

Detailed Table of Contents

Foreword *xxiii*

Justice Michael Moldaver, Supreme Court of Canada

Acknowledgements *xxv*

CHAPTER ONE

Introducing Sentencing in Canada *1*

David Cole and Julian Roberts

- A. The Complexity of Sentencing: Determining the Purpose, the Sanction, and the Quantum** *3*
- B. The Purposes of Sentencing in Canada: Past or Future Crime?** *5*
 - 1) Denunciation *7*
 - a) Attrition in the Criminal Process: Seeking Crime Prevention in the Wrong Direction *8*
 - 2) General and Specific Deterrence *8*
 - a) General Deterrence *9*
 - b) Specific Deterrence *10*
 - 3) Incapacitation *12*
 - 4) Rehabilitation *13*
 - 5) Reparations for Harm Done to Victims or to the Community, and Promoting a Sense of Responsibility in Offenders *13*
 - 6) Assessing the Use of Various Sentencing Approaches *14*

- C. Canadian Sentencing Principles 16**
 - 1) Just Deserts and the Fundamental Principle of Proportionality 17
 - 2) Secondary Principles 18
- D. The Choice of Sanction 20**
- E. A Typical Sentencing Hearing 21**
- F. Conclusion 24**
- Further Readings 25**

CHAPTER TWO

Sentencing Options and Sentencing Trends 26

Andrew A Reid

- A. The Challenges of Documenting Sentencing Options and Trends 27**
- B. Recent Trends in Sentencing 29**
 - 1) Cases Sentenced 29
 - Figure 2.1: Cases sentenced by offence category: Percents (2016) 30
 - 2) General Overview of Patterns and Trends 30
 - Table 2.1: Sanction use pertaining to all criminal cases by frequency and percent (2016) 31
 - Table 2.2: Sanctions serving as the most serious sentences by offence category (2016) 32
 - Figure 2.2: Trends in most serious sanctions for eight provincial/territorial jurisdictions, 1994–2016 33
 - 3) Single- Versus Multiple-Charge Cases 33
 - Figure 2.3: Trends in most serious sanctions for single-charge cases in eight provincial/territorial jurisdictions, 1994–2016 34
 - Figure 2.4: Trends in most serious sanctions for multiple-charge cases in eight provincial/territorial jurisdictions, 1994–2016 35
 - 4) Principal Sanctions 35
 - a) Imprisonment 35
 - i) Sentence Length 36
 - Table 2.3: Median sentence length by offence type (2016) 38
 - b) Probation 38
 - Table 2.4: Median length of probation by offence type (2016) 40

- c) Fines 40
 - Table 2.5: Median amount of fine by offence type (2016) 41
- d) Conditional Sentence of Imprisonment 41
- e) Sentencing of Indigenous Offenders 42
 - Figure 2.5: Aboriginal sentenced admissions as a percentage of total provincial and territorial sentenced admissions, Canada, 1978–79 to 2016–17 43
 - Table 2.6: Sentenced admission rates and Aboriginal rate ratio for four federal census years, Canada 45
 - Table 2.7: Aboriginal prison admissions as a percentage of total sentenced admissions, by provincial/territorial jurisdiction, 1978–79, 2000–2001, and 2017–18 46

C. Concluding Comments 46

Further Readings 47

CHAPTER THREE

Community-Based Sanctions 48

Dawn North

A. The Value of Community-Based Sanctions 50

- 1) Brief History of Community-Based Sanctions 50
- 2) Consequentialist Arguments for Community Sanctions 52
- 3) Legislative Constructs—Recent History 54

B. Current Community-Based or Non-institutional Sentencing Options 55

- 1) Absolute and Conditional Discharges 55
- 2) Suspended Sentences 57
- 3) Fines 58
- 4) Probation 59
- 5) Collateral Orders 60

C. Community-Based Sanctions: Theoretical and Operational Challenges 61

- 1) Proportionality 61
- 2) Net-Widening 63

- 3) Resourcing 64
- 4) Public and Judicial Acceptance: Promoting Community-Based Sanctions 66

D. Conclusion: The Future of Community-Based Sanctions 68

Further Readings 70

CHAPTER FOUR

Conditional Imprisonment: A Troubled Past and an Uncertain Future 71

Julian Roberts and David Cole

- A. Many Forms of Imprisonment 72
- B. The Current Regime 74
- C. The Objectives of the Conditional Sentence of Imprisonment 77
- D. Judicial Interpretation of Section 742 79
- E. Recent Legislative Reforms 80
- F. Conditional Sentencing and the Purposes and Principles of Sentencing 81
 - 1) Restraint Regarding the Use of Custody 83
 - 2) Proportionality 84
- G. Current Issues 85
 - 1) Current and Historical CSI Use 85
 - Table 4.1: Conditional sentence of imprisonment admissions by jurisdiction, 1996–2016 86
 - Table 4.2: Annual volume of conditional sentence of imprisonment admissions, ten jurisdictions, 1996–2016 87
 - Figure 4.1: Conditional sentence of imprisonment admissions as a percentage of total provincial/territorial admissions, ten jurisdictions, 1996–2016 87
 - a) Impact of the CSI on Admissions to Prison 89
 - 2) Supervision in the Community 90
 - 3) Community Reaction 91

H. The Future of the Conditional Sentence 93

Further Readings 94

CHAPTER FIVE

Informing the Court: The Use of Pre-sentence and Gladue Reports at Sentencing 96

Paula Maurutto

A. Risk and the Restructuring of PSRs 97

B. Risk PSRs and Gladue 106

C. Gladue Reports 108

D. Conclusions 111

Further Readings 112

CHAPTER SIX

The Role of the Prosecutor at Sentencing 113

Lia Di Giulio

A. The Prosecutor's Sentencing Submissions 115

1) Submissions Reflecting a Balanced Approach 115

2) The Prosecutor as an Effective Advocate 116

B. The Prosecutor's Role at Sentencing 118

1) Plea Bargaining 118

2) Resolution Discussions 120

3) Joint Submissions 122

4) Victims' Needs Addressed at Sentencing 123

C. A Few Words About Key Sentencing Provisions 125

1) Sentencing Submissions and Evidence: Section 723(1)(2) 125

2) Hearsay Evidence: Section 723(5) 126

3) Notice Requirements: Section 727 126

D. Crown Sentence Appeals 127

Further Readings 128

CHAPTER SEVEN

The Role of Defence Counsel at Sentencing 129*Naomi M Lutes*

- A. The Role of Defence Counsel in the Legal System** 130
- B. How Defence Lawyers Advocate for the Offender** 133
 - 1) General Principles of Sentencing 133
 - 2) The Offence: Ranges, Starting Points, and Jurisprudence 135
 - 3) The Offender 135
 - 4) Mitigating and Aggravating Factors 137
 - a) Remorse and Responsibility 137
 - b) Youth and Lack of Criminal Antecedents 138
 - c) *Charter* Considerations and Remedies 138
 - d) Collateral Consequences of the Sentence 138
 - e) Pretrial Custody 139
 - f) Credit for Bail 141
- C. The Sentencing Hearing: Procedure and Evidence** 142
 - 1) Proving the Facts of the Offence and Gardiner Hearings 142
 - 2) Documentary Evidence Filed at Sentencing 143
 - a) Character Letters on Behalf of the Defendant 143
 - b) Pre-sentence Reports 144
 - c) Victim Impact Statements 145
 - 3) Procedural Considerations 146
 - a) Plea Bargaining and Joint Submissions 146
 - b) Allocution 147
 - c) Probation and Conditional Sentences: Crafting the Order 147
 - d) Intermittent Sentences 148
 - 4) Ancillary and Financial Orders 148
 - a) Types of Ancillary Orders 148
 - b) A Note on Restitution, Fines, and Forfeiture Orders 149
- D. Conclusion** 151
- Further Readings** 152

CHAPTER EIGHT

Hearing the Victim at Sentencing 153

Marie Manikis

- A. The Changing Role of Victims at Sentencing 154**
- B. Purposes and Aims of Victim Impact Statements 156**
- C. The Canadian Victim Impact Statement: Objectives and Evidentiary Framework 159**
 - 1) VIS Content as Aggravating Evidence 160
 - 2) Victim Impact Statements, Victim Opinions, and Mitigation 162
- D. Community Impact Statements 166**
 - 1) Defining a “Recognized Community” 166
 - 2) CIS Framework 167
- E. Future Considerations 168**
- Further Readings 168**

CHAPTER NINE

The Role of Appellate Courts in Sentencing 169

Gary T Trotter

- A. The Procedural Framework 170**
 - 1) The Appellate Pathways 170
 - 2) The Nature of Sentence Appeals 171
- B. The Scope of Appellate Review of Sentence Decisions 173**
 - 1) Introduction 173
 - 2) Clarification from the Supreme Court: The Trilogy 176
 - 3) Reaffirmation in *Lacasse* 179
- C. Conclusion 182**
- Further Readings 182**

CHAPTER TEN

Sentencing and Parole for Persons Convicted of Murder 183

Mary E Campbell and David Cole

- A. Some Myths About Murder** 185
- B. Current Trends and Issues** 192
 - 1) Indigenous Offenders 192
 - 2) Managing the Life Sentence: Aging Prisoners 193
 - 3) Sentencing for “Compassionate Homicide” 194
 - 4) Sentencing and Release of Young Persons 195
- C. Conclusion** 198
- Further Readings** 199

CHAPTER ELEVEN

Sentence Administration and Parole 200

Nancy T Charbonneau and Kathryn E Ferreira

- A. Introduction to Conditional Release** 200
 - 1) Assessment of the Prisoner’s Behaviour 202
 - 2) Conditional Release Authority 203
 - 3) Parole 204
- B. A Brief History of Parole** 205
- C. Criteria for Release on Parole** 207
- D. Day Parole for Federal Prisoners** 208
- E. Full Parole for Federal Offenders** 210
- F. Federal Parole Hearings** 211
- G. Provincial/Territorial Parole in Atlantic, Prairie, and Pacific Regions** 212
- H. Ontario Provincial Parole** 213
- I. Quebec Provincial Parole** 216
- J. Conditions of Release: Standard and Special** 217

- K. The Relationship Between Conditional Release and Sentencing 220
- L. The Future of Parole 223
- Further Readings 225

CHAPTER TWELVE

Sentencing Indigenous Offenders: From *Gladue* to the Present and Beyond 226

Kent Roach and Jonathan Rudin

- A. *Gladue*, *Ipeelee*, and Canadian Sentencing Jurisprudence 228
 - 1) *Gladue* 229
 - 2) *Ipeelee* 232
 - 3) *Gladue* in the Courts of Appeal and Trial Courts 234
 - 4) The Jurisprudential Legacy of *Gladue* and *Ipeelee* 236
- B. The Hard Work of Implementing *Gladue* 237
 - 1) Divided Jurisdiction over Criminal Justice 237
 - 2) *Gladue* Reports 238
 - 3) Indigenous Courts 244
 - 4) The Unfinished Work of Implementing *Gladue* 245
- C. Measuring *Gladue*'s Successes and Failures 246
- D. Conclusion: Pathways to Success 249
- Further Readings 249

CHAPTER THIRTEEN

How Sentencing Reform Movements Affect Women 250

Lisa Kerr

- A. The Gendered Experience and Impacts of Imprisonment in Canada 254
- B. Comparing Sentencing Reform Movements 257
 - 1) Disparity Battles: The United States Sentencing Guidelines Project, 1985–2005 257

2) Resisting Radical Change: The Canadian Path Not Taken 262

C. Canadian Sentencing Jurisprudence Today 265

D. Conclusion 271

Further Readings 272

CHAPTER FOURTEEN

Sentencing Mentally Disordered Offenders 273

Richard D Schneider

A. The Challenge of Determining Fit Sentences for Offenders Who Are Mentally Disordered 274

1) Self-Induced States Excluded 276

B. Justifying Mitigation Based upon Mental Disorder 276

1) The Clinician's Perspective 278

C. Adopting the Mental Health Court (MHC) Approach 279

1) What Underlies Problem-Solving Courts: Therapeutic Jurisprudence 279

2) Broader Recognition Emerging 281

D. Applying Traditional Sentencing Objectives to Mentally Ill Offenders 282

E. Tough on Crime Versus Rehabilitation 284

F. Statutory Provisions That May Assist the Court in Sentencing a Mentally Disordered Offender 285

1) Psychiatric Assessment 285

2) Assessments Pursuant to Civil Legislation 285

3) Assessments Arising out of the *Criminal Code*, Sections 723(3), 720(2), and 726.1 286

4) Optional Probation Terms That May Be of Assistance in Sentencing Mentally Disordered Offenders 287

G. Conclusion 290

Further Readings 290

CHAPTER FIFTEEN

Dangerous and Long-Term Offenders 291*Mihael Cole*

- A. Introduction to the Dangerous Offender and Long-Term Offender Regimes 292**
- B. Historical Evolution 293**
- C. The Current Regime 298**
- D. Emerging Questions 299**
 - 1) How Is Dangerousness Defined? 299
 - 2) What Is Meant by “Intractability”? 303
 - 3) How Do You Rehabilitate a Dangerous Offender? 304
 - 4) Where Do Offenders on Long-Term Supervision Orders Reside in the Community? 306
 - 5) How Can Sentencing Courts Balance the Overrepresentation of Indigenous Offenders with Concerns over Public Safety? 307
- E. Two Case Studies 310**
 - 1) *R v Byers* 310
 - 2) *R v Stuckless* 312
 - 3) The Main Issue to Be Resolved 313
- F. Conclusion 313**
- Further Readings 314**

CHAPTER SIXTEEN

Evaluating the Youth Sentencing Regime in Comparison with Adult Court 315*Andrea EE Tuck-Jackson*

- A. Measurements of Moral Blameworthiness as the Ultimate Distinguishing Feature Between the Two Regimes 317**
- B. Purpose, Objectives, and Principles of Sentencing 320**
 - Table 16.1: Sentencing objectives in the youth and adult regimes 321
- C. Sentencing Options 323**

- 1) Five Key Differences Between Youth and Adult Sentencing Regimes 324
- 2) Sanctions Unique to the *YCJA* 327
 - a) Non-custodial Sanctions 327
 - b) Custodial Sanctions 328
- D. Available Evidence Relating to the Individual to Be Sentenced 331
- E. Sanction Variations 334
- F. Conclusion 336
- Further Readings 337

CHAPTER SEVENTEEN

Principles and Politics: Sentencing and Imprisonment Policy in Canada 338

Cheryl Marie Webster and Anthony N Doob

- A. Describing Sentencing/Imprisonment Policy: A Question of Measurement 342

Figure 17.1: Components of provincial/territorial imprisonment rates (1978–2017) 344
- B. Describing Sentencing/Imprisonment Policy: A Question of Principles 347

Table 17.1: Partial list of commissions, committees, reports, et cetera expressing concern about the utility of imprisonment and/or suggesting restraint in the use of imprisonment (adults and youth) 348
- C. Describing Sentencing/Imprisonment Policy: A Question of Politics 356

Figure 17.2: Canadian imprisonment rates: Total, federal, and provincial adult imprisonment rates per 100,000 residents (1951–2016/17) 360
- D. Describing Sentencing/Imprisonment Policy: A Look to the Future 363

Figure 17.3: Youth and adult imprisonment rates in Canada
(1997/98–2015/16) 366

Further Readings 367

CHAPTER EIGHTEEN

**Proportionality and the Experience of
Punishment** 368

Benjamin L Berger

A. Individualized Proportionality, Introduced 368

B. The Emergent Principle Described 372

- 1) Suffering at the Hands of Police 372
- 2) Collateral Consequences of Sentencing 375
- 3) The Relevance of Hope 378
- 4) The Principle Summarized 381
- 5) The Promise and Challenges of Individualized Proportionality 382

Further Readings 389

CHAPTER NINETEEN

**Sentencing in Canada: Current Issues and
Concluding Thoughts** 390

Julian Roberts and David Cole

A. Race, Ethnicity, and Sentencing 390

B. Guilty Plea “Discounts” and Plea-Based Sentence “Reductions” 394

- 1) Canadian Concerns Pertaining to Guilty Plea “Discounts” 395
- 2) International Approaches to Addressing Possible Deductions
to Guilty Pleas 396
- 3) Pre-sentence Custody Credits 399
- 4) A Broader Question 401

C. Sentencing Disparity and Sentencing Guidelines 401

D. Coda 405

Proposed Legislation on the Independence of the Judiciary 406

Further Readings 408

APPENDIX A

Reasons for Sentence 409

APPENDIX B

Overview of Australia and New Zealand Legislative Provisions Relating to the Sentence Reductions for a Guilty Plea 422

Leila Tai

APPENDIX C

Example of a Typical Victim Impact Statement 428

Contributors 435

Table of Cases 441

Index 451