

## Sentencing

Where a defendant (the person accused of an offence) pleads guilty, or is found guilty after a trial, the court will hear submissions about an appropriate sentence from Crown Counsel and the defendant, or defendant's lawyer. This is called a sentencing hearing.

In the absence of a prescribed minimum punishment, it is up to the judge to decide what sentence will be imposed. For criminal offences, judges must impose sentences that comply with the *Criminal Code*, which falls under the jurisdiction of the federal Parliament. For regulatory offences, provincial legislation will apply.<sup>1</sup>

### The Sentencing Hearing

The judge will consider a variety of information about the defendant and the offence, which may include:

- the facts of the case;
- the background of the defendant, including any criminal history;
- the present circumstances of the defendant;
- information on the risk presented by a defendant, or prospects for rehabilitation;
- letters from members of the community who know the defendant; and
- any Victim Impact Statements or Community Impact Statements presented to the court.

This information will ordinarily come from the Crown, the defendant (or defendant's lawyer), a pre-sentence report prepared by a probation officer, or someone with specialized expertise in a particular area (for example, a psychologist or psychiatrist). Often, the judge has a great deal of information available to assist in deciding what a fit sentence should consist of.

A guilty plea, especially an early guilty plea that avoids the necessity of a trial, is considered a mitigating circumstance at law and may result in a reduced sentence.<sup>2</sup>

### Purpose and Principles of Sentencing

Under the *Criminal Code*, the fundamental purpose of sentencing is to foster respect for the law and maintain a just, peaceful, and safe society by imposing sanctions that have one or more of the following objectives:

- to denounce unlawful conduct;
- to deter the offender and other persons from committing offences;
- to separate offenders from society, where necessary;
- to assist in rehabilitating offenders;
- to provide reparations for harm done to victims or to the community; and
- to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.<sup>3</sup>

Sentencing is a difficult – and probably the most controversial – part of what judges do. Unless the *Criminal Code* or provincial statute mandates a minimum punishment for the offence, judges have considerable latitude in deciding what sentence should be imposed. However, the nature of the offence that has been committed by the defendant will be an important factor for consideration, as well as the history of the defendant and any information about past offences and current risk. The more serious the offence and the greater the public risk presented by a defendant, the more likely it is that a sentence will increase in length and severity.

Judges are also guided by the sentences imposed by other courts (especially appellate courts) in similar circumstances. And, they are bound to follow the purpose and principles of sentencing as mandated by Parliament for criminal offences, or by the provincial legislature for regulatory offences.

The principles of sentencing in the *Criminal Code* include:

- the sentence must be proportionate to the gravity (seriousness) of the offence and the degree of responsibility of the offender;
- a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;
- where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh (the “totality” principle);<sup>4</sup>
- an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and
- all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.<sup>5</sup>

## Maximum Sentences

Maximum sentences are rarely imposed by the courts and are not used as a starting point in the sentencing process.<sup>6</sup> The maximum sentence for an offence provides some indication to

judges as to Parliament's view of the gravity of the offence.<sup>7</sup> In most cases, courts are guided by a sentencing range that is determined based on previous sentencing decisions and the circumstances of the case. Even where the crime may have shocked the community because of its heinous nature, judges must take a principled approach to sentencing.

## Types of Sentences

There are different types of sentences that may be imposed on a defendant, individually or sometimes in combination: discharges, fines, community supervision, and imprisonment.

A judge, depending on circumstances and governing legislation, may also order the defendant to do such things as:

- provide a sample of DNA;
- register with the sex offender registry;
- surrender firearms and be prohibited from possessing firearms or explosives, etc.;
- pay restitution; or
- be prohibited from driving a motor vehicle or vessel.

In some circumstances, a judge may grant a defendant a discharge. It must be in the best interest of the defendant, and not contrary to the public interest. The discharge may be absolute, or it may be imposed conditionally upon the defendant's successful completion of a period of probation. A defendant who is discharged is deemed to not be convicted of the offence.<sup>8</sup>

Under the *Criminal Code*, a conditional sentence of imprisonment is a jail sentence that is served in the community. It will contain conditions that are similar to those of a probation order, although some of the conditions are usually more restrictive, at least initially. If the defendant does not obey the conditions, he or she can be ordered to serve the remaining sentence in jail instead of in the community.

A probation order may be imposed along with other types of sentences, except where the defendant is sentenced to a federal term of imprisonment of more than two years. The conditions of the probation order may include:

- reporting to a probation officer;
- not consuming alcohol or drugs;
- remaining in the jurisdiction of the court;
- living in a specific residence;
- no contact with the victim or others;
- a curfew;

- attendance at school;
- attendance at rehabilitation or addiction programs; or
- community service hours with a community agency.

### Sentencing of Aboriginal Persons

Judges have a statutory duty to consider the unique circumstances of Aboriginal persons when imposing sentence. The *Criminal Code* requires judges to exercise restraint in incarcerating offenders, but with particular attention to the circumstances of Aboriginal persons.<sup>9</sup>

The Supreme Court of Canada has stated that judges are required to use a different method of analysis when determining a fit sentence for Aboriginal offenders. They must consider:

- the unique systemic or background factors which may have played a part in bringing the offender before the courts; and
- the types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular Aboriginal heritage or connection.<sup>10</sup>

The Supreme Court of Canada urges judges to apply a restorative approach to the sentencing of Aboriginal defendants. This does not mean that Aboriginal persons are entitled to an automatic reduction of sentence. Instead, judges are required to apply an individualized assessment which is meaningful to Aboriginal persons and effectively achieves the objectives of sentencing.<sup>11</sup>

### Sentencing of Young Persons

Young persons are sentenced under the provisions of the *Youth Criminal Justice Act* (YCJA). The YCJA recognizes that young persons must be held accountable for criminal acts, but in a different manner from adults. The YCJA provides that a young person must be subject to meaningful consequences for his or her offence, but aims at preventing crime by addressing the circumstances underlying a young person's offending behaviour, rehabilitating young persons who commit offences, and reintegrating them into society.

The factors a youth court judge considers when deciding the sentence for a young person include:

- how much the young person participated in the offence;
- the harm done to victims, and whether it was intentional or foreseeable;
- any reparation made by the young person to the victim or community;
- time already spent in detention as a result of the offence;

- previous findings of guilt of the young person; and
- any other circumstances related to the young person or the offence.

## Appeals of Sentence

Both the defendant and the Crown can initiate an appeal of a sentence. The decision to initiate a Crown appeal is made by the Criminal Justice Branch, independent of government. As a general rule, the Attorney General is not involved in decisions on whether a particular matter should be appealed. The Branch Policies Appeals by Crown to the Court of Appeal and Supreme Court of Canada ([APP 1](#)) and Appeals by Crown of Summary Conviction Matters ([APP 1.1](#)) assist Crown Counsel in their decision as to whether an appeal should be initiated.

The appeal process under the *Criminal Code* is an onerous one, with specific threshold tests that must be met, including that the sentence demonstrated legal error that led to a clearly unreasonable sentence. The appeal court will generally defer to the sentencing judge's findings of fact, as well as the judge's assessment of what principles of sentence should be given priority in the case. Because of the discretionary nature of the sentencing process, appellate review and intervention with a sentence is limited.

The mere fact that the sentence imposed in a case is different from or less than the sentence sought by Crown Counsel does not mean that there is a legal basis for an appeal.

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<sup>1</sup> Where the defendant has been convicted of an offence under a provincial statute, the provisions of the *BC Offence Act* will apply, not the *Criminal Code*. There are considerable differences between the two sentencing regimes.

<sup>2</sup> See *R v Klassen*, 2012 BCCA 405 at para 16.

<sup>3</sup> *Criminal Code*, section 718.

<sup>4</sup> "A cumulative sentence may offend the totality principle if the aggregate sentence is substantially above the normal level of a sentence for the most serious of the individual offences involved, or if its effect is to impose on the offender 'a crushing sentence' not in keeping with his record and prospects." C. Ruby, *Principles of Sentencing*, as cited in *R v CAM*, [1996] 1 SCR 500 at para 42.

<sup>5</sup> *Criminal Code*, ss. 718.1 & 718.2.

<sup>6</sup> See *R v LM*, 2008 SCC 31, where the Court noted that the imposition of a maximum sentence would be "exceptional".

<sup>7</sup> *R v Hajar*, 2016 ABCA 222 at para 75.

<sup>8</sup> *Criminal Code*, section 730.

<sup>9</sup> *Criminal Code*, section 718.2(d) & (e).

<sup>10</sup> *R v Gladue*, [1999] 1 SCR 688 at para 66.

<sup>11</sup> *R v Ipeelee*, 2012 SCC 13.