THE ROLE OF AN APPELLATE COURT IN DEVELOPING SENTENCING GUIDELINES

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AUTHOR'S PREFACE

In 1984 and 1985 I was retained by the Canadian Sentencing Commission to research and write a number of reports concerning the impact of appellate review of sentencing. The five reports that were completed are as follows:

1) The In-Out Decision and the Impact of the Criminal Record (1985)
2) The Operation of Mitigating and Aggravating Factors in Appellate Sentencing Decisions (1985)
3) Tariff Sentencing in Canada (1985)
4) The Operation of Appellate Sentencing Ranges in Trial Court Sentencing Decisions (1984)
5) The Role of Appeal Courts in Establishing Ranges (1984)

All five papers involved extensive examination of the available reported caselaw, and notwithstanding the difficulty presented by the possibility that reported caselaw was not representative of actual sentencing practice, certain conclusions have been drawn from the available data. Due to the length of the individual reports and the extensive citation of particular cases in each report, it was believed that it would be useful to prepare a document that summarizes the findings of all five papers. Accordingly, this paper has been prepared to discuss in general terms the role that appellate courts have in structuring the sentencing process in Canada. For those interested in the data or evidence that supports some of the conclusions presented in this paper reference may be made to the original five reports that are in the possession of the Department of Justice, Canada.

It must be noted that this paper is an accurate description of the law as it existed in 1984-5 at the time these reports were submitted to the Canadian Sentencing Commission. Sentencing reform or changes emanating from the judiciary is a slow process and it is unlikely that there have been substantial developments in the

caselaw since the time these reports were submitted. With the exception of the impact of the case of R. v. Smith, released by the Supreme Court of Canada on June 25, 1987 (a case dealing with the constitutionality of the minimum 7 year sentence for importation of narcotics) I am confident in my belief that there does not exist any recent caselaw that somehow diminishes the significance or relevancy of the conclusions drawn in this paper.

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1) INTRODUCTION

Traditionally, sentencing has been viewed as a discretionary process that is constrained only by statutory maxima and implicit notions of fitness that can be derived from past practice. These constraints are more illusory than real, and this is readily apparent from the fact that the maximum sentences designated by statute for indictable offences only represent the outer limit of choice for a sentencing judge. The judge is informed that upon conviction for a designated offence an offender may be punished by 2 years, 5 years, 10 years, 14 years or life imprisonment, but no guidance is provided for the choice of the actual term to be imposed or for the decision of whether to impose a non-custodial sentence in lieu of imprisonment.

The process of arriving at a "fit" sentence requires a coherent synthesis of common sense and social policy. Unlike other areas of criminal law the post-conviction sentencing determination remains a largely discretionary process in which the judge must weigh and balance as many factors as there are offenders in the country. The realization that no two offenders are alike has contributed to a growing skepticism about the viability of developing general sentencing principles; however, the failure to enunciate proper guidelines makes it difficult to achieve the goal of reducing sentencing disparity.

In recent years there has been a growing concern that the free reign given to a sentencing judge may be contributing to inconsistencies in the treatment of offenders. Appellate courts have recognized that disparity amongst similar offenders is anathema to the development of a rational and consistent sentencing practice, and attempts have been made to structure sentencing discretion by the release of appellate guidelines and principles. For the most part lower courts have been resistent to any

attempts to reduce their discretion because they are of the belief that in approaching the difficult task of sentencing they must be able to respond to individual offenders with maximum flexibility. The approach that appellate courts have taken to provide guidance on sentencing has taken many forms; the court can promote consistency by (a) articulating relevant factors that should be taken into account; (b) ascribing the weight that should be accorded to the factors in any particular case; (c) releasing general policy statements as to the purpose of a particular sentencing measure or (d) recommending a certain range of sentence for various offences.

This report will examine the extent to which appellate courts have been successful in structuring and confining the discretion inherent in the sentencing process. Many people may be convinced that discretion is a necessary evil and that any attempt to structure the sentencing decision will thwart the important objective of imposing a sentence that is perfectly tailored to the circumstances of the offender and the offence. There can be little doubt that both offenders and offences are uniquely individual, and in recognition of the kaleidoscopic nature of human behaviour it is necessary to first provide some justification for the enterprise of creating uniform moral responses, as reflected in sentencing decisions, to this vast landscape of offences and offenders.

Accordingly, this report will begin with a discussion of the problem - we will begin by examining the current and common approach to sentencing that is adopted by lower court sentencing judges. Assuming that the mere description of current sentencing practice readily reveals the nature of the problem we will then turn to an examination of the possibility that appellate courts can rectify the problem. We will examine the various devices that appellate courts have adopted in their attempt to

make the process more coherent and consistent, and an evaluation of the efficacy of these approaches will follow. There is something alluring about the notion of having the judiciary attend to the very abuses inherent in sentencing adjudication as this self-regulation works fairly well with respect to substantive law; however, it will become apparent that self-regulation with respect to sentencing may be an insidious proposal because it is largely ineffective yet it leaves the impression that the problem is being adequately attended to.

2) THE PROBLEM EXPOSED - THE SUMMARY JUDGMENT

The determination of guilt or innocence attracts the attention of jurists and laypersons to such an extent that in our debates over whether one accused of a crime is guilty we expend so much energy and effort that when we arrive to the critical question of disposition, we are too enervated to invest the same time and energy in debating the issue of an appropriate sentence. The choice of sentence appears far too often as an afterthought. This relegation of the sentencing process to an afterthought is all the more surprising in light of the fact that the vast majority of criminal charges are cleared by way of guilty plea. We have forgotten the 19th century admonition of J.F. Stephen who stated that: "the sentence of the law is to the moral sentiment of the public in relation to any offence what a seal is to hot wax. It converts into a permanent final judgment what might otherwise be a transient sentiment"[1].

Regardless of whether one views the sentence imposed by a court as a reltification of moral sentiment or as a deterrent threat to future, potential offenders, one would expect that the choice of sentence would be supported by an elaborate,

well-reasoned and principled approach. In fact, the examination of over 700 lower court sentencing decisions[2] reveals that sentencing decisions are supported by the barest of reasons. Lengthy terms of incarceration are meted out without any indication of why this sentence is considered appropriate. Both the offender and the public are left guessing as to the reasons in support of any particular sentence.

The primary difficulty in attempting to characterize and evaluate the nature of trial-court sentencing decisions is that many of the decisions are summary in nature. A Provincial Court judge may have been cognizant of appellate court prescriptions; however, the absence of stated reasons shrouds the decision-making process in mystery. For example, in R. v. Beckwith (1979), 75 A.P.R. 698 (N.B. Co. Ct.) the court delivers lengthy reasons for conviction on a count of giving contradictory evidence and then concludes the judgment with a terse sentencing disposition:

> In my respectful view in this case there was the intention to mislead. I find the Crown has proved the charge against the accused beyond a reasonable doubt.
> Two years in penitentiary. (at 705)

Similarly the N.B. Co. Ct. in R. v. Watters (1976), 21 A.P.R. 682 concludes its judgment on a charge of possession of a restricted weapon with the following:

> I have found you guilty of the offence with which you are charged, and I now adjudge that you, for the said offence, be imprisoned in the Provincial Gaol in the City of Saint John, New Brunswick, and there to be kept for a period of nine months. That is the decision of the Court. (at 690)

Even though a trial court may state some reasons for the disposition of a sentence, the reasons may only be an outline of salient facts that leave many

questions unanswered. In Hedberg (1979), 15 A.R. 181 (Alta. S.C.) the court imposed the following sentence:

> It is difficult to imagine a more aggravated case of manslaughter. I have presided over the worst homicide that I have encountered in my twenty years' association with the administration of criminal justice in this province.
>
> It is obvious to me that the prosecution of the public is the paramount -- probably the only consideration in sentencing you. The savage and maniacal nature of the attack on this girl demands that the public be protected from this accused and his propensities by his isolation for an extended period of time from a vulnerable and unsuspecting public.
>
> Stand up, Mr. Hedberg. You are sentenced to imprisonment for life. (at 200)

From these brief reasons it is evident that the trial judge considered this to be a extremely aggravated case yet one does not know from the judgment whether he was aware of the fact that the sentence was a dramatic departure from the common range for manslaughter. (Note: unlike other reports the Alberta Reports often include sentencing submissions of counsel and in this case defence counsel presented 3 appellate decisions that awarded sentences ranging from 18 mos. to 9 yrs. However, notwithstanding the unique nature of these reports, it can be generally stated that the actual judgments rarely reflect all the factors the judge may or may not have considered.)

The nature of the summary judgment is an indication of the nature of the problem that must be rectified. Not only is a sentence that is unsupported by stated reasons of little precedential value in future cases, but it is also of little value for the case at bar. The inherent moral ambiguity of punishment[3] seems to require that the punisher justify the imposition of the punishment in order to distinguish a

legitimate exercise of authority from sheer terror and domination. The summary judgment reveals little of the justifying reasons for punishment; consequently, neither the public nor the offender are able to determine whether the sentence is a legitimate exercise of power. Of course, the sentencing judge may respond by claiming that the absence of identifiable guidelines makes it impossible to present a structured, and principled exposition of the reasons for sentence. If no criteria are provided then there are no specific concerns that the sentencing judge must address in his reasons. This response is unsatisfactory. It should prompt Parliament and/or appellate courts to provide guidelines of some sort that could assist the judge in articulating reasons for sentence.

3) THE ROLE OF APPELLATE COURTS

Since the introduction of appellate review of fitness of sentence in 1921 the appellate courts have not been instrumental in designing relevant sentencing principles to assist lower-courts in their determination of an appropriate sentencing disposition. Only in recent years have the appellate courts begun to express dissatisfaction with the impressionistic nature of sentencing decisions. The major factor that has limited the development of a rigorous appellate approach to sentencing review has been the common view that appellate courts have limited jurisdiction in reviewing fitness of sentence.

Unlike an appeal on substantive questions of law in which principles are enunciated that serve as precedents, the sentence appeal is more commonly viewed as a procedural safeguard to ensure that the sentence awarded at trial is not manifestly

excessive. The Ontario Court of Appeal described the role of the appellate court as follows (Simmons et al. (1973) 13 C.C.C. (2d) 65):

> Parliament has given the right to the appellant to appeal from the sentence and imposed the duty upon this Court as the final Court of Appeal in such matters to consider "the fitness of the sentence". It has been said the Court should only find the sentence is not fit if it appears that the trial Judge has proceeded upon an error in principle and/or if the sentence is manifestly excessive or inadequate. If it is manifestly excessive or inadequate the trial Judge must have proceeded on an error in principle and the opposite *may* be true. There is no scale other than the scales of justice and it is the duty of this Court to re-examine fact and principle and pass upon the fitness of the sentence imposed. In his able argument Mr. Scullion cautions us we must not interfere simply because had we tried the case we might have imposed a different sentence. On the other hand, one would not interfere if this were not so. (at 72)

Adopting this approach many appellate courts dispose of sentence appeals on the basis of adjusting the sentence if the trial judge proceeded on an error in principle. This remedial approach does not require the court to develop more general principles that possess precedential value; however, numerous appellate decisions have recognized the intractable problems inherent in determining an appropriate sentencing disposition and accordingly, they have begun to take a wider view of the role of sentence appeals. These decisions recognize that the appellate courts should provide guidelines for lower-courts with respect to both principles and quantum. In the oft-cited case of Morrissette (1970) 13 C.L.Q. 268 the Ontario Court of Appeal reflected on their role stating that:

> A provincial Court of Appeal, being the final court in dealing with appeals in respect of sentences, has a duty to give some guidance to trial judges in this field. Upon the Court of Appeal, rests the responsibility of stating the principles underlying the imposition of a sentence so that at least uniformity of approach to this problem may be achieved. Also, while there can be no such thing as uniform sentences, it is

> incumbent upon the appellate court to see that the disparity in sentences for the same or similar offences can be rationalized. (at 271)

The slow movement towards the acceptance of appellate guidelines corresponds with the development of the principle of uniformity. The need to achieve uniformity in sentences was not considered to be a valid objective of sentence appeals as our sentencing process has traditionally emphasized that the punishment should fit the offender. In a sentencing model based upon the primacy of the individual there is little need for precedents that can extend beyond the characteristics of the offender in any given case. This view dominated the jurisprudence until the mid-sixties and it was reflected in the fact that the law reports rarely reported any sentencing decisions, appellate or otherwise. The traditional wisdom was expressed as follows:

Zizu Natuson (1927), 49 C.C.C. 89 (Sask. C.A.)

> It would be impossible and, if possible it would be undesirable to lay down any general rule as to the punishment to be inflicted for any particular class of offence. Every case must be dealt with on its own facts and circumstances. (at 90)

Connor and Hall (1975), 118 C.C.C. 237 (Ont. C.A.)

> It serves little purpose to know what sentences have been imposed in other countries or jurisdictions or by other courts. (at 238)

The severity of this view became tempered in the mid-sixties by the perceived need to infuse the sentencing process with a measure of uniformity. The turning point was the decision in R. v. Baldhead (1965), 4 C.C.C. 118 (Sask. C.A.) in which uniformity of sentence was finally recognized as a valid objective. The court decided that an appellate court could review a sentence if there has been a marked departure

from sentence "customarily imposed in the same jurisdiction for the same or similar crime".

Since Baldhead numerous appellate courts have expressed an interest in creating guidelines to further the objective of uniformity. The P.E.I. Court of Appeal has expressly stated that one factor in determining the fitness of any given sentence should be:

> the sentence should be within the range of sentences imposed for similar offences within a period reasonably contemporaneous with the time of the commission of the offence (Cusak (1977), 31 A.P.R. 181; see also Haran (1976), 25 A.P.R. 2 (Nfld. Prov. Ct.)).

This shift in the jurisprudence augurs well for the development of appellate guidelines and ranges; however, there is still a considerable amount of reluctance to embrace a common-law notion of presumptive sentencing. This reluctance is reflected in the oft-quoted words of the N.S. Court of Appeal in Grady (1971), 5 N.S.R. (2d) 264:

> It would be a grave mistake, it appears to me, to follow rigid rules for determining the type and length of sentence in order to secure a measure of uniformity, for almost invariably different circumstances are present in the case of each offender. There is not only the offence committed but the method and manner of committing; the presence or absence of remorse, the age and circumstances of the offender, and many other related factors. For these reasons it may appear at times that lesser sentences are given for more serious offences and *vice versa*, but the court must consider each individual case on its own merits, even if the different factors involved are not apparent to those who know only of the offence charged and the penalty imposed. (at 266)

The courts have not wholly embraced the notion of uniformity for fear that broad, general principles will fail to take into account the unique characteristics of

every offender. As the Nova Scotia Court of Appeal recently stated (Campbell (1983) 10 W.C.B. 490) "it is always necessary to make the punishment fit the criminal rather than the crime".

Before discussing how this notion of the primacy of the offender has affected the structure of appellate sentencing decisions it should be noted that the appellate courts share a common feature with the lower-courts in approaching the matter of sentence. Both levels of court are prone to releasing cursory reasons for sentence that are generally of little assistance for analytical purposes or for the development of meaningful precedents. The vast array of these cursory decisions leaves the impression that the court finds it difficult to articulate the reasons for the imposition of a particular sentence.

The following cases are representative of this approach:

Bronk (1981) 14 Man. R. (2d) 246 (Man. C.A.)

> FREEDMAN, C.J.M.: The Crown appeals against a sentence of four months imposed by Ferg, C.C.J., on a charge of possession of marijuana for the purpose of trafficking. The quantity in question was about 45 pounds. The accused claimed he had found the marijuana in question in a ditch somewhere in the United States, either in Iowa or South Dakota. When discovered by the police the marijuana was hidden in several tires of the accused's car.
>
> Four months was inordinately low. We increase the sentence to one year. The appeal of the Crown is allowed accordingly.

Johnson (1982) 53 N.S.R. (2d) 176 (N.S.C.A.)

> The appellant has a substantial record, particularly for offences involving theft, dating back several years.
>
> The appellant is twenty years of age.

> The present offences were serious and the learned trial judge took the view that the primary consideration was the matter of deterrence. On the first charge for possession of stolen property and the third charge for theft of the tires, Judge Kimball imposed terms of nine months each to run consecutively. On the second count for theft of gas he imposed a sentence of one month to run concurrently with the first charge for a total term of eighteen months in the Halifax County Correctional Centre.
>
> As we are in agreement with the sentences imposed, we are unanimously of the view that leave to appeal should be refused. (at 177)

Letendre (1975) 25 C.C.C. (2d) 180 (Man. C.A.)

> Concerning sentence, I say at once that a term of 14 years imprisonment on the charge of attempted murder cannot be regarded as excessive in the circumstances. It is an admittedly long sentence. But the crime for which it was imposed is a very grave one. Indeed the accused is fortunate that the bullet from his gun took the course it did; otherwise the charge might have been murder. I would dismiss the appeal on this count.
>
> The learned trial Judge imposed concurrent terms of imprisonment on the two other counts. Any variation of these sentences will accordingly be without practical effect so far as time to be served by the accused is concerned. None the less the sentences must be reviewed to see if they are appropriate. On the charge of attempted robbery, the learned trial Judge imposed a sentence of 14 years. I regard this sentence as excessive and would substitute a term of seven years in its place. On the charge of assault causing bodily harm, a sentence of five years was imposed. I would change that sentence to one of three years. The sentences will of course be concurrent. (at 177)

Not all cursory judgments are devoid of details but the common characteristic of these decisions is the conclusory manner in which the precise sentence is awarded. For example the B.C. Court of Appeal in Gardiner (1981) 23 C.R. (3d) 190 reviewed relevant factual details on an appeal from an eight year sentence for attempted murder. They discussed the appellant's lack of remorse and the degree of planning accompanying the offence. These facts were discussed because "they are proper for consideration of a court of appeal in reviewing the sentence and deciding upon its

fitness". The inclusion of these factual details increases the precedential value of the case yet the discussion following the factual recitation is of little assistance:

> Counsel for the Crown asserts that the sentence imposed is entirely fitting and stresses the importance of a sentence which will deter others who might be minded to attack in circumstances like this.
>
> That, of course, raises the question which we have frequently to consider: how severe a sentence is required to deter others if, indeed, any kind of a sentence will deter crimes of this nature? Having regard to all of the circumstances and the careful and able submissions made to us on behalf of the appellant, it is my opinion that the sentence of eight years was a fitting one in all of the circumstances. I would, accordingly, grant leave, but dismiss the appeal. (at 192)

There is nothing in the judgment to suggest that the sentence is anything other than arbitrary.

When an appellate court delivers reasons that do not fall into the cursory category it is far more common for the court to emphasize factors and principles relating to the offender as opposed to the offence. Accordingly most well-reasoned decisions will yield principles relating to the personal circumstances of the offender (e.g. the significance of the offender's previous record) and will rarely yield offence-related principles (e.g. fraud in excess of $100,000 must be punished by at least one year imprisonment). The Russell-Mayne case (1982), 102 A.P.R. 695 (N.S.C.A.) is a model example of the most common structure employed by appellate courts in delivering reasons for judgment. The decision begins with four paragraphs outlining the facts surrounding the offence in an attempt to evaluate the severity of the incident of attempted murder. The decision continues by outlining the accused's pre-sentence report with particular emphasis on psychiatric assessments. At this point the court discusses the trial judge's reasons for judgment and the psychiatrist's

recommendations with respect to treatment. Once all these factors are outlined the Court comments that the 12 year sentence awarded at trial appears excessive and they cite a previous appellate decision in which 9 years was considered appropriate for roughly-comparable circumstances.

This decision indicates that an appellate court can (and most often will) decide upon the appropriate sentence without an elaborate examination of other decisions. The important and most significant factor affecting the choice of sentence is the personal circumstances of the offender. The Russell-Mayne case contributes to what may be classified as an implicit, emerging range and like most other cases it may cite other precedents but it displays no concern in explicitly defining a tariff or range.

The process of reviewing the fitness of a sentence is primarily an exercise in reviewing the facts of the case and determining whether the presiding sentencing judge disregarded an important principle or placed too much or too little emphasis on any particular factor. If the appellate court discovers misplaced emphasis or disregard of principles then the sentence will be adjusted accordingly. The following cases are examples of this common process of adjustment for misplaced emphasis or disregard of principle:

MacLean (1978), 7 C.R. (3d) s-3 (Ont.)

> The trial judge, while recognizing that he should be dealt with as a youthful offender, erred in considering that the conditional discharge in respect of the previous offences constituted a criminal record. This court pointed out in R. v. Murray, 2nd June 1976 (not yet reported -- summarized 19 Cr. L.Q. 26) that a person who is granted a discharge is deemed not to have been convicted in respect of that offence. The discharge is to be taken into consideration only in deciding whether a further discharge should be granted. (at s-4)

Benning (1979), 21 Nfld. & P.E.I.R. 393 (Nfld.)

> The magistrate in his reasons for sentencing quite properly pointed out the necessity of deterrence, both to the appellant and to the general public, and as stated, the fact that the enterprise was planned and commercial, obviously influenced him. The facts, without doubt, justify a custodial sentence. The magistrate, however, makes no reference to reformation or rehabilitation of the appellant and while Benning's past record is not good, and the facts of this case show few mitigating factors, it is our view that rehabilitation and reformation must be a major consideration in imposing a first custodial sentence, especially in a case of a young offender. (at 394)

Williams (1983), 60 N.S.R. (2d) 29 (N.S.)

> I have considered all of the evidence and the decision of the trial judge as well as the submission of both counsel and, in my opinion, the trial judge erred in overemphasizing the element of deterrence, and in failing to take into consideration the element of rehabilitation and the principle of totality of sentence. (at 30)

There is little doubt that appellate review for misplaced emphasis or disregard of principle will incrementally lead to the construction of implicit principles. It has been noted by some commentators that "it is possible to construct a taxonomy of the factors utilized by appellate judges in sentence review" and that "extensive analysis of appellate sentencing decisions...will encourage that development of sentencing principles empirically that are grounded"[4]. An examination of appellate decisions does confirm that there are consistent trends and recurrent themes that can be abstracted from the cases and developed into proper guidelines; however, this report is not concerned with the possibility of abstracting guidelines after formal analysis and lengthy examination. Only in an ideal system would we expect to find that a sentencing hearing would be based upon the detailed analysis of caselaw required to abstract the relevant principles. In a large percentage of cases, especially in provincial court, the sentencing hearing is a rather informal, and skeletal proceeding

in which mention is made of the offender's background with very little reference to caselaw. Notwithstanding the existence and development of implicit guidelines the likelihood is that these guidelines will have little impact unless they are made explicit.

The ideal model of an explicit appellate prescription that is designed to guide lower courts in the future can be found in a recent decision of the Court of Appeal in England. In R. v. Aramah (1983) 76 Cr. App. R. 190 the court had occasion to prescribe a detailed and extensive scale of available sentencing dispositions for those convicted of committing narcotics violations. Before turning to the attempts of Canadian appellate courts to reduce disparity and increase uniformity by means of appellate guidelines I have chosen to reproduce in its entirety the scale formulated by the British court to show that it is possible for the judiciary to enact rule-like guidelines that can match legislative rules in their specificity and clarity:

> Class "B" drugs, particularly cannabis:
>
> We select this from amongst the class "B" drugs as being the drug most likely to be exercising the minds of the courts.
>
> Importation of cannabis: importation of very small amounts for personal use can be dealt with as if it were simple possession, with which we will deal later. Otherwise importation of amounts up to about 20 kilogrammes of herbal cannabis oil, will, save in the most exceptional cases, attract sentences of between 18 months and three years, with the lowest ranges reserved for pleas of guilty in cases where there has been small profit to the offender. The good character of the courier (as he usually is) is of less importance than the good character of the defendant in other cases. The reason for this is, it is well known that the large scale operator looks for couriers of good character and for people of a sort which is likely to exercise the sympathy of the court if they are detected and arrested. Consequently one will frequently find students and elderly people are used as couriers for two reasons: first of all they are vulnerable to suggestion and vulnerable to the offer of quick profit, and secondly, it is felt that the courts may be moved to misplaced sympathy in their case. There are few, if any,

occasions when anything other than an immediate custodial sentence is proper in this type of importation.

Medium quantities over 20 kilograms will attract sentences of three to six years imprisonment, depending upon the amount involved, and all the other circumstances of the case.

Large scale or wholesale importation of massive quantities will justify sentences in the region of ten years' imprisonment for those playing other than subordinate roles.

Supply of cannabis: here again the supply of massive quantities will justify sentences in the region of ten years for those playing anything more than a subordinate role. Otherwise the bracket should be between one to four years' imprisonment depending upon the scale of operation. Supplying a number of small sellers -- wholesaling if you like -- comes at the top of the bracket. At the lower end will be the retailer of a small amount to a consumer. Where there is no commercial motive (for example, where cannabis is supplied at a party), the offence may well be serious enough to justify a custodial sentence.

Possession of cannabis: when only small amounts are involved being for personal use, the offence can often be met by a fine. If the history shows, however, a persisting flouting of the law, imprisonment may become necessary. (at 193)

4) THE FIRST STEP - THE DEVELOPMENT OF SENTENCING RANGES

In the attempt to instil uniformity and consistency in sentencing dispositions the appellate courts may be reluctant to incorporate a rigid, presumptive approach, but, they have not been hesitant to suggest that within the broad statutory maxima for designated offences there does exist discernable ranges of sentences that are tailored to the gravity of the offence. The establishment of a range is premised upon the belief that any given offence is usually committed in certain circumstances with certain consequences, and this common mode of commission can be reflected in a pre-existing sentencing range. Once the court can settle upon the common mode of commission for a designated offence they can then specify that this mode of

commission should be punished by a choice of sentence ranging from X years to Y years.

The two leading commentators on sentencing (Ruby, Sentencing, 1980; Nadin-Davis, Sentencing in Canada, 1982) have expressed disparate views about the role of appellate courts in developing a sentencing range. Ruby expresses the view that Canadian courts have avoided adopting a tariff approach in which specific ranges of sentencing options are deemed appropriate for specific offences. Ruby appears to characterize the establishment of a tariff as a mechanical enterprise that is ill-suited to our objective of having punishment fit the offender. Ruby asserts that "sensitivity and flexibility in sentencing requires that the approach to be taken should flow from the facts of the case and not from any single rule, however useful or certain that rule may be"[5]. Accordingly, Canadian courts determine an appropriate sentence by weighing various factors relating to the offender and the offence without reliance on a tariff; however, it must be recognized that the accumulation of appellate sentencing decisions with respect to specific offences ultimately yields a range or tariff as certain patterns of disposition emerge. Despite the emergence of a pattern reflecting an appropriate range the development of the tariff is not explicitly condoned, and without an explicit approval of the emerging tariff it appears that courts are free to disregard or distinguish the emerging pattern in their search for an appropriate sentence.

Nadin-Davis believes that the role of the tariff in Canadian sentencing is more significant than the implicit emergence of sentencing patterns. Despite the fact that some judges deny the existence or use of the tariff, Nadin-Davis asserts that attempts to achieve uniformity in assessing the fitness of a sentence by examining whether the

sentence is consistent with other sentences customarily imposed, approximates the tariff system employed in England. D.A. Thomas describes the British system as follows:

> The process consists of three stages, which may be called "defining the range within the scale", "fixing the ceiling", and "Allowing for mitigation". The overriding principle is that the sentence must not be more severe than is justified by the gravity of the offence for which it is imposed, whatever other considerations might suggest a longer term.[6]

Nadin-Davis believes that Canadian courts adopt a similar approach with the following modifications:

> Having established in general the appropriate range for the *type* of offence before it, the Court's next step is to determine where in that range the offence should be placed. Thomas calls this step "fixing the ceiling", with accounting for mitigation, a third stage, to follow. With gravity of the offence as the governing principle, the upper limit of sentence in this particular case will be fixed. While Thomas is able to cite a number of examples of this three-step process clearly occurring in British Courts, the more general practice in Canada is for the Court, at least in its reasons for sentence, to combine Thomas' second and third steps. That means, having decided where the appropriate range of sentence lies, the questions of just exactly where on the range the offence lies, and how much mitigation is to be allowed, are discussed prior to fixing a final sentence. However, no intermediate figure is generally named prior to the accounting for mitigating factors; aggravating and mitigating features, alongside considerations relating to disparity, are cumulated to draw a final figure from the range. It is because of this tendency to treat aggravating factors and mitigating circumstances as part of one calculation that Part Two of this book treats the whole group of "factors affecting (or not affecting) sentence" as one element in the sentencing process.[7]

From an examination of over 800 appellate decisions relating to over 40 offences[8], it appears that the views of both commentators are reflected in the cases. On some occasions a sentence is reviewed on the basis of its correspondence with

implicit and emerging patterns that may be characterized as sentencing ranges, but it must be noted that this method of review is still the exception; most sentencing appeals are disposed of without reference to any discernible range.

Many appellate decisions indicated an awareness of an operative range, but such awareness was usually evidenced by an oblique reference in which the court suggested it was considering the general range of sentence customarily awarded. Unfortunately, the appellate courts often do not specify the nature of the range being considered, and one is left wondering whether the reference to a range is more a matter of rhetoric than of substance. The following cases are representative:

McNabb (1979) 49 C.C.C. (2d) 263 (Sask. C.A.)

> As sentences imposed are in accordance with those usually imposed in this jurisdiction for the same or similar offences, the appeal in respect of the sentences is also dismissed. (at 276)

Squires (1977), 35 C.C.C. (2d) 325 (Nfld.)

> Once again, it must be stressed that this Court does not minimize the seriousness of this offence, but in our view the elements of punishment and deterrence have been over-emphasized by the Magistrate and, in line with other decisions of this Court and those in other jurisdictions, we would reduce the sentence for the offence of breaking and entering to two years. (at 329)

Cadotte (1982) 18 Man. R. 88 (Man.)

> The sentence of two years is totally inadequate for this type of crime of excessive violence, following as it did upon the use of a knife in a similar attempt forty-five minutes earlier. Taking into account the fact that there was an altercation and the lack of a serious record, we assess the punishment at the lower end of the scale for his type of offence.

Flight (1982), 16 Man. R. 88 (Man.)

> The difficulty I have is that several of the important facts leading up to the crime are in serious doubt. The learned provincial court judge, in carefully written reasons for judgment,

> gave the benefit of the doubt to the accused, and on his reading of the facts concluded five years was an appropriate sentence. I consider the sentence, even on the facts referred to by the learned provincial court judge, to be on the low end of the appropriate range. But the sentence is not so inordinately low as to call for revision by this court.

The appellate court may go beyond this vague type of reference and indicate its awareness of an operative range by citing numerous cases from which the range may be abstracted. Although this technique of cataloguing cases is an extremely useful exercise it is interesting to note that the court rarely states explicitly the precise range they have abstracted from the catalogue. In addition they rarely provide an explicit approval of the range that is implicit in the catalogue (see Thornton (1980), 57 C.C.C. (2d) 314 (N.S.); Chaisson (1979), 31 N.S.R. (2d) 115; Moore (1975), 13 N.S.R. (2d) 687).

Even in cases where the appellate court undertakes to catalogue existing caselaw and abstract relevant ranges, it is common to see the court then disparage the significance of its labours. In the Fifield case (1978), 36 A.P.R. 407 the Nova Scotia Court of Appeal set out emerging ranges of sentence for different modes of drug trafficking based upon an extensive examination of previous sentencing decisions in the province. The court then undercut the relevancy of its catalogue by stating that:

> In the various categories one cannot expect to find any uniformity of sentence. The cases above are merely random samples to illustrate the apparent categories....The categories respectively have broad and overlapping ranges of sentences into which the individual offender must be appropriately placed, depending upon his age, background, criminal record and all surrounding circumstances....We must constantly remind ourselves that sentencing to be an effective social instrument must be flexible and imaginative. We must guard against what my brother Macdonald has criticized as a cookie-cutter approach. (at 410)

The development of sentencing ranges has developed in a fairly random and inconsistent manner. Some provincial appellate courts are more inclined to give explicit recognition of an operative range than other provincial appellate courts, and recognition of operative ranges is common for some offences (e.g. robbery, rape, trafficking in narcotics), while wholly disregarded for other offences. In addition, if a court goes beyond the passive observation that an implicit range is in existence and actually specifies the range, the specification of the range is of limited assistance due to its high degree of generality. Many provincial courts of appeal have approved of the formulation of an operative range for the now-repealed offence of rape that falls between 3 to 7 years; however, the generality of the range cannot be considered an effective method of increasing uniformity of disposition. The courts have not yet been able to resolve the inherent tension between the need for individualized dispositions and the need for reducing disparity.

5) THE SECOND STEP - THE DEVELOPMENT OF TARIFF SENTENCING

In light of the rather lukewarm acceptance of the need to develop sentencing ranges, it is surprising to find that some provincial appellate courts have begun to move beyond the development of general ranges and have in fact begun to specify particular terms of imprisonment that are considered appropriate for designated offences. The genesis of an appellate specification of a presumptive sentence can be found in 1975 in an oft-quoted decision of the New Brunswick Court of Appeal. In the Chaisson case (1975), 24 C.C.C.(2d) 159 the court disposed of a sentence appeal by including a specific prescription as a recommended sentence for robbery:

> ...a normal sentence in the Province for such an offence where the accused has no previous record is one of not less than 3

> years and where there is a criminal record a substantially greater term. (at 160)

Since then other courts have taken the initiative to recommend specific sentences for certain offences. Sometimes the court will recommend a specific sentence as a starting point for the consideration of an appropriate and fit sentence, or they will specify a sentence to operate as a minimum sentence in the absence of exceptional circumstances; but notwithstanding the particular form of the recommendation, the common element underlying this recent movement has been the attempt to pass beyond the acknowledgement of a general sentencing range into a realm of specific sentence prescriptions. Although there are definitional problems it is common to refer to appellate sentence prescriptions as sentencing by tariff.

Many courts and commentators have deprecated the use of the term "tariff" as they contend that this term suggests a process of applying an inflexible scale that ignores the unique factors that are present in any given case. The employment of this term has its genesis in the pioneering work of D.A. Thomas and it can be seen that the concept of tariff sentencing does not embody an inflexible sentencing scale. Thomas simply used the term tariff to describe the implicit approach to sentencing taken by English judges. He contended that the "principles of the tariff constitute a framework by reference to which the sentencer can determine what factors in a particular case are relevant to his decision and what weight should be attached to each of them"[9]. In essence Thomas was describing a process in which the Court of Criminal Appeal was attempting to carve out realistic ranges for offences that carried high maximum penalties. Thomas refers to the existence of two systems of sentencing: 1) the tariff and 2) the individualized measure. The tariff by nature carries a fixed penalty whereas the individualized measure contains an indeterminate

element (i.e. hospital order, life imprisonment) that provides for the necessary flexibility in dealing with the unique characteristics of any given offender. Thomas states that the first question a court must ask when sentencing is whether to employ the tariff or individualized measure. Thomas calls this the "primary decision". The individualized measure is designed for the offender whose unique problems require a flexible and responsive sanction. The tariff should always be employed in the following circumstances: 1) the intrinsic gravity of the offence so requires; 2) the victim/offender relationship (i.e. breach of trust) so requires; 3) the offender is unsuitable for individualized treatment.

Once a decision has been made to employ the tariff the sentencer must apply a three-step analysis. The first step is the defining of the available range of sentence. Defining the range provides a scale of factual situations each with a corresponding range of sentence that excludes consideration of mitigating factors relevant to the accused. Once the range is defined it is necessary to fix the ceiling of punishment. This is a process of determining the upper limit of permissible sentencing within the range by reference to the gravity of the offence committed. Once the ceiling is set the third step is the consideration of mitigating factors that may reduce the sentence below the ceiling. The cardinal rule is that the sentence must not be disproportionate to the facts and accordingly the sentence can never be inflated beyond the ceiling.

In recent years courts in Alberta, New Brunswick and Nova Scotia have developed an approach to sentencing that is fundamentally different than the type of tariff sentencing described above. This approach employs the use of suggested starting-points or prescribed minima to assist in the calculation of a fit sentence and as such it can be loosely described as a tariff approach to sentencing since it

constitutes a "framework of reference" to assist judges in carving out realistic sentencing ranges for offences that carry high maximum penalties. This new development is a natural progression from the recognized existence of operative sentencing ranges, yet it is quite a radical departure for Canadian courts who have previously been content to outline general sentencing principles without specifying the details that are necessary to give substance to the principles.

For the most part the use of a specific tariff or starting point has been confined to sentencing for robbery or drug offences. Territorially, it has been confined to Alberta, Nova Scotia and New Brunswick. It is instructive to contrast the approaches taken by the Alberta and Nova Scotian courts to the creation of a tariff for robbery as these two approaches illustrate different underlying objectives to the creation of a tariff.

Firstly it can be seen that the Alberta tariff is far more offence-oriented than the Nova Scotia tariff. In Johnas (1983), 2 C.C.C. (3d) 490, the Alberta Court stated:

> This brings us to what should be regarded as a fit sentence in Alberta for unsophisticated armed robbery of unprotected commercial outlets in the absence of actual physical harm to the victim and with modest or no success. We are of the opinion that we must record a term of three years imprisonment as a starting point in the seeking of an appropriate sentence. (at 495)

The relevant factors that trigger the employment of the tariff all relate to offence characteristics (i.e. unsophisticated, commercial outlet, absence of harm, modest success).

Since Johnas any refinement of the tariff has been related to creating new offence categories; that is, there is now a tariff for bank robberies (5 yr.)[10] and

night deposit robberies, (4 yr.).[11] There is never any discussion as to whether the tariff applies to a first offender equally as to a repeat offender.

In Nova Scotia the tariff applies to a generic offence, armed robbery, without further elaboration upon other relevant offence characteristics. In prescribing a 3 year minimum sentence for armed robbery the court has included a number of offender characteristics that trigger the tariff. In Hingley (1977), 19 N.S.R. (2d) 541 the Court states that:

> We must begin with the premise that armed robbery and robbery with violence require strongly deterrent sentences of imprisonment. Only where such an offence is isolated, minor, and committed, perhaps impulsively or drunkenly, by a very young person or one of previously good character, should sentences as low as 2 or 3 years imprisonment be considered. It is such cases that we had in mind in referring to a minimum of 3 years imprisonment in Brennan (1975) 11 N.S.R. (2d) 84. (at 544)

The Court has also been careful to stipulate that the tariff applies equally to first and repeat offenders:

> "In the absence of exceptional circumstances a sentence of at least 3 years is required for armed robbery, even by a first offender, although sentences for attempting to commit an offence should be less severe."[12]

Far more significant than the offender/offence dichotomy is the fact that the tariff in Nova Scotia is expressed as a minimum sentence whereas the Alberta tariff is expressed as a mere starting point of calculation. The Nova Scotia tariff is one of rigid application that can only be ousted by the presence of exceptional circumstances that are never clearly enumerated. As a result of expressing the tariff as a minimum sentence there has been no need for the court to express a corresponding methodology. In Alberta the use of the tariff as a starting point has necessitated the

expression of a corresponding methodology and the suggested approach has been expressed as follows:

> The proper approach in sentencing, as we have said is to calculate a fit starting point on the basis of sentencing guidelines expressed by or extracted from the decisions of this court. The specific sentence for the specific accused should then be adjusted on a balance of the compendium of aggravating and mitigating circumstances present in the case. The end of this process is not uniform sentences, for that is impossible. The end is a uniform approach to sentencing.[13]

It can be seen that this approach to tariff sentencing is fundamentally different than the three stage approach presented by D.A. Thomas.

These contrasting approaches to the tariff reflect disparate underlying objectives for their construction. In reading the cases from Nova Scotia it is clear that the creation of a minimum sentence for robbery is viewed as a need to recognize the importance of general deterrence. General deterrence is to be achieved through the use of a rigid scheme of minimum sentences. Numerous courts have stated:

> "Robbery and attempted robbery have been held by this court to be serious offences demanding, with very few exceptions, lengthy penitentiary sentences. The deterrence must not only be a specific deterrence to the individual, but also a general deterrence to others of similar mind and disposition."[14]

> "Armed robbery and robbery with violence require strongly deterrent sentences of imprisonment and that in the absence of exceptional mitigating circumstances such sentences should not be less than 3 years."[15]

> "This court has stated on numerous occasions that in crimes of violence in which robbery is included the paramount consideration is the protection of the public to which all other considerations must yield. I find no exceptional circumstances in this case which would warrant a departure from this general principle."[16]

In Alberta there is some discussion of the need for general deterrence; however, the impetus for the creation of a tariff appears to have been generated by a different concern. The Alberta Court has expressed a concern over proper judicial reasoning, and accordingly a tariff expressed as a starting point with a corresponding methodology can fulfill the desire to insure that judges are uniformly approaching their task of sentencing in an appropriate manner. In Johnas, supra, the court stated that "we do think that judicial reasoning as to a fit sentence for any offence must start with a norm for the type of offence involved" (at 499). One might have thought that the courts would have mentioned the reduction of disparity as an objective underlying the creation of a tariff; however, the Nova Scotia courts have by and large disregarded this objective and the Alberta Court, with their focus on proper judicial reasoning, have addressed the disparity problem by relying upon the oft-quoted statement of Lord Justice Lane that "we are not aiming at uniformity of sentence; that would be impossible. We are aiming at uniformity of approach".[17]

Despite the best intentions of the appellate courts, the development of tariff sentencing has not had great success. Later in this report we will examine the impact of this development on lower court sentencing patterns, but at this juncture it is sufficient to note that the appellate courts have themselves jeopardized the success of the enterprise by failing to consistently apply their own tariff prescriptions. In Alberta, for example, a tariff approach has been established for robberies of commercial establishments, financial institutions and for night depositories, yet no tariff has been prescribed for the other variety of robbery known as mugging or street crime. An examination of appellate decisions in Alberta reveals the surprising conclusion that sentencing for the non-tariff governed street crime appears to follow

a more predictable pattern of disposition than the rather desultory collection of sentences found in the tariff cases[18].

An examination of the robbery cases in Alberta reveals that disparity in sentences still exists under the tariff regime primarily as a result of the failure of the court to indicate how various mitigating and aggravating factors affect the adjustments from the starting point of the tariff. The cases do not reveal any startling insights other than the trite conclusion that two factors will result in significant upward adjustments from the starting point; namely, the presence of violence during the commission of the offence and the presence of a serious criminal record. There is little doubt that an appellate court takes a dim view of an offender with a lengthy record, but the precise impact of the record on the sentence is elusive. Despite the presence of the tariff it is clear that it is still possible for similarly-situated offenders to receive disparate sentences, and for dissimilar offenders to be punished by the same sentence[19].

In Nova Scotia, where the tariff for robbery is expressed as a minimum sentence for all forms of robbery, it can be seen that some uniformity of approach and disposition is being achieved. However, unlike the more flexible approach of the Alberta tariff, the Nova Scotia approach of creating minimum sentences without specification of exceptions raises the potential danger of ossifying the sentencing process. There are already indications that the minimum is being applied too rigidly. For example, in the category of street crimes we find a number of cases of taxi robberies in which the offenders all received the three year minimum. Among these cases we find a robbery at gunpoint, a robbery at knifepoint and a robbery by threats. All of the offenders had criminal records except for the one offender who

employed threats to commit the robbery. Instead of a mechanical application of the tariff one would have expected the court to draw distinctions between the offenders based upon the relative seriousness of the method chosen to commit the offence. The inequity of applying a rigid formula to sentence offenders can be seen by the fact that one offender received the same year sentence as the other taxi-robbers even though he did not use a weapon nor did he have a criminal record.[20]

Other tariff prescriptions by appellate courts have simply been disregarded in subsequent decisions of the court. The New Brunswick Court of Appeal has not consistently followed or cited its three year tariff for robbery, and the Alberta Court of Appeal has not consistently followed its three year tariff prescription for trafficking in cocaine as developed in the Koch case (1983) Alta. D. 7375-01. The provinces of Nova Scotia and Prince Edward Island have had similar difficulties in following their own tariff prescriptions for trafficking in narcotics. In Nova Scotia two cases roughly established a tariff approach to trafficking in cannabis. In Spencer (1974), 16 C.C.C. (2d) 29 the Court of Appeal designated a range of 3 months to 4 years and 5 years later in Boyd (1979) 21 C.L.Q. 282 the court designated a tariff of a minimum 12 month sentence for incidents that suggest serious commercial involvement. In subsequent cases the court has had little difficulty in keeping consistently within the general range, and it has had little difficulty in ensuring that commercial ventures attract a minimum sentence of 12 months. The difficulty sets in due to the fact that the court has failed to specify a methodology for distinguishing cases above and below the 12 month minimum. For commercial ventures the court has failed to indicate whether the critical factor to be relied upon in increasing the sentence beyond 12 months is the presence of a criminal record or the quantity of cannabis seized. Similarly, for cases of non-commercial ventures there is a wide disparity of sentences

ranging from probation to the 12 month maximum as prescribed by tariff. Little guidance has been offered and it is apparent that the court is not overly-impressed by their own tariff prescriptions. In the Stuart case (1976) 24 C.C.C. (2d) 370 the court commented on the danger of slavishly following their own prescriptions:

> The sensitive and difficult task of sentencing requires individual appraisal of the rehabilitative and deterrent aspects of each case without any slavish following of precedents. The process must be conducted flexibly and imaginatively, with a realization not only that individual needs vary, but also that the climate of judicial and other supposedly informed opinion necessarily changes from time to time. (at 373)

Finally, it should be noted that Alberta[21], Nova Scotia[22] and Newfoundland[23] the appellate courts have attempted to establish a tariff or general range for designated sexual offences. Once again the exercise appears to have been thwarted by inconsistencies as the cases that follow the tariff pronouncement have fallen outside the suggested range[24]. In the case of Alberta, the cases have fallen within the designated range but the courts have disregarded their own clear prescription that distinctions to be drawn within the range are to be drawn upon evidence of family reconciliation[25].

It can be seen that tariff sentencing in Canada has been promoted by various courts of Appeal, yet its success has been limited. This may be partly due to lower court resistance, as will be discussed later, but this resistance does not account for the failure of the appellate courts to follow their own guidelines. Perhaps the greatest shortcoming of tariff sentencing to this date is that the courts have only established vague criteria for the invocation of the tariff. The tariff itself is clear but the circumstances that trigger its operation are at times too amorphous to achieve

rational application. Andrew Ashworth, in commenting upon similar developments in England, stated:

> If a guideline judgment is to achieve maximum effectiveness, by bringing coherence and promoting consistency, the Court of Appeal should show how the problems raised in previous reported cases might be resolved within the framework of the guidelines. In blunt terms, the Court should seek to integrate the relevant decisions and not leave individual sentencers to make the reconciliation for themselves ....
>
> If the aims of guideline judgments are fairly defined in terms of coherence and consistency of approach, they surely ought to deal with the factors which may or may not justify departures from the declared starting points. It may be unfair to expect the Court to anticipate new variations in the form of an offence, but there is surely little excuse for failing to deal with variations which have already been the subject of reported decisions of the Court. The recent guideline judgments in Boswell and in George are welcome steps in this direction.[26]

A question then arises as to whether an appellate court in disposing of a sentence appeal is properly equipped to develop detailed guidelines with effective criteria. Ashworth states that "the notion that, because complete guidance on all combinations of factors cannot be provided, most attempts at guidance are not worthwhile, must be discarded as a pernicious fallacy".[27] In the United States the judiciary in various states has been able to complete the task of developing detailed guidelines, but this process has never taken place in the context of sentence appeals. Any guidelines that have been developed by the judiciary have been the product of commissions and boards of inquiry. In a study into the effectiveness of judicial guidelines developed in Florida and Maryland the conclusion was reached that despite the sufficiency of details within the guidelines, the guidelines met with resistance due to the fact that its implementation was left on a voluntary basis.[28]

In conclusion, tariff sentencing in Canada suffers from three deficiencies; 1) lack of sufficient details to establish an operative criteria; 2) the failure of the appellate courts themselves to consistently follow their own tariff guidelines; 3) the loose nature of sentencing precedents leaves the implementation of the guideline on a voluntary basis. It may be that tariff sentencing will only achieve the requisite clarity and consistency to effect a change in our sentencing process if the development of the tariff takes place outside of the constraints of disposing of sentencing appeals. The impetus to develop a workable tariff may be judicial or legislative, but the important factor will be the delineation of detailed criteria. Tariff sentencing in Canada is still at an incipient stage but without a more serious attempt to expand upon the existing criteria it is doubtful whether the mere statement of an existing tariff will achieve any of the stated objectives underlying its creation.

6) A LESS AMBITIOUS VENTURE - PRINCIPLES RELATING TO MITIGATING AND AGGRAVATING FACTORS

The creation of sentencing ranges and tariffs may be an enterprise destined to fail because appellate courts may believe that they are not institutionally competent to undertake large-scale sentencing reform. The movement towards presumptive and determinate sentencing may be seen as a legislative task. A more modest task that is properly within the institutional competence of the judiciary is the delineation of general sentencing principles that would govern the operation of mitigating and aggravating factors. These principles may not make as great a contribution to uniformity and consistency as would tariff prescriptions; however, there can be little doubt that lower courts would find great assistance in principles that outline relevant

factors and considerations to be taken into account in arriving at a determination of a fit sentence.

Although the task may be less onerous an undertaking, the appellate courts have even shown some diffidence about this enterprise. The vast majority of appellate decisions on sentencing proceed on the basis of a listing of factors without further elaboration or further classification of the factors as aggravating or mitigating. The court appears to justify its decision by merely acknowledging awareness of all the factual variables. The legal significance of any particular decision is minimized if the court does not make an attempt to ascertain the varying degrees of relevancy or importance in the factors present. A barren catalogue is of little precedential value because this type of decision can give no indication of the manner in which a given factor has influenced the outcome. The tenuous nature of this cataloguing process can be seen the Leger case (1983), 46 N.B.R. (2d) 349. The court outlines the factual content of the case:

> (3) The appellant is twenty-three years of age and had previously been convicted of two offences of break, enter and theft, one offence in 1976 and the other in 1977. In 1977, he was also convicted of an offence of possession of stolen goods and of an offence of damage to property. The penalties imposed for these offences were either a fine or a suspended sentence. The appellant left school at the age of fifteen and since then has worked sporadically at various jobs. His income has been derived either from these jobs, unemployment insurance benefits or occasionally from welfare. The nature and quantity of the goods and the fact that they were being transported from Moncton for re-sale in the Newcastle area indicates an illegal profit-making scheme. As indicated by the trial judge, the appellant has not benefited from the leniency shown him by the courts on previous occasions. (at 351)

Immediately following this outline the court delivers its decision:

> (6) For these reasons, we would allow the appeal and substitute a term of imprisonment of twelve months in place of the term of nine months imposed by the trial judge for the offence involving the heavy equipment tools which was obviously the more serious of the two offences. We would not disturb the sentence of five months' imprisonment imposed by the trial judge for the order that the sentences be served concurrently. (at 352)

When the court states "for these reasons" one can see that the court has confused facts with reasons.

Notwithstanding the reluctance of the court to categorize and priorize factors many cases clearly provide a context from which inferences can be drawn about the catalogue of factors. In Falconi (1982), 41 A.R. 433 the Alberta Court of Appeal states:

> The appellant is twenty-five years of age. He has no criminal record. On the other hand he has a good work record and there is another youngster in the family and the information we have is that the family ordinarily gets along splendidly. He is the sole support of the family. His wife is very supportive of him. The appellant has undertaken to undergo counselling.
>
> Under the circumstances, we propose to allow the appeal and to substitute for the sentence imposed by the learned trial judge, a sentence of time in custody, which amounts to some eight days, and we will make an order for probation. (at 435)

When the court states "under the circumstances" it is patently obvious from the context and the manner in which the court lists the factors that the courts has concluded that numerous, significant mitigating factors exist that suggest leniency.

The Falconi case, supra, is unusual in that the personal factors are so obviously mitigating: however, not all cases are so one-sided and often the interplay of mitigating and aggravating factors requires some explanatory comment from the court. Although it is rare to find an explanation for the operation of the factors it is

common for an appellate court to isolate the most important factors from the general catalogue and note them as points in mitigation or aggravation. For example, in Pasha (1981) 61 C.C.C. (2d) 340 the Ontario Court of Appeal clearly isolated the relevant aggravating factors.

> In our opinion, the sentence imposed on Zaki Pasha is ordinately low having regard to (a) the quantity and value of the hashish, (b) the commercial nature of the transaction, (c) the high level of trafficking that was involved and (d) the international aspects of the trafficking and Canada's obligation to deter the international distribution of narcotic drugs. (at 342)

Once the factors are identified, there are generally two ways in which an appellate court can provide concrete guidance as to the operation of mitigating and aggravating factors. Firstly, the Court can in the body of its judgment clearly make, with varying degrees of particularity, a statement of principle outlining the impact and effect of a specific mitigating and aggravating factor. Such a statement may be a general statement of approach or a recommendation for a specific type of disposition if certain factors are present. In over 600 cases between 1980-85 only 13 cases contained a statement of sufficient generality that could be classified as a principle or guideline.[29]

Another, and even less frequent, method by which an appellate court can illustrate the operation and impact of a specific factor is by establishing a causal link between the factor and the ultimate disposition. In the Bingham case (1982), 69 C.C.C. (2d) 221 the Ontario Court of Appeal was asked to review a 4 month sentence for a serious incident of dangerous driving. The trial judge imposed a lenient sentence to give effect to the offender's good character. The Court of Appeal approached the issue by stating at the outset that "putting aside good character" this

offence called for a sentence of 18 months. The Court then concluded that after taking into account the mitigating effect of good character an appropriate sentence would be one of 9 months. By proceeding in this manner the Court established a causal link between the mitigating factor of good character and the sentence of 9 months.

One could infer from Bingham, supra, that the mitigating effect of good character was of sufficient strength to reduce an expected 18 month sentence by 9 months, or alternatively, that the presence of good character was sufficient to reduce by half the sentence normally awarded for this type of offence.

In a similar vein the Alberta Court of Appeal in Ladouceur (1982) 37 A.R. 65 stated that the fraud presented in the case would normally attract a penitentiary term had it not been for the offender's close ties to his children. Similarly, in Michaels (1981), 23 C.R. (3d) 311 the Alberta Court of Appeal stated that the forgery in this case would have attracted a penitentiary term if the offender's parents had not made restitution. The Court sentenced Michaels to a 6 month term. By isolating the relevant mitigating factor in this manner and by establishing a crude causal link between the factor and the sentence one can abstract a basic principle of operation from the case. One can say that in forgery cases of sufficient magnitude to warrant penitentiary time the presence of voluntary restitution can operate to reduce the sentence to reformatory time: however, without additional factors in mitigation, the presence of restitution cannot convert a custodial term into a non-custodial sentence.

It would be preferable if the court explicitly stated this principle because the method of causally linking factor and sentence is fraught with ambiguity; however,

this method provides for greater guidance concerning the operation of mitigating and aggravating factors than does the mere cataloguing of factors.

The wide variety of factors that are present in any given case make it extremely difficult to approach the plea in mitigation in a systematic way. The myriad of available factors defies a quantitative analysis and it is more usual for the court to approach the factors in an impressionistic manner. Instead of ascribing relative weight to each factor and carefully balancing the significance of each, it is far more common for the court to approach this task by listing the factors and then extracting an appropriate disposition as if the factors were all thrown into a melting-pot. The final disposition is a sum of the parts (i.e. factors) but in its final form it is impossible to identify the contribution made by the individual parts.

This impressionistic approach is readily identifiable by the phrase "taking into account all the circumstances"[30]. This phrase is the only link between the catalogue of factors and the final disposition. This method of disposition reveals next to nothing about the appellate court's view of the priorization of factors; however, it is not surprising that appellate courts have been reluctant to approach the operation of mitigating/aggravating factors on the basis of a quantitative analysis in which the presence of various factors leads to very specific and quantifiable adjustment in sentence. Any attempt to develop principles that, for example, suggest that a good employment record can reduce the ordinary sentence for a large-scale theft by anywhere between 1 year to 2 years would appear arbitrary and mechanical. An offender who is to be sentenced usually presents a wide array of offence/offender factors and a specific quantifiable principle, such as one relating to a good

employment record, would only be useful if further principles were developed outlining the proper balancing mechanism to account for the interplay of numerous factors.

The development of specific principles that would assist a court in progressing beyond the impressionistic approach would require consideration of many divergent factors. Upon a sentence appeal, the primary task of the appellate court is to arrive at an appropriate disposition for a particular offender; the development of a principle is usually not necessary for the disposition of a case, and it may be that the appellate courts are reluctant to digress far from their primary task. As will be discussed later, general principles do emerge from the appellate courts from time to time; however, with the exception of cases that establish a causal link between factor and sentence, the courts guard against developing concrete guidelines that approach a presumptive quantification of factors. The strong reluctance to embark on a process of presumptive quantification is evident in the appellate courts' approach to the factor of pre-trial custody. Unlike most mitigating factors which concern human characteristics that are not easily reducible to numerical equations, the factor of pre-trial custody is a pure question of mathematics. The rule of thumb is that one day in pre-trial custody is worth two days of a sentence. In other words, if an accused spends 4 months in pre-trial detention, that time is worth 8 months off the sentence that the judge would otherwise impose. Notwithstanding the fact that this factor lends itself to quantification, the appellate courts have generally[31], with the exception of the Quebec Court of Appeal,[32] rejected the employment of a mathematical formula. The following passage illustrates this attitude:

> In our view, no such rule of thumb has ever been recognized by the Courts of this Province, and furthermore, such a rule ought not to be recognized in the future. Each instance of sentencing has to be considered on its own merits, and, no

> doubt, in proper cases time already spent in custody, and the circumstances thereof, may be taken into account as provided by the Criminal Code. Beyond that, we do not believe any rule in this regard can be laid down.[33]

When the court places all the relevant sentencing factors into the melting-pot, the end result of this impressionistic blend should be a conclusion as to whether the aggravating factors outweigh the mitigating factors or vice versa. Once this decision is made the Court can then arrive at a fit sentence by adjusting the "ordinary sentence" up or down in accordance with their decision about relative weight. The "ordinary sentence" referred to is based upon the assumption that courts have a general idea of the usual sentence that should be awarded for the most common or run-of-the-mill variation of a particular crime. This average sentence would be derived from appellate court tariffs, general lists of precedents, personal and professional experience and submissions from counsel. Although the court will not quantify individual factors, it will explicitly or implicitly (i.e. "taking all the factors into consideration") reach a conclusion about the relative weight of the combined mitigating and aggravating factors. This conclusion is the basis of any corresponding upward or downward adjustment of the "ordinary sentence"; however, the conclusion as to whether an adjustment is required is impressionistic, and the actual adjustment is arbitrary in the sense that there are no guidelines or principles that dictate the quantum of the adjustment.

An example of the endeavor of arriving at a general assessment of relative worth can be seen in the decision of the Alberta Court of Appeal in the Hessam case (1983), 43 A.R. 247. In this case the court states:

> (13) I would take as a starting point for consideration of sentence for these offences a sentence of four years

> imprisonment. The various factors in aggravation or mitigation peculiar to the particular offences or personal to the respondent then tend to increase or decrease that starting point. Aggravating factors are the use of the weapon (even if it is inoperable, it is still a terrifying experience for the victim) the threats made and the planning and deliberation implicit in carrying out four similar offences over a time span of more than two months. Mitigating factors are the respondent's extreme youth, his virtually clear record of prior offences, the influence on him of an older accomplice, his remorse, his favourable work record, his supportive family, his co-operation with police and his plea of guilty at the first opportunity. It also seems clear that, while he provided the weapon and acquiesced in its use, he did take steps to ensure that no one could be injured by it.
>
> (14) In my view, balancing all of the factors, in mitigation and in aggravation in this case, a fit sentence for the first of the offences would have been a sentence of imprisonment for 3 1/2 years. In reaching this conclusion, I consider that the many mitigating factors to some extent outweigh the very serious nature of these offences. (at 250)

The process of weighing the relative value of the combined effect of mitigating and aggravating factor is reflected in cases in which the appellate courts must decide whether the interests of rehabilitation or general deterrence will be the paramount consideration in the disposition of a case. The interests of rehabilitation are usually introduced by mitigating factors relating to the personal characteristics of the accused, whereas general deterrence concerns factors relating to the gravity of the offence. In many ways the impressionistic balancing of mitigating/rehabilitative factors and aggravating/deterrence factors is comparable to what D.A. Thomas calls the "primary decision" in deciding whether or not to employ an individualised measure or a tariff sentence.[34]

The struggle to resolve the competing interests of rehabilitation and deterrence is most pronounced in narcotics cases. If an offender has taken active steps to disassociate himself from the world of narcotics through treatment or change in

lifestyle then the court must consider whether or not the facilitation of rehabilitation should be the paramount consideration in arriving at a fit sentence. In Alberta between 1980-82 there were a number of cases that attempted to strike a proper balance between the rehabilitation and deterrence concerns. Factually the cases had many similar features yet disparate conclusions were reached.

Dion (1981), 29 A.R. 32
- Trafficking, 3/4 oz. cocaine
- 22 years old; no record
- active steps taken to "remove" himself from "drug scene"
- 15 month sentence increased to 2 years less a day.

Maskell (1981), 29 A.R. 107.
- possession for the purpose, cocaine, 17 grams (3/5 oz.)
- bright, university student with no record
- favourable references
- 3 yr. sentence upheld

Burchnall (1980), 24 A.R. 17.
- possession for purpose; cannabis (a quantity which would be of comparable street value as the narcotic in the above two cases)
- 28 year old, remarried and expecting child; "wild" as youth but lifestyle changing
- favourable letters of reference
- progress made to quitting use of narcotics
- one previous conviction for possession of cannabis
- suspended sentence upheld

Dochiak (1980), 25 A.R. 187.
- trafficking (small amount of heroin)
- 25 years old
- expecting child; has quit use of drug
- 2 years less day reduced to 90 days intermittent.

Despite the fact that all four accused had similar backgrounds in that they were all endeavouring to change their lifestyle the sentences in each of the cases are significantly different. The disparity can be partly justified by the contention that the most significant determinant in narcotics cases is not the personal circumstances

of the accused but rather the gravity of the offence as signified by the nature of the drug involved. Even if this may be true in a general sense there is still a problem in that the Dion, supra, and Maskell, supra, cases involved the same narcotic in roughly the same quantity; the significant distinguishing factor in the cases is that Dion was truly taking active steps to improve herself where Maskell's rehabilitative potential did not arise because of his efforts but rather because of his fortunate background. In the Dion case the court concluded that the accused would have received penitentiary time if it had not been for his active steps to reform. The distinction between active rehabilitation and potential rehabilitation provides a rationale for the different sentences in the two cases and this distinction could easily be restated as a principle; that is, a sincere and active attempt to reform by quitting the use of drugs warrants a reduction from penitentiary time to reformatory time in cases that would ordinarily warrant penitentiary time. From the Burnchall case one could elaborate upon this by stating that cases warranting reformatory time may be reduced to non-custodial measures if this rehabilitative factor is present.

These statements of principle exist more as an academic abstraction than as an explicit statement of judicial policy. The Alberta Court of Appeal is careful to avoid an explicit pronouncement of principle. In Dion the court acknowledges the significance of rehabilitation yet they dilute its significance by attempting to distinguish this case and the Maskell case on other factual grounds, (relating to the commission of the offence) that are not wholly borne out by the evidence. In addition one finds the following statement in the Burnchall case, supra:

> It is always difficult to compare the factors in one sentencing case with those in another. The personal attributes of the accused and the facts of the offence itself are so infinitely variable that any valid comparison is virtually

> impossible. Different judges on those facts, each bringing to the case his own lifetime of differing experience, will often disagree. The best that can be achieved is a range of sentences meeting the needs of a particular part of Canada at a particular time. The courts must also retain an element of flexibility in sentences to reflect the concerns of society which may differ with the passage of time. (at 32)

If this be the prevailing judicial attitude then it should not be a surprise to find a reluctance to postulate principles of general application relating to the question of mitigating and aggravating factors.

Not all cases are resolved on the basis of an impressionistic blending of factors. On occasion the court will extend beyond the facts of a given case to state a principle of general application. The principles are directions or guidelines as to how a court in the future should view or consider a certain factor; however, specific guidance as to the operations of the factor and its ranking in the hierarchy of factors is rarely presented. As a rule, the statements of principle are usually just an acknowledgement that a certain fact can operate as a mitigating or aggravating factor in certain circumstances. In approximately 700 cases from 3 provinces there are just over a dozen cases in which the courts attempt to outline principles that extend beyond the unique facts of a given case. It must be kept in mind that this report surveyed cases between 1980-85, and numerous sentencing principles had already been established prior to 1980. Therefore, some cases that appear to fall into the impressionistic approach may have, to a certain degree, been influenced by pre-1980 principles that have become so familiar that they are not explicitly referred to. Even taking into account the tacit employment of older principles it can be seen that most cases are disposed of without references to guiding principles.

The establishment of a governing principle is always stated at a high degree of generality that is divorced from the particulars of the case at bar. An example of the attempt to establish a principle that is to apply to future cases is found in the Faid case (1984), 31 A.L.R. 193:

> (17) On the ordinary appeal from sentence the court frequently does take into account the post sentence conduct on the part of an appellant. So, in the case of a substantial fraud or theft, restitution after sentence would certainly be a factor to be considered by the Court of Appeal. This, however, goes to the seriousness of the offence itself. It is one thing if the appellant has had the benefit of the proceeds and the victim is without practical recourse. It is another if the accused has sold his house to make restitution. In the latter cases the offence becomes, as far as seriousness goes, a different offence. Deterrence to others becomes a lesser factor as restitution has removed the profit motive. And so, it is really the offence itself that may have changed character. By way of contrast, post sentence good behaviour does in no way change the "nature of the offence and the circumstances surrounding its commission", when murder is under consideration.
>
> (18) Again, in the case of some offenders, and particularly young people who have been given comparatively short sentences, the Court of Appeal in considering the fitness of the sentence will take into account that a young offender pending appeal seems to be re-established in either a course of training or in a job that has some future. The court there may put the emphasis on rehabilitation and may lower a sentence to permit the offender to avoid interrupting the program on which the offender has embarked. These considerations do not apply in a case where 10 years must in any event be served. (at 198)

Other cases that prescribe principles governing the operation of mitigating and aggravating factors are few and far between[35]. An examination of appellate decisions in three provinces, Ontario, Alberta and New Brunswick reveals that for the most part appellate decisions are inscrutable pronouncements that do not articulate or rely upon principles. For 38% of decisions in Alberta, 60% of decisions in New Brunswick and 61% of decisions in Ontario it was impossible to discover the basis for the decision.

Reliance upon a principle, a stated tariff or range, or simply upon an established precedent was an infrequent occurrence with Alberta showing the greatest reliance (17%) and New Brunswick and Ontario showing virtual disregard (2%).

As indicated earlier, there has been no attempt to prepare a quantitative analysis of the operation of various factors. It would be unreasonable to expect that courts could precisely construct a quantitative matrix that would be comparable to the presumptive sentencing schemes that have been developed in the United States. Assuming the intractable problems presented by such a task, one must then go on to question whether or not the courts have undertaken the less herculean task of enunciating general principles that loosely describe the impact of certain factors. With the exception of the dozen or so cases cited earlier, the courts have avoided this task, and the result of this avoidance has been the creation of a system of sentencing that lacks predictability and certainty. Within the 4 year survey of cases prepared for this report it was found that there still exists confusion about the most fundamental of questions. It can be seen that no consensus has clearly emerged about whether certain recurring factors can actually operate to aggravate or mitigate. Notwithstanding the publication in Canada of two textbooks that outline sentencing principles and processes it can be seen that sentencing in Canada has not reached the level of certainty that would be expected of a legal process that has a fundamental impact on liberty.

A number of recurring factors were isolated in order to study the question of whether or not a consensus has been reached about their impact. Not only have discrepancies been found between the appellate courts of different provinces but conflicts also exist within the same court. With the prohibition against sentence

appeals to the Supreme Court of Canada it must be acknowledged that regional disparity will exist; however, such disparity may be acceptable for questions of range or tariff (as this reflects regional concerns) but can respect for the law be nurtured if intoxication will mitigate in New Brunswick but not in Alberta? A study of specific factors such as intoxication, exceptional circumstances warranting leniency, disadvantaged background and remorse and co-operation with authorities reveals that there is little consistency amongst the various provincial appellate courts as to the significance of these factors.[36] In light of the confusion existing at the appellate levels it is not surprising to find that lower court sentencing decisions are inconsistent and prone to suffer from the same confusion.

7) A CASE STUDY - THE IMPACT OF THE CRIMINAL RECORD ON SENTENCING DECISIONS

Two significant factors that affect the choice of sentence are the court's perception of the gravity of the offence and the criminal's past record. These two factors are the major aggravating factors that can result in substantial increases of a sentence beyond the average or ordinary sentence that might be expected. In light of the significance of the factor of the criminal record an examination of lower court and appellate sentencing decisions was undertaken to determine if the courts have at least reached some consensus concerning the impact of the record. One need only look at the summary judgment in Robinson (1973), 6 N.B.R. (2d) 439 to see how an instinctive response to the record will dramatically affect the sentence:

> HUGHES, C.J.N.B., [orally]: .We allow the appeal of the Crown against the sentences of six months each to run concurrently, imposed March 7, 1973, by a judge of the Provincial Court at Fredericton on convictions of the respondent on five charges of fraud by means of worthless cheques contrary to

S.338(1) and one charge of uttering a forged document contrary to s.326(1)(a) of the *Criminal Code of Canada.*

The criminal record which the respondent admits, shows that he had been previously convicted of some 25 similar or related offences for which he has served terms in jails in the penitentiary.[37]

The sentence is increased to a term of two years on each of the six convictions, to be concurrent and to date from March 7, 1973.

The desire to severely punish recidivists is overwhelming and appellate courts often adjust sentences downward in cases in which trial judges placed too much emphasis on the past record. In Grant (1982) 39 N.B.R. (2d) 179 the accused was convicted of robbery in a mugging scenario. The offender had a lengthy record that indicated that in the past ten years he had received a total of 8 years imprisonment. The judge sentenced Grant to ten years in prison but on appeal the court reduced the sentence to five years commenting that the trial judge placed too much emphasis on the record and not sufficient emphasis on the actual offence that involved a mugging for $200.00.

What is the justification for permitting the choice and severity of sentence to be influenced by past offences? On an intuitive level the arguments point in opposite directions. On the one hand, allowing the sentence to be influenced by past offences appears to sanction the improper practice of double punishment; that is to say, punishing for a crime that has already been fully disposed of. On the other hand, there is a sense that an offender who repeatedly violates the law is deserving of greater punishment because he may be a greater menace or his deliberate flouting of the law is culpable in itself. This latter sense embodies the notion of sentencing on the basis of incapacitation or prediction. The predictive rationale requires the court

to assess the probability of the offender committing further crimes and to then increase the sentence if the judge believes that there is such a probability. In general it is believed that prior criminal history is the best indicator of future inclinations; therefore, the record will be the prime determinant in achieving the objective of incapacitation. On this rationale the gravity of the offence which was previously stated to be of prime importance takes a back seat to the past record which serves as an essential predictive mechanism.[38]

Many theorists dispute the validity of incapacitation to curb future offences. George Fletcher asserts:

> The comtemporary pressure to consider prior convictions in setting the level of the offense and of punishment reflects a theory of social protection rather than a theory of deserved punishment. The rule of thumb is that recidivists are more dangerous and that society will be better served if the recidivists are isolated for longer terms. This view raises empirical and methodological issues in gauging the dangerousness of recidivists and it poses serious ethical issues in punishing a person more severely on the basis of past crimes already once punished. These are issues that must be confronted directly, with no illusions about the camouflage offered by the concepts of retribution and desert.[39]

The last sentence in this quotation mentions retribution or desert. These concepts are more in line with the observation that gravity of the offence is the prime determinant. Under a desert model the sentence must be proportionate to the offence committed, and this does not leave any room for adjustment to reflect past offences. Fletcher not only disparages the predictive rationale for allowing the record to influence the sentence but he also asserts that the record has no part to play under a desert model. He submits that the desert model is concerned with the degree of wrongdoing or culpability of the offender -- an issue that can only be

determined by reference to the offender's present activities. In other words, the idea of desert "looks at the crime, not the criminal".[40] Our system is then faced with an inherent contradiction in that our strong emphasis on gravity suggests that we are employing a desert model, but the many cases that adjust sentences based upon the record suggest that we are concerned with prediction and incapacitation. Andrew von Hirsch has provided a response to this dilemma by providing an explanation of how the record can have a part to play according to a desert model. In a nutshell, his theory is that an offender who has not committed any crimes would be entitled to assert upon his first conviction that the commission of the offence was totally out of character for him. As von Hirsch says: "the actor should be disapproved of less for a particular wrongful act, if that act was uncharacteristic of his previous behaviour".[41] In other words, a previous good record goes to the offender's present culpability. The significant implication of this perspective is that as an offender commits more crimes it is less plausible for him to assert that the offence was uncharacteristic. Accordingly, the repeat offender cannot have less blame imputed to him but rather he must be sentenced on the basis of the degree of culpability that can be inferred from the gravity of the offence and not on any lesser degree of culpability that can be inferred from past good behaviour.

Von Hirsch believes that this theory provides a full answer to those who object to using past record because it triggers double punishment:

> The foregoing reasoning also gives us an answer to the oft-heard objection that the offender has been "punished already" for his prior crime, and should not suffer for it again. The offender is not being made to suffer twice for the same crime. He is punished less on the first occasion than he otherwise would be because of our reluctance to impute the full measure of blame to a first offender. On the subsequent occasions, he simply loses

> this preferred status and is punished as he deserves for his current crime.[42]

This suggests that the previously good offender is deserving of leniency whereas the repeat offender is disentitled to leniency; however, in no case can a repeat offender receive a sentence that is disproportionate to the gravity of his crime. As the offender commits more offences his sentence will come closer to the ceiling or maximum sentence that could be awarded in accordance with the gravity of the offence. By contrast, an incapacitative model allows for incremental increases of sentence as the offender commits more and more offences. In this system there is no ceiling and the offender can receive sentences that are grossly disproportionate to this crime on the basis that his past behaviour suggests that there is a greater need for incapacitation. In one way it can be said that the record in a desert model is severity-reducing while in a predictive/incapacitation model the record is severity-enhancing. The English commentators, Thomas and Ashworth, and the Canadian commentators, Ruby and Nadin-Davis, adopt the position that the record should be used to disentitle the offender to leniency. Of course, the obvious question is whether this theory is reflected in the current practice of the Canadian courts.

Judicial statements regarding the use of the criminal record are few and far between. To acquire a sense of how courts allow the record to affect sentence can only be gained from an examination of all the cases; however, recently the Alberta Court of Appeal released a judgment that provides a theoretical analysis of the use of the record. In Hastings (1985), 58 A.R. 109 the court was faced with a brutal robbery and sexual assault. The trial judge sentenced the offender to 15 years, but the Crown appealed on the basis that the offender's record warranted a life sentence. The Court of Appeal recognized that a life sentence could be awarded in extreme

cases of dangerousness and they held that the record has probative value in determining whether or not a showing of dangerousness had been made to justify a sentence of preventive detention. This is an explicit recognition of the validity of the predictive/incapacitation model in that a sentence that would be disproportionate to the offence could be justified on the basis of the record. However, the record is only partial proof of dangerousness and it is not dispositive of the issue. Accordingly, the court would not award a life sentence on the basis of dangerousness in the absence of psychiatric testimony and an "overwhelming record of physical violence".

The interesting aspect of the case is that the Crown argued that a life sentence could be imposed not only on the basis of dangerousness, but on the basis that the lengthy record indicated incorrigibility and this could justify an exemplary sentence. This notion of incorrigibility brings the question of incapacitation to the forefront and the court responded by placing reliance upon a model of just desert to deny the Crown's position. This reliance upon desert is ironic considering the court's approval of incapacitative sentencing on the issue of dangerousness. The court's reliance upon desert is an adoption of Von Hirsch's argument and it is reproduced in its entirety below:

> [22] I do not hesitate to draw an inference from his criminal record that Hastings is incorrigibly committed to a life of crime. Shall I therefore sentence him to life? I think not. The governing rule is that a person should not be punished again for past misdeed even if he is incorrigible. To do so would be to re-introduce, by judicial fiat, lengthy or indefinite detention for the habitual offender. Canadian society has rejected that idea.
>
> [23] One can, however, validly rely upon a criminal record to rebut any suggestion of good character. The significance of this for the sentencing process is this: In the case of youthful or first offenders, previous good character is assumed and, for that

> reason, the full measure of punishment appropriate to the crime is, by policy, usually withheld. If the life of crime continues, the sentences increase. The sad reality is that this is often the situation, and the most common sentence is one which simply is a jump over the previous sentence. But those increases must stop when the sentence appropriate to the crime before the court is reached unless some overriding rule, like dangerousness, is invoked.
>
> [24] I concede that many sentences might, at first glance, appear to involve double punishment. Sentencing judgments often contain a remark that "because of the record", a certain sentence is a fit one. What is necessarily implicit in that reasoning is not that, because of the record, one gets more than what the crime deserves but rather one cannot, because of the record, expect to get less! As a starting-point, the judge has a certain sentence in mind as fit for the crime, and he then rejects any reduction for previous good character on the evidence of the record. There is no double punishment. It would, on the other hand, be error for a judge to add something to that fit starting-point by reason of the record.
>
> [25] As I have already noted, the sentence here falls within the upper end of the range for crimes of this sort. The learned sentencing judge did not, quite properly in the circumstances, reduce the sentence in response to any plea based upon remorse, rehabilitation or previous good character -none of which are present here. Moreover, as I have already observed, previous good character pales as a mitigating factor for the worst crimes. I conclude that there was no error by the learned sentencing judge in assessing the significance of the previous criminal record under this head.
>
> [26] In conclusion, I would dismiss the appeal. The Crown has not proven dangerousness; rather he seeks to rely for an indeterminate sentence simply upon Hastings' incorrigibility. That, as I have taken some pains to explain, is not good enough. (at 112-3)

Few cases are as explicit as the Hastings case in outlining the theoretical basis for their reliance upon the record as an aggravating factor. In light of the development of tariff sentencing and increasing reliance upon general deterrence as a prime justification (this issue will be discussed in the next section dealing with the "in-out" decision) one might conclude that current sentencing practice is premised

upon a desert model. However, the desert model can have a rational application only if there is a clear idea of the designated ceiling for an offence as measured by the gravity of the offence. In all the current formulations of sentencing ranges or tariffs it is not at all clear whether the range is specifying a ceiling based upon gravity. In actuality, the designated ranges always appear to invoke an incapacitative model in which the sentence increases with the record. The tariffs established for robbery in Nova Scotia, New Brunswick and Alberta all appear to indicate that the sentence is to be increased with the record.[43] The current sentencing practice contains an inherent contradiction in that there is a movement towards a desert model of sentencing without a corresponding movement towards enunciating clear sentencing ceilings.

Nevertheless the courts do on occasion endorse the severity-reducing nature of the record. For example, in Breen (1982), 69 C.C.C. (2d) 654 the Newfoundland Court of Appeal dealt with an offender convicted of robbery whose plea in mitigation was that the offence was uncharacteristic and the offence was committed due to his intoxication. The court rejected the plea stating that his lengthy record negated any inference of the offence being out of character. This reasoning is an application of Von Hirsch's model of just desert. Even when the court endorses the desert model there is often an ambiguity that suggests that the court has a confused notion of the theoretical considerations. In Gushe (1976), 32 C.C.C. (2d) 189 the court commented that the offender's record could operate in one of two ways: namely, to disentitle the offender to leniency or to warrant a conclusion that at the present time "he constitutes a serious threat to the physical safety of others". The first rationale is classic desert reasoning whereas the second rational is an adoption of the predictive model. Similarly, the Newfoundland Court of Appeal managed to articulate both models in one sentence. The court stated that "a person's record may be taken into

account, not so as to punish again for his past misdeed but because it provides a good test of his character and propensity for violence".[44]

One other feature of current practice suggests that the desert model has a confused application. For some offences the court will take the position that an offender's good character will not mitigate but rather aggravate the sentence. In Boross (1984), 12 C.C.C. (3d) 481 the court took this position for the offence of perjury and in Bourque (1977), 17 N.B.R. (2d) 409 discussed earlier, the court took a similar position with respect to drug trafficking. Although on the surface this contradicts von Hirsch's position that good character relates to culpability there may be a plausible rationale for this exception. For some offences a prophylactic rule excluding the relevance of good character must be adopted because for some offences the offender's good character will facilitate the commission of the offence as good character makes detection very difficult. This principle would easily apply to the offences of perjury and trafficking.

Despite the confusion there is further evidence supporting the desert model that can be inferred from present practice. Von Hirsch asserts that the plea of out of character does not only apply to a first offender but also to an offender that has a record for less serious offences than the one he is currently being sentenced for. The offender's plea would be: "yes, I've committed petty acts of malice before, but this is the first time I've done anything like this before". Therefore, Von Hirsch concludes that "if someone is to be sentenced for a serious crime, he should be entitled to some reduction in severity if this is his first serious offence - even if he has a prior conviction for lesser crimes".[45] This extension of the desert model is reflected in the fact that sentencing courts do take into account the quality of the

offender's past record. Firstly, it common for the court to treat an offender as a first offender if his record only consists of minor, unrelated offences. In Trask (1974), 28 C.R.N.S. 321 the Ontario Court of Appeal treated an offender convicted of indecent assault as a first offender because his record consisted of "petty and unrelated" offences (i.e. one theft under and one attempted theft). In addition, it is common for the appellate court to reduce sentences because the trial judge did not take into account the quality of the offender's record. In Pettigrew (1978), 3 C.R. (3d) s-59 the court reduced a 5 year sentence for robbery to 3 years because the offender's record was "minimal" and this suggested that the current offence was "out of character". In Riddell (1973), 11 C.C.C. (2d) 491 the court reduced a 3 year sentence for robbery to 2 years because the offender's prior record did not contain any offences of violence. Similarly, in Aylward (1978), 43 C.C.C. (2d) 455 the court reduced a sentence of 6 years for robbery to 4 years because despite the offender's lengthy record "in his favour he has no prior conviction for robbery, nor for any offence involving serious violence".

There are two elements of current sentencing practice that strongly oppose the conclusion that we have wholly incorporated a desert model into our process. These two features are the practice of sentencing an offender to a term of imprisonment based solely on his record and the practice of cumulative sentencing. The practice of incarcerating someone based solely on the record shows that gravity and the corresponding notion of proportionality are not the only factors affecting the "in-out" decision. The influence of record on the "in-out" determination is clearly shown by the Riordan (1974), 15 C.C.C. (2d) 219 case. In that case the court reduced a sentence of 6 months to 1 month for a minor fraud. The factor militating against the imposition of a non-custodial term was the offender's past record. The court said

that "the record makes it impossible to consider merely a substantial fine or suspended sentence, such as might be appropriate for this type of offence in the case of a first offender (at 222)". The notion of incarceration for minor crimes as a result of the record is incapacitative sentencing at its harshest. The caselaw is replete with other examples and thay are included below to rebut the common judicial assertion that courts do not allow the record to distort the sentence beyond the boundaries of proportionality:

1. Loucks (1979), 2 Sask. R. 174

   - theft of shaving lotion - one year reduced to 6 months, lengthy record consisting of 44 convictions.

2. Redstar (1981), 7 Sask. R. 192

- driving while disqualified - 9 months - 21 previous convictions for related offences.

3. Desjarlais (1982), 16 Man. R. (2d) 86

- FREEDMAN, C.J.M.: The accused appeals against a sentence of six months imposed by Minuk, P.J., on a charge that the accused stole six pairs of pants to a value of $221.92 from Simpsons-Sears Limited. The accused has a long record of criminal offences related in character to the one now before us.

There is no merit in the appeal. It is dismissed accordingly.

4. Collins (1982), 14 Man. R. (2d) 174

- theft under -- 11 cans of salmon - one year - "dreadful record" - "although we cannot sentence him for his bad record, we can look at the record as a factor disentitling him to leniency."

5. Krawetz (1974), 20 C.C.C. (2d) 173

- driving while disqualified - Court of Appeal raises sentence from a fine to 9 months - offender had 4 previous convictions for the same offence.

6. Tanner (1981), 22 C.R. (3d) 196

- minor break and enter - trial judge gives a suspended sentence on the belief that probation will be as effective as jail in controlling offender - court raises sentence to 3 years to reflect wide-ranging record consisting of 44 convictions.

7. McMullen (1984), 26 Man. R. 80

- theft under of sweater - chronic schizophrenic with other theft convictions - 6 months - "society will not and cannot tolerate the petty crimes he commits from time to time."

8. Dauphinee (1984), 62 N.S.R. (2d) 156

- possession cannibus - 3 months - lengthy record including 5 convictions for same offence.

9. Pitchuck (1973), 6 N.S.R. (2d) 426

- theft of 2 T.V. dinners and auto seat covers - 2 years reduced to 8 months - "substantial record of property offences" - "previous sentences have been of little use in controlling him therefore this should not be considered a minor shoplifting case that for a first offender would bring a non-custodial term."

10. Gratton (1978), 13 A.R. 177

- driving while disqualified - 6 months - fifth conviction for this offence.

Not only will courts award sentences that are disproportionate to the offence simply because of the record but the courts appear to practice cumulative sentencing in that they will determine sentence based upon the length of the last sentence awarded to the offender, insuring that the current sentence is marginally longer than the previous one without reference to the gravity of the current offence. Just as incarcerating because of the record reflects an incapacitative model so does this practice of cumulative sentencing. Some of the cases cited above reflect this practice. In Pitchuck (1973), 6 N.S.R. (2d) 426 the offender received 8 months for a petty theft and, even though the court makes no reference to the cumulative approach, it is no mere coincidence that the last sentence the offender received was 3 months for a break and enter. The cumulative approach to sentence is usually an implicit process and one cannot be certain that the court is aware that its choice of sentence length is being calculated on the basis of the length of past sentences; however, there are cases in which the court is explicit in its objective. In Toulejour (1983), 27 Sask. R. 72 the Saskatchewan Court of Appeal dealt with an offender convicted of assault causing bodily harm and they raised the sentence from 18 months to 3 years, 6 months. In raising the sentence the court commented on the offender's lengthy record and stated that his last sentence was 2 years less a day, thus for this offence a "penitentiary term is now inescapable(at 75)."

In Poole (1980), 27 Nfld. & P.E.I.R. 6 the Newfoundland Court of Appeal followed a similar process of adjusting a sentence so that it would be marginally higher than the previous sentence meted out to the offender. In that case the offender was

convicted of 5 counts of theft and possession and he was given sentences of 2, 2, 6, 6, and 1 month to run consecutively for a total of 17 months. The Court of Appeal noticed that the offender's last sentence for a related offence was 5 months and accordingly the court raised the sentences to 9, 9, 9, 9, and 1 month for a total of 37 months. More often there is not an explicit co-relation between the previous sentences and the current sentence even though there is a strong sense within the cases that this is the operative factor. The usual expression of the court is reflected in the Fleming (1980), 25 Nfld. * P.E.I.R. 341 case in which the court raised a sentence for an isolated break and enter from 4 years to 6 years. The court stated that the offender had a lengthy and serious record, and that a "heavy sentence for an offence of this nature would be 4 years (at 347)". The fact that the court then awarded a sentence of 6 years indicates that the court believed that the record could justify a sentence that "is disproportionate to the gravity of the current offence".

An implicit recognition of this process is shown by two cases from Nova Scotia, Tellum (1980), 41 N.S.R. (2d) 626 and Treholm (1979), 36 N.S.R. (2d) 604. In the first case, the court sentenced the offender for auto theft to a sentence of three years. The process of arriving at a figure of three years seems to be, as in most cases, an arbitrary determination; however, in this case we can get a glimpse into the court's thought process because the court mentions that the offender last received a sentence of 2 years for the offence of theft over. In Treholm the cumulative sentencing process resulted in an offender receiving a penitentiary term for a minor offence. In that case a sentence of 2 years was awarded for the offence of possession under, and this harsh sentence appears to have been justified by the fact that the offender last received a sentence of 1 year for a similar offence.

Two principles that mitigate the rigours of cumulative sentencing are the gap and jump principles. Simply stated, the gap principle requires the court to discount the impact of the past record if the offender has been able to go many years without committing a criminal offence. Despite having a lengthy record, an offender will receive some leniency if he had a period of "crime-free living" in between his past offences. In Campbell (1977), 38 C.C.C. (2d) 6, the offender had a 25 year sentence for attempted murder reduced to 15 years because the trial judge did not "give adequate weight to the appellant's previous crime-free pattern of behaviour". Similarly, in Harrel (1973), 12 C.C.C. (2d) 480, the offender had his sentence for robbery reduced from 5 years to 3 years to reflect 11 years of "offence-free living". A final example of this principle can be found in the previously discussed Riordan (1974), 15 C.C.C. (2d) 219 case in which the offender received 6 months for selling deficient hearing aids to elderly people. The offender had 7 previous convictions for related offences but these all occurred between 1956-61 and the court stated that this gap must be taken into account.

The jump principle is in some ways a repudiation of the process of cumulative sentencing in that the jump principle dictates that the offender's current sentence should not jump or be raised drastically from his last sentence. There are very few cases that adopt this working premise and it cannot really be said that it is an important limitation on cumulative sentencing. One case that illustrates the principle at work is the Duguay (1979), 9 C.R. (3d) s-30 case in which the B.C. Court of Appeal reduced a penitentiary term for the offence of false pretence to a sentence of 1 year. The court reduced the sentence to keep the offender out of the penitentiary and to take into account the fact that despite the offender's lengthy record his longest previous term of incarceration was 2 months.

Cumulative sentencing has not been accepted by all courts as there are still some judges that recognize that this approach violates the principle of proportionality. In Gouchie (1975), 1 C.R. (3d) s-33 the court reduced a one year sentence for theft under to 3 months because the court held that his lengthy record could not justify the imposition of a high sentence for minor property offences. In Ansley (1974), 22 C.C.C. (2d) 114 another case of a minor property offence, the court reduced a sentence of 3 years to 1 year despite the fact that the offender's last sentence was one of 2 years for attempted break and enter. This reduction was also justified on the basis that the offender showed some evidence of rehabilitation.

The issue of rehabilitation is often discussed in cases dealing with repeat offenders. It appears that the court often takes the position that the presence of a past record will negate any effect that evidence of rehabilitation may offer. In Michaels (1977), 24 N.S.R. (2d) 193, an offender found in possession of $60,000 worth of stolen property had his sentence raised from a suspended sentence to 9 months imprisonment. The court would not allow the evidence of rehabilitation to offset the offender's lengthy record:

> We have great respect and admiration for the blend of compassion and social responsibility that the learned trial judge ordinarily displays in sentencing. We cannot help but respectfully believe, however, that in the present case he was overly impressed by the respondent's undoubtedly sincere effort to live a new life and rehabilitate himself and that he failed to pay adequate regard to the unavoidable necessity, as we see it, of imposing a term of imprisonment for an offence such as this in these circumstances (at 195).

A final question concerning the record relates to the specific impact of the record on the length of sentence. At the outset, it can be said that an examination of the cases will not yield any concrete indication of the precise impact of the

record. Unlike other mitigating or aggravating factors the criminal record does lend itself to a quantifiable analysis - the record is a tangible item than can be utilized in a mathematical manner. Nevertheless, the courts have never made an attempt to quantify the impact of the record. In an examination of 30 break and enter cases in Nova Scotia between 1983-5 there did not emerge any discernable pattern. In a general sense it was apparent that the sentence will be greater as the number of convictions increase, but it could not be concluded that the sentence was directly proportional to the number of past criminal convictions[46].

A greater sense of the actual impact of the record on sentence length can be derived from cases involving multiple accused. In these situations the difficulty of having to compare cases that may concern offences of differing gravity is eliminated. Unfortunately, these cases of multiple offenders do not support any greater proposition than the self-evident fact that the offender with the greater record will receive a greater sentence in all cases where the offenders' complicity are equal and even in some cases in which the offender with the longer record can be said to be less involved in the crime:

1. Picard (1982), 43 N.B.R. (2d) 60

   - robbery - three offenders - equal complicity - two offenders with no record receive 12 and 14 months respectively - third offender with record receives 2 years.

2. Babiuk and Stephaniuk (1974), 21 C.C.C. (2d) 464

   - possession of small amount of heroin - S. has no record and receives 1 year - B. has record of three minor offences and one trafficking offence and receives 2 years.

3. Orvis and Taylor (1982), 17 Man. R. (2d) 45

   - break and enter - O. gets 6 months and T. gets 9 months - T. had

lesser involvement but he had a record of 2 minor thefts 4 years ago and 3 offences (including assault bodily harm) two years ago - O. had no record.

4. Martel and Currie (1977), 23 N.S.R. (2d) 584

   - break and enter - both offenders had 4 previous convictions but M.'s convictions were unrelated whereas C.'s convictions included 3 break and enters - M. gets 12 months and C. gets 18 months.

5. Melanson and Tobin (1983), 51 N.S.R. (2d) 537

   - break and enter - T. had 15 previous convictions with the longest sentence being 4 years - M. had 4 previous convictions with the longest sentence being 1 year - T. gets 5 years and M. gets 2 years (is this an indication of cumulative sentencing?)

The Orvis case (**above**) comes closest to a quantification of the impact of the record. In a dissenting opinion, the dissenter would have given both offenders the same sentence and he disapproved of the trial judges approach of employing a formula whereby an offender with a record would receive a 50% increase in his sentence in comparison with an offender who did not have a record. The majority opinion allowed this 50% increase in sentence but they were silent as to the validity of such a formula. Even when the opportunity presents itself the court is reluctant to discuss the possible quantification of the record. It may be assumed that this quantified approach to the record is a matter for the legislature.

In the movement towards determinate sentencing in the U.S., many examples can be ground of legislative quantification of the impact of the record. There are two basic approaches - a closed criminal history score in which additional prior convictions would cease to count after a certain point and an open-ended criminal history score in which each prior conviction would count to raise the sentence without any limitation on the permissable increases in sentence.[47] The former approach is a reflection of the desert model and the latter approach is a reflection of

the predictive/incapacitation model. This quantification of the record can be a complex exercise especially when attempts are made to have the formula take into account not only the number of past convictions, but also the quality of the record. Guidelines currently employed in Florida and Minnesota illustrate that it is possible to lend a measure of certainty to the judicial use of the record in sentencing; however, the methodology may be too complicated to expect appellate courts in Canada to be able to develop similar guidelines. The institutional framework of courts contains certain inherent limitations for the development of policy or guidelines, and legislative intervention is necessary for the achievement of uniformity and consistency in this area of the sentencing process.

8) THE FUNDAMENTAL ISSUE - THE "IN-OUT" DECISION

The decision concerning the desirability of imposing a custodial term on any offender may be both the most important and the most difficult decision a judge has to make. The determination of when to imprison is largely a question of judicial discretion that is constrained by very malleable principles. There can be little doubt that every judge's subjective perception of penal policy will have a profound effect on this fundamental question. In his classic study on judicial sentencing behavior, Hogarth presents a picture of the type of judge that will readily resort to incarceration:

> Magistrates who rely heavily on institutional measures tend to feel that punishment corrects offenders, are concerned for justice and for social defence, and are rather traditional in outlook. They tend to have positive relationships with crown attorneys, they feel the community supports a punitive sentencing policy and they believe that their own sentencing practice is different from that of other magistrates. With respect to cognitive-complexity, these magistrates tend to use less information in

> problem solving, do not discriminate so well among information, and expend less effort in problem solving.[48]

One cannot sufficiently underscore the significance of the judicial determination as to whether or not to incarcerate a particular offender. The Criminal Code provides little guidance as to when it is permissible to deprive and offender of his/her liberty. In some limited circumstances, murder, importing narcotics, some firearm offences an repeat drunken driving, the legislature has relieved the courts of the difficult task by prescribing minimum sentences that require the imposition of a term of imprisonment; however, for the vast majority of offences, s.645 of the Criminal Code simply states that the punishment to be imposed is "in the discretion of the court". In the last decade a great deal of sentencing reform has been directed towards the issue of the length of a prison term, yet very little discussion has been generated concerning the equally important question of when incarceration should be used in the first place. In commenting upon American sentencing reform that has exclusively focussed upon questions of sentence length, Zimring has stated that:

> The retention of judicial "in-out" discretion makes it difficult to judge whether any of the new laws has reduced sentence disparity. The sentences served by those imprisoned for the same crime are equal in California; but why prison for them and not two other defendants convicted of the same crime.[49]

The issue of the "in-out" decision is not only important with respect to the values of uniformity and equality, but it must also be recognized that the severe deprivation of liberty that flows from a term of imprisonment should only be permitted if it serves a valid penal purpose that is clearly within the contemplation of the sentencing judge. Over the last two decades the courts have consistently enunciated that the purposes of sentencing must serve the following goals; namely,

protection of the public, punishment of the offender, deterrence of the offender and of the public and rehabilitation. These objectives have become mere catchwords that are used to rationalize and justify a judge's choice of sentence. The common exhortation that courts must produce a "wise blending" of these factors in order to discover the appropriate sentence is a barren statement that cannot possibly assist a judge in deciding whether or not to imprison an offender. The B.C. Court of Appeal recently outlined how a court should undertake to wisely blend these factors, and despite the best intentions it is doubtful whether or not these principles contribute to a more informed approach to the "in-out" decision. The court outlined the proper approach as follows:

> How much emphasis will be placed on each of these principles will depend on many circumstances and will, obviously, vary from case to case. In some cases the major, if not the only, concern will be the protection of the public and little, if any, concern will be given to the reformation and rehabilitation of the accused. In other cases the emphasis will be altered. How much weight will be attached to any of these principles will depend on a number of things including (a) the degree of premeditation involved; (b) the circumstances surrounding the commission of the offence: (c) the nature of the crime and the gravity of it; (d) the attitude of the offender after the commission of the crime; (e) the previous criminal record, if any, of the offender, (f) the age, mode of life, character and personality of the offender; (g) any recommendation of a probation officer, and (h) character references.[50]

By far the vast majority of cases that reach the conclusion that imprisonment is necessary do so on the basis of deterrence. It would not be an unfair characterization to summarize th "in-out" decision as the resolution of the competing theoretical concerns of deterrence and rehabilitation. If rehabilitation is paramount then the likely disposition is a non-custodial sanction, and if deterrence is paramount then the disposition will invariably be a term of imprisonment.

This balancing of competing justifications illustrates the rather dubious foundation that we employ in justifying a decision to imprison. The foundation is dubious because both rehabilitation and general deterrence are concepts that are widely challenged. By the middle of the last decade the goal of rehabilitation was greatly disparaged with the release of numerous studies that put into question its validity. With respect to general deterrence, there has been a growing awareness of its shortcomings and this has led many courts to dismiss it as a relevant consideration.

The English Court of Appeal commented upon the growing disillusionment with the concept of deterrence. They stated:

> I turn now to the element of deterrence, because it seems to us the trial judge probably passed this sentence as a deterrent one. There are two aspects of deterrence: deterrence of the offender and deterrence of likely offenders. Experience has shown over the years that deterrence of the offender is not a very useful approach, because those who have their wits about them usually find the closing of prison gates an experience which they do not want again. If they do not learn that lesson, there is likely to be a high degree of recidivism anyway. So far as deterrence of others is concerned, it is the experience of the courts that deterrent sentences are of little value in respect of offences which are committed on the spur of the moment, either in hot blood or in drink or both. Deterrent sentences may very well be of considerable value where crime is premeditated. Burglars, robbers and users of firearms and weapons may very well be put off by deterrent sentences. We think it unlikely that deterrence would be of any value in this case.[51]

This distrust of deterrence as a viable justification reached its climax in a series of decisions out of British Columbia. In 1978 the Court of Appeal awarded a suspended sentence for the offence of robbery and in the course of the decision they adopted with approval the views of a writer that apart from drug cases, general deterrence is not necessarily an aim of any particular sentence. This led to many

lower court decisions in which more lenient sentences were being awarded in light of the court's belief that they were freed from the shackles of considering general deterrence. Finally in 1981 the Court of Appeal in Campbell (1981), 64 C.C.C. (2d) 366 decided that it was necessary to reinstate general deterrence to its pre-eminent position to insure that further erosions in sentence severity did not take place. The court stated:

> After anxious reflection I have come to the conclusion that Harrison should no longer be followed and, despite the limitations expressed in Hemstad, that this Court should make it clear that where a serious offence involving violent crime has been committed by persons, including young offenders, deterrence to others is not only an important factor in sentencing but should be the prime consideration to be taken into account. (at 329)

It was also necessary for the Alberta Court of Appeal to run to the rescue of the concept of deterrence. In Burnchall (1980), 65 C.C.C. 500, the sentencing judge refused to consider the concept of deterrence which he characterized as being "illogical". Accordingly, he awarded a suspended sentence for trafficking to further the offender's rehabilitation. The appellate court did not disturb the sentence; however, they laid to rest his disparagement of deterrence. They stated:

> The learned trial Judge, in his written reason for judgment, discussed extensively the validity of the principle of deterrence as a factor in sentencing. He referred at one point to "the illogicality of punishing one person for what others might do". I do not agree with that analysis of the problem. It will always be the duty of the Courts to induce persons to control their behaviour by providing clear examples of the punishment for crime. In any event, an extensive discussion of the principle of deterrence is hardly warranted in view of the many decisions of this and other Courts of Appeal prescribing it as a factor in sentencing. (at 505)

Despite the movement that opposes reliance upon general deterrence it can be seen that the appellate courts have actually placed great reliance upon this concept to furnish justification for the newly-developed notion of tariff sentencing. Even though tariff sentencing introduces some certainty into the difficult process of the "in-out" decision, it runs contrary to the Ouimet Report and the Law Reform Commission Report calls for restraint in the employment of custodial terms.

The concerns for satisfying the needs of general deterrence will be called into play whenever the court feels that the gravity of the offence so requires. It can be said that the governing consideration in deciding the primary question of when to incarcerate is the subjective assessment by the court of the gravity of a particular kind of offence. However there is another related consideration that leads courts to believe that incarceration is a necessary disposition. When the Alberta Court of Appeal decided to create a tariff for robbery it began its decision by stating:

> We commence by saying we are concerned about the prevalence of robbery. The Crown has advised the court that statistics from the City of Edmonton Police Department show that 562 robberies occurred in Edmonton in 1981. This figure is not particularly helpful in itself, as we were not furnished with statistics for other years or other places. The court itself, however, cannot be unaware of the vast increase in appeals coming before the court involving robbery.[52]

In numerous cases judges have stipulated that their decision to incarcerate is justified on the basis that the increasing prevalence of a crime requires a custodial term in the name of general deterrence. It is common for courts to cite the following reasoning of the B.C. Courts of Appeal:

> Where the incidence of a particular type of crime has become so great that the Court must punish it severely in order to assist in bringing it under control, rehabilitation becomes secondary. Even with the greatest concern for the welfare of

> young offenders, the Courts cannot allow a criminal law to be frequently broken with impunity. This in not to denigrate the importance of rehabilitation. Frequently, in practice, deterrence and rehabilitation are treated, and properly so, as concomitant circumstances, each modifying the other, resulting in a compromise sentence reflecting both elements. But first of all, the Courts have to consider whether the public interest requires the punishment to be imposed primarily as a deterrent to others and thus to maintain the sanctions of the criminal law (at 314).[53]

The courts have appeared to begin to embark upon a broad extension of the doctrine of judicial notice to furnish the requisite evidence of a crime wave that must be curbed by custodial sentencing. The following cases illustrate the increasing reliance upon the belief that prevalence of a crime triggers general deterrent concerns:

> During the past couple of years owners of country cottages and cabins on the Avalon Peninsula area have suffered numerous break-ins, thefts and vandalism to their property. The problem is particularly acute during the fall. The problem of such break-ins is becoming serious.
>
> In imposing sentence I am primarily concerned with the deterrent effect of the sentence. The sentence must be such as to deter not only the Accused from again committing such an offence but more particularly to deter other members of the public who are inclined to commit this type of offence. Coady (1977), 14 Nfld. & P.E.I.R. 274 at 288
>
> Crown Counsel has pointed out that in very recent times there have been a number of cases before the Courts involving assaults in taverns and I am inclined to agree with him that these assaults both within and outside taverns seem to be occurring more frequently. In addition, the assaults appear to be of a more serious nature. It is for this reason therefore that I consider the deterrence aspect of the sentence to be very relevant. Murphy (1976), 11 Nfld. & P.E.I.R. 491 at 517
>
> Crown counsel has brought to our attention statistics showing the prevalence of the offence of break and entry of premises in the general area in which the offences committed by the respondents took place, and the fact that in the great majority of such cases the perpetrator goes undetected. The offence of break and enter with intent to commit an indictable offence is a serious offence

> as evidenceed by the maximum punishment of life imprisonment authorized by the Criminal Code. In view of the foregoing we do not agree that the present case is a proper one for the suspension of sentence even though it was a first offence for each of those involved. Suspension of sentence completely ignores one of the purposes of sentencing which is the deterrent effect it may have on those who may be tempted to commit *similar offences. Because of the provisions of s. 646(2) a fine* cannot be imposed in lieu of imprisonment, the offence being punishable by more than five years imprisonment. Guptill (1975), 11 N.B.R. (2d) 477 at 479

In light of this trend towards sentencing on the basis of unconfirmed beliefs in the increasing prevalence of a crime, the Ontario Court of Appeal issued a statement to remind judges that their quest to satisfy the needs of general deterrence should not negate the important consideration of proportionality of punishment. In Sears (1978), 2 C.R. (3d) s-27, an offender convicted of minor shoplifting was sentenced to a large fine. The court substituted a conditional discharge and reminded the trial judge of the proper approach to sentencing for this crime by stating:

> The trial judge indicated that, in his area, charges for theft under $200 were "not just increasing, but soaring", and he observed that in the protection of society it is the deterrence of others that comes into play. We agree with the statement that in considering the appropriate sentence to be imposed in cases of shoplifting or related offences, it is appropriate to consider whether in that particular community, at that particular time, there appears to be an unusual amount of that type of crime, which therefore calls for a sentence which will reflect a degree of deterrence to others. At the same time, that situation can never be more than one of the factors which is to be taken into account, the paramount question of course always being: what should this offender receive for this offence, committed in the circumstances under which it was committed? (at s-28)

Deciding to imprison on the basis of an increased prevalence raises the question of to what extent a court should take into account public opinion in deciding whether to imprison a particular offender. The courts have clearly differentiated between

being impermissibly swayed by public opinion and properly taking into account the relevant crime rate. The B.C. Court of Appeal has stated that the sentencing process should not be overly influenced by the public pressure to mete out severe punishment in response to crimes that have gained notoriety in a particular community. The Court said:

> 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.[54]

However, it must be recognized that the court must be responsive to community concerns. One commentator has remarked that in sentencing the court should not follow public opinion, but rather lead it. This is a mistaken assumption because the courts are primarily a reactive not a pro-active institution. This realization has lead the court to on occasion award a sentence of imprisonment to placate public opinion. In the McNabb case (1979) 49 C.C.C. (2d) 263 the Saskatchewan Court of appeal awarded a term of imprisonment for the purpose of "maintaining public confidence in the enforcement and administration of the criminal law". In that case the offender embarked upon a course of fraudulent activity that did not result in enormous losses for the various victims; however, there were 22 victims and this surely left the court in the position of having to respond to community concerns notwithstanding the rather minor nature of the fraud.

Upon an examination of the cases it becomes clear that the underlying theoretical concern that provides the basic justification for the imposition of custodial terms is the concept of general deterrence. The need to invoke general deterrence is triggered by the court's subjective perception of the severity of an offence or

alternatively the court's belief that a crime wave must be curbed. The court never attempts to gauge the efficacy of its reliance upon incarceration to achieve the stated objective, but this is probably not a result of an indifference to results but rather a recognition that the court lacks the resources and expertise to measure the effectiveness of its actions. The failure of the court to measure the validity of its assumptions underscores the need for the legislature, with its available resources, to test the effectiveness of judicial sentencing policy.

It should be mentioned that the current emphasis on deterrence does not mean that the court has completely forsaken the goal of rehabilitation. Obviously the court needs to furnish some underlying rationale for its decision not to incarcerate and to rely upon some non-custodial, individualized measure. In the Lebovitch (1979), 48 C.C.C. (2d) 539 case the Quebec Court of Appeal approved of a suspended sentence for a morphine trafficker and in justifying the sentence the court developed a rationale that avoided an overt reliance upon the discredited notion of rehabilitation. Even though it is implicit in the judgment that the court is performing the traditional task of balancing the competing theoretical concerns of deterrence and rehabilitation the court speaks of the rationale of "neutralizing the danger" with respect to "user-traffickers". A consumer of drugs is considered to be a danger to society because this addiction will lead him to commit other crimes to support his habit. If the consumer manages to rid himself of his dependency then there remains no justification for the imposition of a custodial term. Without overtly expressing reliance upon the disparaged goal of rehabilitation the court achieved the same result:

> It is not by imposing a sentence on the consumer of narcotics that society shows best its disapproval of narcotic trafficking, but by imposing a sentence of imprisonment on the trafficker who with others was the cause of the accused's drug

> addiction. This is to say that when the user-trafficker is incarcerated it is not so much on the ground of denunciation (social disapproval) as of the need to neutralize his dangerousness which becomes grater when he chooses among other crimes to provide drugs to others in order to supply himself. In the vast majority of cases this distinction will be of little importance since for all practical purposes the result will be the same: the user-trafficker will be incarcerated mostly on the ground of neutralizing his dangerousness, often as much, sometimes more than he would have been, had he been a non-user trafficker. The distinction, however, had to be made, I think, since it takes on enormous importance when the user-trafficker has mastered his drug habit. (We are of course conscious of the frailty of this control.) When this happens, that is to say when all indications are present which give us ground for a reasonable belief that the dangerousness has been resolved, the imperatives of neutralization no longer demand as vigorous a control of his activities as is exercised during a lengthy incarceration; without nevertheless justifying a pure and simple discharge. (at 542-3)

For the most part, both Canadian and American legislatures have been content to leave the "in-out" decision to judicial discretion. Whether this is a result of legislative inertia or the realization that guiding principles are difficult to express in legislation is not certain. Recently, in the ill-fated Bill C-19, Parliament attempted to delineate a number of principles of a restrictive nature with respect to the use of incarceration. These principles were largely an embodiment of the Law Reform Commission's view on the proper utilization of the custodial sanction. The proposed s.645(3)(f) read:

> (f) a term of imprisonment should be imposed only
>
> (i) to protect the public from a violent or dangerous offender,
>
> (ii) where a less restrictive alternative would not adequately protect the public or the integrity of the administration of justice or sufficiently reflect the gravity of the offence or the repetitive nature of the criminal conduct of an offender, or
>
> (iii) to penalize an offender for wilful non-compliance with the terms of any other sentence that has been imposed on the offender.

In addition, the next sub-section proposed that incarceration should not be imposed, nor should the length of any prison term be determined solely for the purpose of rehabilitation. This provision was based on the developing perception that prison sentences were wholly lacking in corrective or rehabilitative value.

In the U.S. the last decade saw a great deal of sentencing reform that was primarily directed towards the creation of determinate sentencing schemes. The focus on determinate sentences did not carry with it a concomitant undertaking to rationalize the "in-out" decision; however, some states did attempt to provide guidelines to assist the judge in dealing with the difficult task of determining which offenders should be punished by way of incarceration. The legislative guidelines were commonly open-ended provisions that did little more than direct the judge to the relevant considerations. The proper weight to be ascribed to the considerations, and the approach to balancing the factors, were left to judicial ingenuity. One example of a legislative guideline reads as follows:

> **921.005. Criteria for sentencing**
>
> The courts shall use the following criteria for sentencing all persons who committed crimes before October 1, 1983:
>
> (1)(a) A court shall not impose a sentence of imprisonment unless, after considering the nature and circumstances of the crime and the prior criminal record, if any, of the defendant, the court finds that imprisonment is necessary for the protection of the public because:
>
> 1. A lesser sentence is not commensurate with the seriousness of the defendant's crime; or
>
> 2. There is a probability that during the period of a suspended sentence or probation the defendant will commit another crime.
>
> (b) The following grounds, while not controlling the discretion of the court, shall be accorded weight in favour of withholding a sentence of imprisonment:

1. The defendant's criminal conduct neither caused nor threatened serious harm.

2. The defendant did not know and had no reason to know that his criminal conduct would cause or threaten serious harm.

3. The defendant acted under a strong provocation.

4. There were substantial grounds tending to excuse or justify the defendant's criminal conduct, though failing to establish a defense.

5. The defendant has compensated or will compensate the victim of his criminal conduct for the damage or injury that the victim sustained.

6. The defendant has no history of prior delinquency or criminal activity or had led a law-abiding life for a substantial period of time before the commission of the present crime.

7. The defendant's criminal conduct was the result of circumstances unlikely to recur.

8. The character and attitudes of the defendant indicate that he is unlikely to commit another crime.

9. The defendant is particularly likely to respond affirmatively to noncustodial treatment.[55]

In England, a number of legislative restrictions on the use of imprisonment have been created. In effect various statutory provisions make imprisonment a sanction of last resort. Section 20 of the Powers of Criminal Court Act 1973 states:

(1) No court shall pass a sentence of imprisonment on a person of or over 21 years of age on whom such a sentence has not previously been passed by a court in any part of the United Kingdom unless the court is of the opinion that no other method of dealing with him is appropriate; and for the purpose of determining whether any other method of dealing with any such person is appropriate the court shall obtain and consider information about the circumstances, and shall take into account any information before the court which is relevant to his character and his physical and mental condition;

(2) Where a magistrates' court passes a sentence of imprisonment on any such person as is mentioned in subsection

> (1) above, the court shall state the reason for its opinion that no other method of dealing with him is appropriate, and cause that reason to be specified in the warrant of commitment and to be entered in the register.

Section 21 of the same Act prohibits the imposition of a term of imprisonment upon an unrepresented accused who has not been previously sentenced to a term of imprisonment. This restriction does not apply to someone who has failed to apply for legal aid and/or someone who has been refused legal aid for reasons of having sufficient means to independently retain counsel. Further, a court must not send a young adult offender, age 17 to 21, to jail:

> unless it is of opinion that no other method of dealing with him is appropriate because it appears to the court that he is unable or unwilling to respond to non-custodial penalties or because a custodial sentence is necessary for the protection of the public or because the offence was so serious that a non-custodial sentence cannot be justified.

It can be seen from these examples that it is possible for a legislature to construct, with varying degrees of specificity and elegance, guidelines concerning the use of imprisonment. The failure of our government to legislate such a construction has made it incumbent on the judiciary to take the initiative.

One of the few principles that have been developed with respect to the "in-out" decision relates to the problem of first offenders. In actuality this may be the only principle that has been developed that restricts the use of imprisonment (there have been numerous principles developed that make the imposition of prison inevitable in certain situations - this will be discussed shortly). In Stein (1974), 15 C.C.C. (2d) 376 the Ontario Court of Appeal characterized the principle as follows:

> It is the view of the Court that the sentence imposed upon the appellant does reflect an error in principle. In our view, before imposing a custodial sentence upon a first offender the sentencing Court should explore the other dispositions which are open to him and only impose a custodial sentence where the circumstances are such, or the offence is of such gravity that no other sentence is appropriate. In our view, the offence does not fall within the category of offenses where a custodial sentence is the only appropriate sentence to be imposed upon a first offender, nor are there other circumstances which require the imposition of a custodial sentence. (at 377)

The Stein case concerned a 29 year old mother who found her self in desperate financial circumstances, and she was convicted of 13 counts of obtaining property by false pretence. In a subsequent case the Ontario Court of Appeal stated that the Stein principle was not to be solely restricted to youthful first offenders, and the court awarded a suspended sentence to a 38 year old merchant convicted of possession of stolen property.[56]

In Alberta, the appellate court has articulated a similar principle with respect to youthful first offenders convicted of property offenses. The court said:

> We have repeatedly said that youthful first offenders (and the accused was a first offender as far as the trial judge was concerned) should not be gaoled for property related offenses if another disposition is appropriate. Generally speaking, a pre-sentence report should be obtained before imposing a gaol sentence in order to determine if another disposition would be suitable.[57]

It must be recognized that this principle and the Stein principle are more in the nature of procedural rules than statements of substantive principle. In essence they only direct the sentencing judge to consider alternatives without placing any obligation upon him to avoid the imposition of a custodial term. As mentioned at the outset of this paper, one should be careful to distinguish between what a court says

and what it actually does. A survey of sentences reported in the Alberta Digest suggests that the principle referred to above regarding youthful, first-time property offenders may be respected more in its breach than its observance. Between 1982-1985 there were 34 custodial sentences awarded for break and enter (without any violence) and only 4 non-custodial sentences. More germane is the fact that five of the custodial terms were applied to first offenders.

Once one leaves the realm of first offenders there exists a paucity of principles. One is uncertain from the cases whether or not the governing factor dictating the choice of sanction is the issue of gravity of the offence or the offender's past record with its implication for future criminality. In Steven (1981), 25 C.R. (3d) 95 the Alberta Court of Appeal suggests, implicitly, that the determining factor is gravity. In that case two men were sentenced to 6 and 9 months in jail for keeping a common gaming house. The appellate court substituted fines for the custodial term even though the offenders had records of similar offenses. Conversely, the B.C. Court of Appeal raised sentences of probation to 2 and 3 years for an admittedly minor incident of arson that caused minimal damage (due to the offenders' quick notification of their activities to the police). The court felt that these offenders must be incarcerated due to their history of similar behaviour. The court said that "I think that everyone agrees that jail is not a good answer. Unfortunately, no one suggests another answer that is better".[58]

The comment made by the B.C. Court of appeal about the unavailability of other "answers" in lieu of jail provides the explanation for the attitude that if general deterrence is the necessary objective in a given case then this concern can only be satisfied by the imposition of a term of imprisonment. In the Legare (1977), 48 C.C.C.

(2d) 285, case the accused was convicted of a large-scale commercial fraud and this triggered the need for satisfying the concern for general deterrence. The Quebec Court of Appeal noted that the accused had greatly suffered from the prosecution and it reduced a sentence of 7 years to 30 days. Once can see that if general deterrence is the relevant consideration then the court will disregard all other sanctions and employ prison even if the term of incarceration is a mere token sentence as it was in this case.

Does this suggest that the courts do not see any punitive effect in any of the other available sanctions? The court is not always so dogmatic about its assessment of punitive effect and there are occasions in which the court will resort to other sanctions to satisfy the need for general deterrence. In Arsenault (1981), 30 Nfld. & P.E.I.R. 489, the P.E.I. Court of Appeal approved of a $500 fine for an assault causing bodily harm. The Crown argued that incarceration was necessary because the public will believe that "the court has done nothing unless imprisonment is imposed". The court responded by stating that "prison must never be considered the only form of punishment" (at 491). If that is true then there is an obligation on the court to articulate the circumstances in which other sanctions that possess punitive elements can be employed in lieu of prison.

This discussion raises the question of the courts' characterization of other sanctions, and whether the court has considered the sanction of probation to be, in principle, punitive enough to satisfy the deterrent needs of punishment. There are ample statements to the effect that probation has certain punitive elements. In Richards (1979), 11 C.R. (3d) 193, the court upheld a suspended sentence for possession of heroin stating that "a person released on probation does not go scot-

free" (at 204). They then enumerated the various punitive elements inherent in a probationary term including the requirement of continued treatment and the possibility of resentencing for non-compliance and revocation. Similarly, in Belanger (1979), 46 C.C.C. (2d) 266, the court commented that "there is also a deterrent value in probation for "in the event of its breach the appellant may once again find himself before the courts" (at 268). Finally the same sentiment was expressed in the Brown (1984), 53 A.R. 1, case in which the court baldly stated that "a suspended sentence is a punishment" (at 17). The court cited the disabilities inherent in being subject to resentencing and the attendant community disrespect. One must question whether the court is being disingenuous in these pronouncements. If the court truly believed that probation could serve a punitive function then we should see a grater reliance on this sanction; yet this reliance is notably lacking. The bottom line is that there reaches a point in the judicial assessment of the seriousness of an offence in which the court moves ineluctably in the direction of incarcerating to the exclusion of all other sanctions. Unfortunately the courts have been unable to capture this point of no return in a coherent linguistic formula.

There is some confusion concerning the issue of whether or not it is permissable to imprison based solely on the consideration that other sanctions are ineffective. One principle is clear and that is that if other sanctions have been tried and have proven to be ineffective then resort to incarceration is proper. It is sufficient at this point to cite the clear ruling of the Ontario Court of Appeal in Marnoch (1984), 11 C.C.C. (3d) 286:

> HOWLAND, C.J.O.: - The importance of this decision is to make it clear that a penitentiary sentence may be appropriate if an offender embarks on a course of repeatedly breaking and entering

> private residences after lesser sentences including probation have proved ineffective in deterring and rehabilitating him. (at 286)

What is not sufficiently clear is whether it is proper to send someone to prison because in theory other sanctions would be ineffective, although these other sanctions have yet to be tried. In Johnson (1984), 11 C.C.C. (3d) 286, the N.S.C.A. disapproved of a sentence of 7 days imprisonment for an offender whose excellent financial situation made the imposition of a fine an ineffective response. The court stated that it was improper to send an offender to prison solely because he was "a man of means" as this amounted to discrimination. Even though the court based its judgment on the impermissible discrimination it must be recognized that our law will permit discrimination if the distinctions drawn are based upon a valid societal purpose. Accordingly, it is possible to justify the short term of prison in this case based on Ashworth's notion of equality of impact[59] - a notion that justifies disparity and adjustment of sentences based on the principle that sentences will have differing impact upon different offenders. It is submitted that the Johnson case was not a case of remedying improper discrimination, but rather it was merely another example of the fundamental and overriding consideration that the gravity of the offence will in most cases determine the appropriate sentence. Johnson was convicted of impaired driving and in the absence of serious aggravating factors this offence is usually punished by a fine.

The factor that distinguishes prison from other sanctions is the attendant loss of liberty through the imposition of custody. If it was possible to impose some element of custody and control through use of other sanctions would the court believe that the purpose of punishment had been well-served? It must be recognized that custody is not an all or nothing proposition and that curtailment of liberty can be

accomplished through progressive gradations of liberty. The Ontario Court of Appeal recognized that deprivation of liberty must be carefully circumscribed and kept to the minimum required to achieve its desired objectives:

> In my view, the predominant aim of sentencing in the unusual circumstances of this case is the protection of the public by providing the necessary control over the appellant without imposing on him any greater deprivation of liberty than is necessary to achieve that aim.[60]

The notion that there are varying degrees of custodial intervention has been recognized by the legislature with its creation of intermittent sentences. The judiciary has expanded the scope of the intermittent sentence beyond its application to offenders who must maintain their employment. In Spring (1977), 35 C.C.C. (2d) 308, the court allowed an intermittent sentence for attempted fraud to allow the offender to maintain his family ties and to enable him to pay off debts even though he was unemployed. Additionally, one study has shown that 25% of offenders sentences to an intermittent term are unemployed.[61] This shows that the judiciary have recognized that some offenders do not require the full brunt of prison and that some lesser degree of custodial intervention will suffice.

The attempt to instil a measure of custodial intervention into the other sanctions has met with mixed success. These attempts have been directed to trying to make the other sanctions viable alternatives to incarceration in cases in which the cries for deterrence necessitate some deprivation of liberty. Recently, the Saskatchewan Court of appeal approved of a condition of probation in which the offender was required to reside at a community Training Residence;[62] however, in another recent case the Ontario Court of appeal struck down an attempt by a trial court judge to impose a firm measure of custodial intervention through the use of a probation order.[63] In

that order the judge required the accused to remain at his home for all hours excluding the time that he has to be at his employment. The court said that this term of "self-imposed" custody did not satisfy the needs of general deterrence and they substituted a 90 day intermittent sentence.

In summary this discursive description of the principles guiding the "in-out" decision merely points to the fact that there are no concrete principles. There is a great deal of abstract justification, but in the end it becomes apparent that the only guiding principle is that in some cases the crime cries out for the imposition of a custodial term, and, to date, the court has not been convinced that there is an adequate substitute for the panacea of prison.

In 1975, the Alberta Court of Appeal stated that "the offences which require a prison sentence grow fewer and fewer as more humane and varied types of punishment are developed".[64] The extreme irony of this statement is underscored by the fact that since that date the Alberta court and most other provincial appellate courts have been proposing that numerous offenses must be approached by the presumption that a custodial term must be imposed unless exceptional circumstances prevail. If there is any true operative principle in Canada that guides the "in-out" decision it is the notion that certain offenses must attract custodial terms, and through this principle a measure of certainty, though draconian, has been introduced into the process.

The appellate courts have deified the concept of general deterrence and in its worship the higher courts have developed an approach to the "in-out" issue that is distinguished by its rigidity and severity. This movement in penal policy is largely a construct of the appellate courts and it appears that the lower courts are mere reluctant followers. There is a strong divergence between trial and appellate court

perceptions of acceptable penal policy. The lower courts are well aware of this schism and County Court Judge O'Hearn has characterized the difference as follows:

> Most appeal judges tend to support a deterrent philosophy and are somewhat more punitive in their general outlook. In some provinces, a real struggle appears to have been taking place between trial and appeal judges. Crown appeals from sentences have generally been upheld in these provinces. It is clear that appeal judges in most provinces have felt it necessary to lay down rather stern sentencing guidelines in drug cases. Appeal judges are much more isolated from the drug offender and social circumstances than lower court judges. Moreover, their experience tends to be based on a biased sample of cases coming before the courts. They tend to see the more serious cases.[65]

The clearest manifestation of the attitude of appellate courts is the development of presumptions of incarceration for various offenses. The articulation of the presumption is typically in this form - in sentencing an offender for fraud the Ontario Court of Appeal stated that "the public interest requires that it be made very clear to one and all that in the absence of exceptional circumstances a person holding a position of trust who steals from his employer must expect a term of imprisonment".[66] Similar formulations have been made for drug trafficking,[67] crimes of violence,[68] perjury and related offenses against the administration of justice,[69] repetitive break and enters,[70] extortion[71] and sophisticated commercial crime.[72]

One may look at this movement and contend that the statements of presumptions do not change the traditional sentencing policy because the offenses subsumed under the presumption were only offenses that in the ordinary course would attract custodial terms due to their inherent gravity. This may be so; however, when one then looks at the offenses that fall outside the presumptive category one begins to understand why Canada has such a high per capita rate of incarceration. The only offenses that have escaped the wrath of presumptive incarceration are: Part IV and V offenses (i.e.

obscenity, gambling and related offenses); and some property offenses that are neither repetitive nor involve breach of trust. Therefore for a large proportion of offenses prosecuted in this country the offenders must discharge the burden of showing why they should not be incarcerated.

As a result of the creation of a form of presumptive incarceration it is necessary to closely examine the circumstances of individual cases in order to get a sense of what factors oust the presumption. Whether one calls the factors exceptional or whether the court speaks of an overriding concern for the rehabilitation of the offender, the important point to remember is that the decision not to imprison is based upon factors peculiar to the accused and not some general principle guiding the decision. The quest to find exceptional circumstances individualizes the sentencing process to such a degree that it is virtually impossible to establish an explanatory theory that accounts for the decision to incarcerate. The courts themselves are aware of the futility of trying to abstract a systematic analysis based upon the caselaw. The Alberta Court of Appeal acknowledged this limitation:

> It is always difficult to compare the factors in one sentencing case with those in another. The personal attributes of the accused and the facts of the offence itself are so infinitely variable that any valid comparison is virtually impossible. Different judges on those facts, each bringing to the case his own lifetime of differing experience, will often disagree. The best that can be achieved is a range of sentences meeting the needs of a particular part of Canada at a particular time. The courts must also retain an element of flexibility in sentences to reflect the concerns of society which may differ with the passage of time.[73]

If the sentencing norm is seen as incarceration then the plea in mitigation is in essence a plea for leniency. The offence must present the court with sufficient exceptional circumstances that will convince the court to deviate from the norm and

exercise leniency. The burden of persuasion is not a light one. Usually a general sense of remorse and a positive indication that it is unlikely that the offender will re-offend will not suffice. In the worship of the elusive need for general deterrence the court must be provided with compelling reasons to award a sentence that may suitably punish the offender without recourse to incarceration. The Ontario Court of Appeal characterized the persuasive burden placed upon the offender as follows:

> There can, of course, be no quarrel with the proposition that from time to time a judge sentencing a convicted person, particularly a youthful one as in this case, should indeed "take a chance" on such a person by exercising leniency in circumstances where leniency might not otherwise appear to be called for. In our opinion, however, there must be some factor present in the case before the sentencing judge that is sufficient to warrant a reasonable belief on his part, going beyond a mere hope, that the leniency proposed to be extended holds some prospect of succeeding where other dispositions available to him may fail.
>
> Whether the factor present is an indication of remorse, a glimpsed change in attitude on the part of the convicted person, or some other sign or signal that the convicted person may have learned something beneficial from his other past and present encounters with the criminal justice system, there must be something positive weighing in his or her favour which can be looked to support the judge's chosen course of action.[74]

No longer may the lower court exercise leniency based upon a hunch that a non-custodial sentence will be in everyone's best interest. For most offenses the appellate court has stipulated that a term of imprisonment must be imposed and any deviation from this presumptive structure must be legitimated. The failure to adduce sufficient evidence that proves the presence of exceptional circumstances will usually result in a decision like Janssen (1975), 28 C.C.C. (2d) 515. Mr. Janssen was a first-offender who damaged a car with a baseball bat and then threatened an intervenor with the bat. Although the element of violence in this case was minimal there is the presumption of incarceration for crimes of violence. Mr. Janssen neglected to present compelling

circumstances and this allowed the court to summarily impose a term of imprisonment without any attempt to justify the imposition of the custodial term. In a system of presumptive incarceration the extent of the court's reasoning will often be as elliptical as the Janssen case:

> FREEDMAN, C.J.M.: - This is an appeal by an accused against a sentence of 30 days imposed by Provincial Judge Trudel on a charge of unlawful possession of a weapon, namely, a 15-in. baseball bat with a rope thong attached, for a purpose dangerous to the public peace.
>
> One evening in August, 1975, the accused and a male companion were at the parking lot of the Manitoba Liquor Commission store, at Victor St. and Portage Ave., in Winnipeg. The companion had a bullwhip approximately five feet long and with it was striking a red Datsun truck which was on display there. One Poirier said: "You shouldn't do that, you are causing damage." At this time the accused, holding in his hand the baseball bat above referred to, said to Poirier: "Back off man or I'll use this on you." As we spoke these words he held the bat approximately six inches from Poirier's chest. Poirier retreated and went into the liquor store, informed the constable on duty there of what had occurred, and the constable took over from there.
>
> The circumstances above recited clearly indicate that a situation of potential violence existed at the time in question. The accused's possession of the weapon in question could only be for a purpose dangerous to the public peace. In our view, the learned trial Judge was justified in imposing the prison term that he did, notwithstanding the absence of a criminal record on the part of the accused.
>
> The appeal is accordingly dismissed.

An examination of appellate pronouncements does not reveal any consistent approach to the considerations of the factors that constitute exceptional circumstances so as to oust the presumption of incarceration[75]. The most concrete observation that can be made is that incarceration is based upon a subtle interplay of factors relating to the accused as understood within the framework of a presumption of incarceration.

There may be easy cases in which the court can safely say that the inherent gravity of the offence warrants a term of incarceration; however, when the court is faced with difficult choices as presented by unique fact situations then the court engages in confusing rationalizations for their visceral or intuitive assessment of what is most appropriate in the circumstances.

One commentator has stated that "as long as the judge retains the authority to choose an alternative to imprisonment (the "in-out" power) the zone which breeds disparity will exist".[76] Disparity is endemic in our sentencing process and this should come as little surprise when we see that the decision as to when to incarcerate is premised upon a presumption to incarcerate, for most offenses, that can only be ousted by the judge's subjective assessment of the relevance of exceptional circumstances. The exceptional circumstances approach is an invitation for the judge to introduce his/her personal values as they relate to penal policy. The courts are indifferent to the problem of the burgeoning prison population and they continue to rely upon incarceration as the most effective deterrent. Deterrence is the password for entry into the prison, and it is difficult to persuade a court that exceptional circumstances exist that obviate the need to satisfy the hunger of deterrence. When the higher courts are pressed to define the nature of relevant exceptional circumstances they resist and rely on the incantation that no two cases are alike and each case must be disposed of on the basis of its unique factual setting.

9) THE IMPACT OF APPELLATE COURTS ON LOWER COURT SENTENCING DECISIONS

Although appellate courts have not developed a consistent body of sentencing principles, there do exist sufficient prescriptions to suggest that the appellate courts

must be having some impact upon the sentencing process. In fact lower courts and appellate courts seem to be in a state of mutual antagonism. The lower courts are prone to disregard appellate attempts to structure their discretion, or in seeming contradiction to their indifference to the appeal courts, they vigorously complain about the lack of guidance they receive from the higher courts.

It is instructive to note the recent experience in England in which the appellate courts attempted to direct the lower courts to place less reliance upon incarceration for minor offenses. In England, in 1980, the government decided that the prison population had reached dangerously high levels, yet they affirmed that sentencing policy was the reserve of the court. Meanwhile the Home Office issued a circular to the magistrates requesting cooperation in reducing prison population by disposing of cases without reliance upon incarceration so far as it was possible.[77] Since then the Court of Appeal has responded to this problem in two judgments. In Upton (1980), 71 C.R. App. R. 102, the court stated that "sentencing judges should appreciate that overcrowding in many of the penal establishments in this country was such that a prison sentence, however short, was a very unpleasant experience indeed". The court then generally stated that non-violent petty offenders should not be allowed to take up valuable space in prison. The decisive judicial solution was then enunciated in a case called Bibi (1981), 71 C.R. App. R. 360. The court presented the following guidelines:

> "Many offenders can be dealt with equally justly and effectively by a sentence of six or nine months' imprisonment as by one of 18 months or three years. We have in mind not only the obvious cases of the first offender for whom any prison sentence however short may be an adequate punishment and deterrent, but other types of case as well.

> The less serious types of factory or shopbreaking; the minor cases of sexual indecency; the more petty frauds where small amounts of money are involved; the fringe participant in more serious crime: all these are examples of cases where the shorter sentence would be appropriate.
>
> There are, on the other hand, some offenses for which, generally speaking, only the medium or longer sentences will be appropriate. For example, most robberies; most offenses involving serious violence; use of a weapon to wound; burglary of private dwelling-houses; planned crime for wholesale profit; active large scale trafficking in dangerous drugs. These are only examples. It would be impossible to set out a catalogue of those offenses which do and those which do not merit more severe treatment. So much will, obviously, depend upon the circumstances of each individual offender and each individual offence.
>
> What the Court can and should do is to ask itself whether there is any compelling reason why a short sentence should not be passed. We are not aiming at uniformity of sentence; that would be impossible, we are aiming at uniformity of approach." (at 360)

This appellate court initiative had little impact on sentencing practice as statistics have not shown any appreciable change in the sentences for the above-mentioned offenses[78]. In Canada there is evidence to indicate that lower court judges will also not be very amenable to appellate influence. In an examination of 778 lower court sentencing decisions only 18% of the decisions made mention of appellate statements of principle and only 7.3% made reference to appellate statements of range of sentence[79]. In fact, these statistics overestimate the impact of appellate court decisions because many lower court decisions simply make gratuitous reference to appellate decisions without any indication of the significance of the citation[80]. In addition, it is far more common for lower courts to simply ascertain a relevant sentencing range without reference to appellate decisions[81], and in cases where the court does refer to earlier precedent, no preference is given to appellate pronouncements as the sentencing court views other trial court decisions as having the same weight as appellate pronouncements[82].

Not only do lower courts disregard appellate principles but the lower courts exhibit some hostility to the entire concept of being guided by appellate courts in sentencing matters. Studies conducted in the early 1970's showed that 36.6% of magistrates found that guidance from the appellate court was "of little or no help", and that 14.1% actually found appellate decisions were a "hindrance"[83]. In Burchnall (1980) 22 A.R. 421 (Alta. Q.B.) the trial judge rejected appellate guidelines as being an undesirable fetter upon his discretion:

> In Bernard (supra) the Court of Appeal also said: "The learned trial judge departed from the guidelines which have been laid down by this court". Taken literally that statement seems to assert that by laying down guidelines the Court of Appeal can amend the law to be applied by the trial court. With the greatest respect I do not think that was the intention for only Parliament can do that. The law as it stands is that the Trial Court must use its discretion in imposing a sentence within the range prescribed by law. (See Section 645 of the Criminal Code). The court of Appeal, in its turn, pursuant to Section 614 must consider the fitness of the sentence imposed and may vary it within the limits prescribed by law. Unfortunately, all too often the version of the facts differs at least in emphasis before the Trial Court and before the Court of Appeal. Also the two courts may take different views of the facts. For example, whether circumstances in a given case are exceptional or not. I find it difficult to believe that a trial judge conscientiously exercising the discretion given him by law should consider himself bound not to do so because others also doing their duty conscientiously think otherwise. In any event, in my view the circumstances here are exceptional (at 428).

The Alberta Court of Appeal took exception to this rejection of their guidelines, and despite their dismissal of the appeal they took the opportunity to reassert their authority:

> In his written reasons for the Burchnall decision, the learned trial Judge seems to suggest that Court of Appeal errs in laying down such guidelines, since only Parliament may specify a minimum sentence. I respectfully disagree with that view. Of course no Court of Appeal in Canada has attempted or could

> attempt to specify hard and fast rules of minimum sentences. One reason for that is as the learned trial Judge states, that only Parliament may prescribe minimum sentences. Another reason is the infinite variety of people and of offenses to which I have already alluded. That does not preclude a court of appeal from stating, as is its duty to do, that unless there are highly unusual factors, it will be an error in principle not to impose a custodial sentence for trafficking in narcotics. This, of course, leaves undefined the "exceptional circumstances" or the "highly unusual factors", contained in these statements of principle. They cannot be defined. To attempt to do so is to attempt to foresee the infinitely variable facts of every case in the future and the infinitely variable human beings who will be involved in them.[84]

The appellate courts themselves do little to foster confidence and compliance with their guidelines. In the case of Doherty (1972) 9 C.C.C. (2d) 115 a trial judge complained about the absence of guidelines as to what constitutes exceptional circumstances for the purpose of ousting the presumption of incarceration for the offence of trafficking in narcotics. The appellate court responded by recognizing the inherent limitation of their own guidelines:

> If by that statement the trial judge was indicating that in his opinion this Court should set exhaustive guidelines of sentencing for trial Judges, I simply decline to accept his invitation. In my view, it would not only be unwise, but dangerous to attempt any such exercise. Each must be considered in light of its own circumstances and if those circumstances are extraordinary, or rare, and suggest that a jail sentence is not appropriate then a jail sentence should not be imposed (at 117).

Even in cases where the lower court diligently applies what it perceives to be the relevant appellate statement of range this effort may not be accepted by the appellate court. In Basha (1978), 61 A.P.R. 310 the court approached the question of sentence by stating at the outset that "in deciding upon a fit and proper sentence...one must have regard to the sentences being handed down by the Court of Appeal in the province and in other Canadian provinces, so that where possible a

uniformity of sentencing is applied" (at 311). The court then examined numerous cases and abstracted an appropriate range to apply to the case at bar. On appeal some of the appellants succeeded in having their sentences reduced. The Court of Appeal commented with respect to range that "what this court must consider on appeal is the appropriate range of sentence, taking the crime, the circumstances surrounding it and the offender himself into consideration"[85]. If Basha is representative of the attitude of appellate courts, it is not surprising that trial-courts lack the impetus to discover the appropriate range. The trial court judges may believe that whatever conclusions they may draw as to range can be imperiously overturned on appeal.

The simple fact is that lower courts and appellate courts are not ad idem in matters of quantum of sentence. This is evidenced by the large variations in sentence that are made upon appeal. The discrepancies between sentences awarded at trial and upon appeal may exist because the lower courts utilize a different starting point for calculation of sentence; even if the widespread dissemination of precedents has resulted in a common starting-point for sentence for both levels of court, the discrepancy may also be seen as a result of differing perceptions as to the operation of mitigating and aggravating factors. Without the development of principles of general application a lower court and appellate court may agree upon a three year starting point for armed robbery sentences yet when faced with an intoxicated offender, in the absence of guidelines, one court may make a significant reduction in sentence to account for this factor whereas the other court may disparage the significance of the factor.

The following list of cases is merely an illustrative sample that indicates the wide perceptual gap that currently exists between appellate and lower court assessments of a fit sentence:

1. Chase (1982), 42 N.B.R. (2d) 339 (N.B.): rape - 9 yr. reduced to 5 yr.

2. Hannah (1982), 44 N.B.R. (2d) 207 (N.B.): attempt murder - 10 yr. reduced to 5 yr.

3. Merrithew (1983), 46 N.B.R. (2d) 356 (N.B.): causing bodily harm - 2 yr. increased to 5 yr.

4. Beckner (1984), 15 C.C.C. (3d) 244 (Ont.): manslaughter - 9 yr. reduced to 2 yr.

5. Petrovic (1984), 13 C.C.C. (3d) 417 (Ont.): assault bodily harm - 5 yr. reduced to 2 yr.

6. Detler (1981), 23 C.R. (3d) 59 (Ont.): attempt murder - 2 yr. less day increased to 6 yr.

7. Beauregard (1982), 38 A.R. 350 (Alta.): rape - 4 yr. increased to 9 yr.

8. Smith (1981), 25 C.R. (3d) 190 (Alta.): attempt murder - 30 mo. increased to 7 yr.

9. Glauser (1981), 25 C.R. (3d) 287 (Alta.): perjury - 2 yr. less day increased to 6 yr.

Perhaps the most striking example of the disparate approaches to sentence that exist among judges is the Churchill (1982) Alta. Dig. 7515-01 case. In that case an accused was convicted and sentenced to 3 years for the offence of rape. His conviction was overturned by the Alberta Court of Appeal and a new trial was ordered. At his 2nd trial he was convicted and sentenced to 6 years. A sentence appeal was launched and the sentence was reduced to 2 1/2 years. One must wonder whether or not proper sentencing guidelines could protect against this situation in which two judges can arrive at fundamentally different sentences for the very same case.

One may have expected that the recent development of a tariff approach to sentence would reduce the disparity of approach between lower courts and appellate courts; however, the impact has been slight. It does appear that tariff sentencing has resulted in an increase of sentences that are upheld on appeal, but in the cases of sentences being overturned there still exists a great disparity between the sentence awarded at trial and the sentence as varied on appeal[86].

Trial court judges are zealous in ensuring that there discretion in sentencing matters is not interfered with. Their sentiments with respect to attempts to curb their discretion are aptly expressed by this statement from a lower court judge:

> 'In my view it is always dangerous to lay down principles for sentencing offenders out of whole cloth, because the judge trying the individual case must, in my view, consider the circumstances of the particular offence and the circumstances of the particular

> offender in light of the broad general principles of sentencing. I do not perceive it to be necessary in a case of this kind to lay down hard-and-fast rules beyond the general principles which have developed over the centuries and the statutory guidelines that are in place within the particular charging sections themselves.[87]

The lower courts' resistance to appellate court guidance cannot be considered an act of subversion - it is simply an expression of the fact that the court is not impressed by abstract principles created by a non-legislative institution. These principles are developed in the rarified atmosphere of the appellate courts and the lower courts may find these principles of no assistance when faced with the difficult task of casting judgment upon a flesh and blood offender. The lower courts agonize over decisions regarding sentence, and they have yet to realize that guidelines that constrain their discretion will not make the decision more difficult. In fact the guidelines should help in reducing the agony of arriving at a sentence that matches both the offender and the offence.

10) CONCLUSION

It is thought that discretion in sentencing is the cornerstone of the process. It is thought to be the necessary precondition for introducing sufficient flexibility into the process to ensure that the sentence is precisely tailored to meet the needs of the individual offender. With developments such as tariff sentencing and a working presumption of incarceration, it appears that the primacy of the individual has been replaced by a practice that emphasizes offence characteristics as the prime determinant of sentence. If this is the case then one must wonder why it is that lower courts are so pertinacious in their worship of discretion. The costs of

discretion are high - without proper constraints discretion invariably leads to disparity and inconsistency.

In the last decade there has been a great deal of discussion about creating legislative guidelines to constrain sentencing discretion; however, the actualization of this objective seems to be a remote possibility and therefore the responsibility for constructing a rational sentencing process lies, by default, with the judiciary. The appellate courts have recognized their responsibility for structuring sentencing discretion and some efforts have been made in that direction. The appellate courts can promote consistency by (a) articulating relevant factors to be taken into account; (b) ascribing the weight to be accorded such factors in any particular case; (c) releasing general policy statements as to the purpose of particular sentencing measures and (d) recommending a certain range of sentence for various offenses.

Efforts have been made to introduce these various measures; however, their introduction has been impeded by a lack of commitment to the importance of the enterprise. The discussion presented in this paper clearly shows that the appellate courts have been irresolute in their efforts. Perhaps the appellate courts have been discouraged by the recognition that their modest efforts have been largely disregarded by the lower courts. For whatever reason, we are left with a process that cannot answer with any certainty why it is that one offender receives a non-custodial term and another similarly-situated offender is subject to a term of imprisonment.

There is general agreement that the criminal justice system has failed to remedy manifest inequities in the sentencing process. Admittedly, a solution is not beyond the institutional competence of the judiciary; they possess the requisite expertise and familiarity with the issues to enable them to develop coherent and consistent

guidelines. In the past decade, however, the appellate courts have done litte to rationalize the process. I believe that this paper clearly shows that the law of sentencing is impoverished, and the legislature can no longer passively sit back and avoid involvement in the belief that the appellate courts are actively working to reduce sentence disparity.

ENDNOTES

1. J.F. Stephen, A History of the Criminal Law of England, vol.2, (1883), 80.

2. See, my report, The Operation of Appellate Court Sentencing Ranges in Trial Court Sentencing Decisions (1984) - on file with the Sentencing Commission.

3. See, Packer, The Limits of the Criminal Sanction (1968) 35-70 for a discussion of the inevitability and ambiguity of punishment.

4. Vining and Dean, Towards Sentencing Uniformity in New Directions in Sentencing, ed. B. Grosman (1980) at 147.

5. Ruby, Sentencing (1980) at 424.

6. Thomas, Principles of Sentencing (1979) at 29.

7. Nadin-Davis, Sentencing in Canada (1982) at 48.

8. See, my report, The Role of Appeal Courts in Establishing Sentencing Ranges (1984) - on file with the Sentencing Commission.

9. Supra, note 6 at 29.

10. Kurichh (1983), 9 W.C.B. 138.

11. Hall (1983) 10 W.C.B. 138.

12. Butler (1983), 9 W.C.B. 401.

13. Raber and Hedch (1983) 57 A.R. 360.

14. Hackett (1981) 50 N.S.R. (2d) 249 at 252.

15. Owen (1982) 50 N.S.R. (2d) 696 at 698.

16. Gilkes (1982) 52 N.S.R. (2d) 309 at 310.

17. Bibi (1980) 71 C.R. App. R. 360.

18. For a detailed analysis of these cases see, my report, Tariff Sentencing in Canada (1985) - on file with the sentencing commission.

19. This conclusion can be seen by comparing the following group of cases: 1) Kurichh (1983) 9 W.C.B. 138 - Trudell (1984) Alta. D. 7464-05 - Stevenson (1984) Alta. D. 7465-05; 2) Runke (1983) Alta. D. 7465-02 - Keenan (1983) Alta. D. 7465-04; 3) Rahim (1983) Alta.D. 7465-09; Strauss (1984) Alta. D. 7465-01 - Gulbrandsen

(1985) Alta. D. 7465-03

20. See the decisions reached in Gilkes (1982) 52 N.S.R. (2d) 309; Deschamps (1983) 57 N.S.R. (2d) 271; Matheson (1983) 60 N.S.R.(2d) 200; Mclaren (1984) 62 N.S.R. (2d) 152; Nauss (1983) 62 N.S.R. (2d) 252; Gough (1984) 65 N.S.R. (2d) 49.

21. R.P.T. (1983) 46 A.R. 87.

22. Moore (1979) 30 N.S.R. (2d) 638.

23. Noseworthy (1982) 40 Kfld. & P.E.I. 93.

24. Herrit (1984) 63 N.S.R. (2d) 638; Taylor (1984) 45 Nfld. & P.E.I. 98.

25. See, A.S.P. (1983) Alta. D. 7510-03; Crowshoe (1983) Alta. D. 7525-03; Mathieson (1984) Alta. D. 7495-01; Fischer (1984) Alta. D. 7510-02; Ross (1984) Alta. D. 7510-03; T. (19840 Alta.D.7517-01; F.T. (1984) Alta. D. 7517-02.

26. Ashworth, Techniques on Guidance on Sentencing (1984) CRIM. L.R. 519 at 522-3.

27. Ibid at 531-1.

28. Carrow, Judicial Sentencing Guidelines, (1984) 68 Judicature 159.

29. See, my report, The Operation of Mitigating and Aggravating Factors in Appellate Sentencing Decisions (1985).

30. See, for example, Basque (1982) 41 N.B.R. 700; Gonidis (1980), 57 C.C.C. (2d) 90; Cheetham (1980), 17 C.R. (3d) 14; Irwin (1979) 48 C.C.C. (2d) 423; Blais (1982) 40 A.R. 378.

31. Aikens (1981), 33 N.B.R. (2d) 630; Meilleur (1981), 22 C.R. (3d) 185 (Ont. C.A.).

32. Gravino (1971), 13 C.L.Q. 434.

33. Regan (1975), 24 C.C.C. (2d) 225.

34. D.A. Thomas, Principles of Sentencing, 1979.

35. See, e.g., Burnchall (1980), 24 A.R. 17; Jacobs (1982) 39 A.R. 391; Fait (1982) 37 A.R. 273; Sawchyn (1981) 30 A.R. 374; Piper (1982) 39 A.R. 442; Holt [1983] Ont. Dig. Sent. T405-01;Henien (1980) 53 C.C.C. (2d) 257; Gionet (1984) 52 N.B.R. 281; Matthews (1983) 45 N.B.R. 265.

36. See, my report, The Operation of A Mitigating and Aggravating Factors in Appellate Sentencing Decisions (1985).

37. (1973), 6 N.B.R. (2d) 439.

38. For general discussion of this issue see: A. von Hirsch, Sentencing, 65 Minn. L.R. 591 (1981).

39. G. Fletcher, Re-thinking Criminal Law (1978), p.466.

40. Ibid., at pp.460-66.

41. See, Von Hirsch, supra, note 38 at 613.

42. Ibid, at 615.

43. See, Hingley (1977), 19 N.S.R. (2d) 541 at 544 (NSCA); Chaisson (1975), 24 C.C.C. (2d) 159 at 160 (NBCA); Johnas (1983), 2 C.C.C. (3d) 490 at 495 (ALTA. CA.).

44. Kelland (1979), 18 Nfld. & P.E.I.R. 346 at 348.

45. See. Von Hirsch, supra, note 38 at 615.

46. See, my report, The In-Out Decision and the Impact of the Criminal Record (1985) - on file with the Sentencing Commission.

47. See, Von Hirsch, supra, note 38 at 620-1.

48. John Hogarth, Sentencing as a Human Process (U. of Toronto Press, Toronto, 1971) p.355.

49. Zimring, Sentencing Reforms, 2 N. Ill. U.L. Rev. 1 (1981).

50. Shaffer (1979 50 C.C.C. (2d) p.424 at 429).

51. Sargeant (1974) 60 Cr. App. R. 74.

52. Johnas (1983), 2 C.C.C. (3d) 490 at 492.

53. Adelman (1968), 3 C.C.C. 311.

54. Oliver [1977] 5 W.W.R. 344, 346.

55. Florida, Title 47, Criminal Procedure and Corrections.

56. Bates (1977), 32 C.C.C. (2d) 493.

57. Piper (1982), 39 A.R. 442.

58. Astaroff (1981), 27 C.R. (2d) 286 at 288.

59. Ashworth, Sentencing and Penal Policy (Weidenfeld and Nicholson, London, 1983) pp.274-9.

60. Boyd (1979), 47 C.C.C. (2d) 369 at 374.

61. Dombeck, The Intermittent Sentence in Canada, 25 Can. J. Crim. 43 (1984).

62. Degan 91985), 38 Sask. R. 234.

63. Large (1984), 5 O.A.C. 328.

64. Wood 91975), 26 C.C.C. (2d) 100 at 107.

65. Fairn (1973), 22 C.R.N.S. 307 at 311-12.

66. McEachern (1978), 42 C.C.C. (2d) 189 at 191.

67. Sprauge (1974), 19 C.C.C. (2d) 513.

68. Gilpin (1975), 36 C.R.N.S. 363.

69. Foster (1982), 69 C.C.C. (2d) 484.

70. Dysan (1982), 69 C.C.C. (2d) 265; Vandale (1974), 21 C.C.C. 250.

71. McDonald (1981), 60 C.C.C. (2d) 336.

72. Grossman (1980), 53 C.C.C. (2d) 143.

73. Burnchall (1980), 65 C.C.C. 490 at 502.

74. Quesnel (1974), 14 C.C.C. (3d) 254 at 255.

75. See, my report, The In-out Decision and the impact of the Criminal Record (1985), for a discussion of the role of exceptional circumstances for commercial Crime, narcotics offenses and manslaughter.

76. Haddad, Some Lessons from the History of Illinois Sentencing Law, 2 N. ILl. U.L. Rev. 19 (1981).

77. Munro, The Separation of Power: Not Such a Myth, (1981) P.L. 19 at 23.

78. Ashworth, Techniques on Guidance on Sentencing (1984) Crim. L.R. 519 at 524

79. See, my report, The Operation of Appellate Sentencing Ranges in Trial Court Sentencing Decisions (1984) - on file with the Sentencing Commission.

80. See, eg., Mclean (1980) 72 A.P.R. 158 (Nfld. Prov. Ct.); Johnstone (1980), 38 N.S.R. (2d) 313 (N.S. Prov. Ct.).

81. See, eg., Wong Tsoi (1982) 36 A.R. 606 (Alta. Q.B.); Summers (1983) 10 W.C.B. 501 (Ont. Prov. Ct.); Firth (1984) 52 A.R. 311 (N.W.T.S.C.).

82. See, eg., Garnham (1983), 122 A.P.R. 65 (P.E.I.S.C.); Brown (1976) 29 A.P.R. 1 (Nfld. Dist.Ct>0; O'bront (1976) 39 C.C.C. (2d) 243 (Que. Sess.).

83. Hogarth, Sentencing as a Human Process (1971) at 175.

84. Burnchall (1980) 65 C.C.C. (2d) 490, 503.

85. Basha (1978) 61 A.P.R. 286, 310.

86. See, my report, Tariff Sentencing in Canada (1985).

87. Herbst (1984) 39 C.R. (3d) 61, 65 (Ont. Co. Ct.).