THE SUPREME COURT AND SENTENCING

Since Parliament has codified the principles and procedures of sentencing in Bill C-41, the Supreme Court has also become more active. Intervention in sentencing by both Parliament and the Supreme Court is a positive development that holds out the promise of greater national guidance and supervision for the most common, coercive and overtly discretionary activity in criminal trials. The court can add flesh to the bare and ambiguous bones of the legislation. Nevertheless, some of its recent pronouncements are at odds with the legislation. The considerable deference the court is now demanding towards trial judges may sap the legislation of much of its promise and undercut the longstanding role of Courts of Appeal in supervising sentences.

Although the advantages possessed by trial judges, particularly after a guilty plea, can be overstated, appellate courts should not substitute their views for those of the sentencing judge. Deference to trial judges is generally required, but it can be expressed in different ways for different reasons. The Supreme Court's recent formulations and rationales for deference may, contrary to its earlier statements, amount to deference to anything short of a patently unreasonable sentence. Picking up on the court's hint in *R. v. Currie* (1997), 115 C.C.C. (3d) 205 at p. 220 (S.C.C.), it may now be necessary for Parliament to intervene and enlarge the appellate court's seemingly broad powers to review the fitness of sentences.


In *Shropshire*, at p. 210 C.C.C. deference was related to the idea that sentencing was "profoundly subjective". This may be so, but it is not helpful to celebrate this if the goal is greater clarity and consistency in sentencing. The legislation's attempt to impose national standards is threatened by the idea that sentences "should be expected to vary to some degree across various commu-
nities and regions in this country"; *M (C.A.),* supra, at p. 375 C.C.C. Stress on local conditions may allow some sentencing experiments, such as sentencing circles, to thrive but they can be more directly supported by the *Criminal Code's* references to reparative justice, sanctions other than imprisonment and the circumstances of Aboriginal offenders: *Criminal Code,* R.S.C. 1985, ss. 718.2(e), 717(e), (f).

In *M. (C.A.)*, at p. 375 C.C.C., legitimate concerns about sentencing disparity were dismissed as "the search for a single appropriate sentence" and "a fruitless exercise of academic abstraction". The idea that Courts of Appeal should only intervene to address sentencing disparity if there is a "substantial and marked departure" is unlikely to fulfill the mandate of s. 718.2(b) which requires similar sentences for similar offenders for similar offences in similar circumstances.

In *McDonnell,* supra, starting point sentences are threatened by both the majority and minority's decision that failure to consider them is not a reviewable error in principle. Starting points, like concerns about disparity, are disparaged by arguments, effectively rebutted by the minority, that they are inconsistent with deference to the trial judge and create new offences.

Some of the court's recent interventions have been more promising and demonstrate the value of judicial interpretation of the Code's new principles. In *M. (C.A.)*, the court clarified retribution as relating to the moral blameworthiness of the offender and proportionality of punishment. The Chief Justice contrasted it with both vengeance, which is a unreasoned and unrestrained response to crime, and denunciation, which is based on condemnation of the crime. This discussion, and particularly the idea that retribution can restrain punishment, will be helpful in interpreting the fundamental principle that "a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender": *Criminal Code,* s. 718.1.

In *M. (C.A.)*, the court rejected judicially created ceilings on sentences of imprisonment as a response to the maximum of seven years of parole ineligibility. Its comments about the continued deterrent and denunciatory force of a sentence when an offender has been granted parole may be relevant to understanding and justifying conditional sentences. On the other hand, the court's holding in *Shropshire,* supra, at p. 211 C.C.C. that trial judges do not err by failing to give reasons is inconsistent with attempts to bring greater clarity and consistency to sentencing. Fortunately, it is overruled by the new s. 726.2 which requires reasons for sentence.

Although arguably based on a mischaracterization of the Alberta Court of Appeal's starting point approach, the majority's insistence in *McDonnell* on proof beyond a reasonable doubt of aggravating factors is welcome and consistent with s. 724(3)(e).

The Supreme Court is right to become more involved with sentencing and it can become a valuable partner with Parliament. It is also understandable and defensible that the court will be more concerned than Parliament with individualized justice. Nevertheless, the court should be less quick to reject legitimate attempts to minimize sentencing disparity and provide national guidance and supervision for trial judges.

K.R.