CASE COMMENT: STOPPING STARTING POINTS: *R.* v. *McDONNELL*

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I. INTRODUCTION

The issues considered in Heather Steinke's prize-winning case note came before the Supreme Court in the case of *R.* v. *McDonnell*.[1] In the course of affirming the principles of appellate review of sentences, the majority of the Supreme Court rejected the Alberta Court of Appeal's starting point approach to sentencing. The majority also made some valuable remarks respecting "presumptive" fact-finding in sentencing and charging and prosecution practices. This comment will review *McDonnell* in the lower courts, the basis for the Supreme Court's majority ruling, and some implications of *McDonnell*.

II. THE CASE ON APPEAL

McDonnell was charged with two counts of sexual assault under s. 271 of the *Criminal Code*.[2] Following a preliminary inquiry before Burch P.C.J., McDonnell re-elected trial by provincial court judge, pleaded guilty to both counts, and was subsequently sentenced by her. The basic facts pertinent to sentencing, confirmed by McDonnell, were as follows.

The first offence occurred in 1986, when McDonnell was 29 and the complainant was 16. The complainant was a ward of the province, placed with McDonnell's family by Alberta Family and Social Services. On 1 April 1986, the complainant was asleep on the living room couch in McDonnell's home. McDonnell came home intoxicated. He undid the complainant's pants. The complainant rolled onto her stomach. McDonnell persisted in touching the complainant. He took off her pants, and partial penile penetration followed. The complainant did not consent to McDonnell's actions.[3] The complainant filed a victim impact statement, placed before the court by consent, in which she provided evidence of psychological trauma which she attributed to the offence.[4] She did not report the offence until 1993, after hearing reports of the second offence.

The second offence occurred in 1993. McDonnell was 36. The complainant was 14, a babysitter for his family. On 31 October 1993, the complainant fell asleep while

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1 [1997] S.C.J. No. 42 (QL) [hereinafter *McDonnell*, cited to paragraph number]. Ms. Steinke's article was not referred to in the judgments, but was cited in the Factum of the Appellant Terry McDonnell.

2 R.S.C. 1985, c. C-46 [hereinafter *Criminal Code*].

3 *McDonnell*, *supra* note 1 at para. 3.

4 *R.* v. *McDonnell* (1995), 169 A.R. 170 at 175 (paras. 18, 19) (C.A.) [hereinafter *McDonnell* (C.A.)].

babysitting. She awoke to find her underwear pulled down and McDonnell on top of her. The complainant fled, screaming.[5] This complainant also filed a victim impact statement, providing some evidence of psychological trauma.[6]

Evidence was tendered in the sentencing hearing that McDonnell had strong family and community support, and that he was remorseful and desired to quit drinking. Good character evidence was adduced. McDonnell had maintained employment and supported his wife and three children. There was evidence, however, that counselling would not stop McDonnell from re-offending, since he might simply re-offend if he got drunk again.[7]

Burch P.C.J. held that the first offence was not a "major sexual assault," as defined by the Court of Appeal. She commented that the assault was reprehensible, but isolated. While the offence involved more than fondling, it was not accompanied by violence or threats. The assault did not advance beyond partial penetration. McDonnell acted "spontaneously," because of his intoxication. Burch P.C.J. recognized that "[i]t was a traumatic experience for the victim," but added that "she was already 16 years old and was having other problems which may have contributed to her subsequent state of mind." Burch P.C.J. took into account the evidence of family and community support, remorse, and the desire to quit drinking. Burch P.C.J. also considered the time between the offence and sentencing: "I recognize that the time elapsed since the offence has relevance in relation to the relative effect of this on both the accused and the victim."[8]

On the level of principle, Burch P.C.J. referred to the *R.P.T.* case,[9] but stated that a purely rehabilitative sentence was inappropriate; the sentence must involve "some element of denunciation and general deterrence" as well. Her solution was "to graft a rehabilitative sentence to a denunciatory sentence." Burch P.C.J. ruled that the fit sentence was twelve months imprisonment followed by two years probation.[10]

Burch P.C.J. also held that the second offence was not a "major sexual assault." She recognized that the second complainant had been traumatized, although, in her estimation, McDonnell's acts respecting her were "less grave" than those respecting the first complainant. Burch P.C.J. observed that

> Mr. McDonnell is a man of otherwise good character and is a strong member of his community. He has always maintained employment and supported his family. An additional lengthy consecutive custodial sentence to the custodial sentence imposed on the first charge would only seek to destroy the accused and his family and is not necessary to deter others from committing such an offence.[11]

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5 *McDonnell, supra* note 1 at para. 4; *McDonnell* (C.A.), *ibid.* at 172 (para. 4).
6 *McDonnell* (C.A.), *ibid.* at 176 (para. 21).
7 *McDonnell, supra* note 1 at para. 7.
8 *Ibid.*
9 *R.* v. *R.P.T.* (1983), 7 C.C.C. (3d) 109 (Alta. C.A.) [hereinafter *R.P.T.*].
10 *McDonnell, supra* note 1 at para. 7.
11 *Ibid.*

She sentenced McDonnell to six months imprisonment, concurrent to the first sentence, and six months probation.

The Crown appealed. In a *per curiam* decision,[12] the Court of Appeal held, in brief, that Burch P.C.J. erred in failing to classify the offences as "major sexual assaults"; in failing to recognize the trauma suffered by the first complainant; in considering the time gap in relation to the first offence as a mitigating factor; in making the sentences concurrent rather than consecutive; and in imposing too low a sentence.[13] The Court of Appeal dramatically increased McDonnell's sentence — to four years imprisonment on the first count, and one year consecutive on the second; it quintupled the total period of imprisonment from one year to five. The Court of Appeal did recommend that, given McDonnell's personal circumstances and apparently successful attempts to quit drinking, he serve his sentence in a provincial institution and that he be given early parole consideration.[14]

McDonnell appealed to the Supreme Court. By a five to four majority, Sopinka J., joined by Lamer C.J.C., Cory, Iacobucci, and Major JJ., allowed McDonnell's appeal and restored the original sentences; McLachlin J., joined by La Forest, L'Heureux-Dubé, and Gonthier JJ., dissented, and would have dismissed the appeal and confirmed the Court of Appeal's sentences.

III. *McDONNELL* BEFORE THE SUPREME COURT

The majority decision has two main aspects — (A) a discussion of general principles respecting sentencing and appellate review of sentences; and (B) the application of those principles to the Court of Appeal's review of Burch P.C.J.'s sentencing of McDonnell.

A. PRINCIPLES

Sopinka J. considered three general areas of the law of sentencing — (1) the rules governing appellate review of sentences; (2) the proper approach to "starting points" in sentencing; and (3) presumptions of fact in sentencing.

1. Appellate Review of Sentences

a. The Role of the Sentencing Judge

The understanding of the proper role of appellate review of sentencing judges' determinations must begin with reflection on the task of the sentencing judge. The fundamental challenge faced by a sentencing judge is that criminal laws seldom specify particular penalties for offences. The reason for this is that many crimes may be

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12 Fraser C.J.A., Bielby and Cairns JJ. (*ad hoc*).

13 The Court of Appeal's analysis will be considered in detail below.

14 *McDonnell* (C.A.), *supra* note 4 at 177 (para. 28). This was only a recommendation, with no binding effect.

committed in a host of different ways, with widely varying effects; the blameworthiness of particular offenders may range across a broad continuum.[15] Hence, most criminal laws simply indicate a maximum sentence, or, more rarely, a range of sentence between a minimum and maximum, or, more rarely again, a minimum sentence only (*i.e.*, life imprisonment for murder, which is, in effect, the maximum sentence as well). Maxima and minima establish the end-points of sentencing, but do not specify particular modalities of punishment or particular quantities of punishment appropriate for particular offenders in particular circumstances. The *Criminal Code* grants sentencing judges the discretion to set fit sentences.[16] A sentencing judge must select the sentencing tool or combination of tools appropriate to an offender and offence. These tools range from discharges, through suspended sentences and the new conditional sentences, to fines, restitution, and imprisonment, with creative probation conditions a frequently available resource. The sentencing judge must also determine the quantity of penalty. Paradigmatically, the judge must determine the length of imprisonment or state supervision — federal time or provincial? Three years or five? Imprisonment plus probation? Imprisonment plus fine?

In the selection of sentencing tools and the setting of the quantum of punishment, judges are guided by constitutional, statutory, and common law rules, principles, and guidelines. A basic constitutional provision in the sentencing context is s. 12 of the *Charter of Rights and Freedoms*,[17] which provides that "[e]veryone has the right not to be subjected to any cruel and unusual treatment or punishment." Section 7 of the *Charter* protects the principle that, as a matter of fundamental justice, the punishment for an offence must be proportionate to the blameworthiness of the offender.[18]

The *Criminal Code* now sets out rules governing sentencing determinations. Section 718.1 (which may be taken to mirror the constitutional requirements of s. 7 of the *Charter*) provides that "[a] sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender." Section 718 of the *Criminal Code* sets out the purposes of sentencing:

> The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:
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> (a) to denounce unlawful conduct;
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> (b) to deter the offender and other persons from committing offences;
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> (c) to separate offenders from society, where necessary;

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15 See *McDonnell*, *supra* note 1, McLachlin J. at para. 85.

16 *Criminal Code*, s. 718.3(1).

17 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter the *Charter*].

18 *R.* v. *Martineau*, [1990] 2 S.C.R. 633 at 645, Lamer C.J.C.; *R.* v. *C.A.M.* (1996), 105 C.C.C. (3d) 327 (S.C.C.) at 368 (para. 79), Lamer C.J.C. [hereinafter *C.A.M.*].

(d) to assist in rehabilitating offenders;

(e) to provide reparations for harm done to victims or to the community; and

(f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.

A judge must consider these purposes of sentencing when deciding on an appropriate sentence for a particular offender. Judges should also consider the particular circumstances of the offence, the offender, the community, and the system of justice in the jurisdiction. Section 718.2 of the *Code* provides as follows:

A court that imposes a sentence shall also take into consideration the following principles:

(a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,

(i) evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or any other similar factor, or

(ii) evidence that the offender, in committing the offence, abused the offender's spouse or child, or

(iii) evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim

shall be deemed to be aggravating circumstances;

(b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;

(c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;[19]

(d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and

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[19] Sopinka J. resolved any tension that may have existed between the sentencing rule calling for consecutive sentences for unrelated offences and the "global effect" rule now codified in s. 718.2(c) of the *Criminal Code*, making it clear that the former rule does not "trump" the latter (*McDonnell*, *supra* note 1 at para. 27). Thus, where a sentencing judge feels that it will best meet sentencing goals in a particular case, he or she may impose concurrent sentences for unrelated offences.

> (e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

While the *Criminal Code* now codifies many former common law sentencing rules, some additional factors established at common law are considered by judges in fashioning penalties:

(i) factors relating to the gravity of the offence: as indicated, *e.g.*, by the maximum sentence for the offence;

(ii) factors relating to the circumstances of the offence: *e.g.*, evidence of motive, planning, aggravating circumstances (use of violence, weapon); degree of participation by offender;

(iii) factors relating to the personal characteristics of the offender (considered both before and after the offence): *e.g.*, age, dependents, employment, remorse, embarking on counselling programs (*e.g.*, Alcoholics' Anonymous or marital counselling);

(iv) factors relating to the offender's interaction with the administration of justice (cooperation with the authorities): *e.g.*, early guilty plea,[20] whether he or she informed on comrades, his or her conduct at trial; and

(v) factors relating to the administration of justice in the jurisdiction: *e.g.*, policies concerning sentencing (*e.g.*, the establishment of "starting points" for categories of offences, such as major sexual assaults, or major sexual assaults committed by a person in violation of a position of trust).

One of the most important personal factors is the offender's criminal record. Generally, a "step-up" principle applies: sentences for the repetition of the same offence or similar offences should increase over time, but never to an extent greater than that called for by the offence and its particular circumstances. A "gap principle" also applies, however; if an offender has gone a substantial period without offending (or without having committed the type of offence in question), the step-up principle should not apply.

Sentencing judges must take all of the foregoing into consideration in fashioning sentences. Lamer C.J.C. provided a valuable observation on the role of the sentencing judge: "The determination of a just and appropriate sentence is a delicate art which attempts to balance carefully the societal goals of sentencing against the moral blameworthiness of the offender and the circumstances of the offence, while at all times

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[20] Although the Alberta Court of Appeal stated in *Sandercock* that a substantial discount should be given for a prompt guilty plea, when dealing with sexual assault sentencing appeals some panels of the Court of Appeal have, in practice, given little weight to or ignored altogether a guilty plea as a mitigating factor when applying starting point sentences: *R.* v. *Sandercock* (1985), 62 A.R. 382 (C.A.); *R.* v. *Lakotos* (17 June 1996), Edmonton 9603-0173-A5 (Alta. C.A.); *R.* v. *Dionne* (9 November 1991), Calgary #14521 (Alta. C.A.); *R.* v. *Berard*, [1994] AJ No. 732 (QL); *R.* v. *Keizer*, [1994] AJ No. 820 (QL).

taking into account the needs and current conditions of and in the community."[21] A challenging job indeed.

b. The Role of Courts of Appeal

The orientation of appellate courts to sentencing judges' determinations must be one of deference. When reviewing sentences, appellate courts must bear in mind that sentencing judges have had the benefit of seeing and hearing the parties, should there have been a trial; and of hearing counsels' submissions and observing offenders' demeanour, on guilty pleas. Appellate courts should respect trial judges' skills and experience gained on the "front lines" of criminal litigation. Perhaps most importantly, appellate courts should recognize that sentencing judges are likely to reflect the interests, concerns, and moral reactions of the community in which the offence took place.[22] Appellate courts may be less in tune with community sentiments than lower court judges, if only because of a lack of physical proximity to the communities in question. One might say that sentencing judges deserve deference, in part, because their determinations have a greater democratic reflection than might appellate determinations.

An appellate court's role is to determine whether a sentence was "fit."[23] In *McDonnell*, Sopinka J. confirmed the non-interventionist approach to appellate review of fitness developed in the *Shropshire*[24] and *C.A.M.* cases. An appellate court should not substitute its own views for those of the sentencing judge, simply because the appellate court would have decided the matter differently. An appellate court should interfere with a sentencing judge's determination only if, notwithstanding all due deference, the determination was "clearly unreasonable." A sentence is "clearly unreasonable" if the trial judge applied incorrect legal principles (*e.g.*, misinterpreted a provision in the *Criminal Code*); if the trial judge failed to consider all factors properly — by failing to consider all relevant factors, or by over- or under-emphasizing relevant factors; or if the sentence was manifestly unfit, whether excessive or inadequate.[25]

2. Starting Points

The starting point approach to sentencing arises from the legitimate appellate review concern that, across the province, similar offenders who commit similar offences in similar circumstances should receive similar sentences. As McLachlin J. observed, "it affronts common-sense notions of justice if people who have committed the same criminal act receive wildly disparate sentences. It is neither fair nor just that one person languish in prison years after another, who committed a similar act, is released to

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21 *C.A.M.*, *supra* note 18 at 374-75 (para. 91).

22 *Ibid.* at 374 (para. 91).

23 *Criminal Code*, s. 687.

24 *R.* v. *Shropshire*, [1995] 4 S.C.R. 227.

25 *McDonnell*, *supra* note 1 at para. 17. Sopinka J. held that these principles of appellate review also apply respecting a sentencing judge's determination of whether multiple sentences should run concurrently or consecutively — the concurrent/consecutive determination is as worthy of deference as other sentencing determinations (*ibid.* at para. 46).

liberty."[26] The starting point approach, however, is not committed only to the goal of sentencing uniformity. Advocates of the starting point approach do require consideration of individualizing factors, so that the ultimate sentence is tailored to the particular circumstances of the offence and the offender.[27] In McLachlin J.'s words, the approach "represents an attempt to marry in one sentencing principle the values of uniformity and individualization."[28]

McLachlin J. described the starting point approach as having two main stages. At the first stage, she wrote, the judge determines the range of sentence for a "typical" case.[29] The first stage is rather more complex than McLachlin J. suggested. The appellate court (generally not the sentencing judge) determines the criteria for the "typical" case. The criteria will relate to the offence itself, the circumstances in which the offence occurred, the circumstances of the victim, and the circumstances of the offender. The appellate court then determines the blameworthiness or culpability of the typical offender who commits the typical offence defined by the starting point criteria. To this blameworthiness will correspond some proper form of punishment. With the blameworthiness of the typical offence in mind, the appellate court may attach a sentence or range of sentence to the typical case. Only with this apparatus in place may the sentencing judge proceed. The sentencing judge must examine the evidence in the particular case and determine whether the criteria for a particular starting point (*e.g.*, for a "major sexual assault") are satisfied. If not, the range of sentence attached to that starting point would be irrelevant; if so, the judge has a sentencing starting point — a range of sentence for the particular offence.[30]

At the second stage, the judge adjusts the sentence up or down on the basis of factors relating to the particular offence and offender.[31] The factors particular to the case may mitigate, indicating lower than typical blameworthiness and justifying a lower than typical sentence; or may aggravate, indicating a greater than typical blameworthiness and justifying a higher than typical sentence.[32] A noteworthy aspect of the second stage, as interpreted by McLachlin J., is that — contrary to what might be one's intuitions — an offender's good character and lack of a criminal record cannot serve as mitigating factors. This is because the stage one typical case presupposes an offender of good character with no criminal record.[33] Good character and lack of record are already built into the typical case (*i.e.*, their mitigating effect has been taken into account) so these factors cannot serve as mitigating circumstances at the second

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26 *McDonnell*, *supra* note 1 at para. 66; see also para. 76. This observation applies not only intra-provincially, but inter-provincially. In *McDonnell*, the Supreme Court did not address its own responsibilities in light of disparities in sentences and sentencing principles across Canada — disparities sure to be exacerbated by the introduction of the new sentencing rules under Bill C-41 (*An Act to Amend the Criminal Code (Sentencing)*, S.C. 1995, c. 22).

27 *Ibid.* at para. 61.

28 *Ibid.* at para. 67.

29 *Ibid.* at para. 58.

30 One of the difficulties with the Alberta experience is that starting points have taken on the character not of ranges, or of pivots of ranges, but of minimum sentences.

31 *McDonnell*, *supra* note 1 at para. 58.

32 *Ibid.* at para. 61.

33 *Ibid.* at para. 59.

stage.[34] One might observe that good character, like bad character, has many degrees. To say that "good character" is assumed in a starting point begs the question of the degree of good character assumed; the assumption of "good character" discounts the character of those whose good qualities might exceed McLachlin J.'s norm. Her assumption is unfair to such offenders. Furthermore, the notional inclusion of good character in the starting point effectively forecloses reliance on many mitigating factors. An offender could not assert in mitigation that he or she has led a blameless life in what might be the many years since the commission of the offence; that he or she has had a good employment record and has been a good family provider; or that he or she has made significant contributions to his or her community. The only type of mitigating factor left might be that since the time of the offence the offender has obtained some form of rehabilitative treatment, so that he or she no longer poses a threat to the complainant or the community.

The majority and dissent agreed that appellate courts should be concerned with sentencing disparities. Appellate courts may give guidance to lower courts respecting the appropriate ranges of sentence. Sopinka J. accepted the starting point approach, if it is conceptualized as a *guide* to sentencing only.[35] Moreover, if a particular sentence deviates markedly from a sentencing guideline, that may be (but is not necessarily) an indication that the sentence is unfit.[36]

At issue between the majority and the Court of Appeal was whether starting points are only guides, or are legal classifications bearing on fitness. Put another way, at issue was the effect of a failure of a sentencing judge to abide by a starting point. If starting points were legal classifications, equivalent to *Criminal Code* rules governing sentencing, a sentencing judge's misunderstanding, misapplication, or non-application of a starting point would be an error of principle and would be, by itself, a basis for appellate intervention respecting a sentence. The Court of Appeal appears to have taken the view that the starting point approach is a matter of legal principle. Thus, in *McDonnell*, the Court of Appeal held that the trial judge "erred in finding that [the first] assault was not a major sexual assault,"[37] and held that the second assault was "serious" and not "minor."[38] These findings were used to support the Court of Appeal's increase of McDonnell's sentence. Sopinka J. considered the Court of Appeal to have conceptualized the starting point approach as establishing legal classifications.[39] Sopinka J. rejected this conceptualization.

Before turning to Sopinka J.'s reasons, however, this comment will canvass some arguments against the starting point approach which Sopinka J. did not consider, but which McLachlin J. did. She did not find these arguments compelling. McDonnell had argued that the starting point approach fetters the judicial discretion to impose

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34 *Ibid.* at para. 114.

35 *Ibid.* at para. 43.

36 *Ibid.*

37 *McDonnell* (C.A.), *supra* note 4 at 172 (para. 6).

38 *Ibid.* at 176 (para. 20).

39 *McDonnell*, *supra* note 1 at para. 30.

individualized sentences. McLachlin J. responded that the approach facilitates and does not hinder judicial discretion; the approach confines discretion to "legitimate considerations"; "it provides a structure which helps to ensure that [all relevant personal factors] are considered and given their proper weight."[40] McDonnell had argued that the approach violates the principle that punishment should be the least in the circumstances. McLachlin J. countered that the starting point itself is (or should be) the least appropriate punishment for the typical offence.[41] If there are mitigating factors, these can be considered in the second stage of the approach, reducing the sentence to its appropriate level.[42] McDonnell had argued that the approach relieves the Crown of its burden of establishing the appropriateness of severe punishments. McLachlin J. denied this claim. Before an offender can be sentenced, the Crown must have proved its case beyond a reasonable doubt. If the Crown's case for conviction has not established the facts satisfying a particular starting point, the Crown has the burden of establishing those facts and any further aggravating circumstances in the sentencing hearing beyond a reasonable doubt.[43] McDonnell had argued that the criteria for the "major sexual assault" starting point were unconstitutionally vague. The starting point fails to delineate an "area of risk" as required by s. 7 of the *Charter*; Court of Appeal decisions have expanded the notion of "major sexual assault" to such an extent that an offender cannot obtain legal advice as to whether his or her conduct amounted to a major sexual assault. McLachlin J. rejected this argument on two grounds. First, she claimed that the "void for vagueness" principle does not apply to sentencing ranges, but only to the description of criminalized conduct. She wrote that

> The *Criminal Code* contains hundreds of offences with wide penalty ranges. To hold that the law must describe with certainty the precise sentence which particular conduct may attract would be to render all these laws subject to attack on the ground that they are too vague. In place of the existing regime of broadly defined offences with broad ranges of sentences, Parliament would be compelled to legislate thousands of precise crimes attaching precise penalties.[44]

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40 *Ibid.* at para. 80.

41 McLachlin J. reflected the Court of Appeal's approach to starting points. If a starting point is understood as the "least appropriate punishment," the starting point may be transformed into a minimum sentence.

42 *McDonnell, supra* note 1 at para. 83.

43 *Ibid.* at para. 82.

44 *Ibid.* at para. 91. McLachlin J. equivocated in this response. McDonnell did not argue that maximum sentences are vague. They are very clear, if very broad. Neither did McDonnell claim that Parliament should legislate precise sentences for precise offences. This would be contrary to the principled argument that the sentence should fit the crime and the criminal; tariff or grid sentencing would be *a priori* objectionable to McDonnell. McDonnell's concern was that the Court of Appeal had carved out a sentencing range within the *Criminal Code* maximum, but did not properly define the criteria by which particular cases could be drawn into that carved-out area. It would be as if the *Criminal Code* created a new level of assault with a higher maximum penalty than the other types of assault (assault *simpliciter*, assault causing bodily harm, and aggravated assault), but no one could determine the sort of conduct that amounted to this sort of assault. Furthermore, the notion that vagueness applies only to the prohibition, not the penalty, seems wrong. How could a definite crime with an unknowable penalty be in accordance with fundamental justice? McLachlin J. also ignores the problem of the "individuation" of a criminal law: at least on one approach, a criminal law is more than just a description of prohibited conduct; it is this description plus the penalty for committing the prohibited conduct. To limit the vagueness doctrine

Second, she claimed that, even if the vagueness doctrine applied, the starting point for major sexual assaults was not vague. The criteria are merely "flexible" and may be given sensible meanings by the courts.[45] Although McDonnell lost these battles, through the majority decision, he won the war.

McLachlin J.'s reservations aside, Sopinka J.'s general response to the Court of Appeal was that "it can never be an error in principle in itself to fail to place a particular offence within a judicially created category ... for the purposes of sentencing";[46] or to fail to refer to a particular starting point classification.[47] Sopinka J. had two reasons for this conclusion.

First, the recognition of starting points as legal principles would diminish the deference owed to sentencing judges. Appellate courts could create starting points and treat deviations from the starting point quanta as errors of law justifying interference: "Indeed, that is what the Court of Appeal in Alberta has done in the present case. If the categories are defined narrowly, and deviations from the categorization are generally reversed, the discretion that should be left in the hands of the trial and sentencing judges is shifted considerably to the appellate courts."[48]

Second, appellate courts have no legal authority to create categories of offences within statutory offences for the purposes of sentencing. It is for Parliament to create offences, not the courts:

> By creating a species of sexual assault known as a "major sexual assault", and by basing sentencing decisions on such a categorization, the Alberta Court of Appeal has effectively created an offence, at least for the purposes of sentencing, contrary to the spirit if not the letter of *Frey*.[49]

Parliament has already created categories of assault and sexual assault. If further refinements are required, Parliament may amend the *Criminal Code*.

Apparently in response to those compelling arguments, McLachlin J. adopted a subtle view of starting points, through which she attempted to avoid the argument against the impropriety of judicial legislation. In her view, the starting point approach does not create new crimes. The approach merely expresses the judicial recognition that a particular offence may be committed in different typical circumstances, and each of the typical modes of commission of the offence attracts a different level of blameworthiness and sentence.[50] A starting point is not a "minimum" sentence. A starting point is only a starting point, which is adjusted up or down as particular circumstances warrant.[51]

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as suggested by McLachlin J. would be to apply it to only half of a law.

45 *Ibid.* at para. 93.

46 *Ibid.* at para. 32.

47 *Ibid.* at paras. 24, 32, 42, 43.

48 *Ibid.* at para. 32.

49 *Ibid.* at para. 33, referring to the case of *Frey* v. *Fedoruk*, [1950] S.C.R. 517. See also *Criminal Code*, s. 9.

50 *McDonnell, supra* note 1 at para. 85.

51 *Ibid.* at para. 86.

McLachlin J. did not purport to conceptualize starting points as legal principles, but as means through which the fitness of sentences could be judged:

> The "starting point" is not a principle of law, but rather a tool to determine the proper range of sentence for a certain type of offence. Failure to allude to the appropriate starting point or range is not an error of principle as that term is used in *M.(C.A.)*.... If the trial judge fails to refer to the appropriate starting point or range but in the end imposes a sentence within the acceptable range of sentence for the offence as adjusted for the particular circumstances of the offender, a court of appeal should not interfere. On the other hand, if the sentence falls outside the appropriate range, the court of appeal must interfere.[52]

McLachlin J., however, faced a dilemma. If starting points are only tools for assessing fitness, then a departure from the starting point sentence cannot be, by itself, a basis for appellate intervention respecting a sentence; and, moreover, the starting point approach drops away as superfluous — rather than worry about starting points, appellate courts should focus on the fitness issue in the particular circumstances of the case. This approach to starting points is Sopinka J.'s; and McLachlin J. had endeavoured to dissent from Sopinka J.'s position, not adopt his position under an alias. If, however, starting points are in practice more than merely tools, departures from starting points become significant, and should allow appellate intervention. But this approach turns starting points into principles, in effect if not in name. Thus, Sopinka J. commented on McLachlin J.'s approach as follows:

> That is [according to McLachlin J.], the failure to characterize the assault properly is not an error in principle, but if the sentence reached as a result of that error is not very similar or identical to the sentence that would have been reached had the mischaracterization not occurred, appellate courts may intervene. In my view, this effectively states that ... appellate courts may intervene, notwithstanding deference, if the trial judge's mischaracterization affected significantly the sentence ordered.... [M]ischaracterization is treated by McLachlin J. as an error which will often lead to appellate intervention.[53]

McLachlin J. was either caught by the judicial legislation charge, or by the concession that starting points are only guidelines. McLachlin J.'s subtle account of starting points could not save them as "quasi-principles."

Neither Sopinka J. nor McLachlin J. considered the issue of whether the institutional limitations on appellate courts impair their ability to craft rigid sentencing guidelines. Appellate courts may lack the representative data necessary to create guidelines. Appellate courts typically deal with abnormal cases appealed from because matters have gone awry in the courts below. Cases with satisfactory sentences seldom are appealed. Appellate courts, in any event, lack the resources to collect and process sentencing

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[52] *Ibid.* at para. 109.

[53] *Ibid.* at para. 42.

data.[54] Finally — and this is a difficulty besetting all courts, from provincial courts to the Supreme Court — courts lack empirically and theoretically sound sentencing principles. All too often, courts sentence and review sentence on the basis of merely personal intuitions about the justifications and effects of punishment — the foremost subject of mere intuition being the notion of deterrence. Given these problems of data, resources, and concepts, appellate courts should attempt to give guidance only cautiously.

3. Presumptions of Fact in Sentencing

One of the aspects of a "major sexual assault" is the psychological harm suffered by the victim. In the course of its reasons, the Court of Appeal referred to a "presumption" of psychological harm. Where actions classified as a serious sexual offence have taken place, "[p]sychological harm is presumed in the absence of evidence to the contrary."[55] The Court of Appeal appeared to make two different sorts of claims — first, that when a serious sexual offence has occurred, there exists a very real likelihood or risk of psychological harm to the victim; second, that when a serious sexual offence has occurred, actual harm is presumed.[56]

Both Sopinka J. and McLachlin J. assented to the proposition that psychological harm is likely to result from a sexual assault.[57] The courts take judicial notice of this likelihood of psychological harm. The "presumption" of harm in this sense is not a legal presumption, but a strong natural inference. Sopinka J. suggested that this likelihood of psychological harm illustrates the seriousness of sexual offences.[58] As McLachlin J. put the point, where a "judge concludes that an act was of a type that would make lasting emotional or psychological harm likely, the judge may classify the assault as major."[59] She adopted one aspect of the position of the Court of Appeal, which wrote that "the offender is being sentenced ... not because any specific psychological consequences have flowed from the attack but rather because of the nature of the attack and the fact that it poses the very real *likelihood* of long-term emotional or psychological harm."[60] She assigned this reasoning to the first stage of the starting point analysis.

Defence counsel may seek to establish that, despite its likelihood, no psychological harm in fact resulted from a particular assault. It was in response to this type of contention that the Court of Appeal ran into difficulties. The Court of Appeal wrote that "[b]ringing the presumed harm into question in this context means pointing to cogent evidence to the contrary"; "it is not enough that the defence simply denies that it

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54 *Report of the Canadian Sentencing Commission: Sentencing Reform: A Canadian Approach* (Chair: the Honourable J.R.O. Archambault) (Ottawa: Minister of Supply and Services Canada, 1986) at 295.

55 *McDonnell* (C.A.), *supra* note 4 at 173 (para. 11).

56 *McDonnell*, *supra* note 1 at para. 35.

57 *Ibid.* at paras. 36, 95.

58 *Ibid.* at para. 35.

59 *Ibid.* at para. 95.

60 *McDonnell* (C.A.), *supra* note 4 at 174 (para. 14) [emphasis in original].

[psychological harm] exists."[61] What the Court of Appeal appears to have meant was that, because of the strength of the natural inference of psychological harm, the inference will not be rebutted simply because the defence has challenged the inference or called the inference into question, or because the defence has tendered only some rebuttal evidence on the issue — the inference is, as a matter of fact, very difficult to rebut.

Where, however, the only evidence respecting psychological harm is an assault coupled with the natural inference, it should be borne in mind that harm is only a likelihood. The offender should only be blamed for creating this likelihood (provided that the existence of the likelihood has not been rebutted). The offender should not be blamed for creating actual psychological harm. Some of the Court of Appeal's language is misleading on this score. It referred to psychological harm being presumed in the absence of evidence to the contrary.[62] This language was probably just an inaccurate way of putting the likelihood point. Sopinka J. was concerned, though, that no error follow from this language.

Sopinka J. held that the likelihood of harm properly recognized by the Court of Appeal does not establish a legal presumption of actual harm. If the Crown wishes to rely on the existence of actual harm, the harm must be proven by the Crown, beyond a reasonable doubt. To hold otherwise would be to relieve the Crown of part of its burden of proof, contrary to the presumption of innocence protected under s. 11(d) of the *Charter*; and it would be contrary to the principle — now codified in s. 724(3) of the *Criminal Code* — that the Crown bears the burden of establishing aggravating facts in sentencing hearings beyond a reasonable doubt.[63] McLachlin J. agreed that if the Crown wishes to rely on actual harm, it must prove harm without the aid of any presumption.[64]

B. APPLICATION OF PRINCIPLES

The Court of Appeal held that Burch P.C.J. erred in principle, failed to consider all relevant factors properly, and set an unfit, unduly low sentence. Sopinka J. disagreed with each of the Court of Appeal's findings.

Sopinka J. considered three errors of principle that the Court of Appeal found Burch P.C.J. to have made. First, by implication, the Court of Appeal held that Burch P.C.J. failed to classify the offences as major sexual assaults, and that this was an error of principle. We reviewed above Sopinka J.'s conclusion that "it can never be an error of principle in itself to place a particular offence within a judicially created category of assault for the purposes of sentencing."[65] Second, the Court of Appeal held that Burch P.C.J. erred by relying on *R.P.T.* because here "there was no family that might be

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61 *Ibid.* at 174-75 (para. 15).

62 *Ibid.* at 173 and 174-75 (paras. 11, 15).

63 *McDonnell, supra* note 1 at para. 37.

64 *Ibid.* at para. 95.

65 *Ibid.* at para. 32.

restored."[66] Burch P.C.J. had written as follows: "In sentencing Mr. McDonnell regarding this first charge, I am cognizant of the decision in *R.* v. *R.P.T.*, but this is not a case where simple rehabilitation will suffice... [T]here must be some element of denunciation and general deterrence in this matter as well."[67] Sopinka J. asserted that the Court of Appeal misinterpreted Burch P.C.J. In his opinion, she did not rely on *R.P.T.* as support for taking the restoration of the family as a mitigating circumstance, but as support for applying both a denunciatory and a rehabilitative sentence where the assault was serious.[68] Presumably the Court of Appeal would respond that its point was that a rehabilitative sentence was inappropriate in the circumstances, whether by itself or in conjunction with a denunciatory sentence (hence the pure jail-time of the Court of Appeal's sentence); insofar as Burch P.C.J. relied on *R.P.T.* to justify a rehabilitative aspect of the sentence, Burch P.C.J. committed an error of principle. Third, the Court of Appeal found that Burch P.C.J. improperly relied on "the passage of time between the first and second offence (and sentencing)" as a mitigating factor.[69] Burch P.C.J. had written that "I recognize that the time elapsed since the offence has relevance in relation to the relative effect of this [offence] on both the accused and the victim."[70] Just what Burch P.C.J. meant is not clear. Sopinka J. did not interpret Burch P.C.J. to have relied on the mere passage of time between the first and second offence, or between the first offence and sentencing, as a mitigating factor. Rather, he interpreted Burch P.C.J. to have been referring to the

> effect of the actions on the accused since the offence, which included, for example, remorse and the desire to quit drinking, and to the effect of the actions on the victim since the offence, which included the psychological harm that the victim had displayed since the offence. These factors may be relevant considerations and the sentencing judge did not err in principle in referring to them.[71]

Burch P.C.J. did not in fact say what Sopinka J. claimed she said, and the Court of Appeal may have offered the more accurate interpretation, but this was not a decisive point in the case.

Sopinka J. held that Burch P.C.J. properly considered all relevant factors in the case. Sopinka J. observed that she considered the partial penetration respecting the first offence, and that she recognized that both complainants had suffered psychological trauma.[72] Burch P.C.J. had written that the first offence "was a traumatic experience for the victim, but she ... was having other problems which may have contributed to her subsequent state of mind"; she later referred to the "trauma suffered by the victim at a time when she was already troubled."[73] The Court of Appeal suggested that it did not "accept the theory that the young victim of the first assault did not suffer any trauma because she already had problems," and referred to such a theory as "potentially

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66 *Ibid.* at para. 39, referring to *McDonnell* (C.A.), *supra* note 4 at 178 (para. 22).
67 *McDonnell*, *supra* note 1 at para. 7.
68 *Ibid.* at para. 40.
69 *Ibid.* at para 41, referring to *McDonnell* (C.A.), *supra* note 4 at 177 (para. 23).
70 *McDonnell*, *supra* note 1 at para. 7.
71 *Ibid.* at para. 41.
72 *Ibid.* at paras. 20, 21, 27.
73 *Ibid.* at para 21.

perverse."[74] Sopinka J. rightly responded that Burch P.C.J. did not consider the first complainant to have suffered no trauma, and in fact considered her trauma to be more severe because she was already troubled. Burch P.C.J. was of the view that not all of the complainant's psychological problems could be blamed on McDonnell's offence — but after all, an offender is not necessarily liable for all of the conditions which may attend a victim following the commission of an offence.[75]

On the issue of fitness of sentence, Sopinka J. admitted that Burch P.C.J.'s sentences were low, but they were not demonstrably unfit. In reaching this decision, Sopinka J. considered some cases that McLachlin J. offered as showing that the sentences were outside the acceptable range. Sopinka J. distinguished these cases, demonstrating, in passing, that care must be taken in selecting suitable precedents for sentencing.[76]

Since Burch P.C.J. committed no error of principle, did not fail to consider properly any relevant fact, and did not order demonstrably unfit sentences, her sentences were restored.

IV. SOME IMPLICATIONS OF *McDONNELL*

This comment will briefly explore three implications of *McDonnell*, concerning (1) charging practices; (2) proof of harm in sexual assault cases; and (3) the post-*McDonnell* approach to sentence appeals.

1. Charging Practices

Sopinka J. observed that Parliament has created categories of sexual offences, including sexual assault *simpliciter* and sexual assault causing bodily harm.[77] In the course of criticizing the Court of Appeal for encroaching into the realm of Parliament, Sopinka J. commented that "[g]iven Parliament's intention to treat sexual assaults causing bodily harm under s. 272(c), it is particularly inappropriate to create a "major sexual assault," which is based at least in part on the existence of harm to the complainant pursuant to s. 271."[78] Significantly, Sopinka J. went on to comment that "if the prosecution is to be based on the harm to the victim, the accused should be charged under the appropriate section, s. 272(c)."[79] Later, Sopinka J. repeated this sentiment: "if the Crown wishes to rely on the existence of psychological harm, in my

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74 *McDonnell* (C.A.), *supra* note 4 at 175 (para. 16).

75 *McDonnell*, *supra* note 1 at para. 22.

76 *Ibid.* at para. 29. The difficulty of finding precedents to establish a range of sentence should not be exaggerated, however. Generally, with some diligence, counsel should usually be able to uncover a number of cases with roughly similar circumstances to a case at bar; counsel should then justify any departure from that range based on the circumstances of the case. Part of the problem of sentencing disparity may be attributable to counsel who have not done the necessary work, and who have focused not on the applicable range of sentence, but on the highest or lowest conceivable sentence, as professional interest may dictate. Such practices leave sentencing judges without proper guidance.

77 *Criminal Code*, ss. 271 and 272(c), respectively.

78 *McDonnell*, *supra* note 1 at para. 34.

79 *Ibid.*

view the Crown should charge under the section set out in the Code that contemplates harm, s. 272(c), and prove the offence."[80]

Sopinka J.'s comments are *obiter*, but they direct us to an important point. Persons should not be charged with sexual assault *simpliciter*, if the intention is to prove in sentencing facts amounting to sexual assault causing bodily harm.[81] The fundamental complaint in an undercharging/oversentencing case is that the accused has not been provided with sufficient notice of the specific offence which he or she is facing. Section 11(a) of the *Charter* does require that a person charged with an offence has the right "to be informed without unreasonable delay of the specific offence." The complainant could be focused at the "right to counsel" stage of proceedings against an accused, under ss. 10(a) and (b) of the *Charter*. For example, if an accused were simply told that he or she was being charged with sexual assault rather than sexual assault causing bodily harm, the accused may have decided not to seek the assistance of counsel; and even if counsel were consulted, counsel's advice might have been different had counsel been aware of the more serious nature of the effective charge. At the stage of trial, the complaint could be framed as a violation of fundamental justice — more particularly, a violation of the right to make full answer and defence, protected under s. 7 of the *Charter*. The complaint would not be, presumably, a straightforward "incomplete disclosure" claim — if the Crown had failed to disclose information in its possession or power concerning the victim's injuries, the accused would have his or her remedy under *Stinchcombe*.[82] Instead of concerning the information disclosed, the complaint would concern the use to which the Crown has put the information disclosed. The disclosure was misleading, because the accused could not tell from the disclosure the true offence that the accused was, in effect, facing. Where a violation of ss. 10(a), (b), 11(a) or 7 of the *Charter* has been made out, the appropriate remedy under s. 24(1) of the *Charter* could be the restriction of the Crown's sentencing submissions to fact and a sentencing range not involving psychological harm to the victim. We might expect police and Crown practices to be amended to ensure that accuseds are charged appropriately.[83]

2. Proof of Harm

As seen above, Sopinka J. strongly supported the principle that harm to a victim, including psychological harm, must be proven by the Crown beyond a reasonable doubt in sentencing proceedings. Psychological harm cannot be presumed. Sopinka J.'s perspective may have an impact on Crown disclosure and third party production issues,

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80 *Ibid.* at para. 37.

81 Pursuant to the *McCraw* case, psychological harm arising from a sexual assault is considered to be a form of bodily harm (*R.* v. *McCraw*, [1991] 3 S.C.R. 72).

82 *R.* v. *Stinchcombe*, [1991] 3 S.C.R. 326.

83 An amendment of charging practices would result in increased numbers of prosecutions for the "higher-level" sexual assault causing bodily harm and aggravated assault offences. From the standpoint of victims, the current habit of charging sexual assault *simpliciter* amounts to undercharging many offenders: see J. Roberts & M. Grossman, "Changing Definitions of Sexual Assault: An Analysis of Police Statistics" in J. Roberts & R. Mohr, eds., *Confronting Sexual Assault: A Decade of Legal and Social Change* (Toronto: University of Toronto Press, 1994) 57 at 66.

even under the new Bill C-46 legislation, which restricts disclosure and production of victims' records in sexual offence proceedings.[84] By emphasizing the Crown's burden, Sopinka J. has reminded judges that the Crown must have a very significant evidential basis for establishing aggravating factors. If the Crown's burden is heavy and an offender is to have the benefit of reasonable doubts, the offender should be put into the position to be able to raise reasonable doubts. The Crown's burden would be diminished in practice if only the Crown had the resources to speak to the issues of aggravating factors, and the offender lacked the resources to make an effective response. In light of *McDonnell*, it will now be very difficult for the Crown to allege psychological harm in the context of sexual offences without making available to the defence the various records, notes, and other materials bearing on proof of the allegation.

3. Sentence Appeals Post-*McDonnell*

McDonnell does not strip appellate courts of the jurisdiction to review the fitness of sentences. It does remind appellate courts of the deference that should be extended to sentencing judges. The Supreme Court confirmed that a sentence should be judged to be fit, so long as it is not clearly unreasonable; in assessing unreasonableness, appellate courts should consider whether the sentencing judge erred in principle, failed to consider properly all relevant facts, or ordered a manifestly unfit sentence. *McDonnell* does not prevent an appellate court from interfering with a sentence that is too high, or a sentence that is too low. *McDonnell* is no recipe for appellate court passivity or acquiescence in the face of undeserved sentences.

McDonnell does not forbid appellate courts from providing guidance in the interests of uniformity and equitable treatment of offenders. It does caution appellate courts against hardening guidelines into minimum sentences. While appellate courts must be cognizant of the limitations on their data, resources, and conceptual apparatus, appellate courts do have greater resources for reviewing sentences intra- and inter-provincially than most lower court judges. Appellate courts should give lower courts the benefit of their research and analyses, and help to show the broad ranges of penalty that should accompany different types of moral blameworthiness.

McDonnell does not force appellate courts to endorse the lowest conceivable sentences for offenders, regardless of the circumstances. It does remind appellate courts that a sentence at the low end of the appropriate range may still be a fit sentence. *McDonnell* should serve as a reminder to appellate courts of the "ladder" approach to sentencing implicit in ss. 718.2(d) and (e) of the *Criminal Code* quoted above — the notion that a sentence should be the least restriction on liberty proportionate to the gravity of the offence and the degree of responsibility of the offender. Low sentences may not have popular appeal. They may, however, as an empirical matter, be effective; they may also have the virtue of being just.

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[84] *An Act to Amend the Criminal Code (production of records in sexual offence proceedings)*, S.C. 1997, c. 30; in force May 12, 1997.