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WRESTLING WITH PUNISHMENT:

The Role of the BC Court of Appeal in the Law of Sentencing

GERRY FERGUSON AND BENJAMIN L. BERGER¹

INTRODUCTION

SENTENCING IS OFTEN PORTRAYED, in the media, as a postscript to the real stuff of criminal justice: the investigation and trial of crime. To be sure, if one is looking for drama, it is most readily found in the excitement of the investigative process or the stylized thrust and parry of the adversarial criminal trial. Yet, as is the case in so many areas of the law, it is the *remedial* dimension of the law – its “business end” – that discloses most about its nature. It is in fact the law of sentencing that provides the most direct window into the theories and assumptions animating the criminal justice system as a whole. Equipped with a broad range of forms and durations of punishment, the sentencing judge is asked to craft a just and effective sanction. But any assessment of the justice and efficacy of a sentence presumes an orienting point by reference to which a judge can set his or her sentencing compass. This orienting point depends upon social views about the nature of individual responsibility and just and appropriate collective responses to wrongdoing. As views on these matters shift, so too do the practices of sentencing.

With this in mind, it is remarkable that sentencing has been and continues to be a relatively “lawless” practice. Historically, little legislative guidance has been available to the sentencing judge on either the aims and purposes of criminal punishment or the fit form and quantum of punishment for given offences, apart from the comparatively few instances in which Parliament has prescribed a minimum sentence. The 1995 amendments to the *Criminal Code* appear to speak to this absence of guidance, listing the aims and principles that should guide sentencing; but this list has amounted to just that – a kind of buffet of objectives

¹ Professors Ferguson and Berger wish to thank Mr. Ryan Bortolin and Ms. Lyndsay Watson for their invaluable research assistance in the preparation of this article.

and principles leaving sentencing judges in much the same position as before the amendments, responsible for selecting one or more of these objectives. In the end, the sentence in a given case turns overwhelmingly on the theory of criminal justice adopted by the particular judge before whom the accused finds him or herself.

This situation, combined with a strong tradition of giving a very large measure of deference to the sentencing judge's decision, has put courts of appeal in a unique and important position. Bound by this principle of deference but aware of the need to articulate some basic principles to guide the practice of sentencing, courts of appeal have played an active role in debating and expounding theories of crime and punishment by which judges can set their sentencing compasses. As a result, in their decisions on the appropriate ends and means of punishment, one finds in appellate pronouncements a uniquely rich source in which to chart shifting social views on the aims, purposes, and practices of sentencing. This article looks at the role and the work of the British Columbia Court of Appeal (BCCA) in this area since the court was first given jurisdiction to hear sentence appeals in 1921. In the three broad periods that we canvass, we draw out the sometimes surprising, often unique, and frequently provocative ways in which the BCCA has, over its history, wrestled with the practice of criminal punishment and, with it, the basic assumptions of our system of criminal justice.

THE EARLY YEARS: 1921-49

Modest Guidance in Respect to Sentencing

As already stated, Parliament has traditionally provided very little guidance to sentencing judges in their important task of imposing a fit sentence. The sentencing framework under Canada's first *Criminal Code*, enacted in 1892, was pretty threadbare. It amounted to the following: (1) capital punishment was restricted to nine offences; (2) a maximum term of imprisonment was specified for all other offences; very few offences specified any mandatory minimum punishment; (3) fines were separate stand-alone sanctions for minor offences or could also be added as an additional sanction to terms of imprisonment; and (4) whipping was available as an additional punishment to imprisonment for approximately ten serious offences. Apart from specifying the maximum penalty, this legislative framework provided no real guidance to sentencing judges since (1) the *Criminal Code* did not set out a statement

of either the aims and objectives of sentencing or the aggravating and mitigating factors that should guide the determination of a fit sentence; and (2) the maximum sentences that were specified in the *Criminal Code* were generally set quite high to cover “the worst case scenario” and therefore provided no guidance on the appropriate sanction for an average, rather than extreme, example of the offence in question.

In short, sentencing was left to the unfettered discretion of the sentencing judge’s own philosophy and attitude towards sentencing. The severity of a sentence depended more on who the judge was than on the gravity of the offence and the circumstances and blameworthiness of the offender.² This potential for unwarranted sentencing disparity was magnified by the fact that there was no right of appeal from the sentence imposed by the trial judge until 1921.³ And even after sentence appeals were established in 1921, appellate guidance and review in regard to sentencing remained fairly limited for a number of reasons. First, sentence appeals were relatively infrequent. In the first twenty-five years after the initiation of sentence appeals, there were on average only two *reported* sentencing appeal decisions per year from the BCCA.⁴ Second, those reported sentence appeal decisions were quite brief – on average one page or less. Generally they confirmed or varied the sentence under appeal with little or no explanation of the sentencing objectives, principles, and factors that justified their conclusion.

This relative lack of guidance in the BCCA’s sentencing decisions can be illustrated by reference to whipping cases. As already noted, the *Criminal Code* indicated that whipping was a discretionary additional punishment that the sentencing judge could impose in respect of a small number of serious offences. Canada-wide statistics on whipping for the five year period 1930–34 indicate that judges imposed whipping very selectively as an additional punishment in 29 percent of rape convictions, 13 percent of robbery convictions, and 4 percent of indecent assault convictions.⁵ Under such circumstances, one might expect that clear guidance would and should be given to sentencing judges by the Court of Appeal regarding the criteria to be used in deciding whether to impose whipping. This did not happen. In each of the four cases between 1925 and 1949, where

² See J. Hogarth, *Sentencing as a Human Process* (Toronto: University of Toronto Press, 1971).

³ See s. 1013(2) of the *Criminal Code*, S.C. 1921, c. 25 as amended by S.C. 1923, c. 41. Although there was no general right to appeal a sentence until 1921, prior to that time a writ of error or a writ of *habeas corpus* could be filed to challenge the legality of a sentence.

⁴ There may have been other unreported sentence appeals.

⁵ Special Joint Committee of the Senate and House of Commons, Final Report on Corporal Punishment, Debates of the Senate 1956 (Hansard) at 872–85. The statistics in this report do not include whipping for drug offences and armed burglary.

the fitness of a sentence of whipping was under consideration, the BCCA summarily concluded that whipping was or was not a fit sentence without any discussion of the criteria or general principles that judges should use in deciding whether whipping was appropriate.

A third explanation for the lack of appellate guidance in sentencing cases is the very deferential approach that the appeal court took to sentences imposed by trial judges. Although the *Criminal Code* indicated that the Court of Appeal “shall consider the fitness of the sentence appealed against,” that appeal function was narrowly construed. In *R. v. Zimmerman*,⁶ the first BCCA decision on sentencing, the court referred to and followed the practice in England and elsewhere in Canada that an appeal court should not vary a sentence unless that sentence applied a wrong principle or was clearly wrong in the sense that it was way too harsh or way too lenient, considering all the circumstances. The fact that the appeal judges were of the opinion that a different sentence would have been preferable was not a sufficient reason to vary the sentence. The limited scope for appellate review set out in *Zimmerman* was consistently cited as the guiding principle in subsequent BCCA sentencing cases.

Prevailing Sentencing Objectives: Retribution and Deterrence

Punishment is first and foremost associated with retribution. In legal terms, retributive punishment is the deliberate infliction of pain, suffering, or deprivation on morally responsible offenders for their culpable violation of criminal laws. It is the criminal justice system’s way of righting the wrong. The sentencing cases decided by the BCCA before 1949 make it clear that their decisions were governed by a sense of retribution and the hope and expectation that the retributive punishment would have a denunciatory and deterrent impact. The court’s decisions never cited rehabilitation as a primary sentencing objective and mentioned it only once in the late 1940s.⁷

⁶ (1925), 46 C.C.C. 78 (B.C.C.A.).

⁷ See *R. v. Cruickshanks* (1946), 63 B.C.R. 102 (C.A.).

THE NEXT QUARTER CENTURY: 1950-75

A Modest Increase in Appellate Guidance

As the number of sentence appeals to the BCCA increased in the third quarter of the century, the court began to issue more detailed judgments that set out some general principles and guidelines for sentencing. For example, in *R. v. Dupont*,⁸ the accused was convicted of armed robbery for the second time and was sentenced to seven years imprisonment and to be whipped with a paddle on two occasions with ten strokes each time. He appealed against the whipping. The BCCA quashed that sentence and commented for the first time on the principles that should govern whipping sentences. Wilson J.A., speaking for two of the three appellate judges, referred to *R. v. Childs*,⁹ in which the Ontario Court of Appeal criticized the backward and outdated nature of whipping and held that judges should impose whipping only in very exceptional cases. Wilson J.A. took exception to these remarks, arguing that Parliament, not judges, should decide whether whipping should be discontinued and that refusing to impose whipping because a judge found it personally distasteful improperly usurped a legislative function. Second, he noted that, in cases in which whipping was imposed as a suitable punishment, the court might properly reduce the length of imprisonment that might otherwise be imposed if whipping were not part of the sentence. Third, in regard to the rationale for whipping, he stated:

With deference, I think that whipping is not to be decreed as a measure of retribution, but only as a deterrent. Where the actions of the prisoner have shown a callous and brutal disregard for the sufferings and indignities he has imposed upon other persons then it may be that one way of bringing home to him what his victim has suffered and thus deterring him, is to expose the prisoner to pain and indignity. This I conceive to be at least part of what parliament had in mind in authorizing judges to order whipping.¹⁰

Finally, on the facts of this case, he noted that the offender used no brutality in his offence (in fact, he restrained brutality by his accomplice), and there were no other features of the robbery that would justify the addition of a sentence of whipping to an appropriately severe sentence of seven years imprisonment.

⁸ (1962), 39 W.W.R. 217 (B.C.C.A.).

⁹ (1939), 71 C.C.C. 70 (Ont.C.A.).

¹⁰ (1962), 39 W.W.R. 217 (B.C.C.A.) at 223.

The BCCA's decision in *R. v. Hinch and Salanski*¹¹ in the late 1960s was another example of the court's setting out general objectives and principles of sentencing as guidance for subsequent cases. The two accused pleaded guilty to conspiracy to obtain money from BC Hydro by false pretences. They agreed to pay kickbacks (approximately \$20,000 over an eight-month period) to a BC Hydro employee who threatened to deny them further construction contracts unless they did so. The two accused were experienced businessmen with no prior criminal records and were well respected in their small-town communities. The trial judge characterized the two accused as victims of the unscrupulous BC Hydro employee and imposed one-month imprisonment and a \$2,000 fine on each of them. Measured against existing precedents, these were very lenient sentences. The Crown appealed. Somewhat surprisingly, a majority of the BCCA held that the trial judge had not made an error in principle and that the sentences were not so low as to warrant the interference of the court.¹² In the course of its judgment, the majority specified the objectives of sentencing as (1) the safety of the public; (2) the deterrent effect of a sentence; (3) punishment of the offender; and (4) reformation and rehabilitation of the offender. However, the court did not indicate how a trial judge should determine which objective(s) should be given priority. The court also waded into the debate over whether retribution and vengeance are appropriate sentencing objectives, stating that "retribution" is too easily confused with vengeance, which involves a loss of objectivity, and concluding that the word "retribution" "is misleading and is to be deprecated."¹³ The court also listed seven factors to be taken into account in reviewing the fitness of a sentence.¹⁴

¹¹ [1968] 3 C.C.C. 39 (B.C.C.A.).

¹² The dissenting judge, Robertson J.A., held that the trial judge did err in treating the two accused as hapless victims, that a one-month sentence was a wholly inadequate deterrent to others, and that any sentence of less than eighteen months would not be an adequate deterrent.

¹³ *Hinch*, supra note 11 at 55.

¹⁴ *Ibid.* at 44-45, where the majority stated "the following factors are among those to be considered by this Court in reviewing the sentences: (1) The degree of premeditation involved; (2) The circumstances surrounding the actual commission of the offence; (3) The gravity of the crime committed in regard to which the maximum punishment provided by statute is an indication; (4) The attitude of the offender after the commission of the crime as this serves to indicate the degree of criminality involved and throws some light on the character of the participant; (5) The previous criminal record, if any, of the offender; (6) The age, mode of life, character and personality of the offender; (7) Any recommendation of the trial Judge, any pre-sentence or probation officer's report, or any mitigating or other circumstances properly brought to the attention of this Court."

Finally, *R. v. Switlishoff*¹⁵ is a remarkable illustration of both appellate deference and of the BCCA's willingness to forego long sentences of imprisonment on the theory that they may sometimes do more harm than good. In this case, six Sons of Freedom Doukhobors were convicted of three serious acts of arson arising out of a clash of ideology with the mainstream Doukhobor community. The sentencing judge, Manson J., widely viewed as particularly severe in matters of sentencing, imposed remarkably lenient sentences on the offenders, ranging from one day to three months. He noted that the offenders were repentant and had promised they would not repeat these offences and that severe sentences imposed on radical Doukhobors in the past had failed to deter them and engendered a sense of grievance. He held that leniency had a real chance of accomplishing what severity had not in the past. The Crown appealed and the majority of the BCCA upheld these sentences. O'Halloran J.A., for the majority, after referring to the principle of appellate deference in *Zimmerman*, stated:

Were the sentences adequate? That depends upon all the surrounding circumstances. There is no such thing as a uniform sentence for a particular crime. No doubt in somewhat similar circumstances it is desirable to avoid marked disparity in sentences. But the individual himself and his surrounding conditions cannot be ignored ...¹⁶

The Doukhobors have been a problem. They have been dealt with severely in the past, both in large and small groups, for failure to obey Canadian laws. The Piers Island temporary penitentiary was an outstanding example, when hundreds of them were incarcerated. But severe sentences have neither reformed them nor deterred them. Manson J. became convinced that leniency might accomplish what severity failed to do in the past. He believes by reason of what he has seen and heard as the assize judge that, outside some "outlaws," the Doukhobors may now be responsive to leniency. He may be right or he may be wrong but this Court plainly cannot say he is one or the other. If he is right posterity may acclaim him as a great judge, far-seeing beyond his generation. If he is wrong, he cannot be much more wrong than many other capable judges and administrators in the past who have relied on severity that has failed in its purpose.¹⁷

¹⁵ (1950), 97 C.C.C. 132 (B.C.C.A.).

¹⁶ Ibid. at 136.

¹⁷ Ibid. at 138. It is interesting to note that Justice O'Halloran seems to lump all Doukhobors together in his assessment of the issues, a common perspective among non-Doukhobors of the time.

In so ruling the BCCA both underscored the principle of appellate deference to sentencing decisions and resounded a note of scepticism about the efficacy of long sentences of incarceration.

The Emergence of Rehabilitation as a Correctional and Sentencing Objective

During this period, rehabilitation emerged gradually as a significant objective, first in correctional policy and then in sentencing. By the 1950s, there had been a significant shift in correctional policy:¹⁸ imprisonment was no longer viewed solely as punishment; it should include as much as possible rehabilitation, which, in turn, necessitated a transformation in prison programming and expertise. New “reform” institutions were established in British Columbia, including New Haven, the Young Offenders Unit at Oakalla Prison, and, later, the Haney Correctional Institution. These reform institutions were modelled on the British “borstal” system, which provided intensive programs of education, training, and instruction for young offenders in specially created correctional institutions with the overriding objective of rehabilitating these youths. There was optimism that rehabilitation, especially of young offenders and first offenders, could occur in these specialized prison programs.¹⁹ This shift towards rehabilitation in correctional policy was accompanied by two important legislative changes that allowed judges to take a more rehabilitative approach to sentencing: (1) the enactment of a *Probation Act* for British Columbia and (2) the creation of indeterminate sentences for young offenders in British Columbia.

Increased Use of Suspended Sentences and Probation

In 1946, British Columbia enacted a *Probation Act*, which put in place the beginnings of a probation service staffed by professional probation officers who could supervise offenders in the community.²⁰ Probation quickly became a popular sentencing option for trial judges and the BCCA

¹⁸ This shift in correctional policy is set out in detail in D. Doherty and J. Ekstedt, *Conflict, Care and Control: The History of the Corrections Branch in British Columbia* (Vancouver: Institute for Studies in Criminal Justice Policy, Simon Fraser University, 1991).

¹⁹ By 1958, New Haven was claiming a rehabilitation rate of 80 percent for the more than five hundred young offenders treated there during the past ten years. By 1962–63, these success rates were downgraded to 62 percent for New Haven, 64 percent for Haney, and 70 percent for Gold Creek Forestry Camp. Success was measured by the narrow criterion that the young offender had not re-entered the correctional system for at least one year after his or her release. See Doherty and Ekstedt, *Conflict* at 92–93 and 102.

²⁰ *Probation Act*, S.B.C. 1946, c. 60.

supported the use of probation for rehabilitative purposes. For example, in *R. v. Allen*,²¹ the trial judge imposed a sentence of two years imprisonment on the offender for three counts of indecent assault on young girls. The BCCA, on the advice of a psychiatric expert who indicated that the offender would not benefit from imprisonment, quashed the prison sentence and placed the offender on probation for two years, with the requirement that he attend the Crease Clinic for psychotherapy. And in *R. v. Bludoff*,²² the offender was convicted of stealing gas over a two-year period to a value of more than \$20,000. Notwithstanding that this type of offence would normally result in a prison sentence, the magistrate imposed a suspended sentence and probation and the BCCA upheld that sentence, applying its normal deferential approach. However, the BCCA made it clear that a suspended sentence and probation was not acceptable in those cases in which a court decided that general deterrence was the primary sentencing objective. For example, in the late 1960s and early 1970s, the BCCA attempted to stamp out the rapid increase in marijuana use among young people by imposing harsh sentences designed to deter both the offender and others. In *R. v. Budd*,²³ *R. v. Hartley and McCallum*,²⁴ and *R. v. Adelman*,²⁵ the BCCA indicated that sentences of six months imprisonment should be imposed on the offenders, all of whom were college students and first time offenders. For example, although the sentencing judge had imposed a suspended sentence on Adelman (who had a master's degree and was studying for another), the BCCA overturned that sentence. In its view, the primary purpose of sentencing was to control the incidence of crime through punishment and this could be accomplished by deterring others and rehabilitating the offender. However, the court held that rehabilitation was a secondary objective in circumstances where severe sentences are necessary to bring a rapidly increasing offence under control. Notwithstanding their concern for the adverse consequences of sending these young offenders to jail, the court held that sentencing judges could not allow a criminal law to be broken frequently with impunity. Obviously, the court considered the use of fines and probation in such cases as virtually equivalent to impunity.²⁶

²¹ (1954), 108 C.C.C. 239 (B.C.C.A.).

²² (1960), 129 C.C.C. 264 (B.C.C.A.).

²³ Unreported, B.C.C.A. January 15, 1965.

²⁴ (1968), 63 W.W.R. 174 (B.C.C.A.).

²⁵ (1968), 63 W.W.R. 294 (B.C.C.A.).

²⁶ The court did leave open the possibility that there might be exceptional cases where probation could be a fit sentence for possession of marijuana.

Adelman set the standard for imposition of jail sentences on first time offenders for simple possession of marijuana for the next several years.²⁷

Indeterminate Sentences

To facilitate rehabilitation of young adult offenders, the BC government requested that the federal government amend the *Prisons and Reformatories Act* to authorize the use of indeterminate sentences for young offenders in British Columbia. The new provision, enacted in 1948,²⁸ gave BC judges the power to sentence male persons aged sixteen to twenty-two to a definite term of imprisonment between three months and two years less a day and an additional indeterminate period thereafter of not more than two years less a day to be served “in New Haven, instead of the common gaol.”²⁹ The new provisions under the *Prisons and Reformatories Act* also created a BC Parole Board, which was authorized to release the young offender on parole at the optimum rehabilitative moment during the indeterminate portion of his sentence. And the *New Haven Act*³⁰ specified that the newly created institution called New Haven should be for the custody and detention of young persons “with a view to their education, training, and reclamation.” As the court noted in *R. v. Adams*,³¹ the rehabilitative purposes of the new provisions were clear. They were designed “to provide a means of segregation of certain youthful offenders from hardened criminals, and of making every effort to reclaim such offenders from a life of crime by methods which could only succeed in the most favourable surroundings set apart from a crowded prison such as Oakalla.”³² Likewise the court in *R. v. Moss* indicated that

²⁷ In *R. v. Bruckshaw*, (1972), 9 C.C.C. (2d) 133 (B.C.C.A.), where the accused had bought an ounce of hash and cut it into smaller pieces for his own use and also to sell a couple of pieces to his friends, Robertson J.A., concurred in by Nemetz and Branca JJ.A., stated: “It goes against the grain to send an otherwise nice boy to prison, where he must come in contact with persons of the most undesirable kind. But the quantity of a narcotic that a nice boy sells does just as much harm to its user as the same quantity sold by a depraved adult, and it is the potential users of drugs that the Court’s policy is primarily directed to protecting” (137).

²⁸ *Prisons and Reformatories Act*, RSC 1927, c. 165, amended by S.C. 1948, c. 26, which added ss. 147A to 147C. Ontario was the only other province that had a determinate/indeterminate sentencing scheme.

²⁹ The *Prisons and Reformatories Act* was subsequently amended in 1951 to authorize indeterminate sentences to be served in the Young Offenders Unit at Oakalla and in 1958 to be also served at the Haney Correctional Institute.

³⁰ Stats. B.C. 1949, c. 45.

³¹ (1950), 98 C.C.C. 53 (B.C.S.C.).

³² *Reference Re Adams*, [1950] 2 W.W.R. 614 at 617 (B.C.S.C.).

the new provisions were “directed to a special object, viz., the efficient administration of the Borstal system in British Columbia.”³³

It is apparent from reading the cases that some judges, in order to provide correctional authorities with adequate time to carry out a program of rehabilitation, were imposing longer determinate/indeterminate sentences under the *Prisons and Reformatories Act* than they would have done had the offender been sentenced under the general sentencing laws.³⁴ The longer sentences were considered appropriate since rehabilitation was seen to be in the best interests of both the offender and society and because there was an expectation that parole would normally be granted for a portion of the indeterminate sentence. Interestingly, in *R. v. Holden*,³⁵ the BCCA stated that it is “quite wrong” to impose longer sentences on *adult offenders* solely for rehabilitative purposes, leaving it to the Parole Board to release such offenders at the optimum rehabilitative point in their sentences. The court stated that “no greater sentence should be imposed than the nature of the offence requires when it is considered in the light of the attendant circumstances and established principles.”³⁶ However, the court expressly stated that its comments in this regard did not apply to determinate/indeterminate sentences on young offenders under the *Prisons and Reformatories Act*.

As time passed, the conflict between the principle of proportionality and the practice of imposing longer sentences for rehabilitative purposes under the *Prisons and Reformatories Act* came to a head. In *R. v. Turcotte*,³⁷ the offender was sentenced to a definite term of eighteen months imprisonment plus an indeterminate term of two years plus a day. But the maximum punishment for the offence in question under the statute creating the offence was only eighteen months. By reliance on the *Prisons and Reformatories Act*, the trial judge had sentenced the offender to two years longer than the maximum sentence prescribed for that offence. A majority of the BCCA held that such an application of the *Prisons and Reformatories Act* was contrary to the legislative intent of the Act. Surprisingly, a five to four majority of the Supreme Court of

³³ *R. v. Moss* (1951), 4 W.W.R. (N.S.) 688 at 689 (B.C.C.A.).

³⁴ See, for example, *R. v. Moss*, *ibid.*, where the Court of Appeal altered an eighteen-month definite sentence in Oakalla to a six-month determinate sentence and a two-year-less-one-day indeterminate sentence in New Haven. Conversely, where the Court of Appeal was of the view that the trial judge overemphasized deterrence and retribution and gave insufficient consideration to reformation, it reduced an aggregate sentence of six years imprisonment to a sentence of twelve months definite and twelve months indeterminate. See *R. v. Courtney* (1956), 115 C.C.C. 260 (B.C.C.A.).

³⁵ [1963] 2 C.C.C. 394 (B.C.C.A.).

³⁶ *Ibid.* at 396-97.

³⁷ (1969), 69 W.W.R. 705 (B.C.C.A.), reversed [1970] S.C.R. 843.

Canada (scc) overturned the Court of Appeal and held that the interpretation placed on the *Prisons and Reformatories Act* by the sentencing judge was correct. Thus young offenders, in the name of rehabilitation, could be sentenced to longer maximum sentences than adult offenders.

Four years later the same issue was before the courts in *R. v. Burnshine*.³⁸ This time the offender argued that the imposition of a determinate/indeterminate sentence under the *Prisons and Reformatories Act* that was longer than the maximum sentence set out in the statute creating that offence and that only applied to male persons in British Columbia between the ages of sixteen and twenty-two was a violation of equality before the law under s. 1(b) of the *Canadian Bill of Rights*. A majority of the BCCA agreed with that submission and held that the determinate/indeterminate provision of the *Prisons and Reformatories Act* was inoperative. The majority held that treating offenders in British Columbia under the age of twenty-two more harshly than similar offenders in other parts of Canada was indeed a denial of equality under the law. Once again, on further appeal, a six to three majority of the scc set aside the BCCA's progressive judgment and held that there was no infringement of the offender's right to equality before the law. The majority of the Supreme Court, in effect, justified its amazing conclusion on the basis that the young offenders in question were not being treated "more harshly" since the determinate/indeterminate provisions under the *Prisons and Reformatories Act* were enacted for legitimate rehabilitative purposes.

Soon after the BCCA issued its judgment in *Burnshine* declaring that determinate/indeterminate sentences were a violation of the *Bill of Rights*, the new NDP provincial government's interest in these types of sentences waned, and it was not revived when the scc declared, a year later, that those sentences were indeed legal. Instead, in 1975, the BC government closed Haney Correctional Institution, and Parliament formally abolished determinate/indeterminate sentences in 1978. The closing of Haney marked a shift in the government's penal policy reflecting the view that rehabilitation could be achieved more effectively through community-based, rather than jail-based, programs. The government believed that these community-based programs could be implemented by greater use of temporary absence programs, parole, halfway houses, probation, and community service orders.³⁹

³⁸ (1973), 22 C.R.N.S. 271 (B.C.C.A.), reversed (1974), 25 C.R.N.S. 270 (S.C.C.). For a critique of the scc decision, see W. Conklin and G. Ferguson, "The *Burnshine* Affair: Whatever Happened to *Drybones* and Equality before the Law?" *Chitty's Law Journal* 22 (1974): 303-13.

³⁹ Doherty and Ekstedt, supra note 18 at 137-39.

MODERN TIMES: 1975 TO THE PRESENT

The Sentencing Role of Appellate Courts

The number of sentencing appeals coming before the BCCA continued to increase rapidly during this most recent period. Yet matching this trend in increased workload on sentencing matters was an equally robust and continuing trend in favour of significant appellate deference on sentence appeals. Although some appellate courts were becoming more interventionist in the 1970s and 1980s,⁴⁰ the SCC strongly reasserted, in a series of cases in the 1990s and thereafter, that appellate courts must pay great deference to the sentencing judge's choice of sentence.⁴¹

This combination of a marked increase in the number of appeals and great appellate deference towards the sentences meted out by sentencing judges meant that the chief influence of appellate courts was in the broad articulation of principles and objectives that ought to guide sentencing judges. Indeed, until 1995 when Parliament passed Bill C-41,⁴² which added new sections to the *Criminal Code* outlining the objectives, purposes, and principles of sentencing, appellate courts were the key source of legal guidance on the ends that we purport to seek with the imposition of criminal sanctions. And since the SCC seldom entertained sentence appeals on the sole issue of the fitness of a given sentence,⁴³ provincial appellate courts were in most instances courts of last resort on issues of sentencing. Not surprisingly, these appellate courts frequently held very divergent opinions on the approach that one should take to

⁴⁰ This more active approach to appellate review was facilitated by appellate courts establishing starting points or ranges for particular types of offences. See, for example, *R. v. Sandercock* (1985), 22 C.C.C. (2d) 79 (Alta. C.A.). However, appellate statements of starting point sentences was somewhat frowned upon in *R. v. McDonnell*, [1997] 1 S.C.R. 948. In *R. v. Stone*, [1999] 2 S.C.R. 290, in which the practice of appellate courts setting sentencing "ranges" for particular categories of offences in order to minimize sentencing disparity was approved of, Justice Bastarache nevertheless cautioned that "in attempting to achieve uniformity, appellate courts must not interfere with sentencing judges' duty to consider all relevant circumstances in sentencing" (para. 244). See also BC Chief Justice Farris's remarks in "Sentencing" (1976) 18 Crim. L.Q. 421 at 422.

⁴¹ See *R. v. Shropshire*, [1995] 4 S.C.R. 227; *R. v. M.(C.A.)*, [1996] 1 S.C.R. 500. In a BC Court of Appeal case in 2000, McEachern C.J.B.C. expressed the opinion that the Supreme Court's recent jurisprudence on appellate deference "unduly limits the proper exercise" of the right of appeal and can lead to unfair or unjust sentences being upheld. See *R. v. Mafi* (2000), 142 C.C.C. (3d) 449 at para. 39 (B.C.C.A.), leave to appeal refused [2000] S.C.C.A. No. 180.

⁴² *An Act to Amend the Criminal Code (Sentencing and Other Acts in Consequence Thereof)*, S.C. 1995, c. 22.

⁴³ Although the Supreme Court does not grant leave to appeal a sentence on the basis that it is unfit, it does entertain a limited number of sentence appeals that involve questions of law or significant sentencing principles. See, for example, *R. v. Gardiner* (1982), 68 C.C.C. (2d) 477 (S.C.C.).

criminal sentencing. During this period, appellate courts were also acting in an environment in which there was vigorous public, governmental, and academic discussion on how to navigate and balance the divergent philosophies of punishment variously at play in the system. The Law Commission of Canada and other legal reform institutions were, in the 1970s and thereafter, actively engaged in researching and suggesting sentencing models.⁴⁴ The appellate judgments of this time were, thus, engaging with this energetic body of debate and reform literature, not least of which was the 1987 Report of the Canadian Sentencing Commission, chaired by Judge Archambault.⁴⁵

In this context, appellate courts attempted to balance and reconcile the two broad constellations of principles outlined thus far in this article: (1) the traditional model of deterrence- and retribution-based sentencing predominant in the early years and (2) the ethic of rehabilitation that, although unsuccessful in the particular form that it first took in British Columbia, was nevertheless very much still in the air in the late 1970s and beyond. Needless to say, the BCCA decided many important technical points of sentencing law in this period. However, it is on these broader philosophical questions – questions about the orientation of the system of punishment as a whole – that the BCCA adopted unique and important positions in the last quarter of the twentieth century. Some of these cases reflect the shape that our modern law has ultimately taken, whereas others now stand out as marking sentencing roads not taken.

The BC Court of Appeal on the Objectives of Sentencing

The 1995 amendments to the *Criminal Code* came after many years in which appellate courts wrestled with and developed their own approach to the objectives of criminal punishment. The period between the mid-1970s and 1995 was a particularly active time for the BCCA in coming to terms with the various – and often competing – objectives of sentencing. Here, we focus upon four key contributions of the court to the debate about the aims and purposes of sentencing in the time leading up to and immediately following the 1995 amendments.

⁴⁴ For a summary of the various reports and bodies engaged in assessing the sentencing system in Canada, see Gerry Ferguson, “From Jeremy Bentham to Anne McLellan: Lessons on Criminal Law Codification,” in Don Stuart, Ronald J. Delisle, and Allan Manson, eds., *Towards a Clear and Just Criminal Law: A Criminal Reports Forum* (Scarborough, ON: Carswell, 1999) 192 at 208–10.

⁴⁵ Canadian Sentencing Commission (Archambault Commission), *Sentencing Reform: A Canadian Approach* (Ottawa: Canadian Government Publishing Centre, 1987).

Questioning Deterrence

As already discussed, retribution and the notion of specific and general deterrence was the backbone of sentencing law in the early years of the BCCA's work. In the late 1970s, however, one finds the BCCA struggling with *and questioning* the utility of deterrence as an objective of criminal punishment. Consider, for example, the 1977 case of *R. v. Harrison and Garrison*.⁴⁶ The accused were convicted of robbery and given suspended sentences that included two hundred hours of community service. The Crown appealed, *conceding* that the accused had themselves learned their lesson but arguing that the principle of general deterrence – discouraging others from committing similar crimes – mandated an increase in sentence. In the course of dismissing the Crown appeal, Chief Justice Farris offered provocative remarks on the nature of general deterrence. Referring to and adopting comments that he made on another occasion, Farris C.J.B.C. expressed the view that “general deterrence is a by-product of the whole system of justice and not necessarily an aim of any particular sentence.”⁴⁷ Rather than emphasising the severity of individual punishment, Chief Justice Farris reasoned – wisely, in our view – that “[p]revention follows from awareness of the system and of the efficiency of its operation,”⁴⁸ appealing to the reason of some and to the fear of others, thus creating a deterrent effect. As a result, “[t]he effectiveness of the principle of general deterrence (such as it is) is not diminished by refusing to imprison a person who should not be imprisoned.”⁴⁹

This critical stance towards deterrence is somewhat remarkable viewed from within the current political climate in which so much criminal justice policy is driven by the assumed efficacy and predominance of this objective. Yet it is a view supported by much social-scientific literature that suggests that the likelihood of being caught is a far more effective route to deterrence than severity of punishment, which has marginal effect at best. Chief Justice Farris's decision, thus, offered the possibility of marginalizing a heavily invoked but dubious aspect of our sentencing system. Unfortunately, the impact of this decision would be short-lived. In the 1981 case of *R. v. Campbell*,⁵⁰ and “[a]fter anxious reflection,” Chief Justice Nemetz expressly overruled *Harrison*, stating that it “should no longer be followed.”⁵¹ Indeed, he stated that

⁴⁶ [1978] 1 W.W.R. 162 (B.C.C.A.).

⁴⁷ *Ibid.* at 164.

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

⁵⁰ [1982] 1 W.W.R. 739 (B.C.C.A.).

⁵¹ *Ibid.* at 741.

"where a serious offence involving violent crime has been committed ... deterrence to others is not only an important factor in sentencing but should be the *prime consideration* taken into account."⁵² Chief Justice Nemetz substituted a period of incarceration for the suspended sentence imposed by the sentencing judge. Although the court would later clarify that the decision in *Campbell* did not mean that imprisonment was the only means of achieving general deterrence,⁵³ it also confirmed the idea that deterrence is not only still a key objective of criminal punishment in British Columbia but also the *prime consideration* in serious offences.⁵⁴ In *R. v. Mulvahill*⁵⁵ the court explained that, "[a]lthough thoughtful questions have been raised from time to time as to whether sentences imposed for some crimes do in fact deter others," pursuing deterrence by means of a severe sentence was appropriate for serious crimes and for those in which "there is a high degree of planning and pre-meditation, and where the offence and its consequences are highly publicized."⁵⁶

In 1992, the BCCA decided the case of *R. v. Sweeney*,⁵⁷ which it viewed as an important opportunity to undertake a full re-examination of the objectives and principles governing criminal sentencing in the province. To facilitate the free reassessment of sentencing law and theory, the court sat as a panel of five, which gave it the liberty to depart from past rulings.⁵⁸ Justice Wood issued separate reasons concurred in by Chief Justice McEachern. These concurring reasons are remarkable inasmuch as they offer a clear and systematic assessment of the purposes and objectives of sentencing, drawing heavily from the report of the Canadian Sentencing Commission, three years before the introduction of Bill C-41.

Interestingly, Wood J.A. expressed deep scepticism about the theory of general deterrence. In this respect, his position was more radical than that of the Commission, which had cautiously accepted deterrence as a sentencing objective. "The problem with the theory," Wood J.A. explained, "lies in its extension to the conclusion, which I believe has been too easily accepted in the past, that the greater the sanction imposed in any given case, the greater will be its general deterrent effect."⁵⁹ Justice Wood, very much echoing Chief Justice Farris's concerns articulated

⁵² Ibid. (emphasis added).

⁵³ *R. v. Schell and Moran*, [1982] 1 W.W.R. 682 at 690 (B.C.C.A.).

⁵⁴ See, for example, *ibid.* at 690.

⁵⁵ (1993), 21 B.C.A.C. 296.

⁵⁶ *Ibid.* at para. 28.

⁵⁷ (1992), 71 C.C.C. (3d) 82 (B.C.C.A.).

⁵⁸ Justice Wood explained this in the opening words of his judgment. See *Sweeney*, *ibid.* at 89.

⁵⁹ *Ibid.* at 98-99.

in 1977, cites “an increasingly persuasive body of evidence and learned opinion” against the general deterrent effect. Yet it remains a substantial component of our modern law *and politics* of sentencing, and the SCC has itself adopted a formula very much similar to that enunciated in *Campbell*, giving a privileged position to deterrence in cases of serious crime.

Wrestling with Denunciation

Chief Justice Farris commented in *Harrison* that it is “the moral sense of the community which substantially achieves the objective of the prevention of crime.”⁶⁰ Interestingly, despite his difference with Farris C.J.B.C. on the deterrence point, in his separate concurring reasons in *Campbell*, Justice Taggart similarly endorsed the notion that “a sentence is imposed because it reflects the revulsion of society against the particular offence.”⁶¹ What is the role of “the moral sense of the community” and “revulsion” for particular acts in a just sentencing regime? The BCCA has wrestled with this issue as a matter of the appropriate role of *denunciation* as an aim of the law of sentencing.

In this period of substantial debate about the purposes of sentencing, the morally communicative aspect of criminal sentences was endorsed early by Chief Justice Farris in the 1977 case of *R. v. Oliver*.⁶² The case involved a lawyer who was convicted of misappropriating over \$300,000 from trust funds. He was given a ninety-day sentence to be served intermittently (i.e., on weekends). The Crown appealed, arguing that this sentence was unfit. Chief Justice Farris agreed and imposed a sentence of four years incarceration. The principal justification for this radical increase in the severity of the sentence was the objective of denunciation, the sense of revulsion felt by the community at the breach of the moral standards of the criminal law. He explained as follows:

Courts do not impose sentences in response to public clamour, nor in a spirit of revenge. On the other hand, justice is not administered in a vacuum. Sentences imposed by courts for criminal conduct by and large must have the support of concerned and thinking citizens. If they do not have such support, the system will fail. There are cases, as Lord Denning has said, where the punishment inflicted for grave crimes should reflect the revulsion felt by the majority of citizens for them. In his view, the objects of punishment are not simply deterrent or

⁶⁰ *Harrison*, supra note 46 at 164.

⁶¹ *Campbell*, supra note 50 at 742.

⁶² [1977] 5 W.W.R. 344 (B.C.C.A.).

reformatory. The ultimate justification of punishment is the emphatic denunciation by the community of a crime.⁶³

Chief Justice Farris's acceptance of denunciation while putting into question deterrence points to an important fault line in the theory of sentencing. One may reject a utilitarian approach to sentencing while strongly embracing a morally expressivist sense of the ends of criminal punishment.

Yet, while accepting denunciation as a legitimate aspect of criminal sentencing, the BCCA has reflected a certain caution about heavy reliance upon it. In *R. v. Pettigrew*,⁶⁴ the court was faced with the case of an alcoholic woman who, while drunk and attempting to remove bullets from a firearm, killed the man with whom she was living. She was convicted of manslaughter and the sentencing judge imposed a one-year custodial sentence, noting that "courts have to mark the taking of a life in a way that's significant to members of society".⁶⁵ Ms. Pettigrew appealed, arguing that imprisonment solely for the purposes of denunciation was unwarranted. Justice Taylor, writing for the majority of the court, conceded that denunciation, or punishment "as expression or reflection of society's 'abhorrence at,' or 'rejection of,' the conduct of the offender"⁶⁶ is a legitimate part of the sentencing process. Yet Justice Taylor emphasized that denunciation must be assessed in the context of the given case and that a sentencing judge must consider any adverse effects that a denunciatory sentence might have on the rehabilitation of the offender. Faced with a Métis offender with no prior criminal record and afflicted with alcoholism, Justice Taylor concluded that "a sentence based wholly on 'denunciation,' 'rejection' or 'abhorrence,'" was, in his view, "difficult to justify."⁶⁷ He allowed the appeal and reduced the sentence.

In *Sweeney*, Justice Wood confirmed this cautious approach to the use of denunciation as a justification for punishment. He argued that denunciation was but a mechanism to achieve what he, along with the Canadian Sentencing Commission, concluded was the fundamental purpose of sentencing: proportionality between the gravity of the offence and the degree of responsibility of the offender, as measured by "the moral culpability of the offender's conduct."⁶⁸ As such, "denunciation, as a goal of sentencing, must be *strictly limited* to ensuring that sentences imposed

⁶³ Ibid. at 346.

⁶⁴ (1990), 56 C.C.C. (3d) 390 (B.C.C.A.).

⁶⁵ Quoted in *ibid.* at 393.

⁶⁶ Ibid. at 394. Justice Taylor here cites the Archambault Commission in support.

⁶⁷ Ibid. at 397.

⁶⁸ *Sweeney*, *supra* note 57 at 97.

for criminal convictions are proportionate to the moral culpability of the offender's unlawful act."⁶⁹ Why this deep caution around the objective of denunciation, a caution not frequently detected in contemporary sentencing law? The answer is found in Justice Wood's recognition that denunciation is an objective "associated with the retributive theory of sentencing"⁷⁰ and in the BCCA's unique and fascinating debate on the legitimacy of *retribution* in our system of criminal punishment.

What Role for Retribution?

In the 1968 case of *R. v. Hinch and Salanski*,⁷¹ discussed above, the BCCA took a strong position against the legitimate place of "retribution" in a modern system of criminal punishment. In that case, Justice Norris reasoned that "the use of the term 'retribution' as a factor in sentencing is misleading and is to be deprecated"⁷² as it reflected a sense of societal vengeance meted out against an offender and a concomitant loss of objectivity "not in accord with the present-day concept of the purposes of the criminal law."⁷³

Yet to accept, as the court did from the late 1970s into the 1990s, the idea that denunciation – or the expression of *abhorrence* or *revulsion* of society at the breach of its moral code – has a legitimate role to play in a just system of criminal punishment but to reject the idea of the infliction of punishment for *retributive* purposes is a fine jurisprudential line to walk. Thus, by the early 1990s, and no doubt precipitated by its various decisions endorsing the concept of denunciation, the BCCA was faced with a series of cases that put the hard question of whether retribution was, indeed, a legitimate aspect of the sentencing process.

One finds in the cases at this time a rich discussion surrounding the concept of retribution. On the one hand, in certain cases the court seems to take the position that "retribution" is merely an old and perhaps outdated term used to designate the legitimate end of denunciation. This is the view of Taylor J.A. in *Pettigrew*, who wrote that denunciation,

⁶⁹ Ibid. at 103 (emphasis added). See also *R. v. Hicks* (1995), 56 B.C.A.C. 259, in which Lambert J.A. explained that the overriding principle of sentencing must be "that the sentence must be commensurate with the gravity of the offence" (para. 13) and that denunciation is only "a proper factor to consider and apply in order to lead to a sentence that is consistent with the overriding principle that the sentence must be commensurate with the gravity of the offence" (para. 14).

⁷⁰ *Sweeney*, supra note 57 at 103.

⁷¹ [1968] 3 C.C.C. 39 (B.C.C.A.).

⁷² Ibid. at 44.

⁷³ Ibid.

a legitimate factor in the sentencing process, is simply “not spoken of today as ‘retribution,’”⁷⁴ but it still captures the idea of the infliction of a penalty in response to society’s “abhorrence at” or “rejection of” the conduct of the offender. In a later case, *R. v. Eneas*,⁷⁵ Justice Southin, writing a majority opinion from which Wood J.A. dissented, voiced even more explicit support for the legitimate role of retribution in sentencing, arguing that the key distinction is that between “retribution,” which is an aspect of sentencing, and “revenge,” which is not. She described revenge as “what the family of the victim wants for its own loss” and concluded “of that the law takes no account.”⁷⁶ By contrast, Southin J.A. reasoned that “retribution is what society demands as an expression of its own moral code”⁷⁷ and is, thus, essential to the criminal law. One sees the close link drawn between retribution and denunciation in her thought when she explains that “[t]he moral code of any society finds some of its expression in the criminal law”⁷⁸ and that retribution serves the end of expressing abhorrence at the breach of this moral code. Justice Southin wrote that a judge is entitled to gauge the moral outrage that retribution legitimately reflects not only by reference to the *Criminal Code* but also by reference to the “thoughts, feelings, and attitudes of the rest of the community.”⁷⁹ In a resonant turn of phrase, she explained that retribution as a component of criminal sentencing is a legitimate response to the fact that “the community is outraged by mindless violence, especially by mindless violence ending in death, and expects *a killing to be expiated* by a substantial term of imprisonment.”⁸⁰ By means of retribution, she seems to be arguing, criminal punishment legitimately serves as a kind of sacrificial atonement for the moral sins of the offender.⁸¹

But the weight of authority in the BCCA stood against retribution as a legitimate purpose of sentencing. The conceptual struggle for the judges taking this position was to meaningfully distinguish this aim from that of denunciation. This is clear in the 1992 judgment of Wood J.A. in *R. v. Hoyt*.⁸² Justice Wood refers to and endorses the rejection of retribution as a principle of sentencing in *R. v. Hinch and Salanski*,

⁷⁴ *Pettigrew*, supra note 64 at 394.

⁷⁵ [1994] B.C.J. No. 262 (C.A.), leave to appeal refused [1994] S.C.C.A. No. 154.

⁷⁶ *Ibid.* at para. 47.

⁷⁷ *Ibid.* at para. 47.

⁷⁸ *Ibid.* at para. 48.

⁷⁹ *Ibid.* at para. 49.

⁸⁰ *Ibid.* at para. 49 (emphasis added).

⁸¹ Justice Wood dissented vigorously from this reasoning, stating: “I do not accept that retribution can be distinguished from revenge, nor do I agree that the theological notion of expiation has anything to do with modern day principles of sentencing.” See *ibid.* at para. 55.

⁸² (1992), 77 C.C.C. (3d) 289 (B.C.C.A.).

stating that none of the court's jurisprudence could be said to have retreated from that position. His stance against retribution is firm, and he states that "there is no meaning theoretical or otherwise ... which can give retribution any role in a principled approach to sentencing."⁸³ He explains: "At best it is a concept which is incapable of any objective standard of application. At worst it subverts the rule of law which, in a civilized community, stands between the offender and the understandable and quite natural instinct of revenge which arises both in the victim and in all who identify with the victim." In the case at hand, Justice Wood read the sentencing judge's reference to retribution as an "inadvertent slip of the tongue";⁸⁴ the trial judge was, in Wood J.A.'s view, actually invoking the legitimate purpose of denunciation. In *Hicks*,⁸⁵ Lambert J.A. underscored the legitimate role of denunciation but characterized the distinction between denunciation and retribution as a matter of *degree*: "It is when denunciation goes further and results in a sentence that is more severe than is required in order to be proportionate to the gravity of the offence that denunciation turns from an applicable sentencing principle into retribution or revenge, neither of which is appropriate."⁸⁶

The contours of this engaging debate in the BCCA are clear. Retribution is a problematic aim of sentencing that sits somewhere between illegitimate vengeance and the accepted purpose of denunciation. For those judges who accepted the role of retribution, it was but a rephrasing and legitimate form of denunciation – the desire to express, through criminal punishment, the moral disapprobation of the community. On the other side, and reflecting the weight of authority from the BCCA, judges who rejected retribution distinguished it from denunciation precisely in its slide to revenge.⁸⁷

Although the BCCA would ultimately reject retribution as a legitimate component of our criminal justice system, in *R. v. C.A.M.*,⁸⁸ the SCC disagreed. *C.A.M.* was a horrific case involving multiple counts of egregious sexual violence. The sentencing judge had imposed a sentence totalling twenty-five years, but a majority of the BCCA reduced the sentence by approximately seven years on the basis that this sentence

⁸³ Ibid. at 296.

⁸⁴ Ibid. at 297.

⁸⁵ Supra note 69.

⁸⁶ Ibid. at para. 14.

⁸⁷ See, for example, *R. v. D.E.S.M.* (1993), 80 C.C.C. (3d) 371 (B.C.C.A) at para. 22, in which a unanimous bench of five defines retribution as punishment "motivated primarily by a desire to exact revenge." "This approach," the court explains, "has long been rejected by the Courts and by Parliament as a principle of sentencing."

⁸⁸ [1996] 1 S.C.R. 500.

offended the court's general rule that consecutive sentences should not exceed a total of 20 years in custody. In the course of his reasons, Justice Wood also reiterated the position of the court that retribution is not a legitimate goal of sentencing, referencing "[t]he fine line which separates the legitimate denunciatory objective from its illegitimate retributive cousin,"⁸⁹ and he also referred to the practice in the United States, under the banner of retribution, of imposing sentences totalling several hundred years imprisonment, a practice that, to Justice Wood, "with respect, can only be regarded as both absurd and uncivilized."⁹⁰ But the scc overruled the BCCA's decision, restoring the sentence of twenty-five years imprisonment. In the course of its reasons, the scc also held that the Court of Appeal had erred in concluding that retribution is not a legitimate principle of sentencing.

In the scc's view, retribution "is an accepted, and indeed important, principle of sentencing in our criminal law."⁹¹ Chief Justice Lamer, writing for the court, explained that "[r]etribution, as an objective of sentencing, represents nothing less than the hallowed principle that criminal punishment, in addition to advancing utilitarian considerations related to deterrence and rehabilitation, should also be imposed to sanction the moral culpability of the offender."⁹² Yet the Supreme Court did not follow the path of the BC dissenters who would tie retribution to denunciation, nor did it reject the concerns expressed by those BC justices who were so very uneasy with its ready association with vengeance. Instead, the scc explained that, unlike vengeance, which is "an uncalibrated act of harm upon another, frequently motivated by emotion and anger, as a reprisal for harm inflicted upon oneself by that person," retribution "represents an objective, reasoned and measured determination of an appropriate punishment which properly reflects the *moral culpability* of the offender."⁹³ Yet retribution, the scc explains, is also distinct from denunciation. Whereas denunciation is a symbolic expression of the community's condemnation of the conduct in question, retribution is about properly reflecting the moral culpability of the offender.⁹⁴

⁸⁹ *R. v. C.A.M.* (1994), 28 C.R. (4th) 106 (B.C.C.A.) at para. 29.

⁹⁰ *Ibid.* at 30.

⁹¹ *Supra* note 88 at para. 77.

⁹² *Ibid.* at para. 79.

⁹³ *Ibid.* at para. 80 (emphasis in original).

⁹⁴ Interestingly, in the 1995 sentencing amendments, Parliament did not use the word "retribution" in listing the aims and objectives of sentencing. That having been said, Section 718 of the *Criminal Code* specifically mandates the imposition of "just sanctions," sanctions that, according to s. 718.1, "must be proportionate to the gravity of the offence and the degree of responsibility of the offender." In effect, although it did not adopt the language of "retribution,"

One can take issue, as we would, with the distinctions drawn here by the SCC, particularly the extent to which emotion and reason, calibration and the seeking of harm, lie comfortably or stably on one side of the vengeance/retribution division that the court draws. But for present purposes, the most interesting dimension of this judicial debate about retribution is that it highlights the BCCA's role in wrestling with the ends of the criminal justice system, a task that has forced it – and other appellate courts – to be expounders of social theory as much as jurisprudence.

A Renewed Commitment to Rehabilitation

The failure and abandonment of the borstal-style reformatories in British Columbia did not put an end to rehabilitative intentions in criminal sentencing in the province. From 1975 onwards, the rehabilitative ethos shifted to one that sought the use of non-custodial means of encouraging the reformation and reintegration of the offender as a responsible and safe member of society. Over these years the sentencing objective of rehabilitation took on a strongly non-custodial connotation and, indeed, became the principal counterweight against sentencing considerations, such as deterrence and denunciation, that might lead to a punishment involving incarceration. Alongside the scepticism about deterrence and anxiety about retribution in the court's jurisprudence over this period, one finds by the 1990s a strong sense in the BCCA's sentencing jurisprudence that the harshness of punishment should, whenever possible, bend to the imperative of rehabilitation.

In *R. v. Preston*,⁹⁵ for example, the court wrestled with the relationship between deterrence and rehabilitation in the context of an accused who had been convicted of her twenty-fourth drug-related offence. Justice Wood, who clearly played an important role in BC sentencing law during this period, accepted that the overall goal of the criminal justice system must be the protection of society and that if incarceration is the *only means* by which this protection can be achieved, this option must be used. However, writing for a panel of five, Wood J.A. reasoned that, “where, as in this case, the danger to society results from the potential of the addict to commit offences to support her habit, and it appears to the court that there is a reasonable chance that she may succeed in an

Parliament's description of the fundamental purpose and principles of sentencing mirrors the logic of the Supreme Court of Canada in *C.A.M.*

⁹⁵ (1990), 79 C.R. (3d) 61 (B.C.C.A.).

attempt to control her addiction, then it becomes necessary to consider the ultimate benefit to society if that chance becomes a reality.”⁹⁶ In Justice Wood’s opinion, allowing for this chance not only offers the possible permanent protection of society but may also avoid the costs associated with the frequent incarceration of someone suffering from an addiction. At a time when our jails are swelling with individuals incarcerated for drug-related crimes, it is instructive to reflect back on Justice Wood’s “grave doubts”⁹⁷ that incarceration for possession holds any hope for specific or general deterrence of addicted offenders. The court speaks of “the ultimate futility of the short-term protection which the community enjoys from a sentence of incarceration” and argues that, in cases such as *Preston*, “the principle of deterrence should yield to *any reasonable chance* of rehabilitation which may show itself to the court imposing sentence.”⁹⁸

Justice Taylor, writing in *Pettigrew*,⁹⁹ came to a similar conclusion with respect to the relationship between the goal of denunciation and that of rehabilitation. Justice Taylor did not limit himself to minor or drug-related offences. Indeed, as noted above, *Pettigrew* was a case of manslaughter.¹⁰⁰ Nevertheless, in this case that otherwise endorsed the use of denunciation as a legitimate component of criminal sentencing, the BCCA stated that a key question in the imposition of a denunciatory sentence had to be “whether any adverse effects which a denunciatory punishment would have on the rehabilitation of the offender can be justified in the overall interest of the protection and advancement of society.”¹⁰¹

Yet the most vigorous defence of rehabilitation and the consequences of the *logic* of rehabilitation on the use of incarceration came in *Sweeney*.¹⁰² Justice Wood, writing for himself and Chief Justice McEachern, stated that “[i]t has long been recognized that rehabilitation, as a goal of the sentencing process, cannot be achieved through the imposition of custodial sentences.”¹⁰³ Given our heavy reliance upon incarceration, one might be led by this statement to conclude that rehabilitation must be a secondary or subsidiary goal of our justice system. Yet Wood J.A. drew the opposite conclusion, placing rehabilitation at the core of the BCCA’s

⁹⁶ Ibid. at 70.

⁹⁷ Ibid. at 71.

⁹⁸ Ibid. at 72 (emphasis added).

⁹⁹ Supra note 64.

¹⁰⁰ See text accompanying note 64, above.

¹⁰¹ Ibid. at 395.

¹⁰² Supra note 57.

¹⁰³ Ibid. at 101.

theory of sentencing. Since “rehabilitation remains the only certain way of permanently protecting society from a specific offender,”¹⁰⁴ “if the rehabilitation of a specific offender remains a reasonable possibility, that is a circumstance which requires the sentencing court to consider seriously a non-custodial form of disposition.”¹⁰⁵ Justice Wood made clear that this principle ought to apply to serious criminal offences, presenting the possibility that a significant prospect of rehabilitation “may outweigh the perceived general deterrent advantages of a custodial sentence.”¹⁰⁶

None of this should suggest that, in the 1990s, the BCCA was abandoning the use of custodial sentences. In cases where the protection of the public could reasonably be achieved only through incarceration, the court had no hesitation imposing carceral sentences.¹⁰⁷ Yet in the early 1990s, the court was strongly advancing the notion of the parsimonious use of incarceration on the principled basis that the protection of society is better served by rehabilitated, rather than isolated, offenders.¹⁰⁸ With the passage of Bill C-41 in 1995, the *Criminal Code* reflected this view, articulating the principle that “an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances”¹⁰⁹ and that “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.”¹¹⁰

Although these principles of restraint are sadly underutilized in current sentencing practices, the BCCA did play an important role in the development of these principles in the context of the sentencing of Aboriginal offenders in a case called *R. v. Gladue*.¹¹¹ The case involved an Aboriginal woman who pled guilty to manslaughter for killing her common law husband in a drunken fit of jealousy. The sentencing judge imposed a sentence of three years imprisonment, expressly refusing to give weight to the accused’s Aboriginal status, as suggested by s. 718.2(e), on the basis that she was living off-reserve. The court unanimously

¹⁰⁴ Ibid.

¹⁰⁵ Ibid.

¹⁰⁶ Ibid.

¹⁰⁷ See, for example, *R. v. Robitaille* (1993), 31 B.C.A.C. 7.

¹⁰⁸ In this respect, the court was mirroring the Archambault Commission’s critique of the *Criminal Code*’s “bias toward the use of incarceration” and its conclusion that “[a] number of difficulties arise if imprisonment is perceived to be the preferred sanction for most offences. Perhaps most significant is that although we regularly impose this most onerous and expensive sanction, it accomplishes very little apart from separating offenders from society for a period of time” (at xxiii-xxiv).

¹⁰⁹ Section 718.2(d).

¹¹⁰ Section 718.2(e).

¹¹¹ (1997), 119 C.C.C. (3d) 481 (B.C.C.A.).

rejected this interpretation of s. 718.2(e), although the majority of the court, in reasons written by Justice Esson, concluded that the trial judge's sentence ought not to be interfered with. Justice Rowles dissented in the result. She interpreted s. 718.2(e) as a parliamentary "recognition of the principle of restraint in the use of incarceration in sentencing."¹¹² She noted Canada's comparatively high incarceration rate and emphasized the tremendously disproportionate incarceration of Aboriginal peoples in Canada, a fact referred to in innumerable public reports and scholarly writings. "Overrepresentation of the magnitude found in the studies," Rowles J.A. found, "results, in part, from what is referred to as systemic discrimination."¹¹³ Justice Rowles read s. 718.2(e), which emphasizes the attention that should be given to Aboriginal offenders, as an invitation for the "recognition and amelioration of the impact systemic discrimination has on aboriginal people,"¹¹⁴ a reflection of an emphasis on rehabilitation, and an opening for a new form of rehabilitation that would take account of the needs of the broader community – restorative justice. Although the Supreme Court would not disturb the trial judge's sentence in *Gladue*,¹¹⁵ the theory and interpretation of s. 718.2(e) offered by Justice Rowles was very much adopted and amplified, opening new avenues – regrettably not yet as robustly explored as we would hope – for an emphasis on rehabilitative sentencing and restorative justice with special attention to the unique history and circumstances of Aboriginal offenders and communities.

CONCLUSION

The great constitutional scholar, advocate, and Canadian poet F.R. Scott painted a challenging and provocative picture of the practices of criminal punishment as he saw them in the mid-20th century:

III. JUSTICE

This judge is busy sentencing criminals
Of whose upbringing and environment he is totally ignorant.
His qualifications, however, are the highest –
A B.A. degree,

¹¹² Ibid. at para. 49.

¹¹³ Ibid. at para. 55.

¹¹⁴ Ibid. at para. 56.

¹¹⁵ [1999] 1 S.C.R. 688.

A technical training in Law,
 Ten years practice at the Bar,
 And membership in the right political party.
 Who should know better than he
 Just how many years in prison
 Will reform a slum-product,
 Or whether ten or twenty strokes of the lash
 Will put an end to assaults on young girls?¹¹⁶

As much as it is a critique of institutional hubris in the infliction of criminal punishment, Scott's verse is also a call to attend to the theories about the causes of crime, the nature of human conduct, and just social responses to wrongdoing that invariably animate our criminal justice system.

In this article we have explored the important role that the BCCA has played in wrestling with what constitutes a just social response to criminal wrongdoing. The court's work in this area has been rich, its views on sentencing as mercurial as the practices of punishment. At times the court has served quite directly as an institutional voice for dominant social views of punishment, whether they were of a more sternly retributive form or reflected an era of hope in rehabilitation. Yet, in more recent years, the jurisprudence of the court has also included strong voices expressing the kind of critical posture towards traditional assumptions in our theories and practices of sentencing that Scott would seem to commend.

Our current political climate finds a retributive ethos in the criminal law in ascendancy. We use preventative detention more now than ever. Recent governments have shown an appetite for more and harsher minimum sentences. Our prisons swell with overuse. Yet we are no safer as a result. In this context, the BCCA will continue to serve as an important institutional player in the ongoing debate about the just and effective forms of criminal punishment. As it continues in its task of wrestling with the competing constellations of sentencing objectives in the criminal law, we hope that the court will also draw upon its own tradition and continue to push us to think more deeply, critically, and cautiously about the assumptions that tacitly guide our system of criminal justice.

¹¹⁶ From "Social Notes," in F.R. Scott, *Selected Poems* (Toronto: Oxford University Press, 1966) at 49.