

HANDOUT 1: Purpose and Principles of Sentencing in Canada

Principles of Sentencing

The *Criminal Code of Canada* outlines the principles and purpose of sentencing in s. 718. These principles are placed in the *Criminal Code* as a clear guideline to judges and a statement of principles that give direction to our penal laws and sanctions.

The following sections from the *Criminal Code* are the codification in Canada of the principles which have governed sentences in the common law:

- *Denunciation*- making sure the punishment reflects society's abhorrence for the crime committed
- *Deterrence* (both specific for the accused and general for the population at large) - to reduce criminal conduct
- *Rehabilitation* - to change the behaviour of an offender and reconstitute them as productive citizens
- *Protection of the public* - through incarceration and/or the imposition of conditions to control the accused's behaviour in the community and to prevent the repetition of the criminal activity.

In addition to these principles, the Code has added the principles of:

- *Reparation* - to repay, repair or compensate the victim or community loss and harm
- *Responsibility* - for the offender to acknowledge the harm done to the victim and the community.

These principles are all shaped by the over-arching concept that any sentence must be proportional to the gravity of the offence and the degree of responsibility of the offender. The *Criminal Code* also mandates the consideration of aggravating or mitigating factors, similar sentences for similar crimes and offenders and special consideration for aboriginal offenders.

s. 718. - The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

- 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
- To promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community

The fundamental principle of sentencing is as follows:

s. 718.1 - A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

Other sentencing principles include the following:

s. 718.2 - A court that imposes a sentence shall also take into consideration the following principles:

- A sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,
 - I. evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or any other similar factor, or
 - II. evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim shall be deemed to be aggravating circumstances;
- 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;
- 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.

Sentencing Options

Presently the criminal law courts have several options when sentencing offenders. This gives the court considerable latitude to consider the nature of the crime, the offender, the victim, public safety and the society at large. The following options may be used.

1. *Absolute and Conditional Discharge*: An absolute discharge means the offender will be viewed as not having a conviction, whereas a conditional discharge means the offender must follow certain guidelines for a specified period of time. Upon successful completion the offender will be given an absolute discharge.
2. *Probation*: A court order for a term of up to 3 years which contains conditions to control an accused's behaviour in the community. These conditions generally include behaviour expectation, including consumption of alcohol or drugs or possession of weapons and may also impose community service hours. A

probation order may stand alone, be in combination with a fine or in combination with a jail sentence of 2 years or less.

3. *Restitution*: This is a payment made by an offender to the victim to cover expenses arising from the crime.
4. *Fines*: Are monetary penalties which may be imposed alone or in combination with incarceration or with probation.
5. *Conditional Sentence*: A conditional sentence is a sentence of incarceration served in the community, with the conditions of the sentence (such as curfews, restricted movement or contact with named others) forming the “walls” of the prison.
6. *Intermittent Imprisonment*: For custodial or jail sentences of 90 days or fewer, an offender can serve the sentence intermittently and be bound by a probation order while at large between times in prison.
7. *Imprisonment*: The most serious sentencing option available and may range anywhere from one day to a maximum of life in prison.
8. *Long Term Offender*: Offenders found by the court to be at risk to re-offend but where there is a reasonable possibility of eventual control of the risk in the community will receive a sentence of imprisonment longer than two years and a community supervision order for up to 10 years.
9. *Dangerous Offender Declaration*: Section 753 of the *Criminal Code* allows the court to categorize the most dangerous offenders (those whose past aggressive, violent or sexual behaviour establishes a pattern that is unlikely to be able to be changed) and sentence them to an indefinite period of imprisonment.

[\(www.laws.justice.gc.ca/en/C-46/\)](http://www.laws.justice.gc.ca/en/C-46/)

Restorative Justice

A recent direction in Canada’s justice system is known as restorative justice. Restorative justice puts the emphasis on dealing with the wrong done to a person and community. This shifts the focus from punishing offenders to helping and healing victims and repairing relationships with the community. Restorative justice programs involve the voluntary participation of the victim of the crime, the offender and, ideally, members of the community, in discussions. The goal is to “restore” the relationship, fix the damage that has been done and prevent further crimes from occurring. The offender must acknowledge and accept responsibility for crime and for the harm done to the victim. Group conferencing, healing circles, reconciliation panels and victim-offender mediation are used in restorative justice initiatives.

Special Considerations

Canadian sentencing laws recognize that some categories of people in society are different than others. This section considers how the *Criminal Code* and *Youth Criminal Justice Act* tailor sentencing principles to meet the needs of Aboriginals and youth respectively.

Aboriginal Sentencing

Section 718.2(e) of the *Criminal Code* addresses Aboriginal sentencing. The section requires a sentencing judge to pay particular attention to the circumstances of Aboriginal offenders and to consider all available sanctions other than imprisonment that are reasonable in the circumstances. An individual's Aboriginal status is considered in determining a sentence because his or her circumstances are different from non-Aboriginal offenders.

One reason why the *Criminal Code* treats Aboriginal people uniquely is because Aboriginal people are overrepresented in Canadian prisons. For example, in 1997, Aboriginal people constituted close to 3 percent of the population of Canada, yet amounted to 12 percent of all federal inmates.

To deal with the overrepresentation of Aboriginal people in prison, s. 718.2(e) directs judges to undertake the sentencing of Aboriginal offenders differently. First, the sentencing judge should consider "the unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts". Some of these background factors include the low incomes, high unemployment, lack of opportunities, lack or irrelevance of education, substance abuse, loneliness, and community fragmentation that lead Aboriginals to have a higher incidence of crime and incarceration. Systemic factors include the widespread discrimination that Aboriginals experience both in, and outside, penal institutions.

Second, the sentencing judge should consider "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". This is because the traditional sentencing ideals of deterrence, separation, and denunciation do not accord with the understanding of sentencing held by Aboriginal offenders and their community. Most traditional Aboriginal conceptions of sentencing place a primary emphasis upon the ideals of restorative justice. Restorative justice is an approach to remedying crime in which it is understood that all things are interrelated and that crime disrupts the harmony which existed prior to a crime's occurrence. Restorative justice determines a particular sanction by considering the needs of the victims, and the community, as well as the offender. An example of this can be seen in circle sentencing.

In a circle sentencing, the judge, crown counsel, defence lawyer, victim, offender, police and community members discuss the crime. In this sense, the community participates in resolving the conflict. Those involved sit in a circle to break down the formality that

can characterize a courtroom sentencing hearing. An emphasis is placed on healing and consensus building among all who are affected by the crime.

Youth Sentencing

The *Youth Criminal Justice Act* provides the legislative framework for Canada's youth justice system. It includes a separate sentencing regime because the needs and situations of youth are different from those of adults.

Section 38 states the principles and purposes of youth sentencing:

38. (1) The purpose of sentencing under section 42 (youth sentences) is to hold a young person accountable for an offence through the imposition of just sanctions that have meaningful consequences for the young person and that promote his or her rehabilitation and reintegration into society, thereby contributing to the long-term protection of the public.

(2) A youth justice court that imposes a youth sentence on a young person shall determine the sentence in accordance with the principles set out in section 3 and the following principles:

- a. The sentence must not result in a punishment that is greater than the punishment that would be appropriate for an adult who has been convicted of the same offence committed in similar circumstances;
- b. The sentence must be similar to the sentences imposed in the region on similar young persons found guilty of the same offence committed in similar circumstances;
- c. The sentence must be proportionate to the seriousness of the offence and the degree of responsibility of the young person for that offence;
- d. All available sanctions other than custody that are reasonable in the circumstances should be considered for all young persons, with particular attention to the circumstances of aboriginal young persons; and
- e. Subject to paragraph (c), the sentence must:
 - i. Be the least restrictive sentence that is capable of achieving the purpose set out in subsection (1),
 - ii. Be the one that is most likely to rehabilitate the young person and reintegrate him or her into society, and
 - iii. Promote a sense of responsibility in the young person, and an acknowledgement of the harm done to victims and the community.