CHAPTER 8 / D. SCHARIE TAVCER

Sentencing

LEARNING OUTCOMES

After reading this chapter, students will be able to:

- ❒ Compare the purpose, principles, benefits, and limitations of sentencing in Canada.
- ❒ Understand the sentencing process, including how judges make sentencing decisions.
- ❒ Comment on the involvement of victims of crime in the sentencing process.
- ❒ Describe the various types of dispositions.
- ❒ Describe the grounds for appealing a sentence or a conviction.
- ❒ Explain the objectives of Indigenous restorative justice remedies and specialized courts.

CHAPTER OUTLINE

Introduction

> 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 taking into account the needs and current conditions of and in the community. (*R v M (CA)*, 1996)

Sentencing in Canada has remained fairly consistent since formalized courts, at both the federal and provincial levels, were established shortly after Confederation in 1867. Once an accused person is convicted (found guilty) of a crime, the court must decide on an appropriate sentence. Sentencing is one of the most challenging and controversial aspects of our justice system. The public has strong opinions about it, the media reports its perspective, and the written law has its framework. In addition to all of that, there are the individuals affected by the crime—victims and offenders—who also have a broad range of religious, social, cultural, and moral values and views that influence their perspectives on sentencing. Regardless of any opinion or belief, a judge must adhere to the sentencing guidelines within the *Criminal Code*.

Principles of Sentencing

Sentencing involves handing out a prescribed punishment to the convicted offender, taking into consideration that an appropriate sentence can deter the individual from

committing future crimes, as well as rehabilitate the individual. There are many different types of sentences. Formally called **dispositions**, the different types of sentences can be found attached to each offence within the *Criminal Code*.

disposition
A judicial determination or sentence that is given to a person who has been convicted of an offence.

Although written in black and white, sentencing raises a number of complicated questions. Should the disposition support Canada's judicial goal of maintaining order in society? Will this disposition deter other potential offenders from committing similar crimes? Does the disposition acknowledge society's support in rehabilitating this offender? Does the disposition **denounce** victimization? Answers to these questions may seem straightforward at first, but, in reality, they are complex. What is an "appropriate" sentence, and who defines it? How can we be certain that a punishment will indeed prevent future crimes? How do we know whether the convicted offender can be rehabilitated? What is the overriding purpose of sentencing—to protect society, or to rehabilitate or punish offenders? Moreover, judges can exercise their discretion for most offences, meaning that although specific disposition parameters are articulated in the *Criminal Code*, judges have options in most cases. Offences for which judges have fewer options are those that have an articulated mandatory minimum term of incarceration. We will discuss this topic later in this chapter.

denounce
Condemn or criticize another's actions.

Aside from all of that, we must acknowledge that regardless of how long or tough sentences may be, in most cases, offenders will eventually get out of prison. This point raises further questions, such as, Did prison prepare the offender to **reintegrate** into and be a productive member of society? What sentencing mechanisms are in place if he or she does not reintegrate into society in a pro-social manner?

reintegrate
The return of offenders to society as law-abiding and productive citizens.

Section 718 of the *Criminal Code* clarifies how sentences should be decided and delivered. It lists six principles of sentencing that are intended to guide judges in each sentence they hand down:

> (a) to denounce unlawful conduct … ;
> (b) to deter the offender and other persons from committing offences;
> (c) to separate offenders from society, where necessary;
> (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 harm done to victims and to the community.

Denunciation Model

Quite simply, at its foundation, the denunciation model puts into practice dispositions that are meant to denounce the offender's conduct in the form of punishment. Also known as the *retributive model*, it maintains that punishment should be equal to the harm done (i.e., equal to the harm on the victim or business) and that offenders should be punished no more or no less severely than their actions warrant. The focus here is on the *crime* committed rather than on any attributes (positive or negative) of the individual offender. For example, John is convicted of assault with a prior history of assault; the denunciation model purports that he should be given the same sentence as Joe, who has also been convicted of assault and has a prior history of assault. However, imagine that John has a history of addiction and is Indigenous and young: Should his sentence take these factors into consideration (mitigating or reducing the sentence)? What if Joe's history includes corporate crimes and Joe is Caucasian and middle-aged? According to

the denunciation model, both offenders should be given the same disposition. In theory, it may make sense to base the disposition only on the crime committed—and a judge takes this logic into consideration—but in practice, sentencing is often not based *solely* on the offence.

The denunciation model maintains that while sentences are determinate (will eventually end), they should be shorter rather than longer. For example, advocates of this approach might support a sentence of seven years for assault with a weapon with no opportunity to apply for **parole**. By contrast, supporters of the deterrence or selective incapacitation models, discussed below, would prefer a longer sentence with no opportunity to apply for parole, and supporters of the rehabilitation model would prefer a shorter sentence with mandated treatment and an opportunity to apply for parole.

parole
A type of conditional release from a federal penitentiary such as escorted temporary absence, day parole, full parole, or statutory release. Just because an offender is eligible to apply for parole does not guarantee that it will be granted.

Think for a moment about the conditions an offender experiences in prison: limited connection to the outside world, shared housing with other (sometimes violent) offenders, restricted freedom, and limited recreation. These conditions may satisfy the public appetite for revenge. However, will depriving a person in this way necessarily develop a "better" person, or might the harsh conditions of prison cause psychological damage to the offender? In what ways might an offender be changed—for better or worse—by prison once he or she is released? Retribution can quench a public thirst for "justice" by imposing harm on an offender as he or she has done on the victim(s), but does retribution work in achieving the goal of a safer society?

Deterrence Model

The concept of **deterrence** plays a key role in sentencing—the objective being to deter not only current offenders from committing future crimes but also potential offenders. This crime-control model is based on protecting society and reforming the offender. Cesare Beccaria (1738–1794) argued that the purpose of law and punishment is to create a better society, not to enact revenge (as in the retributive model). Beccaria believed that law is most effective when the punishment is swift, severe, and certain. However, if the causes underlying an individual's choice to steal, for example, involve factors such as addiction and poverty, it may be that no law would deter him or her from committing that crime again because the root causes (in this case, poverty and addiction) remain. Think about it: the *Criminal Code* has 467 sections of laws and more than ten additional acts, yet every day many of those laws are broken. Why is that? Does deterrence really work?

Many people commit crimes despite being fully aware of the consequences of being caught. Do you think harsher sentences would deter crime, or might they potentially make crime worse?

deterrence
Disincentive to commit a crime, controlled by the person's fear or threat of getting arrested and incarcerated.

Laws and dispositions are meant to control deviant behaviour and protect society. In order to achieve these goals, deterrence is understood to fall into two categories: specific and general. *Specific* deterrence is meant to discourage the offender from committing future crimes, while *general* deterrence is meant to discourage all other potential offenders (and the general public) from committing such crimes. That is, if the sentence is severe enough, it will deter others from committing similar criminal acts. As such, proponents of the deterrence model generally favour longer sentences.

What disposition is a suitable deterrent for a particular crime and offender? If the disposition involves incarceration, how long should that sentence be? If a sentence is too lenient, it might send the message that sentencing is not to be feared; in other words, it might fail to deter. If a sentence is too harsh, the message might be that the justice system is excessively punitive, which could, in turn, produce a backlash of more criminal activity. For example, if the minimum sentence of incarceration for armed robbery were ten years in prison (instead of five, for a first offence), armed robbers might decide to kill their victims to reduce their chances of being identified and caught. Further, the various sentencing dispositions also provoke questions about the logic and value behind their creation: Who decides that one crime is more "harmful" than another? For example, a conviction of sexual assault (*Criminal Code*, s 271) does not carry a minimum term of incarceration. That means the judge has discretion to issue a fine or probation instead of a prison sentence. Conversely, a conviction of trafficking in a substance (*Controlled Drugs and Substances Act*, s 5(1)) carries a minimum punishment of imprisonment for one year if certain circumstances (e.g., use of violence or a weapon) are present. This means that when the offence is committed within these circumstances, a judge has no choice but to send the offender to prison.

What Do You Think?

Recall the case study on Matt and Robbie that begins Part One of this text, and the sentence you had suggested for Matt. Try to consider your sentence in terms of deterrence: In what ways, if any, does it reflect specific and/or general deterrence?

Selective Incapacitation Model

The selective incapacitation model is based on the idea that if someone is removed from society, that person will no longer be a threat. The belief is that by removing or restricting an offender's freedom, it makes it almost impossible for him or her to commit another crime. However, while it is true that such an offender would not be able to victimize anyone in society, he or she might victimize a fellow inmate or a member of the correctional staff in the institution. What about when the offender is eventually released? Will he or she stop victimizing people (with or without treatment) then?

While both the selective incapacitation and deterrence models focus on punishing offenders for the express purpose of protecting society, the selective incapacitation model favours much longer sentences. This approach is generally taken with offenders who have lengthy criminal histories. Long prison sentences are considered a good idea because removing habitual or career offenders from society for an extended period is thought to decrease the overall crime rate, and some research supports this thinking (Malsch & Duker, 2012; Vollard, 2012). Further, some research suggests that the cost of incarcerating repeat offenders is offset by public savings elsewhere. Studies by Zedlewski (1983, 1985, 2009) have concluded that for every $1 spent on incarcerating an offender, there is a larger saving to society in terms of social costs (such as insurance premiums for businesses and taxes to pay police).

However, critics believe that justifications for the selective incapacitation model are flawed because they cannot prove the cause–effect relationship between punishing one offender with life imprisonment and reducing the overall rate of various crimes. Further, incapacitating criminals protects society only while the offenders are in prison. The fact is, almost all incarcerated offenders will be released from prison eventually, and some research supports the position that after offenders have served their prison terms, they may actually be more predisposed to committing further crimes (as cited in Clear, 1994), especially if the reasons they committed crimes in the first place have not been addressed.

Rehabilitation Model

The rehabilitation model takes the approach that when offenders are treated in humane ways, they are far more likely to lead crime-free lives once released from prison. In this view, communities, individuals, and the state all have a role in repairing the harm done by an offender's actions. Treatment programs and case management are designed to "correct" the offender's anti-social behaviour and treat his or her personality "flaws" in the hope that what was once learned can be unlearned and that new pro-social coping behaviours can be established. The basis for this approach is rooted in the belief that offenders have many layers—they are not "just" criminals—and that their social and psychological experiences (e.g., lack of education, living in poverty, or enduring childhood abuse) have influenced their criminal thinking and decision-making. Therefore, treatment is necessary if society wants an offender to be a "changed person" when he or she returns to society. Since every offender is different and his or her accompanying social and psychological issues are different, the type and length of treatment available to offenders should likewise be varied. Advocates of rehabilitation-based sentencing believe that prisons should have a range of programs available to assist the variety of offenders housed within.

A rehabilitation approach, of course, requires a long-term commitment from federal and provincial governments to fund programs and staff. Regardless of which political party is in power, we often hear society debate the merits of investing millions of dollars on rehabilitating offenders. Further, the success of rehabilitation programs is itself the subject of much debate. Many argue against spending valuable resources on programming in prison, while others believe in its inherent value, especially when programs and offender needs are matched effectively (Andrews et al., 1990, p. 400).

What Do You Think?

In the Part One case study, consider the offender, Matt. When the offence occurred, Matt was 20 years old. At this stage in Matt's life, what programs would you recommend that could successfully support his rehabilitation?

Restorative Justice Model

The restorative justice model of sentencing focuses on repairing the various harms that have occurred as a result of a criminal act. This model recognizes that crime causes harm that can be felt by an individual, a business, and/or a community, and that crime is harmful to the victim, the victim's family, the offender, and his or her family as well. The belief is that by repairing this harm—emotional and material—offenders will understand the consequences of their actions and be deterred from committing future crimes, and that the community and its members will be healed and able to collectively continue on without fear. This model is about bringing people together to respond to crime, its causes, and its consequences. It is based on the idea that those responses should not punish the

offender, but should instead put conditions in place to restore the victim, offender, and community to the state they were in before the crime occurred, insofar as that is possible.

Maximum punishments for all crimes are supported by proponents of restorative justice, although minimum punishments are not. Instead, judicial discretion is valued and preference is given to a wide range of dispositions that may fit the offender, victim(s), and the community better than incarceration. In other words, for many crimes, sentences such as fines, community service (e.g., repairing the broken store window caused by a break-in), financial compensation to victims, reconciliation (mediation between victim and offender), and apologies (to individuals and the community) are favoured over imprisonment. Our criminal justice system is typically adversarial, but efforts are being made in some cities to include restorative justice methods in dispositions. Specialized courts, discussed later in this chapter, are examples of such efforts.

SIDEBAR

What Are the Numbers for Incarcerated Indigenous People?

Canada's population at the end of 2016 was 36,443,632 (Statistics Canada, 2016a). Data from the 2011 National Household Survey (NHS) showed that 1,400,685 people in Canada had an Aboriginal identity and that this population represented 4.3 percent of the total Canadian population. In comparison, 3.8 percent of the population identified as Aboriginal in the 2006 census, 3.3 percent identified as Aboriginal in the 2001 census, and 2.8 percent identified as Aboriginal in the 1996 census (Statistics Canada, 2013). However, Aboriginal people currently account for 23.2 percent of the total inmate population. Moreover, approximately 3,500 Aboriginal people are in federal penitentiaries on any given day. The overrepresentation of Aboriginal adults was more pronounced for females than males. Aboriginal females accounted for 38 percent of female admissions to provincial/territorial sentenced custody, while the comparable figure for Aboriginal males was 24 percent. In the federal correctional services, Aboriginal females represented 31 percent, while Aboriginal males accounted for 22 percent of admissions to sentenced custody. Aboriginal women offenders comprise 33 percent of the total inmate population under federal jurisdiction (Office of the Correctional Investigator, 2016).

What Do You Think?

Reflect on the statistical realities for Indigenous offenders while considering the models of sentencing previously presented. How might we explain the growing overrepresentation of Indigenous people in our prisons?

How Does a Judge Decide on a Sentence?

Regardless of whether an offender was found guilty by a judge or by a jury, it is the judge (or justice) presiding over the trial who decides on an appropriate disposition. It can include a period of incarceration, a term of probation, a fine, and/or a conditional sentence, or all of these, among others. Ideally, the same trial heard in different courtrooms by different judges should result in the same or similar dispositions. However,

in reality, a judicial decision means judicial discretion—the judge who is deciding what an appropriate disposition will be is, of course, a human being. Despite the requirement that all judges be unbiased in their rulings, they are men and women, embedded within society's fabric, who have histories of their own and who are potentially affected by events, opinions, and experiences. Not surprisingly, then, judicial discretion creates disparity. **Disparity** is the notion that differences exist, not necessarily due to intentional prejudice, but as a result of a judge's beliefs and philosophies. Disparity is simply that there are differences between how one judge will sentence an offender compared to how another judge may sentence the same offender. This disparity has caused concern and has led to demands that judicial discretion be controlled. The follow-up question would be, How can that be achieved? Judges must sentence a convicted person according to the terms set out in the *Criminal Code* for that offence, but in many cases, there is leeway.

disparity
A difference or inconsistency in rulings and/or dispositions among judges.

Issues in Sentencing

Judicial Discretion

The Canadian Criminal Justice Association (CCJA) has recommended that sentences "be based on individual contextual factors relating to each offence, rather than legislated minimums that result in ineffective, expensive, and unduly harsh periods of incarceration" (Canadian Criminal Justice Association [CCJA], 2006). In this light, the discretion of individual judges is an important factor. Judicial discretion has been addressed by other legislation throughout the history of Canada's *Criminal Code*. In 1996, Bill C-41 (the *Strengthening Military Justice in the Defence of Canada Act*) came into force, enacting a comprehensive reform of the law of sentencing. It clarified how sentences should be decided and delivered and introduced the six principles of sentencing in s 718 of the *Criminal Code* (discussed earlier in this chapter).

Mandatory Minimum Sentences

In 2012, Bill C-10 (the *Safe Streets and Communities Act*) was enacted. Among other things, it aimed to eliminate judicial discretion and disparity by directing mandatory minimum terms of incarceration for specific offences. Although there is support behind the premise, critics argue that it cannot be ignored that what led Bob to commit an armed robbery could be very different circumstances from what led Sam to commit the same offence (e.g., addiction, being a survivor of abuse, thrill-seeking). If these circumstances are not addressed, the result may be an unduly harsh sentence for one person and an overly lenient sentence for another.

The *Safe Streets and Communities Act* brought together nine smaller bills and is commonly referred to as the Omnibus Crime Bill. It followed a deterrent model in the belief that "getting tough" with harsher sentencing would deter crime. However, as discussed in Chapter 1, statistical evidence shows that violent crime had been steadily decreasing *prior to* the enactment of the *Safe Streets and Communities Act*. The police-reported crime rate, which measures the volume of crime per 100,000 population, continued to decline in 2012, down 3 percent from 2011. After peaking in 1991, the police-reported crime rate has generally declined and, in 2012, it reached its lowest level since 1972 (Boyce, 2015, pp. 4–5).

Currently, 29 offences in the *Criminal Code* carry a mandatory minimum sentence of imprisonment. The majority (19) of these sentences were introduced in 1995, with the

enactment of Bill C-68, which focused on crimes of repeat violent offenders and crimes involving firearms. In 2012, the *Safe Streets and Communities Act* added ten more offences.

Currently, mandatory minimum sentences in Canada can be broken down into four principal categories:

1. A mandatory life sentence, imposed upon conviction for treason, first-degree murder, second-degree murder, and manslaughter.
2. Mandatory minimum sentences primarily for firearms offences.
3. Mandatory minimum sentences for repeat offenders.
4. Mandatory minimum sentences for offences when the victim is under age 16.

Several offences carry mandatory minimum terms of incarceration—the theoretical basis of which is deterrence, the protection of society, and denouncing an individual's repeat offending (see Table 8.1). These sentences are "prescribed," which means that a judge has no discretion. Concerns have been raised that mandatory minimums could lead to unfair sentencing in cases where public interest and individual mitigating circumstances could support a more lenient sentence. One well-known example is the Robert Latimer case (see "Mini Case Study—Robert Latimer"). Conversely, some serious crimes carry no mandatory minimum term of incarceration. For example, in the case of an individual convicted of sexual assault (*Criminal Code*, s 271) or sexual assault with a weapon (s 272) where the weapon was not actually used and the victim was over the age of 18, the presiding judge has the discretion to sentence the offender to a term of probation with no incarceration.

What Do You Think?

Should the *Criminal Code* be revised so that sexual assault convictions carry a mandatory minimum term of incarceration? Would doing so reduce the number of sexual assaults?

TABLE 8.1 Mandatory Minimum Sentences Under the Criminal Code

Criminal Code section	Offence	Mandatory minimum sentence
47(1)(4)	High treason	25 years
85*	Using a firearm during the commission of an offence	• 1 year: first conviction • 3 years: subsequent convictions
	Using an imitation firearm during the commission of an offence	• 1 year: first conviction • 3 years: subsequent convictions
92(1)	Possession of a firearm	No minimum • 1 year: second conviction • 2 years less a day or less: subsequent convictions
95	Possession of a prohibited or restricted firearm with ammunition	*Indictable offence:* • 3 years: first conviction • 5 years: subsequent convictions *Summary offence:* No minimum, but 1 year maximum
96	Possession of a weapon obtained by the commission of an offence	*Summary offence:* No minimum, but 1 year maximum
99*	Weapons trafficking with a restricted firearm or with organized crime	• 3 years: first conviction • 5 years: subsequent convictions

Criminal Code section	Offence	Mandatory minimum sentence
100*	Possession for the purpose of trafficking firearms	• 3 years: first conviction • 5 years: subsequent convictions
	Possession for the purpose of trafficking in other cases	1 year
103*	Importing or exporting a prohibited firearm	• 3 years: first conviction • 5 years: subsequent convictions
212(2)†	Living off the avails of child prostitution	2 years
212(2.1)†	Aggravated offence in relation to living off the avails of child prostitution	5 years
220	Criminal negligence causing death	No minimum
	Criminal negligence causing death with a firearm	4 years
237	Infanticide	No minimum, but 5 years maximum
239*	Attempted murder	No minimum
	Attempted murder with a firearm	4 years
	Attempted murder with a restricted firearm and with organized crime	• 5 years: first conviction • 7 years: subsequent convictions
244*	Discharging a firearm with intent to commit indictable offence	4 years
	Discharging a restricted firearm with intent or in relation to organized crime	• 5 years: first conviction • 7 years: subsequent convictions
253	Operation of a motor vehicle while impaired	*Indictable offence:* No minimum, but 5 years maximum *Summary offence:* • $1,000 fine: first conviction • 30 days: second conviction • 120 days: subsequent convictions
	Operation of a motor vehicle while impaired and causes bodily harm	No minimum, but 10 years maximum
	Operation of a motor vehicle while impaired and causes death	No minimum, but 10 years maximum
	Having blood alcohol content over .08%	*Indictable offence:* No minimum, but 5 years maximum *Summary offence:* • $1,000 fine: first conviction • 30 days: second conviction • 120 days, and 18 months maximum: subsequent convictions
254(5)	Failing/refusing to provide a breath sample	*Indictable offence:* No minimum, but 5 years maximum *Summary offence:* • $1,000 fine: first conviction • 30 days: second conviction • 120 days: subsequent convictions

Criminal Code section	Offence	Mandatory minimum sentence
271	Sexual assault	*Indictable offence:* No minimum, but 10 years maximum *Summary offence:* No minimum, but 18 months maximum
	Sexual assault when complainant under 16	*Indictable offence:* 1 year *Summary offence:* 90 days
272*	Sexual assault with a weapon or threat of a weapon, threats to a third party, or causing bodily harm	No minimum, but 14 years maximum
	Sexual assault with a weapon or threat of a weapon, threats to a third party, or causing bodily harm, with a restricted firearm or with organized crime	• 5 years: first conviction, and 14 years maximum • 7 years: subsequent convictions, and 14 years maximum
	Sexual assault with a weapon or threat of a weapon, threats to a third party, or causing bodily harm, with a restricted firearm	4 years, and 14 years maximum
	Sexual assault with a weapon or threat of a weapon, threats to a third party, or causing bodily harm, complainant under age 16	5 years, and 14 years maximum
273*	Aggravated sexual assault	No minimum, but life maximum
	Aggravated sexual assault with a restricted firearm or with organized crime	• 5 years: first conviction, and life maximum • 7 years: subsequent convictions, and life maximum
	Aggravated sexual assault with a restricted firearm	4 years, and life maximum
	Aggravated sexual assault, complainant under age 16	5 years, and life maximum
279*	Kidnapping	No minimum, but 10 years maximum
	Kidnapping with a restricted firearm or with organized crime	• 5 years: first conviction • 7 years: subsequent convictions, and life maximum
	Kidnapping with a restricted firearm	4 years, and life maximum
	Kidnapping, complainant under age 16	5 years, and life maximum
286.3(2)	Procuring under 18 years	5 years, and 14 years maximum
344*	Robbery	No minimum, but life maximum
	Robbery with a restricted firearm or with organized crime	• 5 years: first conviction, and life maximum • 7 years: subsequent convictions, and life maximum
	Robbery with a restricted firearm	4 years, and life maximum
346*	Extortion	No minimum, but life maximum
	Extortion with a restricted firearm or with organized crime	• 5 years: first conviction, and life maximum • 7 years: subsequent convictions, and life maximum
	Extortion with a restricted firearm	4 years, and life maximum

* Can now be sentenced consecutively.
† Repealed, 2014.

MINI CASE STUDY

Robert Latimer

The Robert Latimer case (*R v Latimer*, 2001) is for various reasons one of the most famous in Canadian history. It sparked fierce national debates on the issues of mandatory minimum sentences and euthanasia, sometimes referred to as "mercy killing." Here is a timeline of the case:

- October 1993: Robert Latimer, a Saskatchewan farmer, kills his severely disabled 12-year-old daughter Tracy by placing her in his pickup truck and asphyxiating her with exhaust fumes. He initially tries to hide his actions, but later admits to poisoning his daughter. He is charged with first-degree murder.
- Fall 1994: Latimer admits during his trial that he killed Tracy, but suggests his actions were justified because he wanted to put an end to the chronic pain that she suffered.
- November 1994: Latimer is convicted of second-degree murder. The judge has no choice in sentencing because this offence carries a mandatory sentence of life in prison, and requires offenders to serve a minimum of ten years in jail before applying for parole. Latimer appeals his conviction and the sentence.
- July 1995: The Saskatchewan Court of Appeal upholds the conviction (i.e., the conviction remains).
- October 1995: It is revealed that the Crown prosecutor interfered with the jury by asking them about their beliefs pertaining to religion, abortion, and mercy killing, which leads to a further appeal.
- November 1996: The Supreme Court of Canada hears the appeal.
- February 1997: The Supreme Court of Canada orders a new trial.
- November 1997: The jury in the second trial finds Latimer guilty of second-degree murder and recommends that he be eligible for parole after one year, which goes against the mandatory minimum sentence set out in the *Criminal Code*.
- December 1997: The trial judge gives Latimer a "constitutional exemption" to the mandatory minimum sentence of ten years and imposes a sentence of one year in custody followed by one year to be spent in the community. The Crown appeals this sentence.
- November 1998: The Saskatchewan Court of Appeal sets aside the constitutional exemption and upholds the mandatory minimum sentence.
- February 1999: Latimer appeals to the Supreme Court of Canada.
- January 2001: The Supreme Court upholds Latimer's life sentence with no possibility of parole for ten years.
- December 2010: The Parole Board of Canada releases Latimer on full parole.

What Do You Think?

Should the *Criminal Code* be revised so that judges can consider "constitutional exemptions" to minimum terms of incarceration in certain cases, such as Robert Latimer's? What would be the conditions to grant such an exemption, and what consequences

For recent developments on the legalization of physician-assisted dying, see *Carter v Canada (Attorney General)* (2016) and M. Butler, "*Carter v Canada:* The Supreme Court of Canada's Decision on Assisted Dying" (2015). Both are available online.

might there be to individuals and society as a whole of opening the possibility to such exemptions?

In 2016, the Supreme Court of Canada struck down two of the mandatory minimum sentencing reforms put in place by the *Safe Streets and Communities Act*: those pertaining to drugs (in *R v Lloyd*, 2016) and bail conditions (in *R v Safarzadeh-Markhali*, 2016).

In the case of *R v Lloyd* (2016), the Supreme Court ruled six to three that a mandatory minimum sentence of one year in prison for a drug offence violates the *Canadian Charter of Rights and Freedoms*. In its ruling, the court said that the sentence caught in its net not only the serious drug trafficking that warrants such a sentence but also conduct that is "much less blameworthy" (Harris, 2016).

What Do You Think?

1. Do you agree with the Supreme Court of Canada's rulings in *R v Lloyd* (2016) and *R v Safarzadeh-Markhali* (2016)?
2. What model of sentencing does each Supreme Court decision follow (i.e., denunciation, deterrence, selective incapacitation, rehabilitation, or restorative justice)?
3. What consequences might these rulings have for individuals and society as a whole?

In the case of *R v Safarzadeh-Markhali* (2016), the Supreme Court unanimously held that a person who is denied bail because of prior convictions will be able to receive enhanced credit for time served before sentencing. On the grounds that pre-trial custody often involves difficult conditions with no programming options, a person denied bail is normally eligible to get 1.5 days of credit for each day spent in pre-sentence custody. In 2009, the former Conservative government introduced sentencing reforms denying the enhanced credit to persons denied bail because of a previous conviction (Harris, 2016).

So far, we have seen that when making a sentencing decision, judges must consider the following:

- the sentencing limits of the summary or indictable offence;
- the seriousness of the crime;
- a sentencing philosophy; and
- whether the offender can be rehabilitated.

Aggravating and Mitigating Circumstances

Before sentencing, judges must also consider whether any other circumstances were present during the commission of the crime or relevant to the offender's criminal lifestyle. Such circumstances may include whether the offender was acting in self-defence, was under the influence of drugs or alcohol, or was in a position of trust over the victim. These aggravating circumstances or mitigating factors may be presented to the judge in a "pre-sentence report" and should be added to the list of factors for the judge's consideration.

aggravating circumstances
Factors of the crime or life circumstances of the accused, which may permit the judge to allocate a more severe disposition, including specifying a length of time in prison before the offender is eligible to apply for release.

Aggravating circumstances can often result in a more severe sentence than would be imposed in a case without such circumstances or in contrast to the average sentence length for a particular offence. This means that despite the general parameters of a disposition (its mandatory minimum and the maximum term listed in the *Criminal Code*), if any one or more of these circumstances were present during the commission of the offence, the judge may choose to increase the sentencing penalty. Such circumstances could be as follows:

- The offender was in a position of trust and authority over the victim.
- There was premeditation and planning.
- The offender used force or a weapon.
- There was injury to the victim.
- There was high financial or personal value of the stolen or damaged property or goods.
- The victim was a youth or a vulnerable person, such as a senior citizen or someone with a developmental disorder.

Non-offence factors could also affect the severity of a sentence. An offender with a long criminal record may receive a harsher sentence than a first-time offender for the same offence. The judge would consider how much time had passed since the offender's last conviction (sometimes called the **gap principle**), and whether the offence was committed while the offender was out on bail or on probation, or on some form of conditional release, such as parole. Also weighing against the offender may be whether he or she interfered with the police investigation, lied to the police, escaped from lawful custody, or gave a false identity.

non-offence factors
Factors that are not directly a part of the offence, but which could impact the type and length of a sentence; for example, whether the offender has a lengthy criminal record or is a first-time offender, or hindered the police investigation.

gap principle
A term used to describe how much time (in days, months, or years) has passed from the offender's last conviction (not arrest) to the current conviction.

Mitigating circumstances are factors that may make the sentence more lenient. Such circumstances would mitigate a sentence—that is, provide reasonable explanations for how and why the offence occurred. These circumstances are not considered excuses in order to avoid criminal responsibility; they are considered practical elements that speak to the fact that people are fallible, have complex histories, and may be dealing with a variety of issues that can influence their decision-making. Here are some circumstances that might be taken into consideration:

mitigating circumstances
Factors of the crime or life circumstances of the accused that may permit the judge to allocate a more lenient disposition in keeping with the parameters outlined in the *Criminal Code*.

- The accused was acting in self-defence.
- The accused was intoxicated or has a history of addiction.
- There was no premeditation.
- The crime was of financial need rather than greed.
- The accused has mental health issues that may reduce his or her decision-making capabilities.
- The accused is Aboriginal (*Criminal Code*, s 718.2(e)).
- The accused is a senior with a short life expectancy because of a chronic or terminal illness.

Under s 718.2 of the *Criminal Code*, a judge is required to consider several factors when determining an appropriate sentence, and that "sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender," without ignoring evidence that the offence was motivated by prejudice, the offender was in a position of trust, or other such factors (see "Sidebar—Determining the Sentence").

SIDEBAR

Determining the Sentence

The following passage from s 718.2 of the *Criminal Code* presents several considerations that a judge must take into account when determining a sentence:

> (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,
>
> (ii) evidence that the offender, in committing the offence, abused the offender's spouse or common law partner, … [or] a person under the age of eighteen years,
>
> (iii) evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim, …
>
> (iv) evidence that the offence was committed for the benefit of, at the direction of or in association with a criminal organization,
>
> (v) evidence that the offence was a terrorism offence, …
>
> 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;
>
> (d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and
>
> (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.

SIDEBAR

Sentencing Terminology

Concurrent sentence: A sentence that allows the convicted offender to serve two or more sentences simultaneously; the total time the offender serves is equal to the longest sentence.

Consecutive sentence: A sentence in which the convicted offender serves two or more sentences one after the other; the total time the offender serves is equal to the total time of the sentences imposed.

Sections 718.01 and 718.02 of the *Criminal Code* state that sentencing for offences involving child abuse, assaulting a police officer, or intimidation of anyone involved in the justice system should also "give primary consideration to the objectives of denunciation and deterrence of such conduct." Section 718.1 requires that the sentence must be proportionate to the gravity of the offence and the degree of responsibility of the

offender. This requirement means that the sentence given for an offence should not be extreme—basically, *not* in accordance with an "eye for an eye," but rather that the offence and the sentence must align.

Section 718.2(e) of the *Criminal Code* is another sentencing guideline that addresses the overrepresentation of Indigenous people in Canadian prisons. The Supreme Court of Canada upheld this sentencing section in *R v Gladue* (1999). It stated that where a term of incarceration would normally be imposed, judges must consider the unique circumstances of Indigenous people in deciding whether imprisonment is absolutely necessary. Specifically, judges must consider the following:

- the systemic factors that may have contributed to the criminal behaviour of the Indigenous individual; and
- the specific sentencing procedures and sanctions that may be more appropriate. These may include such things as restorative justice and healing practices (Griffiths & Cunningham, 2003, p. 201).

However, in subsequent cases (e.g., *R v Wells*, 2000), the Supreme Court of Canada held that s 718.2(e) of the *Criminal Code* should not have an impact on the fundamental duty of sentencing—that judges should impose a sentence that is appropriate for the offence and the offender (Griffiths & Cunningham, 2003, p. 202). In other words, judges are not required to be more lenient on Indigenous offenders or to automatically reduce a sentence on the basis of the offender's race. As Justice Iacobucci remarked in *Wells*, "particularly violent and serious offences will result in imprisonment for aboriginal offenders as often as for non-aboriginal offenders" (para. 44). Instead, s 718.2(e) acknowledges that a proportional sentence must be one that is reached "with sensitivity to and understanding of the difficulties aboriginal people have faced with both the criminal justice system and society at large" (*R v Gladue*, 1999, para. 81). This point was reiterated by the Supreme Court of Canada in *R v Ipeelee* (2012).

To learn how the judge who presided over Matt's case (see the Part One case study) used s 718.2(e) in reaching his decision, see the "Conclusion" chapter of this text.

SIDEBAR

The Gladue Factors

The Supreme Court of Canada's decision in *R v Gladue* (1999) resulted in a series of guidelines for judges when considering suitable dispositions for Indigenous offenders. Section 718.2(e) of the *Criminal Code* states: "all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders." Known as the *Gladue* factors, these guidelines provide judges with a set of considerations that are specific to Canada's Indigenous population in light of the lengthy ramifications of Canada's *Indian Act*. The guidelines take the following into consideration:

For more on the *Gladue* decision and its implications, see Chapter 11.

- Substance abuse—personally, in the immediate family, extended family, and community.
- Poverty—as a child, an adult, within an offender's family, or community.
- Overt/covert racism—in the community, by family members, strangers, school, or workplace.
- Family—quality of relationships, divorce, family involvement in crime, residential. school attendance of individual or family members, abandonment, etc.
- Abuse—sexual, emotional, physical, and spiritual.
- Unemployment—low income, lack of employment opportunity.
- Lack of educational opportunities.
- Dislocation from an Aboriginal community.
- Group/community experiences of discrimination.
- Foster care or adoption—age, length of time, by non-Aboriginal family. (Maurutto & Hannah-Moffat, 2016, p. 456)

Another important outcome of the *Gladue* decision was the establishment of specialized courts for Indigenous offenders. Known as "*Gladue* courts," these regular criminal courts employ a unique sentencing approach that is assisted by a team of specially trained experts who prepare materials (i.e., a *Gladue* report) to support the judge's application of s 718.2(e) of the *Criminal Code* and the *Gladue* factors.

If requested, a pre-sentence report (PSR) can be prepared by a probation officer to help the judge determine an appropriate sentence for an offender. A PSR gives a history of the offender, not only in the context of the crime, and provides the judge with a better sense of the person he or she is sentencing. Such reports are very often used when sentencing youth offenders. A probation officer's PSR could include the following details:

- information on whether the offender has previous convictions or is a first-time offender
- gang activity or criminal associations
- vulnerability of the victim
- multiple incidents committed during the offence
- use or threatened use of a weapon
- the level of brutality used during the offence
- any employment record
- rehabilitative efforts since the offence was committed
- disadvantaged background
- guilty plea and indications of remorse
- length of time to prosecute or sentence the offender
- overall good character

What Do You Think?

In the Part One case study, many mitigating and aggravating factors were present. If you were the judge in this case, how much weight would you place on these factors when determining a suitable sentence for Matt? Does your sentence change when considering the impact the offence has had on the victim?

The Role of Victims in the Sentencing Process

Judges may invite the victims of a crime to prepare a written statement detailing how the crime has impacted their lives, work, health, and relationships. The parameters of this statement, called a victim impact statement, are set out in the subsections of s 722 of the *Criminal Code*. In 1988, prompted by the UN *Declaration of Basic Principles of Justice for Victims of Crime*, all Canadian ministers of justice agreed to adopt a uniform policy statement of victims' rights that would be used to guide their legislative and administrative initiatives in the area of criminal justice (Canadian Resource Centre for Victims of Crime, 2006).

Throughout any trial process, a victim may be called to the stand as a witness to give testimony in response to questions asked by the Crown prosecutor and by defence counsel, but the victim is not permitted to talk freely. A victim impact statement, therefore, offers victims a sense of ownership, allowing them to tell their side of the story, as we saw in the Part One case study. Victim impact statements may assist the judge in determining an appropriate sentence.

Enacted in 2015, the *Canadian Victims Bill of Rights* increased the justice system's acceptance of victims, the recognition of their rights, and their involvement in the system. Historically, victims have been considered witnesses and are involved in the justice system only to give testimony to what they witnessed. They are not told about trial outcomes, adjournments, or arrest processes, and occasionally they had permission to provide the court with a Victim Impact Statement (which gives the judge information about the effects of the crime). Rarely would a VIS be given much weight. The Victims Bill aims to give victims more information and inclusion in the process and to ensure that their VIS would be considered, by judges, when determining a suitable sentence for the convicted person.

Advocates argue that making victims part of the court system recognizes the impact the crime has had on them (and their families). Therefore, doing so grants them their rightful opportunity to address the court directly and share their personal perspectives. Critics argue that expanding victims' rights challenges the very basis of our adversarial legal system and may bias proceedings. Regardless, the *Canadian Victims Bill of Rights* is now legislated; however, judicial discretion may still interfere with its overall purpose, as in a 2016 case where an Alberta judge would not permit the inclusion of a victim impact statement unless it was read by the victim herself. The *Criminal Code* (s 722) and the *Canadian Victims Bill of Rights* give victims the choice of reading the statement themselves or allocating a representative to do so for them (such as the Crown prosecutor). By law, it is up to the judge to permit its inclusion, but seldom is a victim's choice overruled.

Types of Dispositions

According to the Department of Justice Canada (2016b), 64 percent of criminal cases completed in 2011–12 resulted in a finding of guilt (a percentage that is consistent with results from the preceding decade). The remainder of cases were stayed, withdrawn, dismissed, or discharged (32 percent), acquitted (3 percent), or resulted in some other type of decision (1 percent).

Not Criminally Responsible on Account of Mental Disorder

Recall from Chapter 6 that for a determination of not criminally responsible on account of mental disorder (NCRMD), the court must accept that an accused person committed the criminal act, but that he or she lacked a guilty mind when doing so. As was also discussed in Chapter 6, to convict someone of any offence, the Crown must first prove *two* elements:

1. *actus reus* = Latin for "guilty act." The Crown must provide evidence to prove (beyond a reasonable doubt) that the accused committed the criminal act.
2. *mens rea* = Latin for "guilty mind." The Crown must provide evidence to prove (beyond a reasonable doubt) that the accused intended to commit the criminal act (versus self-defence or an accident, etc.).

Judges almost always accept such joint submissions from the Crown and defence. It is important to remember that accused persons found NCRMD are convicted, not acquitted.

Reasons that can affect *mens rea* include mental illness or disease, including episodes of psychosis. As outlined in Chapter 5, independent psychologists or psychiatrists are hired to evaluate the accused in terms of both his or her current mental state and his or her mental state at the time of the crime. In Canada, the Crown and defence typically work together on such cases and put a joint submission together for the court. Their submission clearly states that both sides (Crown and defence) acknowledge that the accused committed the guilty act (*actus reus*), but that due to a mental disorder, the accused did not have a guilty mind (*mens rea*) at the time of the offence. If accepted by the judge, the convicted person will serve a period of incarceration in a forensic mental hospital and his or her conditional release will be determined at review board meetings governed by the province's mental health act.

SIDEBAR

A High-Profile Case of Not Criminally Responsible on Account of Mental Disorder

Allan Schoenborn was found NCRMD in the 2008 stabbing and smothering deaths of his children Kaitlynne, ten, Max, eight, and Cordon, five, in Merritt, British Columbia. In 2015, he was granted the right to request escorted outings into the community. However, as at the writing of this text, the Crown was seeking to have Schoenborn designated a high-risk accused (Grant, 2016). NCRMD offenders designated as high risk are held in custody in hospital and cannot be released by a review board until the high-risk designation is removed by a court (Government of Canada, 2014).

absolute discharge
A finding of guilt without a conviction. It is imposed when considered to be in the best interests of the accused and not contrary to public interest. Offenders given an absolute discharge cannot be charged and retried for the offence.

Absolute and Conditional Discharges

When the court imposes an **absolute discharge**, the offender is found guilty of the offence, but is not convicted (meaning that there is no criminal record). The offender cannot be subsequently charged with and retried on the same offence. However, a record is kept of the absolute discharge and can be used against the offender if he or she commits another crime in the future (John Howard Society of Alberta, 1999).

A **conditional discharge** requires the offender to follow certain rules for a specified time period as set out in a probation order. Once that period has passed without the offender breaking any of the rules, the discharge becomes absolute. If the conditions of the probation order are not followed or the offender commits a new offence while on probation, the offender can be convicted of the original offence and sentenced accordingly.

conditional discharge
Similar to an absolute discharge, a finding of guilt without conviction. It is imposed when an accused is found guilty for a summary offence with no mandatory minimum punishment, and when it is considered to be in the accused's best interest and not contrary to the public's interest. Conditional discharges are accompanied by rules that must be followed.

Suspended Sentence

With a suspended sentence, a conviction is entered, but the judge "suspends" the passing of a sentence for a fixed time period, either with or without a probation order. If the conditions of the suspended sentence (or probation order) are not followed or the offender commits a new offence, the offender can be convicted of the original offence and sentenced accordingly.

Fines

A judge has discretion over whether a fine stands alone as a disposition for a conviction or is combined with other types of dispositions, such as probation and/or incarceration.

Any person convicted of an offence (except if the offence has a minimum term of incarceration) can receive a fine (*Criminal Code*, s 734). For summary conviction offences, the maximum fine is $5,000 (s 787); for indictable conviction offences, there is no limit. Judges will also normally impose a 15 percent victim fine surcharge (s 737) or a restitution order (s 738) (John Howard Society of Alberta, 1999). Table 8.2 shows the mean amount of fines imposed in adult criminal courts in relation to guilty verdicts between 2010–11 and 2014–15.

In 2014–15, fines were imposed in 28 percent of adult criminal court cases. In general, fines can range from small amounts for less serious offences to large amounts for more serious offences. In 2014–15, the median amount of fine imposed was $500 (Statistics Canada, 2016b, 2016c).

Restitution

Restitution involves the offender paying a specified sum directly to the victim for expenses resulting from the crime, such as property loss and/or damage. The amount of restitution is equal to the replacement value of the property. In cases where someone is injured, the restitution may cover medical bills and lost income (John Howard Society of Alberta, 1999). The belief is that "repayment" of the harm done needs to occur in order for the accused to "learn" from his or her mistakes. However, many offenders are financially unable to meet the expectations of the restitution order.

TABLE 8.2 Adult Criminal Courts, Guilty Cases by Mean and Median Amount of Fine

	2010–11	2011–12	2012–13	2013–14	2014–15
Count	76,914	69,853	69,408	70,323	58,939
Mean	$1,093	$1,200	$1,129	$1,372	$1,076
Median	$1,000	$800	$800	$800	$500

Source: Statistics Canada (2016c).

SIDEBAR

Fines, Victim Surcharges, and Restitution Orders

A *fine* is paid by the offender directly to government; the money collected is used to pay for various judicial services and resources. A *victim surcharge* is a monetary penalty paid by an offender to the province or territory where sentencing occurs; the money collected is used to support victims of crime in the jurisdiction. By contrast, a *restitution order* is an order for the offender to pay money directly to the victim(s) of the crime for financial losses incurred as a result of the offender's crime.

Fine Option Program

Offenders sentenced to pay fines may participate in the fine option program, which allows them to pay off their fines through work in the community. They can perform this service in lieu of, or in addition to, the cash payment of fines. The compensation rate is set at provincial minimum wage standards for adults and typically involves some type of community service.

Institutional Fine Option

Offenders who are unable or who refuse to pay a fine may be eligible to "work off" the fine by remaining in a correctional facility. When they have earned enough credits to satisfy the fine, they are released (John Howard Society of Alberta, 1999, pp. 4–5). The period of imprisonment is based on the following calculation:

$$\frac{\text{the unpaid amount of the fine + the costs \& charges of committing the person to prison}}{\text{(divided by) 8 hours per day}} \times \text{the provincial minimum hourly wage}$$

Intermittent Sentence

intermittent sentence
A prison sentence served at designated times (usually weekends), with the offender residing in the community the rest of the time under certain conditions as set out in a probation order.

When a judge sentences an offender to prison for 90 days or less, s 732 of the *Criminal Code* allows the judge to order that the time be served intermittently. An **intermittent sentence** allows the offender to serve the prison sentence at designated times. For example, an offender could serve the prison sentence on weekends so that he or she could still maintain employment during the week to support a family, etc. When not in custody, the offender must comply with the conditions set out in a probation order (John Howard Society of Alberta, 1999, p. 6). If the conditions of the sentence and/or probation order are not followed or the offender commits a new offence, the offender can be sent to prison.

Conditional Sentence

conditional sentence
A prison sentence that is served in the community, under certain restrictions, the primary goal of which is to reduce judicial reliance on incarceration.

A **conditional sentence** is a prison sentence that is served in the community. Time in prison is suspended as long as the offender obeys the rules imposed by the court and is under the supervision of a probation officer. A conditional sentence can be given as an alternative to incarceration for sentences of less than two years, but some offenders are ineligible, such as those convicted of an offence that has a mandatory minimum prison sentence. All conditional sentence orders have mandatory conditions, and they may

also include optional conditions (Canadian Bar Association, British Columbia Branch, 2011). Table 8.3 lists mandatory conditions that must be met by those serving conditional sentences, and some common examples of optional conditions that may be required.

TABLE 8.3 Conditional Sentences: Mandatory and Optional Conditions

Mandatory conditions	Optional conditions
Keep the peace and be of good behaviour.	Do not use drugs and/or alcohol.
Appear before the court when required to do so.	Do not own, possess, and/or carry a weapon.
Report to a supervisor/probation officer by a specified date.	Perform community service within a specified time period.
Remain within the jurisdiction.	Attend a treatment program approved by the court.
Notify the court, the supervisor, or the probation officer in advance of any change of name, address, and/or employment.	Do not associate with known criminal contacts.
	Stay a specified distance away from an individual(s) and/or specific location(s).

MINI CASE STUDY

R v Proulx (2000)

R v Proulx (2000) is another key case in Canadian history that has influenced sentencing. Here, the Supreme Court of Canada's judgment pertained to conditional sentences. In this case, after drinking at a party, the 18-year-old accused decided to drive some friends home in a vehicle that was mechanically unsound. He drove erratically for 10 to 20 minutes, sideswiped one car, and crashed into another. One of the passengers in the accused's car was killed, and the driver of the second car was seriously injured. The accused pleaded guilty to dangerous driving causing bodily harm and dangerous driving causing death. The trial judge sentenced him to 18 months in jail. Proulx appealed, resulting in the Manitoba Court of Appeal substituting the jail time with a conditional sentence. Another appeal was submitted, this time by the Crown, which resulted in the Supreme Court restoring the original jail sentence. The Supreme Court explained that the original sentence was not unfit and that the trial judge did not commit any error that would justify overturning the jail sentence in favour of a conditional sentence (Department of Justice Canada, 2011).

What Do You Think?

1. Search your *Criminal Code* to find whether or not there is a mandatory minimum attached to either of those offences.
2. Do you think a conditional sentence should have stood for this conviction?

Probation

probation
A disposition that is served within the community. Probation orders come with mandatory conditions (e.g., regular check-in with a probation officer; keeping the peace) and often additional restrictions and conditions (e.g., avoidance of certain geographical areas; addiction treatment).

Probation is a sentence that is served in the community. A probation order could follow a period of incarceration or it could be used instead of incarceration. While on probation, the convicted person must follow specific conditions set by the judge for a specified time period under the supervision of a probation officer. All probation orders have a set of mandatory conditions and judges have the discretion of adding further optional conditions that may reflect the particular offending behaviour. Offenders who break any of the conditions of their probation order may be charged with breach of probation (*Criminal Code*, s 733.1) and subject to a term of imprisonment of up to two years. (For information on probation in relation to youth, see Chapter 12.)

In 2013–14, probation was the most common disposition imposed in adult criminal court cases, at 43 percent of all guilty cases. This finding includes sentences of probation alone or in combination with other types of sentences. The median length of probation in Canada during this time period was 365 days (Maxwell, 2015).

Imprisonment

Imprisonment involves taking away an offender's freedom and incarcerating him or her in either a provincial or federal correctional facility. The facility the offender is sent to depends on the length of the sentence (two years less a day = provincial jail; over two years = federal penitentiary). Imprisonment is the most serious disposition available in Canada and is intended as a last resort to be used only when a judge considers less restrictive dispositions are not suitable.

SIDEBAR

Terms of Incarceration for Summary and Indictable Conviction Offences

For *summary conviction offences*, the maximum term of incarceration is six months.

For *indictable conviction offences*, the term varies by offence. Some offences have a minimum term and a maximum term of incarceration; others have no minimum term, but have a maximum term of incarceration; and still others carry the maximum sentence possible, which is life imprisonment.

dangerous offender
A designation that can be applied to an offender who has repeat convictions that shows a failure of restraint, a pattern of offending, and a demonstrable likelihood of causing death or injury to another person. If so designated, the sentence of incarceration imposed can be indeterminate.

Dangerous Offender Designation

Under s 753 of the *Criminal Code*, the Crown can apply to designate an individual as a **dangerous offender**. Any person may qualify who is convicted of a serious personal injury offence (e.g., sexual offence, homicide offence); who poses a danger to the life, safety, or physical/mental well-being of others; and who the Crown has established engages in a pattern of repetitive behaviour. Section 753 allows the court to impose on a dangerous offender a sentence of detention in a penitentiary for an indeterminate period of incarceration (i.e., a life sentence) or lesser period.

Long-Term Offender Designation

Section 753.1(1) of the *Criminal Code* describes those offenders who may be subject to a long-term offender application by the Crown, which is any person who meets the following criteria:

> (a) it would be appropriate to impose a sentence of imprisonment of two years or more for the offence for which the offender has been convicted;
> (b) there is a substantial risk that the offender will reoffend; and
> (c) there is a reasonable possibility of eventual control of the risk in the community.

If designated as a long-term offender by the court, the offender will be given a sentence of imprisonment of at least two years, followed by a period of supervision in the community not exceeding ten years (a long-term supervision order).

What Do You Think?

In the Part One case study, did Matt qualify for a dangerous offender designation, a long-term supervision order, or neither?

Appealing a Sentence or a Conviction

> The right to appeal a court's decision is an important safeguard in our legal system because a court could make an error in a trial. (Department of Justice Canada, 2016b)

Once the trial has ended and an accused has been convicted, there is the possibility of an appeal, which can be filed by either the Crown or the defence counsel. The finding of guilt (conviction) or innocence (acquittal) can be appealed, as can the sentence. There must be grounds for appeal, however, that involve questions of law, questions of fact, or both. For example, a convicted person who appeals a conviction must be able to show that there was a procedural error (question of law) in the trial, that evidence presented was not correct (question of fact), or that new evidence was discovered (question of fact) that resulted in the offender being found guilty. A convicted person who appeals a sentence must show that the sentence is too harsh or is unconstitutional (according to the Charter). Most appeals originate from the defence. However, the Crown can also appeal a sentence (if it is considered to be too lenient) or the acquittal of an accused person, although the Crown must first be able to establish that a legal error occurred in the first trial (Griffiths & Cunningham, 2003, p. 167). Figure 8.1 presents the structure of the appeals process in Canada.

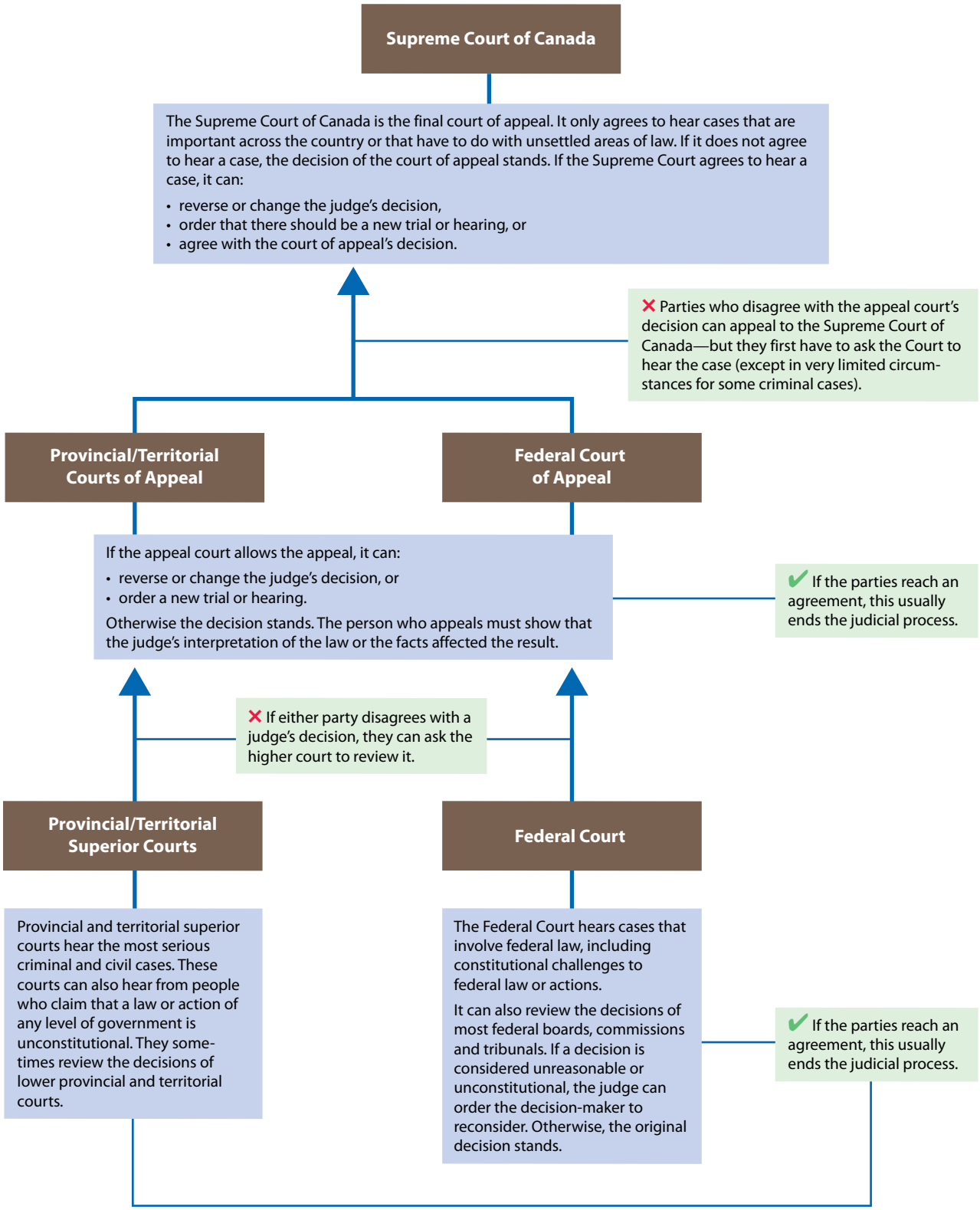
For more on the importance of timely processing of cases and appeals, see "Sidebar—Unreasonable Trial Delay" in Chapter 7.

Once an appeal has been filed, the convicted person may be released from jail on bail until the appeal is heard or **remanded** into custody while the appeal takes place. A judge must consider whether it is in the best interests of society, the court, and the individual to deny bail. Judges must also consider the merit of the appeal to ensure that frivolous appeals do not take up the court's time.

remand
The holding of an accused in custody while the person waits for trial (as opposed to being granted bail, which would allow the individual to live in the community while awaiting trial).

In Ontario, a review was recently undertaken of the appeals management process. The result was the 2016 guideline "Scheduling and Case Management Guidelines for Criminal Appeals" (Court of Appeal for Ontario, 2016). This guideline sets out specific protocols and time limits that must be adhered to for appeals to be heard in a timely manner and managed efficiently.

FIGURE 8.1 The Appeal Process in Canada



Source: Department of Justice Canada (2016a).

Indigenous Restorative Justice Remedies and Specialized Courts

Indigenous Healing Circles

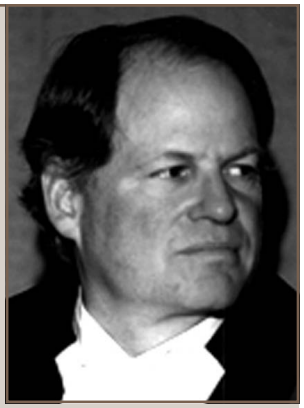
Indigenous culture reflects a belief that all living things—people, animals, and nature—are interconnected. Circles, being inherently inclusive and non-hierarchical, represent respect, equality, continuity, and interconnectedness. Healing circles—gatherings in which people come together to express themselves as equals—have proven to be a very useful tool for addressing criminal behaviour within Canadian Indigenous communities. They support the process of healing for offenders, victims, and their families, and give people a means to reclaim their cultural traditions. They have also been adopted within criminal justice systems as an alternative or additional sanction to address the harms caused by criminal behaviour to both the offenders and victims. After a finding or an admission of guilt, the court invites interested members of the community to join the judge, prosecutor, defence counsel, police, social service providers, and community elders, along with the offender and the victim, and their families and supporters, in a circle to discuss the offence, factors that may have contributed to it, sentencing options, and ways of reintegrating the offender into the community. The circle allows individuals to work together toward healing, in the belief that that each person has a role and responsibility in that process.

For more on efforts by Correctional Service Canada to incorporate traditional Indigenous practices into prison practices, see Chapter 11.

What Do You Think?

What place would Indigenous healing circles have in the sentencing of Matt in the Part One case study? How might a healing circle serve the justice needs of Matt's community? What sentencing principles are best served with the use of healing circles?

CAREER PROFILE



Barry Stuart

Judge Barry Stuart, now retired, was the chief judge of the Territorial Court of the Yukon. He pioneered the use of Peacemaking Circles in Canada and is well known for his work with community-based justice processes.

How did you first become interested in restorative justice?
While working in the Papua New Guinea National Planning Office in 1974, I was fascinated by many parts of their informal, village-level justice processes. These processes evolved over many generations, were transparent and inclusive, and they aspired to achieve reconciliation, healing, and peacemaking. Our courts focus on unrealistically narrowly defined legal questions in ways that exclude key people and interests. Our legal processes undermine the relationships needed among all participants to collaboratively find new ways to deal with their differences and generate sustainable relationships and outcomes. In Papua New Guinea, their inclusive, consensus-based, peacemaking processes offered so much more.

How did you become the chief judge of the Territorial Court of the Yukon?
At 16, I set out ten goals for my life. None of them included anything that suggested I might ever be a judge. The two that led me to Yukon were "experience every province before settling down" and "ensure I leave this world a better place than I found it." The latter goal led me to law school. Medicine lost out because too many in my extended family were doctors. I—perhaps foolishly—rebelled against their pressure, thinking law addressed the health of interactions within communities. While teaching law at Dalhousie, I was offered a chance to serve as a Yukon deputy judge. That summer, I fell in love with the Yukon. I agreed to return for two years to serve as their chief judge, and to work with the wonderful people I encountered in communities and in the justice system.

Now that you are retired, how involved are you in restorative justice?
Once involved in it, it seems you are stuck for life working on processes that build relationships of mutual respect, trust, and understanding. I am slightly over 16, not a long way over 60, working on any fronts developing inclusive processes that aspire to build collaborative relationships and safe places for difficult conversations.

Looking back on your career, what are you most proud of? What do you feel has been your biggest impact?
No question, I am most proud that I never gave up, worked hard on my dreams, and never stopped dreaming of what can be done to improve our shared world. But the rest is still a work in progress.

Why is it so important to involve the community in the justice process?
If communities fail to be involved in the hard moral work, we will fail to create the relationships needed to appreciate the strength in our differences, and to build mutual respect and trust. No community—geographical, institutional, or family based—can be more than strangers superficially related unless all voices are respected, engaged, and feel a deep sense of reciprocal connection. A connection that offers opportunities to give and receive in meaningful ways. Restorative processes build community opportunities out of conflict, which generate the connections necessary for healthy communities. Restorative processes are an essential feature of participatory democracy. The health of our families, local communities, indeed of our nation depends on inclusive, peacemaking, consensus-based processes on all levels.

How effective are restorative justice practices in both providing closure to victims and preventing recidivism?
No one process fits all conflicts. The challenge in every case is to fit the best process to the conflict, not to reshape conflicts to fit the process. Some conflicts, some crimes, are not suitable for only restorative processes. With every crime, a very careful triage is needed at every stage to determine what process best serves the interests of the parties and communities, and best realizes the overarching objectives and principles we share.

In all of my experiences, restorative processes are much more effective in providing closure to victims and preventing recidivism, and profoundly better at developing innovative, effective solutions to complex challenges. They are clearly needed to build the collaborative partnerships among all state agencies, and within communities, to heal harm, reconnect victims to their communities, and connect offenders to constructive lives. They are also necessary for community members to become involved in the hard moral work of building community.

Drug Treatment Courts

Drug treatment courts (DTCs) began as a response to large numbers of (non-violent) offenders being incarcerated for drug-related offences and continuing to reoffend due to their underlying addictions. DTCs aim to reduce crimes through court-monitored treatment and community support for those with alcohol and/or drug addictions. The first DTC opened in Toronto in 1998; to date, there are five other such courts in operation in cities across Canada. The principles of DTC recognize that not all criminal behaviour is inherently "malicious," but instead can be a symptom of an individual's addiction. By diverting drug-dependent offenders from the correctional system, more effective measures can be implemented in the belief that future criminal activity will be deterred. Participants must appear regularly in court and successfully complete all ordered sanctions, programming, and treatment. Once the participant gains social stability and demonstrates control over the addiction, either the criminal charges are "stayed" (meaning a judgment is suspended or postponed) or the offender receives a non-custodial sentence (such as house arrest). If unsuccessful, the offender will be sentenced as part of the regular court process (see Chapter 11 for more on offenders who abuse drugs and alcohol).

Domestic Violence Courts

Domestic violence courts have been established in several cities across Canada since as early as 1990. These courts address the nature of domestic or family violence by "providing a more coherent and holistic approach to families involved in both the criminal and family justice systems" (Di Luca, Dann, & Davies, 2014, p. 48). Many unique dynamics exist within the context of family violence, such that a high proportion of victims will often recant their earlier testimony or are reluctant victims and witnesses. Because of these realities, alternatives are needed. Specially trained judges, Crown prosecutors, probation officers, court workers, and defence counsel are assigned to these courts. Together they work with the family involved to create positive solutions for every member of the family.

Conclusion

Sentencing in Canada is one of the most complex and controversial aspects of our criminal justice system. Judges must make crucial decisions that will restrict (or remove) an individual's rights and freedom. Judges make such decisions by considering various aspects of the accused, the case, the offence(s), the context, the victim(s), and more. When issuing a disposition, judges are also guided by the principles in the various theoretical models of sentencing: denunciation, deterrence, selective incapacitation, rehabilitation, and restorative justice. With the 2015 change in our federal government, certain laws are being revised, reversed, and/or reconsidered, including some laws around mandatory minimum sentences. Such changes to our laws are favoured by some and criticized by others. We must wait for the long-term consequences to be revealed in order to make valid judgments. Meanwhile, ongoing issues in the context of sentencing are the overrepresentation of Indigenous people within our correctional system, the growing need for specialized courts, and recognition of the value of the victim's role within the sentencing process.

IN-CLASS EXERCISE

You Be the Judge

Read the case of *R v Archibald* (2012 CanLII 11927 (NLSCTD)). Now, you be the judge! In small groups, present the case to the class. Identify and discuss the mitigating and aggravating factors, as well as the five other elements the judge must consider (*Criminal Code*, s 718, etc.) prior to his disposition. Use the *Criminal Code* and together decide on an appropriate disposition (it may or may not differ from the one imposed). Share your group's decision-making process with the class as a whole. Discuss and debate.

DISCUSSION QUESTIONS

1. What are some of the arguments for mandatory minimum sentences? What are some of the arguments against them? If mandatory minimum sentences (such as those in the *Safe Streets and Communities Act*) had been in place prior to the crime described in the Part One case study, do you think that they may have deterred or prevented the crime?
2. Why do you think so many Canadians support "tough on crime" policies, despite the relatively lower levels of crime today?
3. How do the media influence public opinion on sentencing? How do the media influence decisions made by judges?
4. What are the benefits of victim impact statements? What are the limitations?
5. What aspects of our criminal justice system would you change and why?
6. Compare and contrast the sentencing options of absolute discharge and suspended sentence. When should neither be used?
7. Do you agree with the principle articulated specifically within s 718.2(e) of the *Criminal Code*? What consequences might consideration of this principle have for Indigenous and non-Indigenous offenders as well as society's perception of the criminal justice system?

SUGGESTED FURTHER READINGS

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