

**Criminal**

## Decision addresses 'major problem' of sentence disparity in Canada

By **Nathan Baker**

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(September 30, 2021, 1:56 PM EDT) -- A conviction for murder, be it first degree or second degree, carries with it a required life sentence of imprisonment. The difference in minimum parole ineligibility, 25 years for first degree and 10 years for second degree, does not change the fact that the murderer will be subject to supervision for the rest of their life. Minimum parole ineligibility does not mean that an offender will necessarily be released upon serving this minimum period. However, reflecting the seriousness of the offender's actions in the minimum parole ineligibility is still an important assessment that must be carefully considered even with the knowledge of the life sentence to which it will apply.

Different levels of involvement in an offence can be reflected through different sentences, including differences in parole ineligibility. However, where the actions and blameworthiness of multiple offenders is similar, the law requires that the principle of parity be applied and similar sentences be imposed. No two cases, and no two accused persons, are ever exactly the same. However, our common law justice system relies on reference to prior cases in assessing appropriate sentences.

In the case of *R. v. Cabrera* 2021 ABCA 291, the Alberta Court of Appeal dealt with a sentence appeal regarding Franz Cabrera, who had been convicted of second-degree murder. A parole ineligibility of 15 years was imposed with regard to his life sentence.

The case involved a first individual, convicted of manslaughter, beating the victim and knocking him to the ground. A second individual, convicted of first-degree murder, then stabbed the victim four times. Finally, Cabrera and another, Assmar Shlah, approached and beat the victim with their fists and feet, with Cabrera using a car key to punch the victim. This was a heinous crime, committed by four people, each with differing degrees of guilt found by the court. Shlah, similar to Cabrera, was also convicted of second-degree murder and had the parole ineligibility on his life sentence fixed at 12 years.

The majority of the Alberta Court of Appeal agreed that a range of 12 to 15 years for parole ineligibility was appropriate but found Cabrera's actions and Shlah's actions were not sufficiently different in their character to warrant a difference of three years in parole ineligibility. They had similar backgrounds. They were involved in similar ways in the attack.

The main difference was Cabrera's use of keys while assaulting the victim. The majority of the Court of Appeal noted though, that "the medical examiner did not identify any injury sustained as a result of being struck with the key." Since the key did not result in any significant difference in the injuries sustained by the victim, the majority found that the sentences as between the two individuals should be the same given their similar backgrounds and involvement. As a result, the parole ineligibility for Cabrera was reduced to 12 years.

In dissent, Justice Thomas Wakeling found that the sentencing judge committed no reversible errors and that the 15-year period of parole ineligibility was not demonstrably unfit. Justice Wakeling went so far as to state, "I would have imposed a twenty-one-year parole ineligibility had I been the original sentencer." Finding no error in the application of the law and the sentence being within the range, Justice Wakeling found that the trial judge's decision was owed deference in this case.

Justice Wakeling went on to review that "sentence disparity is a major problem" in Canada and "that the Canadian sentencing patterns for parole ineligibility for second-degree murderers contain major and unacceptable deviations as to cause reasonable informed persons to question the validity of the sentencing protocol responsible for this suspect sentencing pattern."

He went on to state that Canada needs "guideline sentencing judgments" and that it is the responsibility of appeal courts to do so. He sets out an eight-step framework for courts to do this:

- 1) Establish minimum and maximum available sentences
- 2) Establish appropriate subsets for the offence and what the features of each are
- 3) Determine degree of gravity for each subset
- 4) Decide a starting point with the range for the particular offence
- 5) Identify aggravating factors that justify upward adjustment
- 6) Identify mitigating factors that justify downward adjustment
- 7) Confirm that the sentence meets remaining applicable sentencing principles
- 8) Determine if a sentence reduction is required to account for a guilty plea

Justice Wakeling included six schedules to his judgment which summarized significant amounts of case law at both trial and appellate levels, within Alberta and without, and at different time frames. These schedules provide a wide summary of sentencing decisions in murder cases that provide a useful resource in finding similar cases.

While the majority judgment surrounding parity and the appropriate sentencing range will be binding on lower courts and hold more jurisprudential authority, the dissent of Justice Wakeling raises interesting questions regarding sentencing ranges and offers a different perspective on how to achieve parity and the role of appellate courts in setting sentencing ranges.

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