N.B.R. (2d) 137 (C.A.) - eight months for accused, aged 18, short record but some evidence of repentence, cooperation with police, four months served pending trial, who held up ticket booth of theatre with two others.

75. See e.g. R. v. Smith (1975), 12 N.S.R. (2d) 289 (C.A.).

76. See e.g. R. v. Cusack (1977), 14 N. & P.E.I.R. 181, 33 A.P.R. 181 (P.E.I.C.A.) - five years for robbery of service station, accused had 21 previous convictions including robbery; R. v. Clark (1979), 48 C.C.C. (2d) 440, 33 N.S.R. (2d) 636, 57 A.P.R. 636 (C.A.) - five years for robbery of store, prior record of two offences of possession of weapon, two break and enters, one theft under, accused unmarried and unemployed; R. v. Smith (1977), 3 C.R. (3d) S-53 (Ont. C.A.) - five years for 21-year-old who robbed store armed with knife and disguised; two previous convictions of robbery and one of arson.

77. See e.g. R. v. Aylward (1978), 43 C.C.C. (2d) 455 (Ont. C.A.).

78. (1972), 8 C.C.C. (2d) 97 (Man. C.A.).

79. (1979), 11 C.R. (3d) 188 (Que. C.A.).

80. Supra note 77.

81. Ibid. at 458 per Martin, J.A.

82. (1976), 3 C.R. (3d) S-50 (Ont. C.A.).

83. (1973), 21 C.R.N.S. 205 (Que. C.A.).

84. See e.g. R. v. Burgess (1980), 42 N.S.R. (2d) 181, 77 A.P.R. 181 (C.A.) - three years; R. v. Crossman (1981), 44 N.S.R. (2d) 174, 83 A.P.R. 174 (C.A.) - five years; R. v. Park (1973), 6 N.S.R. (2d) 430 (C.A.) - six years; R. v. Samaras (1971), 16 C.R.N.S. 1 (Ont. C.A.) - four years.

85. (1978), 22 N.B.R. (2d) 530, 39 A.P.R. 530 (C.A.).

86. See e.g. R. v. Bateman (1977), 23 N.S.R. (2d) 70 (C.A.) - three years; R. v. Karas (1976), 17 N.S.R. (2d) 72 (C.A.).

87. Thomas, D.A. Principles of Sentencing (2nd ed. 1979, London: Heinemann Books Ltd.) at 141.

88. Ibid.

89. R. v. Condo, [unreported] March 25th, 1981 (Ont. C.A.) - 15 months' imprisonment and probation for 16-year-old.

90. R. v. Lambert et al. (1978), 20 N. & P.E.I.R. 458, 53 A.P.R. 458 (Nfld. C.A.) - 2-1/2 years and one year.

91. R. v. Chaisson (1980), 25 N. & P.E.I.R. 112, 68 A.P.R. 112 (P.E.I.S.C.).

92. See comments of Hughes, C.J.N.B. in R. v. Chiasson (1975), 24 C.C.C. (2d) 159 at 160, 10 N.B.R. (2d) 696 (C.A.).

93. Ibid.

94. (1979), 31 N.S.R. (2d) 469, 52 A.P.R. 469 (C.A.).

95. [1973] C.A. 1095.

96. (1972), 5 N.S.R. (2d) 24 (C.A.).

97. (1978), 26 N.S.R. (2d) 122, 40 A.P.R. 122 (C.A.).

98. See e.g. R. v. Carver (1980), 4 Man. R. (2d) 107 (C.A.) - suspended sentence and three years' probation for 20-year-old who bullied younger boy, taking 50 cents and chains from his neck.

99. See e.g. R. v. McKinnon (1979), 31 N.S.R. (2d) 178, 52 A.P.R. 178 (C.A.) - four months' imprisonment plus probation for 16-year-old who robbed another of $4, cutting his face with a knife, accused was drunk at time of offence and had no criminal record.

100. See e.g. R. v. Sampson (1979), 31 N.S.R. (2d) 177, 52 A.P.R. 177 (C.A.) - three months plus probation for man who stole, using violence, bottle of wine from 82-year-old man, but victim was not hurt or injured, Court found offence "petty" in nature.

101. See e.g. R. v. Yeates (1979), 31 N.S.R. (2d) 206, 52 A.P.R. 206 (C.A.) - 23 months consecutive for grabbing purse of woman in restaurant, and striking her in face to stop resistance.

102. See e.g. R. v. Maynard (1980), 40 N.S.R. (2d) 204 (C.A.) - two years consecutive for accused who met victim, invited him to go for drinks, then attacked him as the two were walking in an alley, relieving him of a sum of money.

103. R. v. Reddick (1976), 17 N.S.R. (2d) 369 (C.A.); R. v. Pace (1977), 23 N.S.R. (2d) 7 (C.A.); R. v. Huskins (1974), 10 N.S.R. (2d) 553 (C.A.).

104. See e.g. R. v. Henderson (1979), 8 C.R. (3d) S-19 (B.C.C.A.) - four years for first offender convicted of three robberies in parking garage using sawed-off shotgun; see also R. v. McLeod, [1970] C.A. 568.

105. Ibid.

106. [1973] C.A. 364.

107. (1971), 1 N. & P.E.I.R. 406 (P.E.I.C.A.).

108. (1970), 15 C.R.N.S. 140 (Que. C.A.).

109. (1978), 41 C.C.C. (2d) 492 (Ont. C.A.).

110. R. v. Winters, Knox and Palmer (1974), 16 C.C.C. (2d) 551 (N.S.C.A.); R. v. Perry and Franks (1977), 36 C.C.C. (2d) 209 (Ont. C.A.); R. v. Reid (1974), 26 C.R.N.S. 292 (Que. C.A.).

111. Ibid. at 297 per Belanger, J.A.

112. A rarer type is that of extortion of consent to sexual intercourse - for an example see R. v. Markic and McGovern (1978), 21 Crim. L.Q. 419, 3 W.C.B. 77 (Ont. C.A.).

113. See e.g. R. v. Finamore, [unreported] March 16th, 1981 (B.C.C.A.).

114. See e.g. R. v. Rosenberg (1979), 4 W.C.B. 104 (Ont. C.A.) - three years upheld for extortion of automobile.

115. See e.g. R. v. Smith (1977), 1 W.C.B. 609 (Que. C.A.) - 3-1/2 years upheld for attempts to "collect" protection money from night-club owner.

116. [1978] 5 W.W.R. 382, 10 A.R. 162 (C.A.).

117. Non-custodial sentences are very rare for extortion of property. However, very lenient dispositions have been awarded in highly unusual circumstances - see e.g. R. v. Pitcher (1976), 19 Crim. L.Q. 158 (B.C.C.A.) - one year for demanding $10,000 with threats that victim's son would die from an overdose of heroin otherwise, accused later phoned victim, identified himself and apologised; R. v. Leydier (1981), 5

W.C.B. 425 (Man. Co. Ct.) - suspended sentence for 19-year-old first offender who concocted "bizarre scheme" for extorting money from small store-owner, accused was brilliant violinist, perhaps genius, who devoted most of life to training and was given to "fantacizing", had never really led normal life, no-one hurt as result of scheme.

118. To which many cases bear witness. For comprehensive summaries of reported cases for the last 10 years see Nadin-Davis, R.P. and Sproule, C.B., Canadian Sentencing Digest (1980, Toronto: The Carswell Co.).

119. (1978), 17 A.R. 91 (T.D.).

120. (1973), 12 C.C.C. (2d) 480 (Ont. C.A.).

121. See also R. v. McCaw et al. (1974), 15 C.C.C. (2d) 321 (Ont. C.A.) - sentences of three to five years upheld for planned break and enter out of which a "shooting incident" arose; R. v. Bailey (1979), 35 N.S.R. (2d) 341, 62 A.P.R. 341 (C.A.) - three yeas for entry armed with rifle and machete, one occupant assaulted; R. v. Fougere (1979), 31 N.S.R. (2d) 100, 52 A.P.R. 100 (C.A.) - three years for entry during which elderly man hit with bottle.

122. (1974), 9 N.S.R. (2d) 351 (C.A.).

123. (1977), 18 N.S.R. (2d) 362 (C.A.).

124. R. v. Chaisson (1979), 31 N.S.R. (2d) 115, 52 A.P.R. 115 (C.A.); R. v. Keats (1980), 26 N. & P.E.I.R. 226 (Nfld. C.A.).

125. (1979), 32 N.S.R. (2d) 87, 54 A.P.R. 87 (C.A.).

126. See, again, for extensive listing of examples, Nadin-Davis and Sproule, supra note 118.

127. (1977), 2 B.C.L.R. 89 (Prov. Ct.).

128. Criminal Code, s.309(1).

129. (1977), 1 W.C.B. 522 (Que. C.A.).

130. (1981), 26 A.R. 568 (C.A.).

131. Criminal Code, s.313.

132. See e.g R. v. Carrigan (1974), 8 N.S.R. (2d) 79 (C.A.) - one year for possession of stolen motor vehicle, accused had serious record; R. v. Chandler (1974), 8 N.S.R. (2d) 17 (C.A.). - two years and one year for youths convicted of breaking and entering school, and possession of stolen property therefrom; R. v. Orman and Marcotte (1975), 25 C.C.C. (2d) 337, 32 C.R.N.S. 364, 12 N.S.R. (2d) 217 (C.A.) - three years for possession of stolen truck.

133. (1973), 22 C.R.N.S. 359 (B.C.C.A.).

134. Ibid. at 365 per Limerick, J.A.

135. See e.g. R. v. MacFarlane, 3 Alta. L.R. (2d) 341, [1976] W.W.D. 74 (C.A.) - suspended sentence and probation for purchase of $760 worth of stolen car parts; R. v. Bates (1977), 32 C.C.C. (2d) 493 (Ont. C.A.) - 7 days time served for 38-year-old shopkeeper who received stolen goods worth $360, 60 days "disproportionate" in light of his good background and character.

136. See e.g. R. v. Short (1979), 30 N.S.R. (2d) 181, 49 A.P.R. 181 (C.A.) - four and five months consecutive for possession of stereo system worth $5,500 and stolen cheque, lengthy criminal record and drug addiction.

137. Criminal Code, s.313.

138. See e.g. R. v. Fallofield, 22 C.R.N.S. 342, 13 C.C.C. (2d) 450, [1973] 6 W.W.R. 472 (B.C.C.A.) - absolute discharge for three men who took left-over pieces of carpeting from new apartment building.

139. See R. v. Vicente (1975), 18 Crim. L.Q. 292 (Ont. C.A.) - conditional discharge for 17-year-old, Court held discharge in such circumstances "not confined to trivial matters".

140. (1976), 16 N.S.R. (2d) 706 (C.A.).

141. Criminal Code, s.320(3).

142. (1974), 8 N.S.R. (2d) 553 (C.A.).

CHAPTER 18: FORGERY, FRAUD AND CURRENCY OFFENCES

There is considerable overlap between the offences of theft, obtaining by false pretences, forgery and fraud. For example, a person whose "business" involves stealing cheques and cashing them might, having forged a signature, be convicted of any or all of these crimes, not to mention others.

As will be seen, the differences in statutory maximum penalties are largely irrelevant except in the case of fraud under $200, where charged summarily.[1] Forgery and its counterpart, uttering a forged document, are punishable by 14 years' imprisonment.[2] Frauds are punishable on indictment by 10 years' imprisonment where the subject-matter exceeds $200 in value or is a testamentary instrument,[3] and a related offence, fraudulently affecting the public market price of stocks, shares or merchandise may also incur up to 10 years' imprisonment.[4] Persons convicted of frauds upon the unemployment insurance system may be convicted summarily under the Unemployment Insurance Act 1971[5] for false statements made in claims.[6] Personation with intent, a useful charge where an attempted fraud is detected before the offender has received anything, is punishable by 14 years' imprisonment.[7] Statutory maximum penalties for obtaining by false pretences were outlined in the previous Chapter.

Particularly in the case of forgery, fraud and their related offences, there is little to be gained by analysis according to the strict legal categories into which the charges laid fall. Rather, a number of typical fact-situations may be discerned which shed more light on the pattern of sentencing.

A. "PAPERHANGING" AND RELATED FRAUDS

A large number of cases relating to the fraudulent signing, endorsing and cashing of cheques come before the appellate Courts. The range of sentence for such offences appears to extend from one month's imprisonment for isolated, low-value frauds by persons of good repute, to about four years in the opposite circumstances. Individualized dispositions have been granted in the face of strong mitigating circumstances,[8] but the planning and deliberation necessarily involved in cheque frauds makes the Courts keen to determine sentences with an eye fixed firmly upon the notion of general deterrence.[9]

The most influential factors in determining tariff sentences appear to be the amount involved, the number of offences committed, and the accused's history. Sentences low in the range, from one to three months' imprisonment, tend to be reserved for single instances and occasional multiple offences where the amount involved is measured in hundreds of dollars. Thirty-day sentences imposed or upheld on appeal in recent years have related to quite small amounts, like the cheques all worth $155 or less involved in a related group of Prince Edward Island fraud prosecutions in 1971.[10] In R. v. Whitlock,[11] four terms of 15 days, consecutive, were imposed on a first offender of 17 on four counts of fraud, each involving cheques for under $300.

The importance of the size of fraud is seen in a comparison between Whitlock and R. v. Diotte.[12] Diotte, a first offender aged 18, stole a bank pass-book from a fellow worker, and attempted to withdraw $2,000. He had, however, an unfavourable presentence report; a term of two years' imprisonment was upheld. In R. v. Kennedy,[13] which involved two purchases

of goods valued at over $2,000 with worthless cheques, a total of one year's imprisonment was imposed.

With planning, repetition and increase in the size of the transaction, the quantum of sentence increases. The decision in Meakins v. R.,[14] which involved a total of 16 charges against an offender of 22, was in favour of a term of four years' imprisonment. A total of 32 months was imposed on another offender with a record, in R. v. Hatch,[15] for nine counts relating to thefts of cheques from mail-boxes and their subsequent use.

A "breach of trust" element also incurs, as in other areas, an increase in penalty. In R. v. Morrison,[16] a lawyer obtained over $18,000 and attempted to obtain a further $11,000; holding that suspension of sentence overlooked the element of deterrence to others, the Nova Scotia Court of Appeal substituted a sentence of two years' imprisonment.

B. COMMERCIAL FRAUDS

i) Submission of False Invoices, Overbilling and Related Offences

Inflated and false invoices are a persistent problem both in the private sector and for government granting agencies. In view of the deliberate, and usually rational, planning involved in false billing offences, prison terms are almost standard. The range of sentence in recent years has extended from six months to two years for "medium" amounts (tens of thousands), with a lesser disposition, 5 days' imprisonment, in one very minor instance.[17] The major consideration is, indeed, the amount of money involved, though naturally the duration of the offence[18] and other aspects of both it and the accused are taken into consideration. In Simard v. The

Queen[19] a sentence of five years was imposed at trial on a school director who defrauded the provincial government of over $132,000 by claiming subsidies for non-existent students. The term was reduced on appeal to 18 months' imprisonment, in view of his previous good record, excellent background and work reputation, and state of family ruin. Breach of a position of trust, as by a professional person, is an aggravating factor;[20] however, it should be noted that a government contractor has been held not to be in such a position. In R. v. Sullivan,[21] where a first offender received a total sentence of six months' imprisonment and fines for submission of inflated invoices to a government fishing gear replacement subsidy programme, the Court pointed out that the accused was in the same position as any other businessman having dealings with the government. The question of trust does not appear even to have been mentioned in R. v. Carter,[22] where one sentence of two years and three of two months' consecutive were upheld for a submission of invoices for fictitious work to a private building contractor.

A different kind of commercial transaction is closely akin to the "confidence trick", and involves the sale of worthless or depreciated goods to gullible customers at inflated or "new" prices. Such cases rarely come to the Courts of Appeal. However, a small number of decisions indicates that such behaviour will be punished by imprisonment if the accused has a record of similar offences, especially in view of the vulnerable nature of the victims normally chosen. In Denis v. The Queen[23] an accused with a long history of petty frauds was in the business of repairing automobiles. He agreed to fit a rebuilt motor to an elderly gentleman's car for $315, but instead installed a used motor and invoiced the work at $383. The Court of Appeal, considering three months served awaiting trial and the accused's difficult financial position, imposed a sentence of one year's imprisonment. Somewhat shorter

terms, of 30 days concurrent on 13 counts, were to be followed by probation and restitution in R. v. Riordan.[24] Riordan sold used hearing aids to elderly people on the pretence that they were new, and had a record of seven convictions for offences of dishonesty. However, he had a regular job and a long "gap" since his last conviction. While his record meant that a term of imprisonment was necessary, the circumstances indicated that it could be of short duration.

ii) Frauds on Financial Institutions

A handful of cases involving the fraudulent obtaining of large loans from banks and finance companies indicates that a reformatory term will normally be in order. In R. v. Marchand,[25] for example, a university graduate who forged his wife's signature on mortgages to a value of over $32,000 received a term of nine months' imprisonment on the two counts.[26] Somewhat higher sentences are normally imposed where the accused was in a position of trust: in R. v. Warner,[27] the accused bank manager used false names to defraud his employer of over $10,000 in three loan transactions. Pointing out that the main factors in this case were punishment and deterrence, the Court of Appeal increased terms of five days' imprisonment to 12 months concurrent on each count.[28]

iii) "Long Firm" Frauds

So-called "long firm" frauds, in which the offender orders substantial quantities of goods for a "temporary" company, or runs up substantial accounts for a business, diverts funds from it then declares bankruptcy so as

to defraud the creditors, are rarely the subject of appellate consideration. The offence seems to be regarded as similar in gravity to other commercial frauds involving substantial amounts of money; in Erbstein v. The Queen,[29] which involved $26,411 worth of goods, the Quebec Court of Appeal upheld a fine of $25,000 and six months' imprisonment.

iv) Market Manipulation and Investment Scams

The majority of large-scale investment frauds which come before the Courts fall into one of two categories. The first class, market manipulation, is usually committed by wealthy investors whose greed overcomes their good sense. Of a completely different nature, the second class typically involves persuading a group of persons to "invest" in a fictitious venture, often with promises of high profits in the short term.

The Courts clearly take a dim view of both types of offence, and incarceration for up to two years will normally be upheld even in unexceptional cases. In R. v. Littler[30] an elderly businessman, with no need for the money, made an undervalue purchase of shares and immediately resold at a profit of about $1 million, the benefit going to his sons. He had a good record, was sick, and had already suffered from proceedings lasting some seven years. Nevertheless, finding that the sentence in such cases should be exemplary, the Court of Appeal upheld a sentence of two years' imprisonment.[31]

Sentences of about two years' imprisonment are also common for the second class of investment scam, which frequently takes on much of the aspect of a confidence trick. A maximum reformatory term was imposed in R. v. McNabb[32] where an accused, whose company was in difficulties,

defrauded 22 persons of $2,500 each by persuading them to participate in a land investment. In R. v. Murdock[33] the accused set up a company which negotiated sales of shares in sugar options, varying in size from $400 to $3,000. A sizeable but undeterminable total was involved. The company acquired no contracts for its customers, and thus had no security for them even though it had represented itself as a stable enterprise with experienced staff. The trial Judge, cognizant of the usual requirement of prison terms for such cases, justified a departure by pointing to the length of time the case had taken to come on for trial and the accused's civil liability. Finding these considerations inapplicable, the Nova Scotia Court of Appeal set aside a fine and sentenced Murdock to two years' imprisonment.

C. MANUFACTURE OF FORGED DOCUMENTS

The illegal printing of forged documents is closely akin to manufacture of currency, discussed below. While prosecutions are rare, evidence of a substantial operation will justify the imposition of a penitentiary term. In R. v. Pilipenko[34] the accused was found guilty of conspiring to utter, possession of printing plates and forged government documents, and a variety of cheque-printing and selling offences. Sentences totalling five years' imprisonment, including two years consecutive for offences committed while on bail for earlier infractions, were upheld.

D. FORGING TESTAMENTARY INSTRUMENTS

As noted above, fraudulent dealings with testamentary instruments are punishable in the higher statutory sentencing bracket, regardless of

the value of property involved. While prosecutions brought to the Courts of Appeal are rare, the decision of the Ontario Court in R. v. Assaf[35] indicates that Parliament's view of the seriousness of the offence should be reflected in sentencing. Assaf forged his father's will, leaving the entire estate to his mother, and obtained false witnesses to swear as to its validity. He was a first offender and had apparently suffered considerable stress in his familial position; nevertheless, his sentence of four years' imprisonment was reduced only to 30 months.

E. WELFARE FRAUDS

Frauds on the welfare system, most commonly committed by welfare recipients, are generally treated as tariff offences, but of a very minor nature. The principal type of offence is committed by making a false statement in a claim, to increase the amount receivable, or by failing to notify welfare authorities of changed circumstances which would reduce it. Becuse of the circumstances of many welfare recipients, fines could not be imposed even if warranted, and short terms of imprisonment will be appropriate. In R. v. Harrington,[36] for example, sentences of two days' imprisonment, consecutive on five counts, were imposed for false statements. In R. v. Sooley[37] a total of nine days was not regarded as excessive for three false statements; however, in view of the fact that no suitable jail accommodation was available for the young female accused, a suspended sentence was substituted.

Jail has been avoided in light of voluntary discontinuance of an offence.[38] On the other hand, as the length of the period over which an offence is committed, or the amount obtained, increase, the appropriate

quantum of sentence will also grow. In R. v. Kemp,[39] where the mother of a 10-year-old girl continued to receive benefits after obtaining employment, and defrauded the public purse of some $2,600, a term of 90 days intermittent was upheld. A term of five months indeterminate was imposed by the Ontario Court in R. v. Thurrott[40] for offences involving benefits of $1,700. The Court stated:

> Although this case is pitiful in many respects, this Court is unanimously of the opinion that the paramount consideration in determining the sentence is the element of deterrence. Welfare authorities have enough difficulties without having to put up with persons who set out to defraud them. This is such an instance, and others who are similarly minded must be warned that these offences will not be treated lightly.[41]

Welfare officers are in a position of trust, and can expect substantial jail terms if funds are diverted from proper recipients. In R. v. Rogers (No. 2)[42] a sentence of one year's imprisonment was set aside and a term of four years substituted for diversion of about $50,000 in such circumstances.

F. CURRENCY OFFENCES

The statutory maximum penalties for possession of and dealings in counterfeit money are set at 14 years by the Criminal Code;[43] a similar maximum term is prescribed for possession of instruments for counterfeiting.[44] Most reported cases relating to counterfeit money involve offenders found in possession of a number of counterfeit bills. These offences generally call for the imposition of a term of imprisonment.

In R. v. Zezima[45] a term of six months was imposed on a first offender for offences relating to 56 $10 bills. A term of one year was

imposed in R. v. Twitchin,[46] on a first offender who pleaded guilty to possession of 24 counterfeit $20 bills. Sentences of 21 months and six months respectively were imposed in A.G. Can. v. Sigouin[47] and R. v. Jones,[48] for offences relating to $2,460 and "counterfeit $100 bills" (of unspecified amount) respectively. While these cases are insufficient basis upon which to postulate the extent of the range, a substantial reformatory term appears to be unobjectionable for most such cases. An exception was made in R. v. Boisvert,[49] where the accused was convicted of uttering one $10 bill and conspiring to utter. The Quebec Court of Appeal upheld a sentence of one week's imprisonment and a fine of $100, as the Crown had filed its appeal notice almost a year after the sentence was imposed. An annotation indicates that the Court apparently did not feel that the offence in itself was sufficiently grave to demand an increase.

Reviewing the precedents, in R. v. Jones,[50] Nicholson, J. stated:

> These cases indicate that printers of counterfeit money should be treated more harshly than those who distribute it. It also appears that the quantity of counterfeit money involved is a matter generally considered in determining the appropriate sentence.[51]

The distinction can easily be seen between the sentences imposed in the above cases and that in R. v. Sonsalla.[52] Sonsalla, a printer, was found in possession of $241,000 in counterfeit U.S. bills and the printing equipment with which he had made them. On a Crown appeal, a total sentence of one year's imprisonment was increased fourfold.

Footnotes to Chapter 18

1. Criminal Code, s.338.
2. Ibid. ss.324, 326.
3. Ibid. s.338.
4. Ibid. s.338(2).
5. S.C. 1970-71-72, c.48.
6. Ibid. s.121(1).
7. Criminal Code, s.361.
8. See e.g. R. v. Robinson, [unreported] March 12th, 1981 (B.C.C.A.) - probation for single woman who forged endorsement on employer's cheque, as she was supporting two children with no help from her husband. Taggart, J.A. stated: "I cannot say that the sentence of two months is a wrong sentence, having regard for the nature of the offence, which is a very serious one. I do think, however, that having regard for the circumstances of this offender, it would not be fitting for this court to now direct that she return to prison."
9. See e.g. R. v. Fieldman (1970), 13 Crim. L.Q. 14 (Ont. C.A.).
10. R. v. Pretty (1971), 5 C.C.C. (2d) 332, 2 N. & P.E.I.R. 10 (P.E.I.C.A.); R. v. Faulkner (1971), 2 N. & P.E.I.R. 20 (P.E.I.C.A.); R. v. Matthews (1971), 2 N. & P.E.I.R. 30 (P.E.I.C.A.); R. v. Veale (1971), 2 N. & P.E.I.R. 37 (P.E.I.C.A.).
11. (1976), 13 N.B.R. (2d) 121 (C.A.).
12. (1977), 1 W.C.B. 178 (Que. C.A.).
13. (1976), 15 N.S.R. (2d) 470 (C.A.).
14. (1978), 4 C.R. (3d) S-13, 26 N.S.R. (2d) 451, 40 A.P.R. 451 (C.A.).
15. (1979), 31 N.S.R. (2d) 110, 52 A.P.R. 110 (C.A.).
16. (1975), 13 N.S.R. (2d) 98 (C.A.).
17. R. v. Burgess (1973), 6 N.S.R. (2d) 432 (C.A.) - the accused was the "passive and almost involuntary beneficiary" of overpayments at his job resulting from deliberate falsification of time sheets by his supervisor.
18. R. v. Soble (1978), 3 C.R. (3d) S-1 (Man. C.A.).
19. [1979] C.A. 101.

20. R. v. Soble, supra note 18.

21. (1978), 15 N. & P.E.I.R. 271, 38 A.P.R. 271 (Nfld. C.A.).

22. (1978), 27 N.S.R. (2d) 579, 41 A.P.R. 579 (C.A.).

23. [1970] C.A. 954.

24. (1974), 15 C.C.C. (2d) 219, 25 C.R.N.S. 265 (N.S.C.A.).

25. (1980), 115 D.L.R. (2d) 403 (N.S.C.A.).

26. See also R. v. Parry (1979), 34 N.S.R. (2d) 85, 59 A.P.R. 85 (C.A.) -total of nine months for two frauds totalling over $35,000, accused accountant, aged 34, had no previous record. MacKeigan, C.J.N.S. stated at 86-78: "We are unable to see that there is anything exceptional about these offences. They were typical so-called white collar thefts or frauds. They occurred over a considerable period of time - nearly a year and a half. They obviously involved premeditation. The fraud of the bank in particular required considerable planning and sophisticated arrangements. There is no doubt ofthis man's otherwise good character and of his repentance. This is not a case where rehabilitation or personal deterrence is concerned. We must emphasize, however, that those committing this type of offence and others tempted to act similarly must be shown that they cannot escape severe punishment merely by repentance or restitution and that a substantial measure of public deterrence has to be administered."

27. (1974), 7 N. & P.E.I.R. 79, 3 A.P.R. 79 (Nfld. C.A.).

28. But see R. v. Hurtubise (1979), 22 Crim. L.Q. 164 (B.C. Co. Ct.) - suspended sentence for finance company employee who procured loans in false names, but employer suffered no loss, substantial other mitigating factors.

29. [1970] C.A. 346.

30. (1975), 27 C.C.C. (2d) 234, 65 D.L.R. (3d) 467 (Que. C.A.).

31. For an example of a very substantially mitigated sentence see R. v. McNaughton (1976), 43 C.C.C. (2d) 293, 33 C.R.N.S. 279 (Que. C.A.) - one day's imprisonment and $10,000 fine for accused who was involved in plan to manipulate a "box" (reservation of shares) so as to bring about an artificial rise in value: accused did not know operation was illegal, made no profit, and exposed the operation by making too many inquiries about the matter.

32. (1979), 49 C.C.C. (2d) 263, 1 Sask. R. 47 (C.A.).

33. (1980), 42 N.S.R. (2d) 90, 77 A.P.R. 90 (C.A.).

34. (1971), 13 Crim. L.Q. 294 (Ont. C.A.).

35. (1978), 7 C.R. (3d) 267 (Ont. C.A.).

36. (1976), 10 N. & P.E.I.R. 288 (Nfld. Dist. Ct.).

37. (1977), 17 N. & P.E.I.R. 384, 46 A.P.R. 384 (Nfld. Dist. Ct.).

38. R. v. Bates (1972), 9 C.C.C. (2d) 74 (Ont. Co. Ct.).

39. [Unreported] March 23rd, 1981 (B.C.C.A.).

40. 5 C.C.C. (2d) 129, [1972] 1 O.R. 460 (C.A.).

41. Ibid. at 129 per Gale, C.J.O.

42. (1972), 6 C.C.C. (2d) 107, 17 C.R.N.S. 294, 2 N. & P.E.I.R. 371 (P.E.I.C.A.).

43. Ss. 408, 410.

44. Ibid. s.416.

45. (1970), 13 Crim. L.Q. 153 (Que. C.A.).

46. (1970), 13 Crim. L.Q. 295 (Ont. C.A.).

47. [1970] C.A. 569.

48. (1974), 17 C.C.C. (2d) 31, 27 C.R.N.S. 107, 6 N. & P.E.I.R. 48 (P.E.I.C.A.).

49. (1970), 13 Crim. L.Q. 153 (Que. C.A.).

50. Supra note 48.

51. Ibid. at 34 per Nicholson, J.

52. (1971), 15 C.R.N.S. 99 (Que. C.A.).

CHAPTER 19: MISCHIEF AND ARSON

A. MISCHIEF CAUSING ACTUAL DANGER TO LIFE

The statutory maximum penalty for mischief which causes actual danger to life is life imprisonment.[1] Reported cases are extremely rare, with the result that generalizations based upon convincing precedent are not possible. Analogy with practice in relation to other offences may be more productive: the accused must have done an act toward property which, while not so intended, has put life or lives in jeopardy. As no one will normally have been killed, the offence is less serious than manslaughter, however. The situation is somewhat analogous to criminal negligence causing death, minus the death, but plus an element of intention not present in negligence cases. As such, it might fairly be predicted that the most serious cases where no actual injury is caused would not receive sentences in excess of three years' imprisonment, although the presence of such injury might take the sentence above that level.

The two decisions reported in recent years bear out at least the first of the above propositions. In R. v. B.[2] a sentence of 12 months' imprisonment was imposed upon an accused of 17 who fired several shots into two homes, narrowly missing the occupants. In R. v. Kopuk[3] a highly intoxicated man, with a number of convictions for property damage, interfered with the pilot of a light aircraft and caused it to go out of control. A term of one year's imprisonment, followed by probation, was imposed. As these sentences presumably reflect the mitigating factors of age and drunkenness respectively, but the offences were serious of their kind, it may be deduced that they represent the middle of the range of sentence for mischief causing actual danger to life.

B. MISCHIEF TO PROPERTY

The statutory penalties for mischief to property distinguish between public and private property: mischief to both is punishable on summary conviction, but on indictment the maxima are 14[4] and five[5] years respectively.

While these provisions could, in extreme cases, cater to wholesale destruction of public buildings, and thus be used to impose very substantial penitentiary terms, resort is had more frequently to them to punish vandalism and damage caused during minor disturbances stopping short of riot. Cases like Couture et al. v. The Queen,[6] where the accused received five years' imprisonment for the deliberate destruction of a car and boat with dynamite, are few and far between.

A recurring set of facts in the context of public property involves deliberate destruction of property by prisoners in a provincial jail or penitentiary, often arising out of a minor grievance. The Courts generally must have regard to totality of sentence in such cases, the offenders usually being already subject to another sentence, but the cases indicate that there will normally be no objection to a term of one to two years consecutive. In R. v. Martin,[7] where a "riot of sorts" occurred in the Kamloops Correctional Centre, the Court found "nothing really exceptional" to justify a change in the accused's one-year sentence. It was, however, reduced on the ground that other participants had been tried summarily and received lesser terms. In R. v. Lloyd,[8] where a lone accused went on a rampage with farm machinery after missing a Christmas shopping trip from a prison work camp, a sentence of two years' imprisonment was held justified on account of damage to several buildings and a car belonging to the institution.

Similar acts committed in the private sector, while also normally incurring terms of imprisonment, are not commonly punished so severely. The fact that the offenders are not prisoners is undoubtedly largely responsible for the difference. In R. v. Havers[9] a three-month prison sentence followed by probation was imposed upon an accused who smashed a glass door in the aftermath of an altercation between police and student pickets at a university; in R. v. Cooper,[10] an accused with a record, who caused considerable damage by throwing chairs during a melee at a restaurant, received a similar sentence.

Vandalism (the term is used here to refer to destruction or damaging of property for reasons other than gain, revenge or intimidation) is predominantly the domain of the youthful. Such behaviour is commonly supposed to be engendered by boredom; if the consumption of alcohol is included in the diagnosis the reported cases indicate that it may well be correct.

In sentencing for acts of vandalism the Courts generally have regard to the circumstances of the accused, especially his record and the amount of damage caused. Occasionally, sentences as high as three years' imprisonment have been imposed for serious, repeated acts of destruction by offenders with substantial records;[11] such terms are, however, exceptional and more frequently even offenders with records receive sentences of one year or less for deliberate damage.[12] For first offenders non-custodial dispositions are most frequently employed,[13] although a sentence of one to four months' imprisonment may be imposed where the Court is impressed by the pointlessness of the offence and the extent of damage.[14]

C. WILFUL DAMAGE NOT EXCEEDING $50

The Criminal Code makes special provision for very minor damage, not exceeding $50. By s.388, if actual danger to life is not involved, the accused may be punished on summary conviction and ordered to pay compensation, with up to two months' imprisonment in default.

The principles of sentencing would appear to be the same as for more serious offences, although the amount of damage caused will necessarily be small. As a result, non-custodial dispositions are extensively used for this offence, and terms of imprisonment should be reserved for exemplary sentences and offenders with records. A three-month jail term was upheld in Gouchie v. The Queen[15] for destruction of a plate-glass window, in view of the accused's long criminal record.

D. ARSON, CAUSING A FIRE, FRAUDULENTLY BURNING PERSONAL PROPERTY

Arson, defined as setting fire to

(a) a building or structure, whether completed or not,
(b) a stack of vegetable produce or of mineral or vegetable fuel,
(c) a mine,
(d) a well of combustible substance,
(e) a vessel or aircraft, whether completed or not,
(f) timber or materials placed in a shipyard for building, repairing or fitting out of a ship,
(g) military or public stores or munitions of war,
(h) a crop, whether standing or cut down, or
(i) any wood, forest, or natural growth, or any lumber, timber, log, float, boom, dam or slide,

is an indictable offence punishable by imprisonment for up to 14 years.[16] A lesser offence, causing a fire either wilfully or by violating the law in another

way, is punishable on indictment by five years' imprisonment if the fire results in loss of life or damage to property.[17] A third offence, of fraudulently burning personal property, is also punishable by five years' imprisonment.[18] There is considerable overlap between the two last-mentioned offences.

Fire-setting is treated differently according to which of several characteristic patterns the offence fits. One common character is the mentally disturbed offender for whom fire-setting is a symptom of his illness. The normal policy of the Courts is to impose a custodial sentence wherever serious damage to real property has been caused by such an offender, though the term may be modified in light of clear evidence of the accused's treatment needs. In R. v. Menkes,[19] for example, a sentence of five years was reduced to two years less a day so that the accused, a paranoid schizophrenic, could receive treatment and serve his sentence with inmates who would be less intolerant of him than those in the penitentiary. Where less serious damage has occurred, the Court may consider a non-custodial course of treatment. Three years' probation with mandatory psychotherapeutic sessions was substituted in Leger v. R.[20] where the accused, who also had a psychiatric problem, set fire to garbage cans inside buildings then extinguished the fires to show his heroism.

A second class of arsonist contains persons who deliberately burn houses, either for no special reason or in response to disputes. The range of sentence for deliberate or vindictive arson appears to extend from nine months to seven years' imprisonment. Other things being equal, the major considerations are the amount of damage done and any danger occasioned to the lives of occupants. In R. v. Cloud[21] a term of one year's imprisonment was imposed on a woman who caused a fire which completely destroyed a

house, the owner of which she had been at loggerheads with for some time.[22] In R. v. Varbeff,[23] on the other hand, a term of three years was upheld for the deliberate setting of a fire to an occupied house in the early hours of the morning.[24]

Terms in excess of three years are generally reserved for offenders whose conduct displays particular callousness, or who cause very large amounts of damage. A term of five years was imposed in R. v. Bruneau,[25] where one of five men, having been told to leave a hotel in the early hours of the morning, became involved in an altercation with the bartender. Bruneau and one of the others returned to the hotel soon after with two bottles of gasoline, which they threw into a corridor and ignited. While the fire was quickly put out, the hotel had been crowded at the time of the offence. Bruneau had a previous record: the appeal Court held that, in the circumstances, it was quite correct to impose an exemplary term.

A particularly large amount of damage was caused in R. v. Lockhart.[26] The accused and his three associates burned barns worth $70,000 on one farm, and several months later burned two more. In the later fires 17 head of cattle, machinery and goods were destroyed, the total loss amounting to some $100,000. Taking into account Lockhart's record of similar offences, the Court upheld a total sentence of eight years' imprisonment, consisting of five years for the first offence and one year consecutive for each of three others.

A final common class of arsonist is the fraudulent burner of property. Depending on the type of property destroyed, he may be charged with arson, fraudulently burning personal property, or causing a fire. It is submitted that such cases, while the element of destruction of property is borne in mind, are sentenced primarily with reference to the element of

fraud involved. The circumstances of the fraud and its magnitude will thus be the major considerations, subject to the usual mitigating circumstances. Thus in R. v. Pruner,[27] where a depressed accused burned down his own house to collect insurance, a term of three years' imprisonment was imposed; in R. v. Smith, Thomas and Boyce,[28] on the other hand, where only a car was burned, terms of six and three months were held appropriate. It was further held:

> [T]he minimum penalty to be imposed in a situation of this nature should be a term of imprisonment for six months with respect to the principle [sic] offender, and a term of imprisonment for three months for any accomplice who aids or abets without reward.[29]

E. INJURING OR ENDANGERING CATTLE

Section 400 of the Criminal Code sets a maximum penalty of five years' imprisonment for killing or otherwise harming cattle, or placing poison where it may easily be consumed by cattle. The appellate decisions reported for prosecutions brought under this provision all relate to killing for purposes of financial gain; that is, to sell the meat. The sentencing pattern is thus similar to that for offences of stealing cattle, discussed in Chapter 17.C. Due to the Court's strongly-felt need to protect the farmer and his livelihood, a term of imprisonment of up to one year will not be exceptional except in the presence of strong mitigating circumstances.[30] In R. v. Allen[31] a sentence of six months was upheld for an accused with no previous record; a nine-month sentence was upheld in R. v. Hunt[32] in view of the accused's lengthy criminal record.

Footnotes to Chapter 19

1. Criminal Code, s.387(2).
2. (1975), 31 C.R.N.S. 59 (Ont. Co. Ct.).
3. (1980), 19 A.R. 412 (N.W.T.S.C.).
4. Criminal Code, s.387(3).
5. Ibid. s.387(4).
6. [1970] C.A. 1185.
7. [Unreported] February 27th, 1981 (B.C.C.A.).
8. (1978), 27 N.S.R. (2d) 91, 41 A.P.R. 91 (C.A.).
9. (1975), 18 Crim. L.Q. 400 (C.A.).
10. (1979), 3 W.C.B. 466 (P.E.I.S.C.).
11. See e.g. R. v. Wiswell (1976), 17 N.S.R. (2d) 231 (C.A.) - three years concurrent on six counts of relating to smashing windows of six businesses and a home during drinking spree, accused had three previous convictions and had failed to comply with probation order.
12. See e.g. R. v. Carter (1977), 20 N.S.R. (2d) 456 (C.A.) - two months time served and probation for 29-year-old alcoholic who broke plate glass window while drunk, restitution and treatment required; R. v. Talbot (1977), 21 N.S.R. (2d) 689 (C.A.) one year's imprisonment for 18-year-old with previous record for damaging window and shed door of a shop.
13. See e.g. R. v. McFee (1970), 13 Crim. L.Q. 151 (Ont. C.A.) - time served and six months' probation for accused who broke into automobile, took parts from it, broke radio antenna and soaked interior with naptha gas; R. v. Martin (1974), 8 N.S.R. (2d) 635, 17 C.C.C. (2d) 66 (C.A.) - conditional discharge for 16-year-old who broke plate glass door after altercation with commissionaire of apartment building, accused was slightly drunk; R. v. Larkin (1979), 3 W.C.B. 466 (P.E.I.S.C.) - $100 fine for throwing bottle onto rink during hockey game; R. v. Cheung, Gee and Gee (1977), 5 A.R. 356 (T.D.) - suspended sentence, probation and restitution for youths who fired pellet gun at windows of automobiles and showroom, cracking or damaging them.
14. See e.g. R. v. King (1975), 10 N. & P.E.I.R. 456 (Nfld. Dist. Ct.) - four months plus probation for 19-year-old who smashed facilities in two public washrooms in public park, custodial term held necessary even though accused was a youthful first offender.
15. (1975), 1 C.R. (3d) S-33, 11 N.S.R. (2d) 100 (C.A.).

16. Criminal Code s.389(1).

17. Ibid. s.392(1).

18. Ibid. s.389(2).

19. (1977), 19 Crim. L.Q. 278 (C.A.).

20. (1979), 10 C.R. (3d) S-25 (Que. C.A.).

21. (1975), 11 N.B.R. (2d) 29 (C.A.).

22. See also R. v. Carr (1978), 23 N.B.R. (2d) 326, 44 A.P.R. 326 (C.A.) - nine months' imprisonment for accused who set fire to mobile home in which he had a part interest after argument with wife, drinking and consuming valium; R. v. Poitras (1978), 21 Crim. L.Q. 281 (N.B.C.A.) - 16 months' imprisonment for accused who deliberately started fire in home, caused only $400 worth of damage but rendered occupiers homeless.

23. (1977), 24 N.S.R. (2d) 279, 35 A.P.R. 279 (C.A.).

24. See also R. v. Ruiz and Gonzales (1974), 8 N.B.R. (2d) 46 (C.A.) - three years for accused who, in course of dispute over second-hand washing machine sold to his girlfriend, threatened to bomb or put fire to seller's dwelling then burned house down, sentence warranted in view of fact that adjoining property also caught fire and danger caused to life of occupants.

25. (1976), 18 Crim. L.Q. 397 (C.A.).

26. (1976), 14 N.S.R. (2d) 262 (C.A.).

27. (1979), 9 C.R. (3d) S-8 (Ont. C.A.).

28. (1979), 21 N. & P.E.I.R. 17, 56 A.P.R. 17 (P.E.I.C.A.).

29. Ibid. at 19 per McQuaid, J. See also R. v. Davis (1978), 24 N.B.R. (2d) 193, 48 A.P.R. 193 (C.A.) - one year for similar offence to that in R. v. Smith, Thomas and Boyce, ibid.

30. See R. v. Mitchell (1979), 2 Sask. R. 382 (C.A.).

31. (1974), 17 C.C.C. (2d) 549, 8 N.B.R. (2d) 131 (N.B.C.A.).

32. (1977), 13 N. & P.E.I.R. 184, 29 A.P.R. 184 (Nfld. C.A.).

CHAPTER 20: OFFENCES INVOLVING PROSCRIBED DRUGS

A. GENERAL PRINCIPLES OF DRUG SENTENCING

The principal criminal statutes dealing with proscribed drugs are the Food and Drugs Act[1] and the Narcotic Control Act.[2] The former deals with two classes of drug, "controlled" and "restricted". Prosecutions brought under this Act most commonly involve methamphetamine (speed), a controlled drug, and lysergic acid diethylamide (L.S.D.), a restricted drug. The penalties provided for offences relating to these substances are somewhat less severe than those of offences under the Narcotic Control Act, which regulates, as one class, many drugs including cannabis, heroin, cocaine and phencyclidine. Before dealing with the detailed sentencing patterns for each type of drug and offence, some general principles will be drawn from the jurisprudence.

For the vast majority of offences involving drugs, tariff sentences are imposed. Referring to traffickers, Gale, C.J.O. in R. v. Salamon[3] stated:

> This type of person is, in this Court's opinion, not entitled to any substantial consideration so far as his or her own future and welfare is concerned.[4]

This attitude has been modified somewhat in later decisions of the same and other Courts. Despite a general policy for all offences except simple possession of "soft" drugs that a jail sentence is required,[5] it has been recognized that in exceptional cases individualized measures may be taken,[6] and even where jail terms are demanded their length has been tailored to reflect treatment needs of addicts.[7] Such sentences may be shortened to give the addict access to programmes of treatment in a reformatory rather than a penitentiary;[8] they may not, however, be lengthened beyond the

appropriate range to ensure compeletion of such programmes.[9] The frequent willingness of appellate Courts to pay at least some attention to the plight of the addict has led, as will be shown below, to a noticeable difference in sentencing practice for purely commercial traffickers and addicts who traffic to finance their own consumption.

Within the bounds of this general policy framework, the major considerations having special relevance to drug offences pertain to the type of offence, both as to legal definition and beyond, and the substance involved. A number of general factors having special relevance to drug cases are discussed elsewhere.[10] Particular reference should also be made to the discussion in Chapter 27 of the fine as a mechanism for removing profits from commercial traffickers.

B. LEGAL AND FACTUAL CATEGORIES OF OFFENDING BEHAVIOUR

The legal categories under which the large majority of cases are prosecuted are possession, trafficking, possession for the purpose of trafficking and importation. Some importance attaches to these categories, for the prescribed penalties and methods of proceeding differ substantially. Under the Food and Drugs Act, trafficking and possession for the purpose of trafficking of a controlled drug is punishable on summary conviction by 18 months' imprisonment,[11] and on indictment by imprisonment for 10 years.[12] Mere possession of a restricted drug is dealt with by s. 41:

> 41.(1)Except as authorized by this Part or the regulations, no person shall have a restricted drug in his possession.
>
> (2) Every person who violates subsection (1) is guilty of an offence and is liable
>
> (a) upon summary conviction for a first offence, to a fine of one thousand dollars or to imprison-

> ment for six months, or to both, and for a subsequent offence, to a fine of two thousand dollars or to imprisonment for one years, or to both; or
> (b) upon conviction on indictment, to a fine of five thousand dollars or to imprisonment for three years, or to both.

The penalties for trafficking restricted drugs and possession for the purpose of trafficking are the same as those for controlled drugs.[13]

One set of penalties is provided for all narcotics offences. Simple possession is punishable summarily on conviction of a first offence by imprisonment for up to six months, a $1,000 fine or both:[14] for subsequent offences the summary maxima are doubled.[15] Upon conviction on indictment, the maximum penalty is seven years' imprisonment.[16] For trafficking offences, including possession for the purpose, life imprisonment is the only limit.[17] The same maximum applies to importing and exporting, but a seven-year minimum is also provided.[18]

These are the legal categories. Within them, however, the Courts have recognized further factual distinctions. The quantity of a drug involved is a primary consideration in this respect. First, it is clear that larger quantities generally attract longer sentences; that the amount found was small will take a sentence for possession or trafficking into the lower reaches of the range, while extraordinarily large amounts push the penalty imposed into different ranges altogether. In R. v. White,[19] for example, an accused still on probation for narcotics offences was party to the sale of 1/2 oz. of marijuana. A sentence of 3 1/2 years' imprisonment was held on appeal to be excessive in light of the nature of the narcotic and the amount involved. A term of two years' imprisonment was substituted. By way of contrast, the Ontario Court in R. v. Pearce[20] upheld a six-year jail term for conspiracy to traffic in methamphetamine, emphasizing that the seizure was, at the time,

the largest ever made in Toronto. In R. v. Zizzo, Codispotti, Bellitti, Cutrona and Cutrona[21] the same Court upheld life sentences, some $32 million worth of heroin having been involved. Gale, C.J.O., delivering his judgment, noted Crown counsel's view that "the amount concerned was unparalleled in the history of importation of drugs into Canada".[22]

The amount of the drug involved is also important in another sense. Both the provisions of the Food and Drugs Act and those of the Narcotic Control Act create a presumption that an accused in possession of a drug is in possession for the purpose of trafficking, the burden being on the accused to establish the contrary.[23] It is, naturally, somewhat more difficult to establish that a large quantity of a drug was for personal consumption than a small quantity, and different sentencing brackets may be opened up accordingly.

Within the context of trafficking offences, the Courts make several distinctions as to the nature of the offence. At the lower end of the scale is so-called "social trafficking". This form of distribution involves commission of the offence of trafficking by giving a quantity, usually small, to a friend or other user. This may occur during actual consumption of the drug, or following purchase of a larger quanity which is divided up for future use by two or more associates. The Courts clearly recognize a distinction between "social" and "commercial" trafficking. In R. v. Whalen,[24] the accused shared a package of hashish with his friends. Noting that he had barely passed over the "thin line" between simple possession and possession for the purpose, the Newfoundland Court imposed a sentence of one months' imprisonment. In R. v. Markbride[25] Wren, J. in the Ontario County Court, surveyed the range of sentence for trafficking in cocaine, distinguishing traffickers for gain, "middle men" and social traffickers. The last category,

His Honour concluded, normally receive sentences of a lower order than those incurred by other traffickers. The Nova Scotia Court, in R. v. McKay,[26] similarly concluded that there was no compulsion to apply the usual requirement of imprisonment to users who, on a non-commercial basis, transfer a small quantity of marijuana to another. The Court felt that such offences, while technically trafficking, are not morally more serious than mere possession.[27]

Commercial trafficking itself must be further subdivided. One distinction is drawn between addicts who traffic to raise the funds to supply their own habit, and purely entrepreneurial ventures. As noted above, in appropriate cases the former may have more thought given to their treatment needs than the latter.[28] A similar distinction is drawn between occasional transactions, often participated in to accommodate other users, and professional "pushing". In R. v. Longeuay,[29] reducing a term of five years' imprisonment to 12 months plus probation, MacKeigan, C.J.N.S. stated:

> It is apparent that the appellant was not engaged in the business of trafficking. She was not the typical "pusher". Her offence seems to be different in kind and quality from most heroin trafficking. I can see here no evidence, of an intention by her to traffic in heroin or other drugs on a commercial basis, even on a small scale. Here we do not have even ... very faint indications that the accused made other sales of heroin .... Here we have no other evidence pointing strongly to the probability of the accused being herself an active pusher ....[30]

In R. v. Kosh[31] the Saskatchewan Court upheld a suspension of sentence for a 17-year-old convicted of trafficking in marijuana. Amongst other mitigating factors, the Court noted that he had trafficked only as an intermediary in just two transactions, and had received no financial benefit.

As will be further seen from the cases discussed below, a finding of commercial intent bodes ill for the trafficker before the Court. Once

trafficking activities reach the level of organized distribution, very heavy penalties are the norm and there is little precedent for leniency. Within the category of large-scale trafficking, the major factors usually considered are the amount of the drug involved,[32] the sophistication and profitability of the enterprise,[33] the drug involved,[34] the period of time for which trafficking was carried on before apprehension,[35] and, as to the individual, his role in the organization. The extent of any one individual's participation in transactions is always important, and becomes particularly so when distinctions must be made between co-conspirators.[36] In large-scale trafficking cases, the Courts often embark upon an analysis of the hierarchy of criminal organization to determine the "level" of offenders.[37]

C. POSSESSION AND TRAFFICKING: THE DRUGS EXAMINED

i) Controlled and Restricted Drugs.

a) Methamphetamine

Methamphetamine, commonly known as "speed" is a controlled drug. Simple possession is not an offence: trafficking and possession for the purpose, however, are.

All reported cases since 1970 of methamphetamine trafficking relate to substantial commercial enterprises. The Courts have been quite willing to impose sentences at or near the 10-year maximum; the lower end of the scale appears to be about four years' imprisonment for major enterprises. Sentences of five, seven and 10 years were imposed in R. v. McAllister, Lansdowne and Harvey[38] for conspirators in a $6 million manu-

facturing enterprise; nine years was upheld in R. v. Bulleyment[39] for a seasoned criminal who wholesaled "speed" over a period of some 2 1/2 years, earning more than $20,000 in his illicit dealings. Representing the lower end of the scale for such offences is R. v. Douglas[40] where a female divorcee and mother of seven children, aged 44, received four years for allowing her home to be used as a "clearing-house" for substantial drug transactions.

b) L.S.D.

Lysergic acid diethylamide, popularly known as "acid" or LSD, is a restricted drug listed in Schedule H of the Food and Drugs Act. Accordingly, both possession and trafficking without lawful excuse are prohibited.

Reported decisions on simple possession are rare, but indicate a very low "floor" to the range. In R. v. Jimiro[41] a first offender aged 18 received a suspended sentence and probation for possession of 83 LSD tablets, capsules and papers; in R. v. Hawryluk,[42] where the accused had a previous conviction for the same offence and was found with 100 tablets, the Court upheld a term of 15 days' imprisonment and a fine of $500. The sentence was not, their Lordships felt, as long as they would have imposed at first instance, but in view of the accused's efforts to break his addiction to drugs it was not so inordinately low as to merit interference.

Offences relating to trafficking in LSD are more common. While it was recognized that occasional exceptional cases may merit non-custodial disposition,[43] the normal practice is to impose a reformatory sentence for small-scale trafficking. By analogy with practice relating to methamphetamine, it may be reasoned that large-scale trafficking could incur terms right up to the statutory maximum 10 years.[44]

Within the reformatory range, sentences for small-scale trafficking have varied considerably. Sales to students at school, even by their peers, are frowned upon, as evidenced by the maximum reformatory sentence imposed on the accused Schwartz in R. v. Doyle and 10 Others.[45] Similar or slightly shorter terms are likely to be upheld for possession of moderately large quantities with clear evidence of intent to traffic,[46] while sentences of nine to 18 months are common for isolated sales to undercover police officers.[47] Below this range substantial mitigating factors, including youth, marginal involvement and/or good previous record will normally be required to avoid an increase on Crown appeal.[48]

ii) Narcotics

Despite the treatment of narcotics as one class in the Narcotic Control Act, the Courts clearly distinguish in sentencing between the various drugs. It may be deduced from the jurisprudence that the common drugs fit into an ascending order of gravity as follows: cannabis, phencyclidine, cocaine and heroin.[49] The major distinction is drawn between cannabis and other drugs, referred to as "soft" and "hard" respectively. In R. v. Spicer[50] the Alberta Court stated:

> While in recent years the simple possession of marijuana ordinarily attracts a fine, we think that a vast distinction must be made in the case of heroin and other addictive drugs, and that the simple possession of these drugs should, unless the circumstances are most unusual, attract terms of imprisonment.[51]

Similarly in R. v. DiGiovanni,[52] Gale C.J.O. stated:

> I regard trafficking in heroin, in cocaine, in morphine, and in other so-called "hard" drugs as a much more serious offence than trafficking in, for example, mari-

> juana. I must say, with the greatest respect, that if the following statement by the Honorable Mr. Justice Aylesworth in R. v. Robert, Shacher, Young and Smith,[53] ... "To the members of this Court there is no essential difference in the principle to be applied with respect to any of these prohibited drugs" means that the Court does not, or should not, give more weight to the fact that in one case there has been trafficking in heroin and in another case trafficking in marijuana, then I simply content myself with the conclusion that the statement was not intended to be read literally. Having regard to the potentialities of trafficking in the "hard" drugs, one who engages in that exercise ought to be and is now alerted to the probability that he will be treated in a different manner than one trafficking in marijuana.[54]

The distinction between marijuana and phencyclidine, the latter being of relatively recent popularity, may easily be seen in decisions involving offenders convicted on counts of possessing the two substances at the same time. In R. v. MacLeod,[55] two transactions involved an ounce of phencyclidine and a pound of marijuana. A term of five months' imprisonment was imposed for the marijuana count, with seven months consecutive for the phencyclidine offence. In R. v. Scott,[56] the accused had 10 matchboxes of cannabis and 14 capsules of phencyclidine. As the sentences were to be served concurrently, their relative severity is significant: the sentence of four months' imprisonment imposed for the phencyclidine count was exactly double that for the marijuana offence.[57]

A further distinction is clearly established between trafficking in actual narcotics and substances "held out to be" narcotics. With some reserve, the Courts have accepted the principle that sales of innocent substances as drugs should normally be punished less severely than actual sales. This is especially the case where there is no evidence that the accused did actually handle a forbidden substance.[58] Clearly the drug-related culpability of the accused will be higher is he himself believes the matter

sold to be proscribed, though if he knew it was not he takes on something of the character of a confidence trickster! In R. v. Masters[59] the accused sold what he and the purchaser, an undercover agent, both believed to be heroin. It was not, and the Ontario Court found a maximum reformatory term too long in the circumstances. Martin, J.A. explained:

> While we are of the view that there may very well be cases in which no distinction should be made with respect to the sentence imposed upon conviction for the offence of trafficking in a substance represented to be a narcotic as distinct from actually trafficking in a narcotic, we are of the view that in all the circumstances of this case that the learned trial Judge should have differentiated between actually selling heroin and selling a substance represented to be heroin.[60]

Much the same proposition was presented by Sinclair, J.A. in R. v. Lecapoy.[61] Here, however, it was unclear whether the accused knew that his "heroin" was aspirin or not. While upholding a sentence of 3 1/2 years' imprisonment, his Lordship stated:

> The Narcotic Control Act makes no distinction between actual trafficking in a narcotic, and trafficking in a substance represented to be a narcotic. However, in my opinion, the nature of the substance in fact sold is an element that can properly be taken into account in conjunction with other circumstances.[62]

In light of the distinctions drawn between the various common narcotics, an analysis of sentencing must be undertaken with reference to each separately.

a) Heroin

Heroin, a derivative of the opium poppy, is widely regarded as the most dangerous of common narcotics and has strongly addictive qualities.[63] There are also strong links between opiate addiction and crime.[64] Tariff

sentences in the range of one to two years are the norm for simple possession,[65] with individualized measures being significantly more difficult to obtain than for possession of soft narcotics.[66] The policy of the Alberta Court in 1975 was set out by McGillvray, J.A.:

> ... unless the circumstances are most unusual, simple possession of addictive drugs such as heroin, morphine, opium or cocaine should attract a sentence of imprisonment.
>
> Two situations generally appear. There is first, the addict. In this case, we think it desirable that he be put in custody for two reasons. The first is that in order to supply the habit, it is almost inevitable that he turns to a life of crime.
>
> Secondly, if removed from access to the drug, he at least may attempt to make a decision with regard to his future.
>
> The second situation is the non-addict. We think in this instance our duty is to impress upon that offender and the public that addictive drugs are not to be played or experimented with, as the history of so doing shows that such persons doing so tend to become addicts, and, in due course, public charges.[67]

For traffickers, as mentioned earlier, there are three main sentencing brackets. Addicts who traffic to supply their own needs normally receive a jail term between one and three years' imprisonment, with a marked emphasis in favour of reformatory as opposed to penitentiary terms for young addicts.[68] Penitentiary terms tend to be reserved for those with long records, including failure of attempts at treatment, and those who endeavour to profit beyond their narcotic needs.[69] In exceptional circumstances, where the addict has shown a substantial initiative toward rehabilitation, this may persuade the Court to impose a shorter term[70] or even a non-custodial sentence.[71]

The general requirement of deterrence in such cases rarely gives way to other possibilities in the case of true "commercial" traffickers. Penalties for such trafficking range all the way up the scale from about six

years for possession of relatively small amounts[72] to life imprisonment for major importers and promoters.

The life sentence as applied to heroin traffickers is a tariff, not individualized, measure. As pointed out by the British Columbia Court, which has had substantial experience in such matters, the "ultimate penalty" should be reserved for the worst cases.[73] The floor for large-scale distribution of heroin seems to have been set at about 10 years' imprisonment for senior participants, the major variable being the amount of drugs involved. In both R. v. Jung[74] and R. v. Wong[75] sentences of 15 years' imprisonment were imposed for transactions involving one pound of heroin worth $25,000 to $30,000. In R. v. Ko,[76] where a similar quantity plus a sample were involved, 14 months served awaiting trial was taken into account to arrive at a total sentence of 12 years. Sentences of 20 years[77] to life have, however, been imposed for dealings in large quantities[78] and conspiracies.[79] Sentencing for trafficking conspiracies may take account of the continuing nature of the offences planned.[80] Both the British Columbia and Ontario Courts of Appeal have agreed to the imposition of life terms where unusually large quantities are involved: in R. v. Richa and Bou-Mourad,[81] for example, the Ontario Bench had little hesitation in upholding a maximum penalty for dealings in heroin worth $1.5 million.[82]

b) Cocaine

Cocaine, derived from the leaves of the coca bush;[83] is generally classed by the Courts as a "hard" narcotic, but is not regarded as seriously as heroin.[84] Its controversial nature — medical experts seem to be in some disagreement as to how dangerous it really is — has been the subject of considerable judicial comment.[85]

The least serious offence, possession, is not the subject of extensive reported reasoning. From the few available decisions on possession of smaller quantities, it appears that the necessity of a prison term in the case of this drug gives way more easily to mitigating factors personal to the accused. In R. v. Mason,[86] the accused admitted possession of 2.4 gm. of cocaine, which he used on social occasions. He had an impeccable previous record and had already suffered greatly from the indignity of arrest and the shame caused to his family. Although imprisonment is appropriate in general for possession of cocaine, the Court held, there was concern as to whether it was appropriate here. A fine and probation with community service were imposed instead. In R. v. Robertson,[87] a fine of $200 imposed at trial for possession of $500 worth of cocaine was held to have been appropriate to the offence. However, in view of the far-reaching effects of conviction upon the accused (she was pregnant, and would be deported from the U.S., thus being forced to separate from her husband), an absolute discharge was substituted.

For "small-time" traffickers, the range of sentence is somewhat different to that for heroin. While longer terms have been upheld,[88] terms under one year are not common for single transactions.[89] Again, where significant motivation to cease involvement in drugs is shown by users, a non-custodial disposition[90] or intermittent sentence may be found appropriate.[91]

For deliberate commercial trafficking on a larger scale, the range appears to run from a lower level than that for heroin. In R. v. Mota[92] the accused, owner of a bodyrub parlour, was in the business of distributing cocaine to street sellers. The Ontario Court upheld a term of two years' imprisonment. Similar terms, consecutive to a five-year term for conspiracy but concurrent with each other, were upheld in R. v. Cleveland.[93] In R. v. Bowles,[94] where the accused rented a post-box under an assumed name and

received cocaine worth $5,000 to $7,000, a sentence of four years was upheld. A similar term was found appropriate for an offender who was found in possession of both opium and cocaine for the purpose while on probation in R. v. Dube,[95] though the value of the drugs was only about $800.

At the highest levels of cocaine trafficking, sentences for large conspiracies and wholesale dealings in very large quantities again appear to be somewhat less than for heroin. In R. v. Marton[96] the Ontario Court imposed a sentence of five years for an accused found in possession of $50,000 (uncut) to $100,000 (cut) of cocaine, said to be involved "at the upper level of the hierarchy". In R. v. Brais[97] the Quebec Court upheld a total of four years for dealings in over $100,000 retail value of drugs, mainly cocaine.

The recent decision of Berger, J. in R. v. Bengert, Robertson et al. (No. 14),[98] albeit not decided in an appellate Court, seems destined to become a leading authority on cocaine trafficking. This is so not only because of the number of persons involved at different levels of culpability, but also in light of Berger, J.'s detailed and scholarly survey of medical opinion on the drug, and his careful exposition of sentencing principles.

In Bengert, nine accused were convicted on conspiracy charges at the conclusion of the longest trial ever held in British Columbia. The scheme, a multi-million dollar venture, involved the purchase of cocaine in South America and its importation, cutting and distribution. The last seizure, worth $1.3 million on the street, was the largest ever made in Canada. Crown counsel, asking the Court to treat cocaine as seriously as heroin, asked for life sentences for the leaders and second-level managers. Defence counsel, on the other hand, in an imaginative but doomed argument suggested that as cocaine has effects similar to those of amphetamines, sentencing should be on the Food and Drugs Act scale (up to 10 years) rather than that

actually provided under the Narcotic Control Act. Berger, J., adopting a middle course, held that cocaine is not as dangerous to society as heroin, being physically non-addictive and contributing only marginally to deaths by overdosage. Allegations that cocaine psychosis is common, and inevitably leads to violence, were rejected as "propoganda" and exaggerated. On the other hand, the accused had conspired to "breach the wall of interdiction" on a massive scale, and should not be free to reassemble the organization. Accordingly, while life terms would be excessive, terms of 20 years' imprisonment and substantial fines were imposed on the first and second-level personnel, with lesser terms for lesser participants.

Clearly, the 20-year term, being slightly less than those imposed for equivalent cases relating to heroin, ratifies Berger, J.'s belief that the two drugs are of a different order of dangerousness. Apparently, then, it will represent the very top of the range for large-scale trafficking in cocaine.

c) Cannabis (Marijuana, Hashish)

Simple possession of marijuana is the least serious narcotics offence commonly encountered, and is frequently charged summarily. While it has been pointed out that routine discharging of offenders would be improper, as appearing to condone conduct proscribed by Parliament,[99] discharges are very frequently granted to first offenders.[100] Fines are also common,[101] and imprisonment today tends to be reserved for cases involving offenders with previous convictions.[102] Probation is also commonly used for young offenders felt to be in need of guidance.[103]

It is in cannabis cases that the distinction between various types of trafficking has been most highly developed. A series of cases from Prince

Edward Island, submitted to be of quite general application, neatly illustrate the main principles.

In R. v. Culleton[104] the Court of Appeal was faced with an appeal by the Crown against a three-month term for trafficking. Referring to its general principle that six months was the minimum term for trafficking, the Court varied the sentence to nine months. Speaking generally, this represents the higher portion of the range for "commercial" trafficking on a small scale. In R. v. Mutch,[105] examining the precedents, the Supreme Court found that the range for trafficking of less than three pounds generally involved a term of three to nine months, in the absence of "special circumstances". Numerous cases still bear testimony to the accuracy of this statement,[106] with special circumstances like previous record leading to the imposition of higher terms[107] and youth, danger to employment prospects and exemplary rehabilitation permitting lesser sentences right down to the non-custodial level.[108] Throughout, terms of penitentiary length and beyond are extremely rare for sales of small amounts of drugs.[109]

In Mutch, MacDonald, J. continued to say that "those cases where the sale is made merely for the purpose of accommodation of a friend must be looked at in a different light". "Social trafficking" is normally punished by a very short prison term or non-custodial disposition. In R. v. Hutton,[110] a term of six days intermittent was imposed for possession of a relatively large amount of marijuana, as the intent to traffic consisted only of an intention to distribute the drug at a party. In R. v. McKay[111] the Nova Scotia Court was called upon to consider a suspended sentence imposed in respect of $5 of hashish in an isolated transaction. The recipient, thought by the accused to be a "friend", was in fact an undercover policeman. The Court re-affirmed its own policy of requiring imprisonment for traffickers, but stated that there

was no compulsion to apply that policy where only a sale or gift to a friend is involved. Such offences, it was pointed out, are not morally more serious than mere possession.

As the amount trafficked begins to be measured in tens of pounds, the prison terms lengthen. In R. v. Dickie,[112] a sentence of 54 months' imprisonment was imposed on two counts of trafficking relating to 240 lb. of hashish. Importation of 150 lb., charged as trafficking, brought terms of 10 and seven years in R. v. Johnston and Tremayne,[113] while in R. v. Carr and Robson[114] seven years' imprisonment was upheld for possession of about 1,800 lb. The ceiling for large-scale trafficking is apparently somewhat lower than that for cocaine, perhaps about 15 years.[115] In the last major conspiracy case, R. v. Basha et al.,[116] which involved distribution of over $1 million worth of marijuana province-wide, the leader of the entire operation received a sentence nine years' imprisonment.

d) Phencyclidine (P.C.P.)

Sentencing dispositions relating to phencyclidine have only begun to be reported in any number since 1975. Phencyclidine is still somewhat less popular and less frequently discussed than the other narcotics mentioned above. Mere possession appears to merit a reformatory term in the lower half of that scale,[117] while trafficking of "moderate" amounts has incurred terms from one to five years.[118] For a rehabilitated addict a non-custodial term has been allowed.[119] The only reported case approximating to organized trafficking reported in recent years is R. v. White and Clarke,[120] where the Newfoundland Provincial Court imposed a term of six years on each of two men who conspired to produce approximately four pounds of high purity P.C.P.

D. IMPORTING NARCOTICS

Importing a narcotic, when proven, incurs a statutory minimum penalty of seven years' imprisonment.[121] While unpopular with many critics in its application to importation of small amounts,[122] the minimum has withstood an assault based on the Bill of Rights, and thus must be imposed even in the most minor case.[123] This precludes useful discussion of range for importing small amounts of narcotics. Sentencing for large-scale importation and conspiracy to import is generally carried out on a level with sentencing in large-scale trafficking, which itself frequently involves importation not charged as such. In R. v. Arellano and Sanchez[124] terms of 14 years were imposed for importing 4 kg. of cocaine; life imprisonment was imposed on, inter alia, importation of heroin charges in R. v. Zizzo et al.[125] Marijuana has attracted lesser terms, ranging from 10 years for the leading conspirator in R. v. Vrany, Zikan and Dvorak[126] to the statutory minimum in Salvador et al. v. The Queen,[127] imposed in light of substantial mitigating circumstances.

Footnotes to Chapter 20

1. R.S.C. 1970, c.F-27, as am.
2. R.S.C. 1970, c.N-1, as am.
3. 6 C.C.C. (2d) 165, [1972] 2 O.R. 247 (C.A.).
4. Ibid. at 166 per Gale, C.J.O.
5. See R. v. Spicer (1975), 28 C.C.C. (2d) 334, [1975] W.W.D. 32 (Alta. C.A.); R. v. Cuzner, [1970] 5 C.C.C. 187, [1970] 3 O.R. 222 (C.A.).
6. See e.g. R. v. Lebovitch, 48 C.C.C. (2d) 539, 8 C.R. (3d) S-41, [1979] C.A. 462.
7. See e.g. R. v. Marcello (1973), 11 C.C.C. (2d) 302 (Ont. C.A.).
8. Ibid.
9. R. v. Luther, 5 C.C.C. (2d) 536, [1972] 1 O.R. 812 (C.A.).
10. I.e. previous good record, Chapter 3.B.ii; breach of a position of trust, Chapter 3.E.v, vi and vii; reformation pending trial, Chapter 7.E, and entrapment, Chapter 8.B.
11. Supra note 1, para. 34(3)(a).
12. Ibid. para. 34(3)(b).
13. Ibid. s.42.
14. Narcotic Control Act, supra note 2, para 3(2)(a).
15. Ibid.
16. Ibid., para. 3(2)(b).
17. Ibid. s.4.
18. Ibid. s.5.
19. (1978), 16 N. & P.E.I.R. 46, 42 A.P.R. 46 (Nfld. C.A.).
20. (1974), 16 C.C.C. (2d) 369 (Ont. C.A.).
21. (1975), 23 C.C.C. (2d) 319 (Ont. C.A.).
22. Ibid. at 320 per Gale, C.J.O.
23. Food and Drugs Act, supra note 1, ss.35(2-3) and 43(2-3); Narcotic Control Act, supra note 2, s.8.

24. (1974), 17 C.C.C. (2d) 162, 5 N. & P.E.I.R. 548 (Nfld. C.A.).

25. (1980), 23 Crim. L.Q. 171 (Ont. Co. Ct.).

26. (1976), 17 N.S.R. (2d) 135, 19 A.P.R. 135 (C.A.).

27. See also R. v. Mutch (1977), 38 C.C.C. (2d) 447, 14 N. & P.E.I.R. 124, 33 A.P.R. 124 (P.E.I.S.C.).

28. See especially R. v. Lebovitch, supra note 6. An interesting concept developed in recent cases is the "social utility" of the addict as a means of educating others as to the dangers of addiction. While upholding a probation term requiring the accused to perform a benefit concert for charity in R. v. Richards (1979), 49 C.C.C. (2d) 517, 11 C.R. (3d) 193 (Ont. C.A.), the Court mentioned that some additional requirement, such as a term that the accused participate in a preventive education programme, should have been inserted. In R. v. Rubin (1978), 23 Crim. L.Q. 169 (Ont. Co. Ct.), despite a joint recommendation of counsel that a term of one year be imposed for trafficking in cocaine, O'Connell, J. imposed a sentence of 90 days intermittent in view of the accused's background. He had been the founder of "Crisis Intervention Centre" in Western Canada, a researcher for the LeDain Commission, and had several character references. A number of social agencies also wanted the accused to do voluntary work for them.

29. (1977), 3 C.R. (3d) S-29, 34 C.C.C. (2d) 438, 18 N.S.R. (2d) 574, 20 A.P.R. 574 (C.A.).

30. Ibid. at 445 per MacKeigan, C.J.N.S.

31. (1970), 1 C.C.C. (2d) 290, 13 Crim. L.Q. 154 (Sask. C.A.).

32. See supra, text accompanying and notes 19-21.

33. See e.g. R. v. Richa and Bou-Mourad (1974), 18 C.C.C. (2d) 63 (Ont. C.A.); R. v. Bulleyment (1979), 46 C.C.C. (2d) 429 (Ont. C.A.).

34. See generally discussion below.

35. See e.g. R. v. Bulleyment, supra note 33.

36. See e.g. the detailed account of the hierarchy of the conspiracy in R. v. Basha et al. (1979), 23 N. & P.E.I.R. 286, 61 A.P.R. 286 (Nfld. C.A.).

37. See e.g. R. v. Dass (1979), 47 C.C.C. (2d) 194 (Man. C.A.); R. v. McLean, Legge, Saunders and Russell (1980), 26 N. & P.E.I.R. 158, 72 A.P.R. 158 (Nfld. Prov. Ct.).

38. (1976), 1 C.R. (3d) S-46 (Ont. C.A.).

39. Supra note 33.

40. (1977), 1 C.R. (3d) 238, 33 C.C.C. (2d) 395 (Ont. C.A.).

41. (1973), 16 C.C.C. (2d) 396 (Que. C.A.).

42. (1976), 14 N.B.R. (2d) 538, 15 A.P.R. 538 (C.A.).

43. See e.g. R. v. Doyle and 10 Others, 13 C.R.N.S. 80, 2 C.C.C. (2d) 82, [1971] 1 W.W.R. 70 (Alta. C.A.) - $250 fine and probation for accused with serious liver ailment; R. v. MacVicar (1980), 37 N.S.R. (2d) 308, 67 A.P.R. 308 (Co. Ct.) - suspended sentence for accused non-commercial trafficker with low I.Q., unfortunate background.

44. There are few reported cases relating to organized trafficking. In R. v. Couture, [1975] R.L. 527 (Que. C.S.P.), however, a term of seven years was imposed on an accused who sold LSD to students at a school, in view of his breach of a position of trust and the nature of the "victims".

45. Supra note 43.

46. See e.g. R. v. Sprague et al. (1974), 19 C.C.C. (2d) 513, [1975] 1 W.W.R. 22 (Alta. C.A.); R. v. Kopach (1980), 22 A.R. 497 (C.A.) - 18 months for purchase with joint funds of 350 doses.

47. See e.g. R. v. Doyle and 10 Others, supra note 43 (accused Brost and Wiens).

48. See e.g. R. v. Price (1970), 12 C.R.N.S. 131 (Ont. C.A.) - two months, accused female had history of psychiatric problems; R. v. Sheridan (1980), 3 Man. R. (2d) 83 (C.A.) - nine months for first offender; R. v. Peet (1978), 15 N. & P.E.I.R. 3, 38 A.P.R. 3 (Nfld. C.A.) - nine months for 17-year-old first offender, good character and academic record.

49. Reported decisions involving other substances are rare. Isolated examples are R. v. Davidson (1978), 23 N.B.R. (2d) 21, 44 A.P.R. 21 (C.A.) - anileridine; R. v. Burke (1978), 44 C.C.C. (2d) 33, 16 N. & P.E.I.R. 132, 44 A.P.R. 132 (P.E.I.S.C. in banco) - morphine and demerol; R. v. DiSensi (1977), 5 C.R. (3d) S-13 (B.C.S.C.) - morphine.

50. Supra note 5.

51. Ibid. at 336 per McGillivray, C.J.A.

52. 10 C.C.C. (2d) 392, [1973] 2 O.R. 156 (Ont. C.A.).

53. [1971] 2 O.R. 558, 3 C.C.C. (2d) 149 (Ont. C.A.).

54. Supra note 52 at 393-94 per Gale, C.J.O.

55. (1976), 32 C.C.C. (2d) 315, 17 N.S.R. (2d) 569, 19 A.P.R. 569 (C.A.).

56. (1976), 9 N. & P.E.I.R. 340 (Nfld. Dist. Ct.).

57. For an example of the wide distinction drawn between marijuana and morphine see R. v. Salamon, supra note 3; for marijuana/L.S.D. see R. v. Kloot (1975), 11 N.S.R. (2d) 440 (C.A.).

58. R. v. Mallia (1980), 22 Crim. L.Q. 302 (Ont. C.A.).

59. (1974), 15 C.C.C. (2d) 142 (Ont. C.A.).

60. Ibid. at 144 per Martin, J.A.

61. (1974), 18 C.C.C. (2d) 496, [1974] 6 W.W.R. 547 (Alta. C.A.).

62. Ibid., 18 C.C.C. (2d) at 499 per Sinclair, J.A. An accused who sells one drug, believing it to be another, less dangerous substance, is entitled to be treated less severely than one who deliberately sells the worse substance, knowing its character. See R. v. Woolf and Doyle (1979), 22 Crim. L.Q. 36 (Ont. Co. Ct.),

63. See generally Wilson, J.Q., Moore, M.H. and Wheat, I.D., "The Problem of Heroin," (1972-73), 2 Drug Abuse Law Review 102.

64. Dupont, R.L. "Heroin Addiction Treatment and Crime Reduction," (1972-73), 2 Drug Abuse Law Review 484.

65. See e.g. R. v. Babiak and Stefaniuk (1974), 21 C.C.C. (2d) 464, [1975] 3 W.W.R. 615 (Man. C.A.) - two years and one year; R. v. Spicer, supra note 5 - one year; R. v. MacNeill (1972), 15 Crim. L.Q. 17 (Ont. C.A.) - one year definite and one year less a day indeterminate.

66. But see R. v. Richards, supra note 28.

67. R. v. Spicer, supra note 5 at 335-36 per McGillivray, J.A.

68. See e.g. R. v. Marcello (1973), 11 C.C.C. (2d) 302 (Ont. C.A.); R. v. Longeuay, supra note 29; R. v. Sabloff, [1979] C.S. 1077, 13 C.R. (3d) 326.

69. See e.g. R. v. Mearns, 22 C.C.C. (2d) 457, [1975] 4 W.W.R. 328 (Alta. C.A.); R. v. Kirzner, 32 C.C.C. (2d) 76, 14 O.R. (2d) 665, 74 D.L.R. (3d) 351 (Ont. C.A.), appeal against conviction dismissed 38 C.C.C. (2d) 131, 1 C.R. (3d) 138, [1978] 2 S.C.R. 487, 18 N.R. 400, 81 D.L.R. (3d) 229.

70. See e.g. R. v. Dochniak (1980), 25 A.R. 187 (C.A.) - 90 days intermittent.

71. See R. v. Lebovitch, supra note 26; R. v. Fuchs (1978), 21 Crim. L.Q. 424 (Ont. Co. Ct.).

72. See e.g. R. v. Bell (1976), 18 Crim. L.Q. 402 (Ont. C.A.) - six years for possession of about $40,000 worth or heroin, accused, non-addict, had previous conviction of possession of methamphetamine for purpoes of trafficking.

73. R. v. Ko (1979), 11 C.R. (3d) 298, 50 C.C.C. (2d) 430, [1980] 1 W.W.R. 577 (B.C.C.A.).

74. (1976), 1 C.R. (3d) S-1 (B.C.C.A.).

75. 37 C.R.N.S. 147, [1977] 1 W.W.R. 383 (B.C.C.A.).

76. Supra note 73.

77. See R. v. Ma, Ho and Lai, 44 C.C.C. (2d) 537, 6 C.R. (3d) 325, [1979] 1 W.W.R. 436 (B.C.C.A.).

78. See R. v. Ponak and Gunn, 11 C.C.C. (2d) 346, [1973] 4 W.W.R. 206 (B.C.C.A.).

79. See e.g. R. v. Zizzo et al. (1975), 23 C.C.C. (2d) 319 (Ont. C.A.).

80. Or "the possibility of aggregation". See generally post, Chapter 25.

81. Supra note 33.

82. See also R. v. Devlin and Marentette, 3 C.C.C. (2d) 20, [1971] 2 O.R. 359 (C.A.).

83. For a detailed and scholarly survey of the history of cocaine see McLaughlin, G.T., "Cocaine: The History and Regulation of a Dangerous Drug," (1972-73) 58 Cornell Law Review 537.

84. See R. v. Aikens (1981), 33 N.B.R. (2d) 630, 80 A.P.R. 630 (C.A.).

85. See especially R. v. Bengert, Robertson et al. (1979), 15 C.R. (3d) 97, 52 C.C.C. (2d) 100 (B.C.S.C.).

86. (1977), 23 Crim. L.Q. 170 (B.C. Co. Ct.).

87. (1981), 5 W.C.B. 337 (Co. Ct.).

88. See e.g. R. v. Dion, [unreported] April 8th, 1981 (Alta. C.A.) - two years less a day.

89. See e.g. R. v. Swanson (1980), 25 A.R. 197 (N.W.T.C.A.) - six months.

90. See e.g. R. v. Boucher (1978), 21 Crim. L.Q. 160 (Que. C.A.) - fine of $1,500.

91. See e.g. R. v. Costanzo (1980), 23 Crim. L.Q. 168 (B.C. Co. Ct.); R. v. Rubin (1978), 23 Crim. L.Q. 169 (Ont. Co. Ct.).

92. (1979), 8 C.R. (3d) 270, 46 C.C.C. (2d) 273 (Ont. C.A.).

93. (1977), 1 W.C.B. 609 (Ont. C.A.).

94. (1974), 16 C.C.C. (2d) 425 (Ont. C.A.).

95. (1977), 1 W.C.B. 630 (Que. C.A.).

96. (1980), 22 Crim. L.Q. 433 (Ont. C.A.).

97. (1979), 3 W.C.B. 135 (Que. C.A.).

98. Supra note 85. Bengert has already been followed in Ontario: see R. v. Ruez (1979), 4 W.C.B. 89 (Ont. Prov. Ct.).

99. R. v. Derksen (1972), 20 C.R.N.S. 129, 9 C.C.C. (2d) 97 (B.C. Prov. Ct.).

100. See e.g. R. v. Sampson (1975), 23 C.C.C. (2d) 65, 7 O.R. (2d) 582 (Ont. C.A.); R. v. Culley (1977), 36 C.C.C. (2d) 433 (Ont. C.A.); R. v. Quantz (1978), 20 A.R. 167 (Dist. Ct.); R. v. Hill-Tout, [1981] 2 W.W.R. 91 (Alta. Q.B.); R. v. Rowan, [1981] 2 W.W.R. 89 (Alta. Q.B.). For a detailed but dated survey see Leon, J.S., "Drug Offences and Discharges in Canada: The Need for Reform," (1977), 35 University of Toronto Faculty of Law Review 38.

101. See e.g. R. v. Carter (1974), 7 N. & P.E.I.R. 290 (Nfld. C.A.); R. v. Earle (1975), 8 N. & P.E.I.R. 390, 8 A.P.R. 390 (Nfld. Magis. Ct.); R. v. Cock (1976), 11 N. & P.E.I.R. 431, 22 A.P.R. 431 (P.E.I.S.C.); R. v. Dalton (1977), 18 N.S.R. (2d) 555, 20 A.P.R. 555 (C.A.); R. v. Fudge (1979), 49 C.C.C. (2d) 63, 26 N. & P.E.I.R. 76, 72 A.P.R. 76 (Nfld. C.A.); R. v. Bell (1979), 23 A.R. 398 (N.W.T.S.C.); R. v. Camp (1979), 7 Sask. R. 197 (Dist. Ct.).

102. See e.g. R. v. Fairn (1973), 22 C.R.N.S. 307, 12 C.C.C. (2d) 423 (N.S. Co. Ct.); Gouchie v. The Queen (1975), 1 C.R. (3d) S-33, 11 N.S.R. (2d) 100, 5 A.P.R. 100 (C.A.); R. v. Courty (1976), 15 N.B.R. (2d) 57, 18 A.P.R. 57 (C.A.); R. v. Ross (1977), 34 C.C.C. (2d) 483 (B.C.C.A.).

103. See e.g. R. v. Carter, supra note 101; R. v. Culley, supra note 100; R. v. Fudge, supra note 101; R. v. Bell, supra note 101.

104. (1976), 10 N. & P.E.I.R. 355, 17 A.P.R. 355 (P.E.I.C.A.).

105. (1977), 38 C.C.C. (2d) 447, 14 N. & P.E.I.R. 124, 33 A.P.R. 124 (P.E.I.S.C.).

106. For comprehensive listings of reported cases see Nadin-Davis, R.P. and Sproule, C.B., Canadian Sentencing Digest (1980, Toronto: The Carswell Co.).

107. See e.g. R. v. Benning (1979), 21 N. & P.E.I.R. 393, 56 A.P.R. 393 (Nfld. C.A.); R. v. Marcotte (1976), 11 N. & P.E.I.R. 469 (Nfld. Dist. Ct.).

108. See e.g. R. v. Burchnall (1980), 24 A.R. 17 (C.A.); R. v. Haskins (1978), 5 C.R. (3d) S-17 (B.C.C.A.); R. v. Shaw and Brehn (1977), 36 C.R.N.S. 358 (Ont. C.A.); R. v. Eccleston and Gianiorio, 24 C.C.C. (2d) 564, [1975] 5 W.W.R. 141 (B.C.C.A.).

109. For isolated examples see R. v. Eustace (1977), 23 N.S.R. (2d) 524, 32 A.P.R. 524 (C.A.); R. v. Fifield (1978), 5 C.R. (3d) S-9, 25 N.S.R. (2d) 407, 36 A.P.R. 407 (C.A.); R. v. Perrin (1971), 14 C.R.N.S. 24 (Que. C.A.).

110. (1977), 13 A.R. 557 (Dist. Ct.).

111. (1976), 17 N.S.R. (2d) 135, 19 A.P.R. 135 (C.A.).

112. (1979), 14 C.R. (3d) 105 (Que. C.S.P.).

113. [1970] 4 C.C.C. 64, [1970] 2 O.R. 780 (C.A.).

114. (1976), 15 N.S.R. (2d) 465 (C.A.).

115. See R. v. Dass (1979), 47 C.C.C. (2d) 194 (Man. C.A.).

116. Supra note 36.

117. See R. v. Gaudet (1976), 9 N. & P.E.I.R. 434, 12 A.P.R. 434 (P.E.I.C.C.A.) - six months consecutive; R. v. Bartkow (1978), 1 C.R. (3d) S-36, 24 N.S.R. (2d) 518, 35 A.P.R. 518 (C.A.) - four months.

118. See R. v. Normandeau et al. (1975), 10 N.B.R. (2d) 687, 4 A.P.R. 687 (C.A.) - one year and 18 months for accused found in van with 10 bags of phencyclidine weighing 63.1 gm; R. v. Mirovitch (1979), 10 C.R. (3d) S-22 (Que. C.A.) - three years for trafficking in 1/2 lb; R. v. Walsh (1977), 1 W.C.B. 106 (Ont. C.A.) - total of five years for offences of trafficking PCP, 26-year-old first offender found to have "no respect for drug laws"; R. v. Paquin (1979), 3 W.C.B. 369 (Ont. C.A.) - two years, reduced from three, for large-scale commercial trafficking of hashish and phencyclidine, 26-year-old married accused with child had favourable pre-sentence report and had never been to jail before; R. v. Sprague et al., supra note 46; two years for possession of 37 capsules for the purpose, accused had long criminal record; R. v. Bell and Neveu (1978), 3 C.R. (3d) S-21, 6 Alta. L.R. (2d) 80, 11 A.R. 564 (T.D.) - 30 months for one pound of the drug, valued at $4,500 to $5,000; R. v. Gregor (1980), 4 W.C.B. 503 (Ont. C.A.) - 13 months, taking into account 88 days of pre-trial custody, for accused of 32, addict, lengthy record mainly of property offences, previous sentence of 18 months found too long as accused was selling to feed his own habit.

119. R. v. Vance; R. v. Christopher (1977), 2 W.C.B. 23 (Ont. C.A.).

120. (1978), 21 N. & P.E.I.R. 279, 56 A.P.R. 279 (Nfld. Prov. Ct.).

121. Narcotic Control Act, supra note 2, s.5(2).

122. See Levy, H.J., Importing Hash: A Silly Law, A Terrible Penalty," [February 1979] Canadian Lawyer 10.

123. R. v. Shand (1976), 30 C.C.C. (2d) 23, 35 C.R.N.S. 202, 13 O.R. (2d) 65, 70 D.L.R. (3d) 395 (C.A.); see also R. v. Gignac and Newman (1976), 30 C.C.C. (2d) 40 (Ont. C.A.).

124. (1975), 30 C.R.N.S. 367 (Que. C.A.); see also R. v. Ruez, supra note 98 - eight years for courier of 1.6 lb. of cocaine.

125. Supra note 79.

126. (1979), 46 C.C.C. (2d) 14 (Ont. C.A.).

127. [Unreported] April 2nd, 1981 (N.S.C.A.).

CHAPTER 21: TAXATION OFFENCES

A. CUSTOMS ACT

The Customs Act[1] creates a number of offences and sets penalties aimed at curtailing duty avoidance. The most used provisions are those in s.192(3), smuggling, and s. 205, possession of unlawfully imported goods.

Smuggling (which may be clandestine or overt[2]) is an indictable offence. The current penalty is a fine of not more than $1000 and not less than $200, or imprisonment for four years and not less than one year, or both. In addition, the accused forfeits the goods smuggled or the value thereof.[3] It will be noted that the two scales of penalty provided, fines and imprisonment, are of quite different orders. Their usage by the Courts reflects what was, perhaps, the intention of Parliament. The scale of fines is used for casual, single acts, including those done under a mistake of law, while imprisonment is reserved for cases of planned, methodical smuggling.

As an example of the former type of offence stands R. v. Riddell.[4] The accused and his brother purchased a grader in the United States, and the accused drove it into Canada. He did not stop at the customs office, and claimed at trial that he did not think that duty was payable. The trial Judge entered a verdict of acquittal as nothing "secretive" had been done, but the decision was reversed on appeal, the Court finding that smuggling need not be clandestine. The minimum penalty, a fine of $200, was imposed.

The decision of the Ontario Court of Appeal in R. v. Guenot, Kocsis and Lukacs[5] indicates that maximum reformatory terms are not

inappropriate for continuing, planned evasion of duty. The case involved a scheme for the smuggling of automobile parts from the United States wherein Guenot, a Customs Officer, would clear truckloads of parts without payment of duty. At trial he received a sentence of one year, while Kocsis and Lukacs received 22 months and two years less a day. The latter two appealed. The Court, taking the view that Guenot's breach of trust rendered his offence more serious, reduced the others on grounds of disparity to one year each. Nothing in the decision, however, indicates the inherent impropriety of the trial sentences imposed on Kocsis and Lukacs. It seems reasonable to speculate that the Court would have been prepared to uphold a penitentiary term for Guenot, in view of his breach of trust.

Possession and other dealings[6] with unlawfully imported goods are punishable on indictment or summary conviction. Subsection 205(1) of the Customs Act provides for compulsory forfeiture of the goods or their value if not found. Subsection 205(2) provides in addition that a sum equal to the value of the goods shall be forfeited, and on summary conviction (where the value for duty of the goods is less than $200) the accused is liable to a fine of $50-$200, imprisonment not exceeding one year and not less than one month, or both. Subsection 205(3) creates an indictable offence of possession, etc. of goods worth $200 or more, punishable by a fine of $200-$1,000, imprisonment for one to four years, or both.

The 1973 Criminal Statistics reveal that, in that year, seven indictable offences were recorded under the Customs Act. All seven offenders were fined. Of 618 summary offenders, 572 were fined and only 24 imprisoned.[7] From these figures and the limited case-law it may be deduced that a similar sentencing pattern exists as that for smuggling. Thus in R. v. Berger[8] an accused found in possession of a large amount of smuggled goods,

worth nearly $3,500, received a minimum jail term of one year. This case may be contrasted with R. v. Walker et al.[9] Walker and his associates had in their possession a diamond, worth $200 or more, which had been carried from the United States for appraisal. Despite their mistaken belief that they did not have to report the importation of the stone (no duty was payable), they were found guilty on appeal as "ignorance of the law is no excuse", and their belief was not a "lawful excuse" within the meaning of s. 205. However, a minimum fine was an appropriate penalty in the circumstances.

It should be noted that the forfeiture provisions of the Customs Act operate automatically, and should not be incorporated into the sentence imposed.[10]

B. INCOME TAX ACT

Offences relating to income taxation almost always call for tariff sentences. By their nature, such offences are most often committed coolly and rationally, and in more serious cases often involve detailed planning and falsification of records. As can be seen from the case-law, most serious offenders are well-respected, without previous records, and of course wealthy. These conditions prevailing, the Courts require serious consideration of the deterrent aspects of sentencing,[11] sometimes to the extent of imposing exemplary penalties.[12]

Section 231 of the Income Tax Act[13] makes detailed provision for investigation of businesses, and creates several offences relating to hindering such investigations. The penalty on summary conviction for such hindrance, provided in s. 238(2), is

(a) a fine of not less than $200 and not exceeding $10,000, or
(b) both the fine described in paragraph (a) and imprisonment for a term not exceeding 6 months.

Reported prosecutions under this section are rare. Imprisonment, however, must be reserved for extremely severe cases if the decision in R. v. Hashem[14] is used as a standard; the accused, who refused to supply the Minister with purchase vouchers for over $3/4 million worth of scrap, was fined $2,000. The sentence was upheld on appeal.

Tax evasion, false returns and allied offences are dealt with in s. 239 of the Act. It provides:

239.(1) Every person who has
(a) made, or participated in, assented to or acquiesced in the making of, false, or deceptive statements in a return, certificate, statement or answer filed or made as required by or under this Act or a regulation,
(b) to evade payment of a tax imposed by this Act, destroyed, altered, mutilated, secreted or otherwise disposed of the records or books of account of a taxpayer,
(c) made, or assented to or acquiesced in the making of, false or deceptive entries, or omitted, or assented to or acquiesced in the omission, to enter a material particular, in records or books of account of a taxpayer,
(d) wilfully, in any manner, evaded or attempted to evade, compliance with this Act or payment of taxes imposed by this Act, or
(e) conspired with any person to commit an offence described by paragraphs (a) to (d),
is guilty of an offence and, in addition to any penalty otherwise provided, is liable on summary conviction to
(f) a fine of not less than 25% and not more than double the amount of the tax that was sought to be evaded, or
(g) both the fine described in paragraph (f) and imprisonment for a term not exceeding 2 years.

(2) Every person who is charged with an offence described by subsection (1) may, at the election of the Attorney General of Canada, be prosecuted upon indictment and, if convicted, is, in addition to any penalty otherwise provided, liable to imprisonment for a term not exceeding 5 years and not less than 2 months.

> (3) Where a person has been convicted under this section of wilfully, in any manner, evading or attempting to evade payment of taxes imposed by Part I, he is not liable to pay a penalty imposed under section 163 for the same evasion or attempt unless he was assessed for that penalty before the information or complaint giving rise to the conviction was laid or made.

As indicated by sub.-s.(3), a range of civil consequences may also ensue from improper reporting of income.[15]

Imprisonment has always been a rare sentence in tax evasion cases.[16] Generally, a substantial fine will be found sufficient for purposes of punishment and deterrence. The amount of tax evaded is an important consideration, especially in summary cases where the maximum and minimum fines are fixed with reference thereto. If civil penalties have been levied, the sentencing Court may take these into account, although it should not be "unduly influenced" by them.[17]

The general principles relating to fines in general apply in taxation-related suits. Thus in R. v. Thistle[18] a fine of $35,000 for evasion of some $47,500 over five years was reduced to $25,000, as the accused's financial position was already destined to be precarious for some time, and the Court did not wish to "crush" him and his family. Similarly, in R. v. Fera[19] where the accused had debts of about $237,000, the Court took note of counsel's submission that the fine must be "tailored to fit the circumstances" of the accused and levied a fine of only $6,000, with one year to pay. In R. v. Ostertag[20] the accused had evaded just under $5,500 in taxes, and was fined $1,000 at trial. The Crown appealed, alleging that the "average" of fines imposed for tax evasion was 50% of the tax evaded. After reviewing the authorities, Cashman, J. dismissed the appeal having found an actual range from 14% to 222%.

> In my respectful view no penalty should be imposed simply because it comes within some statistical average. A penalty, whether it be a fine or other type of penalty ought to be imposed in accordance with the particular circumstances of each case.[21]

As fines are tailored to the circumstances of the accused, it is inevitable that no statistical uniformity will appear.

Where relative poverty is not in issue, the size of the fine in relation to tax evaded will naturally reflect the Court's view of the seriousness of the offence committed. Thus in R. v. Gregoire,[22] the Court increased the fine from $3,600 to $13,000 plus costs on evasion of about $30,000. The accused had avoided tax over a period of eight years and was, inter alia, a Municipal Court Judge. For a relatively much smaller evasion, of tax of $19,000, a fine of $1,000 was imposed in R. v. Lombardo.[23] Similar considerations apply to the sentencing of corporate tax evaders.[24]

A matter often regarded by the Courts as making an offence particularly serious is its continuation over a long period. It is normally only continuing offences which will attract a jail sentence. In addition, the jurisprudence indicates that the Courts view with particular disfavour any complicated scheme designed to hide the offences.

The range of sentence for such offences is one year to 18 months.[25] In R. v. Poynton[26] the accused evaded about $11,000 of tax payable on "kick backs" from his business, criminally received but nevertheless taxable. He had no record "of any consequence", was married and had four children. One year concurrent on each of three sentences was imposed. In R. v. Kapoor,[27] similarly, a sentence of 18 months was upheld for a man of 49, married with three children, with no previous record. His offences arose out of a circuitous series of transactions involving shares in a company, deliberately designed to make investigation by the Department of National Revenue or the Securities Commission very difficult.[28]

Footnotes to Chapter 21

1. R.S.C. 1970, c.C-40.

2. R. v. Riddell (1973), 11 C.C.C. (2d) 493, 24 C.R.N.S. 144 (Que. C.A.).

3. Customs Act, s.192(3).

4. Supra note 2.

5. (1979), 51 C.C.C. (2d) 315 (Ont. C.A.).

6. Specifically, possession, harbouring, concealment, purchase or sale of such goods.

7. Plus 14 probation orders and 8 "other dispositions".

8. 2 C.C.C. (2d) 492, [1971] 1 O.R. 765 (C.A.).

9. (1980), 4 W.C.B. 246 (Ont. C.A.).

10. R. v. Berger, supra note 8. There is surprisingly little Canadian academic comment on customs law in general, and especially prosecutions under the Customs Act. For a recent review of U.S. law in the area see Dickey, W.L. "Customs: Fines and Forfeiture Under Section 592 of the Tariff Act of 1930 - Revisited," (1980) 35 Business Lawyer 149.

11. R. v. Kitto (1969), 8 C.R.N.S. 277 (B.C. Prov. Ct.); R. v. Hashem (1978), 38 N.S.R. (2d) 301, 69 A.P.R. 301 (Co. Ct.); R. v. Larson and Larson Woodlands Research Ltd. (1976), 1 W.C.B. 8 (Ont. Prov. Ct.).

12. See e.g. R. v. Lambert, [1979] C.S.P. 1028.

13. R.S.C. 1952, c.148, as am.

14. Supra note 11.

15. On which see generally Harris, E.C. Canadian Income Taxation (1979, Toronto: Butterworths); LaBrie, F.E. The Principles of Canadian Income Taxation (1965, Don Mills: CCH Canadian Ltd.) Chapter 17; Scace, A.R.A. The Income Tax Law of Canada (2nd ed. 1973, Toronto: Department of Continuing Education, Law Society of Upper Canada) Chapter 18.

16. See Quain, R. "Income Tax Evasion," (1955), 58 Revue du Notariat 100 at 104.

17. R. v. Sumarah et al., [1970] 5 C.C.C. 317, 10 C.R.N.S. 169, 70 D.T.C. 6164 (N.S. Co. Ct.); R. v. Horowitz (1971), 71 D.T.C. 5350 (Ont. Co. Ct.); R. v. Carter (1976), 23 N.S.R. (2d) 237 (Co. Ct.).

18. [1974] C.T.C. 798, 74 D.T.C. 6632 (Ont. Co. Ct.).

19. (1976), 32 C.C.C. (2d) 219 (Ont. Prov. Ct.).

20. (1977), 34 C.C.C. (2d) 133 (B.C. Co. Ct.).

21. Ibid. at 136 per Cashman, Co. Ct. J. The principle of totality may also be applied to multiple fines: see e.g. Baigent v. The Queen (1973), 74 D.T.C. 6467 (Ont. Co. Ct.) - six counts, fine of $15,000 on first but only $50 on each of other five. Further, on successful appeal by the accused against a wrongful assessment of the amount of tax evaded, the corresponding fine may be "pro-rated" or approximately scaled down. See e.g. R. v. Sihler (1976), 31 C.C.C. (2d) 73, 13 O.R. (2d) 285, 70 D.L.R. (3d) 616 (C.A.).

22. (1972), 72 D.T.C. 6219 (Que. Q.B.).

23. (1976), 1 W.C.B. 166 (Ont. Co. Ct.).

24. See e.g. R. v. Inter Publishing Co. Ltd. (1977), 1 W.C.B. 221 (Alta. Dist. Ct.) - fine of $250,000 for evasion of $878,000 tax; R. v. Halcraft Printing Ltd. et al. (1977), 1 W.C.B. 179 (N.S. Co. Ct.).

25. For a rare departure in which a term of two years was imposed on a 65-year-old accused who evaded tax on income of $1.4 million, see R. v. Inter Publishing Co. Ltd., supra note 24.

26. 9 C.C.C. (2d) 32, [1972] 3 O.R. 727, 29 D.L.R. (3d) 389, [1972] C.T.C. 412, 72 D.T.C. 6329 (C.A.).

27. (1978), 39 C.C.C. (2d) 326 (B.C.C.A.).

28. See also R. v. Lambert, supra note 12 - 12 months for evasion of over $250,000 tax over three-year period; R. v. Hill (1979), 3 W.C.B. 369 (B.C. Co. Ct.) - one year for evasion of $134,958 tax.

CHAPTER 22: TRADE OFFENCES

A. FINES AND ORDERS UNDER THE COMBINES INVESTIGATION ACT[1]

The general criminal sanction for offences committed in the course of trade is the fine. This is so because the overwhelming majority of offenders charged are corporations, for whom other sanctions are not available. As Professor Stanbury noted in 1976,

> During the first eighty-five years following the enactment of the Combines Investigation Act, or its predecessor statutes, not one individual was sentenced to jail for an offence in restraint of trade. In fact, few were ever charged. In the past two years, four individuals have been imprisoned; one offender for a term of one year and three others for one day each. All were convicted of misleading advertising rather than for some large-scale, multi-year price fixing scheme.[2]

In an outstanding article, Professor Stanbury goes on to document in some detail his contention that the sizes of fines imposed in illegal competition and related offences have been "grossly inadequate" for purposes of deterrence. The purpose of this Chapter will be not to support or dissent from that view, but rather to attempt to elicit the principles upon which the amounts of fines are based.

It should be noted first, however, that a supporting sanction is available to the Courts in cases brought under the Combines Investigation Act. In addition to the penalties stipulated by the various penal sections of Part V, Subsection 30(1) of the Act gives the Court power, upon conviction or within three years thereafter, to

> prohibit the continuation or repetition of the offence or the doing of any act or thing by the person convicted or any other person directed toward the continuation or repetition of the offence and where

> the conviction is with respect to a merger or monopoly, direct the person convicted or any other person to do such acts or things as may be necessary to dissolve the merger or monopoly in such manner as the court directs.

An application by the federal or provincial attorney general is required for this purpose.[3]

While it has been found that prohibition orders are obtained in a high percentage of cases where a fine has been imposed, and in some cases the Crown has settled for such an order only,[4] the jurisprudence indicates that such orders should be imposed judiciously, and only after full consideration of the need alleged and their terms. As to need, it was pointed out in R. v. Seltzer[5] that the granting of orders is discretionary. This implies that the necessity of such an order must be established: if Parliament had meant prohibitory mandates to be imposed routinely, it would have said so. As to the scope of such an order, it was found by the Manitoba Court in R. v. Kito Canada Ltd.[6] that

> It would be contrary to justice to make a blanket prohibition order against [all directors, officers, partners, servants, or agents of a corporation]. Each person sought to be covered by a prohitition order should receive notice of an application for such an order, and should be afforded a right to be heard.[7]

It is clear, however, from the judgment of Ritchie, J., speaking for the majority of the Supreme Court of Canada in R. v. Sunbeam Corporation (Canada) Ltd.,[8] that the order may be broad in a different respect: that is, that it may go forth not only to prohibit the very acts complained of in the indictment, but, as Laskin, J.A. (as he then was) has stated, "to cover the commission of the like offence in respect of any person other than the [complainants] particularly mentioned in the counts on which convictions were made and to cover the use of any other means by which, within the

definition of the offence, it may be committed".[9] Laskin, J.A.'s view is at odds with the opinion expressed by Kelly, J.A. in R. v. F.W. Woolworth Co. Ltd.,[10] that "the order ... must relate to the continuation or repetition of the offence for which the conviction was made." As Chief Justice Trainor has noted,[11] however, the Laskin view must be taken as correct in view of its adoption by the Supreme Court of Canada in Sunbeam Corporation.

The evidentiary requirements for the making of an order pursuant to summary conviction of a trade offence were extensively discussed in R. v. S.S. Kresge Co. Ltd.[12] In the Prince Edward Island Supreme Court, Trainor, C.J. found that conviction of an offence was only the first pre-requisite for the granting of an order, and that more should be required in the way of evidence that a fine alone will not be a sufficient deterrent. While no such evidence had been adduced in the Court below, counsel before the Chief Justice had tendered, without objection, evidence of a previous conviction of the same company in Calgary. His Lordship continued:

> While the last-mentioned offence had nothing to do with customers in Prince Edward Island, the appellant is a large corporation doing business in many places, and when that conviction was registered against the company a duty rested upon the board of directors or management to take the necessary steps to avoid any repetition. If it were otherwise, persons could be victimized by misleading advertisements in each of the areas of operation, and all that could be done would be to impose a fine not exceeding $1,000, which in the case of a large corporation, might be considered as little more than a licence fee to continue wilfully or negligently to deceive the public by misleading advertisements. Even if it may be considered that the learned Magistrate was in error in making the prohibitory order on the basis of the evidence in the record then before him, I believe that as the record now stands the case is one in which the discretionary power provided by s. 30(1)(a) should be exercised in favour of making the order.[13]

On further appeal, the Prince Edward Island Court of Appeal quashed the order thus imposed, finding that the prohibitory order was not a "fit" sentence on the basis of the evidence that had been available before the Chief Justice in the Court below. Emphasizing the summary nature of the proceedings, as reflecting that the offence was not viewed with great seriousness by the Crown, and the nature of the offence itself, Nicholson, J. stated:

> Prohibitory orders under s. 30(1) of the Combines Investigation Act if they are made when the proceedings are by way of summary conviction should only be made where there is an established likelihood of a repetition of the offence charged. In the case at bar no such likelihood was established before the summary conviction Court or before the learned Chief Justice, and in our opinion a prohibitory order should not have been made in this case.[14]

B. SPECIFIC OFFENCES UNDER THE COMBINES INVESTIGATION ACT

i) Illegal Conspiracies and Combines

Subsection 32(1) of the Combines Investigation Act makes illegal conspiracy in restraint of competition and kindred offences punishable on indictment by imprisonment for five years and/or a fine of $1 million. Bid-rigging, under s. 32.2, is punishable by a fine in the discretion of the Court and/or imprisonment for five years.

Despite the low incidence of fully reported cases brought under these provisions, the fact that several companies are usually involved in each prosecution has caused the Courts to give detailed reasons for differentiation in the amounts of fines. Within the bounds of the general principles for the fining of corporations, principally the declared intent that fines should not

amount to mere licence fees for the continuation of illegalities,[15] the following are the principal factors considered in calculation of fines for conspiracies and related offences.

a) Factors Relating to the Conspiracy as a Whole

1 The nature and duration of the conspiracy.[16]

2. The geographical area covered by the conspiracy.[17]

3. The share of the market controlled by the conspirators. Where complete or virtually complete control has not been attained, so that the elimination of competition is not fully achieved, the conspiracy may not be regarded so seriously as one which succeeded in gaining full control of a market.[18]

4. The methods by which the conspiracy was carried on. Evidence of subterfuge, code letters,[19] or attempts to cover up the conspiracy[20] aggravate the offence as indicating "bad faith" or "moral turpitude" on the parts of the conspirators.

5. Evidence that the conspiracy was used to drive prices upward to the detriment of the public. Such evidence obviously enhances the gravity of the offence;[21] however, it will be to a conspirator's credit that the public has not been "held to ransom" by exhorbitant pricing;[22] more occasionally, beneficial effects may be felt and can be considered mitigating factors.[23]

b) Factors Relating to Individual Conspirators

1. The extent of involvment of each conspirator in the scheme.[24] This consideration subdivides into:

a) The period of involvement of each conspirator, as compared to the total active life of the conspiracy.[25]

b) The influence of each conspirator on the conspiracy, instigators being regarded as more culpable than those who joined later.[26]

2. The size of the market share of each conspirator.[27]

3. The size and financial condition of each conspirator.[28]

4. The profitability of the conspiracy. This factor is taken into consideration with some reserve. Seaton, J.A. in R. v. Ocean Construction Supplies Ltd. and Six Other Corporations[29] pointed out that computation of fines based on income alone excludes many other considerations.[30] In addition, there may be practical difficulties in determining the profits generated by the illegal act — as was pointed out by Brooke, J.A. in R. v. Browning Arms Co. of Canada Ltd.,[31] a case of resale price maintenance, some profits at least may be attributable to the quality of the product. The conspiracy may not have been profitable:[32] nevertheless, the offence has still been committed. Pennel, J., reviewing the law in this area, has stated:

> An attempt to arrive at an appropriate penalty under the philosophy that the fine imposed on the violator should exceed the profits generated by his violation is not free of difficulty. For example, the attack on a conspiracy to lessen, unduly, competition is often made without substantial reliance on economic evidence. The essence of the offence is the illegal agreement. Therefore, what is attacked is the act of agreement — the attempt to affect the market price of commodities. The actual effect on prices is not always before the court with any precision, and in that sense the court sometimes lacks the information necessary to determine the gravity of the offence. It may be that a conspiracy to lessen, unduly, competition had a negligible import on average industry prices. It might be thought that it would be difficult to find an instance of such a result ....
> On the other hand, a problem of undeterrence may result if the penalty for violation underestimates the

> gain received from the illegal activity that was the object of the conspiracy. In saying this — I hope with becoming diffidence and deferrence — I am far from implying that an appropriate sentence can be reduced to an arithmetic problem.[33]

5. Previous Convictions of Each Conspirator. The absence of previous convictions is a factor in the favour of defendant companies;[34] continued offending in the face of prior warnings, on the other hand, aggravates the offence.[35] The offence is particularly aggravated if committed while subject to a prohibition order under s. 30.[36]

6. Reliance Upon Legal Advice. In R. v. Canadian Professional Golfers' Association et al.,[37] Berger, J. took into account in mitigation of sentence that the Association had relied upon legal advice that its acts were lawful. A similar consideration was brought forward in R. v. St. Lawrence Corporation,[38] but found by Schatz, J. to be of questionable weight in light of attempts by the conspirators to "disguise the scheme in the beginning".

7. Voluntary Discontinuation of the Offence. The discontinuation of the offence some three years before sentencing was taken into consideration in R. v. Canadian Professional Golfers' Association.[39] A nominal fine of $500 was levied in R. v. William E. Coutts Co. Ltd.[40] on the basis, inter alia, that the offence was committed over 13 years prior to trial.

c) Uniformity of Sentence

A consideration unique to this area of the law is the occasional judicial inference that uniformity of sentence may not be so desirable here as in other areas of the law. In R. v. Browning Arms Co. of Canada Ltd.[41]

Brooke, J.A., dissenting in part, recognized the general desirability of uniformity of sentence. His Lordship pointed out the danger, however, that predictability of fines would enable businessmen to budget for prosecutions like insurance risks. A similar sentiment was expressed in R. v. Ocean Construction Supplies Ltd. and Six Other Corporations:[42]

> The foundation of many of the arguments of those who would reduce the fines is that the amounts were not foreseeable. We were led to believe that these conspirators were shocked at the amounts. As to the first I say that I see no particular virtue in foreseeability. Indeed, I see the disadvantage that one may budget for a fine when he decides to commit the offence. The complaint seems to be that the price of a permit to commit the crime has been raised without notice and that this is unfair to the conspirators. That argument must fail.[43]

While this philosophy has not been adhered to in other decisions, the individual characteristics of corporate offenders do mean inevitably that no "range" of fine is or should be set down. In light of the size of some corporations, their ability to pay large sums of money without undue concern, and the principle that fines should be sufficient to "hurt" but not so high as to ruin, it is obvious that the appropriate fine for a multinational convicted of an offence similar to one committed by a family hardware business may be different by a factor of thousands. In R. v. Ocean Construction Supplies Ltd. and Six Other Corporations,[44] fines ranged from $7,000 to $125,000. In Armco Canada Ltd. and 9 Other Corporations (No. 2) the range was from $2,000 to $125,000.[45] The notion of consistency of sentence in the case of fining corporations is a matter of consistency of approach, not amount.

ii) Misleading Advertising

Section 36 of the Combines Investigation Act creates a range of offences which may loosely be classified under the heading of "misleading

advertising". Such offences are punishable on indictment by a fine in the discretion of the Court, imprisonment for five years or both. On summary conviction the maximum penalties are a fine of $25,000, one year's imprisonment or both.

As with all commercial offences, the accused is most often a corporation, with the result that fines are the most common penalty. The range of behaviour seen in the jurisprudence varies from the small store marking an item as reduced in price when this is not the case, or representing the regular price untruthfully,[46] to misleading statements widely published in the context of a major advertising campaign by a nation-wide concern.[47] As a result the fines imposed have varied from almost nominal levies for unprofitable, isolated instances[48] to more substantial five-figure fines for "blatantly and irresponsibly false" claims regarding the savings to be obtained by shopping at branches of one particular chain store.[49] In only one reported case since 1970, R. v. O'Brien,[50] was a man sentenced to imprisonment for a deliberately misleading campaign.

The major considerations in such cases are substantially the same as those for conspiracies, albeit usually in a much more restricted sphere. Profitability,[51] deliberation and planning[52] (or lack of them[53]), the extent of harm to the public,[54] and the duration of the offending behaviour are all considered.[55] Previous convictions aggravate:[56] offences committed in areas of commerce where the reliance of the buyer upon the seller's expertise is great are regarded with particular seriousness.[57] An offender's bona fide reliance upon the word of a supplier[58] or lawyer[59] will mitigate its sentence, as will voluntary discontinuation of the conduct.[60] Underlying all these considerations is the general practice of fixing the fine with reference to the size of the company concerned,[61] thus making consistency in principle, not quantum, the dominant feature of sentencing practice.

iii) Resale Price Maintenance

Offences of resale price maintenance are punishable pursuant to s. 38(3) of the Combines Investigation Act by a fine in the discretion of the Court, imprisonment for five years or both. The essence of this offence is an attempt to stop reduction of prices or force them upward, usually perpetrated through refusal to supply products except pursuant to an undertaking to resell at a stipulated price. Offenders have ranged in size from local automobile leasing agencies[62] to industrial giants;[63] many offenders are household names in Canada. Consequently, again, the range of fines imposed is wide, from mere thousands for smaller companies to substantially greater amounts for large corporations. Essentially, while the offender is usually a single corporation, the applicable principles for this offence are the same, mutatis mutandis, as those for conspiracies and combines, discussed above.

iv) "Pyramid Sales" Schemes

"Pyramid sales" schemes typically involve the sale of "distributorships", or rights to sell a product, to private individuals who receive in return for their fee the right to sell further distributorships for a commission. Frequently only a token amount of merchandise, or none, ever changes hands: those at the bottom of the "pyramid", when the potential market is saturated, are left unable to recoup their investment by selling further memberships, while those at the top will have recouped many times their initial expense. In one typical case, R. v. Hiram Saindon Inc.,[64] for a $100 entry fee members were given a watch and the right to sell memberships: some 16,000 persons had joined by the time proceedings were commenced.

Pyramid sales schemes are punishable by two years' imprisonment under s. 189(1) of the Criminal Code, or under s. 36.3 of the Combines Investigation Act by

> (3)(a) on conviction or indictment ... a fine in the discretion of the court or ... imprisonment for five years or ... both; or
> (b) on summary conviction ... a fine of twenty-five thousand dollars or ... imprisonment for one year or ... both.

Where corporations are used to set up the scheme, the normal method of punishment is by a deterrent fine, with considerable reference to profits made. Perhaps profits assume greater importance here than in other corporate crimes. There is really no "product" being sold, other than the scheme, to which some gains are attributable. Reflecting the major considerations in such cases, Cioni, Prov. Ct. J. said in R. v. Dare to Be Great of Canada Ltd.:[65]

> This Court at this time is not faced with a scheme such as this as being a continuing problem in this jurisdiction, whereby the Court might be prevailed upon to act in the interests of society to stop a continuation of many of these schemes. However, as against this is the contention, properly so, of the Crown, that illegal schemes in general must be discouraged by the Courts .... The law ... aims at commercial regulation. It may well be that the accused did not know that the scheme under which they operated was an illegal one .... [I]t is my intention ... to handle the matter by way of fine ... and I think that the fines imposed should reflect the operation as a whole. It was a highly aggressive one which resulted in the collection of a substantial amount of money in a short time. Persons involved all profited or tried to profit under the scheme to the maximum of their ability that the scheme would allow ....' In determining these fines, I am having in mind that it is a proper function of this Court to discourage illegal schemes, not by repressive fines but by substantial ones.[66]

Fines, of $20,000 for the company and $5,000 for each of its directors, were imposed for an aggressive, "hard-sell" scheme which had

relieved at least 56 people of sums from $2,500 to $5,000. Some victims had been urged to use illegal means to borrow the necessary capital.

These sentences seem light in comparison to the precedents from Quebec, which has provided most of the reported decisions in this area. While a fine of only $5,000 was upheld in 1970 in Pechdo v. The Queen,[67] where the accused earned some $33,000 in seven weeks, later decisions show increasing severity. In R. v. Koscot Interplanetary of Canada Ltd.,[68] sales of beauty products distributorships netted over $43,000: a fine of about four times that amount, $175,000, was imposed to deter other schemes. In 1976 a similar scheme rendered profits to an operator of about $4,750: he was fined $4,000 and sent to prison for 60 days. Explaining the decision, Bilodeau, J. stated:

> [Translation] With all respect to the Appeal Court Judges who, to this date, have upheld sentences of fines, the court is of the the opinion that the responsibility it faces in respect to the proliferation of these schemes is to protect the consumers by imposing not only a fine but a sentence of imprisonment so that the promoters who would be tempted to get involved in such operations would be dissuaded. The impositon of a prison sentence, in the Court's opinion, is the only effective deterrent. With respect to contrary opinion, the continuation of imposing fines, though substantial, would be like licensing promoters to carry out these operations.[69]

It will be noted that individuals are charged in a greater percentage of cases of pyramid sales schemes than in other commercial areas. As a result, in such cases considerations more like those applicable in the sentencing of individuals in other areas come into play, and at times the decision takes on the aspect of relating to participation in a minor fraud rather than a major commercial illegality. In the last available decision under s.189(1) of the Criminal Code, R. v. Weisdorn and Weisdorn,[70] this is particularly evident. The British Columbia Court of Appeal, while intimating

that a fine might have been more appropriate, upheld the grant of discharges conditional upon probation for two young first offenders involved in a very minor way in a pyramid scheme.

C. OTHER TRADE OFFENCES

Federal legislation creates a vast number of "regulatory" offences relating to illegalities in the carrying on of business. In view of the low incidence of reported decisions and the wide range of behaviour concerned, it would serve little purpose to review each of these areas. It may be stated, however, that as with the more noteworthy trade offences discussed above, fines are the predominant method of dealing with illegal conduct, their size being determined principally with reference to the size of the company involved, the need to enforce regulatory statutes by deterrence, the gravity of the conduct and the extent of harm or potential harm to the public.[71]

Footnotes to Chapter 22

1. R.S.C. 1970, c.C-23, as am.

2. Stanbury, W.T. "Penalties and Remedies Under the Combines Investigation Act 1889-1976," (1976) 14 Osgoode Hall L.J. 571 at 571.

3. Quia timet relief in similar terms is also available, pursuant to s.30(2).

4. Stanbury, supra note 2 at 577.

5. (1970), 64 C.P.R. 77 (Que. C.S.P.).

6. 30 C.C.C. (2d) 531, 25 C.P.R. (2d) 145, [1976] 4 W.W.R. 189 (Man. C.A.).

7. Ibid. at 539-40 per O'Sullivan, J.A.

8. 56 C.P.R. 242, 1 D.L.R. (3d) 161, [1969] 2 C.C.C. 189 (S.C.C.).

9. 62 D.L.R. (2d) 75 at 109, [1967] 3 C.C.C. 149 at 186, 53 C.P.R. 102 at 139 (Ont. C.A.).

10. (1974), 16 C.P.R. (2d) 272, 46 D.L.R. (3d) 345, 18 C.C.C. (2d) 23 (Ont. C.A.).

11. R. v. S.S. Kresge Co. Ltd. (1975), 24 C.C.C. (2d) 357, 20 C.P.R. (2d) 96, 7 N. & P.E.I.R. 305, 61 D.L.R. (3d) 295 (P.E.I.S.C.), sentence overruled in part 27 C.C.C. (2d) 420, 25 C.P.R. (2d) 16, 65 D.L.R. (2d) 628 (P.E.I.C.A.).

12. Ibid.

13. Ibid. at 364-65 per Trainor, C.J.P.E.I.

14. Ibid. at 438.

15. For discussion of the principles applicable to the fining of corporations generally see post, Chapter 27.

16. A very common and obvious consideration. See e.g. R. v. Canada General Electric Co. (1977), 35 C.P.R. (2d) 210, 2 B.L.R. 230 (Ont. H.C.).

17. See e.g. R. v. Ocean Construction Supplies Ltd. and Six Other Corporations (1974), 22 C.C.C. (2d) 340, 18 C.P.R. (2d) 166, 61 D.L.R. (3d) 323 (B.C.C.A.).

18. See e.g. R. v. Barton Tubes Ltd. et al. (1978), 3 W.C.B. 29 (Ont. H.C.).

19. See e.g. R. v. Northern Electric Co. Ltd. et al. (1956), 116 C.C.C. 98, 24 C.R. 201 (Ont. H.C.).

20. See R. v. St. Lawrence Corp. Ltd. and 19 Other Corporations, [1969] 2 O.R. 305, [1969] 3 C.C.C. 263, 59 C.P.R. 97 (Ont. C.A.).

21. See R. v. Canadian Professional Golfers' Association et al. (1980), 5 W.C.B. 77 (B.C.S.C.); see also R. v. Firestone Tire and Rubber Co. of Can. Ltd. et al. (1953), 107 C.C.C. 286, 17 C.R. 401, 20 C.P.R. 8 (Ont. H.C.).

22. See e.g. R. v. Canada General Electric Co., supra note 16.

23. See e.g. R. v. Hoffman-LaRoche Ltd. (1980), 16 C.R. (3d) 13, 53 C.C.C. (2d) 1, 48 C.P.R. (2d) 145, 109 D.L.R. (3d) 5 (Ont. H.C.) - a case brought under the "illegal trade practices" provisions of s.34(1).

24. This consideration has a very long pedigree, dating back at least to R. v. Container Materials Ltd. et al. (1940), 4 D.L.R. 293, 74 C.C.C. 113 (Ont. H.C.); see Stanbury, supra note 2 at 580.

25. R. v. Armco Canada Ltd. and 9 Other Corporations (No. 2) (1975), 21 C.C.C. (2d) 129, 24 C.C.C. (2d) 147, 6 O.R. (2d) 521, 8 O.R. (2d) 573, 17 C.P.R. (2d) 211, 19 C.P.R. (2d) 273, varied 30 C.C.C. (2d) 183, 13 O.R. (2d) 32, 24 C.P.R. (2d) 145, 70 D.L.R. (3d) 287 (C.A.).

26. Ibid.

27. Ibid. See also R. v. Canada General Electric Co., supra note 22.

28. R. v. Armco Canada Ltd. and 9 Other Corporations (No. 2), supra note 25.

29. Supra note 17.

30. Following R. v. A.B.C. Ready-Mix Ltd. (1972), 17 C.P.R. (2d) 91 (Ont. H.C.); see also R. v. Deschenes Construction Ltd. (1967), 51 C.P.R. 255 (Que. Q.B.).

31. (1974), 18 C.C.C. (2d) 298 at 300, 15 C.P.R. (2d) 97 at 100 (Ont. C.A.).

32. See e.g. R. v. Barton Tubes Ltd., supra note 18; R. v. St. Lawrence Corp., supra note 20.

33. R. v. Canada General Electric Co., supra note 22, 20 C.P.R. at 8.

34. See e.g. R. v. Barton Tubes Ltd., supra note 18.

35. R. v. Armco Canada Ltd. and 9 Other Corporations (No. 2), supra note 25; R. v. Canada General Electric Co., supra note 16.

36. R. v. Armco Canada Ltd. and 9 Other Corporations (No. 2), supra note 25.

37. Supra note 21.

38. Supra note 20.

39. Supra note 21.

40. [1968] 1 O.R. 549, 2 C.C.C. 221, 54 C.P.R. 60, 67 D.L.R. (2d) 549 (Ont. C.A.).

41. Supra note 31.

42. Supra note 17.

43. Ibid., 18 C.P.R. (2d) at 169 per Seaton, J.A.

44. Supra note 17.

45. Supra note 25.

46. See e.g. R. v. Seltzer, supra note 5.

47. See e.g. R. v. Imperial Tobacco Products Ltd., 4 C.C.C. (2d) 423, 3 C.P.R. (2d) 178, [1971] 5 W.W.R. 409, 22 D.L.R. (3d) 51 (Alta. C.A.).

48. See e.g. A.G. Can. v. R.A. Beamish Stores Co. (1970), 63 C.P.R. 152 (Ont. C.A.) - $50 fine on each of three counts of advertising which represented that accused gave customers a better "deal" than other television dealers in the area.

49. R. v. Cunningham Drug Stores Ltd. (1973), 17 C.C.C. (2d) 279, 13 C.P.R. (2d) 244 (B.C.C.A.), affirming 12 C.C.C. (2d) 4, 8 C.P.R. (2d) 127 (B.C. Prov. Ct.).

50. (1975), 25 C.P.R. (2d) 143 (N.S.C.A.) - the term was 12 months.

51. R. v. Family Tire Centres Ltd. (1975), 28 C.C.C. (2d) 474, 25 C.P.R. (2d) 219 (Ont. C.A.).

52. See e.g. R. v. S.C. Johnson & Son Ltd. (1975), 21 C.P.R. (2d) 206 (Man. Prov. Ct.) - "cold and calculating plan" deserves substantial penalty.

53. See e.g. R. v. Centennial Pharmacy Ltd. (1970), 64 C.P.R. 87 (B.C. Prov. Ct.) - accused's action not "flagrant sharp practice"; R. v. Pascal Hardware Co. (1972), 8 C.P.R. (2d) 155 (Ont. Co. Ct.) - similar expressions.

54. R. v. J. Spadafora & Co. (Can.) Ltd. (1972), 10 C.P.R. (2d) 56 (Ont. Prov. Ct.).

55. Compare R. v. J. Clark & Son Ltd. (1972), 8 C.C.C. (2d) 322, 4 N.B.R. (2d) 596, 6 C.P.R. (2d) 5 (Co. Ct.) - "isolated instance"; with R. v. Tobe (1978), 43 C.P.R. (2d) 51 (Ont. Co. Ct.) - sale of book continued for a year or more, substantial penalty required.

56. R. v. Simpson-Sears Ltd. (1976), 28 C.P.R. (2d) 249 (Ont. Co. Ct.).

57. R. v. Ben Moss Jewellers Ltd. (1972), 8 C.C.C. (2d) 509, 7 C.P.R. (2d) 184 (Man. Prov. Ct.).

58. R. v. Imperial Optical Ltd. (1972), 9 C.C.C. (2d) 328, 7 C.P.R. (2d) 146 (Ont. Prov. Ct.); R. v. Giftwares Wholesale Co., 36 C.P.R. (2d) 330, 32 C.P.R. (2d) 243, [1977] 4 W.W.R. 326 (Man. Co. Ct.).

59. R. v. Whitehouse (1972), 8 C.P.R. (2d) 96 (Alta. Dist. Ct.).

60. R. v. Canada Safeway Ltd. (1971), 4 C.P.R. (2d) 217 (Sask. Mag. Ct.); R. v. Consumers' Distributing Co. (1973), 12 C.P.R. (2d) 34 (Ont. Prov. Ct.).

61. See e.g. R. v. Kenitex Canada Ltd. et al. (1980), 51 C.P.R. (2d) 103 (Ont. Co. Ct.).

62. R. v. Campbell (1979), 51 C.P.R. (2d) 284 (B.C. Co. Ct.).

63. See e.g. R. v. Rolex Watch Co. of Canada Ltd. (1980), 53 C.C.C. (2d) 445 (Ont. C.A.); R. v. Petrofina Canada Ltd. (1974), 21 C.C.C. (2d) 315, 20 C.P.R. (2d) 83 (Ont. Dist. Ct.).

64. [1979] R.L. 257 (Que. C.A.).

65. (1972), 8 C.C.C. (2d) 105 (Alta. Prov. Ct.).

66. Ibid. at 111-113 per Cioni, Prov. Ct. J.

67. [1970] C.A. 1073, [1970] R.L. 455.

68. [1973] R.L. 239 (C.M.M.).

69. R. v. Roy, [1976] R.L. 159 (Que. C.S.P.).

70. [Unreported] March 25th, 1981 (B.C.C.A.).

71. See e.g. R. v. Ford Motor Co. of Canada (1979), 49 C.C.C. (2d) 1 (Ont. C.A.) - $5,000 fine for failing to give notice of defect under s.8 of Motor Vehicle Safety Act, R.S.C. 1970, c.26 (1st Supp.) (since rep. and sub.); R. v. Centre Datsun Ltd. (1975), 29 C.C.C. (2d) 78 (Ont. Prov. Ct.) -$500 fine for corporation which did not adequately supervise its employees, allowing them to alter the odometer of a car and thus breach ss.27(1) and 35(1) of the Weights and Measures Act, S.C. 1970-71-72, c.36; R. v. Dominion Stores Ltd. (1979), 4 W.C.B. 207 (Ont. Co. Ct.) - fine of $3,500 for sale of regular ground beef with fat content higher than that permitted under the Regulations to the Food and Drugs Act, R.S.C. 1970, c.F-27, Winter, J. held that despite evidence of precautions normally taken by accused, such offence very serious when committed by large corporate chain.

CHAPTER 23: OFFENCES AGAINST ENVIRONMENTAL PROTECTION LAWS[1]

In a recent decision, R. v. United Keno Hill Mines Ltd.,[2] the accused, which had exceeded the allowable discharge of contaminants into a creek, was convicted of an offence under s. 6(1) of the Northern Inland Waters Act.[3] Over the last few years the company had spent over $1/3 million in trying to resolve its pollution problems. Imposing a fine of $1,500, Stuart, C.J. of the Yukon Territorial Court reviewed the policy of the Courts in sentencing for offences against the environment. As a general principle relating to environmental offences, His Lordship stated, "the severity of punishment is dependent upon the nature of the environment and the extent of damage inflicted." In this case, where the damage was minimal, a substantial penalty would have been inappropriate.

The importance of the extent of damage to (or lack of real impact upon) the environment is reflected in many decisions. In R. v. Brillon,[4] for example, a fine of $100 was levied for fishing in a prohibited area.[5] The accused had caught no fish there, and his net was in the area only because of mechanical failure aboard his vessel. In R. v. Fraser[6] the accused, normally a good fisherman who had taken part in conservation programmes, received an absolute discharge for possession of undersized lobster.[7] Similarly, in R. v. Quinn,[8] the accused was fined $50 on each of three charges relating to his installation of a new sewage system which was not in accordance with the standards set out in his Certificate of Approval under the Ontario Environmental Protection Act, 1971.[9] On the other hand, exemplifying the treatment of damage regarded as serious, is R. v. Churchill Copper Corp. Ltd.[10] The accused corporation discharged effluent into a settling pond for some years, but for a period of 13 days it overflowed, causing a "greyish

black substance" to run into a river. The superintendent had known of the overflow, which had so polluted the water that it was detrimental to fish in the river. Emphasizing the need to deter this and other companies, the Court imposed a fine of $5,000.

The majority of defendants in criminal pollution suits are corporate bodies, usually industrials. A second point noted by Stuart, C.J. in United Keno Hill Mines[11] is that the size, nature and wealth of the accused substantially affects the penalty. That is, the normal principles relating to fining corporations apply. His Lordship went on to point out, referring to the company's attempts to resolve its problems, that restitution is a better method of dealing with such matters than the fine. In effect, "cleaning up" is a mitigating circumstance.

This comment reflects a subtle and desirable trend in environmental sentencing. For some years the Courts have regarded deterrence as an important element in sentencing corporate polluters and the like. The extent of judicial indignation is perhaps best reflected in R. v. Kenaston Drilling (Arctic) Ltd.,[12] where a $2,000 fine was imposed for "conducting a land use operation in a land management zone without a permit".[13] No damage had been done; the company had merely allowed a tractor, for which the permit had expired nine days previously, to be driven across the tundra. Similarly, in R. v. The "City of Guildford",[14] the Ontario Court imposed a fine of $2,000 on a vessel convicted of discharging a pollutant, oil, into Toronto Harbour.[15] Again, the Court emphasized the seriousness of a charge of polluting and the importance of imposing a sentence to deter others.[16]

A decision of similar import to that of United Keno Hill Mines[17] was rendered by Low, J. in R. v. Canadian Cellulose Ltd.[18] The accused's conviction of depositing a deleterious substance in water[19] was upheld on

appeal as, despite the accidental nature of the initial spillage, the company had subsequently failed to contain the discharge. It had, however, spent some $200,000 in a "clean-up", and in the circumstances fines of $3,500 per day, for seven days, were reduced to $1,000 per day. Given the general disillusionment of environmentalists with criminal sanctions as an effective method of pollution control,[20] it is submitted that the increased use of "restitutionary" tactics by sentencers in such cases, by orders or by mitigating sentence where voluntary improvement has taken place, is a useful and desirable step toward redemption of the law's image in environmental matters.

Finally, it should be noted that environmental offences are frequently of a continuing nature. The standard practice is to assess penalties on a per diem basis,[21] and it has been held incorrect to assess a fine for one continuing offence in such circumstances.[22]

Footnotes to Chapter 23

1. This Chapter will review the principles of environmental sentencing generally, with reference to decided cases. For a detailed review of federal provisions in this field as they relate to the petroleum industry, see Stroppa, B.L.: "Federal Legislation and Common Law Aspects of Environmental Problems in Canada," (1975), 13 Alta. L. Rev. 18.

2. (1980), 5 W.C.B. 467 (Y.T. Terr. Ct.).

3. R.S.C. 1970, c.28 (1st Supp.).

4. (1971), 6 C.C.C. (2d) 268 (B.C. Co. Ct.).

5. In contravention of the Fisheries Act, R.S.C. 1970, c.F-14, as am, ss.19, 61(1).

6. (1979), 28 N. & P.E.I.R. 175 (P.E.I.S.C.).

7. Contrary to the Lobster Fishery Regulations, C.R.C. 1978, c.817, and Fisheries Act, supra note 5, s.61(1).

8. (1977), 1 W.C.B. 410 (Ont. Prov. Ct.).

9. S.O. 1971, c.86, ss. 59(1), 60(1) and 62.

10. (1975), 5 C.C.C. (2d) 319, aff'd 8 C.C.C. (2d) 36 (B.C.C.A.).

11. Supra note 2.

12. (1973), 12 C.C.C. (2d) 383, 41 D.L.R. (3d) 252 (N.W.T.S.C.).

13. Contrary to s.3.2 of the Territorial Lands Act, R.S.C. 1970, c.T-6, as am.

14. (1975), 27 C.C.C. (2d) 212 (Ont. C.A.).

15. Contrary to s.752 of the Canada Shipping Act, R.S.C. 1970, c.S-9, as am.

16. See also R. v. Algoma Steel Corp. Ltd. (1977), 1 W.C.B. 118 (Ont. Prov. Ct.) - total fines of $16,500 on 12 charges under Ontario Water Resources Act, R.S.O. 1970, c.332, and Environmental Protection Act, 1971, supra note 9; R. v. William R. Barnes Co. Ltd. (1980), 4 W.C.B. 249 (Ont. Prov. Ct.) - fine of $5,000 for extending plant without approval of Ministry, contrary to s.8 of Environmental Protection Act - accused had "poor record for pollution" and new equipment resulted in increased dust levels and discomfort for many people; R. v. Canada Metal Co. Ltd. (1980), 5 W.C.B. 297 (Ont. Co. Ct.) - wrong to consider importance of general deterrence reduced because only one other refinery in area, considerations of general deterrence should be governed by reference to wide purposes of Act, fines should not amount to "mere licence".

17. Supra note 2.

18. (1979), 3 W.C.B. 412 (B.C. Co. Ct.).

19. Contrary to the Fisheries Act, supra note 5, s.33(2).

20. See e.g. Emond, D.P. "A Critical Evaluation of the Nova Scotia Environmental Protection Act," (1975), 24 University of New Brunswick L.J. 69 at 100-101; Good, P. "Anti-Pollutant Legislation and Its Enforcement: An Empirical Study," (1971), 6 University of British Columbia L. Rev. 271 at 273ff; Franson, R.T. and Burns, P.T. "Environmental Rights for the Canadian Citizen: A Prescription for Reform," (1974), 12 Alta. L. Rev. 153 at 155.

21. See e.g. R. v. Canadian Cellulose Co. Ltd., supra note 18.

22. R. v. Caciolo and Long (1980), 5 W.C.B. 164 (Ont. Co. Ct.).

CHAPTER 24: MISCELLANEOUS OTHER OFFENCES

A. GENERAL CONSIDERATIONS

In the case of a handful of offences created by various federal acts, particularly those punishable on summary conviction, no reported or semi-reported jurisprudence for the last 10 years is in existence to tell us anything of the sentencing principles involved. For other offences, there are just one or two cases. It would be fruitless to enter into a detailed enumeration of each of these, particularly as even recent sentencing statistics are unavailable for many offences. In this brief chapter, however, are presented summary tables abstracted from the 1973 Criminal Statistics for these uncommon offences, followed by comment upon a few issues relating thereto.

TABLE 24.1: OFFENCES PUNISHABLE ON INDICTMENT[1]

OFFENCE	CONVICTIONS[2]	SUSPENDED SENTENCE	FINE	IMPRISONMENT 1 day +, under 6 mos.	IMPRISONMENT 6-18 mos
BIGAMY, FEIGNED & UNLAWFUL MARRIAGE, POLYGAMY	14	7	4	1	2
KILLING UNBORN CHILD	2	-	-	2	-
LIBEL	1	1	-	-	-
NEGLECT IN CHILDBIRTH, CONCEALING DEAD BODY	2	-	-	2	-
SEDUCTION	1	1	-	-	-
THREATENING LETTERS[3]	25	15	2	2	2
TRADE MARKS OFFENCES	1	-	1	-	-
OFFENCES AGAINST THE BANK ACT[4]	2	-	1	1	-
OFFENCES AGAINST THE IMMIGRATION ACT[5]	1	-	1	-	-
OFFENCES AGAINST THE POST OFFICE ACT[6]	1	-	1	-	-

TABLE 24.2: OFFENCES PUNISHABLE ON SUMMARY CONVICTION[7]

OFFENCE	CONVICTIONS	PROBATION	FINE	GAOL	OTHER[8]
COMMUNICATING VENEREAL DISEASE	2	-	2	-	-
CRUELTY TO ANIMALS	46	5	34	3	4
VAGRANCY	5	2	2	1	-
HARBOUR BD. AND MERCHANT SEAMAN'S[9]	506	31	425	20	30
IMMIGRATION ACT[10]	370	12	303	45	10
INDIAN ACT[11]					
INTOXICATION	143	3	125	15	-
OTHER	194	4	162	8	20
JUVENILE DELINQUENTS ACT[12]					
CONTRIBUTING TO DELINQUENCY	738	228	137	314	59
INDUCING CHILD TO LEAVE HOME	174	1	4	167	2
SEXUAL IMMORALITY	57	12	16	3	26
OTHER	1087	252	402	9	424
LORD'S DAY ACT[13]	188	-	158	-	30
NATIONAL DEFENCE ACT[14]	29	1	26	-	2

B. COMMENTARY

Some of the offences included in the above tables are regarded as "regulatory" offences; that is, offences mala quia prohibita rather than mala in se. Frequently such offences are committed by corporations and businessmen; almost routinely, the Courts punish such offences by fines aimed at enforcing, by deterrence, general compliance with the Act or regulations in question.

A reported decision exemplifying this policy is R. v. Maahs and Teleprompter Cable Communications Corp.,[15] where the accused company and its manager were fined $2,000 and $500 respectively for conducting broadcasting operations without a licence.[16] Both had displayed a "defiant attitude" to the Broadcasting Act[17] by carrying unlicensed transmissions by coaxial cable from the United States to subscribers in Sault Ste Marie, Ontario. A similar instance is the decision in R. v. Appleby (No. 2),[18] where the publisher of the New Brunswick Reports was fined $100 for failing to send two copies of a book to the National Library.[19] Appleby (No. 2) was also regarded as having been litigated principally in order to determine the constitutionality of the provisions in question.

One feature which stands out from Table 24.2 above is the bimodal distribution of sentences under the Juvenile Delinquents Act, with many offenders receiving terms of imprisonment, and a large number of others being placed on probation. While the latter group is populated to some extent by adults convicted of relatively minor offences, it no doubt also reflects the individualized considerations necessarily applied to young offenders convicted of corrupting other juveniles. An example typifying the approach in such cases is R. v. B.A.K.,[19] where the accused 17-year-old had

sexual intercourse with a 13-year-old girl, with her consent and cooperation. The appeal Court upheld a fine of $250 and a year's probation, considering the accused's good record, employment record and relationship with his family.

> In considering whether or not a discharge would be contrary to the public interest, I will apply the various considerations from R. v. Hinch:[20]
> (1) The safety of the public. Unquestionably 13-year-old girls are fragile members of the public who require special protection because of their immaturity, not only against the sexual desires of others but also against their own awakening sexual drives. Parents of such children require society's protection of them. Here it is clear that this is not an aggravated case in that there was no great disparity of age, force or even persuasion - only reciprocal enthusiasm...
>
> It is significant that the prosecutor in exercising his discretion to proceed on the lesser charge has already recognized that this offence should be dealt with as a relatively minor one.
>
> (2) Deterrence. Virtually the same considerations apply. The sexual inviolability of the child under 14 years must be maintained and an exampIary [sic] sentence against a violator should constitute a warning to others. The "others" most likely to receive and to need the warning are contemporaries of the appellant, who are the group most closely exposed to this particular temptation because of their age proximity to the prohibited class of children. While not many years separate this girl and the accused, from a 13-year-old's point of view, a 17-year-old male is grown up and impressive and because of this he can exercise domination over her.
>
> (3) Punishment of the offender. In my view this should not be a predominant consideration here because exposure of his conduct and all the consequent anguish it has brought is probably punishment enough.
>
> (4) Reformation and rehabilitation of the offender. These aspects would only need consideration if a gaol term was contemplated, and that has never been suggested as appropriate under the circumstances.
>
> I am left with the positive belief that there should be an element of repudiation and deterrence in the sentence. The sentence should express society's rejection of this kind of conduct and also serve as a warning to others.[21]

Older offenders who interfere sexually with children, attempt to induce them to leave home, or otherwise involve them in misdoings, are liable

to be treated severely, as the statistics for "inducing child to leave home", in particular, indicate. In R. v. Dalton,[22] the last reported case in this area, an 18-year-old of previous good character who induced two very young children to perform "certain physical acts as between themselves" received a sentence of 90 days' imprisonment, timed so as not to interfere with his education.

Involving a juvenile in criminal behaviour may aggravate the offence, and thus call for a harsher sentence. It was noted in R. v. Jimmo,[23] however, that this factor must be ignored if separate proceedings have been commenced for involving the juvenile in a delinquency. Reasoning from this decision, it may be deduced that an adult who has already received an aggravated sentence for an offence, because he involved a juvenile therein, should receive only a token penalty if subsequently convicted under the Juvenile Delinquents Act for this second aspect of the offence.

In an area not covered by the above tables, offences against the Aeronautics Act,[24] a recent decision of the British Columbia County Court is of interest. In R. v. Bang[25] the accused was convicted of landing an aircraft at night at an unlighted aerodrome,[26] and of flying at night with a passenger on board, without the appropriate permit[27] (his second offence of this nature). The Court dismissed an appeal against a fine of $750 on each count and probation for one year, including a condition that the accused not fly. The Ministry of Transport has expressed the hope that these sentences might establish a guideline for other Courts dealing with prosecutions for such offences,[28] although in view of the accused's contentions on appeal that the average penalties for such infringements are of the order of $75, it might be questioned whether the fines set in Bang are not a departure from usual practice.

Footnotes to Chapter 24

1. Source: Statistics Canada, Statistics of Criminal and Other Offences 1973 (1978, Ottawa: Statistics Canada) Tables 6A and 6B.

2. Excludes Alberta and Quebec.

3. No explanation is given for failure of figures to tally. Presumably the remainder were given "other dispositions", i.e. discharges, adjourned sine die, or similar.

4. R.S.C. 1970, c.B-1, as am.

5. R.S.C. 1970, c.I-2. Penalties provided by this Act were replaced by very different provisions in the Immigration Act, S.C. 1976-77, c.52. No cases are as yet reported under the new provisions: for an example under the old provisions see R. v. Wells (1972), 7 C.C.C. (2d) 480 (Ont. Prov. Ct.).

6. R.S.C. 1970, c.P-14, as am.

7. Source: Statistics Canada, supra note 2, Table 13.

8. Presumably includes absolute and conditional discharge, but quaere whether reporting agencies should include such in enumeration of "convictions" - see Chapter 29.

9. Harbour Commissions Act, R.S.C. 1970, c.H-1, as am; and The Merchant Seamen Compensation Act, R.S.C. 1970, c.M-11, as am.

10. R.S.C. 1970, c.I-2, as am.

11. R.S.C. 1970, c.I-6, as am.

12. R.S.C. 1970, c.J-3, as am.

13. R.S.C. 1970, c.L-13, as am.

14. R.S.C. 1970, c.N-4, as am.

15. (1974), 21 C.C.C. (2d) 497, 20 C.P.R. (2d) 117, 6 O.R. (2d) 774 (Dist. Ct.).

16. Contrary to the Broadcasting Act, R.S.C. 1970, c.B-11, as am., s.29(3).

17. Ibid.

18. (1976), 35 C.C.C. (2d) 94, 38 C.R.N.S. 48, 31 C.P.R. (2d) 242, 15 N.B.R. (2d) 650, 76 D.L.R. (3d) 110 (C.A.).

19. (1978), 6 C.R. (3d) S-1, [1979] 1 W.W.R. 197 (B.C.S.C.).

20. R. v. Hinch and Salanski, [1968] 3 C.C.C. 39, 2 C.R.N.S. 350, 62 W.W.R. 205 (B.C.C.A.).

21. Ibid., 6 C.R. (3d) at S-7 per MacKenzie, J.

22. (1979), 26 N.B.R. (2d) 142, 55 A.P.R. 142 (Q.B.).

23. (1973), 16 C.C.C. (2d) 396 (Que. C.A.).

24. R.S.C. 1970, c.A-3, as am.

25. [Unreported] April 16th, 1981 (B.C. Co. Ct.).

26. Contrary to s.804 of the Air Regulations, C.R.C. 1978, c.2.

27. Contrary to s.400 of the Air Regulations, ibid.

28. Letter from J.G. Marshall, Esq., counsel for the Crown in R. v. Bang, supra note 25, to the Canada Law Book Co. Ltd; copy on author's file.

CHAPTER 25: INCHOATE OFFENCES

A. ATTEMPTS, ACCESSORIES

With the exception of those offences (such as attempted rape[1] and attempted murder[2]) for which special provision is made in the Criminal Code, attempts and offences of accessory after the fact are dealt with by s. 421. For attempters of, and accessories after, indictable offences punishable by death or life imprisonment, the maximum penalty is 16 years' imprisonment;[3] those who attempt or aid following offences punishable by imprisonment for 14 years or less are liable to half the penalty for a completed offence.[4] Similar offenders with respect to summary conviction offences are themselves guilty of summary offences, and liable to the regular penalties in s.722.[5]

Generally speaking, the policy of the Courts is to punish attempts less severely than completed offences, even though the charge of attempt may have resulted from the fortuitous intervention of a third party. No set percentage has, of course, been laid down; quantified discounts in recent years have varied, depending on the circumstances, from about 50% to 20%. In R. v. Bailey,[6] for example, the accused was found guilty of attempted break and entry of a bicycle shop. The appeal Court, commenting that in light of his record, a sentence of three years or more would have been appropriate, reduced such a term to two years as the offence had not been completed.[7]

B. COUNSELLING, PROCURING, INCITING

The Criminal Code, in s. 422, sets out a scheme of sentences for counsellors, procurers and incitors of offences not committed. They are identical to those for attempt.[8] While there have been a small number of reported prosecutions for these offences in recent years, none has dealt fully with the principles applicable to them. It may be deduced from those dispositions, however, that judicial policy is also similar to that for attempt; that is, that while 50% may not always be the appropriate "discount", counselling and allied offences merit less severe terms than the corresponding completed offence. Thus, for example, terms of six years have been imposed for procuring to commit murder,[9] and in R. v. Hickey[10] an eight-month sentence was imposed for counselling perjury in relation to a drug trafficking trial.

C. CONSPIRACIES

The Criminal Code contains detailed provisions for the punishment of conspiracies. The main provisions are as follows:

> 423.(1) Except where otherwise expressly provided by law, the following provisions apply in respect of conspiracy, namely,
>
> (a) every one who conspires with any one to commit murder or to cause another person to be murdered, whether in Canada or not, is guilty of an indictable offence and is liable to imprisonment for fourteen years;
>
> (b) every one who conspires with any one to prosecute a person for an alleged offence, knowing that he did not commit that offence, is guilty of an indictable offence and is liable
>
> (i) to imprisonment for ten years, if the alleged offence is one for which, upon conviction, that person would be liable to

> be sentenced to death or to imprisonment for life or for fourteen years, or
> (ii) to imprisonment for five years, if the alleged offence is one for which, upon conviction, that person would be liable to imprisonment for less than fourteen years,
> (c) every one who conspires with any one to induce, by false pretences, false representations or other fraudulent means, a woman to commit adultery or fornication, is guilty of an indictable offence and is liable to imprisonment for two years; and
> (d) every one who conspires with any one to commit an indictable offence not provided for in paragraph (a), (b) or (c) is guilty of an indictable offence and is liable to the same punishment as that to which an accused who is guilty of that offence would, upon conviction, be liable.
>
> (2) Every one who conspires with any one
> (a) to effect an unlawful purpose, or
> (b) to effect a lawful purpose by unlawful means,
> is guilty of an indictable offence and is liable to imprisonment for two years.

Thus conspiracy, unlike attempt or counselling, is generally punishable on a par with the substantive offence.

Judicial policy is somewhat more complicated than for other inchoate offences. The reality is that although mere agreement is sufficient to constitute the offence of conspiracy, it is frequently charged where one or several acts, including completion of the substantive offence, have taken place. As Morgan, J.A. pointed out in R. v. Murrin:[11]

> On a charge of conspiracy, the agreement is itself the gist of the offence, but on sentencing the overt acts of the offenders in furtherance of that agreement must be carefully considered in determining an appropriate sentence. Regard, too, must be had to the role in the conspiracy of the particular offender.[12]

The effect of such consideration is that the nearer to completion of the act the accused came, the more seriously will his crime be regarded. It is submitted that Parliament did not intend mere conspiracies to be penalized so severely as completed offences; rather, the principles for such cases are

analogous to those for attempts. For conspiracy to murder, for example, the maximum sentence is much less than that for murder. In normal circumstances, a more severe sentence than that appropriate for the completed offence will not be imposed; at the mere inception of the plan, the culpability of the conspirator is less than that of the offender who has accomplished his purpose.[13] Where the substantive offence is committed but not charged, sentence for the conspiracy will not differ greatly from what would have been appropriate on a substantive charge. Where the substantive offence is committed and is the result of a separate conviction, concurrent service of sentences will normally be ordered.[14]

Parliament's intention in setting maximum terms for most conspiracies equivalent to those for substantive offences, then, was apparently to allow for flexibility according to the stage which a conspiracy has reached.[15] Further, a special use of conspiracy charges is common in cases involving organized crime, especially drug trafficking. Where a trafficking "network" has been set up and has continued over a long period, thousands of transactions may have occurred. It would be wasteful and perhaps difficult to charge and prove each transaction; however, the entire scheme can be demonstrated and penalized on one conspiracy charge.[16] The Court here will be prepared to punish for a scheme of repeated offending more severely than for any one isolated act:

> Conspiracy to do acts, which, if done, would constitute a single specific offence would normally attract the same punishment as would be given for the commission of that specific offence. Where, however, the conspiracy is aimed at the commission of a number of crimes, the sentence imposed will be relatively high because of the possibility of aggregation.[17]

A final consideration is the role of each individual conspirator. A succinct summary of all factors special to conspiracy was delivered by

Gushue, J.A. in R. v. Basha et al.,[18] in the course of review of sentences for a massive scheme of drug trafficking:

> As to the effect of the conspiracy on individual sentencing, it is my view that the nature and magnitude of the conspiracy, the particular offender's role in it, as well as the fact of its being put into effect and the extent to which this was done, are highly relevant considerations for a sentencing judge or court. It is true that the offence of conspiracy itself is made out by the mere planning of the unlawful act, but the sentence to be imposed as the punishment for that offence depends to a great extent on the circumstances surrounding the offence — as it does in other crimes. All of the sentences imposed here were undoubtedly severe ones and it is obvious that the reason for their severity was the scope of the conspiracy and its results generally. As ... a general principle, ... I am of the view ... that the conspiracy in this case — a plot which was, without any concern for the ultimate results, extensively and indiscriminately carried into fruition over so many months — was more serious and deserves heavier punishment than simple sets of trafficking or of conspiracy to traffic.[19]

Footnotes to Chapter 25

1. Criminal Code, s.145 creates a specific offence of attempted rape, punishable on indictment by imprisonment for 10 years.

2. Ibid. s.222 sets the maximum penalty for attempted murder at life imprisonment.

3. Ibid. s.421(a).

4. Ibid. s.421(b).

5. Ibid. s.421(c). The maximum penalties provided by s.722 are imprisonment for six months and/or a fine of $500.

6. (1978), 25 N.S.R. (2d) 687, 36 A.P.R. 687 (C.A.).

7. For other examples of sentence in attempt cases, see: **THEFT:** R. v. Latta (1978), 29 N.S.R. (2d) 295, 45 A.P.R. 295 (C.A.); R. v. Black (1978), 23 N.B.R. (2d) 92, 44 A.P.R. 92 (C.A.); R. v. Laboucane (1979), 1 Sask. R. 23 (C.A.); R. v. Phillip (1978), 20 Crim. L.Q. 297 (Ont. C.A.). **EXTORTION:** R. v. Regan, Huntley, Hasay and Blenkinsop, 24 C.C.C. (2d) 225, [1975] 4 W.W.R. 335 (Alta. C.A.); R. v. Behr (1976), 1 W.C.B. 45 (Man. C.A.). **BREAK AND ENTER:** R. v. Lahey (1977), 13 N. & P.E.I.R. 167 (Nfld. C.A.); R. v. Taplin (1977), 23 N. & P.E.I.R. 178 (Nfld. C.A.). **FRAUD:** R. v. Spring (1977), 35 C.C.C. (2d) 308 (Ont. C.A.); R. v. Peitsch (1980), 3 Man. R. (2d) 86 (C.A.); R. v. Castonguay (1978), 20 Crim. L.Q. 439 (Que. C.A.). **ROBBERY:** R. v. Samaras (1971), 16 C.R.N.S. 1 (Ont. C.A.); R. v. Gallant (1971), 2 N. & P.E.I.R. 518 (P.E.I.S.C.); R. v. Letendre, 25 C.C.C. (2d) 180, [1975] 6 W.W.R. 360 (Man. C.A.); R. v. Tapp (1976), 13 N.B.R. (2d) 234 (C.A.); R. v. Forbes (1976), 13 N.B.R. (2d) 279 (C.A.); R. v. Eby (1979), 49 C.C.C. (2d) 27, 33 N.B.R. (2d) 80 (C.A.); R. v. McGuigan, Lawson and Tatum (1979), 50 C.C.C. (2d) 306 (Ont. C.A.); R. v. Shea (1981), 44 N.S.R. (2d) 176, 83 A.P.R. 176 (C.A.); R. v. Goodwin (1981), 43 N.S.R. (2d) 106, 81 A.P.R. 106 (C.A.).

8. Enumerated supra text accompanying notes 3-5.

9. R. v. Walia (No. 2) (1975), 9 C.R. (3d) S-43 (B.C.C.A.); R. v. Glubisz (No. 3) (1979), 9 C.R. (3d) S-42 (B.C.C.A.).

10. (1978), 14 N. & P.E.I.R. 271, 33 A.P.R. 271 (Nfld. C.A.).

11. (1980), 27 N. & P.E.I.R. 9 (Nfld. C.A.).

12. Ibid. at 11 per Morgan, J.A.

13. Few cases of mere agreement are reported. One example, prosecuted under the conspiracy to commit murder provision (s.423(1)(a)) where the maximum sentence is 14 years, is R. v. Chase and Armitage (1979), 10 C.R. (3d) S-1 (Ont. H.C.). The two accused, each with minor records,

were arrested before any acts in furtherance of a "contract" for the killing of a third party could be carried out. Stressing the importance of deterrence and the seriousness of contract killing, Southey, J. imposed terms of six years' imprisonment on each.

14. See post, Chapter 26.D.iv.c.

15. For examples of sentence imposed for counts of conspiracy see: **KIDNAPPING:** R. v. Cossette-Trudel and Cossette-Trudel (1979), 11 C.R. (3d) 1 (Que. C.S.P.). **THEFT:** R. v. MacLean (1978), 24 N.S.R. (2d) 179, 35 A.P.R. 179 (C.A.); R. v. Grossman (1980), 53 C.C.C. (2d) 143 (Ont. C.A.). **ROBBERY:** R. v. Anderson and Anderson (1970), 1 C.C.C. (2d) 228 (Man. C.A.); R. v. Fleury (1971), 23 C.R.N.S. 164 (Que. C.A.); R. v. Delay (1976), 25 C.C.C. (2d) 575 (Ont. C.A.); R. v. Guatto, MacInnis and Tobin (1977), 21 N.S.R. (2d) 361 (C.A.); R. v. Lambert et al. (1978), 20 N. & P.E.I.R. 458, 53 A.P.R. 458 (Nfld. C.A.); Doyon v. R. (1979), 11 C.R. (3d) 188 (Que. C.A.); R. v. Murrin, supra note 11. **FORGERY:** R. v. O'Bront (1977), 43 C.C.C. (2d) 524 (Que. C.A.); R. v. Kenny and Tatelman, [1979] 1 W.W.R. 292 (Man. C.A.); R. v. Dickey (1979), 7 C.R. (2d) S-13 (Que. C.A.). **FRAUD:** Nantel v. The Queen (1973), 26 C.R.N.S. 359 (Que. C.A.); R. v. Pottie and Keating (1978), 4 C.R. (3d) S-24, 26 N.S.R. (2d) 646, 40 A.P.R. 646 (C.A.); Simard v. The Queen, [1979] C.A. 101; R. v. McNamara et al. (No. 2) (1981), 56 C.C.C. (2d) 516 (Ont. C.A.); R. v. Taylor (1977), 19 Crim. L.Q. 279 (Ont. C.A.). **UTTERING COUNTERFEIT MONEY:** R. v. Kelly and Lauzon (1979), 48 C.C.C. (2d) 560 (Ont. C.A.). **TAX EVASION, FALSE RETURNS:** R. v. Olah, Brooks, Gomes and Fong (1979), 7 C.R. (3d) 273, S-38 (Sask. C.A.); R. v. Nimegeers (1980), 3 Sask. R. 282 (Dist. Ct.), Crown found to have no right of appeal (1980), 6 Sask. R. 45 (C.A.).

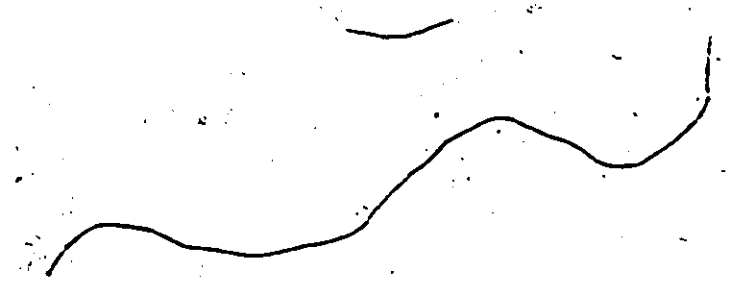
16. See e.g. R. v. McAllister, Lansdowne and Harvey (1976), 1 C.R. (2d) S-46 (Ont. C.A.); R. v. Douglas (1977), 1 C.R. (3d) 238, 33 C.C.C. (2d) 395 (Ont. C.A.); R. v. Devlin and Marentette, 3 C.C.C. (2d) 20, [1971] 2 O.R. 359 (C.A.); R. v. Ponak and Gunn, 11 C.C.C. (2d) 346, [1973] 4 W.W.R. 206 (B.C.C.A.); R. v. Pelletier (1974), 4 O.R. (2d) 677, 28 C.R.N.S. 129, 18 C.C.C. (2d) 516 (C.A.), leave to appeal to Supreme Court of Canada refused 4 O.R. (2d) 677n; R. v. Zizzo et al. (1975), 23 C.C.C. (2d) 319 (Ont. C.A.); R. v. Ma, Ho and Lai, 44 C.C.C. (2d) 537, 6 C.R. (3d) 325, [1979] 1 W.W.R. 436 (B.C.C.A.); R. v. Basha et al., (1979), 23 N. & P.E.I.R. 286, 61 A.P.R. 286 (Nfld. C.A.); R. v. Bengert, Robertson et al. (No. 14) (1979), 15 C.R. (3d) 97, 52 C.C.C. (2d) 100 (B.C.S.C.); R. v. McLean, Legge and Saunders (1980), 29 N. & P.E.I.R. 194, 82 A.P.R. 194 (Nfld. C.A.), where the Court criticized a broad generalization by the trial Judge that any conspiracy to traffic was more serious than the offence of trafficking; R. v. Wellington and MacCleave (1980), 32 N.B.R. (2d) 665, 78 A.P.R. 665 (C.A.); R. v. Ruggles and Kirton (1978), 21 Crim. L.Q. 158 (Man. C.A.); R. v. Guindon (1980), 4 W.C.B. 241 (Ont. C.A.); R. v. Rowbotham (1980), 22 Crim. L.Q. 434 (Ont. C.A.).

17. R. v. McLean, Legge and Saunders, supra note 16 at 195 per Morgan, J.A.

18. Supra note 16.

19. Ibid., (1979), 2 N. & P.E.I.R. 286 at 298-99.

PART IV: TYPES OF SENTENCE



INTRODUCTION

In this final Part, four Chapters discuss the law relating to the main types of disposition available in federal criminal law: imprisonment, the fine, suspension of sentence with and without a probation order, and absolute and conditional discharge. While these are not the only dispositions available under the Criminal Code and related statutes, they alone are used in more than 95% of all criminal dispositions. A discussion of these measures will, it is hoped, complement and strengthen the contentions in Part I regarding tariff and individualized sentencing.

Within each Chapter, following a general discussion of the role of each disposition in the overall scheme of sentencing, discussion is limited to special rules and technical matters applicable to each. In addition, some discussion of issues is incorporated by reference to Part II, above. The consideration of each measure in the large majority of cases is essentially a question of quantum, and has been covered above. For example, it is a fruitless and inverted question to ask: "In what circumstances may sentence be suspended?" It is true that there are limitations, general rules as to when such a step may not be imposed; however, the real question is, in each individual case, "May sentence appropriately be suspended here?"

CHAPTER 26: IMPRISONMENT

A. GENERAL CONSIDERATIONS

In general, imprisonment is the quantum sentence. The fine and some discharges are also tariff sentences, albeit at the lower end of the scale. Alongside these, imprisonment stands as a sentence in which the major consideration is matching the size of penalty to the crime committed and the particular circumstances of the offender. Occasional reference in the past to imprisonment serving as a place of training,[1] or a measure for improvement of the offender,[2] have given way, in the wake of increasing judicial disillusionment with incarceral improvement,[3] to a general conception that it is a disposition of last resort. Other factors have added to this policy:

> [T]he Court ought to explore the possibility of making an appropriate disposition of any matter ... without imposing a custodial sentence but, at the same time, giving all due protection and consideration to the public interest. To relieve the taxpayer of the cost of imprisonment may be a factor not irrelevant in the circumstances ... [T]he Court should take cognizance of the effect which imprisonment of the accused may have upon the welfare of his wife and child....

Nevertheless, in a large number[5] of cases each year the Court is led to the conclusion that a term of incarceration is necessary for deterrence, denunciation, or incapacitation of the offender. The question of length of term is normally a matter merely of quantum, and is discussed at length for each offence in Part III. Some further matters directly related to the law of imprisonment have also been canvassed in earlier Chapters, as follows:

1. Manipulation of quantum to effect treatment: Chapter 3.C.iii, "Modification of Sentence to Permit Treatment".

2. Manipulation of quantum to take account of sickness of the accused: Chapter 3.D, "PHYSICAL HEALTH".

3. Mitigation of quantum by factors making imprisonment particularly difficult or dangerous: Chapter 9.E, "IMPRISONMENT EXCEPTIONALLY DIFFICULT OR DANGEROUS FOR ACCUSED".

4. Avoidance of imprisonment due to hardships engendered to the family of the accused: Chapter 9.F, "Effect on Accused's Family" and see infra, Section G, "THE INTERMITTENT SENTENCE".

Calculation of sentence remission and parole by prison and parole authorites is not discussed, as it is normally irrelevant to the trial Judge considering imposition of sentence.

The Criminal Code and related statutes prescribe, in the majority of cases, only maximum terms of imprisonment. In addition, a few offences incur statutory mandatory or minimum terms.[6] The remainder of this Chapter will be devoted to principles applicable to imprisonment in general.

B. YOUNG AND FIRST OFFENDERS

In view of a complete absence of judicial dissent as to the presumptions utilized in the sentencing of young and first offenders, a lengthy discussion would be unproductive. From the precedents, the following uncontroverted principles may be drawn:

1. The rule that imprisonment should be used only as a last resort is particularly strong in the case of youthful[7] or first[8] offenders.

2. As mentioned above,[9] the emphasis in sentencing youthful first offenders should be placed on individual deterrence and rehabilitation.[10] These principles may yield in the face of serious offences, such as those involving extreme personal violence.[11]

It is not, however, necessarily indicative of an error in principle that a custodial sentence has been imposed on a first offender.[12]

3. If a term of incarceration is to be imposed the Court should proceed on the basis of the fullest information possible, including at least a pre-sentence report or some very clear statement with regard to the accused's background and circumstances.[13]

4. Such term of incarceration should be as short as possible,[14] and a penitentiary term should be foregone in favour of a reformatory term wherever feasible.[15]

5. In the case of a young offender, the existence of a minor record of offences which did not result in incarceration will not necessarily disqualify the accused from receiving the benefit of the above principles.[16]

C. PLACE OF IMPRISONMENT

The Criminal Code sets out detailed provisions to the general effect that a sentence of two years' imprisonment or more, sentences totalling two years or more, and a life sentence, will be served in a penitentiary.[17] A term or aggregate term of less than two years is served in a provincial institution, generally a reformatory.[18] This division explains the significant number of sentences of "two years less a day", the maximum sentence which may be imposed to be served in a provincial institution.[19]

The differences in available facilities, location and nature of provincial and federal institutions frequently have an effect on the determination of an appropriate sentence. The Courts have recognized the increased deleterious effects of penitentiary as opposed to reformatory

terms; hence the insistence (noted above) that young and first offenders should, if imprisoned, be placed in reformatories rather than penitentiaries.[20] Hughes, J., in R. v. Denholm,[21] went so far as to cite frequent references to the penitentiary as "a college offering a post-graduate course in crime"!

Where a sentence in the region of two years is proper, consideration of available facilities and location may lead the Court to impose a term on either side of the boundary to secure treatment.[22] Where imprisonment in a penitentiary would cause the accused to be removed far from his or her family, a reformatory term may be imposed.[23]

The Courts also recognize that the penitentiary contains more violent, dangerous offenders, who may create a difficult environment for a sexual offender or informer. It was indicated earlier that there are authorities to the effect that such matters should not be considered in sentencing;[24] however, there are also many precedents for the Court acting on such information.[25]

The majority of decisions to move the offender from one type of institution to another involve a change from penitentiary to reformatory. There are occasional exceptions. In R. v. Kelly,[26] the Court allowed a request by the accused to lengthen his term of two years less one day to two years, so that he could take a training course offered in the penitentiary.

There has also been occasional reservation expressed by the judiciary regarding movement of prisoners who have spent some time in penitentiary to a reformatory. That the rationale for such unease might be the disruptive effect upon the prisoner himself is indicated by the decision in R. v. Fireman.[27] Fireman's lengthy penitentiary term was reduced on appeal to two years. The Court found that a reformatory term would have been appropriate but, as little benefit would accrue from such a change, substituted instead a minimum penitentiary term.

Similar reasoning may lie behind the decision in R. v. Burden.[28] Reducing a three-year term to two years, the Court stated:

> We are not changing the sentence to bring him from the penitentiary, where he has been for some months, into a reformatory. He was in a penitentiary on a previous occasion and the disruption of moving a person, who has been incarcerated in a penitentiary for some time, into a reformatory is one that ought to be avoided in most circumstances.[29]

As Ruby notes,[30] the alternative possibility is that the Court was referring to avoidance of disruption caused in the reformatory at large by transferring penitentiary inmates thereto.

Ruby is sceptical of the validity of this rule, suggesting that it "ought to be given effect only in cases where the crime and its circumstances are serious enough to justify a penitentiary term, without recourse to the notion that a man has previously been in a penitentiary".[31] While this statement is at first sight unobjectionable, Ruby indicates in another passage that he has forgotten that a previous penitentiary term is a very important "circumstance":

> There would appear to be no principle that a prisoner who has been previously sentenced to a penitentiary term should thereafter be sentenced to a penitentiary term merely for this reason.[32]

On the contrary, in accordance with the principles of the "jump", discussed above,[33] wherever a course of similar offending is continued despite a previous penitentiary term, this is a very compelling reason to impose a period of incarceration of even greater length!

D. CONSECUTIVE SENTENCES, CONCURRENT SENTENCES, AND THE PRINCIPLE OF TOTALITY

i) Interpretational Problems

In a provision which has proved, in retrospect, to be somewhat ill-drafted, the Criminal Code lists situations in which consecutive serving of terms of imprisonment may be ordered. The power is discretionary, and the majority of cases regarding this section concern application of the Court's discretion. Nevertheless, a handful of interpretational difficulties have repeatedly beset the Courts. Section 645(4) provides:

> 645. (4) Where an accused
> (a) is convicted while under sentence for an offence, and a term of imprisonment, whether in default of payment of a fine or otherwise, is imposed;
> (b) is convicted of an offence punishable with both fine and imprisonment, and both are imposed with a direction that, in default of payment of the fine, the accused shall be imprisoned for a term certain; or
> (c) is convicted of more offences than one before the same court at the same sittings, and
> (i) more than one fine is imposed with a direction in respect of each of them that, in default of payment thereof, the accused shall be imprisoned for a term certain,
> (ii) terms of imprisonment for the respective offences are imposed, or
> (iii) a term of imprisonment is imposed in respect of one offence and a fine is imposed in respect of another offence with a direction that, in default of payment, the accused shall be imprisoned for a term certain,
> the court that convicts the accused may direct that the terms of imprisonment shall be served one after the other.

The major problems in interpretation involve two questions: whether s. 645(4) is exhaustive of the circumstances in which consecutive

serving can be ordered; and the meaning of "under sentence". It will be instructive to refer to general statutory principles before discussion of the case-law in order to attempt to resolve these difficult questions.

a) Does Section 645(4) Exhaust the Possibilities?

Ruby suggests: "The ordinary rule would be that since Parliament has applied its mind to the problem, one may safely presume that specific mention of some circumstances by implication excludes others...."[34] Presumably this is a reference to the twin statutory maxims, expressio unius (personae vel rei), est exclusio alterius and expressum facit cessare tacitum.[35] At first sight, the notion that unmentioned possibilities are excluded by express mention of others, seems attractive. To say that one may "safely presume", however, over-states the case. The maxims are aids, not overriding doctrines, in the interpretation of statutes, and a rigorous application of them may result in injustice. They work best where it is apparent on a reading of the provision that Parliament "studiously avoided" additional categories.[36] It has been cautioned, however, that the expressio unius rule is a "valuable servant, but a dangerous master to follow in the construction of statutes.... The exclusio is often the result of inadvertence or accident, and the maxim ought not to be applied when its application, having regard to the subject-matter to which it is to be applied, leads to inconsistency or injustice."[37]

The comments of MacKeigan, C.J.N.S. in R. v. Muise (No. 3)[38] clearly indicate that the learned Chief Justice felt that there was an omission in the law, as opposed to an implied exclusion and, in the result, the majority took the view that a residual power, flowing through the history of

similar provisions to pre-confederation days, existed. This power could be exercised to impose consecutive sentences in the absence of an express power.[39]

In an off-hand comment following a discussion of R. v. Muise (No. 3), Ruby also suggests that

> this result is incorrect on general statutory principles, including the view that a penal enactment, even if ambiguous, is to be construed strictly in favour of the liberty of the subject....[40]

The submission has some merit, despite an incorrect rendition of the principle (the word "even" in the phrase "even if ambiguous" should have been omitted — it is only an ambiguous provision which can be construed two ways, and thus must be construed in favour of the accused !).[41] However, some development of the principle is required to advance from the authorities currently available to the construction postulated.

The general rule of strict construction, as regards penalties, is that a penalty may only be imposed "if the circumstances of the case fall clearly within the words of the enactment".[42] The precedents on this matter deal virtually exclusively with imposition of a prescribed penalty as such; that is, the liability of the accused to any punishment.[43] In the case of ordering of consecutive service, however, there is no doubt that the accused is guilty and liable to the term of imprisonment imposed. To require strict construction to be applied to the consecutive service rules involves taking the view that s. 645(4) imposes an additional penalty, a view not supported by any authority and, in legal logic, far from incontrovertible. Even if this view is taken, however, it must still be asked, "What words in the statute are ambiguous?" The answer is "none". The inclarity lies in the exclusiveness or otherwise of s. 645(4), which must surely be resolved by application or

otherwise of the expressio unius principle, not the strict construction rule. It is notable that the precedents on this matter have not, perhaps on the basis of such considerations, considered the strict construction rule as relevant.

Judicial determinations on the exclusiveness issue have been resolved differently outside Nova Scotia. In Primeau v. The Queen[44] Taschereau, J. for a unanimous Court, held that power to impose a consecutive sentence must be found in existing federal legislation, thus dissenting from the approach of the Nova Scotia Court of Appeal in Muise (No. 3).[45] Later, in Ex parte Risby[46] the British Columbia Supreme Court quashed a warrant of committal for consecutive service in a case not covered by the provisions of s. 645(4), and in R. v. Oakes[47] the Ontario Court of Appeal followed Primeau and Risby in concluding that sentence on a later offence could not be made consecutive to sentence imposed upon revocation of a prior suspended sentence. It is noteworthy, however, that in both Risby and Oakes the crux of the decision rested upon whether an independent power to order consecutive service could be found in s. 664(4)(d) (regarding revocation of suspended sentences). The Courts' statements that consecutive sentences could not be imposed independently of s. 645(4) were made on the basis of Crown concessions to that effect, and were not reached on the basis of full reviews in principle of the correct interpretation of the Criminal Code. In the result, the Nova Scotian decisions on the one hand, and Primeau on the other, stand as the only fully discussed conclusions on the matter. They are in conflict, and on the basis of the arguments on principle advanced above, it would appear that either conclusion may still be reached by other Courts where the view is taken that s. 645(4) suits certain situations due to oversight rather than express exclusio.

b) The Meaning of "under sentence"

Section 645(4)(a), reproduced above, provides that consecutive service may be ordered when an accused, already "under sentence" for a previous offence, is again sentenced. The draughtsman did not embrace specifically the common practice of convicting and sentencing on separate days, and the less common situation where a sentence is not being served, although imposed, due to such technicalities as bail pending appeal.

The former situation was the precise cause of the difficulty in R. v. Muise (No. 3).[48] Muise, after conviction but before sentence on a charge of sexual intercourse with a female under 16, was convicted of rape. He appealed from the consecutive sentence imposed on the second conviction on the basis that he was not "under sentence" for the first at the time of his second conviction.

The resolution of this problem, as related above, involved acceptance by the Court that Muise was not "under sentence", and the confirmation of his consecutive term pursuant to the "general power" to impose such sentences. It follows, then, that the outcome of such appeals in other provinces, would be dependent upon the determination of the "exhaustiveness" issue. Surely it must be accepted that a person convicted but not sentenced is not "under-sentence"; to hold otherwise would "do violence" to the language.[49] Thus, the matter for resolution becomes the availability of a power to order consecutive service outside of s. 645(4).

The second situation postulated above came before the Court in R. v. Pearson.[50] Following a conviction on earlier offences, execution of those sentences was delayed pending appeal dispositions, and the accused was allowed out on bail. He was convicted of further offences during the bail

period, and argued that he could not be sentenced for service consecutive to the stayed terms. Greenberg, J. rejected this argument, stating that despite the accused's not yet having commenced to serve the terms, he was still under sentence in respect of them. In any case, His Lordship continued, had he not been "under sentence" the Court would have had power outside s. 645(4) to order consecutive serving. It would thus appear that the phrase "under sentence" should be read as requiring imposition, not commencement, of sentence.

ii) Application of the Discretionary Power

As just noted, the power to impose consecutive sentences is subject to discretionary exercise. Rules for its application have, however, been developed by the Courts.

Few matters in the whole of sentencing law have caused as much difficulty as defining precisely when consecutive or concurrent sentences should be imposed. Running through all such considerations is the overriding principle, referred to as the "totality principle", that the total of sentences imposed should not be excessive in relation to the offender's overall culpability. Totality will be discussed following an explanation of the principles of consecutive and concurrent sentencing.

The variety of situations containing multiple offending which may arise perhaps defies attempts to provide for all contingencies. The approach to multiple offences has been described in various ways. The Nova Scotia Court of Appeal has favoured the concept of "one continuous criminal act" — the test for appropriateness of concurrent sentences. Thus in R. v. Oldham,[51] as two offences were committed a week apart, they could not

incur concurrent sentences. In R. v. Charchuk[52] the accused broke into a limestone company to steal blasting caps in one month, and again in the following month. Three months after that, he broke into two buildings at a Canadian Armed Forces base, stealing field telephones from one and ammunition from the second. His counsel argued on appeal that all sentences should have been concurrent; the two earlier instances involved the same premises, and all four were committed to secure explosives. The Court, rejecting these submissions, pointed out that "concurrent sentences should only be imposed where what was really one single enterprise occurred".[53] Only the last two offences fell within this definition. Further, referring to R. v. Chisholm,[54] the Court gave as its rationale for this rule that concurrent sentences in such cases would "almost be an inducement not to refrain" from similar or dissimilar acts, committed at related times.[55]

The concept of "single enterprise" was again called in aid by the Nova Scotia Court in R. v. Brush.[56] Brush, while intoxicated, embarked on a 10-minute spree of vandalism and smashed the windows of six stores. MacKeigan, C.J.N.S., imposing concurrent sentences on all counts, stated:

> It is not a case of breaking one window at one end of the street and then another at the other end where two "intents" rather than one might well be involved and where a judge in the exercise of his discretion might therefore well decide that the accused undertook two distinguishable and separate enterprises which justified consecutive sentences. Thus a man who assaults a jailer, breaks a window, and breaks out of jail commits three offences, but with a concurrency of intent, time and place, may be found, if the judge so assesses the facts, to be conducting a single criminal enterprise; if he then goes down the street and steals a car to complete his escape, the car theft may well be a separate enterprise warranting a consecutive penalty, depending upon how the judge assesses the facts and the relationships between the events.[57]

The extent to which a Judge is entitled to use his discretion in finding such a relationship was indicated in R. v. Lavhey.[58] Lavhey broke

into a store and took a safe, which he could not open. Having travelled some miles with it he broke into a cottage, stole an axe, and used it to break open the safe. Remarkably, the Court found that the two illegal entries were part of the same continued act, and imposed concurrent sentences.

Different phrases and tests have been used by other Courts across the country. In R. v. Harrington,[59] Steale, J. relied on the concept of a "relationship" or "connection" between offences as justifying concurrent service. It is instructive to note, however, that His Lordship felt the finding of such a relationship still allowed the Court a discretion; it "may consider it appropriate that the sentences be served consecutively".[60] In R. v. White, Dubeau and McCullough[61] the three accused raped a woman in a car in a lonely area. The four then returned into town, and one accused was left at his home. The remaining two offenders then took the complainant to a park and raped her again. On appeal, the imposition of consecutive sentences was held correct, as there had been a "break in the transaction".[62]

It may readily be discerned that the "one criminal act" test and the "break in the transaction" test, which approach the problem from quite different angles, may lead to differing results. Lavhey, for example, would almost certainly have been decided differently under the latter test. The phraseology used has widened still further, with the Nova Scotia Court in R. v. Higginbotham[63] employing the phrase "so connected in time and place"[64] and the Newfoundland Court in R. v. Squires[65] looking for a "separate and distinct offence".

The British Columbia Court may have created a further misleading precedent in its decision in R. v. Saumer.[66] Saumer was convicted on eight counts of robbery, and sentenced as follows: two terms of 15 years concurrent for robberies committed on February 28th; consecutive thereto,

three concurrent 12-year terms for offences on March lst; and consecutive thereto, three concurrent terms of 10 years, for a total of 37 years. While reducing the package to 25 years in accordance with the totality rule, discussed below, the Court stated that, in principle, consecutive sentences should be imposed for offences of violence committed on different days.

The relevance of the offences being violent is difficult to grasp. In addition, the mere distinction of offences on the basis of their having occurred on different days seems questionable. In R. v. Gabovic[67] the Ontario Court imposed concurrent sentences upon similar offences committed three days apart, having found a close connection between them.[68] The Court in Saumer seems, on the other hand, to have been searching for a jusitification for a heavy sentence, not deserved by any one offence in the group, to reflect the cumulative seriousness of the repeated offences.

In this observation lies, perhaps, a clue to the reason for the continued existence of such muddy waters in this area, and the lack of judicial disquiet about it. It often seems that the appeal Courts regard the rules of consecutive and concurrent sentencing as containing a great deal of discretion for the sentencing Judge, and take the view that it does not really matter how the sentences are calculated, so long as the final result is just and appropriate. The Nova Scotia Court, in R. v. Hatch,[69] imposing a strong qualification to the idea expressed in Saumer as to offences committed on different days,[70] stated:

> The choice of consecutive versus concurrent sentences does not matter very much so long as the total sentence is appropriate. Use of the consecutive technique, when in doubt as to the closeness of the nexus, ensures in many cases that the total sentence is more likely to be fit than if concurrent sentences alone are used. Conversely, unthinking use of con-

> current sentences may obscure the cumulative seriousness of multiple offences.[71]

A similar attitude prevailed in R. v. Gollop[72] where the Court, dismissing submissions that several offences related to "one continuous enterprise", added that the total sentence which the accused had received was perfectly appropriate.

iii) The Totality Principle

The apparent willingness of some Courts to abandon the principles of consecutive and concurrent service for a just result leads squarely into a discussion of the notion of "totality of sentence". Briefly stated, this simple idea that wherever an accused is convicted and sentenced for more than one offence, at either the same or subsequent sittings, care must be taken not to impose a group of sentences which, in their cumulative effect, are disproportionate to the overall culpability of the accused.

> The totality principle is the twin of the consecutive sentence principle. In imposing consecutive sentences the court must always keep in mind the total term imposed even where the individual sentences might be proper standing alone their sum may constitute an excessive penalty. Thus [the Court is] under the duty to consider the fitness of the total sentence....[73]

Modification of sentence to accord with the totality principle is a commonplace occurrence in both trial and appellate Courts. While the Courts have from time to time laid down rules as to the appropriate technical procedure where consecutive sentences are to be achieved, they have also stated that the method is not duly important provided that a just result is created.[74]

Where a small number of convictions is involved, the normal procedure is to impose a correct sentence for the first offence, then

decreased consecutive sentences for subsequent crimes, to arrive at a suitable total.[75] In R. v. Wyman[76] the accused book-keeper was tried separately, and convicted on two counts relating to cashing cheques which she had tricked a manager into signing for her. A term of 18 months' imprisonment was imposed at each trial, to be served concurrently. The Crown and Wyman both appealed. The Court held that the sentences should have been ordered to run consecutively; however, as a total of three years was disproportionate, the latter sentence was reduced to six months, but ordered to run consecutively. Similarly, in R. v. Leaver,[77] the Court found adequate a term of six months for possession of a dangerous weapon. Standing alone it might have been insufficiently severe; however, as it was to be served consecutively to a three-year term for other offences, the totality principle indicated its adequacy.

In R. v. Newman,[78] the Nova Scotia Court adopted a slightly different technical approach. The accused was convicted of theft of a car from a dealer, carrying a loaded pistol in it, and a separate offence of breaking a store window and stealing less than $10 worth of goods therefrom. Finding that the offences merited a total of three years' imprisonment, the Court felt that there was no need to determine appropriate sentences for each offence if committed in isolation. Instead, it could proceed to impose sentences specifically set to arrive at the desired total.

It is not uncommon for a much larger number of offences to be before the Court at one hearing. Again, here the Court has considerable latitude to make alterations in the structure of sentences to achieve a correct total. In R. v. Switzer,[79] the accused was convicted of robbery (2 counts), attempted robbery, possession of a dangerous weapon, and break and enter. The appeal Court found no error in principle either in the length of

the individual sentences imposed, or in the application of consecutive/concurrent service orders. Nevertheless, the total sentence of four years was too large. As the total could be reduced by making some consecutive elements of the package concurrent, despite the lack of connections as normally required, the Court effected a reduction in that manner.[80]

Finally, a totally different approach has been adopted by the Ontario Court for offenders convicted of a substantial number of essentially unrelated offences. In R. v. Haines[81] the accused was convicted on 17 charges of various types. The Court held that the correct approach was to group offences by subject-matter, impose concurrent sentences within categories and consecutive terms between categories. Thus fraud and false pretence offences were associated in one set of sentences, possession offences in a second set, and a theft conviction incurred a separate consecutive term.

The approach set aside in Haines, that of giving a lengthy term for the worst offence and concurrent, shorter terms for all others has been upheld in British Columbia.[82] It is submitted that this method is objectionable in principle by virtue of an infringement of the notion of double prejudice: the lengthy term is imposed on one offence on account of all other charges, then separate, albeit concurrent, terms as imposed for those offences. With respect, it seems that a proper solution to such cases would be resort to the little-used procedure of "taking into account", described previously.[83]

iv) Special Rules

The law relating to consecutive and concurrent service is further complicated by the existence of several special rules for particular situations. Each of these will be canvassed separately.

a) Further Offences Committed During Flight

It appears well settled that offences committed to facilitate flight from pursuit in respect of an earlier offence require consecutive terms,[84] although it would seem logical that totality of sentence may be considered in determining the length of such sentences. The rationale is clear: the policy of the law should be to discourage further offences, particularly such acts as shooting or attacking police officers,[85] by consecutive sentences. It would not be healthy for escaping criminals to know that any further offences committed during flight would attract only concurrent terms. Indeed, there is English authority to the effect that violent offences committed to facilitate escape from capture attract aggravated sentences for this reason.[86]

b) Offences Committed While on Bail

Where an offence is committed while the accused is on bail in respect of another unrelated charge, despite the order of convictions, consecutive sentences should be imposed.[87] The rationale is again simple: were the general rule otherwise, an acused charged with one offence would have nothing to fear from the commission of lesser offences pending trial if concurrent sentences were imposed.[88]

While this rule has occasionally been given special emphasis by the Courts and separate treatment by commentators,[89] it is really nothing more than an application of the general rule that separate and distinct offences require consecutive sentences.

c) Conspiracies

Where the accused is convicted of conspiracy to commit an offence and the substantive offence, concurrent sentences should be given.[90] It follows from the discussion of connection between offences above that the substantive offence need not be precisely that conspired toward, but must be "connected" with the conspiracy. Considering this issue, Guthrie, J.A. recently stated:

> ... I am not satisfied that ... sentences [for substantive charges under the Narcotic Control Act] should run consecutively to ... conspiracy sentences. Conspiracy to commit a criminal act and the committing of the act are in law basically the same thing. The sentence imposed for a criminal conspiracy is, however, determined by factors ... such as the nature of the conspiracy and the extent to which it was put into effect .... In my further view, the Narcotic Control Act convictions arise out of the conspiracy and flow from it, and thus, while properly registered, should not give rise to consecutive sentences.[91]

d) Escape from Custody[92]

Section 137(1) of the Criminal Code provides that sentences for escape from custody shall be served concurrently with time being served or, if the Court so orders, consecutively.[93] Further, despite provisions[94] for other cases to the contrary, a term of less than two years may be ordered to be served in a penitentiary.

The new provisions in s. 13795 have considerably changed the law, and cleared up some old problems.[96] It seems predictable, though the matter has yet been little tested, that the Courts will, as a general policy, order consecutive service, the imposition of meaningless sentences never having been popular.[97] The principle of totality should continue to apply to escape cases just like others.[98] Consecutive sentences for escapes will now be served after sentences being served at the time of the offence, rather than before the remanet.[99]

Offences committed during or after escape attract special consideration. Two unreported cases cited by Ruby, which he wrongly alleges to represent opposite points of view, neatly illustrate the two principal rules. In R. v. Quelle[100] the accused stole a car to complete his escape from a prison. The theft of the car attracted a sentence concurrent with that for escape; correctly so, as the two offences were part of the same transaction. In R. v. Ewanchuk[101] the accused was already unlawfully at large, and committed offences of theft and possession of a narcotic. The Court made sentences for these two offences run concurrently, but consecutive to the sentence for escape. There is no contradiction here; once the escape is complete, further new offences are not part of the same transaction and accordingly consecutive terms will be merited. If it were otherwise, an escapee would be able to commit offences of a minor nature free of liability to lengthening of his term upon return to custody.

e) Firearms Offences

Section 83 imposes mandatory consecutive terms of one to 14 years for a first offence, and three to 14 for subsequent offences, for using a

firearm while committing, attempting to commit, or fleeing from the commission or attempted commission of an indictable offence. Clearly this section indicates a parliamentary intention to impose "double liability" on persons for the same criminal act, the object being to discourage use of firearms in the commission of other offences,[102] and may have the effect of substantially increasing custodial terms. Nevertheless, it is open to the Court to apply the totality principle to sentences for other offences, and thus reduce the impact of s. 83.[103]

In R. v. MacLean[104] the accused was found guilty, inter alia, on five counts under s. 83, all second or subsequent offences for the purpose of this section. The Court held that the express words of the statute had been correctly followed in the imposition of five consecutive three-year terms.

f) The Offender Already Subject to a Life Term

It has long been recognized that a sentence consecutive to a life term cannot be imposed; the maxim lex non intendit aliquid impossible applies, and consequently a sentence cannot be imposed to take effect when a person dies.[105]

Under the old law relating to sentence for escape, such sentences were served before remanet. It was then held that such a sentence could be made consecutive to life, as the offender would re-commence service of the life term on the expiry of the term for escape. Under the new law, described above, the wording of the Criminal Code requires service following remanet, and it has accordingly been held that terms consecutive to life may no longer be imposed.[106]

Definite terms concurrent to life may, of course, still be imposed, and may be made consecutive to each other.[107] A final question is whether a

court imposing life and another term may order the life term to commence on expiry of the other. While the English Court of Appeal has decided against this possibility, there is Canadian authority that it may be done.[108]

g) Possession Offences

Possession of stolen goods has rarely been considered as meriting special consideration in this context. However, the Nova Scotia Court in R. v. Smith et al.[109] recently laid down principles for multiple possession offences. Where goods from one theft are found in the accused's possession at different times, only one transaction is really involved and concurrent sentences are to be imposed. Where, however, goods from two or more thefts are in his possession at the same time, consecutive sentences should be imposed where the accused must have known that they were separately stolen. It seems probable that, like most so-called "rules" in this muddled area, the suggestions in Smith were intended as no more than a guideline and are susceptible to modification or waiver in appropriate cases.

E. LIFE IMPRISONMENT

i) General Considerations

Life imprisonment, where not mandatory as in the case of murder,[110] is the maximum sentence for a small number of crimes. Nevertheless, its most common role in the scheme of sentencing proposed is not as a penalty for the worst offenders and offences; but rather, it is an individualized and incapacitatory measure, used almost exclusively outside of

the murder categories for dangerous, mentally disordered offenders. The great advantage of the life sentence is its flexibility, which allows the Court some reassurance that the accused will be kept in custody until he is "safe".[111]

The typical case in which a life sentence will normally be imposed involves a mentally disordered offender, who has committed a serious offence, displays a background of offending, and is diagnosed as representing a continuing danger. In R. v. Head[112] the accused committed an "inhuman" attack on a 6-year-old girl, raping her and nearly killing her. Psychiatric evidence indicated that, particularly if he drank alcohol, Head was likely to repeat such offences. A life sentence was, in these circumstances, found best to ensure the protection of the public.[113]

It has been held that mental illness or abnormality need not be demonstrated if the record and evidence disclose a continuing danger.[114] On the other hand, the absence of a continuing danger will be fatal to the case for a life term on psychiatric grounds. In R. v. Skedden[115] the Court varied to 15 years a life term for rape, as it had not been proven that the accused's personality disorder made him a continuing danger to women. Similarly, in R. v. Keefe,[116] as the accused's crime was not one of "stark horror" and no pattern of violent behaviour had been demonstrated, a life term could not be imposed merely in view of the accused's retardation.

It would appear, then, that for what might be dubbed "psychiatric life terms" a continuing danger and a serious offence are the crucial elements.[117] In the rare case where life imprisonment is imposed because the offence is of the worst type, and was committed by the worst type of offender, the circumstances of the offence and the offender will be the dominant factors affecting fixed-term sentencing.[118]

ii) Ineligibility for Parole

Upon conviction for second degree murder, the sentencing Judge is required by s. 669 of the Criminal Code to impose a life sentence. By s. 670 he is required to put to the jury this question:

> You have found the accused guilty of second degree murder and the law requires that I now pronounce a sentence of imprisonment for life against him. Do you wish to make any recommendation with respect to the number of years that he must serve before he is eligible for release on parole? You are not required to make any recommendation but if you do, your recommendation will be considered by me when I am determining whether I should substitute for the ten year period, which the law would otherwise require the accused to serve before he is eligible to be considered for release on parole, a number of years that is more than ten but not more than twenty-five.[119]

He (or in the event of his inability, any other Judge of the same Court) may then,

> having regard to the character of the accused, the nature of the offence and the circumstances surrounding its commission, and to any recommendation made pursuant to section 670, by order, substitute for ten years a number of years of imprisonment (being more than ten but not more than twenty-five) without eligibility for parole, as he deems fit in the circumstances.[120]

The power to replace the minimum parole eligibility period now serves, it seems, two quite distinct purposes. In the first place, it may be used to protect the public from an offender who may be dangerous even after 10 years, where the Court is not happy to leave this task in the hands of the parole authorities. In R. v. McGrath[121] the Court, satisfied that society would require protection from McGrath for more than 10 years, increased his ineligibility term to 20 years. The Court went so far as to say that the parole system appeared unequal to the task; the accused had been on parole when he committed the murder for which he was now before the Court!

The second use of the power of substitution operates as a second tariff measure, making up for the Court's lack of discretion in the matter of actual sentence. In other words, while the Courts have repeatedly insisted that the power of substitution must be exercised sparingly,[122] if a case is particularly bad the parole ineligibility period may be extended, not on grounds of safety, but in view of the offence. This reasoning was explicit in the scholarly judgment of Anderson, J. in R. v. Gourgon and Knowles (No. 2).[123] The Court, while "quite unable" to say that after 10 years society would nevertheless require protection from the accused, extended the ineligibility period to 15 years. Rehabilitation and dangerousness were not the only criteria. Rather,

> the following factors should be considered by the sentencing court:
>
> 1. The period which the accused must serve before becoming eligible for parole should not be extended beyond the minimum period of ten years except in unusual circumstances.
>
> 2. The trial judge should not, in imposing sentence, impliedly reject the finding of the jury that the killing was not planned and deliberate and was not one of the offences referred to in s. 214(5) of the Code.
>
> 3. The recommendation of the jury, if positive or negative ....
>
> 4. That an accused cannot be released upon parole until 25 years have elapsed in the following cases:
>
> Where the accused is charged and convicted of first degree murder as being:
>
> (a) "Planned and deliberate" murder; or
> (b) The murder of a police officer; or
> (c) A "contract" killing; or
> (d) A murder while committing one of the offences outlined in s. 214(5).
>
> 5. Character of the accused, including:

(a) Previous record.
(b) Lifestyle.
(c) Age.
(d) Medical or psychiatric evidence (if any).

6. Nature of the offences and the circumstances surrounding it....

7. Any ameliorating or mitigating circumstances.

8. Public confidence in the administration of justice. In this respect, while the courts do not base their judgments in accordance with the weight of public opinion, which may in many cases be an uninformed opinion, the courts must have some regard to the opinion of the public in matters of this kind.

9. Deterrence to others.

10. Denunciation of the crime itself. In this respect the usual factors relating to rehabilitation, compassion and mercy are given minor consideration. The court declares that the crime is so brutal, so savage and so dastardly that the accused shall for the very considerable time be banished from society, and that the accused has forfeited the right to be treated as an ordinary offender.

11. Sentences imposed in like cases.

12. Protection of society.[124]

That the period may be set on tariff principles is also implicit in a recent decision from Prince Edward Island. In R. v. Wright[125] an extension to 15 years was set aside because the murder committed was not of the worst kind of second degree murder; in fact, there had been no intention to kill when the robbery was commenced.[126]

F. DANGEROUS OFFENDERS

i) General Considerations

Part XXI of the Criminal Code contains relatively new provisions relating to so-called "dangerous offenders". Until October 16th, 1977[127] the heading was "Preventive Detention", and the Part dealt with "habitual offenders" and "dangerous sexual offenders". In summary, the major changes have been the abandonment of the habitual criminal category, and the introduction of a "dangerous offender" concept, a much wider category than the former "dangerous sexual offender". Despite the changes, however, some of the jurisprudence decided under the old legislation remains relevant: in addition, these have been a small number of decisions reported under the new provisions.

ii) Substantive Preconditions

Part XXI authorizes the Court to impose upon a "dangerous offender" an indeterminate sentence to be served in a penitentiary, in lieu of any other sentence which might have been imposed for the offence before the Court.[128] The offender, once confined pursuant to such a sentence, will have his case reviewed by the National Parole Board after the expiration of three years from the day he was taken into custody, and not later than every two years thereafter.[129] The Parole Board, for the purpose of determining whether the accused should be granted parole, will review the condition, history and circumstances of the offender.[130]

The dangerous offenders provisions thus stand alongside life imprisonment in the "individualized" category of dispositions. Measurement

of the penalty against culpability is foregone. Instead, as an incapacitatory measure the offender is confined until he is thought to be "safe". Clearly the sentence actually served may turn out to be far in excess of a term commensurate with his culpability, so the tariff has no application. The dominant motivations are cure, and protection through incapacitation.

In order for an application to be heard to have the accused declared a dangerous offender, several substantive and procedural pre-conditions must be met. First, the accused must be convicted of a "serious personal injury offence". The definition of "serious personal injury offence" is divided into two parts; depending on which category the offender's offence falls into, the other substantive requirements differ. The first part of the definition makes the following "serious personal injury offences":

> an indictable offence (other than high treason, treason, first degree murder or second degree murder) involving
>
> (i) the use or attempted use of violence against another person, or
>
> (ii) conduct endangering or likely to endanger life or safety of another person or inflicting or likely to inflict severe psychological damage upon another person.
>
> and for which the offender may be sentenced to imprisonment for ten years or more....[131]

In the case of a conviction of one of these offences, the Crown must then establish that

> the offender constitutes a threat to the life, safety or physical or mental well-being of other persons on the basis of evidence establishing
>
> (i) a pattern of repetitive behaviour by the offender, of which the offence for which he has been convicted forms a part, showing a failure to restrain his behaviour and a likelihood of his causing death or injury to other persons, or inflicting severe psychological damage upon other persons, through failure in the future to restrain his behaviour,
>
> (ii) a pattern of persistent aggressive behaviour by the offender, of which the offence for which

> he has been convicted forms a part, showing a substantial degree of indifference on the part of the offender as to the reasonably foreseeable consequences to other persons of his behaviour, or
> (iii) any behaviour by the offender, associated with the offence for which he has been convicted, that is of such a brutal nature as to compel the conclusion that his behaviour in the future is unlikely to be inhibited by normal standards of behavioural restraint....[132]

In the alternative, where the accused is convicted of

> an offence mentioned in section 144 (rape) or 145 (attempted rape) or an offence or attempt to commit an offence mentioned in section 146 (sexual intercourse with a female under fourteen or between fourteen and sixteen), 149 (indecent assault on a female), 156 (indecent assault on a male) or 157 (gross indecency)[133]

then the Crown must also establish that

> the offender, by his conduct in any sexual matter including that involved in the commission of the offence for which he has been convicted, has shown a failure to control his sexual impulses and a likelihood of his causing injury, pain or other evil to other persons through a failure in the future to control his sexual impulses....[134]

Reported interpretational decisions have been limited to the second of the two sets of preconditions. In R. v. Roestad,[135] a case decided under the old provisions, it was held that the Crown was required to prove beyond a reasonable doubt that the offender by his conduct in sexual matters had shown a failure to control his sexual impulses, and that he was likely in the future to show a similar failure and was further likely to cause injury, pain or evil to any person. The decision is supported by a more recent determination of the Alberta Supreme Court, R. v. Butler.[136] While splitting the latter required element of the two-fold test in Roestad into two parts — similar failure likely in the future and such failure likely to cause pain, etc.

— the Court imposed a requirement of proof beyond a reasonable doubt of all elements. It might fairly be asked just how something is to be proved beyond a reasonable doubt for the future. Indeed, in R. v. Knight[137] the Ontario High Court recognized this difficulty and stated that proof beyond reasonable doubt was not required. While the authorities are in conflict, the decision in Knight seems eminently more sensible. In the latest decision on this matter, however, the "beyond reasonable doubt" standard was again chosen.[138]

Knight also dealt with the phrase "by his conduct in any sexual matter has shown a failure". [In the present s. 688(b), the equivalent phrase reads "by his conduct in any sexual matter including that involved in the commission of the offence for which he has been convicted, has shown a failure"] Again, interpreting the provision quite liberally, the Court held that there was no requirement that the past failure should amount to a course of misconduct.

The Aberta Court in R. v. Dwyer[139] considered the phrase "injury, pain or other evil". It was held that "other evil" is to be considered disjunctively from injury and pain. In the present case, "evil" referred to evil resulting from the commission of a non-violent offence such as gross indecency. There was a likelihood that evil could be caused to a young boy, or anyone, experiencing sexual abuse.

iii) Evidentiary Considerations

In determining an application for a dangerous offender sentence, the Court has wide discretion in the evidence that it hears. By s.690 it is required to hear the evidence of two psychiatrists,[140] one nominated by the accused and one by the prosecution.[141] If the offender fails or refuses to

nominate a psychiatrist, the Court must nominate one on his behalf.[142] The major problem areas, so far as the precedents reveal, have been three: evidence of the substantive offence, evidence of previous offences, and psychiatric evidence.

a) Evidence of the Substantive Offence

In general, a non-technical approach is taken to evidence in dangerous offender proceedings, as they are the equivalent of a sentencing hearing, not a trial.[143] This point led Walker, J. in R. v. Klassen[144] to the conclusion that no evidence besides that required to prove conviction and the testimony of psychiatrists need be heard, evidence being in the discretion of the Court. In R. v. Eakins,[145] however, the British Columbia County Court was considering an application based upon a conviction on a plea of guilty before the same Judge. Skipp, J. found that it was required of the Court to hear viva voce evidence of the substantive offence, and that it was improper to decide on the basis of evidence read in from the preliminary hearing or original trial. Further, the Court stated, the psychiatrists could not base their testimony on such evidence.

To narrow the question to one of black and white seems unnecessary. The true issue is not of formal consideration of these various matters: rather, the Crown must establish the preconditions set forth in ss.687-688. While there may be cases in which viva voce evidence of the substantive offence is required to prove the demonstration of failure to control sexual impulses, there may be others in which it is not. The words "... the court shall hear ... all other evidence that, in its opinion, is relevant ..." would appear to give to the Court wide discretion to determine this matter in the exact circumstances of each case before it.

b) Evidence of Previous Offences

In R. v. Kanester[146] at the hearing of a dangerous sexual offender application, evidence was given by two women that the accused had raped them. While he had been convicted of one rape, the other was not the subject of a valid, subsisting judicial determination. His contention on appeal that this evidence should not have been considered was rejected, the Court taking the view that the words "any relevant evidence" were wide enough to allow evidence of unproven offences.

In contrast to this case is the decision of Munroe, J. in R. v. Loysen[147] that suspicion of involvement in previous offences is not a satisfactory substitute for proof "where a person's liberty is at stake". Loysen was, however, decided per incuriam Kanester, despite having been decided in a lower court, in the same jurisdiction, at a later date. Further, this statement is but one of three or four reasons given for the final disposition, and is at its highest an alternative ratio. The judgment in Kanester is, therefore, the preferable statement of the law for British Columbia, although it would be open to other courts to reach different conclusions.[148]

c) Psychiatric Evidence

The opinions of psychiatrists, while still "evidence" and thus susceptible to rejection and "weighing" by the Court,[149] are of great importance in dangerous offender hearings due to the statutory obligation of the Court to hear them. A substantial body of case law has developed around this facet of the hearing.

In the majority of cases, it has been held that psychiatrists giving such testimony are not bound by the strict rules of evidence. Thus, the evidentiary rule on confessions has no application to statements made by the offender to a psychiatrist, at least where made in the course of an examination by the psychiatrist to determine the mental state of the offender.[150] Similarly, the hearsay rule does not exclude evidence based on such documents as prison files, psychiatric reports, psychological tests and hospital reports, although the weight of such evidence may be affected.[151] The Supreme Court of Canada, in Wilband v. The Queen,[152] reasoned that the normal evidentiary rules are excluded as it is "normal procedure" for a psychiatrist to form his opinion based on all possible sources of information.

Part XXI confers no power on the Court to enforce the accused to submit to psychiatric examination.[153] However, if the accused refuses to submit to an examination the psychiatrists may attend the hearing and form an opinion based on psychiatric reports and the evidence.[154] Similarly, they may answer hypothetical questions (questions relating to disputed facts must be phrased hypothetically), and no objection may be based upon the absence of an interview before the hearing.[155] In R. v. Eakins[156] it was suggested that psychiatric opinions could not be based on evidence read in from a preliminary proceeding or original trial, although this decision may be regarded with scepticism in view of the liberality of most other decisions in this area.

It is clear that the decision as to whether the accused is a dangerous offender must be made by the Court. Not only is a psychiatrist not allowed to conclude this issue, he must not be asked to express an opinion on it.[157] The proper procedure is for the psychiatrist to be questioned as to the elements of dangerous offender status — "is the accused a person who, by his

conduct in any sexual matter, has shown a failure to control his sexual impulses?" — "What is the likelihood of the accused committing a further sexual offence?" — and "What in your opinion, is the likelihood of the accused causing injury, pain or other evil through failure to control his sexual impulses in the future?"

iv) Formal Preconditions

Section 689 of the Code provides:

> (1) Where an application under this Part has been made, the Court shall hear and determine the application except that no such application shall be heard unless
>
> (a) the Attorney General of the province in which the offender was tried has either before or after the making of the application, consented to the application;
>
> (b) at least seven days notice has been given to the offender by the prosecutor, following the making of the application, outlining the basis on which it is intended to found the application; and
>
> (c) a copy of the notice has been filed with the clerk of the court or the magistrate, as the case may be.
>
> (2) An application under this Part shall be heard and determined by the court without a jury.
>
> (3) For the purposes of an application under this Part, where an offender admits any allegations contained in the notice referred to in paragraph (1)(b), no proof of those allegations is required.
>
> (4) The production of a document purporting to contain any nomination or consent that may be made or given by the Attorney General under this Part and purporting to be signed by the Attorney General is, in the absence of any evidence to the contrary, proof of that nomination or consent without proof of the signature or the official character of the person appearing to have signed the document.

It was held in R. v. Bolduc,[158] decided under the old provisions, that where the Crown had made a verbal application and thus not complied with the predecessors to sub-ss. (1)(b) and (c), the accused could not raise the irregularity as a ground of appeal if he had not objected at the time.

v) Miscellaneous Other Matters

Section XXI makes further provision respecting remands for observation,[159] character evidence,[160] the presence of the accused at the hearing,[161] appeals[162] and disclosure of information to the Solicitor General.[163] Other matters raised in recent years include the offender's age, and the applicability of res judicata. In Re Campbell and The Queen,[164] the accused was convicted of indecent assault before his 18th birthday, but an application was made after his birthday. His defence on grounds of age was rejected, the Court pointing out that had Parliament intended a minimum age limit, it would have specified it.

Res judicata was in issue in Soucy v. The Queen,[165] the accused pleading that an earlier determination that he was not an habitual criminal precluded such a finding at a later date. The Court rejected this submission, holding that his earlier exploits could be relied upon in any subsequent proceedings, provided that they were commenced pursuant to fresh convictions.

vi) Constitutionality

The dangerous offender provisions of the Criminal Code have been among those most challenged on grounds of constitutionality; not least, perhaps, because of the potentially crushing penalty which awaits those who fall within their terms. Dickson, J. posed the question eloquently in Hatchwell v. The Queen[166]

> Should he (the accused) be confined to prison for the rest of his life, subject only to annual review of his case by the Parole Board and release from custody

> only in the absolute discretion of that Board? These are not easy matters of decision for one must balance the legitimate right of society to be protected from criminal depredations and the right of the man to freedom after serving the sentence imposed on him for the substantive offence which he committed.[167]

The provisions, while admitting some minor procedural safeguards such as the right to be presumed innocent (i.e. presumed not to be a dangerous offender),[168] have withstood all onslaughts on their overall constitutionality. The challenges made and rejected have been based largely on various provisions of the Canadian Bill of Rights.[169]

In R. v. Roestad,[170] it was held that Part XXI did not deprive the accused of equality before the law simply because the application is made by a decision of Crown counsel. In fact, the Crown counsel was an agent of the Attorney-General, who was authorized by existing legislation to make applications. Another challenge on this ground, made on the basis that the accused, convicted of the substantive offence which grounded the application while he was under 18, could not have been so convicted in other provinces, was rejected in Re Campbell and The Queen.[171] It was held that the age of conviction was immaterial; it was a full answer that the accused was 18 at the time the application was made.

Arbitrary detention was alleged in R. v. Hatchwell[172] and R. v. Roestad.[173] In both cases the allegation was rejected. In the latter decision the Court pointed out that preventive detention was a form of imprisonment legislated by the collective will of Parliament; in addition, the provisions for annual [now less frequent] review meant that continuing detention was not arbitrary.

Hatchwell also determined that preventive detention was not "cruel or unusual treatment or punishment". In Roestad, it was stated that a

punishment must be both cruel and unusual for s. 2(b) of the Bill of Rights to apply: however, an indeterminate sentence was not cruel where imposed for the purpose of protecting others. This conclusion confirmed a similar result in R. v. Buckler,[174] where the Court also found that rare resort to a punishment did not of itself cause that punishment to fall within the definition of "unusual".

In R. v. Gribble,[175] a challenge to the new provisions was formulated on the premise that the accused was being compelled to give evidence, contrary to s. 2(d) of the Bill of Rights. Again, this contention was rejected, the Court pointing out that the accused may refuse to talk, even to a psychiatrist nominated on his behalf.

Finally, so far as concerns the Bill of Rights, the right to a fair hearing provided by s. 2(e) has been held to be accommodated by the dangerous offender provisions. In Roestad, among the battery of objections to constitutionality was a suggestion that as no one can object to an application before it is brought, or make representations to the Attorney General, this right was affected. On the contrary, held the Court, all rights to full hearing of the application and fairness at the trial are preserved by the provisions. In Gribble, the Court expanded on this notion — if the accused refuses to call in evidence his psychiatrist, and the Court has to do so, there is nothing to prevent him either from cross-examining his own witness or from replying to his evidence. Thus, full rights to a fair hearing are protected.

The only recent (1970) objection outside the Bill of Rights was made in R. v. Buckler.[176] Buckler argued that the power to impose a status accruing from Part XXI encroached on provincial jurisdiction over civil rights, conferred by s. 92.13 of the British North America Act, 1867.[177]

Parliament's legislative authority over the criminal law,[178] he argued, extended only to imposition of a sentence for commission of a particular crime. Accepting this latter submission, the Court held that the imposition of preventive detention was indeed the imposition of a sentence for a particular crime; the penalty could only be imposed in respect of conviction for an indictable offence, and was not awarded independently to punish a status.

G. THE INTERMITTENT SENTENCE

i) General Considerations

Section 663(1) of the Criminal Code empowers the Court, having regard to the accused's age and character, the nature of the offence and the circumstances surrounding its commission,

> (c) where it imposes a sentence of imprisonment on the accused, whether in default of payment of a fine or otherwise, that does not exceed ninety days, order that the sentence be served intermittently at such times as are specified in the order and direct that the accused, at all times when he is not in confinement pursuant to such order, comply with the conditions prescribed in a probation order.

This provision was new when enacted in 1972;[179] previously, the Parole Board alone had power to allow intermittent service.[180] Depending on the precise circumstances in which it is imposed, the order for intermittent service may partake of the qualities of either an individualized or a tariff sentence. Where a short jail term is imposed, but made intermittent so that the financial hardship on the accused and his family will not be too great,[181] then a tariff sentence has been imposed, and account taken of

mitigation in the allowance of intermittent service. Where, however, the Court feels that a jail term is necessary to deter the offender (and possibly others) but sees the accused's potential loss of employment as a bar to rehabilitation, then the order for intermittent service is aimed at "cure" rather than being governed by notions of "desert" and the measure is individualized.[182]

ii) Interpretation

The phrase "does not exceed ninety days" has been the subject of considerable judicial comment. It has been held that it does not require that the sentence be capable of full service within a 90-day period.[183] The Newfoundland Court, in R. v. Sullivan,[184] left open the question of whether two or more sentences, each of less than 90 days, but running consecutively for a total of more than 90 days, could be served intermittently. The Court commented, however, that such an order might be "contrary to the spirit and intent" of the Criminal Code.

The major question has been the anomaly created by "an oversight on the part of Parliament to take into account the vagaries of the Gregorian calendar".[185] Specifically, a sentence of three months' imprisonment which includes a February will not exceed 90 days and the accused will be eligible for intermittent service. However, without a February the same sentence will exceed 90 days. Consistently, the Courts have held that this oversight is a matter for Parliament to remedy;[186] the anomaly is no reason to conclude that the word "months" should mean anything other than "calendar months", as defined in s. 28 of the Interpretation Act.[187] In R. v. Miclette[188] Kaufman, J. queried whether a sentence of "a month" could be served intermittently.

While interesting as a technical exercise, no great practical difficulties arise from the 90-day limitation. The trial Court wishing to impose a maximum intermittent sentence must simply set the term at 90 days; an appeal Court faced with an invalid order for intermittent service of a 3-month term may, of course, vary the term to 90 days. In the event that an accused appeals from a sentence of three months "straight" on the basis that intermittent service should have been ordered, the Court may likewise vary the term to 90 days and add the order.

The Court is apparently bound by s. 663(1)(c) to impose a probation order, with conditions to which the accused will be subject at all times when he is not in custody pursuant to the intermittent sentence order. While this is simple enough, the Courts of Appeal of British Columbia and Ontario have divided sharply on the question of whether there is power to direct compliance with a probation order effective upon the expiration of the intermittent term. The British Columbia Court held in R. v. Blashfield,[189] and confirmed in two recent decisions,[190] that there is no such power. The Ontario Court in R. v. Weber,[191] however, held that an intermittent sentence of imprisonment is still a sentence of imprisonment within the terms of s. 663(1)(b). Accordingly, a probation term may be imposed for a longer period than the intermittent term, but should be so phrased as to make the offender subject to its conditions during the currency of the sentence as well as after its expiry.

iii) Formal Requirements

The Judge imposing an intermittent sentence is required clearly to set out the times at which service should take place. He cannot delegate

his sentencing discretion to the accused; thus, in R. v. Downe, Smith and Dow[192] a sentence of 15 days, to be served on days of the accused's own choosing was held illegal. Similarly, in R. v. Ducharme[193] a sentence which required the accused to submit a work schedule and report for service four hours after the end of his last shift of the week and be released prior to commencement of his work was found defective ab initio. R. v. Dawes,[194] in which the accused member of the armed forces was given a sentence to be served during leave-time (to a minimum of 5 days per month), cited by Ruby as illustrating the flexibility of intermittent service,[195] is in fact probably wrongly decided.

The power to order intermittent service may not be used to circumvent the intent of Parliament in setting minimum terms for certain offences. In R. v. Kischel[196] the accused was convicted of impaired driving and driving "over 80". Pursuant to an application by the Crown which displeased the Judge, she was liable to a minimum sentence of 14 days. An order for intermittent service was made, requiring one minute's imprisonment per day on consecutive Saturdays and Sundays. Setting aside this sentence, Borins, J. held that the trial Judge had failed to act judicially overriding the prosecutor's legitimate discretion and frustrating the object of Parliament.

In addition to the order for intermittent service, an order for committal to jail is still required.[197] The authorities differ, however, on whether a termination date should be set by the trial Judge. In R. v. Ducharme this was considered a non-delegable discretion which should be exercised by the trial Judge; the opposite point of view was, however, taken in R. v. Germaine.[198] In the latter decision the Nova Scotia Court stated that calculation of time is best left to those seized with responsibility in this regard; indeed, this is more in keeping with practice in respect of all other

types of imprisonment, and if the order states clearly when the sentence is to commence and how it is to be served, there would appear to be no need for stipulation of the termination date.

iv) Relevant Factors in the Consideration of Intermittent Service

The offender who will lose his job if subjected to a "straight" term of imprisonment is the classic candidate for intermittent service.[199] However, the order may be used to avoid a variety of ill effects flowing from imprisonment or to assist in rehabilitation. In recent years reported decisions have also exemplified its use to allow an offender to attend school,[200] and to avoid financial hardship to the accused and his family. An unreported decision affirmed its availability to permit a spouse to care for children.[201]

Where a term of incarceration is in order for protection of the victim or others, an intermittent term should not be imposed. In R. v. Moulton[202] a 41-year-old man was convicted of incest with his 15-year-old daughter and sentenced to 90 days intermittent. His counsel argued on appeal that the intermittent term would help in the "rebuilding of the family unit". Substituting a term of two years followed by probation, the Court of Appeal disapproved the term imposed and its intermittent nature. There had been evidence of intercourse between the accused and his daughter for some 18 months preceding the complaint, and the early return of the accused to the household was unlikely to resolve the conditions which led to the offence.

In Wortzman v. R.,[203] the trial Judge took note of a "departmental opinion that intermittent sentences were overloading provincial correctional institutions, and that a temporary absence programme would be more suitable. This was held on appeal to be an error in principle; this was

just the kind of case for which intermittent sentences were intended and the trial Judge had a duty to impose what he thought was a fit and proper sentence.

Footnotes to Chapter 26

1. Ruby, C.C., Sentencing (2nd ed. 1980, Toronto: Butterworths) at 84-85.

2. Ibid.

3. Supra Chapter 1, text accompanying notes 163-165.

4. R. v. Groves (1975), 26 C.C.C. (2d) 468 (Ont. Prov. Ct.) per McEwen, Prov. Ct. J.

5. Although the number of penitentiary admissions in Canada reached an all-time high in 1978, the totals have not altered significantly for some years, being in the range of 4500-4900. Figures of 1976-80 are as follows: 1976 - 4545; 1977 - 4630; 1978 - 4845; 1979 - 4721; 1980 -4764. Mr. N. Kalney, Information Officer, Correctional Services Canada: Telephone Communication, 27th July 1981.

6. A challenge to mandatory and minimum terms was recently made under ss. 1 and 2(a) of the Bill of Rights, R.S.C. 1970, App. III in R. v. Edwards, [1979] 4 W.W.R. 751 (Sask. Prov. Ct.). The Court upheld the constitutionality of such provisions; they are not "arbitrary". The discretion of the Court is limited, but not removed totally. The Court retains power to impose penalties between the maximum and minimum provided, place the accused on probation, or impose a fine in addition to the mandatory sentence.

7. R. v. Vandale and Maciejewski (1974), 21 C.C.C. (2d) 250 (Ont. C.A.).

8. R. v. Stein (1974), 15 C.C.C. (2d) 376 at 377 (Ont. C.A.); R. v. Trask (1974), 28 C.R.N.S. 321 (Ont. C.A.); R. v. Bates (1977), 32 C.C.C. (2d) 493 (Ont. C.A.).

9. Supra Chapter 3, text accompanying notes 1-15.

10. R. v. Rohr (1978), 44 C.C.C. (2d) 353 (Ont. C.A.).

11. R. v. Trask, supra note 8.

12. Neilson v. The Queen (1978), 5 C.R. (3d) S-36 (Ont. S.C.).

13. R. v. Bates, supra note 8.

14. R. v. Vandale and Maciejewski, supra note 7; R. v. Beacon and Modney (1976), 31 C.C.C. (2d) 57 at 59 (Alta. C.A.).

15. R. v. Ferguson (1971), 14 Crim. L.Q. 271 (Ont. C.A.); R. v. Marcello (1973), 11 C.C.C. (2d) 302 (Ont. C.A.); R. v. Dunkley (1976), 3 C.R. (3d) S-51 (Ont. C.A.).

16. R. v. Ferguson, ibid.

17. Criminal Code, s.659 (1).

18. Ibid. s.659(3): "prison or other place of confinement within the province ... other than a penitentiary ..." Section 2 defines "prison" as including a "penitentiary, common gaol, public or reformatory prison, lock-up, guardroom or other place in which persons who are charged with or convicted of offences are usually kept in custody."

19. See generally the cases discussed in Part III.

20. Supra note 15.

21. (1970), 11 C.R.N.S. 380 at 383 (Sask. C.A.).

22. Supra notes 17 and 18.

23. Supra note 19.

24. Supra Chapter 9, text accompanying notes 38 to 41.

25. A new decision released during the final writing of this thesis confirms the continuation of the practice: in R. v. Jones, [unreported] March 11th, 1981 (B.C.C.A.) the Court imposed a sentence of two years less a day to avoid danger to an accused who had agreed to testify at trials of other drug traffickers.

26. [Unreported] February 13th, 1981 (B.C.C.A.).

27. (1971), 4 C.C.C. (2d) 82, [1971] 3 O.R. 380 (C.A.).

28. (1973), 11 C.C.C. (2d) 491 (Ont. C.A.).

29. Ibid. at 493 per Gale, C.J.O.

30. Supra note 1 at 297.

31. Ibid.

32. Ibid. at 296.

33. Supra Chapter 3, text accompanying notes 74-93.

34. Supra note 1 at 300.

35. On which see generally Craies, W.F., Craies on Statute Law (7th ed. 1971 by S.G.G. Edgar, London: Sweet & Maxwell) at 259-60; Driedger, E.A., The Construction of Statutes (1974, Toronto: Butterworths) at 95; Maxwell, P.B., Maxwell on the Interpretation of Statutes (12th ed. 1969 by P. St. J. Langan, London: Sweet & Maxwell) at 293.

36. See Re Medical Centre Apartments Ltd. and City of Winnipeg (1969), 3 D.L.R. (3d) 525 at 543 (Man. C.A.) per Monnin, J.A.

37. Colquhun v. Brooks (1888), 21 Q.B.D. 52 at 65, per Lopes, L.J.

38. (1975), 23 C.C.C. (2d) 440, 11 N.S.R. (2d) 216 (T.D.).

39. In an earlier decision, R. v. Reddick (1974), 9 N.S.R. (2d) 425 (C.A.), the majority of the Court had already expressed doubts as to the exclusiveness of s.645(4), and also doubted whether that section in any event operated to restrict an appeal Court engaged in the variation of sentences. Section 645(4) was held not to be exhaustive, also, in one of two alternative rationes decidendi of Greenberg, J. in R. v. Pearson (1979), 11 C.R. (3d) 313 (Que. Sup. Ct.).

40. Supra note 1 at 301.

41. See Kelly v. O'Brien, [1942] O.R. 691 at 694 (C.A.) per Rose, C.J.

42. Maxwell, supra note 35 at 244; see also Driedger, supra note 35 at 153-54.

43. See further, Maxwell ibid. and Driedger ibid.

44. (1962), 42 C.R. 228, [1962] Que. Q.B. 972n.

45. Supra note 38.

46. (1975), 24 C.C.C. (2d) 211 (B.C.S.C.). See also R. v. Putnam, [1967] 3 C.C.C. 37 (B.C.C.A.).

47. (1975), 24 C.C.C. (2d) 211 (Ont. C.A.)

48. Supra note 38.

49. An impermissible assault on a statute: see London County Council v. Aylesbury Dairy Co., [1898] 1 Q.B. 106 at 109 per Wright, J.

50. Supra note 39.

51. (1975), 11 N.S.R. (2d) 312 (C.A.); referring to R. v. Bossence (1972), 16 C.R.N.S. 6 (Ont. C.A.); R. v. Robert (1972), 16 C.R.N.S. 7 (Ont. C.A.); R. v. Osachie (1973), 6 N.S.R. (2d) 524, 23 C.R.N.S. 285 (C.A.); Huskins v. The Queen (1974), 10 N.S.R. (2d) 553 (C.A.).

52. (1973), 6 N.S.R. (2d) 519 (C.A.).

53. Ibid. at 521.

54. [1965] 4 C.C.C. 289 (Ont. C.A.).

55. See also R. v. Osachie, supra note 51.

56. (1975), 13 N.S.R. (2d) 669 (C.A.).

57. Ibid. at 670-71 per MacKeigan, C.J.N.S. See also R. v. Auerswald (1976), 28 C.C.C. (2d) 177 (Ont. C.A.) - possession of two pistols in the same drawer at the same time, though charged as two offences, is one transaction, which requires that concurrent sentences be imposed.

58. (1976), 15 N.S.R. (2d) 683 (C.A.).

59. (1976), 10 N. & P.E.I.R. 288 (Nfld. Dist. Ct.).

60. Ibid. at 294 per Steele, Dist. Ct. J.

61. (1974), 16 C.C.C. (2d) 162 (Ont. C.A.).

62. A similar decision was reached in R. v. Lockhart (1976), 14 N.S.R. (2d) 262 (C.A.), where inter alia the accused set fire on one night to two barns on different farms. As the fires were separately planned and in separate places, consecutive sentences were imposed.

63. (1980), 40 N.S.R. (2d) 635, 73 A.P.R. 635 (C.A.).

64. Ibid. at 636 per MacDonald, J.A.

65. (1977), 35 C.C.C. (2d) 325 (Nfld. C.A.).

66. [1977] 3 W.W.R. 385 (B.C.C.A.).

67. (1975), 18 Crim. L.Q. 19 (Ont. C.A.).

68. Of course, the temporal element is relevant to an assessment of the nexus - see R. v. Kennedy (1976), 15 N.S.R. (2d) 470 (C.A.), where offences of passing worthless cheques merited ocnsecutive terms as they were committed at different locations on different days.

69. (1979), 31 N.S.R. (2d) 110, 52 A.P.R. 110 (C.A.).

70. I.e. by stating that the requirement of a nexus between offences in time, and place, does not mean that the Court should "slavishly" impose consecutive sentences just because offences were committed on different days.

71. Supra note 69 at 113 per MacKeigan, C.J.N.S.

72. (1980), 28 N. & P.E.I.R. 443 (Nfld. C.A.).

73. R. v. Newman (1977), 22 N.S.R. (2d) 488 at 489; 30 A.P.R. 488 at 489 (C.A.) per MacDonald, J.A. See also R. v. DeYoung (1976), 38 C.R.N.S. 236 (N.S. Co. Ct.); R. v. Reddick, supra note 39; R. v. Robert, supra note 51; R. v. Charchuk (1973), 6 N.S.R. (2d) 519 (C.A.); R. v. Deviller (1975), 14 N.S.R. (2d) 1 (C.A.); R. v. Wyman (1977), 8 A.R. 73 (C.A.); R. v. Switzer (1978), 8 C.R. (3d) S-17 (Ont. C.A.); R. v. MacLean (1979), 49 C.C.C. (2d) 552 (N.S.C.A.); R. v. Leaver (1980), 42 N.S.R. (2d) 543 (C.A.).

74. See e.g. R. v. Hatch, supra note 69. This feeling also appears to lie behind the decision in Beaupre v. The Queen (1973), 21 C.R.N.S. 205 (Que. C.A.) where the accused was convicted or robbery, conspiracy to rob, and being masked. All charges arose out of the same robbery, yet the trial Court imposed a consecutive sentence for being masked. The appeal Court held that, although it would have been preferable to impose concurrent sentences, as the total was not excessive and did not contravene the rule in Valade v. The Queen (1970), 15 C.R.N.S. 42 (Que. C.A.), that total sentence for offences arising out of one incident should not exceed the maximum for one of them, there was no error of law.

75. R. v. Ramsay (1977), 10 A.R. 155 (C.A.).

76. (1977), 8 A.R. 73 (C.A.).

77. Supra note 73.

78. Supra note 73.

79. Supra note 73.

80. See also R. v. MacLean, supra note 73.

81. (1975), 29 C.R.N.S. 239 (Ont. C.A.).

82. R. v. Bryce, [unreported] March 26th, 1976 (B.C.C.A.), cited by Ruby, supra note 1 at 304-05.

83. Supra Chapter 10, text accompanying notes 1-7.

84. R. v. McCaw et al. (1974), 15 C.C.C. (2d) 321 (Ont. C.A.); R. v. Nicholls (1978), 9 A.R. 203 (C.A.). For a case where this principle was not applied, see R. v. Higginbotham (1980), 40 N.S.R. (2d) 635, 73 A.P.R. 635 (C.A.).

85. See R. v. Kastercum (1972), 56 Cr. App. R. 298.

86. R. v. Morris, [1977] Crim. L. Rev. 231 (C.A. Crim. Div.).

87. R. v. Ramsay, supra note 75..

88. Ibid. See also R. v. McKinney (1963), 40 C.R. 137 at 139 (Sask. C.A.) per Disbery, J.

89. See Ruby, supra note 1 at 311-12.

90. R. v. Basha et al. (1979), 23 N. & P.E.I.R. 286, 61 A.P.R. 286 (Nfld. C.A.). See also R. v. Sommers and Gray (1959), 125 C.C.C. 81 (B.C.C.A.); R. v. Hinks, [unreported] June 25th, 1974 (Ont. C.A.), cited in Ruby, supra note 1 at 310n.

91. R. v. Basha et al., supra note 90 at 307 per Gushue, J.A.

92. "Escape" includes breaking prison, escaping from lawful custody, and being unlawfully at large - Criminal Code, s.137(3).

93. Ruby (supra note 1 at 315) concludes the opposite, after citing the provision. His statement that the term is served consecutively unless concurrent service is ordered seems unsupportable on any reading of s.137(1), which states:

> "A person convicted for an escape committed while undergoing imprisonment shall be sentenced to serve the term of imprisonment to which he is sentenced for the escape either concurrently with the portion of the term of imprisonment that he was serving at the time of his escape that he had not served or if the court, judge, justice or magistrate by whom he is sentenced so orders, consecutively and such imprisonment shall be served
>
> (a) in a penitentiary if the time to be served is two years or more, or
>
> (b) if the time to be served is less than two years,
>
> (i) in a prison, or
>
> (ii) notwithstanding the Parole Act and section 659, in a penitentiary if the court, judge, justice or magistrate by whom he is sentenced for the escape so orders." (Emphasis added)

94. Criminal Code, s.659, and Parole Act, R.S.C. 1970, c.P-2.

95. In force October 15th, 1977.

96. See Section D.iv.f, "The Offender Already Subject to a Life Term".

97. See e.g. R. v. Muise (No. 3), supra note 38 at 443 per MacKeigan, C.J.N.S.: - "A so-called concurrent sentence does not sentence the convicted person to a term of any imprisonment at all since it does not require him to serve a single day of imprisonment; a person cannot serve in jail the same day twice any more than he can be successfully hanged twice." In R. v. Thomas, [unreported] March 11th, 1981 (B.C.C.A.), Taggart, J.A. stated: "I think the trial judge was right in making the one year concurrent sentences consecutive to the sentences that the appellant was serving. To do otherwise would, in effect, mean that he would serve little or no part of the ... sentences." In R. v. Charter (1979), 2 Sask. R. 176 (C.A.), the Saskatchewan Court of Appeal upheld a concurrent sentence of 30 days for escape. Culliton, C.J.S., however, confirmed the contentions the suggestion to which this footnote relates. "I think it is obvious that the primary factor to be considered in determining an appropriate sentence for escape or being at large without lawful excuse, is deterrence, and particularly deterrence to others wo might be inclined to commit such offences. Thus, except in special or unusual circumstances, that purpose can be attained only by imposing a sentence that would be consecutive to the sentence the accused was then serving. If it became a general practise to impose a concurrent sentence for such offences, then the prosecution for the offence of escape or being unlawfully at large, would be meaningless. In saying what I have said, I realize that Parliament in amending Section 17 of the Criminal Code repealed the requirement

that such sentences be served before serving the remnant of the sentence the accused was serving and that such sentences may now be made concurrent or consecutive in the discretion of the court. Such change in the law now provides for the imposition by the court of a concurrent sentence where there are circumstances to justify such action. While the granting of such discretion to the court, in my view, is to be commended, that change is not to be construed as a recognition that such offences are no longer to be considered serious." Ibid. at 177.

98. R. v. Lukion and Small (1975), 27 C.C.C. (2d) 11 (Ont. C.A.).

99. Caddedu v. R. (1980), 19 C.R. (3d) 93 (Ont. C.A.).

100. [Unreported] April 18th, 1975 (B.C.C.A.).

101. [Unreported] March 28th, 1977 (B.C.C.A.).

102. R. v. Langevin (1979), 47 C.C.C. (2d) 138 (Ont. C.A.); R. v. Cameron, [unreported] March 12th, 1981 (B.C.C.A.).

103. As was done in R. v. Langevin, ibid., and R. v. MacLean (1979), 49 C.C.C. (2d) 552 (N.S.C.A.). Similarly, in R. v. McGuire, Lawson and Tatum (1979), 50 C.C.C. (2d) 306 (Ont. C.A.), lenient sentences for the principal offences were left undisturbed in view of consecutive terms imposed under s.83.

104. Ibid.

105. R. v. Sinclair (1972), 6 C.C.C. (2d) 523 (Ont. C.A.).

106. Caddedu v. R., supra note 99.

107. R. v. Nicholls, supra note 84.

108. R. v. Lefebvre, [unreported] May 25th, 1976 (B.C.S.C.), cited in Ruby, supra note 1 at 311n.

109. (1980), 40 N.S.R. (2d) 272, 73 A.P.R. 272 (C.A.).

110. Criminal Code, s.669.

111. R. v. Kempton (1980), 21 A.R. 212 (C.A.).

112. (1970), 1 C.C.C. (2d) 436 (Sask. C.A.).

113. See also R. v. Hill (1974), 15 C.C.C. (2d) 145 (Ont. C.A.); R. v. Haig (1974), 26 C.R.N.S. 247 (Ont. C.A.).

114. R. v. Pion; R. v. McClemens (1971), 4 C.C.C. (2d) 224 (Ont. C.A.).

115. (1976), 18 Crim. L.Q. 396 (Ont. C.A.).

116. (1979), 44 C.C.C. (2d) 193 (Ont. C.A.).

117. Although in Britain life terms have been upheld for relatively minor offences where a continuing danger was shown - see Thomas, D.A., Principles of Sentencing (2nd ed. 1979, London: Heinemann Books Ltd.) at 306.

118. See R. v. Craig (1975), 28 C.C.C. (2d) 311 at 315 (Alta. C.A.) per McGillivray, C.J.A: - "life imprisonment will, in some cases of rape, where there is brutality and a record of similar offences, be an appropriate sentence."

119. Section 670 does not, of course, apply to a Judge who hears a case without a jury: R. v. Tait (1978), 5 Sask. R. 193 (C.A.): - or an appeal Court substituting a conviction of second degree murder for another conviction: R. v. Tait, ibid. and R. v. Kjeldsen (1980), 53 C.C.C. (2d) 55 (Alta. C.A.).

120. Criminal Code, s.671.

121. (1980), 25 N. & P.E.I.R. 138, 68 A.P.R. 138 (Nfld. S.C.).

122. R. v. Gadway (1978), 17 A.R. 219 (T.D.); R. v. McGrath (1980), 25 N. & P.E.I.R. 138, 68 A.P.R. 138 (Nfld. S.C.). Also, the Judge must give clear reasons if he does extend - R. v. Leahy (1978), 44 C.C.C. (2d) 479 (Ont. C.A.). An extention which would prejudice psychiatric treatment should not be effected: R. v. Gibson and Riezebos (1974), 26 C.R.N.S. 253 (Ont. S.C.).

123. (1979), 9 C.R. (3d) S-33 (B.C.S.C.), upheld sub nom. R. v. Gourgon, [unreported] March 30th, 1981 (B.C.C.A.).

124. Ibid. at S-39-40 per Anderson, J.

125. (1979), 52 C.C.C. (2d) 81 (P.E.I.S.C. in banco).

126. See also R. v. Gadway, supra note 122. A particularly convincing example of "tariff" substitution of a longer period is a recent decision of the Ontario Court, R. v. Holland, [unreported] June 8th, 1981 (Ont. C.A.). In the complete absence of evidence signifying mental disorder or dangerousness, the Court upheld an increase to 17 years on the basis that this was "one of the worst possible classes of second degree murder", that the victims (employees of a jewellery store) were particularly vulnerable to such offences (arising out of robberies), the accused had a significant previous record and had showed no remorse for his actions.

127. The proclamation date of the new provisions, contained in the Criminal Law Amendment Act, 1977, S.C. 1976-77, c.53, s.14. Transitional provisions were provided by s.15(1) and 15(2) of the same Act, in force August 5th, 1977.

128. Criminal Code, s.688.

129. Ibid. s.695.1(1).

130. Ibid. A similar review takes place every year for offenders who were subject to indeterminate sentences before the amendments came into force - ibid. s.695.1(2).

131. Ibid. s.687.

132. Ibid. s.688(c).

133. Ibid. s.687(b).

134. Ibid. s.688(b).

135. [1972] 1 O.R. 814, 5 C.C.C. (2d) 564, 19 C.R.N.S. 190 (Co. Ct.); leave to appeal refused, 19 C.R.N.S. 235n (Ont. C.A.).

136. (1978), 41 C.C.C. (2d) 410 (Alta. T.D.).

137. (1975), 27 C.C.C. (2d) 343 (Ont. H.C.).

138. R. v. McInnis, [unreported] May 19th, 1981 (N.S.S.C.).

139. [1977] 2 W.W.R. 704, 3 A.R. 96, 34 C.C.C. (2d) 293 (T.D.); leave to appeal to S.C.C. refused, 34 C.C.C. (2d) 293n (S.C.C.).

140. Criminal Code, s.690(1).

141. Ibid. s.690(2).

142. Ibid. s.690(3); see also R. v. Gribble, [1979] 4 W.W.R. 659 (Alta. T.D.).

143. R. v. Klassen, [1977] 4 W.W.R. 561 (Sask. Dist. Ct.). Thus, also, the concept of non-suit is not applicable to dangerous offender provisions: ibid.

144. Ibid.

145. [1978] 5 W.W.R. 112 (B.C. Co. Ct.), appeal dismissed without reasons [unreported] February 24th, 1981 (B.C.C.A.); following R. v. Canning, [1966] 4 C.C.C. 379, 56 W.W.R. 456, 49 C.R. 13 (B.C.C.A.).

146. [1968] 1 C.C.C. 351 (B.C.C.A.).

147. (1973), 13 C.C.C. (2d) 202 (B.C.S.C.).

148. A middle line was drawn in R. v. McInnis, supra note 138. While agreeing with Kanester that offences not the subject of convictions could be adduced in evidence, MacIntosh, J. stated that evidence of such acts must be "cogently relevant". His Lordship felt that the evidence in Loysen, raising only a suspicion, did not fall into this category. Further, it was noted that the function of the Court faced with such evidence is not to determine innocence or guilt of the acts alleged, but their relevance to the application.

149. R. v. Loysen, supra note 147; R. v. Klassen, supra note 143.

150. Wilband v. The Queen, [1967] S.C.R. 14, 60 W.W.R. 292, [1967] 2 C.C.C. 6, 2 C.R.N.S. 29, affirming 51 W.W.R. 251, [1965] 3 C.C.C. 98, 45 C.R. 385 (B.C.C.A.).

151. Ibid; contra, R. v. Knight, supra note 137.

152. Ibid.

153. R. v. McAmmond, 69 W.W.R. 277, [1970] 1 C.C.C. 175, 7 C.R.N.S. 210, 7 D.L.R. (3d) 346 (Man. C.A.).

154. R. v. Kanester, supra note 146.

155. R. v. McAmmond, supra note 153.

156. Supra note 145.

157. But see R. v. McInnis, supra note 138, where exactly this question was asked by the trial Judge, who asked the doctor to read the provisions of the Criminal Code and express an opinion as to "whether McInnis fit into that category".

158. (1973), 16 C.C.C. (2d) 280 (Que. C.A.).

159. Criminal Code, s.691.

160. Ibid. s.692.

161. Ibid. s.693.

162. Ibid. s.694; see also R. v. Galbraith, [1972] 1 W.W.R. 586, 5 C.C.C. (2d) 37 (B.C.C.A.); aff'd [1972] 2 W.W.R. 80, 6 C.C.C. (2d) 188n (S.C.C.) - where application dismissed for insufficiency of notice, Crown could appeal.

163. Criminal Code, s.695.

164. [1975] 3 W.W.R. 593, 22 C.C.C. (2d) 65 (B.C.C.A.).

165. (1974), 28 C.R.N.S. 383 (Que. C.A.).

166. (1975), 21 C.C.C. (2d) 201 (S.C.C.).

167. Ibid. at 206.

168. R. v. Gribble, supra note 142.

169. Supra note 6.

170. Supra note 135.

171. Supra note 164.

172. Supra note 166.

173. Supra note 135.

174. [1970] 2 O.R. 614, [1970] 2 C.C.C. 4, 12 Crim. L.Q. 214 (Prov. Ct.).

175. Supra note 142.

176. Supra note 174.

177. 30 & 31 Victoria, c.3 (U.K.).

178. Ibid. s.91.27.

179. Enacted S.C. 1972, c.13, s.58; in force July 15th, 1972. Attempts to have the provisions amended so that the Court will be required to ensure that facilities are available before imposing an intermittent sentence have so far been unsuccessful. For a discussion see Chasse, K.L. "Intermittent Sentences: A Question of Judicial Independence," (1980), 12 C.R. (3d) 117.

180. R. v. Kehoe, [1970] 1 C.C.C. 123 (Ont. C.A.).

181. As in R. v. Roche (1975), 10 N. & P.E.I.R. 229 (Nfld. Dist. Ct.).

182. See e.g. R. v. Cooper (1980), 22 Crim. L.Q. 440 (Ont. C.A.).

183. R. v. Lyall (1974), 18 C.C.C. (2d) 381 (B.C.C.A.); dicta in R. v. Blashfield (1972), 5 B.C.L.R. 344 (C.A.) not followed.

184. (1978), 15 N. & P.E.I.R. 271, 38 A.P.R. 271 (Nfld. C.A.).

185. Cyr v. R. (1979), 12 C.R.(3d) 108 (Sask. Dist. Ct.).

186. R. v. Ford (1973), 9 C.C.C. (2d) 515 (B.C. Co. Ct.); Cyr v. R., supra note 185; R. v. Miclette (1980), 16 C.R. (3d) 289 (Que. C.A.).

187. R.S.C. 1970, c.I-23 as am.

188. Supra note 186.

189. Supra note 183.

190. Demedeiros v. R. (1979), 12 C.R. (3d) 113 (B.C.C.A.); R. v. Thomas (No. 2) (1980), 53 C.C.C. (2d) 285 (B.C.C.A.).

191. (1980), 52 C.C.C. (2d) 468 (Ont. C.A.); see also R. v. Blacquiere (1975), 24 C.C.C. (2d) 168 (Ont. C.A.); R. v. Ives (1974), 19 C.C.C. (2d) 104 (Ont. C.A.).

192. (1978), 44 C.C.C. (2d) 468 (P.E.I.S.C. in banco).

193. (1979), 12 C.R. (3d) 111 (Ont. Dist. Ct.).

194. (1975), 19 Crim. L.Q. 155 (B.C.S.C.)

195. Supra note 1 at 289.

196. (1979), 12 C.R. (3d) 97 (Ont. Co. Ct.).

197. R. v. Germaine (1980), 39 N.S.R. (2d) 177, 71 A.P.R. 177 (C.A.).

198. Ibid.

199. See e.g. Wortzman v. R. (1979), 12 C.R. (3d) 115 (Ont. C.A.); R. v. Cooper (1980), 22 Crim. L.Q. 440 (Ont. C.A.).

200. R. v. Maniscalco (1977), 20 Crim. L.Q. 292 (Ont. C.A.).

201. R. v. Jones, [unreported] January 26th, 1976 (Ont. C.A.), cited in Ruby, supra note 1 at 289n.

202. (1979), 21 Crim. L.Q. 275 (B.C.C.A.).

203. Supra note 199.

CHAPTER 27: THE FINE

A. GENERAL CONSIDERATIONS

The fine fills the wide gap in tariff sentencing between discharge and imprisonment. It has little rehabilitative value, but is commonly used, as Thomas points out,

> where a deterrent or punitive sentence is necessary, but either the inherent gravity of the offence is insufficient to justify a sentence of imprisonment, or the presence of mitigating factors justifies the sentencer in avoiding a sentence of imprisonment.[1]

Cases where a fine is imposed, the implication being that the offence does not merit imprisonment, are commonplace.[2] The decision of the Ontario Court of Appeal in R. v. Snider[3] is a clear example of the latter situation. Snider was convicted of unlawfully engaging in the business of betting. The Court seriously considered whether a custodial sentence would have been more appropriate, but upheld a substantial fine in light of his history of serious heart disease, marriage, two children, and lack of criminal record.[4]

That the fine sits below imprisonment on the sentencing scale has important consequences. First, where a fine is the appropriate disposition for the offence, a term of imprisonment may not be imposed simply because the accused is a rich man who would not be significantly hurt by a financial penalty.[5] A second consequence relates to those crimes for which the Courts have declared that custodial terms are necessary for general deterrent reasons. The fine is not an alternative to imprisonment; however large, it is a lesser sentence, and cannot be imposed.[6] This policy is often expressed by the Courts as a principle that a fine should not be imposed where it might

appear to other offenders to be a "licence fee" for the commission of serious offences.[7]

A secondary use of the fine is in its quasi-restitutionary mode, as a means to ensure that a criminal does not profit by his crime.[8] Whether for deterrence or profit-removal, it may be used alone or alongside imprisonment or other measures, in an attempt to blend punishment and supervision (fine and probation) or punishment, supervision and profit-removal (imprisonment, probation and fine). It sees frequent use alone as the only available sanction for corporate bodies found guilty of criminal acts.

The fine has always been popular with penologists. For the large number of cases in which it may be imposed, it is relatively simple, adaptable, non-disruptive of the accused's family, cheap for the penal system, and less stigmatic than most other available dispositions.[9] While, as in the case of imprisonment, the major considerations in the imposition of a fine are quantum questions, the calculation is effected by a methodology sufficiently unique to require separate discussion herein.

B. POWER TO IMPOSE FINES

For a number of offences, statutory minimum and/or maximum fines are set out by the Criminal Code and related statutes. In addition, a person convicted of an indictable offence punishable with imprisonment for five years or less may be fined in addition to, or in lieu of, any other punishment, except that a fine may not be substituted for a minimum term of imprisonment.[10] On conviction for an indictable offence punishable with imprisonment for more than five years, the accused may be fined in addition to any other punishment, but not in lieu of it.[11] For summary offences,

subject to express provision to the contrary, a general penalty of a fine not exceeding $500, or imprisonment up to six months, or both, is provided.[12]

i) The Problem of Fines and Probation

A persistent problem, in need of statutory resolution, is the question of whether a probation order is "any other punishment". According to the result, a sentence of fine and probation may or may not be imposed in the case of an offence punishable with imprisonment for more than five years. The probation order itself is important because the mere suspension of sentence is not the imposition of punishment.[13]

The great weight of precedent supports the view that a probation order is a punishment, although several arguments may be made on principle to suggest that the authorities are wrongly decided. The solution to this problem depends largely on the approach taken to the task of interpreting the statute.

a) General Principles of Statutory Interpretation

Section 663 is contained within that Part of the Criminal Code headed "Punishment, Fines, Forfeitures". Headings may be used in the interpretation of a federal statute;[14] probation is not a fine or forfeiture, therefore it appears that Parliament considered it to be a punishment.[15] This straightforward argument adds weight to the "for" position, although it must be added that headings are merely "aids" to statutory interpretation. It may well be considered that "punishment" was used loosely in the Code as a catch-all synonym for "dispositions", without any intent to give it technical constructive effect over all matters discussed therein.

The contrary position is somewhat supported by another general statutory notion, the strict construction rule for penal statutes.[16] There is no doubt that a fine is a penalty; the question is whether a fine may be imposed in addition to probation. If the statute is ambiguous, then it must be construed as not conferring jurisdiction to levy a fine in addition to probation.

Contextual argument is also helpful. Section 663(1)(b) of the Criminal Code provides, inter alia, that the Court may, where an accused is convicted of an offence,

> in addition to fining the accused or sentencing him to imprisonment ... for a term not exceeding two years, direct that the accused comply with the conditions prescribed in a probation order...".

It has been held[17] that this section overrides s. 646, giving the Court power to fine or imprison where a probation order is included in the disposition. This is a compelling argument, for on a literal reading of the provision the Court is clearly given just such power. Indeed, the provision may also logically be reconciled with s. 646(2), in the suggestion that although Parliament would not tolerate a penalty of a fine alone for offences punishable with more than five years' imprisonment, it would in appropriate cases allow the substitution of a probation order for the period of imprisonment in addition to the fine.

An argument not so far raised in reported decisions pertains to the overall nature of the suspended sentence and probation package. While "sentence" is not defined for the purposes of s. 663, it seems fair to suggest that a fine is a "sentence". If a Judge suspends sentence, then he is foregoing his power to impose a penalty and instead will order that the accused comply with the terms in a probation order. How, then, can he do so then turn around and impose a sentence?

Finally, it has been suggested that s. 663(1)(a), which permits the suspension of sentence with probation, is not punishment due to its contrast with s. 663(1)(b), which allows imposition of a fine or imprisonment plus probation, and thus is punishment.[18] This author is aware of no statutory principle which suggests that the juxtaposition of two items in a list leads to an inference that they are opposite or converse propositions, or apply to converse situations!

b) Examination of the Nature of Probation

In R. v. Marcello[19] the Court recognized that probation puts a restraint on the freedom of the accused, as he remains under an obligation to the Court, not dependent upon any new process or charge. Similarly, in R. v. Desmarais[20] it was pointed out that reporting may be burdensome. Other conditions may increase the onerousness of an order. Therefore, if the question is approached via consideration of whether probation imposes a "disadvantage" on the accused, and thus is punishment, the answer will be in the affirmative. It adds little to consider, as the Court did in Desmarais, whether probation fits the definition of punishment in the Shorter Oxford Dictionary. That definition, "a penalty imposed to ensure the application and enforcement of a law", simply creates a second confusing question of whether probation is a "penalty"!

c) Consideration of the Consequences of Breach of Probation

It has been suggested[21] that probation is a punishment due to the potential punitive consequences of breach. It is respectfully submitted that

this argument better supports the opposite conclusion; if an accused who contravenes his probation order is liable to be brought back and punished for the original offence, then the implication arises that he has not yet been punished. Indeed, the very essence of suspension of sentence and probation is that the accused is given a period to show that he can "behave himself" — in the event that he proves this, then sentence is not imposed at all.

In a Hohfeldian sense,[22] the accused subject to a probation order is subject to a greater liability than his fellow citizens as breach of his probation order will incur sanctions. To assert this much, however, takes one little nearer to the proposition that the imposition of such liability is a "punishment".

d) Decisions Against Probation as "Punishment"

Ruby[23] lists those decisions which have found that probation is not "punishment", rightly casting some aspersions on their value. They are few in number, and universally weak in authority. R. v. Pretty,[24] a decision of the Prince Edward Island Court, was rendered per incuriam all other decisions, and would appear to have been overruled by R. v. Thompson.[25] R. v. Pawlowski,[26] a 1972 decision of the Manitoba Court, considered the issues more fully, but in the event relied upon two earlier decisions of the Quebec Courts, R. v. Zezima[27] and A.G. Can. v. Wong.[28] Both of these cases have since been overruled by the decision of the same Court in R. v. Desmarais. Finally, R. v. Ziatas[29] is a case in which the Ontario Court set aside a term prohibiting driving in a probation order because it had been imposed "as additional punishment". Clearly, the case does not assert that probation is not a punishment, but merely that a probation term may not be imposed for punitive reasons.

ii) Concurrent Fines

The Ontario Court of Appeal has ruled that there is no authority in the Criminal Code to impose "concurrent" fines. In R. v. Ward,[30] it held that where a fine, either in lieu of or in addition to a custodial sentence, is in order, a separate sentence must be imposed on each count. The Court must take care, however, that the total amount of the fines does not exceed what is appropriate for the overall gravity of the case.

C. DETERMINING THE AMOUNT OF THE FINE

i) Ability to Pay

In any case in which a fine is an appropriate disposition, the ability of the accused to pay it may become relevant. It is an error in principle to impose a fine without an investigation as to whether the accused can pay it,[31] although the Court need not always assume that a present inability to pay will persist in the future.[32]

In terms of the proper considerations in tariff sentencing, the poverty of an offender is a mitigating circumstance. If a fine is appropriate, it should be fixed at a level which he can pay. On the other hand, an offender should not be fined more because he is wealthy; the fine should not be above what is appropriate to the offence, even though this may appear to impose less meaningful sanctions on wealthy offenders. Two decisions of lower courts in Ontario and Alberta neatly illustrate these propositions.

In R. v. Fera,[33] the Court was to sentence a man of 61, with no previous record, for evading tax in excess of $20,000. The Court took note

that he had personal debts of $237,000, had cooperated with the authorities and had overcome his addiction to gambling. In justifying the imposition of a minimal fine of $6,000, the Court quoted from R. v. Thompson,[34] an English case:

> ...Where a fine is properly imposed, the amount of the fine must not be excessive in relation to the offender's means, even though the result may be a fine which appears to be less than the facts of the offence warrant.[35]

In R. v. Wells,[36] the District Court reduced a fine of $800 to $400, stating that the trial Judge had erred in principle in imposing a "day fine" based on a percentage of the accused's monthly income; it was wrong to take into account a person's income in assessing the amount of fine to be paid. Although it is true that the Court should not impose a fine on a person of modest means that is obviously in excess of his ability to pay, a person of more substantial means should not be required to pay a heavier penalty simply because he has the means to do so. The Court recognized that it would be unfair to treat people in the same community who had committed the same offence differently on the basis of income and agreed with the reasoning in Thomas, Principles of Sentencing[37] that:

> ... while there may be discrimination between offenders of different financial standing in respect of similar offences this discrimination is the result of mitigating the fine imposed on the less affluent offender, rather than by increasing the fine imposed on the wealthier man beyond the amount which can be justified by reference to the gravity of the offence.[38]

Occasionally, the Court may be reluctant to decrease a fine sufficiently to permit immediate payment in view of the seriousness of the offence. In such cases, it is permissible for the Court to allow time to pay, instead of a reduction in the amount.[39] It remains a strong consideration, however, that the fine should not be of such magnitude, having regard to the means of the offender, that it cannot be paid within a reasonable time.[40]

There is ample authority that, even where a person appears not to have sufficient means to pay a large fine, it may be concluded that he has such means where he has been involved in large-scale criminal activity such as drug trafficking or tax evasion. In R. v. Jung,[41] on appeal from a sentence of 15 years' imprisonment plus a fine of $10,000 on two charges of trafficking in heroin, counsel for the accused submitted that his client was without the means to pay the fine. As a consequence, the imposition of the fine amounted to an increase in the term of imprisonment, as he would have to serve a three-year default period. The Court held, however, that since the trial Judge heard evidence regarding the extent of the accused's involvement and profit from his activities, he was justified in concluding from the size of the sales of narcotics that the fine was appropriate. Similarly, in R. v. Dow[42] the British Columbia Court of Appeal upheld a sentence of 15 years' imprisonment and a fine of $10,000, with three years consecutive in default. The accused had been convicted of trafficking in heroin. Although there was no evidence before the trial Judge which made it clear that the accused could pay the fine, the appeal Court noted that great profits are made in the distribution of narcotics and the accused was quite high on the ladder of local drug traffickers. Criminals of this sort tend to keep a low profile and keep "their ill-gotten gains out of sight". Consequently,

> [i]f it is necessary to point out specific assets by means of which a convicted trafficker will be able to pay before a fine can be imposed on him, it will in most cases be impossible to impose a fine ... [W]hen it is shown ... that a convicted trafficker in one of the higher up echelons has been engaging in substantial transactions, a judge may properly ... conclude either that he will be able to pay a reasonable fine or that someone else will pay it for him.[43]

ii) Removing Profits

While profitability may simply reflect upon the ability of an accused to pay, it is also a legitimate and frequently cited use of the fine to attempt to ensure that the offender does not profit by his crime. This policy applies to both corporate and individual offending.

In the corporate sphere, where the fine is the only penal sanction available for many offences, profit-removal assumes particular importance. In R. v. Hoffman-LaRoche Ltd.[44] a large corporation was convicted of selling products at unreasonably low prices in order to weaken its competitors. Linden, J. stated that it would be wrong to allow a company to profit from illegal activities. If the accused has succeeded in

> eliminating its competition and ... gone on to increase its profits thereby, this Court would impose a fine in excess of those extra profits in order to demonstrate that economic crime, like all other crime, cannot pay.[45]

A fine directed at profit-removal need not be based on deliberate criminal intent of the company. In R. v. A. & M. Records of Canada Ltd.[46] a large record company was convicted of price maintenance. It had benefited from its illegal activity for some eight years, although it had not realized that its policy was illegal, and discontinued it when so informed. Nevertheless, it was held that the fine should "be directed to eliminating to some degree [the] illicit gain". A fine of $35,000 was imposed.

In the context of individual crime, the most common instance of fining for profit-removal relates to drug trafficking offences. Repeatedly, from Newfoundland[47] to British Columbia,[48] the Courts have stressed that in appropriate cases, a fine should be imposed in addition to imprisonment to remove illegal gain.

The converse proposition, that a fine should not be imposed in addition to imprisonment where no profit has been made, is also correct. In R. v. Jaasma[49] the president of a life insurance company was sentenced to substantial terms of imprisonment for theft and a fraud during inter-company dealings. The Appeal Division of the Alberta Court stated that where an accused has benefited by his crime, a fine should be imposed in addition to a jail term. Where, however, the accused did not profit, no such fine should be imposed.

D. FINING CORPORATIONS

The Criminal Code provides:

> 647. Notwithstanding subsection 646(2), a corporation that is convicted of an offence is liable, in lieu of any imprisonment that is prescribed as punishment for that offence,
>
> (a) to be fined in an amount that is in the discretion of the court, where the offence is an indictable offence, or
>
> (b) to be fined in an amount not exceeding one thousand dollars, where the offence is a summary conviction offence.
>
> 648. Where a fine that is imposed on a corporation is not paid forthwith the prosecutor may, by filing the conviction, enter as a judgment the amount of the fine and costs, if any, in the superior court of the province in which the trial was held, and that judgment is enforceable against the corporation in the same manner as if it were a judgment rendered against the corporation in that court in civil proceedings.

Special considerations apply to the fining of corporations. As with the fining of individuals, the aims are general and individual deterrence,[50] and profit-removal.[51] Unlike individuals' fines, however, corporate penalties are fixed with reference to relative wealth of the company as well as relative poverty.

The factors to be considered in the fining of corporations have been listed in a number of decisions. In R. v. Ocean Construction Supplies Ltd.,[52] a competition offence, McKay, J. considered:

1. The period of the conspiracy, and the length of time each company was a member of it;
2. The geographic area involved, and the consumption of the product in that area;
3. The share of the market enjoyed by each of the conspirators;
4. The size of the companies involved;
5. The need to impose a penalty that will provide a real deterrent and will be more than a minor cost of doing business.[53]

Similarly, in R. v. St. Lawrence Corp. Ltd. and 19 other Corporations[54] the Ontario Court considered, inter alia,

1. The size of the companies.
2. Their share of the market ...
3. Their position or influence in the conspiracy and the [sic] initiative in promoting the agreement.
4. Length of time as a member of the conspiracy.[55]

The same Court, in R. v. McNamara (No. 2),[56] a bid-rigging case, considered in addition the prevalence of such offences, premeditation and deliberation, and the fact that the victims defrauded were public agencies. The Court gave only marginal consideration to the actual losses or profits incurred, preferring to examine what each corporation expected to receive.

It may readily be seen that most of these considerations amount to what is really an obvious point - that the nature and magnitude of the crime, its effect, and the role of the individual corporation in it, are primary factors in deciding how heavily each accused should be punished. These are simply usual considerations applied to the corporate sphere. In addition, however, in each case one factor listed was "the size of the companies".

The importance of this element has been explained in a number of decisions. In R. v. K. C. Irving Ltd. and 3 other Corporations (No. 2); R. v. K.C. Irving Ltd. et al. (No. 2),[57] fines totalling $150,000 were imposed on corporations convicted of unlawful mergers. The Court, following the St. Lawrence decision,[58] agreed with Crown counsel that:

> The fines must be of such an amount as will act as a real deterrent and must be very substantial in respect of companies with substantial assets.[59]

Similarly, in R. v. Armco Canada Ltd. and Nine other Companies,[60] Lerner, J. stated:

> To fine a large, faceless corporation can hardly be said to be a punishment or a deterrent unless the fine is substantial.[61]

The same policy is frequently expressed in other words, as a requirement that "a more than nominal penalty is required",[62] and that "the penalty must be more than a mere licence fee".[63]

The rationale is clear: if the penalty is to be effective, it must be sufficient to remove profits and to be "felt" by the offending corporation. While it may appear anomalous to take corporate wealth into account while insisting that individual wealth be discounted, it is submitted that the latter policy is the less justifiable course. Surely, if a fine imposed on an individual is to be effective, it, too, must be sufficient to be "felt" by the offender.

E. IMPRISONMENT IN DEFAULT OF PAYMENT

The Criminal Code provides, as to indictable offences:

> 645.(3) Where an accused is convicted of an offence punishable with both fine and imprisonment and a term of imprisonment in default of payment of the fine is not specified in the enactment that prescribed the punishment to be imposed, the imprisonment that may

> be imposed in default of payment shall not exceed the term of imprisonment that is prescribed in respect of the offence.
>
> 646.(3) Where a fine is imposed under this section, a term of imprisonment may be imposed in default of payment of the fine, but no such term shall exceed
>
> (a) two years, where the term of imprisonment that may be imposed for the offence is less than five years, or
>
> (b) five years, where the term of imprisonment that may be imposed for the offence is five years or more.

As to summary offences:

> "772.(2) Where the imposition of a fine or the making of an order for the payment of money is authorized by law, but the law does not provide that imprisonment may be imposed in default of payment of the fine or compliance with the order, the court may order that in default of payment of the fine or compliance with the order, as the case may be, the defendant shall be imprisoned for a period of not more than six months.

The default period is, perhaps, one of the most misunderstood devices in penal law. Its proper purpose, it is submitted, is to enable the Court to give alternatives to an accused who has the means to pay a fine. It has often been held, in enlightened judgments, that a default period should only be imposed where the trial Judge has ample evidence of means to pay,[64] and implemented where the accused refuses to pay.[65]

Certainly there is no requirement that a default term may be imposed; in R. v. Tomlinson[66] the Court characterized the default provisions of the Code as "permission rather than mandatory" legislation. It has been stressed, further, that the threat of a jail sentence should not be used as a convenient means of enforcement. The fine is a civil debt owed to the Crown, and civil remedies are available under s. 652.[67]

On the other hand, the Court should not abandon the default period altogether. In R. v. Yearwood[68] the accused was convicted of theft

under $200 and fined $150. The trial Judge stated that he had decided to discontinue imposing a period of imprisonment in default of payment of a fine in an attempt to remove the last vestiges of imprisonment for debt. The appeal Court stated that there may well be cases where a period of imprisonment in default should be ordered and imposed a period of 10 days' imprisonment in default of payment of the $150 fine.

> The decision not to provide for imprisonment in default ... did not result from a consideration of such factors as the deterrent effect or what protection may be afforded society if imprisonment in the event of default was or was not provided. The sentence was imposed because of the court's decision in all cases not to impose imprisonment in default.[69]

The appeal Court quoted with approval the considerations elucidated in R. v. Yamelst,[70] and stated that in this case, the trial Judge had made the mistake of abandoning his adjudicative function.

The civil nature of the default period has some curious effects. In R. v. Chiovitti[71] it was held that a term in default may follow an ordinary term of imprisonment which is set at the statutory maximum, thus making the total term greater than the statutory maximum. In R. v. Tomlinson,[72] the accused had left the courtroom before the trial Judge added a default period, as an afterthought. Certiorari to quash the period was refused, the review Court finding that it was no part of the sentence and therefore not vitiated by late addition.

Where a default period is imposed, the Court must impose a term in default of payment of the whole fine. There is no power to order imprisonment in default of payment of a portion,[73] and no power to order imprisonment pending payment.[74]

One potentially disquieting result of default provisions is the possibility that a rich man may escape custody where a poor man will go to

jail. Properly used, the default term will not have this effect, for the defaulter, whether rich or poor, should go to jail only for refusal to pay a penalty which is within his means. For this reason, a challenge to the constitutionality of the default provisions was unsuccessful in R. v. Natrall.[75] Counsel argued that the routine imposition of default terms offended against the Bill of Rights, placing the rich and the poor on a different footing before the law. However, s. 722 does not, as Tysoe, J.A. held, provide for routine imposition. It

> ... places upon the tribunal ... a duty to have regard to the ability or lack of ability of the particular accused to pay whatever fine is proposed to be imposed. The power to fine rather than imprison and to order imprisonment in default of payment is ... discretionary, not mandatory.[76]

While routine imposition does place persons of differing financial means in unequal positions, it is the routine imposition which is illegal. Such illegality of practice does not, of course, colour the constitutionality of provisions which, if properly applied, would have no unconstitutional effect.

A default period, where imposed, should not be excessive in relation to the size of the fine. In R. v. Grady[77] the accused, convicted of assault causing bodily harm, was fined $500 with three months' imprisonment in default. The Court found the default period "a little excessive" as an alternative to a $500 fine, and reduced it to one month.

F. TIME TO PAY

The Criminal Code contains parallel provisions for time to pay on indictable and summary conviction fines. In either case, the Court may direct immediate payment,[78] or payment at a time and on terms such as it finds appropriate.[79]

If immediate payment is required, the Court must either be satisfied that the accused has the means to pay the fine,[80] receive a negative reply from the accused when he is asked if he wishes time to pay,[81] or deem it expedient for any other special reason that no time should be allowed.[82] If time to pay is refused, the warrant of committal must state the reason for immediate committal.[83] This requirement is an important safeguard to ensure that an accused will not be deprived of his liberty because he has no immediate access to means to pay the fine, and habeas corpus will issue if the reason for immediate committal is not stated.[84]

In consideration of whether time should be allowed, the Court is obliged to listen to any representations by the offender.[85] If time is allowed, it must be "not less than fourteen clear days from the time sentence is imposed",[86] and a warrant of committal may not be issued until the expiration of the time set.[87] On application by or on behalf of the accused, the time may be extended.[88]

Occasionally an accused who has been granted time may decide that he wishes to be committed before the end of the allowed period. On his appearance before the Court and signification of his wishes in writing, the warrant may issue.[89]

A special procedural provision applies to the commmittal of an accused who appears to be aged 16-21 (inclusive). Before committal, the Court must obtain and consider a report concerning the conduct and means to pay of the offender.[90]

There is no jurisdiction to extend the time for payment in the case of a corporation. The operation of the time to pay provisions in s.646 has been held to apply only to individuals subject to default terms. Corporate fines not paid forthwith should be entered as enforceable civil judgments under s.648 of the Code.[91]

When time for payment expires and a warrant of committal is issued and executed, the power of the Court to extend time is not exhausted. The sentencing Court may still grant an extension in appropriate circumstances.[92]

How long a period may the terms of a fine cover? Ruby[93] cites an English authority[94] and an older Manitoba decision[95] to the effect that only a "reasonable time" may be covered. Living under a threat of imprisonment for defaulting on payments over four years is too heavy a penalty even for grave wrong-doing. While this position appears to be correct in principle, there are exceptions where a long period will still be reasonable. In A.G. Can. v. Radigan[96] the accused was convicted of trafficking in marijuana and sentenced to four days' imprisonment and a fine of $5,000, payable over a period of four years ($625 every six months). The Court held that the fine, while its method of payment was unusual, was neither illegal nor negligible. The question was whether the mode of payment was so lenient as to negative the deterrent and exemplary aspects of the fine. In this case, to reduce the payment period might diminish the possibility that the accused could serve his punishment honestly and regularly. This was an exceptional case, and there was no reason to interfere with the trial Judge's discretion.

G. EFFECT OF PAYMENT

Payment of a fine, pursuant to s.651 of the Code, is to the Crown. Older authorities indicate the impropriety of directing payment to a victim as compensation,[97] although there would be no need for such action today as the Criminal Code contains provision for direct compensation and restitution.[98]

Payment of a fine by the accused does not waive his right of appeal under s.748 of the Criminal Code.[99] The cases conflict, however, on whether the Crown may appeal when it has accepted payment of the fine;[100] on general statutory principles it is suggested that it may not, pursuant to the maxim expression unius est exclusio alterius. The draughtsman having considered the effect of payment of a fine, has stipulated for saving of the accused's appeal. No such stipulation is made for the Crown's appeal, from which it may be taken that Parliament did not intend that it should remain.

Footnotes to Chapter 27

1. Thomas, D.A., Principles of Sentencing (2nd ed. 1979, London: Heinemann Books Ltd.) at 318.

2. See e.g. R. v. Brillon (1971), 6 C.C.C. (2d) 268 (B.C. Co. Ct.); R. v. Hashem (1978), 38 N.S.R. (2d) 301 (Co. Ct.), and see generally cases cited in Part III.

3. (1977), 37 C.C.C. (2d) 189 (Ont. C.A.).

4. It was cautioned in R. v. McLaughlin (1976), 17 N.S.R. (2d) 604 (C.A.) that the fact of marriage and family should not create a double standard whereby a married man might be fined while a bachelor would receive a custodial term for the same offence. It is a mitigating factor, and may be considered, but should not be elevated to too high a position.

5. R. v. Johnson (1971), 5 C.C.C. (2d) 541 (N.S.C.A.).

6. See e.g. R. v. Bruckshaw (1972), 9 C.C.C. (2d) 133 (B.C.C.A.).

7. See e.g. R. v. Doherty (1972), 9 C.C.C. (2d) 115 (Ont. C.A.); R. v. Dunton (1973), 24 C.R.N.S. 116 (Ont. C.A.).

8. Thus, it should not be used in lieu of imprisonment to allow a wealthy offender by "buy his way out" of an appropriate term of incarceration - Thomas, supra note 1 at 318ff.

9. Samuels, A., "The Fine: The Principles," [1970] Crim. L. R. 201.

10. Criminal Code, s.646(1).

11. Ibid. s.646(2). Technically incorrect fines, standing alone for such offences, are frequently corrected by the addition of one day's imprisonment. See e.g. R. v. Arseneau (1977), 36 C.C.C. (2d) 65, 17 N.B.R. (2d) 292, 23 A.P.R. 292, affirmed 45 C.C.C.(2d) 321, [1979] S.C.R. 136, 25 N.B.R. (2d) 390, 51 A.P.R. 390, 95 D.L.R. (3d) 1, 26 N.R. 226.

12. Ibid. s.722(1).

13. R. v. Johnson (1972), 6 C.C.C. (2d) 380 (B.C.C.A.).

14. See Driedger, E.A., The Construction of Statutes (1974, Toronto: Butterworths) at 112-116.

15. This argument was put forward in R. v. Desmarais (1971), 3 C.C.C. (2d) 523 (Que. C.A.), and R. v. Johnson, supra note 13.

16. I.e. the rule that ambiguous penal provisions should be construed in favour of the accused. See Craies, W.F., Craies on Statute Law (7th ed.

1971 by S.G.G. Edgar, London: Sweet & Maxwell) at 529-35; Driedger, supra note 14 at 153-54; Maxwell, P.B., Maxwell on the Interpretation of Statutes (12th ed. 1969 by P. St. J. Langan, London: Sweet & Maxwell) at 238-46.

17. R. v. Desmarais, supra note 15.

18. R. v. Johnson, supra note 13.

19. (1973), 11 C.C.C. (2d) 302 (Ont. C.A.).

20. Supra note 15.

21. R. v. Desmarais, supra note 15; R. v. Thompson (1976), 9 N. & P.E.I.R. 427 (P.E.I.C.C.A.).

22. That is, because the Court has certain powers over him he must be subject to corresponding liabilities. For a description of Hohfeld's scheme, much clearer than his own original papers, see Dias, R.W.M., Jurisprudence (4th ed. 1976, London: Butterworths) Chapter 2.

23. Ruby, C.C., Sentencing (2nd ed. 1980, Toronto: Butterworths) at 248.

24. (1971), 5 C.C.C. (2d) 332 (P.E.I.C.C.A.).

25. Supra note 21.

26. (1972), 5 C.C.C. (2d) 87 (Man. C.A.).

27. (1970), 13 Crim. L.Q. 153 (Que. C.A.).

28. [1961] Que. Q.B. 907 (C.A.).

29. (1973), 13 C.C.C. (2d) 287 (Ont. C.A.).

30. (1980), 56 C.C.C. (2d) 15 (Ont. C.A.).

31. R. v. Rasper (1978), 1 C.R. (3d) S-45 (Ont. C.A.).

32. R. v. LeBlanc; R. v. Long, [1939] 2 D.L.R. 154 (N.B.C.A.).

33. (1976), 32 C.C.C. (2d) 219 (Ont. Prov. Ct.).

34. [1974] Crim. L.R. 720 (C.A. Crim. Div.).

35. Ibid. at 721.

36. (1977), 7 C.R. (3d) S-17 (Alta. Dist. Ct.). See also R. v. Kolbuc (1978), 11 A.R. 105 (Dist. Ct.).

37. (1st ed. 1970, London: Heinemann Books Ltd.).

38. Ibid. at 221.

39. R. v. Doucette (1974), 6 N. & P.E.I.R. 100 (P.E.I.S.C.).

40. R. v. Ward, supra note 30.

41. (1976), 1 C.R. (3d) S-1 (B.C.C.A.); followed in R. v. Wong (1976), 37 C.R.N.S. 147 (B.C.C.A.).

42. (1976), 1 C.R. (3d) S-9 (B.C.C.A.).

43. Ibid. at S-15 per Robertson, J.A. See further R. v. Kotrbaty (1978), 5 C.R. (3d) S-13 (B.C.S.C.); R. v. Bengert (No. 14) (1979), 15 C.R. (3d) 97 (B.C.S.C.).

44. (1980), 16 C.R. (3d) 13 (Ont. H.C.).

45. Ibid. at 18 per Linden, J.

46. (1980), 51 C.P.R. (2d) 225 (Ont. Co. Ct.).

47. R. v. Blundon (1975), 8 N. & P.E.I.R. 405 (Nfld. Mag. Ct.).

48. R. v. Kotrbaty, supra note 43; R. v. Bengert (No. 14), supra note 43.

49. (1976), 1 A.R. 553 (C.A.).

50. See R. v. Hoffman-LaRoche Ltd., supra note 44; R. v. Rolex Watch Co. of Can. Ltd. (1980), 53 C.C.C. (2d) 445 (Ont. C.A.).

51. Supra text accompanying notes 44-49.

52. (1974), 15 C.P.R. (2d) 224 (B.C.S.C.).

53. Ibid. at 229 per McKay, J.

54. [1969] 3 C.C.C. 263 (Ont. C.A.).

55. Ibid. at 287 per Shroeder, J.A.

56. (1981), 56 C.C.C. (2d) 516 (Ont. C.A.).

57. (1974), 22 C.C.C. (2d) 281 (N.B.Q.B.).

58. Supra note 54.

59. Supra note 57 at 284 per Robichaud, J.

60. (1975), 24 C.C.C. (2d) 147 (Ont. H.C.).

61. Ibid. at 149 per Lerner, J.

62. R. v. Hoffman-LaRoche, supra note 44.

63. R. v. A. & M. Records of Canada Ltd., supra note 46.

64. See e.g. R. v. Jung, supra note 41; R. v. Natrall (1972), 9 C.C.C. (2d) 390 (B.C.C.A.).

65. R. v. Tessier (1957), 21 W.W.R. 331 (Man. Co. Ct.).

66. (1971), 2 C.C.C. (2d) 97 (B.C.S.C.).

67. R. v. Yamelst (1975), 22 C.C.C. (2d) 502 (B.C.S.C.); R. v. McGarvie (1978), 18 N. & P.E.I.R. 463, 47 A.P.R. 463 (Nfld. C.A.).

68. (1980), 28 N. & P.E.I.R. 463, 79 A.P.R. 463 (P.E.I.S.C.).

69. Ibid. at 466-67 per Nicholson, C.J.P.E.I.

70. Supra note 67.

71. (1950), 96 C.C.C. 177 (B.C.C.A.).

72. Supra note 66.

73. R. v. Prier, [1979] 6 W.W.R. 328 (Alta. C.A.).

74. R. v. Berger, [1971] 1 O.R. 765 (C.A.).

75. Supra note 64.

76. Ibid. at 397 per Tysoe, J.A. See further Tarnopolsky, W.S., The Canadian Bill of Rights (2nd ed. 1975, Toronto: McClelland and Stewart Ltd.) at 310-311.

77. (1974), 10 N.S.R. (2d) 90 (C.A.)

78. Criminal Code ss.646(4)(a) and 722(3)(a).

79. Ibid. ss.646(4)(b) and 722(3)(b).

80. Ibid. ss.646(5)(a) and 722(4)(a).

81. Ibid. ss.646(5)(b) and 722(4)(b).

82. Ibid. ss.646(5)(c) and 722(4)(c).

83. Ibid. ss.646(8) and 722(7).

84. Ex parte Andrews (1973), 15 C.C.C. (2d) 43 (B.C.S.C.).

85. Criminal Code ss.646(6) and 722(5).

86. Ibid.

87. Ibid. ss.646(7) and 722(6). Part payment merits a pro-rated reduction in time to be served: ibid. s.651.

88. Ibid. ss.646(11) and 722(10).

89. Ibid. ss.646(9) and 722(8).

90. Ibid. ss.646(10) and 722(9).

91. R. v. McNamara et al. (No. 2), supra note 56.

92. R. v. Yamelst, supra note 67.

93. Supra note 23 at 270.

94. R. v. Hewitt (1971), 55 Cr. App. R. 433.

95. R. v. Tessier, supra note 65.

96. (1976), 33 C.R.N.S. 358 (Que. C.A.).

97. R. v. Sperdakes (1911), 24 C.C.C. 210 (N.B.C.A.); R. v. England (1925), 43 C.C.C. 11 (Sask. C.A.); both cited by Ruby, supra note 23 at 273.

98. Sections 653 and 655.

99. Criminal Code s.753. No such provision is made for appeals in indictable matters.

100. Crown barred: R. v. Bernier (1939), 71 C.C.C. 380 (Que. K.B.). Crown not barred: R. v. Fraser, [1944] 2 D.L.R. 461 (P.E.I.S.C.).

CHAPTER 28: THE SUSPENDED SENTENCE AND PROBATION[1]

Suspension of sentence and the imposition of probation orders are dispositions catering to the "individualization" aspect of sentencing. Probation may be imposed in several different contexts: pursuant to suspension of sentence, conditional discharge, or in addition to fine, imprisonment or intermittent sentence. The probationer will be subject to statutory terms, and possibly other terms imposed by the Court, designed to ensure his good behaviour and rehabilitative progress. Generally, the purpose of probation is to achieve these ends through control, supervision and/or treatment, but occasionally a probation order may be imposed simply in order that some control over the offender's activities may be exercised.[2] In cases where a term of imprisonment is appropriately imposed on tariff principles, probation may still follow as a rehabilitative device.[3]

A: PLACING THE OFFENDER ON PROBATION

Within the context of the five possible occasions for ordering probation, several special principles and occasional technical difficulties have arisen. It may be instructive to examine each in detail.

i) Suspension of Sentence

Subsection 663(1) of the Criminal Code gives to the Court power to, having regard to the age and character of the accused, the nature of the offence and the circumstances surrounding its commission,

> (a) in the case of an offence other than one for which a minimum punishment is prescribed by law, suspend

> the passing of sentence and direct that the accused be released upon the conditions prescribed in a probation order....

Where the Court suspends sentence pursuant to this provision, it must impose a probation order.[4] The accused does not have a "sentence" to complete,[5] and if he breaches the probation order or otherwise offends during its duration he may be brought back before the Court for sentencing[6] or variation of the order.[7]

It is important to note that in Canada, what is suspended is sentencing, not the execution of a sentence already pronounced.[8] In R. v. Sangster,[9] the Court held that it is unwise to indicate to an accused the precise sentence to be imposed if he breaches his probation. This may later place the Judge in a predicament; to keep his word and impose a sentence unjust in the circumstances, or to give a proper sentence and lose credibility. The accused may be forewarned of serious consequences, even imprisonment for a lengthy period. But the Court should not bind itself in so absolute a fashion that it has no discretion. Sangster was approved in R. v. Tuckey[10] the Court going so far as to disapprove the trial Judge's admonition to the accused that a penitentiary term would be imposed in the event of a breach.

Whether suspension of sentence is appropriate in the circumstances of each case is a "quantum" question - the offence and offender, taken together, must be deserving of individualized treatment. Thus, the offence must not be one which demands an incarceral term for deterrence or denunciation,[11] and the offender must not be one who is disentitled by virtue of a long record to individualized consideration.[12] Further, if it is not likely that the offender will benefit from a term of probation, then there is no point in considering it.[13] Conversely, wherever the accused is, for example, a young or first offender, and thus merits very serious consideration for an individualized measure, probation may well be appropriate.[14]

ii) Conditional Discharge

It is of the very essence of a conditional discharge that the accused be placed on probation. The probation order distinguishes this disposition from an absolute discharge. Discharges are discussed at length in Chapter 29.

iii) In Addition to Fine or Imprisonment.

Subsection 663(1) of the Criminal Code provides that the Court may

> (b) in addition to fining the accused or sentencing him to imprisonment, whether in default of payment of a fine or otherwise, for a term not exceeding two years, direct that the accused comply with the conditions prescribed in a probation order....

Read in conjunction with s. 646(2), which gives the Court power to impose a fine in lieu of imprisonment where the offence is punishable with five years of less, it is clear that in such cases a sentence of a fine plus probation is legal.[15] Also, a probation order may be attached to any term of imprisonment not exceeding two years,[16] including a default term.[17]

In the case of an offence punishable with more than five years' imprisonment, there is considerable controversy as to whether a fine plus probation is a legal sentence. This matter was discussed earlier.[18]

More difficulty arises in the question of whether a fine, probation and imprisonment may be imposed for the same offence. Section 663(1)(b) allows the imposition of probation "in addition to fining the accused or sentencing him to imprisonment". On a plain reading of the provision,

probation with a fine and imprisonment would not be permissible. This approach was taken by the Ontario Court of Appeal in R. v. Blacquiere,[19] following the North West Territories Court's decision in R. v. Smith.[20] An opposite stance was, however, taken by the Nova Scotia Court in R. v. Dobson,[21] their Lordships following their decision in R. v. Wournell and Brennan[22] that all three measures could be imposed in respect of one offence. The Nova Scotia position has since been upheld in Newfoundland cases,[23] and Judge Barnett[24] cites British Columbia decisions in which, while not discussing the issues involved, that Court of Appeal has applied the three sanctions to one conviction.[25]

iv) In Addition to Intermittent Imprisonment

Pursuant to s. 663(1)(b) of the Criminal Code, the accused who is allowed to serve his sentence intermittently must be placed on probation.[26] As noted in Chapter 26.G.ii, "THE INTERMITTENT SENTENCE, Interpretation", there is controversy over whether the term of probation may extend beyond the expiry of the term of imprisonment. The effective length of the probation period, even if imposed only for the duration of the intermittent custodial term, may of course be lengthened by modification of the stipulations as to when the days of imprisonment are to be served.[27]

If the Blacquiere decision, discussed above, is correct in its ruling that a sentence of a fine, imprisonment and probation cannot ordinarily be imposed, Barnett correctly points out that the ruling would not apply to sentences containing intermittent service orders.

> [S]uch a sentence is nevertheless permissible when the sentence is an intermittent one and the probation order is limited in duration to expire with the

> completion of the sentence. Section 646(1) and (2) of the Code authorize fines in addition to any other authorized punishment, and s. 663(1)(c) of the Code gives the court authority to order that a gaol sentence which does not exceed 90 days be served intermittently. In such a case the probation order is mandatory, not optional, and, it is submitted, permissible upon the reasoning of the decision in the Smith case, supra. Such a sentence was imposed by the British Columbia Court of Appeal in Regina v. McGroty, 19th February 1974, No. 867/73 (not yet reported).[28]

Whichever of the above modes of imposition is adopted, the law relating to procedure, conditions, and consequences of probation is the same. The remainder of this Chapter will therefore be devoted to a discussion of the law of probation in general.

B. FORM AND PROCEDURE

When imposing a probation order in one of the above situations (there is no power to order probation alone[29]), the Court is required to specify in the order the period for which it is to remain in force.[30] Further, the Criminal Code provides:

> 663.(4) Where the court makes a probation order, it shall
> (a) cause the order to be read by or to the accused;
> (b) cause a copy of the order to be given to the accused; and
> (c) inform the accused of the provisions of subsection 664(4) and the provisions of section 666.

The precise practice by which these provisions are complied with varies from court to court.[31] The importance of compliance is demonstrated by the number of cases in which failure to comply has been pleaded as a full defence to charges of breach of probation laid under s. 666.

In R. v. Cottrelle,[32] Marin, J. held that the provisions of s. 663(4) are administrative, not judicial, in character. His remark is qualified, however, by the following statement:

> When a person is placed on probation and told in open Court of the terms of his probation, as is the practice, he is then bound by the conditions therein set out subject to the compliance of the purely administrative functions of the Clerk. The Clerk in turn is then directed to comply with the aforesaid provisions of s.663(4). If, at a trial for a breach of probation an accused wishes to avail himself of the defence of lack of knowledge as to the order, he must then lead evidence to satisfy the Court of non-compliance with the provisions of s.663(4). Then he may be acquitted.[33]

What Marin, J. appears to be saying is that in a case where full compliance with s.663(4) has not taken place, an accused who had been told of the terms of his probation and the effect of breach could not thereafter plead ignorance of such matters in defence to a charge of breach.

The use of the word "administrative" was perhaps unfortunate. It was seized upon by Bence, C.J.Q.B. in a strong judgment to the opposite effect in R. v. Piche.[34]

> It is difficult ... to conclude that these paragraphs could be disregarded on the basis that they are purely administrative.
>
> One might argue that it is sufficient to make the probation order and disregard compliance with the paragraphs and then place the onus upon the accused of establishing that he was unaware of the conditions of the order. This ... is entirely contrary to the fundamental principles inherent in our criminal law.
>
> I agree that the making of the probation order is not predicated on such conditions but in my view they are necessary for its enforcement.
>
> It is particularly interesting that s. 666 uses the words which I have emphasized, namely, "an accused who is bound by the order". It does not say, as it might well have done, that "an accused against whom (or with respect to whom) an order has been made and who wilfully ...".
>
> It is my conclusion that all the paragraphs in question were meant for the protection of the accused

> and that no offence has been established under s. 666 unless the Crown shows that they have been followed.
>
> By way of suggestion, it seems to me that all Courts acting under this section should be zealous in seeing to it that the provisions are followed meticulously.
>
> I believe that para. (c) should follow compliance with paras. (a) and (b), and both the reading of the order and the delivery of the copy should be in the presence of both the accused and the Judge. It can only be by taking such precautions that it can be reasonably assured the accused was fully aware of his position.[35]

Decisions since Cottrelle and Piche have backed away from the Piche position, adopting the notion underlying Cottrelle that s. 663(4) must be complied with in spirit, and adopting liberal interpretation in the requirements of that provision. In Re Juvenile J.,[36] for example, the accused was a juvenile charged with a breach of s. 666. The prosecution could not establish that he had been given a copy of the order, or told of the consequences of its breach. An acquittal ensued. While the formality of writing out the order and handing a copy to the accused is a useful procedure, it need not be strictly observed where the probationer clearly understands the terms of the order. However, he must be warned of the specific consequences of any breach. It is not sufficient to tell the accused that he might be returned to Court.

A similar trend may be observed in judicial comments upon compliance with s. 663(4)(c), although as may be observed from the decision in Juvenile J., the Courts are more cautious that the accused has been properly informed of the consequences of breaching the order. In R. v. Leboeuf,[37] the Court held that it is sufficient that the accused be informed of the provisions in ss. 664(4) and 666 by the Court in the widest sense. It is, however, desirable that the Judge himself inform the accused of them. It

would make it more difficult for the accused to argue failure to comply with s. 663(4): an extremely strong presumption of compliance, perhaps irrebuttable, will exist. If the accused signs a document acknowledging compliance, this creates a presumption of fact, and the question becomes an evidentiary one as to whether he was in fact informed. On the facts of particular cases, for example illiteracy of the accused or his ignorance of what he was signing, the presumption might be overriden.

In R. v. Legilloux[38] the British Columbia Court approved the notion of a "presumption of regularity" arising from a signed document acknowledging compliance, and held that in some circumstances the Court could comply with s. 663(4)(c) other than viva voce, for example by writing or other means of communication. Further, in both Legilloux and R. v. Scott,[39] an Alberta decision which reached essentially the same conclusions, it has been made quite clear that the burden is not upon the Crown to prove compliance in a s. 666 prosecution. The Court may assume until contrary evidence is adduced that the provisions were followed.

C. CONDITIONS OF PROBATION

i) General Considerations

The Criminal Code provides:

> 663.(2) The following conditions shall be deemed to be prescribed in a probation order, namely, that the accused shall keep the peace and be of good behaviour and shall appear before the court when required to do so by the court, and, in addition, the court may prescribe as conditions in a probation order that the accused shall do any one or more of the following things as specified in the order, namely,

> (a) report to and be under the supervision of a probation officer or other person designated by the court;
> (b) provide for the support of his spouse or any other dependants whom he is liable to support;
> (c) abstain from the consumption of alcohol either absolutely or on such terms as the court may specify;
> (d) abstain from owning, possessing or carrying a weapon;
> (e) make restitution or reparation to any person aggrieved or injured by the commission of the offence for the actual loss or damage sustained by that person as a result thereof;
> (f) remain within the jurisdiction of the court and notify the court or the probation officer or other person designated under paragraph (a) of any change in his address or his employment or occupation;
> (g) make reasonable efforts to find and maintain suitable employment; and
> (h) comply with such other reasonable conditions as the court considers desirable for securing the good conduct of the accused and for preventing a repetition by him of the same offence or the commission of other offences.

The conditions attached to a probation order allow the Court to "custom-design" the probationing period to the accused's training, supervision and other needs. Section 663(2) creates three main groups of conditions: the compulsory statutory conditions, optional specified conditions (paras. (a)-(g)) and "other ... reasonable" conditions in the discretion of the Court.

In addition to considerations specific to each type of condition, some general principles relating to terms may be deduced from the jurisprudence. The following is an extended version of Judge Barnett's enumeration:[40]

1. A condition must "clearly and definitely set forth a standard of conduct which the probationer can understand and realistically be expected to follow".[41] In R. v. Munro,[42] the Saskatchewan Court struck out a condition of restitution, as the accused could not possibly comply.

2. A condition must be enforceable.[43]

3. A condition must be relevant to the offence and designed to secure "rehabilitation".[44] In R. v. Stennes[45] the accused was convicted of accompanied theft. Conditions of his probation required that he "not associate with persons of bad character or persons with criminal records; and that he not associate with any of the members of his motorcycle gang, any other motorcycle gang, or, in particular, with a number of men on a list who, according to the trial Judge, had appeared at some time before him. The first condition was held appropriate. As to the second, however, Bull, J.A. stated:

> I do not think that there is any suggestion, although this man was a member of the 101 Knights, that being a member of that club makes him a criminal or inclined to criminal activities. It may well be that some members of that club have in the past been in trouble, as well as members of other clubs have, whether motorcycle clubs or otherwise; but it does seem to me that in the particular circumstances of this case, when we are dealing with a motorcycle mechanic, it would be unreasonable to direct that he should not associate with any motorcycle club or "gang", as the learned Judge referred to it. I see nothing which was before the learned sentencing Judge upon which he could properly pick out any persons with whom the appellant should not associate, with the possible exception of Brimacombe who was with him in connection with this particular offence. However, I do not think it requisite that all the names should have been listed as being people with whom this man was not to associate. In my view there was not sufficient evidence upon which the learned Judge could impose such a restrictive condition on the habits of this man. I mention only that one of the names was the landlord at the home in which this appellant lived, and it seems to me that the effect of an order of this kind goes too far and would make a complete change in this man's whole standard of living, without any suggestion that his association with these people has been to his detriment in the past.[46]

4. A condition "must not be discriminatory or infringe unduly on basic rights". Thus in R. v. Caja and Billings[47] the Court struck out a condition

that the accused "not apply for or receive any unemployment insurance benefits for 12 months without the consent of the Court" as illegal, not being authorized by s. 663(2). In particular, a probation order may not deal with issues affecting the rights and property of persons not before the Court.[48]

5. A condition must not be imposed as "punishment". In R. v. Gladstone[49] the Court struck out a condition of surrender of a fishing permit for one month, as inter alia, it was not directed to rehabilitation but to deterrence and punishment.[50]

6. A condition must not contain unlawful delegation to a probation officer. While this suggestion is a virtual truism, there is some difficulty today in establishing precisely what kind of delegation is "unlawful". In the leading case of R. v. Beam,[51] the Court struck out a condition that the accused "during the period of probation ... will from time to time promptly and faithfully obey the directions of the Probation Officer as to his habits of life and mode of living". Similarly, in R. v. Shorten and Shorten,[52] the Court held that a condition of restitution of a certain amount "to be paid in such amounts and at such times as the probation officer shall order, at his complete discretion" was struck out as an unlawful delegation.

Although the Beam decision has been adopted by the British Columbia Court, it appears to have been abandoned in Ontario. In R. v. Vandale and Maciejewski[53] the two accused were required to make reparation to their victims, "in such amounts and at such intervals as [the] probation officer determines that [they] can reasonably make". Similarly, in R. v. D.L.[54] the Court imposed an order including conditions that the accused should abide by the direction of his probation officer as to his associates and use of alcohol, and that he make restitution of $500, to be paid periodically as directed by the officer.

It appears that strict legality has given way in this instance to the obvious benefits of flexibility and continuous monitoring gained by delegation.[55] The Nova Scotia Court has made similar use of delegation to achieve monitoring of treatment. In R. v. Gouchie[56] the Court required the accused to "take advantage of any treatment for drug addiction that is available ... as may from time to time be arranged and directed by her probation officer". Similarly, in R. v. Dobson,[57] the accused was required to "continue to attend upon his psychiatrist for treatment or submit to such psychiatric treatment as may be arranged for him by [the probation] officer". A similar condition respecting attendance at an out-patients' clinic for treatment of alcoholism, if directed so to do by the Ontario Correctional Institute or the probation officer, was imposed by the Ontario Court in R. v. Beauvais.[58]

ii) The Conditions Examined

a) The Statutory Conditions

Every probation order contains, by law, requirements that the accused "shall keep the peace and be of good behaviour and shall appear before the court when required to do so by the court".

The meaning of "keep the peace and be of good behaviour" has been considered infrequently. In R. v. Lafferty and Chalmers[59] Morrow, J. had before him an accused who, while subject to a recognizance to "keep the peace and be of good behaviour", breached a territorial ordinance by consuming liquor while under age. It was held that he had not breached the recognizance as:

> While it is not intended to say here that there may not be offences under Territorial Legislation indicating a behaviour that is serious enough to be infamous or to suggest the possibility of a breach of the peace, I do not believe that it was ever intended that infractions of legislation such as is found here were ever intended to create a default within the meaning of the sections in the Criminal Code....[60]

Lafferty and Chalmers was decided per incuriam R. v. Abbott[61] and R. v. Konig.[62] Abbott clearly established that the phrase in question constitutes two separate elements, Harvey, C.J.A. holding that consumption of liquor in a public place was not a breach of the peace, but undoubtedly breached the requirement of "good behaviour".[62] In Konig, Harvey, Co. Ct. J. found

> ... the provisions ... relating to forfeiture of recognizances are not rendered inapplicable merely because the nature of the default is a breach of the peace or misbehaviour rather than non-appearance.[64]

On the basis of these authorities Trainor, P.M. reached the opposite conclusion to that in Lafferty and Chalmers in R. v. Barker.[65] His Worship added:

> With respect, I am of the opinion that a person who binds himself in a recognizance to keep the peace and be of good behaviour is making two separate promises as to his future conduct. Certainly a person who commits a breach of the peace is guilty of failing to be of good behaviour, but conduct which amounts to lack of good behaviour need not go to the extent of being a breach of the peace.
>
> A breach of the peace, although it does not appear to have been authoritatively defined, must mean or include crimes and conduct actually disturbing or tending to disturb the public peace and order.
>
> Good behaviour is defined in Black's Law Dictionary, 4th ed., as "orderly and lawful conduct; behaviour such as is proper for a peaceable and law-abiding citizen", and "as used in an order suspending sentence upon a defendant during good behaviour, merely means conduct conformable to law, or to the particular law theretofore breached".[66]

Finally, in a later decision, R. v. Borland,[67] Morrow, J. stated that had the decision in Abbott been brought to his attention in Lafferty and Chalmers, he would have reached the opposite conclusion (i.e. the same as that in Barker). Accordingly, it would appear that the decision of the Yukon Territories' Provincial Court in Barker is the most definitive statement of the applicable law to date. As the decision is clear and does not appear to be incorrect on any matter of principle, it perhaps is the reason why the issue has not surfaced again in recent years.[68]

b) Reporting

Section 663(2)(a) allows the Court to impose a condition that the accused report to, and be under the supervision of, a probation officer or other person. While probation officers are the most used supervisors, it is not uncommon for an employer or other responsible person to take responsibility for a probationer.

Reporting is one of the most commonly used conditions, the element of supervision and guidance being among the most important rehabilitative elements of probation. As Judge Barnett notes, however, precise wording is important if probationers are to be required properly to fulfil the terms of their probation. Typical of many difficulties which have occurred is the case of R. v. Doiron,[69] where the accused was made subject to a probation order for three years, subject to the following conditions:

> (1) That he must notify John William Shea promptly of any change of address or occupation;
> (2) That he must ask permission of John William Shea if he wishes for any reason to leave the town where he resides;
> (3) That he must work under the supervision of John William Shea;

(4) That he must refrain from possession, owning or carrying a weapon;
(5) That he must reside within the jurisdiction of this Court with the exception of employment out of town.

On appeal from his conviction for breach of condition (2), the Court held that when read together these conditions were so vague, uncertain and contradictory as to be incapable of rational interpretation or enforcement. Accordingly, a conviction could not be sustained.

c) Support of Dependants

Like all optional conditions, a provision for support of dependants must be necessary and in some way related to the accused's rehabilitation. An example of correct usage is the Ontario Court's decision in R. v. Hawley,[70] where the accused's recent marriage and parenthood were influential in avoiding a jail term for him. As he was being released in part to provide for them, it was quite sensible to insert such a condition, in order that should his support cease the Court would be able to reconsider his sentence.

Barnett[71] suggests that the term may be useful where the offence was committed against a spouse and has precipitated a separation. It is submitted, however, that the proper forum for maintenance awards and enforcement thereof is the appropriate matrimonial Court, not the criminal Court.

d) Abstention from Alcohol

A condition requiring abstention from alcohol may be imposed pursuant to s. 663(2)(c). Abstention from drugs, however, must be ordered pursuant to the general power in s. 663(2)(h). While there are numerous examples of imposition of alcohol-abstention provisions, a study by Judges Barnett and Sarich[72] found that probation officers almost universally regard them as futile and unenforceable.[73]

e) Abstention from Firearms

The power in s. 663(2)(d) is little used by the Courts. As Barnett points out,[74] in any event the provisions of ss. 83 and 89 of the Code will be a more appropriate vehicle for weapon control than a probation order.

f) Reparation or Restitution

Pursuant to s. 663(2)(e), the Court may require the accused to make restitution or reparation for actual loss as a result of the offence.

The primary purpose of such conditions is to secure the conduct of the convicted person, rather than compensation of the victim.[75] As a result, consideration must be given to the accused's ability to pay; just becuase a victim has suffered loss does not mean that compensation should be awarded.[76] This does not mean, it is submitted, that the accused must have immediate means to pay; in appropriate cases, the Court may order payment by instalments measured against the accused's future income.[77] The terms may not require payments to be made after the end of the probation period.[78]

Restrictive interpretation has on occasion attempted to narrow the scope of s. 663(2)(e). In R. v. LaFriniere[79] the trial Judge ordered payment by the accused, convicted of possession of a stolen vehicle, to its owner. On appeal, the condition was set aside on the basis that the loss to the owner had been caused by the original theft, not the accused's possession.

The requirement of "actual loss or damage" has also taken on a restricted meaning. Although in R. v. A.[80] Haines, J. awarded $1,000, largely for "embarrassment" to the victim of an indecent assault, the decision has since been disapproved. In R. v. Farley[81] the Court struck out terms requiring payment of $250 to each of three victims of indecent assaults, stating that, unless torn clothing, payment of a hospital bill, or something of the like were involved, it was difficult to conceive of the applicability of the reparation provision to indecent assault.

In R. v. Groves,[82] an appeal by way of stated case was heard, inter alia, on the legality of an order to pay the victim a sum for "pain and suffering". The Ontario High Court struck out the order, stating that any order for compensation should be restricted to "special damages".

g) Remaining Within the Jurisdiction; Notification of Change of Address, Employment or Occupation

It is again important to distinguish conditions to remain within the jurisdiction, authorized by s. 663(2)(f), from all other conditions respecting places where the accused may or may not go. While conditions of "remaining within" may work harshly where the Court is of limited territorial jurisdiction, Barnett rightly points out[83] that any attempt to modify such a term may lead to unenforceability and/or vagueness. In R. v. Matrai,[84] for

example, a term of the accused's probation was that he should not for any purpose leave the Municipality of Metropolitan Toronto without first notifying his probation officer of where he was going, and why. Noting that such action might in emergent circumstances be impossible, the Court modified the condition by adding the words "wherever reasonably possible".

In R. v. Stennes[85] a condition in the accused's probation order stipulated that he should stay in the province of British Columbia unless permission to leave was given by a probation officer. On appeal, it was held that the condition was appropriate but that it should have been within the terms of para. (f) of s. 663(2), requiring the accused to remain within the jurisdiction of the Court. There was no reason why, in this case, power to grant permission should be delegated to a probation officer: it would be appropriate for an offender to have to apply to the Court for permission to leave the province.

h). Find and Maintain Suitable Employment

In the absence of substantial jurisprudence, there is little to be said about this condition. The remarks of Judge Barnett, however, are worth repeating.

> The proposition that steady employment would be a material factor in securing an offender's future good conduct makes a great deal of sense in many cases. But the condition suggested in s. 663(2)(g) of the Code is totally inadequate and of no real value at all in a probation order. Unless an otherwise uncooperative probationer is so foolish as to admit to his probation officer that he had made no effort to find employment and prefers to draw unemployment benefits or welfare, there is virtually no way to prove the fact where the "standard condition" is the condition appearing in the probation order.[86]

i) Other Conditions Under s. 663(2)(h)

Paragraph (h) of s. 663(2) confers on the Court a wide discretion to "invent" conditions suitable for insertion into the probation order, amplifying its rehabilitative scope and increasing its flexibility. There are qualifications, however; the condition must be directed at securing the good conduct of the accused, or preventing commission of further offences. The Courts have been innovative in taking advantage of the discretion thus conferred.

Indicative of the wide scope are conditions found in many reported cases. In R. v. Botten,[87] for example, the Court modified sentence imposed on a widow of 59 who, because of pressure and depression, cashed a number of N.S.F. cheques. Inter alia it imposed as a condition of probation that she should make reasonable efforts to secure competent advice in managing her finances.

Conditions aimed toward educational improvement, not specifically authorized elsewhere in s. 663(2), have also been held authorized by para. (h). In R. v. Bell[88] the accused, fined for a second offence of possession of a narcotic, was also placed on probation for one year. Special terms included:

> (1) that you will continue with your school studies, and when the school term has been completed you will seek to find and maintain gainful employment or further your education by additional studies.
> (2) that you will authorize your school principal to furnish [the] court with reports on your progress and conduct in school as and when requested and, in particular, you will arrange to have a report sent to this court not later than March 1st, 1980.

Similarly in R. v. Rose[89] the accused, illiterate and with a drinking problem, was placed on probation with conditions, inter alia, that he seek help to overcome his alcohol problem and "learn to read and write" by enrolling in an adult education course.

Paragraph (h) conditions may also be used in an attempt to limit the possibility of further offending. In R. v. Kirby[90] the accused was convicted of having sexual intercourse with a female under 14. The Court imposed a condition that he "not associate with females under the age of fourteen years, except for close relatives".[91]

The areas of most interest in which para. (h) has been used, however, include the imposition of community service orders, curfew, freedom of movement and association restrictions, driving and drugs prohibitions, and treatment orders.

(l) Community Service Orders

The community service order is "a non-custodial penalty requiring an offender to work unpaid for a specified number of hours".[92] While, unlike the situation in England,[93] there is no specific legislation authorizing such orders in Canada, their legality has been specifically upheld,[94] and their imposition today is a matter of common practice.

The virtues of the community service order were outlined in R. v. Jones.[95] Community service is an alternative to a custodial sentence in those cases where the public interest does not demand that the offender should be imprisoned. It allows the offender to continue to live with his wife and family in the community, and support them by normal work. It shows the offender that society is involved in his delinquency, and that he has incurred

a debt which can be repaid. It also attempts to demonstrate to the public that an offender, properly supervised, can contribute to the public good.

One benefit of the absence of specific legislation is that the work involved in the order may be uniquely suited to the offender's own talents and needs. As Judge Stortini has pointed out:

> An essential difference between community service and any other sentence is that it requires the offender to take on the role of "helper" not "helped"; the work is of a sort normally undertaken by volunteers, so that an offender can be seen and may feel himself to be making reparation to the community. By limiting the tasks to be performed good relations can be maintained with the trade unions. Many of the tasks involve more than mere physical labour, they bring the offender — perhaps for the first time in his life — into personal contact with others worse off than himself, whom he finds he is able to help.[96]

An extremely wide range of work may be the subject of an order. In R. v. Richards,[97] the accused was a member of the rock group, "The Rolling Stones". On conviction of possession of heroin he was ordered, inter alia, to perform a free concert for the benefit of a charity. On appeal, it was held that this was an appropriate form, the Court stressing that the duties required should be those which the accused is fitted to perform. Although it was not practicable to impose new terms at the time of the appeal, the order should also have required Richards to engage in a programme pointing out the disastrous consequences of addiction, and discouraging the use of drugs.

Judge Carver has pointed out[98] that it is possible to require the offender to find his own work. Indeed, that may be a useful part of the rehabilitative process, and in the case of offenders with specialized training they may be the best persons to suggest suitable labours. In R. v. Draisey[99] the accused, aged 44, was driving while impaired, and caused a head-on collision which killed the other driver. He had no previous convictions and

pleaded guilty. The Court held that the case was one "eminently suited" to a sentence involving community service under a probation order. The accused had volunteered to perform a research project involving an examination of the emergency facilities at a hospital, and deliver a report to its Medical Advisory Committee. The hospital's chief of staff indicated the need for a report, lack of funding, and the suitability of the accused (a pathology specialist) to carry it out. Also in evidence was a statement by the Co-ordinator of the city Community Service Project that the project could be monitored.[100]

(2) Curfew

Cases in which a total curfew has been imposed for certain hours are rare. There is, however, some indication that in appropriate cases a curfew might be suitable. In R. v. Stennes,[101] the accused was convicted of attempted theft and sentenced to imprisonment followed by probation. His conditions included a curfew from midnight to 7:00 a.m., unless "working on the night shift". The Court struck out the condition, stating that while such provision might be applicable in the case of a young man inclining toward a criminal life, it was not appropriate at all for a man of 32.

(3) Restrictions on Freedom of Movement and Association

In contrast to the power in s. 663(2)(f) to require the accused to stay within the jurisdiction, the Courts frequently impose conditions forbidding the accused from entering certain localities or associating with certain persons. From the very nature of this kind of order, fear naturally

arises of interference with fundamental rights, and the Courts have been suspicious of such dispositions. Nevertheless, if a condition is sensible, not unduly restrictive, and clearly connected to the offence and/or rehabilitation of the offender, it will in all probability be upheld.

A common type of condition forbids the accused from frequenting a certain small area felt by the Court to be a location conducive to criminality. In R. v. Melnyk,[102] for example, the accused alleged that a condition of her probation was invalid. It read:

> Not to be found at any time during the night time, namely, after 6:00 p.m. or before 9:00 a.m. in the downtown area of Vancouver, namely the waterfront to the North, Stanley Park to the West, the Extensions of False Creek to the South and Commercial Drive to the East.

The appeal Court found the condition, and consequently the conviction in respect of its breach, valid. It was not a decree of exile within the meaning of s. 2(a) of the Bill of Rights.[103] Secondly, the condition was not unreasonable. Following dicta of McFarlane, J.A. in R. v. Cleary,[104] it was reasonable to impose a condition that a person should not habituate certain localities. Thirdly, the provision was not so vague as to be unenforceable.

A second and more objectionable condition is one which tries to banish the accused completely from a particular area during the currency of the order. In R. v. Fuller[105] this type of condition was disapproved. Dickson, J.A., in a strongly worded judgment, stated that the Court would not tolerate "[a] practice whereby one community seeks to rid itself of undesirables by foisting them off on other communities...".[106] Similarly, in R. v. Cleary,[107] the trial Judge imposed as terms of probation, inter alia, that the accused was not to associate with any known drug users and on release was to leave the Counties of Vancouver and New Westminster and not return without leave of the Court. On appeal, MacFarlane, J.A. stated:

> For myself I have grave doubts about the wisdom of the second of those conditions. It is certainly within the terms of the Criminal Code to impose a condition that a man shall not associate with certain persons or habituate certain localities. But I have grave doubts about the wisdom of saying that a man shall not come to certain parts of Canada, any Province or any City or County. The matter was not argued here, so what I am saying is really obiter, but I would not like it to be thought that this Court has approved a probation order of that kind.

The Newfoundland Court has firmly established, in this matter, the strength of the principle that the Court must not attempt to achieve indirectly what it cannot do directly. In R. v. LaSaga[108] the accused, who had been working in Manitoba, visited his home town of Bell Island while awaiting unemployment insurance benefits. He committed an offence of break and enter while there. The Magistrate sentenced him to 18 weeks' imprisonment and three years' probation. Conditions of the probation order were:

> (a) Not to return upon Bell Island, Nfld., unless,
> (i) you have employment;
> (ii) a medical emergency exists concerning your family;
> (b) If you do return to Bell Island, Nfld., pursuant to term 1 you must notify the R.C.M.P. and the Provincial Court, Bell Island, Nfld., of the date of your expected arrival at Bell Island;
> (c) While on Bell Island not to consume alcohol, not to associate with persons of criminal record, not to enter any drinking establishments;
> (d) While resident in Nfld. report to a Probation Officer twice per month.

The Court noted that the general purpose of a probation order is to secure the good conduct of the accused. He may thus be required to comply with reasonable conditions as the Court considers desirable for securing such good conduct, and for preventing a repetition by him of the same offence or the commission of other offences. With this in mind, it was difficult to determine the basis upon which the first three conditions were included in the

order. They prevented the accused from returning to his home town except for specified reasons, but were applicable only with respect to his behaviour in that community. They were thus not reasonable conditions for securing the good conduct and related aspects of the accused, and were deleted.[109]

Barnett[110] notes three cases in which the accused has been required to depart from British Columbia.[111] Invariably such orders require the accused to reside with a relative elsewhere. In light of the decisions in R. v. Ross,[112] R. v. Jackson[113] and R. v. Holhäuser,[114] in each of which such conditions were struck out on the basis of evidence that they had caused difficulties for the accused, his comments on such orders bear serious consideration:

> One wonders whether these orders proved any more successful than those made at trial in the Ross, Jackson and Holhauser cases. With respect, it seems to this writer that attempts by courts to re-cement the bonds between parents and adult offenders in this fashion are not likely to meet with much success in the long run and, in all probability, all such orders really accomplish is the banishment of the offender from the province where the order is made.[115]

A related, infrequently-used condition is one which attempts to regulate the company kept by the accused. While such orders are clearly within the powers of the Courts,[116] it is submitted that they should be imposed keeping firmly in mind the enforceability aspect and the proper purposes of such an order. Restricted conditions directly relating to the offence, such as that in R. v. Koemsted,[117] not to associate with the co-accused, or that in Kirby, discussed above,[118] are most likely to be effective. It is more difficult to see how the accused can be expected not to associate with persons with criminal records,[119] or with "persons using drugs".[120]

(4) Driving Prohibitions

In R. v. Ziatas,[121] while holding that a prohibition from driving was inappropriate in the precise circumstances of that case, the Ontario Court of Appeal declined to decide whether such terms could be legally imposed in appropriate cases. At the time, s. 238 of the Criminal Code, since repealed, was still in force, listing those convictions pursuant to which the Court could issue an order prohibiting driving. The same Court, however, again declined to decide the issue in 1979.[122]

Courts in other provinces have, however, imposed such prohibitions. A condition prohibiting driving was imposed in R. v. Pineau[123] by the Alberta Court of Queen's Bench, and the Quebec Superior Court addressed the issue squarely in its recent decision of Nadeau v. R.[124]

The accused was found guilty of impaired driving, and pleaded guilty to a charge of failing to comply with a demand for a breath sample. As a condition of probation, the Court imposed a "prohibition against driving a vehicle in Canada for a period of one year". On appeal, the accused contended that this condition was illegal: since Judges had lost the power to issue orders prohibiting driving with the repeal of s. 238(1) of the Criminal Code, and they could not do indirectly, under s. 663, what was not within their direct power. The appeal was dismissed, the Court holding that the

> ... repeal of s. 238(1) was effected to put an end to any jurisdictional conflict which could have been said to exist between federal and provincial legislation on the matter. However, the court was not persuaded that the repeal had any effect on the powers granted it by s.663(2)(h) to prescribe, in a probation order, any reasonable condition it considered desirable for securing the good conduct of the accused and for preventing a repetition by him of the same offence or the commission of others. In other words, the repeal of s. 238(1) aimed at something other than a

> restriction of the discretion given the court by s. 663(2)(h). Whether or not a given condition is reasonable or desirable obviously depends on the circumstances in a given case. The accused had been found guilty of some eight other offences of impaired driving and of refusing to provide a breath sample within the three years preceding the trial which gave rise to the present appeal. Not only was the prohibition against driving reasonable, but it was the only means of adequately protecting both the public and the accused.

The British Columbia Court has also upheld driving prohibitions, subject to the usual requirements that they be reasonable, related to the offence, and designed to secure rehabilitation.[125] It was pointed out in R. v. Gladstone[126] that most driving terms restrict, rather than obviate, the offender's driving privileges. This is an obvious and sensible approach, particularly where the accused has to drive to and from, or in the course of, his work.[127]

(5) Drugs Prohibitions

Barnett[128] argues that there is no merit to the imposition of conditions forbidding the use of drugs, despite their use and approval by appellate Courts.[129] "Surely", his Honour says, "no court would say that a person convicted of manslaughter should be told, as a condition of probation, not to kill again."[130] With respect, it is submitted should be pointed out that this is a false analogy. Conditions forbidding drugs usually require submission to urinalysis testing on demand.[131] Although it has been held that the preserve of a drug in urine is not sufficient evidence to sustain a conviction for possession,[132] it is doubtful whether many offenders are familiar enough with the intracacies of the law to know this. In any event, in many cases urinalysis will lead to further inquiry and other evidence which may not come

to light. The urinalysis condition, therefore, may be a helpful device in discouraging the offender from "risking" further drug use.

As with all conditions, such a provision must of course be reasonably related to the accused's offence and/or rehabilitation. Such orders will be struck out where there is no evidence that the accused is, or has been, involved with drugs.[133]

(6) Treatment Conditions

It is common for a Court to make the following of psychiatric treatment, drug or alcohol rehabilitation courses a condition of probation.[134] As noted above,[135] this is also an area where wide discretion has been granted to probation officers.

It is submitted that such conditions should only be imposed where there is at least a reasonable chance of success. In R. v. Sabloff,[136] the Court decided not to enforce behaviour modificaiton therapy upon a 30-year-old female convicted of morphine trafficking. A heroin addict, she had enrolled in such a programme before but had dropped out. While a condition of her probation that she maintain employment would not apply if she voluntarily enrolled in another such programme, the Court felt that enforced participation is not of much benefit to either the accused or to society. "The essential precondition for success in such a programme is the existence in the addict of an overwhelming desire to break and defeat the addiction."

D. COMING INTO FORCE AND CONTINUATION OF ORDERS

The Criminal Code provides:

664.(1) A probation order comes into force
(a) on the date on which the order is made, or
(b) where the accused is sentenced to imprisonment under paragraph 663(1)(b) other-wise than in default of payment of a fine, upon the expiration of that sentence.
(2) Subject to subsection (4),
(a) where an accused who is bound by a probation order is convicted of an offence, including an offence under section 666, or is imprisoned under paragraph 663(1)(b) in default of payment of a fine, the order continues in force except in so far as the sentence renders it impossible for the accused for the time being to comply with the order; and
(b) no probation order shall continue in force for more than three years from the date on which the order came into force.

Explaining the effect of s. 664(1)(b), the Manitoba Court in R. v. Constant[137] held that a probation order following imprisonment comes into force on the day of release from prison, notwithstanding that statutory and earned remission shorten the period of incarceration.

E. REVOCATION AND VARIATION OF ORDERS

The Criminal Code provides:

664.(3) Where a court has made a probation order, the court may at any time, upon application by the accused or the prosecutor, require the accused to appear before it and, after hearing the accused and the prosecutor
(a) make any changes in or additions to the conditions prescribed in the order that in the opinion of the court are rendered desirable by a change in the circumstances since the conditions were prescribed,
(b) relieve the accused, either absolutely or upon such terms or for such period as the court deems desirable, of compliance with any condition described in any of paragraphs 663(2)(a) to (h) that is prescribed in the order, or
(c) decrease the period for which the probation order is to remain in force, and the court shall thereupon endorse the probation order

accordingly and, if it changes or adds to the conditions prescribed in the order, inform the accused of its action and give him a copy of the order so endorsed.

(4) Where an accused who is bound by a probation order is convicted of an offence, including an offence under section 666, and

(a) the time within which an appeal may be taken against that conviction has expired and he has not taken an appeal,

(b) he has taken an appeal against that conviction and the appeal has been dismissed, or

(c) he has given written notice to the court that convicted him that he elects not to appeal his conviction or has abandoned his appeal, as the case may be,

in addition to any punishment that may be imposed for that offence the court that made the probation order may, upon application by the prosecutor, require the accused to appear before it and, after hearing the prosecutor and the accused,

(d) where the probation order was made under paragraph 663(1)(a), revoke the order and impose any sentence that could have been imposed if the passing of sentence had not been suspended, or

(e) make any changes in or additions to the conditions prescribed in the order as the court deems desirable or extend the period for which the order is to remain in force for such period, not exceeding one year, as the court deems desirable,

and the court shall thereupon endorse the probation order accordingly and, if it changes or adds to the conditions prescribed in the order or extends the period for which the order is to remain in force, inform the accused of its action and give him a copy of the order so endorsed.

(5) The provisions of Parts XIV and XV with respect to compelling the appearance of an accused before a justice apply mutatis mutandis to proceedings under subsections (3) and (4).

Despite the length and detail of these subsections, they have been the subject of surprisingly little detailed comment. In R. v. Graham[138] it was held that in s. 664(4), "the Court that made the probation order" refers to the Provincial Court Judge who made the order, not any such Judge. The Provincial Judge who made the order would have before him all the necessary facts of the offence and the offender. As a Judge other than the original

Judge had purported to act under s. 664(4), without any evidence of invocation or compliance with the provisions of s. 665, the sentence imposed was quashed.

Little procedural stipulation is made for revocation hearings. The decision of the Ontario Court of Appeal in R. v. Tuckey[139] indicates that at a minimum the rules of natural justice must prevail. In that case, the requirements of notice to the accused and an opportunity to make full answer and defence were applied to s. 664 proceedings. The accused should be given reasonable notice, in writing, of the Crown's intention to take such proceedings, including a clear articulation of the nature of the proceedings, the grounds relied upon, the nature of the order sought, and the date of the hearing.

A further decision of interest was rendered by the Ontario Court in R. v. Oakes.[140] Oakes had been made subject to a probation order, and was subsequently sentenced for another offence. It was held that sentence on revocation of the original order could not be set to run consecutively to the sentence on the later offence. Section 664(4)(d) authorized the Court to "impose any sentence that could have been imposed if the passing of sentence had not been suspended". At the time sentence was suspended, there was no sentence being served to which the revocation sentence could be made consecutive.

A controversial point arises where a probationer re-offends near the end of his term. Must revocation, or revocation and sentencing, take place before the end of the term to avoid loss of jurisdiction? In an older decision, R. v. Ogles,[141] the New Brunswick Court held that both revocation and sentencing must be completed before the expiry of the period. In Re George[142] Dryer, J. held that provided the offence was committed during the

term, revocation and sentencing could take place after expiry. Re George is against the balance of authority, the Alberta Court also having decided recently that revocation may not take effect after expiration of the term.[143] These issues, and some interesting new ones, were fully considered very recentlfy by the Quebec Court of Appeal in Mantanaro v. Greenberg J. et al.[144]

On October 7th, 1977, the accused, Mantanaro, pleaded guilty to three charges of breaking and entering. The Judge suspended sentence and put him on probation for two years. On October 4th, 1979, a few days before the order expired, the accused appeared before the same Judge to answer an application under s. 664(4) for revocation of probation and imposition of sentence. On October 5th, 1979, still just before expiry, after hearing both sides, the Judge revoked the probation order and had the accused detained.

Pursuant to a request by the accused's counsel for a pre-sentence report - a request which counsel suspended until October 11th, 1979 - the Judge postponed the passing of sentence until October 11th, 1979. On that day, following a renewed request by the accused's counsel for a pre-sentence report, the Judge ordered that a report be prepared and again postponed the passing of sentence, this time until November 12th, 1979. Because of a strike of court personnel, the Chief Justice postponed the passing of sentence to November 29th, 1979. Before that date, the accused applied for habeas corpus with certiorari in aid, claiming that the Judge ought simultaneously to hvae revoked the probation order and imposed a sentence. It was contended that in failing to do so the Judge lost jurisdiction, thus rendering the accused's detention illegal. The application was denied, and the accused appealed. His appeal was also unsuccessful.

The Court held that there is a great difference between the use of the word "and" in s.663(1)(a) and that in s.664(4)(d) of the Criminal Code. In

the first case, the suspension of the passing of sentence goes hand in hand with the order, which is a condition sine qua non for the prisoner's release. In the second case, the order is revoked and sentence is passed after full discussion, including, where necessary, the preparation of a pre-sentence report. There is no provision in the Criminal Code which would require that sentence actually be pronounced within the period set in the order. The "revocation" must be within that period, if for no other reason than that something which no longer exists cannot be revoked, but that is where it ends.

The Court further addressed the legality of the accused's detention.

> The power to order the detention of the accused is not specifically spelled out in s.664(4)(d), but it is inherent in the process of revocation and sentence. Section 663(1)(a) has proved to be a useful vehicle. There is, however, some difficulty with s.664(4), for the Court's jurisdiction to revoke and impose sentence exists only when the accused has been convicted of an offence. It is not unusual that an accused who is charged with an offence committed while subject to an order cannot be tried and convicted in sufficient time to have the application made before the order expires. On the other hand, even where an accused pleads guilty and is sentenced and does not appeal, an application by the prosecution may be futile, because any sentence imposed in virtue of s.664(4)(d) will be concurrent with the sentence imposed for the offence committed while on probation.[145]

Despite its own certainty on these issues, the Court went on to comment that difficulties in this area are not uncommon, and suggested that some clarification from Parliament may be in order.

Even scarcer than substantial reported decisions in the area of revocation are those concerning variation. Procedural matters have occasionally been considered. In R. v. Muise[146] it was held tht a variation effected after hearing the accused ex parte errs in law. The Code required

that both the accused and the prosecutor must be heard. In an unreported decision, R. v. Siple,[147] the Ontario Court stressed that the proper forum for variation is the convicting Judge, no doubt because of his first-hand knowledge of all the circumstances of the case.[148] In the event, however, in light of delays in bringing the case to trial the Court of Appeal itself effected the desired variation.

F. TRANSFER OF ORDERS

The Criminal Code provides:

> 665. (1) Where an accused who is bound by a probation order becomes a resident of, or is convicted of an offence including an offence under section 666 in a territorial division, other than the territorial division where the order was made, the court that made the order may, upon the application of the prosecutor, and, if both such territorial divisions are not in the same province, with the consent of
>
> (a) the Attorney General of Canada, in the case of proceedings in relation to an offence that were instituted at the instance of the Goverment of Canada and conducted by or on behalf of that Government, or
>
> (b) in any other case, the Attorney General of the province in which the order was made,
>
> transfer the order to a court in that other territorial division that would, having regard to the mode of trial of the accused, have had jurisdiction to make the order in that other territorial division if the accused had been tried and convicted there of the offence in respect of which the order was made, and the order may thereafter be dealt with and enforced by the court to which it is so transferred in all respects as if that court had made the order.
>
> (2) Where a court that has made a probation order or to which a probation order has been transferred pursuant to subsection (1) is for any reason unable to act, the powers of that court in relation to the probatoin order may be exercised by any other court that has equivalent jurisdiction in the same province.

Again, procedural matters only have been considered in recent reported decisions. In R. v. Graham,[149] it was pointed out that the prosecutor has a strong duty of fairness to the Court and to the accused. Where the original Judge is unable to act, quite apart from establishing to the satisfaction of the "new" Court the reason for the inability the prosecutor should bring before it all background material and information, such as the pre-sentence report, in the hands of the original Court.

In R. v. Vanryckegham[150] an application to transfer a probation order from Alberta to "The Provincial Magistrate's Court, Regina in the Province of Saskatchewan" was refused in light of the absence of the name of a Judge of the receiving Court. The Court held that an order can only be transferred under s.665(1) if the name of a person in the other province is made available to the "sending" Judge. The transfer must be to a person appointed under the law of the receiving province, who is specially authorized to exercise Part XVI magisterial powers, the word "magistrate" involving a person, rather than a court.

G. BREACH OF PROBATION

The Criminal Code provides:

> 666. (1) An accused who is bound by a probation order and who wilfully fails or refuses to comply with that order is guilty of an offence punishable on summary conviction.
>
> (2) An accused who is charged with an offence under subsection (1) may be tried and punished by any court having jurisdiction to try that offence in the place where the offence is alleged to have been committed or in the place where the accused is found, is arrested or is in custody, but where the place where the accused is found, is arrested or is in custody is

> outside the province in which the offence is alleged to have been committed, no proceedings in respect of that offence shall be instituted in that place without the consent of the Attorney General of such province.

Minor interpretational matters dealt with in recent years include the meaning of "an accused" and "wilfully", and limitations on proceedings under s.666.

In R. v. McGowan[151] the British Columbia Court of Appeal held that a juvenile who has been "raised" to the ordinary courts and made subject to a probation order there is liable to be tried for breach of that order in the same Court. He is an "accused" within the meaning of s.666.

Lower courts in Manitoba[152] and British Columbia[153] have indicated that a strong onus lies on the Crown to prove not only that the accused intended to do an act which breached the probation order, but also that he intended thereby to breach the order. The effect of this burden is mitigated somewhat, as was noted in R. v. Shaver,[154] by the Court's ability to draw inferences from conduct where appropriate.

In Butkans v. The Queen[155] the accused was subject to a probation order which contained, inter alia, a condition that he pay a sum of money in restitution by a certain date. He failed to comply, and was convicted for breach of the order in proceedings instituted more than six months after the date of the breach. On appeal, the conviction was quashed. As failure to make restitution is not a continuing offence, the six-month limitation on summary proceedings in s.721(1) of the Code applies to bar prosecutions outside that period.[156]

The regular principles of sentencing must be applied with particular care in breach of probation cases. The breach is an offence, and the Courts are understandably reluctant to impose mere token penalties upon offenders who commit crimes in defiance of the conditions of their

probation.[157] However, it must be remembered that many offenders who come before the Courts on s.666 charges will already have been convicted of other offences, giving rise to these charges. If sentence on other offences was imposed taking into account that they were committed in breach of probation, a penalty other than nominal comes perilously close to violating the principle that no man should be exposed to double punishment,[158] although the rule in Kienapple v. The Queen[159] against multiple convictions is not violated by a prosecution under s.666 on the basis of other offences.[160] The rationale for this latter statement is that the "other offence" and the breach of probation are separate, not alternative charges, containing different elements.[161] Parliament has made it quite clear, in any event, that an accused may be punished under s.666 for offences of which he has already been convicted.[162] For similar reasons, where an accused breached a term forbidding alcohol, and had previously been convicted for unlawful consumption in respect of the same act, he could not plead autrefois convict to a charge under s.666.[163]

Further, if substantial terms of imprisonment have already been imposed for other offences, then the principle of totality comes into play, making it likely that only a short consecutive term will be set. Despite a strong contention in R. v. Chinn[164] that there is no "tariff, scale or usual range of sentence" for this offence, the maximum sentence available, six months' imprisonment and/or a fine of $500, naturally sets bounds to the severity with which infringements may be treated,[165] and sentences for breach of conditions other than good behaviour (breached by re-offending) are usually of substantially lesser duration than the maximum.[166]

Footnotes to Chapter 28

1. The author wishes to acknowledge significant assistance derived throughout this Chapter from an important and useful article by Judge C.C. Barnett, "Probation Orders Under the Criminal Code," (1977), 38 C.R.N.S. 165.

2. See e.g. R. v. Bouzane, [unreported] January 31st, 1977 (B.C.C.A.).

3. This Chapter is limited to a discussion of the present law of probation. For historical and evaluative comment, see Boyd, N., "An Evaluation of Probation," (1977-78), 20 Crim. L.Q. 355; Parker, G., "The Law of Probation," (1977), 19 Can. J. Criminol. & Corr. 53; Armour, E., "Suspended Sentence," (1926), 46 C.C.C. 98.

4. R. v. Desmarais (1971), 3 C.C.C. (2d) 523 (Que. C.A.); Baird v. Nichol (1980), 29 N. & P.E.I.R. 451, 82 A.P.R. 451 (Nfld. S.C.).

5. Thus, s.32(2) of the Immigration Act, R.S.C. 1970, c.I-2 [now s.52(2) of the Immigration Act, S.C. 1976-77, c.52], providing that a person who has not completed his sentence cannot be deported, has no application. Tulshi v. Minister of Manpower and Immigration (1976), 14 N.R. 280 (Fed. C.A.).

6. Criminal Code, s.664(4)(d).

7. Ibid. s.664(4)(e).

8. Which is the form used in Britain. See generally Thomas, D.A., Principles of Sentencing, (2nd ed. 1979, London: Heinemann Books Ltd.) at 239ff.

9. (1973), 21 C.R.N.S. 339 (Que. C.A.).

10. (1977), 34 C.C.C. (2d) 572 (Ont. C.A.).

11. See R. v. Guptill and McCrum (1975), 11 N.B.R. (2d) 477 (C.A.); R. v. Smith (1973), 25 C.R.N.S. 350 (Sask. C.A.).

12. R. v. Chartrand (1971), 17 C.R.N.S. 233 (Que. C.A.); R. v. Brookes, [1970] 4 C.C.C. 377 (Ont. C.A.).

13. R. v. Dawdy (1973), 12 C.C.C. (2d) 477 (Ont. C.A.). See further Barnett, supra note 1 at 178.

14. See e.g. R. v. Stein (1974), 15 C.C.C. (2d) 376 (Ont. C.A.); R. v. Pharo (1970), 12 C.R.N.S. 151 (Ont. Co. Ct.); R. v. St. Onge (1977), 17 N.B.R. (2d) 99 (C.A.).

15. R. v. Desmarais, supra note 4.

16. For judicial affirmation that s.663(1)(b) is unambiguous in this respect, see R. v. Nutter, Collishaw and Dulong (1970), 7 C.C.C. (2d) 224 (B.C.C.A.).

17. Criminal Code, s.663(1)(b). But not to individual terms under two years totalling over two years: R. v. Young, (1980), 4 W.C.B. 428 (B.C.C.A.).

18. Supra Chapter 27.B.i.

19. (1975), 24 C.C.C. (2d) 168 (Ont. C.A.).

20. (1972), 7 C.C.C. (2d) 468 (N.W.T. Terr. Ct.).

21. (1975), 11 N.S.R. (2d) 81 (C.A.).

22. [Unreported] June 28th, 1972 (N.S.C.A.).

23. R. v. Bundon (1975), 8 N. & P.E.I.R. 403 (Nfld. Prov. Ct.); R. v. Brown (1976), 13 N. & P.E.I.R. 1 (Nfld. Prov. Ct.).

24. Supra note 1 at 175-76.

25. R. v. Martichuk, [unreported] September 30th, 1974 (B.C.C.A.); R. v. Reimer, [unreported] June 14th, 1974 (B.C.C.A.).

26. Although the Courts do sometimes forget. See e.g. the decisions listed by Barnett, supra note 1 at 174.

27. Care must be taken, if this device is used, to avoid thwarting of the sentencer's intent by the operation of statutory remission. For a fuller explanation see Barnett, ibid.

28. Supra note 1 at 176. See also R. v. de Vito (1977), 19 C.W.B. 177 (Que. C.A.), cited ibid.

29. R. v. Thomas, [1968] 1 O.R. 1, [1968] 2 C.C.C. 84 (C.A.).

30. Criminal Code, s.663(3).

31. Judge Barnett elaborates: "When the British Columbia Court of Appeal makes a probation order it often (but not always) explains the potential consequences of further trouble to the person in court in the following terms:

> "I inform you that the effect of Section 666 of the Criminal Code is that if you fail or refuse to comply with any of the conditions in the probation order you may be punished therefor; and I inform you that the effect of Sub-section (4) Section 664 of the Criminal Code is that if you, while you are on Probation, are convicted of an offence including a breach of the Probation Order, then in addition to any punishment that may be imposed for that offence, if you commit

> one, the Court may change or add to the conditions of the Probation Order. Do you understand that?'

The practice of the British Columbia Court of Appeal is to direct that the registrar, deputy registrar or assistant deputy registrar of that court observe the requirements of s.663(4): see Regina v. Poitras; Regina v. Bodnar, [B.C.C.A., May 15th 1972, Nos. 423 and 424/72]; Regina v. Kennedy, 24th February 1976, No. 442/75 (not yet reported) (but note that in Kennedy McFarlane J.A. errs in stating that if there were a breach of the probation order "Your sentence for the present offence may also be reconsidered.' That is not so where, as in Kennedy, there is a gaol sentence plus a probation order); Regina v. Davis, 4th June 1974, No. 275/74 (not yet reported).

The practice of the Ontario Court of Appeal is to direct that 'the person in whose custody he is immediately prior to his release will comply with the provisions of s. 663(4) of the Code': see Regina v. Marcello (1973), 11 C.C.C. (2d) 302; Regina v. Stein (1974), 15 C.C.C. (2d) 376; Regina v. Vandale (1974), 21 C.C.C. (2d) 250; and Regina v. Demeter, [(1976), 32 C.C.C. (2d) 379 (Ont. C.A.)].

In Regina v. Christman, 22 C.R.N.S. 338 at 342, [1973] 3 W.W.R. 475, 11 C.C.C. (2d) 245n, the Alberta Supreme Court, Appellate Division, directed that a conditional discharge be granted and stated that 'for this purpose the case is remitted to the trial Court to make the order and comply with the requirements of subs. (4) of s. 663'. In Regina v. Hermann (1974), 18 C.C.C. (2d) 255, a probation order was made by the Nova Scotia Supreme Court, Appeal Division. The court stated [p.256]: 'We direct that the probation order be read to the accused by his counsel, who will give him a copy of the order and at the same time inform him of the provisions of ss.664(4) and 666 of the Criminal Code, all pursuant to the provisions of s-s. (4) of s. 663.' In Regina v. O'Brien (1976), 36 C.R.N.S. 84, 31 C.C.C. (2d) 396 (Nfld.), the learned judge simply contented himself with stating [pp.412-13]: 'I also bring to the attention of the accused and to his counsel the provisions of s-s. (4) of s. 663 of the Code.' In the writer's respectful opinion, the procedures suggested in these cases are inadequate and wrong." Supra note 1 at 183-84.

32. (1972), 7 C.C.C. (2d) 30; 18 C.R.N.S. 230 (Ont. Prov. Ct.).

33. Ibid. at 33 per Marin, J.

34. (1976), 31 C.C.C. (2d) 150 (Sask. Q.B.); followed as to effect of failure to comply with s. 663(4)(c), and approved as to effect of failure to comply with s. 663(4)(b) in R. v. Shaver (1977), 38 C.C.C. (2d) 545 (B.C. Co. Ct.).

35. Ibid. at 153 per Bence, C.J.Q.B.

36. (1978), 2 Can. J. Fam. L. 196 (Ont. Prov. Ct.).

37. (1978), 45 C.C.C. (2d) 152 (Que. Sup. Ct.).

38. (1979), 51 C.C.C. (2d) 99 (B.C.C.A.).

39. (1980), 56 C.C.C. (2d) 111 (Alta. C.A.).

40. Supra note 1 at 186-87.

41. Ibid. See R. v. Doiron (1972), 9 C.C.C. (2d) 137 (B.C.S.C.).

42. (1979), 1 Sask. R. 93 (C.A.).

43. R. v. Shorten, 29 C.C.C. (2d) 528, [1976] 3 W.W.R. 187 (B.C.C.A.) per Seaton, J.

44. R. v. Gladstone (1978), 40 C.C.C. (2d) 42 (B.C. Co. Ct.).

45. (1975), 35 C.R.N.S. 123 (B.C.C.A.).

46. Ibid. at 127 per Bull, J.A.

47. (1977), 36 C.C.C. (2d) 401 (Ont. C.A.).

48. Baird v. Nichol, supra note 4.

49. Supra note 45.

50. See also R. v. Ziatas (1973), 13 C.C.C. (2d) 287 (Ont. C.A.).

51. (1954), 19 C.R. 367 (Ont. C.A.).

52. (1976), 29 C.C.C. (2d) 528 (B.C.C.A.).

53. (1974), 21 C.C.C. (2d) 250 (Ont. C.A.).

54. (1978), 5 C.R. (3d) S-29 (Ont. C.A.).

55. Although, it is submitted, the Courts must not go too far. For an example of an order which is clearly unjustifiable, see R. v. Siple, [1973] B.N. 88 (Ont. C.A.), where the Court ordered the accused to comply with "such other provisions as are fixed from time to time by the probation officer".

56. (1975), 11 N.S.R. (2d) 100 (C.A.).

57. (1975), 11 N.S.R. (2d) 81 (C.A.).

58. (1978), 5 C.R. (3d) S.-27 (Ont. C.A.).

59. (1967), 1 C.R.N.S. 389 (N.W.T. Terr. Ct.).

60. Ibid. at 390-91 per Morrow, J.

61. [1940] 3 W.W.R. 289, 74 C.C.C. 318, [1940] 4 D.L.R. 478 (Alta. C.A.).

62. 45 C.R. 272, 50 W.W.R. 289, [1965] 3 C.C.C. 152 (B.C. Co. Ct.).

63. The authority on "good behaviour" considered in Lafferty and Chalmers, Chesley v. Council of Lunenburg (1916), 50 N.S.R. 85, 28 D.L.R. 571 (N.S.S.C.) is hardly applicable, as it concerned a solicitor's tenure of office during "good behaviour".

64. Supra note 62, 45 C.R. at 293.

65. (1967), 3 C.R.N.S. 58 (Y.T. Mag. Ct.).

66. Ibid. at 60 per Trainor, P.M. For further discussion of the meaning of "peace" see R. v. Badenoch (1968), 4 C.R.N.S. 293 (B.C.C.A.).

67. (1968), 5 C.R.N.S. 251 (N.W.T. Terr. Ct.).

68. For further comments on procedural aspects, see Chasse, K.L., "Breach of Probation as an Offence," (1968-69) 5 C.R.N.S. 255.

69. (1972), 9 C.C.C. (2d) 137 (B.C.S.C.).

70. (1973), 15 Crim. L.Q. 258 (Ont. C.A.); cited by Barnett, supra note 1 at 192.

71. Ibid.

72. See e.g. R. v. Chamberlain (1974), 22 C.C.C. (2d) 361 (Ont. C.A.); R. v. Martin (1974), 17 C.C.C. (2d) 66 (N.S.C.A.); R. v. Smith (1974), 16 Crim. L.Q. 255 (Ont. C.A.); R. v. Cuthbert (1975), 18 Crim. L.Q. 148 (Ont. C.A.); - all cited by Barnett, supra note 1.

73. See Barnett, supra note 1 at 193.

74. Ibid at 195.

75. R. v. Dashner (1974), 15 C.C.C. (2d) 139 (B.C.C.A.).

76. R. v. Munro, supra note 42.

77. See e.g. R. v. Stein, supra note 14; R. v. Colby [1976] B.N. 575 (Ont. C.A.); R. v. Walls (1976), 2 A.R. 263 (T.D.).

78. As to the legality of directing the probation officer to fix the terms of payment, see supra, text accompanying notes 51-58.

79. [Unreported] October 26th, 1976 (B.C.C.A.); cited by Barnett, supra note 1 at 179.

80. (1974), 26 C.C.C. (2d) 474 (Ont. H.C.).

81. [1976] W.W.D. 128 (Man. C.A.).

82. (1977), 37 C.C.C. (2d) 429 (Ont. H.C.).

83. Supra note 1 at 191.

84. (1972), 6 C.C.C. (2d) 574 (Ont. C.A.).

85. Supra note 45.

86. Supra note 1 at 202. Judge Barnett goes on to suggest a more effective form: "Make diligent efforts to find and maintain employment approved by the probation officer. If, on any occasion that he reports to the probation officer as required by this order, he is not actually then employed, he must provide the probation officer with a written report concerning all efforts made to find employment since ceasing to be employed or since last reporting. This report must detail:
(a) who was seen
(b) what work was sought
(c) what response was received.
Where necessary, this condition can be supervised and enforced. In appropriate cases, a condition can be added requiring that the probationer "Advise the probation officer before applying for Unemployment Insurance or welfare benefits." Ibid. at 202-03.

87. (1974), 8 N.S.R. (2d) 553 (N.S.C.A.).

88. (1979), 23 A.R. 398 (N.W.T.S.C.).

89. (1979), 5 Man. R. (2d) 211 (Co. Ct.).

90. (1976), 24 N. & P.E.I.R. 260 (Nfld. Prov. Ct.).

91. See further R. v. McCallum, [unreported] April 10th, 1974 (B.C.C.A.), in which the Court substantially limited the access of an incestuous father to his family.

92. Stortini, R., "Community Service Orders," (1978-79) 21 Crim. L.Q. 503.

93. See generally Thomas, supra note 8 at 236-39.

94. R. v. Jones (1975), 25 C.C.C. (2d) 256 (Ont. Co. Ct.). In R. v. Stennes, supra note 45, the Court held that such an order is not the equivalent of a fine, and thus can be imposed where a fine legally cannot. In R. v. Shaw and Brehn (1977), 36 C.R.N.S. 358 (Ont. C.A.), the Court held not only that community service orders are valid, but that they should be more extensively used in appropriate cases.

95. Supra note 94.

96. Supra note 92 at 503. Referring to the Nova Scotian experience with community service, Judge Carver lists some places where it has been performed: "Churches; cemeteries; fire halls; film making; community halls; in schools assisting janitors or bus mechanics; Senior Citizen Clubs (I may point out here, that within the Senior Citizen's [sic] Groups the President assigns certain of the senior citizens of the club to attend and provide the supervision as well as work along with the offender); arenas; tax-driving [sic] to school for underprivileged children; baby-sitting at Liverpool Babysitting Service; ball parks under

the Kinsmen Club; Legion Halls; disabled citizens; community campaigns; giving blood (to give blood you get credit for three hours and for each additional new donor who actually gives blood a credit of three hours will be allowed); and the latest one added to the list, roadside cleanups." Carver, H.J., "A Nova Scotian Looks at Community Service," (1979) 3/4 Prov. Judges' J. 23.

97. (1979), 49 C.C.C. (2d) 517 (Ont. C.A.).

98. Supra note 96 at 25.

99. (1978), 20 Crim. L.Q. 442 (Ont. Prov. Ct.).

100. See further R. v. Pope (1980), 52 C.C.C. (2d) 538 (B.C.C.A.), where it was held that coaching a Wheelchair Basketball Association's basketball team is an activity coming within the sphere of community service orders.

101. Supra note 45.

102. (1974), 19 C.C.C. (2d) 311 (B.C.S.C.).

103. R.S.C. 1970, App. III.

104. [Unreported] June 1st, 1973 (B.C.C.A.).

105. 67 W.W.R. 78, [1969] 3 C.C.C. 348, 2 D.L.R. (3d) 27 (Man. C.A.).

106. Ibid. at 81, [1969] 3 C.C.C. at 351, 2 D.L.R. (3d) at 31 per Dickson, J.A.

107. Supra note 104.

108. (1977), 13 N. & P.E.I.R. 164 (Nfld. C.A.).

109. A similar decision with respect to identical conditions was reached in the cases of R. v. LaHey (1977), 13 N. & P.E.I.R. 167 (Nfld. C.A.); R. v. Rees (1977), 13 N. & P.E.I.R. 170 (Nfld. C.A.); R. v. Taplin (1977), 23 N. & P.E.I.R. 178; 61 A.P.R. 178 (Nfld. C.A.); R. v. Whelan (1977), 21 N. & P.E.I.R. 390 (Nfld. C.A.).

110. Supra note 1 at 191.

111. R. v. Heasley, [unreported] November 19th, 1981 (B.C.C.A.); R. v. Ward [unreported] November 5th, 1973 (B.C.C.A.), and R. v. Kennedy, [unreported] February 24th, 1976 (B.C.C.A.).

112. [Unreported] October 26th, 1976 (B.C.C.A.).

113. [Unreported] June 4th, 1974 (B.C.C.A.).

114. [Unreported] May 7th, 1975 (B.C.C.A.).

115. Supra note 1 at 192.

116. R. v. Cleary, supra note 104.

117. [Unreported] October 9th, 1973 (B.C.C.A.); cited by Barnett, supra note 1.

118. Supra text accompanying and note 90.

119. See R. v. Stennes, supra note 45.

120. See R. v. Cuthbert, supra note 72.

121. Supra note 50.

122. R. v. Allan (1979), 45 C.C.C. (2d) 524 (Ont. C.A.). But see R. v. Morton (1975), 18 Crim. L.Q. 152 (Ont. C.A.), in which the Court upheld an order containing just such a condition.

123. (1979), 24 A.R. 176 (Q.B.).

124. (1980), 14 C.R. (3d) 101 (Que. Sup. Ct.).

125. See generally Barnett, supra note 1 at 206-07. See also R. v. Claffey (1979), 27 N. & P.E.I.R. 92; 74 A.P.R. 92 (P.E.I.C.A.). In R. v. Bang, [unreported] April 27th, 1981 (B.C. Co. Ct.), a condition prohibiting flying was imposed and upheld on appeal.

126. Supra note 44.

127. Judge Barnett, ibid., suggests a useful form for effecting such limitations.

128. Supra note 1 at 195.

129. See e.g. R. v. Jimmo (1973), 16 C.C.C. (2d) 396 (C.A.); R. v. Chamberlain, supra note 72; R. v. Cuthbert, supra note 72.

130. Supra note 1 at 195.

131. See R. v. Stennes, supra note 45.

132. R. v. Kobierski, [1974] 6 W.W.R. 519 (B.C.S.C.).

133. R. v. Stennes, supra note 45; R. v. Caja and Billings (1977), 36 C.C.C. (2d) 401 (Ont. C.A.).

134. See e.g. R. v. Dobson, supra note 57 (psychiatric); R. v. Gouchie, supra note 56 (drug therapy); R. v. Beauvais, supra note 58 (alcohol therapy).

135. Supra, text accompanying and notes 56-58.

136. [1979] C.S. 1077.

137. (1978), 5 C.R. (3d) S-19 (Man. C.A.).

138. (1975), 27 C.C.C. (2d) 475 (Ont. C.A.).

139. Supra note 10.

140. (1978), 37 C.C.C. (2d) 84 (Ont. C.A.).

141. [1966] 3 C.C.C. 66, 52 M.P.R. 111 (N.B.C.A.).

142. [Unreported] March 9th, 1976 (B.C.S.C.), cited by Barnett, supra note 1.

143. Re Regina and Paquette (1980), 53 C.C.C. (2d) 281 (Alta. Q.B.).

144. (1980), 15 C.R. (3d) 346 (Que. C.A.).

145. This quotation is taken from the excellent C.R. (3d) headnote to Mantanaro. The foregoing account of the facts is a heavily edited version of an earlier part of the same headnote.

146. (1980), 44 N.S.R. (2d) 324, 83 A.P.R. 324 (C.A.).

147. Supra note 55.

148. But note that where the probation order was made in the appeal Court, the trial Court has full jurisdiction in matters affecting the order: Re Keller (1971), 14 C.R.N.S. 234 (Sask. C.A.).

149. Supra note 138.

150. [1976] 4 W.W.R. 454 (Alta. Prov. Ct.).

151. (1970), 75 W.W.R. 481 (B.C.S.C.); aff'd [1971] 5 W.W.R. 279 (B.C.C.A.).

152. See e.g. Butkans v. The Queen, [1972] 4 W.W.R. 262 (Man. Co. Ct.).

153. See e.g. R. v. Shaver (1977), 38 C.C.C. (2d) 545 (B.C. Co. Ct.).

154. Ibid.

155. Supra note 152.

156. See further R. v. Noble, [1966] 3 C.C.C. 66 (N.B.C.A.).

157. See e.g. R. v. Corbeil, [1973] C.A. 63.

158. R. v. Chinn (1977), 38 C.C.C. (2d) 45, [1978] 1 W.W.R. 418 (Alta. Dist. Ct.), affirming a sentence of one day concurrent.

159. (1974), 26 C.R.N.S. 1, 15 C.C.C. (2d) 524, [1975] 1 S.C.R. 729, 44 D.L.R. (3d) 351, 1 N.R. 322.

160. R. v. Pinkerton, 7 C.R. (3d) 39, 46 C.C.C. (2d) 284, [1979] 3 W.W.R. 241 (B.C.C.A.).

161. Ibid. at 45, 46 C.C.C. (2d) at 289.

162. Ibid.

163. R. v. Chinn, supra note 158.

164. Ibid.

165. Criminal Code, s.722. The headnote and key word index entry to the decision of the Nova Scotia Court of Appeal in R. v. Wiswell (1976), 17 N.S.R. (2d) 231 (C.A.) state that the Court upheld a sentence of one year for breach of probation. In fact, the sentence had already been reduced to the legal six months on a separate appeal to the County Court. Ibid. at 234 per Coffin, J.A. For a case in which a maximum six-month sentence was upheld see R. v. Pearcey, [unreported] May 28th, 1981 (N.S. Co. Ct.), where the accused breached his probation by committing a theft just a few days after release from the custodial part of his sentence.

166. See e.g. R. v. Sullivan (1979), 35 N.S.R. (2d) 341 (C.A.) - sentence of six months for failure to abstain from alcohol unfit and excessive, reduced to two months; R. v. Diamond, [unreported] April 7th, 1981 (Nfld. Dist. Ct.) - $100 fine with 30 days penitentiary in default for breach of condition not to associate with persons having been convicted of offences under the Narcotic Control Act.

CHAPTER 29: ABSOLUTE AND CONDITIONAL DISCHARGE

The Criminal Code provides:

> 662.1 (1) Where an accused, other than a corporation, pleads guilty to or is found guilty of an offence, other than an offence for which a minimum punishment is prescribed by law or an offence punishable, in the proceedings commenced against him, by imprisonment for fourteen years or for life, the court before which he appears may, if it considers it to be in the best interests of the accused and not contrary to the public interest, instead of convicting the accused, by order direct that the accused be discharged absolutely or upon the conditions prescribed in a probation order.

Enacted among the amendments of 1972,[1] this provision offers to the Court a disposition which, while the accused has been found guilty, avoids ascribing a criminal record to him and attempts to obviate some of the negative effects of a criminal record. While a person who has received a discharge would apparently not be able to deny that he has been found guilty of a criminal offence, he would not have to say that he had been convicted of it.[2] Accordingly, he would be free of many of the statutory disabilities which attach to criminal conviction.[3] There is little doubt that the discharge provisions are helpful in many cases where the accused would otherwise have been convicted, with all the problems that entails. There has, however, been some discontent with the perceived inadequacy of the provisions as at present drafted,[4] and Wilkins has pointed out the practical problem that prosecutors, aware of the availability of discharge, may prosecute in cases which formerly they would have dropped, in the mistaken belief that discharge does not have any significant repercussions on the offender.[5]

Two quite distinct dispositions are made possible by section 662.1. The first, the absolute discharge, is a tariff measure representing an appropriate disposition for the offender of the very least amount of

culpability. The recipient of an absolute discharge is removed thereby entirely from correctional authority, and has no further obligation to the penal system. On the other hand, the recipient of a conditional discharge is made subject to a probation order. Such a disposition is predicated on individualized considerations. The order is frequently used either to ensure that some rehabilitative course is pursued,[6] or, as in R. v. Martin,[7] "to ensure that the appellant is kept aware that he committed a criminal offence and must behave himself".[8]

A. STATUTORY PRECONDITIONS

Discharges are available in respect of "an offence". While clearly this term, as qualified in section 662.1, includes offences set out in the Criminal Code, certain other offences have caused difficulty. In R. v. Gower[9] the Nova Scotia County Court limited the term to offences under the Criminal Code, holding that as a consequence there was no power to discharge in respect of offences under provincial statutes.[10] It is most likely, however, that the Judge in Gower used the term "Criminal Code" to refer to federal statutes at large. In light of current practice, it seems to be commonly accepted that absolute and conditional discharges are available for most, if not all, federal offences.[11] As to power to order discharge in respect of provincial offences, however, the matter cannot be resolved by reference to the Criminal Code alone. Clearly, the federal government would have no power to confer the ability to discharge in respect of provincial infringements through the Criminal Code. However, in some provinces the provisions of the Criminal Code relating to summary offences are incorporated by reference into provincial provisions. While this was not

found to be the case for Nova Scotia in the Gower decision, the British Columbia Court took the opposite point of view in R. v. Trow.[12] The provincial enactment[13] incorporated the provisions of the Criminal Code to the extent that it was silent, and it was accordingly possible for the Court to grant a discharge.[14]

There has been considerable discussion on the availability of discharge for offenders found to have committed a "deliquency" under s.3(1) of the Juvenile Deliquents Act.[15] In Kroh v. The Queen,[16] s.662.1 was held applicable. Section 5(1) of the Juvenile Deliquents Act incorporates the provisions of the Criminal Code relating to summary convictions, "mutatis mutandis ... insofar as such provisions are applicable". In addition the Court held that the dispositions contained in s.20(1) are not exhaustive, in fact, s.20(3) contemplates the application of other provisions.

The decision in Kroh was confirmed in two recent Alberta cases. In Re The Queen and K.[17] the Juvenile Court pointed out that it was incomprehensible that s.662.1 dispositions would be available only to adults, particularly as the Juvenile Deliquents Act was designed to offer preferential treatment to young offenders.[18]

In R. v. B.A.K.[19] it was held that the provisions of s.662.1 are also available to adults convicted for violations of the Juvenile Deliquents Act. The term "proceedings" in section 662.1(1) was held to include proceedings against an adult under that Act.

Discharges are not available for offenders for which a minimum punishment is prescribed by law, or where the offender is convicted of "an offence punishable, in the proceedings commenced against him, by imprisonment for 14 years or for life ...".[20] The phrase "in the proceedings commenced against him" has caused difficulty where an accused is convicted

of a lesser offence. For example, it is possible that an accused may be charged with manslaughter, an offence for which a discharge is not available, but found guilty of common assault. It was held in R. v. Sampson[21] that "proceedings commenced" referred to the offence of which the offender was actually found guilty. Accordingly, a discharge would be available in such a situation as that postulated above.

The existence of a "minimum punishment" as one of two or more alternative dispositions for an offence is also problematic. Section 234 of the Criminal Code formerly provided for "... a fine of not more than five hundred dollars and not less than fifty dollars or ... imprisonment for three months or ... both ...". There were two equally viable ways of viewing this provision: on the one hand, the section did prescribe a minimum punishment, albeit one that need not be imposed; on the other hand, it could be argued that the section did not prescribe any absolute minimum due to the possibility of an election. The Supreme Court of Canada in R. v. Bradshaw,[22] confirming the earlier decision of the Nova Scotia Court in R. v. Miller,[23] held that the section did indeed impose a minimum punishment, and accordingly discharges were not available. It is to be noted that the situation has to some extent been resolved by Parliament, in that conditional discharge provisions are now included in the Criminal Code for both section 234 and section 236, the sections in which this difficulty arose.[24]

B. PROCEDURAL CONSIDERATIONS

A discharge is granted "instead of convicting the accused".[25] Minor difficulties have arisen in the past due to the many different meanings of the word "conviction" in ordinary legal parlance. The correct procedure is

for the Court to find the accused guilty, but then, instead of entering a formal conviction, to direct that the accused be discharged in accordance with section 662.1. The Ontario Court of Appeal, in R. v. McInnis,[26] distinguished, inter alia, the use of "conviction" to mean the verdict or adjudication of guilt and its use to mean the verdict or adjudication of guilt plus the sentence. A conviction in the former sense, a formal oral conviction by the Judge, does not preclude discharge. Section 662.1(1) simply means that, notwithstanding the plea of guilty or the finding of guilt, the Court may direct a discharge instead of delivering a judgment consisting of a sentence and conviction.[27]

It follows that conviction in the second above sense and discharge are mutually exclusive alternatives. A Judge granting a discharge cannot also impose a conviction and sentence. Similarly, if he convicts and imposes a sentence he may not also grant a conditional discharge.[28]

Where a discharge may possibly be applicable in a case before the Court, the Judge is under a duty to consider whether he should apply section 662.1. It has consistently been held that both failure[29] and refusal[30] to consider a discharge in any case where it might reasonably apply is a reversible error which brings into question the validity of the conviction.

The probation order attached to a conditional discharge is not limited to the statutory conditions in s. 663. The Ontario Supreme Court held in R. v. Groves[31] that in granting a discharge conditional upon probation, the Court may impose the same terms as if it were imposing a term of probation pursuant to a conviction. Similarly, terms may not be inserted in such an order which could not be imposed in a "regular" probation order. In Heckley v. The Queen[32] the trial Judge granted a conditional discharge and probation, conditioned upon a fine of $25 or 10 days' imprisonment. On

appeal, the fine and default period were quashed, as the trial Judge had no power to impose such a sanction after granting a discharge period. He could, however, with sufficient evidence have ordered payment of compensation to the victim.

C. POLICY IN THE APPLICATION OF SECTION 662.1

Section 662.1 requires that the Court find a discharge both "in the best interests of the accused" and "not contrary to the public interest" before granting it. In addition to these matters, which will be considered separately below, the Courts have laid down general guidelines as to cases in which discharge will be appropriate.

In the first place, it is clear that the discharge should never be applied routinely to any criminal offence. To do so would have a number of undesirable effects, including derogating from the authority of Parliament to impose and enforce a law, establishing a "standard sentence", and creating an invitation to break the law. Like all other measures, the discharge should be applied judiciously and selectively upon full consideration of the circumstances.[33]

While frugality is in order in the application of discharges, the Courts have repeatedly emphasized the wide range of possible candidates and offences. In R. v. Fallofield[34] it was held that section 662.1 is not limited in application to cases of strict liability, or cases where the offence was completely unintentional or unavoidable. Extending this principle, the Ontario Court in R. v. Vicente[35] has added that the granting of discharges should not be confined to trivial matters. In appropriate circumstances, a discharge may be granted in a case which is not trivial.

In R. v. Dalton[36] the Court refused to grant a discharge to a 23-year-old accused who was found in possession of two marijuana cigarettes. In support of his application for a discharge, he had argued that he intended to enter either law school or government service on completion of his M.B.A. programme. MacKeigan, C.J.N.S. stated:

> "As indicated [in R. v. Sanchez-Pino[37]] some cases of very young first offenders of good character charged with mere possession of marihuana may be candidates for discharge, but only, I suggest, where not only is the offence trivial but the offender is young, immature, or impetuous."[38]

That may be so for the specific offence of possession of marijuana. However, the balance of authority indicates that the criteria laid down by the Chief Justice should not be applied in all cases. In particular, in R. v. Culley[39] the Ontario Court has strongly emphasized that the discharge provisions must not be regarded as primarily applicable to youthful, as distinct from mature, offenders. To view them so is a reversible error of law.

i) The Best Interests of the Accused

Farris, C.J.B.C. in the leading case of R. v. Fallofield,[40] stated:

> Of the two conditions precedent to the exercise of the jurisdiction, the first is that the court must consider that it is in the best interests of the accused that he should be discharged either absolutely or upon condition. If it is not in the best interests of the accused, that, of course, is the end of the matter. If it is decided that it is in the best interests of the accused, then that brings the next consideration into operation....
>
> Generally, the first condition would presuppose that the accused is a person of good character, without previous conviction, that it is not necessary to enter a conviction against him in order to deter him from future offences or to rehabilitate him, and that the entry of a conviction against him may have significant adverse repercussions.[41]

A similar analysis was made of the first condition in R. v. Guillemette:[42]

> ...[L]a premiere condition, celle qui vise le meilleur interet de l'accuse, ... presuppose ... que l'accuse
>
> - est deja une personne de bon caractere;
>
> -sans condamnation anterieure;
>
> -qu'il ne sera pas necessaire d'enregister contre lui une condamnation pour qu'il s'abstienne de recidive ou encore pour le rehabiliter;
>
> -et finalement, qu'au contraire, une condamnation pourrait avoir, dans son cas, des consequences nefastes.[43]

Each of these elements merits further discussion.

The requirement that the accused be a person of good character, without previous convictions, should perhaps not be regarded as an inflexible rule. It is possible to envisage cases in which a discharge might be appropriate despite previous minor convictions, perhaps those for which a discharge would have been granted had it been available prior to the 1972 amendments. It is clear, however, that a previous record is a significant mark against the possibility of a discharge; indeed, it has been held that a previous discharge should be considered by a trial Judge as relevant to the question of whether a further discharge should be granted.[44]

Secondly, it must not be necessary to impose a conviction and sentence to deter the accused from offending or to rehabilitate him. While there has been little comment on this aspect, it may be pointed out that the requirement should be exercised with caution. It is not required that no personal deterrence of the accused be needed; in appropriate cases, the Court may take the view that the prosecution, finding of guilt and discharge will be sufficient deterrence. As to rehabilitation, however, such a requirement would militate against the award of a discharge where a medical or training

course at a treatment or correctional centre is needed.[45] Again, it may be pointed out that in some such cases a discharge could still be granted with attendance at an appropriate institution required as a condition of an attached probation order.

In regard to the requirement of adverse repercussions, the precedent word "significant" is important. There can be few offenders for whom a conviction will not have some adverse repercussions. However, to justify the granting of a discharge the Courts tend to look for effects likely to flow from conviction which would make punishment imposed unduly disproportionate to the culpability of offenders. While the categories of adverse repercussion should not be closed, the two most common matters raised are the effects upon employment or career prospects of the offender, and the possibility of deportation of non-citizens.

To avoid potential interference by a conviction with the offender's career, discharges have been granted in a wide variety of situations. In R. v. Webb[46] a discharge was granted to permit the accused to continue his career as a teacher; in R. v. Tanguay[47] a similar disposition was made in favour of a government employee. In R. v. Meneses[48] the accused was a woman of 41 with no prior criminal record. She stole goods to the value of $13.61 from a drug store. She had formerly been a practising dentist in the Philippines. As, inter alia, conviction might have had a detrimental effect on her desire to become a registered dentist in Ontario, a conditional discharge was substituted for the fine imposed at trial.

It is not necessary that the conviction would have immediate effects upon the employment or employment prospects of the offender. In R. v. Myers[49] the trial Judge declined to grant a discharge to an 18-year-old first offender found guilty of theft over. Myers had argued that though a

conviction would have no immediate effect on his employment prospects, it might affect his employability in a managerial position in the future. The test of immediate effect employed by the trial Judge was held too narrow, and as the accused met the other conditions precedent for the grant of a conditional discharge his sentence was varied accordingly.

In light of the usual policy of deterrent sentences for those who offend from positions of trust,[50] the cases of R. v. Griffin[51] and R. v. Morton[52] appear somewhat curious. In Griffin, the accused police officer was convicted of assaulting an arrestee, his offence having caused considerable injury to the victim. A discharge was, however, granted in order that the accused could continue his employment as a police officer. In Morton, somewhat similarly, the accused was convicted of possession of two stolen car tires. At trial he indicated his hope of entering a police force, and a conditional discharge was granted so that his plans would not be prejudiced. On appeal the disposition was upheld, the Court varying sentence only to remove unduly onerous terms from the probation order.

Not only do these cases seem odd in light of the "position of trust" principle, but also in light of the requirement that a discharge be "not contrary to the public interest". While it seems justifiable for the Judge in Griffin to have decided that it was in the public interest for an otherwise competent officer to resume his work with the police force, it is difficult to see that mitigation of sentence to allow a person convicted of possession of stolen goods to enter the force is in the public interest. The decision in R. v. Nadeau,[53] relating to a future law student, seems preferable. Nadeau, an Indian man, married with one child, was a successful student at University. However, after his wife had been disturbed in some way in a beverage room by the complainant, he threw the complainant through a glass door. She

required 40 stitches. On appeal, the Court was asked to consider the appropriateness of an absolute discharge imposed at trial. The accused tendered evidence that he was looking forward to entering the Faculty of Law at the University of Manitoba, and that a conviction might interfere with his plans. The Court nevertheless substituted a fine and conviction, stating that the trial Judge had not given sufficient weight to the "public interest" factor. O'Sullivan, J.A., further held that it was not correct to give a discharge solely on the ground that it might help the accused to further his legal career. On the contrary, his intention to become a lawyer was a strong reason for refusing a discharge, in order that his suitability might be assessed by the Law Society at the appropriate time.

The effects of conviction upon immigration status have been the subject of significant discussion. Pursuant to s.19 of the Immigration Act[54] both landed immigrants and non-residents may be deported if convicted of certain offences. Landed immigrants are liable to deportation on conviction of any federal offence for which a term of more than six months' imprisonment is imposed, or if the offence carries a maximum penalty of five years or more. Students or visitors are liable to deportation in respect of any Criminal Code offence, or indictable offences under other federal statutes. The importance of the discharge in this context was illustrated in Re Lew and Minister of Manpower and Immigration,[55] where the Federal Court held that a person who has been granted a discharge has not been "convicted of an offence under the Criminal Code". Though this decision was rendered under the predecessor to the present Immigration Act,[56] it remains equally applicable today.

Policy on taking deportation into account in consideration of a discharge has varied. In R. v. Melo[57] the accused shoplifter applied for a

discharge. The Ontario Court of Appeal held that the fact of jeopardy of deportation is not alone a sufficient ground for the granting of a conditional or absolute discharge. It is merely one of the factors to be considered. Explaining this notion further, the Court suggested that where a discharge is not clearly not merited on the facts, the possibility of deportation is not sufficient to "tip the scales". If the deportation would cause undue hardship in such circumstances, the Immigration Appeal Board has appropriate powers to alleviate it.

It follows from the decision in Melo that the possibility of deportation would tip the balance where a case is borderline. However, it is submitted that to narrow the issues to "other factors" and "deportation' is misleading. In accordance with the tariff process, it would seem more appropriate for the Court to determine the appropriate range of sentence for the offence committed, including an answer to the question "Is a discharge within the range of sentence for this offence?" Having determined these issues, the Court may then consider mitigating factors, including immigration status, in deciding where on the range the sentence should be set. If the circumstances surrounding the accused's immigration status are appropriate, then this strong mitigation will justify a discharge. Although not expressed in these terms, this reasoning would support the majority of the Ontario Court of Appeal's decisions in this area. In R. v. Shanab[58] the accused was an Arab Christian, convicted of shoplifting, who, if deported to Jordan, would have a very difficult life due to his religion. In view of these circumstances, an absolute discharge was substituted for a small fine. Similarly, in R. v. Papodopoulos and Kalafatis[59] the two accused were landed immigrants, liable to deportation on conviction for clumsily executed thefts under $200. They had been drinking at the time of the offences. The appeal Court, considering

an appication for discharges in lieu of fines, took the view that the gravity of the consequences was wholly disproportionate to the offences and substituted discharges conditional upon six months' probation.[60]

The proposed procedure also satisfactorily explains the comments of the Court in Melo. In saying that the possibility of deportation is not sufficient to "tip the scales" in a case where discharge would not otherwise be granted, the Court may be read as saying that where a discharge is not within the proper range of sentence for the offence committed, it is impossible for immigration considerations to mitigate the sentence to the extent of a discharge being granted.[61]

Significantly out of line with the above decisions is that of the Alberta Court in R. v. Fung.[62] The accused, a student from Hong Kong, was convicted of shoplifting and fined $75. The appellate Court was faced with an application for a conditional discharge in view of the accused's potential immigration difficulties. The application was denied. McDermid, J.A. stated:

> We do not think the section should be applied in order to influence the immigration authorities; in fact to the contrary, we think the immigration authorities are entitled to know that the appellant has committed the offence and to take such into consideration.[63]

It is submitted that the decision is clearly wrong on general statutory principles. Parliament must be taken to know the law:[64] it has created a situation in which the grant of a discharge replaces conviction and removes liability to deportation. It must be taken that Parliament intended this result; it follows that Parliament intended the Courts to have power to obviate the possibility of deportation.[65]

Discharge may also be used to influence immigration authorities in other countries. In R. v. Ramolla[66] the accused was fined at trial for

shoplifting articles to a value of $50. Her husband was about to be transfered abroad by his company and a conviction would probably bar her from accompanying him. A discharge was substituted and made absolute in view of the closeness of the date of departure.

ii) The Public Interest

As previously mentioned, the Court must be satisfied that the granting of a discharge would not be contrary to the public interest. Care must be exercised in the application of this standard. In R. v. B.A.K.[67] the trial Judge had considered the best interests of the accused and "the best interests of the community". This was held to be a reversible error, as the standard thus applied was qualitatively different from the standard expressed in the statute.

The public interest, like the interests of the accused, may be seen as a wide catch-all phrase conferring considerable discretion on the Court. Since the enactment of s.662.1, however, a number of considerations have been highlighted as falling under this heading.

First, it has been consistently held that where general deterrence is required as an important element in the penalty imposed, a discharge may not be granted. This is so whether the need for deterrence arises from the type of offence,[69] or from the prevalence of a particular offence as it may exist in the community from time to time.[70] Under the first category, offences of violence resulting in injury exemplify those situations where the requirement of general deterrence militates against the grant of a discharge, notwithstanding considerations personal to the accused. Secondly, the discharge may be refused where the Court considers it in the public interest

that the accused's offence be known to his future potential employers or associates. In R. v. Hurtubise[72] the accused fraudulently obtained credit from his employer, a finance company, on two occasions. Despite full repayment of the money, the accused having found new employment and having been appointed to the Board of the Abbotsville Air Show, the Court refused to grant a discharge as "the public was entitled to know" that he had abused positions of trust on two occasions.

In R. v. Charron[73] the Alberta Provincial Court refused to grant a discharge to an accused found guilty of possession of marijuana. In a decision which seems somewhat out of line with precedent, Stevenson, J. stated that it was reasonable to assume that the quantity of marijuana present in Canada could only find its way in through an organized effort of major proportions. Organized crime was not in the public interest, and it was not appropriate to grant a discharge in the absence of an explanation of the possession showing that the purchase of the marijuana was not a contribution to organized crime.

D. EFFECT OF A DISCHARGE

Section 662.1(3) provides:

> (3) Where a court directs under subsection (1) that an accused be discharged, the accused shall be deemed not to have been convicted of the offence to which he pleaded guilty or of which he was found guilty and to which the discharge relates except that
>
> (a) the accused may appeal from the direction that the accused be discharged as if that direction were a conviction in respect of the offence to which the discharge relates;
>
> (a.1) the Attorney General may appeal from the direction that the accused be discharged, as if that direction were a judgment or verdict of acquittal referred to in paragraph 605(1)(a); and

(c) the accused may plead autrefois acquit in respect of any subsequent charge relating to the offence to which the discharge relates.

(4) Where an accused who is bound by the conditions of a probation order made at a time when he was directed to be discharged under this section is convicted of an offence, including an offence under section 666, the court that made the probation order may, in addition to or in lieu of exercising its authority under subsection 664(4), at any time when it may take action under that section, revoke the discharge, convict the accused of the offence to which the discharge relates and impose any sentence that could have been imposed if the accused had been convicted at the time he was discharged, and no appeal lies from a conviction under this subsection where an appeal was taken from the order directing that the accused be discharged.

While the accused is deemed not to have been convicted, as the law stands at present, he certainly does still have a criminal record.[74] Although the discharge is deemed not to be a conviction, for the purposes of the Criminal Records Act[75] it is re-deemed to be a conviction, and is subject to the relief under that act following a shorter period of good behaviour than that required for offences which incurred other dispositions.

In general, pleas or findings of guilt in respect of which the offender was discharged do not constitute a "previous record". Therefore, such pleas cannot be relied upon in sentencing for later offences.[76] An exception obtains, however, in consideration of whether a second or later discharge should be granted.[77]

E. DISCHARGE AND THE APPEAL COURTS

It was held by the Ontario Court as early as 1973[78] that a Court of Appeal has jurisdiction on an appeal against sentence to substitute a

discharge wherever the trial Judge would have had power so to dispose of the case. Such a substitution vacates the conviction pursuant to s.662.1(3). This decision has gone virtually uncontested since 1973, and is commonly followed in the exercise of appellate jurisdiction.

As regards appeal against discharge, the Supreme Court of Canada, in Hunt v. The Queen,[80] has set out the potential appeal routes. Section 662.1(3) provides that the Attorney General may appeal against the discharge as if it were a judgment or verdict of acquittal. Reference is made to s.605(1)(a), which refers to appeals involving questions of law alone. Accordingly, the appeal under s.662.1(3) by the Attorney-General may be on a question of law alone. Conversely, by the operation of s.662.1(3)(a), the accused may appeal from a discharge as if the direction were a conviction in respect of the offence.

The Supreme Court went on in Hunt to find that s.662.1(3) is not exhaustive of the appeal rights of the Attorney General. Paragraph (b) of s.605(1) states that the Attorney General may appeal, with leave, against the sentence passed by a trial Court in proceedings by indictment. "Sentence" is defined in s.601 as including an absolute or conditional discharge under s.662.1. It follows that, with leave, the Attorney General may appeal against discharge as a matter of sentence.

Different considerations pertain in the case of a discharge following summary proceedings. While the accused and the Crown will naturally have the appeal rights set out in s.662.1, there is no option to appeal as though the discharge were a sentence. The appeal Court in summary proceedings is empowered by s.614(1)(a) to "vary the sentence within the limits prescribed by law for the offence of which the accused was convicted ...". As the accused granted a discharge has not been convicted, no power to appeal from a discharge is conferred by s.614.[81]

It was further held in Miles v. The Queen[82] that an accused who is granted a discharge at trial, but who is convicted on appeal, is not a person whose acquittal at trial has been set aside. Consequently, he does not have an appeal as of right to the Supreme Court of Canada under s.618(2) of the Criminal Code.

Footnotes to Chapter 29

1. S.C. 1972, c.13, s.57. In force June 15th, 1972.

2. R. v. McInnis (1973), 13 C.C.C. (2d) 471 (Ont. C.A.). For a review of the adverse effects of conviction see e.g. Davis, R.P., "The Mark of Cain: Some Subliminal Effects of Criminal Process," (1980) 44 Sask. L. Rev. 219.

3. See Davis, ibid. at 239-51.

4. Swabey, T.R. "Absolute and Conditional Discharge Under the Criminal Code," (1972) 20 C.R.N.S. 132.

5. Wilkins, J.L. "Absolute and Conditional Discharge," (1977), 19 Crim. L.Q. 454.

6. See e.g. Criminal Code, ss.234(2) and 236(2), where the Court is empowered to discharge persons convicted of drunken driving offences subject to probation, which must include a condition respecting attendance for curative treatment, and: R. v. Szola (1977), 33 C.C.C. (2d) 572 (Ont. C.A.); R. v. Beaulieu (1980), 21 A.R. 120 (N.W.T.S.C.); R. v. Croft (1978), 22 A.R. 224 (Dist. Ct.).

7. (1974), 17 C.C.C. (2d) 66 (N.S.C.A.).

8. Ibid. at 68 per MacKeigan, C.J.N.S.

9. (1973), 10 C.C.C. (2d) 543 (N.S. Co. Ct.).

10. Followed in R. v. Rendall (1974), 21 C.C.C. (2d) 253 (Ont. Dist. Ct.).

11. See e.g. the following cases in which discharges were granted for offences against the Narcotic Control Act, R.S.C. 1970, c.N-1 as am: R. v. Sampson (1975), 23 C.C.C. (2d) 65, 7 O.R. 582 (C.A.); R. v. Culley (1977), 36 C.C.C. (2d) 433 (Ont. C.A.); R. v. Quantz (1978), 20 A.R. 167 (Dist. Ct.). As to the availability of discharges under the Juvenile Delinquents Act, see discussion infra. In Kroh v. The Queen (1975), 24 Chitty's L.J. 345 (Ont. Prov. Ct.), it was held that the provisions of s.662.1 are applicable to all federal statutes by virtue of the Interpretation Act, R.S.C. 1970, c.I-23, s.27(2).

12. (1977), 38 C.C.C. (2d) 229 (B.C.S.C.).

13. Summary Convictions Act, R.S.B.C. 1960, c.373, ss. 5, 58, 63, 101.

14. The earlier cases of R. v. MacLean (1960), 127 C.C.C. 400 (B.C.C.A.) and R. v. Button (1974), 21 C.C.C. (2d) 371 (B.C.S.C.) were held inapplicable due to subsequent amendments to the Interpretation Act, S.B.C. 1974, c.42. See further Bobiasz, F.G., "Absolute and Conditional Discharge," (1974), 6 Ottawa L. Rev. 608, 610.

15. R.S.C. 1970, c.J-3.

16. Supra, note 11.

17. [1978] 1 Can. J. Family Law 297 (Alta. Juv. Ct.); followed in R. v. Kloschinsky, [1980] 6 W.W.R. 355 (Alta. Q.B.).

18. For further discussion see "Note" following the report of Re The Queen and K., supra note 17.

19. (1978), 6 C.R. (3d) S-1 (B.C.S.C.).

20. Criminal Code, s.662.1.

21. (1975), 23 C.C.C. (2d) 65 (Ont. C.A.).

22. (1975), 21 C.C.C. (2d) 69 (S.C.C.).

23. (1973), 13 C.C.C. (2d) 395 (N.S.C.A.).

24. Although the new provisions are in force only in limited areas: see discussion supra Chapter 16.D and 16.F.

25. Criminal Code, s.662.1(1).

26. (1973), 1 O.R. (2d) 1; 23 C.R.N.S. 152, 13 C.C.C. (2d) 471 (C.A.).

27. Following R. v. Christman, [1973] 3 W.W.R. 472, 22 C.R.N.S. 338, 11 C.C.C. (2d) 245 (Alta. C.A.); R. v. Fallofield, [1973] 6 W.W.R. 472, 22 C.R.N.S. 342 (B.C.C.A.). Not following R. v. Stafrace (1972), 22 C.R.N.S. 365, 10 C.C.C. (2d) 181 (Ont. C.A.); R. v. Sanchez-Pino, [1973] 2 O.R. 314, 22 C.R.N.S. 350, 11 C.C.C. (2d) 53 (C.A.).

28. R. v. Leonard (1973), 11 C.C.C. (2d) 527 (Ont. C.A.); Heckley v. The Queen, [1976] C.A. 802.

29. R. v. Sanchez-Pino, supra note 27; overruled on other grounds in R. v. McInnis, supra note 2.

30. R. v. Taylor (1975), 24 C.C.C. (2d) 551 (Ont. C.A.).

31. (1977), 37 C.C.C. (2d) 429 (Ont. S.C.).

32. Supra note 28.

33. R. v. Derksen (1972), 20 C.R.N.S. 129, 9 C.C.C. (2d) 97 (B.C. Prov. Ct.); R. v. Fallofield, [1973] 6 W.W.R. 472, 22 C.R.N.S. 342 (B.C.C.A.).

34. Ibid.

35. (1975), 18 Crim. L.Q. 292 (Ont. C.A.). On the other hand, the seriousness of the offence is naturally a pertinent consideration: R. v. MacFarlane (1976), 3 Alta. L.R. 341 (C.A.).

36. (1977), 18 N.S.R. (2d) 555 (C.A.).

37. Supra note 29.

38. Supra note 36 at 560 per MacKeigan, C.J.N.S.

39. (1977), 36 C.C.C. (2d) 433 (Ont. C.A.).

40. Supra note 27.

41. Ibid., 22 C.R.N.S. at 346-47.

42. (1979), 4 M.V.R. 59 (Que. S.C.).

43. Ibid. at 60-61 per Savoie, J.

44. R. v. Tan (1975), 22 C.C.C. (2d) 184 (B.C.C.A.).

45. R. v. Sanchez-Pino, supra note 27.

46. (1975), 39 C.R.N.S. 314 (P.E.I.C.A.).

47. (1975), 24 C.C.C. (2d) 77 (Que. C.A.).

48. (1976), 25 C.C.C. (2d) 115 (Ont. C.A.).

49. (1978), 37 C.C.C. (2d) 182 (Ont. C.A.). On the other hand, there must be convincing evidence of the possibility of detriment. In R. v. Doane (1980), 41 N.S.R. (2d) 340 (C.A.), the accused, convicted of bookmaking, had confined his activities to a small circle of affluent friends and business associates. The trial Judge, in granting a discharge, stated that it would be in the best interests of the accused, "who may very well have to earn a living through occupations which require bonding". No evidence of this possibility had been placed before the trial Judge, other than a reference in the pre-sentence report to the accused's possible return to the real estate business. The evidence did not show that the accused would have to earn a living through an occupation requiring bonding, nor did it show that conviction for this type of offence would make bonding impossible. As the negative consequences were entirely speculative, therefore, and no significant adverse repercussions had been shown to accrue to the accused other than those incurred by any person convicted of a crime, the discharge was set aside and a conviction entered.

50. Supra Chapter 3.E.

51. (1975), 23 C.C.C. (2d) 11 (P.E.I.C.A.).

52. (1975), 18 Crim. L.Q. 152 (Ont. C.A.).

53. (1976), 19 Crim. L.Q. 20 (Man. C.A.).

54. S.C. 1976-77, c.52.

55. (1975), 20 C.C.C. (2d) 127 (Fed. C.A.).

56. Immigration Act, R.S.C. 1970, c.I-2, s.18(1)(e).

57. (1976), 26 C.C.C. (2d) 510 (Ont. C.A.); followed in R. v. Dubuc (1978), 20 Crim. L.Q. 294 (Que. Sup. Ct.).

58. [Unreported] November 22nd, 1973 (Ont. C.A.).

59. [Unreported] May 7th, 1974 (Ont. C.A.).

60. See also Re The Queen and K., supra note 17, where a 14-year-old girl found guilty of a delinquency under the Juvenile Delinquents Act was in Canada on a student visa. The Court granted a discharge as the consequences of conviction (e.g. deportation, denial of immigrant status, stained character back in Poland) would be grossly disproportionate to the offence.

61. See further Mason v. R. (1978), 6 C.R. (3d) S-14 at S-15 (Ont. C.A.) per Arnup, J.A: "It is apparent that in this case the conviction does have implications from the standpoint of the status of the appellant as an immigrant. On the other hand, it was held by this court in R. v. Melo [supra note 57] that this court ought not to set aside a sentence and grant a discharge only on the ground that the immigration status of the appellant is in jeopardy, but, on the other hand, the immigration status of such an appellant is a factor to be taken into account, with all the other circumstances of the case, in determining whether or not it was a proper case for the granting of a discharge."

See also R. v. Cheung and Chow (1976), 19 Crim. L.Q. 281 (Ont. C.A.), where two students from Hong Kong shoplifted goods worth about $30. The Court held that on the facts this was an appropriate case for discharges, but commented in obiter dicta that, had the case been "borderline", deportation could have been considered.

62. (1973), 11 C.C.C. (2d) 195 (Alta. C.A.).

63. Ibid. at 196 per McDermid, J.A.

64. See generally Craies, W.F., Craies on Statute Law (7th ed. 1971 by S.G.G. Edgar, London: Sweet & Maxwell) at 64-73; Maxwell, P.B., Maxwell on the Interpretation of Statutes (12th ed. 1969 by P. St. J. Langan, London: Sweet & Maxwell) at 39-47, and Fisher v. Bell, [1960] 3 All E.R. 731 (Q.B.).

65. Accord, Ruby, C.C., Sentencing (2nd ed. 1980, Toronto: Butterworths) at 218-221.

66. (1975), 18 Crim. L.Q. 18 (Ont. C.A.).

67. Supra note 19.

68. See e.g. R. v. Henderson (1979), 8 C.R. (3d) S-35 (Sask. Dist. Ct.).

69. E.g. dangerous driving - see ibid.

70. R. v. MacFarlane, supra note 35 at 344.

71. Ibid. See also R. v. Wood (1975), 24 C.C.C. (2d) 79 (Ont. C.A.).

72. (1979), 22 Crim. L.Q. 164 (B.C. Co. Ct.); see further R. v. MacFarlane, supra note 35 at 345.

73. (1980), 17 C.R. (3d) 187 (Alta. Prov. Ct.).

74. See Davis, P., "The Discharge: Is It Working?" (1980), 4/2 Prov. Judges' J. 24.

75. R.S.C. 1970, c.12 (1st Supp.), as am., s.2(2).

76. R. v. Nickerson (1975), 7 N. & P.E.I.R. 145 (P.E.I.C.C.A.).

77. R. v. Tan, supra note 44; R. v. Murray (1976), 19 Crim. L.Q. 26 (Ont. C.A.); R. v. MacLean (1978), 7 C.R. (3d) S-3 (Ont. C.A.).

78. R. v. McInnis, supra note 2.

79. See e.g. R. v. Sears (1978), 39 C.C.C. (2d) 199 (Ont. C.A.); R. v. Yeung (1976), 19 Crim. L.Q. 22 (Alta. C.A.); R. v. Meneses (1976), 25 C.C.C. (2d) 115 (Ont. C.A.).

80. [1979] 2 S.C.R. 73, 7 C.R. (3d) S-38, 45 C.C.C. (2d) 257, [1979] 3 W.W.R. 661, 26 N.R. 257, 94 D.L.R. (3d) 321.

81. R. v. Farrar (1980), 27 N. & P.E.I.R. 179, 74 A.P.R. 179 (P.E.I.C.A.).

82. [1976] 3 W.W.R. 664, 33 C.R.N.S. 265, 8 N.R. 211 (S.C.C.).