RESEARCH AND STATISTICS DIVISION
DIVISION DE LA RECHERCHE ET DE LA STATISTIQUE

THE CHANGING FACE OF CONDITIONAL SENTENCING

Symposium Proceedings

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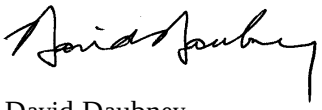
FOREWORD

Conditional sentences of imprisonment were introduced in 1996 and have emerged as one of the most important issues in the area of sentencing. They were created to help reduce Canada's overreliance on imprisonment in a manner that is safe and consistent with the principles of sentencing. Although Canada's overall incarceration rate has declined from 133 per 100,000 in 1994-1995 to 123 per 100,000 in 1998-1999, it is still among the highest in the world among developed countries.

In January 2000, the Supreme Court of Canada handed down a unanimous guideline judgement (R . v. Proulx) on the use of the conditional sentence. The Changing Face of Conditional Sentencing: A One-Day Symposium was the first public forum to address the issue of conditional sentencing since the Supreme Court judgement. The symposium was held at the Faculty of Law, University of Ottawa on May 27, 2000 and was sponsored and organized by the Faculty of Law and Faculty of Social Sciences, University of Ottawa in collaboration with the Research and Statistics Division of the Department of Justice Canada. A number of experts in the area of conditional sentencing spoke at the symposium. Presenters came from a range of departments and organizations and included Judges, academics, Crown Attorneys, defence counsel, and correctional and probation officials from Ontario. Sessions were held on the following: (1) Conditional Sentencing after the Supreme Court judgements: Issues and Directions; (2) Defence and Crown Perspectives on Conditional Sentencing; (3) Limits of the Conditional Sentence and Appellate Review; and (4) Administering Conditional Sentences.

The symposium was well-attended and stimulated a great deal of lively debate on a number of key issues including (1) a discussion of the role of appeal courts in guiding trial judges; (2) an exchange between Ontario Crown counsel and participants regarding the use of guidelines directing Crowns to oppose conditional sentences in specific circumstances; and (3) a general agreement that more resources need to be devoted to the supervision of offenders serving conditional sentences.

We are grateful to the presenters at the symposium and to those individuals who contributed papers on this important issue. This publication is a compilation of eight papers that were presented at the symposium by leading academics in the area, Crown and defence counsel, and Judges. Both the symposium and this publication are timely contributions to current discussions on conditional sentencing. We hope that publishing these papers will help these discussions reach a wider audience. Conditional sentencing will likely continue to be an important part of the sentencing landscape in Canada. Given this, there will be a continuing need to assess and reassess the conditional sentencing regime in order to determine if it is meeting its objectives.



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THE PUNITIVE NATURE OF THE CONDITIONAL SENTENCE*

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Proulx[1] and related cases[2] have settled some points, at least as a matter of abstract principle, but for some time the law and practice of conditional sentencing will remain unsettled. This is not due to apparent discrepancies among the decisions given by the Supreme Court, although those discrepancies make plain that if the Court cannot agree upon the application of its own principles there is little basis upon which to expect such consistency in other courts. The purpose of this paper is to explain why, as a result of the recent decisions, it can be expected that uncertainty in conditional sentencing will continue. The core of that uncertainty is the extent to which the punitive nature of the conditional sentence[3] can accommodate the objectives of restorative justice.

I

In *Proulx* the Supreme Court situated the conditional sentence of imprisonment, among sentencing options, between a term of actual incarceration in a provincial jail and a suspended sentence with probation. For the Court, Lamer C.J.C. explained that from this characterisation it followed that a conditional sentence should express punitive objectives that are consistent with a prison order and, at the same time, objectives that are consistent with rehabilitation and restorative justice.[4] As a rule, therefore, a conditional sentence should include some restriction of liberty or confinement such as house arrest, curfew or electronic monitoring.[5] Punitive objectives should be reflected in both the length and the severity of conditions.[6] Similarly, while the presence of aggravating factors will not necessarily preclude a conditional sentence, they will be reflected in the duration and rigour of the conditions.[7] Considerable emphasis is thus placed by the Court on the need for a clear expression of denunciation and deterrence in conditional sentences.[8] Where those concerns are paramount, Lamer C.J.C.

*This text was prepared for the Sentencing Division of the Department of Justice (Canada) and presented at a seminar, *The Changing Face of Conditional Sentencing*, convened jointly by the Department of Justice and the Faculty of Law, University of Ottawa, on 27 May 2000. Many thanks to Julian Roberts for his work and encouragement in these matters.

[1] *R.* v. *Proulx* (2000), 30 C.R. (5th) 1 (S.C.C.). References are to paragraphs as numbered in the opinion.

[2] *R.* v. *R.A.R.* (2000), 30 C.R. (5th) 49 (S.C.C.); *R.* v. *R.N.S.* (2000), 30 C.R. (5th) 63 (S.C.C.); *R.* v. *L.F.W.* (2000), 30 C.R. (5th) 73 (S.C.C.); *R.* v. *Bunn* (2000), 30 C.R. (5th) 86 (S.C.C.). *R.* v. *Gladue* (1999), 23 C.R. (5th) 197 (S.C.C.) was decided before the five decisions of 31 January 2000 and *R.* v. *Wells* (2000), 30 C.R. (5th) 254 (S.C.C.) was decided after them, even though heard with them.

[3] This phrase, and the title of this paper, are quoted from paragraph 38 of *Proulx*, *supra* at note 2.

[4] See, e.g., *Proulx*, *supra* at paras. 22, 23, 100, 113.

[5] *Ibid.* at paras. 36, 117.

[6] *Ibid.* at paras. 114, 117.

[7] *Ibid.* at paras. 102–103, 115.

[8] *Ibid.* at paras. 30, 41, 102–109, 114.

says that incarceration will be preferable but he adds that "a conditional sentence may provide sufficient denunciation and deterrence, even in cases in which restorative objectives are of lesser importance, depending on the nature of the conditions imposed, the duration of the sentence, and the circumstances of both the offender and the community in which the conditional sentence is to be served."[9]

At no point does Lamer C.J.C. address the possibility that a conditional sentence should favour restorative over punitive objectives, and the contrast that he draws between conditional sentencing and probation rules out this construction.[10] Indeed, the opinion offers little exploration of the practical content of rehabilitative or restorative measures within a conditional sentence.[11] Nor does Lamer C.J.C. contemplate the possibility that punitive and restorative objectives might be of comparable or commensurate concern in the formulation of a conditional sentence. Throughout his reasons the Chief Justice emphasises the primacy of punitive objectives in conditional sentencing.[12] The net effect of the Court's reasons is that the essential elements of denunciation and deterrence in a conditional sentence preclude the idea that this sanction is chiefly a vehicle for restorative justice. This was a view taken by many before *Proulx* and the other cases went to the Supreme Court. These decisions affirm that the conditional sentence was not introduced into the Code as a form of reinforced probation.[13]

In short, the reasons in *Proulx* attempt to place the conditional sentence as a distinct sanction between actual incarceration and probation by insisting upon the punitive objectives of the former and allowing the restorative elements of the latter. It is only a slight exaggeration that the Court associates the punitive objectives with mandatory conditions and restorative objectives with optional conditions. The basis for this is that the Court has, in effect, read into section 742.3(1) a *mandatory* term of punitive conditions and reinforced this by saying that a judge who fails to observe this term for good reason will be subject to appeal for reversible error.[14]

The picture created by the reform of Part XXIII, as interpreted in *Proulx*, is something like this. Whereas the sentencing judge previously had a choice between actual incarceration and probation, there are now three options — two of them dominantly punitive — and each one has its distinctive characteristics: punitive, punitive and restorative mixed in some proportion, and restorative. For each offence and each offender the sentencing judge must find a disposition among these three that is fit. At first blush, the view of conditional sentencing expressed in *Proulx* lends greater force to the punitive options available. This follows from the definition of a

[9] *Ibid.* at paras. 114.

[10] At paragraph 19 of *Proulx*, *supra* Chief Justice Lamer states that "Canadian sentencing jurisprudence has traditionally focussed on the aims of denunciation, deterrence, separation, and rehabilitation, with rehabilitation a relative late-comer to the sentencing analysis". He also notes that with the reform of Part XXIII Parliament has placed a new emphasis on the goals of restorative justice. This characterisation is somewhat perplexing because it appears to give less weight to rehabilitative aims in recent times. It is more perplexing when attention is given to probation, as described by the Chief Justice in paragraphs 32 through 35 as rehabilitative in nature. Probation, of course, has a long history in Canadian law and thus so too does the rehabilitative aspect of at least one important sentencing option. See also para. 29 of the judgement.

[11] See *Proulx*, *supra* at paras. 109–112; *cf.* paras. 18–20.

[12] *Ibid.* at paras. 22, 23, 28, 29, 30, 35, 36, 37, 38, 41, 99, 100, 102, 103, 113, 114, 117.

[13] *Ibid.* at para. 99.

[14] *Ibid.* at para. 37.

conditional sentence alone and the emphasis on denunciation and deterrence. It might be noted that from the very opening of his reasons in *Proulx* Lamer C.J.C. emphasises that the conditional sentence applies only in respect of a limited subclass of non-dangerous offenders who would otherwise be bound for jail.[15]

But it would also *appear* that the conditional sentence has led, or will lead, to increasing emphasis on punitive objectives. Is this correct? The short answer is that it is still too early to say because rigorous empirical detail on sentencing practices in the three categories, and in particular the conditional sentence after *Proulx*, will not be available for some time. The data for all three categories must be read together, obviously, because of the spill-over between and among them. Logically, perhaps it would be desirable if these various categories were wholly distinct and it would be possible to assert *a priori* that a given case properly belongs in one category and not the others. Practically, however, the effect of introducing the conditional sentence has probably been to draw *down* some cases that would otherwise receive provincial jail and to draw *up* some cases that would otherwise receive probation. If this is so, and conditional sentences are applied according to *Proulx*, there can only be heavier reliance on punitive measures because the concentration of dispositions is in two categories that are both characteristically punitive.

The three central variables to note are the rate of provincial admissions, the rate of conditional sentences and the rate of probation orders.[16] Unless there is a radical increase in the rate of probation orders, and a corresponding radical decrease in the rate of provincial admissions or conditional sentences, the emphasis on punitive orders will remain. If the rates in all three categories remain substantially unchanged, and *Proulx* is consistently applied, the same conclusion follows. The Supreme Court's recent exhortations for appellate deference, if heeded, will only strengthen these effects.[17]

II

The first conclusion of this paper is based upon the text of *Proulx* and the general statement of principle that it presents. It is that the creation of the conditional sentence has not marked a shift from punitive to restorative sentencing and indeed that the current interpretation of the conditional sentence is consistent with continuing emphasis upon punitive objectives in sentencing. It bears repetition that in any conditional sentence the Supreme Court has concluded that restorative objectives can only complement a necessary element of punishment. Restorative objectives cannot dominate in a conditional sentence and they cannot be given equal weight either.

With respect to the conditional sentence, the next point is to gauge the extent to which restorative objectives can be addressed within a dominantly punitive context. Lamer C.J.C. concedes in *Proulx* that actual incarceration is largely inconsistent with rehabilitation and

[15] *Ibid.* at para. 12.

[16] With regard to the rate of provincial admissions, attention must focus on the rate of admissions measured against the rate of conviction (which is falling due to fewer cases). See J. Roberts & C. Grimes, *Adult Criminal Court Statistics — 1998/99* (2000) 20 Juristat 1. See also J. Roberts, D. Antonowicz & T. Sanders, *Conditional Sentences of Imprisonment: An Empirical Analysis of Optional Conditions* (2000) 30 C.R. (5th) 113, but it should be noted that the data analysed by them relate to sentences imposed before *Proulx.* One can only hope that a similar study will be conducted in due course to examine the effects of *Proulx*.

[17] See *Proulx*, *supra* note 1 at paras. 123 *et seqq*.

restorative justice.[18] Why should it be any different with the virtual incarceration of a conditional sentence, especially one that might be lengthened and otherwise made more onerous to reflect deterrence and denunciation? The answer, again broad and abstract, would seem to be that an offender might benefit from the restorative features of probation while serving a punishment, for purposes of deterrence and denunciation, that involves some significant restriction of liberty. But is this realistic in the general run of cases?

Only four paragraphs in *Proulx* are given to the consideration of restorative objectives within conditional sentences.[19] These paragraphs say comparatively little and almost nothing of the challenges posed by conditional sentencing. Lamer C.J.C. speaks of the "restorative objectives of rehabilitation, reparations, and promotion of a sense of responsibility in the offender"[20] and notes that in *Gladue* the Court observed that "[r]estorative sentencing goals do not usually correlate with the use of prison as a sanction".[21] Given that so much of the reasons in *Proulx* are devoted to making clear that the virtual incarceration of a conditional sentence should contain as a rule some very real restriction of liberty, thus creating some form of imprisonment within the offender's community, it would seem reasonable to expect the judgment to provide considerable guidance as to how the restorative and rehabilitative aspects of a conditional sentence could be joined with its punitive aspects.

Four examples are given. House arrest is cited as having rehabilitative properties to the extent that it allows the offender to maintain work or studies in the community. This might better be described as a condition precedent to more conspicuous restorative measures because it might permit those measures to have effect but it does not *cause* those effects. The other three forms of restorative measures given as examples are restitution, community service and treatment. As for the first, even after the judge is satisfied that the offender has the means to make compensation, an order of restitution that exceeds strict compensation can appear to have a punitive rather than restorative aspect. Everything will depend on the terms of the order, of course. As for community service and mandatory treatment orders, it will be noted that the Code says that a mandatory treatment order can be made, without the consent of the accused, to attend a programme approved by the province. With regard to community service, Lamer C.J.C. affirms that such orders should be encouraged, "provided that there are suitable programs available for the offender in the community".[22] Thus the effectiveness of both the treatment order and the community-service order will be contingent, in the long run, upon adequate programmes.

Obviously it is possible to combine within the terms of a conditional sentence punitive and restorative aspects. Thus, for example, house arrest, curfew or electronic monitoring are all punitive restrictions of liberty that can be readily combined with treatment, schooling, community service and so forth. It is a difficult matter to determine what conditions are appropriate to each case but there is no reason to suppose that punitive and restorative conditions cannot coexist in a conditional sentence.

At the same time, however, it would appear that the combination of punitive and restorative

[18] *Ibid.* at para. 109.
[19] *Ibid.* at paras. 109–112; *cf.* paras. 18–20.
[20] *Ibid.* at para. 109.
[21] *Ibid.* at para. 109, quoting *Gladue*, *supra* note 2 at para. 43. The same passage in *Gladue* is quoted in *Proulx* at para. 19.
[22] See *Proulx*, *ibid.* at para. 112.

aspects in a conditional sentence can only diminish the significance of the latter in conditional sentencing as a whole. The offender is told in the judge's reasons[23] that the conditional sentence must include punitive conditions, such as house arrest, to express denunciation and deterrence. He will be told that this deprivation of liberty is a mandatory condition of the sentence that will be subject to close supervision. Further, he will be told that if no reasonable excuse is given a breach or non-compliance with the sentence — and especially the mandatory terms — will likely lead to imprisonment for the remainder of the sentence. The offender will then be told that within the context of this punitive sanction there will be added optional conditions under which he will be given the opportunity to receive treatment, training or otherwise to reintegrate himself within the community. He will be reminded, however, that non-compliance with these conditions might also lead to swift imprisonment.[24]

Nothing in this is calculated to subvert the restorative aspects of a conditional sentence but it would seem somewhat obvious that the accent in such a disposition is most emphatically placed upon the punitive aspects. The message conveyed to the offender is that he is given a limited opportunity of rehabilitation and restorative justice while he is being punished. Thus, after *Proulx*, it is clear that conditional sentencing allows for a reduction in the rate of actual incarceration but not of punishment and, further, conditional sentencing allows restorative justice to coexist with punishment but not to prevail over it.[25]

III

Thus the second point of this paper is that *Proulx* has made the conditional sentence a sentence of imprisonment in two senses: in the absence of compelling reasons to do otherwise, every conditional sentence must include a significant restriction of liberty, perhaps longer than the term of actual incarceration that might otherwise have been ordered, and the "threat" of imprisonment for breach must be real. The interpretation advanced by the Supreme Court is that the objectives of restorative justice are secondary in the general run of cases because they are optional while punishment is mandatory. Against this background, what other obstacles might complicate the advancement of restorative objectives?

Four come immediately to mind and their cumulative effect far outweighs their individual importance. First, the decision in *Proulx* would appear to give strength to prosecutors who would oppose conditional sentences or who would argue strenuously for a conditional sentence that includes a substantial punitive component. Nothing in *Proulx* would encourage prosecutors to enhance the development of restorative objectives through conditional sentencing. This now appears to be especially clear in Ontario, where prosecutors have received a practice direction to oppose conditional sentencing for a number of specified offences and, it would seem, not to agree to a conditional sentence in the form of a joint submission.[26] Here, too, one might also expect the Crown to make submissions that would underscore the punitive objectives in any case

[23]Reasons are mandatory: see section 726.2 of the *Criminal Code*.

[24]Lamer C.J.C. refers at several points to the need to ensure that imprisonment for breach is a real threat: see, *eg.*, *Proulx*, *supra* note 1 at paras. 21, 39, 44.

[25]At para. 35 of the judgement, there is an anomalous quotation from *R.* v. *McDonald* (1997), 113 C.C.C. (3d) 418 (Sask. C.A.) at 443 wherein Vancise J.A. is cited with approval for having said that conditional sentences "permit the accused to avoid imprisonment but not punishment".

[26]See Ontario, Ministry of the Attorney General, Criminal Law Division, Practice Memorandum, *The Use of Conditional Sentences* PM [2000] No. 6, 24 April 2000.

where a conditional sentence is an option. At the very least it is improbable that Crown counsel will rise as enthusiastic proponents of restorative objectives in conditional sentencing.

Second, the development of restorative objectives requires a commitment of resources for effective programmes as well as for supervision of punitive features such as house arrest, curfews and electronic monitoring. In the absence of adequate provincial funding the development of restorative objectives will not die; it will simply never grow, or never grow at a healthy rate. It is already the case in some jurisdictions that judges have put an informal moratorium on conditional sentences precisely because there are insufficient resources, particularly for supervision.[27] It does not matter how imaginative a judge might try to be in making an appropriate conditional sentence because if the wherewithal to make it work is not there the enterprise is largely doomed. Moreover, after *Proulx* it is entirely plausible that if increased resources are allocated to conditional sentencing the first priority will be to fund the supervision of the punitive aspects of those sentences and not the restorative aspects. Finally, there is an ambiguity in section 742.3(2)(*e*) that is directly relevant to the issue of administrative and fiscal support for conditional sentencing. This provision refers to a treatment programme "approved by the province". This is a phrase that also appears in the provisions concerning diversion and probation[28] and thus it is obviously rather important in relation to restorative objectives. It is obvious that if there is no programme no order can be made under section 742.3(2)(*e*), but it is arguable that the same result would follow if there is no approval by the province. As yet nobody knows what this phrase actually means but we would soon find out as soon as Crown counsel stand up in any numbers to argue that some formal mechanism for approval by the executive arm of government must exist before a programme can be considered approved. Success in this argument would have sweeping implications for any treatment order in a conditional sentence.

Third, there is the matter of deference. If the interpretation of conditional sentencing sketched in this text is sound, it follows that restorative objectives are now clearly of secondary importance. The Supreme Court has spoken at length about appellate deference but for the moment it might be more apt to speak of deference to the interpretation in *Proulx*. If sentencing judges are properly deferential to *Proulx*, and if appellate judges are also deferential to *Proulx* and the trial courts, it seems self-evident that the growth of restorative objectives in conditional sentencing will be slow indeed. This will not occur only if trial judges and appellate judges openly disagree with the emphasis placed by the Supreme Court upon the punitive objectives of conditional sentencing. If this occurs with any frequency it will mean not only that the concept of deference discussed in *C.A.M.*, *Proulx* and others has no force. It will also mean that there will be another period of uncertainty in conditional sentencing and disparity in sentencing generally.

Fourth, in the longer term, if the incidence of breach is significant, or if the mechanism for reviews of alleged breaches proves ineffectual, the attraction of the conditional sentence will

[27]In Quebec this problem has led to some blistering judicial criticism in the Cour du Québec. See *R.* c. *Fréchette* (Hull, 5 April 2000, No. 550-073-000022-997); *R.* c. *Coley, Forand, L'Heureux & L'Heureux* (Iberville, 14 April 2000, Nos. 755-73-000017-968, 755-73-000018-966, 755-73-000019-964, 755-73-000020-962); *R.* c. *Ménard* (Montréal, 17 April 2000, No. 500-01-066897-981). Thanks to Me François Lacasse for providing copies.

[28]See ss. 717 and 732.1 of the *Criminal Code*, respectively.

drop quickly among sentencing judges and with it will go the vestiges of restorative justice as an objective of conditional sentencing.

In short, if there is error in the initial conclusion of this paper (that the conditional sentence as interpreted by the Supreme Court is a dominantly punitive sanction), or in the following conclusion (that there is now a reduced margin for restorative objectives in conditional sentencing), the final point is certainly sound: that there are real obstacles of a practical nature to making restorative objectives work significantly in conditional sentencing.

IV

To end it is useful to return to the statement in *Gladue* that is quoted with approval in *Proulx*.[29] The Court has accepted that two of Parliament's principal objectives in the reform of Part XXIII were to reduce actual imprisonment as a sanction and to enhance the importance of restorative justice in sentencing. These two points are also expressly identified as principles underlying the creation of the conditional sentence. The effect of *Proulx* is to recognise these two points and perhaps to give some support for them. As regards the first, however, while the conditional sentence might reduce reliance upon actual incarceration, the Court has insisted upon the dominance of virtual incarceration among the conditions imposed. As regards the second, restorative objectives are apparently secondary and in any event the advancement of those objectives is likely to be inhibited by practical obstacles for some time to come. It is for these reasons that the law and practice of conditional sentencing will present considerable uncertainty for some time to come.

[29]See *Proulx*, *supra* note 1 at para. 15.

THE CONDITIONAL SENTENCE: A CANADIAN APPROACH TO SENTENCING REFORM OR, DOING THE TIME-WARP, AGAIN

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1. INTRODUCTION

We are in the fourth year of the conditional sentence regime and 50,000 offenders have been given conditional sentences. To appreciate the full scope of the impact of this innovation, you have to add in the number of cases where a conditional sentence was considered and rejected. During this period, participants in the criminal justice system have struggled with the apparent statutory enigma that seems to arise from s.742.1 of the Criminal Code: when is a required sentence of imprisonment not required? Of course, this is an over-simplification. The real dilemma for the past few years has been how to interpret the statutory pre-conditions in a way that will promote the following goals:

- consistency with statutorily-entrenched principles;
- integration into an existing sentencing scheme that encompasses both custodial and non-custodial sanctions; and
- reduction of the use of incarceration.

A concomitant concern has been to pursue these goals without diminishing, or further diminishing, public confidence in the sentencing function of the criminal justice system during a time when the "law and order" mood continues to stir public opinion.

In early 2000, the Supreme Court of Canada issued six judgements[1] that answer a number of the legal questions that had been generated by trial and appellate court decisions since the introduction of conditional sentences. The primary judgment was a unanimous decision in *R.* v. *Proulx*[2], a case of dangerous driving causing death and bodily harm. The other five cases provided interesting insights into how the *Proulx* principles can be applied. A few months later, we are now starting to see some appellate court decisions applying and interpreting the set of Supreme Court decisions. At the same time, empirical data about the conditional sentence seems to show that, notwithstanding the popularity of conditional sentences, they have not produced a commensurate reduction in the use of imprisonment. Understanding this data requires careful analysis, additional data that focuses on specific issues, and a disciplinary expertise that I do not have. However, the apparent empirical doubts about efficacy make it both pertinent and timely to slow down

[1] *R.* v. *Proulx* (2000), 30 C.R. (5th) 1 (S.C.C.); *R.* v. *Bunn* (2000), 30 C.R.(5th) 86 (S.C.C.); *R.* v. *L.W.F.* (2000), 30 C.R. (5th) 73 (S.C.C.); *R.* v. *R.A.R.* (2000), 30 C.R. (5th) 49 (S.C.C.); *R.* v. *R.N.S.* (2000), 30 C.R. (5th) 63 and *R.* v. *Wells* (2000), 30 C.R.(5th) 254 (S.C.C.) which was argued right after the group of five cases but heard by only seven judges. The judgment written by Iacobucci J. was released a few weeks after the others.

[2] *Proulx*, *supra* note 1.

and ask three questions about the development of the conditional sentence:

(1) What is the current state of the law of conditional sentences?
(2) What sentencing policy choices does this law reflect?
(3) Should sentencing reform take place in this manner?

In addressing these questions, it is necessary to examine the *Proulx* decision in detail. It is also important to step back and examine exactly what has happened over the past decade.[3] In applying a broader perspective to *Proulx*, one is captured by the impression that it is somehow "out of synch". That is, the timing is out of sequence. The reason for this is, in my view, also the answer to what has happened: the Supreme Court has crafted a new intermediate sanction. While many people have argued that we needed one[4], I doubt if anyone expected the Supreme Court to be its designer.

It is too soon to tell whether the post-*Proulx* conditional sentence is a good or bad thing. Before reaching any conclusions about its efficacy and legitimacy, we will need to consider its applicability and observe its effects. It may seem attractive to muse about whether the analysis required by the set of conditional sentence cases was appropriate for the Supreme Court given its institutional structure within our justice system, but it is clear that the Court could not abdicate its role and avoid the task. Whether it was a fair task to impose is another matter.

2. THE PRAGMATIC APPROACH OF THE SUPREME COURT

Early in the decision in *Proulx*, Lamer, C.J.C. indicates what he considers the purpose of conditional sentences to be:

> With the advent of s.742.1, Parliament has clearly mandated that certain offenders who used to go to prison should now serve their sentences in the community. Section 742.1 makes a conditional sentence available to a subclass of non-dangerous offenders who, prior to the introduction of this new regime, would have been sentenced to a term of incarceration of less than two years for offenders with no minimum term of imprisonment.[5]

This capsulized expression of the role for conditional sentences flows largely from comments made by Cory and Iacobucci, JJ. in *Gladue*[6] which required the Supreme Court to consider, in general terms, the purpose and effect of the sentencing amendments. They concluded a major purpose to be the intention to reduce the use of incarceration. After *Gladue*, it was inevitable that the Supreme Court would apply the same general characterization to the various elements of those changes, especially conditional sentences, which had been highlighted as one of the indicia of the concern about over-incarceration. It was not clear, however, exactly what this might mean for conditional sentences.

This question was, to a great extent, answered when Lamer, C.J.C. foretells the analytical

[3]For a history of the conditional sentence proposal, see A. Manson, "Conditional Sentences: Courts of Appeal Debate the Principles" (1998), 15 C.R. (5th) 176, at 182–185. For a detailed history of Canadian sentencing reform going back to the Ouimet Report in 1969, see A. Manson, "The Reform of Sentencing in Canada" in D. Stuart, R. Delisle & A. Manson, eds., *Towards a Clear and Just Criminal Law: A Criminal Reports Forum* (Toronto: Carswell, 1999) at 461–467.

[4]See the *Canadian Bar Association Submission on Directions for Reform* (Ottawa: Canadian Bar Association, 1991) at 35 and 40–48.

[5]*Proulx, supra* note 1 at para. 12.

[6]*R.* v. *Gladue,* [1999] 1 S.C.R. 688.

perspective that will dominate the subsequent analysis and will determine each discrete subordinate issue that the court addresses:

> In my view, to address meaningfully the complex interpretive issues raised by this appeal, it is important to situate this new sentencing tool in the broader context of the comprehensive sentencing reforms enacted by Parliament in Bill C-41. I will also consider the nature of the conditional sentence, contrasting it with probationary measures and incarceration.[7]

The generous reference to Bill C-41 as "comprehensive reform" may be an over-statement[8] but the Supreme Court's plan is clear. It intended to assume the role of sentencing reformer and set out to develop an intermediate sanction. The approach is reminiscent of the early pages in Morris and Tonry's *Between Prison and Probation*[9] which stirred much interest in intermediate sanctions.[10] Whether the intention to craft a new intermediate sanction was a product of the former Chief Justice's earlier role with the Law Reform Commission of Canada, which investigated sentencing intensively in the 1970s, or whether it derived entirely from the enigmatic statutory context which C-41 thrust upon the judiciary, this was how the Supreme Court saw its task. Starting from this point, it became essential for the Supreme Court to ensure that the sanction be both non-custodial and, in some way, more intensive or harsher than the pre-existing probation scheme. The conditional sentence is served in the community but must be more punitive than probation. Otherwise, it would be "surplusage".[11] This is the pragmatic approach taken in *Proulx* but the subsequent exercise is a subtle and challenging one, akin to looking for an intermediate sanction in a *Criminal Code* haystack. Early in the decision, the Supreme Court emphasizes the same philosophical platform that it adopted in *Gladue*, the need to introduce restorative principles while at the same time tempering the new sanction with the concern that it also serve, in plainly perceptible ways, the retributive aspects of sentencing.[12]

3. THE CURRENT LAW AS INTERPRETED BY THE SUPREME COURT

Of the many issues which had been the subject of debate by appellate courts, by the time the conditional sentence came to the Supreme Court it was clear that there were a number of specific controversies that needed to be resolved. How to resolve them was another matter. As we examine the issues individually, it seems that the principal determining factors were the need to distinguish a conditional sentence from probation, and the re-emphasis of individualization and deference as methodological cornerstones of sentencing.

(a) The potential scope of conditional sentences:

The Supreme Court has confirmed that, notionally at least, a conditional sentence can be imposed for any offence unless, as stipulated by s.742.1,

[7] *Proulx*, *supra* note 1 at para. 13.

[8] See the analysis in A. Manson, "The Reform of Sentencing in Canada", *supra* note 3.

[9] N. Morris & M. Tonry, *Between Prison and Probation: Intermediate Punishments in a Rational Sentencing System* (New York: Oxford University Press, 1990).

[10] Tonry has continued to be supportive of intermediate sanctions although he has not been satisfied that they have produced salutary results to the extent that he originally anticipated: see M. Tonry, *Sentencing Matters* (New York: Oxford University Press, 1996) at 100–133.

[11] *Proulx*, *supra* note 1 at para. 28.

[12] Lamer, C.J.C. states in clear terms that the evidence suggests that Parliament intended a conditional sentence to address both punitive and rehabilitative objectives; *Ibid.* at para.23.

it is an offence that carries a "minimum term of imprisonment". This is an important point. It means that no offence is so intrinsically grave that it is precluded from consideration for a conditional sentence regardless of the circumstances of the offence and the circumstances of the offender. Of course, some offences include features as essential elements that would make the availability of a conditional sentence unlikely. A number of specific offences were used in argument in *Proulx* as examples of situations where a conditional sentence should not be considered: sexual offences against children, aggravated sexual assault, manslaughter, serious fraud or theft, serious morality offences, impaired or dangerous driving causing death or bodily harm, and trafficking in narcotics or possession for the purpose of trafficking. The response was unequivocal: a conditional sentence is available in principle for all offences where the statutory prerequisites are met.[13] Sentencing courts are well-suited to characterizing less grave instances of offences and to identifying the individual factors which can change or even reverse the lens usually used to assess the offence.

Manslaughter is a good example. A non-custodial sanction may be unlikely and even rare but it cannot be excluded from consideration out of hand. There have been cases where the history between the parties, the context of the killing and post-offence rehabilitative efforts combine to suggest a basis for sympathy that negates the usual demand for a retributive response. In a case that occurred prior to the conditional sentence regime, a suspended sentence was imposed on a young man convicted of manslaughter in respect of the killing of his father.[14] Moldaver, J. characterized the brutal environment in which the father had essentially imprisoned and abused his son as "horrendous domination" and used adjectives like "cruel, insensitive, inhumane and unthinkable" to describe it. In a more recent example, *Getake*[15], a woman was convicted of manslaughter after being tried on first degree murder in relation to the killing of her husband. While the jury had not accepted the self-defence evidence, the judge considered the extensive psychiatric evidence and found that she had been depressed and suffering from chronic post traumatic stress syndrome at the time of the offence due to abuse inflicted by the husband. After hearing about her efforts to rebuild her life with her children in a new location, he imposed a conditional sentence of two years less a day. The same result occurred, and was upheld on appeal, in *Turcotte*[16] where the accused had killed his mother after they had spent the day drinking. In this case, the major reason for the conditional sentence was the dramatic positive changes in the offender's life since the offence.[17] This brief review is not intended to support the proposition that manslaughter should result in a non-custodial sentence but simply to illustrate that there may be situations where an individualized inquiry may suggest that a conditional sentence is appropriate.

(b) The judge's initial or threshold decision: Section 742.1(a) requires that the situation be one where the court "imposes a sentence of imprisonment of less than two years". This

[13] *Ibid.*at para. 79

[14] *R.* v. *Millar* (1994), 31 C.R.(4th) 315 (Ont.Gen.Div.).

[15] *R.* v. *Getkate*, [1998] O.J. No. 6329 (Ont.Gen.Div.).

[16] *R.* v. *Turcotte* (2000), 144 C.C.C.(3d) 139 (Ont.C.A.).

[17] Given the brutality of the killing, the case has generated some controversy and may be a better example of the impact of deference on the scope of appellate review than of conditional sentence jurisprudence. David Paciocco, at this symposium, has argued that deference would also have produced the converse result. That is, it would have insulated from review a sentence of imprisonment in the range of five years.

phrase and the use of the word "imposes" in the present tense has produced controversy about the role of, and decision-making methodology for, conditional sentences. However, these issues have now been laid to rest by the Supreme Court's decision in *Proulx*. Transcending the specific language, it is clear that s.742.1 speaks not to the specific sentence but to the sentencing context. The judge must have considered and rejected both a non-custodial sanction and a sentence of incarceration of two years or more. In other words, to make a conditional sentence a legitimate consideration, the appropriate penalty cannot be a non-custodial sanction, like a fine or probation, nor can it be a penitentiary term of imprisonment. To paraphrase Morris and Tonry, it must be "between penitentiary and probation". The sentencing judge must have rejected both the low-ball and high-ball submissions leaving as the sentencing context a potential sentence of incarceration of less than two years in length. At this stage, the sentencing judge does not impose a sentence but only determines that the sentencing context implicates s.742.1. While Lamer, C.J.C. defines the initial decision as simply one of excluding the lower and higher options, it seems to me, however, that it is prudent for the judge to contemplate the appropriate range of the correlative term of imprisonment at least in approximate terms. This way, there will be some yardstick to assist in maintaining proportionality, which, as I will discuss later, is a serious issue.

(c) The second stage of the decision

Here, the judge must determine a number of issues:

i. will service in the community endanger the safety of the community?
ii. will service in the community be consistent with the purpose and principles of sentencing set out in ss.718 to 718.2?
iii. if service in the community is justified, what should its duration be and what conditions should be attached to it?

i. Endangering the safety of the community:

The decision in *Proulx* has directed sentencing judges to look only to the risk of re-offending which service of the sentence in the community might generate. Thus, a concern about whether a conditional sentence may diminish the deterrent or denunciatory objective of sentencing is not a legitimate reason to hold that the safety of the community has been endangered. Risk, however, is not restricted to offences against the person that may cause physical or psychological injury but also includes the risk of economic harm through the loss of property or financial resources. The risk assessment includes both the extent and gravity of potential risk. Here, the words of Lamer, C.J.C. are tough:

> If the judge finds that there is a real risk of re-offence, incarceration should be imposed. Of course, there is always some risk that an offender may re-offend. If the judge thinks this risk is minimal, the gravity of the damage that could follow were the offender to re-offend should also be taken into consideration. In certain cases, the minimal risk of re-offending will be offset by the possibility of a great prejudice, thereby precluding a conditional sentence.[18]

A judge can countenance some risk of re-offending. Moreover, the circumstances may suggest specific conditions which can further

[18] *Proulx*, *supra* note 1 at para. 69.

ameliorate the risk of re-offending to the point where service in the community is justified.[19]

Lamer, C.J.C. makes two interesting observations when discussing conditions in relation to endangerment of the community. First, he mentions the drug addict who may be a suitable candidate for a conditional sentence because of the way that conditions can structure a rehabilitative context. Secondly, he says the "judge must know or be made aware of the supervision available in the community".[20] If the level of supervision is inadequate to "ensure safety", then the offender should be incarcerated.[21] There is no question but that it is important for sentencing judges to be familiar with the current inventory of resources in their communities. We all recognize that the insertion in the Code of an option does not guarantee that the responsible authorities, usually provincial or territorial agencies, will provide the resources and infrastructure to make it work effectively and fairly.[22] The answer to the resource problem cannot simply be incarceration. Given the underlying Parliamentary intention to reduce incarceration, sentencing judges ought to state publicly that the reason for incarceration is the absence of appropriate supervisory resources.

ii Conforming with the principles in 718 to 718.2:

A number of important observations can be distilled from the *Proulx* decision. First, the principle of restraint reflected by ss.718(c) and 718.2(d) and (e) applies to the choice between a conditional sentence and a prison sentence.[23] While there is no presumption in favour of a conditional sentence for any particular offence[24], assuming that there is no risk of danger to the safety of the community, the principle of restraint suggests a tilt in favour of a conditional. This, it seems to me, must be the case. Consider how Lamer, C.J.C. describes the nature of the conditional sentence as it relates to the objectives of sentencing and the 1996 amendments:

> Two of the main objectives underlying the reform of Part XXIII were to reduce the use of incarceration as a sanction and to give greater prominence to the principles of restorative justice in sentencing-the objectives of rehabilitation, reparation to the victim and the community, and the promotion of a sense of responsibility in the offender.
>
> The conditional sentence facilitates the achievement of both of Parliament's objectives. It affords the sentencing judge the opportunity to craft a sentence with appropriate conditions that can lead to the rehabilitation of the offender, reparations to the community, and the promotion of a sense of responsibility in ways that jail cannot. However, it is also a punitive sanction. Indeed it is the punitive aspect of a conditional sentence that distinguishes it from probation.[25]

When a judge applies proportionality and restraint in an individualized way to the gravity of an offence as committed by the particular offender, he or she is seeking to determine which of the

[19] *Ibid.* at para. 72, relying on the language in s.742.3(f) and the decision in *R.* v. *Wismayer* (1997), 115 C.C.C. (3d) 18 (Ont. C.A.) at 32.
[20] *Ibid.* at para. 73.
[21] *Ibid.*
[22] Note the disparate availability of curative discharges under s.255(5) and fine option programs under s.736(1).
[23] *Proulx*, *supra* note 1 at para. 95.
[24] *Ibid.* at para. 85.
[25] *Ibid.* at paras. 98–99.

potential objectives of sentencing ought to be addressed. Some of the objectives in s.718 are reformative and others are retributive or penal. The reformative objectives are rehabilitation and reparation. These encompass the goals that are customarily described as restorative. The retributive or penal objectives are denunciation, deterrence, and separation. The duality in the basic nature of a conditional sentence means that the tilt is in its favour for two reasons: (1) we are assuming a finding of no danger in terms of a risk of harm caused by re-offending; and (2) a penal objective can be served by the conditional sentence. The conclusion seems to be that imprisonment should be chosen only when the gravity of the offence points to a penal objective either to the complete exclusion of any interest in rehabilitation or reparation, or to an extent that cannot be accommodated by a conditional sentence, no matter how onerous the conditions. However, the simple existence of aggravating factors in relation either to the offence or the offender does not, by itself, negate the possibility of a conditional sentence[26], although factors that aggravate the gravity of the offence may reinforce the claim for a penal objective.

iii. Duration of the conditional sentence:

This is an important issue which bears on proportionality and may ultimately affect the efficacy of conditional sentences. Lamer, C.J.C. has made clear his view that there need be no equivalence between a conditional sentence and the length of a prison term that would otherwise be imposed. He does not, however, say that a conditional sentence must be longer than the correlative sentence of imprisonment only that it can be. After explaining why the decisions about duration and venue cannot be separated[27], he states:

> This approach does not require that there be any equivalence between the duration of the conditional sentence and the jail term that would otherwise have been imposed. The sole requirement is that the duration and conditions of a conditional sentence make for a just and appropriate sanction.[28]

Other than the rejection of a penitentiary term, the decision about duration only arises within the context of making the decision between a conditional sentence and a prison sentence. A fair decision may be to impose a conditional sentence with a period of control that is longer than the correlative custodial term. This suggests an equivalence not in length but in penal bite, that is, the amount of denunciation that the conditional sentence provides through its public expression and its operative conditions.

Lamer, C.J.C. notes that "duration will depend on the type of conditions imposed"[29] and follows this comment with a discussion of the denunciatory potential of conditional sentences and the stigma that attaches to house arrest. The major influence on duration seems to be the amount of denunciation that the seriousness of the offence demands.[30] If a conditional sentence cannot provide the required amount of denunciation, then custody will be the result. This is not the case with general deterrence about which Lamer, C.J.C. warns that judges should be "wary" about placing too much weight on it as a factor in determining whether to permit service in the community. With respect to the ability to extend a conditional

[26] *Ibid.* at para. 115.
[27] *Ibid.* at para.52.
[28] *Ibid.* at para. 104.
[29] *Ibid.* at para. 52.
[30] *Ibid.* at para. 106.

sentence beyond what the correlative sentence of imprisonment would be, there is no indication that Lamer, C.J.C. means that duration can be extended to accommodate the suggested length of a treatment plan. Extending a state-imposed restriction of liberty for rehabilitative purposes beyond what can be justified by the offence would be contrary to usual sentencing practise. He has unhinged duration from the length of the correlative jail sentence but not for every case. An extension is only acceptable when the gravity of the offence requires it to serve its intrinsic denunciatory objective. Here, it must be remembered that the principles of proportionality and restraint also apply in determining the length of the conditional sentence. Extensions as a matter of practise are not dictated by the decision in *Proulx* and will run afoul of these principles if they are not restricted to proper cases.

(d) Conditions:

The Supreme Court has encouraged creativity in crafting appropriate conditions.[31] Contrasting conditional sentences with the purely rehabilitative nature of probation, the Supreme Court said:

> ...Parliament intended that conditional sentences include both punitive and rehabilitative aspects. Therefore, conditional sentences should generally include punitive conditions that are restrictive of the offender's liberty.[32]

Significantly, Lamer, C.J.C. indicated that "punitive conditions such as house arrest should be the norm not the exception". Still, the most important factors are whether the conditions are needed to address safety through restricting the opportunity to re-offend and the extent to which the offender's circumstances point to special conditions which will have rehabilitative, restorative or denunciatory value. Restraint applies to the imposition of conditions and courts should be careful not to heap on more terms without clear justification and without regard to their effectiveness. It should be noted that once imposed, conditions can be varied.[33]

In discussing conditions, Lamer, C.J.C. adopted a statement made in a speech by Rosenberg, J.A. in which he warned against the use of conditions that were "purely cosmetic and are incapable of effective enforcement".[34] This comment reflects the dual concern that restraint should be exercised to ensure that conditions are necessary and practicable. They should not be imposed if there are no resources to effect and supervise them. Mr. Justice Rosenberg also expressed concern about conditions which could only be enforced "through an intolerable intrusion into the privacy of an innocent person". Here, one should pause to note the burden which house arrest may produce for others. While Lamer, C.J.C. expressed concern that conditional sentences should "generally" contain punitive

[31] *Ibid.* at para. 117.

[32] *Ibid.* at para. 127.

[33] Conditions can be varied upon application of the supervisor if a change in circumstances makes a change to the optional conditions desirable (see s.742.2(1)). The supervisor must give written notification of the proposed change and the reasons for it to the offender, the prosecutor and the court (see s.742.4(1)). The parties have seven days to request a hearing, or the court can order one of its own initiative (see s.742.4(2)). If no hearing is required, the proposed change takes effect 14 days after the court originally received notification of the proposed change (see s.742.4(4)). The offender or the prosecutor can also seek a change to the optional conditions, but there must always be a hearing to consider the proposed variation (see s.742.4(5)). If there is a hearing, it must be held within 30 days after the court received notification of the proposed change (see ss.742.4(2) and (5)). At the hearing, the court can approve or refuse the proposed change, and can make any other changes to the optional conditions that it deems appropriate (see s.742.4(3)).

[34] See *Proulx*, *supra* note 1 at para. 117.

conditions that restrict liberty[35], house arrest is only one example and should not be imposed without considering whether the environment permits it.[36] There have been other examples of inappropriate obligations on third parties like the unconscionable conditions in *Waldner*[37] that the family move to a place where no children lived within a ten mile radius and pay personally for all therapeutic costs. These were quickly deleted after a period for reflection.[38]

(e) Deference to Trial Judges:

Again in *Proulx*, the Supreme Court repeated and emphasized its earlier decisions[39] which articulated the standard of "considerable deference"[40] which controls the relationship between an appellate court and the original trial court. In essence, absent either an error in principle, the consideration or an irrelevant factor, the over-emphasis of a relevant factor, or a demonstrably unfit sentence, an appellate court should not intervene. Applying this standard to conditional sentence decisions, the Supreme Court has indicated that the questions "as to what objectives should be pursued and the best way to do so" may generate different views but a disagreement between the court of appeal and the trial judge does not justify interference.[41] This suggests an enhancement of the role of the trial judge with respect to the characterization of the gravity of the offence, the objectives which need to be addressed, and the balance between them. Here, it should be pointed out that the entrenchment of deference has become the subject of attention by some appellate courts, who are concerned that its application may deny some offenders of a fair right of appeal.[42] This may become more apparent in conditional sentence cases given the domain of issues that seem to have been delegated pre-eminently to the trial judge's discretion. Of course, the inclusion of "over-emphasis" of a relevant factor as a lever that permits review must also necessarily include the corollary of "under-emphasis" of a relevant factor. Surely, this is logical.[43] This recognition ought to provide some opportunity for review if an appellate court considers that a trial judge has wrongly appreciated the significance of a relevant factor in a way that has slanted the ultimate balance.

While the repetition of the deference standard should come as no surprise, when the various principles were applied to the facts, Lamer, C.J.C. also adds the following observation:

> ...trial judges are closer to their community and know better what would be acceptable to their community.[44]

This cannot mean that public acceptability is a legitimate factor. Over time, one hopes that sentences are understood and accepted

[35]*Ibid.* at para. 127, in the second element of the summary.

[36]One can also raise the issue of comparing one individual's home to another to determine whether house arrest will be too comfortable: see the discussion in the Quebec Court of Appeal case *R.* v. *Juteau*, [1999] J.Q. No. 1862 (Que.C.A.) where, in dissent, Fish J.A. would have maintained the conditional sentence but with a four month period of house arrest.

[37]*R.* v. *Waldner* (1998), 15 C.R.(5th) 159 (Alta.C.A.) *per* Cote and Picard, JJ.A; Berger, J.A. dissenting.

[38](1998), 15 C.R. (5th) 174 (Alta.C.A.) per Cote and Picard, JJ.A. deleting the two offensive conditions six weeks after they imposed them.

[39]*R.* v. *Shropshire* (1995), 43 C.R.(4th) 269 (S.C.C.); *R.* v. *M.(C.A.)* (1996), 46 C.R. (4th) 269 (S.C.C.); *R.* v. *McDonnell* (1997), 6 C.R. (5th) 231 (S.C.C.).

[40]*Proulx*, *supra* note 1 at para. 123.

[41]*Ibid.* at para. 125.

[42]See *R.* v. *Mafi* (2000), 31 C.R. (5th) 60 (B.C.C.A.) *per* McEachern, C.J.B.C. at 75–77 and 83.

[43]This was applied by McLachlin, J. as she then was (dissenting on other grounds), in *MacDonnell*, *supra* at note 39.

[44]*Proulx*, *supra* note 1 at para. 131.

by informed members of the community. However, we live in "law and order" times. It is a dangerous use of words to suggest that, as a precept, public acceptability should influence judicial decision-making.

4. THE COMPANION CASES

While *Proulx* has answered a number of the controversies generated by the addition of s.742.1 into the Criminal Code, it has not turned the judge's role into an easy one. The difficulty in applying these principles to the hard cases which commonly come to court is exemplified by the results in the companion cases released the same day as *Proulx*. In *Bunn*[45], a case of breach of trust theft by a lawyer, the Supreme Court upheld the conditional sentence by a margin of five to three. The fact that the offender was the sole care-giver for a disabled spouse was a significant factor militating against a custodial term.[46] In *R.* v. *L.F.W*[47], the judges split evenly on whether to uphold a conditional sentence for a man who, more than 25 years before, committed offences of indecent assault and gross indecency on a young girl who was between the ages of 6 and 12. The offender apparently committed no other offences during the interim, had dealt successfully with an alcohol problem and had a good work record. In *R.* v. *R.N.S*[48], all judges agreed that the nine-month sentence of imprisonment should be restored in a case of sexual assault and invitation to sexual touching committed on a step-daughter who was between the ages of five and eight. The case of *R.* v. *R.A.R.*[49] involved a sexual assault conviction and two convictions for common assault committed at the workplace by an employer on an employee in her early twenties. L'Heureux-Dube, J. and five other judges allowed the appeal restoring the one year term of imprisonment. In dissent, Lamer, C.J.C. would have maintained the nine month conditional with house arrest and sex offender treatment although they remarked that a lengthier conditional sentence would have been preferable. In the result, only *Bunn* and *L.F.W.* maintained their conditional sentences but not without significant dissent. For the other three offenders, a sentence of imprisonment was substituted although stayed since the conditional sentences had already been served and the Crown was not requesting additional punishments.

5. CONDITIONAL SENTENCES, S.718.2(E) AND ABORIGINAL OFFENDERS

A few weeks after the decision in *Proulx*, the Supreme Court issued it decision in *Wells*[50], which applied the *Proulx* principles and s.718.2(e) as interpreted in *Gladue*[51] to the situation of an aboriginal offender who had been convicted of sexual assault. The victim, an 18-year old aboriginal woman, was unconscious at the time of the assault and there was no evidence of penetration. Wells was originally sentence to 20 months imprisonment. The Alberta Court of Appeal upheld the trial judge's rejection of a conditional sentence notwithstanding fresh evidence of the offender's involvement in a community alcohol program and his intention to attend a residential program as soon as a place

[45] *Ibid.*

[46] This decision has been criticized for the way that it diminishes the gravity of offences of dishonesty committed by a lawyer: see A. Kaiser, "*R.* v *Bunn*: A Disconcerting Judicial Response to the Dishonest Lawyer" (2000), 30 C.R. (5th) 102.

[47] *L.F.W.*, *supra* note 1.

[48] *R.N.S.*, *supra* note 1.

[49] *R.A.R.*, *supra* note 1.

[50] *Wells*, *supra* note 1.

[51] *Gladue*, *supra* note 6.

was available. For the Supreme Court, the issue was the significance of the restorative goal in light of the seriousness of the offence. Deferring to the assessment of the trial judge, Iacobucci, J. for a unanimous Court concluded that "it was open to the trial judge to give primacy to the principles of denunciation and deterrence in this case on the basis that the crime involved was a serious one".[52] He also observed that, while offences which could be placed in the category of "more violent and serious" were more likely to result in imprisonment, this was not intended to foreclose a finding that a restorative goal was predominant, especially if circumstances pointed to particular community-based response to the kind of offence in issue. Here, one can infer that he was referring to an example like Hollow Water and its response to sexual assault.[53]

If one dissects *Wells*, the proper approach for considering a conditional sentence for an aboriginal offender involves the following sequential considerations:

1. A preliminary consideration and exclusion of both a suspended sentence with probation and a penitentiary term of imprisonment as fit sentences;

2. Assessment of the seriousness of the particular offence with regard to its gravity, which necessarily includes the harm done, and the offender's degree of responsibility;

3. Judicial notice of the "systemic or background factors that have contributed to the difficulties faced by aboriginal people in both the criminal justice system, and throughout society at large"; and

4. An inquiry into the unique circumstances of the offender, including any evidence of community initiatives to use restorative justice principles in addressing particular social problems.

While counsel and pre-sentence reports will be the primary source of information regarding the offender's circumstances, there is a positive duty on the sentencing judge to inform herself.[54] Assuming that the appropriate sentence is a prison sentence less than two years in length, the judge can, after considering the factors in #2–#4 above, determine whether a conditional sentence with relevant terms should be ordered.

6. UNDERSTANDING THE BREACH MECHANISM

One aspect of the conditional sentence that receives little attention in *Proulx* is the complex breach mechanism in s.742.6. It is the subject of only a few brief remarks. First, Lamer, C.J.C. notes that breaches of conditional sentences can be proven on a balance of probabilities although he is careful to add that he is not commenting on the constitutionality of this diminution of the Crown's burden.[55] Secondly, and potentially

[52]See *Wells*, *supra* note 49 at para. 44.

[53]*Ibid.* at para. 50, in which specific reference is made to sexual assault. For a detailed account of the sentencing process developed at Hollow Water, see Ross Gordon Green, *Justice in Aboriginal Communities* (Saskatoon: Purich Publishing, 1998) at 85–95.

[54]For a discussion of the sentencing judge's duty to be informed, see *R.* v. *Laliberte* (2000), 31 C.R. (5th) 1 (Sask.C.A.) *per* Vancise, J.A. at 31–35. He notes that the trial judge heard evidence from Prof. Tim Quigley about the poverty, substance abuse and racism which aboriginal people in Saskatchewan suffer.

[55]See *Proulx*, *supra* note 1 at para. 38.

more significantly, he offers the view that a conditional sentence breach should be more onerous than a breach of probation.[56] This is consistent with the general approach of distinguishing conditional sentences from probation by ensuring a heavier punitive component. However, he follows this up with the comment that "there should be a presumption that the offender serve the remainder of his or her sentence in jail" if a condition has been breached.[57] This second brief comment about the consequences of a breach is not explained except that it is "more severe" than the consequences of a probation breach by providing a "constant threat of incarceration". If followed, this could have substantial impact on proportionality in that it has the potential of increasing the ultimate restriction of liberty, including custodial periods, beyond what the original offence can justify.

There are, however, reasons why an appellate court might classify the comments about breaches as non-binding *obiter* and not apply the presumption of incarceration. First, there is no real discussion of the elements of the breach mechanism in *Proulx* and it is conspicuously absent in the summary of general propositions.[58] Secondly, *Proulx* does not mention the 1999 amendments[59], which have changed the conceptual structure of the breach mechanism by stopping the clock after a breach allegation is commenced. Thirdly, the 1999 amendments contain specific provisions[60] that bear on the expanded restriction of liberty that occurs after a breach allegation is commenced and, accordingly, relate to proportionality. These were not before the court in *Proulx*. These factors suggest that *Proulx* was not meant to be decisive on breach issues. The Supreme Court has commenced the project of crafting a new intermediate sanction which will need to be integrated with its statutory breach process. This part of the project has not been accomplished by *Proulx*.

Section 742.6 was substantially revised in 1999 to address the criticism that the breach mechanism diminished the conditional sentence because it did not stop the clock running while a breach allegation was being considered. This has now been remedied. The first element of the breach mechanism is the requirement of an expeditious proceeding which must be commenced within 30 days of the offender's arrest for the alleged breach (with or without a warrant) or other authorized order compelling the offender's appearance.[61] Once commenced, it can be adjourned for reasonable periods until the breach allegation is determined. The breach allegation can be heard by any court with jurisdiction either where the breach is alleged to have been committed or where the offender is arrested. The conditional sentence is suspended commencing with the issuance of a warrant, the arrest without a warrant, or, if the offender is otherwise in custody, the compelling of the offender's appearance to answer the breach allegation under s.742.6(1)(d). The suspension continues until there is a determination whether a breach occurred or not. However, during the period of suspension, if the offender is not detained in custody, s.742.6(11) provides that the original conditions continue to apply pending the resolution of the breach issue. The breach

[56] *Ibid.* at para. 27.
[57] *Ibid.* at para. 39.
[58] *Ibid.* at para 127.
[59] See R.S.C. 1999, c.5, s.41.
[60] See, for example, s.742.6(11), discussed below, that continues the conditions even though the conditional sentence is suspended.
[61] See ss.742.6(3) and (1).

allegation "must be supported by a written report of the supervisor, which report must include, where appropriate, signed statements of witnesses".[62] That report is deemed to be admissible evidence at the hearing so long as the offender is given a copy and reasonable notice[63] but the offender can, with leave of the court, require the attendance of the supervisor or any witnesses who provided signed statements.[64]

The central provision of the breach mechanism is s.742.6(9) which provides the essential elements, the burden of proof and the available sanctions:

> Where the court is satisfied, on a balance of probabilities, that the offender has without reasonable excuse, the proof of which lies on him, breached a condition of the conditional sentence order, the court may....

One can hardly conceive of a more expeditious route to incarceration. It bears a marked similarity to the parole revocation process. The onus of proof has been reduced to a balance of probabilities and the proof of the existence of a reasonable excuse lies on the offender. While there is a strong argument that s.742.6 violates the presumption of innocence and the "golden thread" which requires the Crown to prove guilt beyond a reasonable doubt, as guaranteed by s.11(d) of the Charter, the issue has been addressed by two appellate courts who have rejected the argument.[65]

Section 742.6(9) also defines the potential consequences of a breach finding:

(a) take no action;
(b) change the optional conditions;
(c) suspend the conditional sentence order and direct
    (i) that the offender serve in custody a portion of the unexpired sentence, and
    (ii) that the conditional sentence order resume on the offender's release from custody, either with or without changes to the optional conditions; or
(d) terminate the conditional sentence order and direct that the offender be committed to custody until the expiration of the sentence.

Remembering the comment in *Proulx* about the "presumption of incarceration", custody can be ordered for a portion or the entire duration of the unexpired sentence. Here, it is important to note that, as a result of the breach allegation, the offender may have been detained in custody or, if in the community has been subject to conditions without the conditional sentence running. In either case, there has been an additional restriction of liberty that must be factored into the determination of the appropriate response to the breach finding. To ensure fairness and proportionality, the judge at the breach hearing should consider re-crediting some of the time on suspension toward the sentence

[62]See s.742.6(4).

[63]See s.742.6(5).

[64]See s.742.6(8).

[65]In *R.* v. *Casey* (2000), 30 C.R. (5th) 126 (Ont. C.A.) the Ontario Court of Appeal relied on *Cunningham* v. *The Queen* (1993), 80 C.C.C. (3d) 492 (S.C.C.) *per* McLachlin, J., a case dealing with denial of release on mandatory supervision as a result of the new detention provisions, to conclude that there was no breach of s.7 arising from the use of the balance of probabilities standard and the reverse onus. In *R.* v. *Whitty* (1999), 24 C.R. (5th) 131 (Nfld.C.A.), the majority judgment of Gushue, J.A. held that a conditional sentence is a term of imprisonment that is being served in the community and the breach procedure is Aaimed only at determining whether changed circumstances should lead to a variation of the manner in which that imprisonment should be served.

under ss. 742.6(14)[66] and 742.6(16)[67]. The judge should take into account the gravity of the breach and the gravity of the original offence in terms of the correlative jail term that could have been produced to ensure that an inordinate loss of liberty does not arise from the suspension of the conditional sentence. This concern will be enhanced if the duration of the conditional sentence was increased substantially beyond the correlative jail term.

7. FRAMING SENTENCING POLICY AS REFLECTED BY *PROULX*

When reading *Proulx*, there is a real sense of trying to turn the clock back. That is, its author is asking questions about how s.742.1 and its related provisions might be fitted into the *Code's* sentencing scheme after it has already been placed there. At the end of the day, we seemed to have returned to a time when people were arguing for a new intermediate sanction — one that would not be restricted to the purely rehabilitated focus of probation, one which would have some penal bite to it, but one which would avoid, at least in the first instance, incarceration. This is a legitimate argument. But it ought to be made to a legislature, not a court, where its resolution might carry with it a guarantee of resources to ensure success, or at least a good chance at success.

After *Proulx*, we have a new intermediate sanction. It bears some resemblance to intensive probation and some resemblance to judicially-imposed instantaneous parole. It can be suspended and revoked without regard for proof beyond a reasonable doubt in relatively expeditious fashion.

Certainly, this has advantages over a sentencing landscape that does not include a *Proulx*-shaped conditional sentence. However, one can predict certain implications that will follow *Proulx*:

1. there will be fewer conditional sentences;
2. conditional sentences will be of longer duration;
3. they will contain more restrictive conditions especially more house arrest
4. there will be less intervention by appellate courts;
5. proven breaches will result in more incarceration for longer periods.

While Lamer, C.J.C. was concerned in *Proulx* to ensure that the conditional sentence did not widen the net by moving more into an area previously occupied by non-custodial sanctions, the resulting sanction may have widened the net at the other end. Moreover, there is no reason to expect that the resources required to supervise this new intermediate sanction with restrictive conditions will be provided.

Going back to the original enigma (when should a sentence of imprisonment not be served in prison), the answer may lie in the recognition that the decision between a conditional sentence and a sentence of imprisonment is about denunciation. The tilt should be towards a conditional sentence unless the denunciatory objective outweighs the reformative ones. As result, the important questions are:

1. Was the specific offence, although of a type that ordinarily requires denunciation, committed in circumstances that diminish the need for denunciation;

[66]This deals with delay in executing the breach warrant, a period during which the conditional sentence is suspended by s.742.6(1).

[67]This applies in exceptional cases and in the interests of justice. The required considerations are in s.742.6(17).

2. Are there personal circumstances which make it unfair to the offender or an undue hardship on others to require the offender to carry the denunciatory message; or

3. Are there circumstances that suggest that the denunciatory message can be conveyed in some way other than incarceration?

Whether this approach is reconcilable with *Proulx* and whether it will provide a better analytical framework for judges is worthy of debate. Without a clearer framework and with deference restricting appellate review, offenders are at the mercy of how a particular trial judge characterizes the gravity of the offence and the risk of re-offending presented by the offender. In carrying out the complex balancing tasks discussed in *Proulx*, judges must be cautious that inherent biases do not privilege certain offenders and disadvantage others. They must also be sensitive to the underlying parliamentary direction to move away from incarceration as an easy and prevalent response whenever the pre-conditions of s.742.1, in conformity with the principles and objectives of sentencing, permit it.

CONDITIONAL SENTENCES, RESTORATIVE JUSTICE, NET-WIDENING AND ABORIGINAL OFFENDERS

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INTRODUCTION

The Supreme Court's six recent decisions in conditional sentencing cases provide a good opportunity to reflect on conditional sentences as one of the most important and controversial innovations in sentencing in decades. The cases themselves do not answer all the questions and they sometimes point in ambiguous and even contradictory directions. This is not surprising because conditional sentences are themselves quite Janus-faced. They are criticized by some as a slap on the wrist for those who should be punished severely and as a glorified probation order. On the other hand, they are criticized as an intrusive form of net-widening imposed on offenders who would never have gone to prison.

The Supreme Court offers some answers to both these criticisms but the result is something of an unsatisfying saw off. In an attempt to make conditional sentences meaningful and to distinguish them from probation orders, the Court has encouraged the use of punitive conditions such as house arrest and curfews and onerous restorative conditions such as treatment orders. It has also authorized trial judges to order conditional sentences that are longer than equivalent jail terms and has created a new presumption that offenders will be jailed upon proof of breach for the duration of the conditional sentences. These factors may make conditional sentences more meaningful, but they may also contribute to net widening and even the eventual imprisonment of offenders serving conditional sentences.

At the same time, the Court has probably not convinced critics (and perhaps itself) that conditional sentences are a severe enough sanction for serious crimes. Although the Court rejected Crown arguments that conditional sentences are an inherently disproportionate response to serious crimes such as sexual assault and dangerous driving causing death, it did indicate that the need to deter and denounce such crimes can justify the use of imprisonment. This aspect of the Court's decision may also increase net widening by reducing the opportunities to use conditional sentences as true alternatives to jail. As such I am not optimistic that conditional sentences will reduce reliance on imprisonment and in particular the overincarceration of Aboriginal people. Indeed, there is even a danger that conditional sentences will unintentionally help increase the overincarceration of Aboriginal people and other offenders.

Another important feature of the conditional sentence cases is the Court's embrace of restorative justice as a sentencing approach which justifies the use of conditional sentences. The reliance on restorative justice adds to the ambiguity and complexity of the conditional sentence jurisprudence because restorative justice has not traditionally been seen as a sentencing philosophy

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and it means different things to different people. There is also a danger that the Court's understanding of restorative justice and its equation of the use of restraint in imprisonment with the use of onerous restorative conditions in conditional sentences will, when combined with the unwillingness of the Court to use conditional sentences in the most serious cases, also increase netwidening and perhaps the overincarceration of Aboriginal people.

The first part of this brief discussion paper will examine the issue of net widening. The second part will then examine how the Court has approached the use of conditional sentences in cases of serious crimes, including its understandings of proportionality, denunciation and deterrence. The third part will examine the Court's understanding of restorative justice. The fourth part will then reflect on the possible effects of the Court's conditional sentencing jurisprudence on Aboriginal offenders.

I. NET WIDENING

I take net widening to refer to any process in which offenders are subject to more intrusive sanctions than before. Thus net widening would occur if offenders who would be fined or subject to a probation order are now subject to a conditional sentence. It would also occur should an offender who would not normally be imprisoned be sent to jail because of a breach of a conditional sentence order or be jailed for a longer period of time than if he or she had never been subject to a conditional sentence order. This may be a slightly wider definition of net widening than used by others but I believe it is one that makes sense for policy-makers.

The Canadian experience with conditional sentences strongly suggests conditional sentences have resulted in net widening.[2] In the first two years of their existence, over 28,000 conditional sentences were ordered.[3] It is clear that prison populations did not decrease by such a large number even though conditional sentences were defined as sentences of imprisonment that should be served under strict conditions in the community.

At one level, the Court has responded to concerns about net widening in its recent conditional sentence cases. The Court has attempted to define conditional sentences as a tough sanction just short of imprisonment. Hence Chief Justice Lamer has stated that conditional sentences must be distinguished from probation by punitive conditions such as house arrest and strict curfews. He added:

> There must be a reason for failing to impose punitive conditions when a conditional sentence order is made. Sentencing judges should always be mindful of the fact that conditional sentences are only to be imposed on offenders who would otherwise been sent to jail. If the judge is of the opinion that punitive conditions are unnecessary, then probation, rather than a conditional sentence, is most likely to be appropriate.[4]

The Court has made an admirable attempt to situate conditional sentences at the harsh end of the scale of intermediate sanctions short of imprisonment. If courts follow this advice, then there should be a reduction in the use of conditional sentences and an increase in the use of probation orders and other less severe

[2]D. Cole, "What a Mesh We're In: Conditional Sentences After the First Three Years" (Regional Seminar of the Ontario Court of Justice, Fall 1999) [unpublished].

[3]J. Roberts, "The Hunt for the Paper Tiger: Conditional Sentencing After *Brady*" (1999) 42 Crim. L.Q. 38.

[4]*R.* v. *Proulx* (2000), 30 C.R. (5th) 1 (S.C.C.) at para. 37.

sanctions. Conditional sentences should be reserved for serious crimes that require onerous restorative and punitive conditions, but not actual imprisonment.

It is my view that the above scenario is overly optimistic for a variety of reasons. As will be discussed in the second part of this discussion paper, the Court has sent a message that conditional sentences will rarely be appropriate for serious offences which require denunciation and deterrence. It is in these cases that conditional sentences could most often be a genuine alternative to imprisonment. The caution about using conditional sentences in the most serious cases decreases the opportunities for using conditional sentences as true alternatives to significant prison terms.

Another concern is that when conditional sentences are used, the Court has written a virtual prescription for net widening. The Court has held that the length of a conditional sentence can be longer than an actual term of imprisonment. This may be acceptable if conditional sentences are used as real alternatives to imprisonment, but if they are not, it means that offenders will be subject to conditions for a longer duration of time than a probation order. This in itself is net widening. It also increases the possibility of a breach. Next the Court instructs trial judges that punitive conditions such as house arrest and curfews "should be the norm, not the exception".[5] This again increases the chance of breach especially in those provinces which employ electronic monitoring which make such conditions enforceable. To be fair, however, it should be noted that the Court also warned trial judges that "conditions will prove fruitless if the offender is incapable of abiding by them, and will increase the probability that the offender will be incarcerated as a result of breaching them."[6] This and the Court's comment about the need for enforceable conditions, however, should be seen more against the backdrop of direct imprisonment as an alternative.

Finally, and as will be discussed in the third part of this discussion paper, the Court's emphasis on restorative justice also has the potential to contribute to net widening by encouraging judges to impose conditions designed to rehabilitate the offender and provide reparation for the victim and the community. These conditions may be quite intrusive and this again increases the possibility of breaches. Thus the net cast over offenders subject to conditional sentences is long and thick. The likelihood of breaches increase with the severity and duration of conditions. In its recent cases, the Supreme Court has sent clear messages to trial judges to increase the length and severity of conditional sentences and to imprison offenders who breach the conditions.

The severe even draconian breach provisions also contribute to net widening. Those arrested for a breach face a reverse onus on bail. They also have an onus to demonstrate a reasonable excuse for the breach. Finally, the breach only has to be proven on a balance of probabilities and can be established on the basis of hearsay evidence such as a parole officer's report. Although the judge has a wide range of disposition options under s.742.6(9) once a breach has been established, the Supreme Court has effectively created a presumption for the most severe of the possible dispositions. Lamer C.J. has stated that "where an offender breaches a condition without reasonable excuse, there should be a presumption that the offender serve the remainder of his or her sentence in jail. This constant threat of incarceration will help to ensure that the offender complies with condition imposed…It also assists in distinguishing the conditional sentence from

[5] *Ibid.* at para. 36.
[6] *Ibid.* at para. 117.

probation by making the consequences of a breach of condition more severe."[7] Remember that the length of the conditional sentence will be longer than if the offender went directly to jail. This is a recipe for net widening.

II. SERIOUS CRIMES: PROPORTIONALITY, DETERRENCE AND DENUNCIATION

Many of the Crowns in the conditional sentence cases argued that conditional sentences were a disproportionately lenient response to serious crimes such as sexual assault and dangerous driving causing death. Their arguments reflected public concerns about the leniency of conditional sentences and the status of proportionality as the fundamental principle of sentencing. The Crowns lost on this point and the Supreme Court made clear that the only way that Parliament can exclude particular offences from conditional sentences is by amending the Code either to exclude the offence from the regime or by imposing a mandatory minimum term of imprisonment. The Court has also clearly indicated that 718.1 of the *Criminal Code* does not reflect a crude form of "just deserts" that ties punishment solely to the crime committed. Such an approach would collapse the distinct sentencing purposes of proportionality and denunciation[8] and ignore the reference in s.718.1 to the offender's degree of responsibility as well as the gravity of the offence. In rejecting Crown arguments that conditional sentences would not be a proportionate response to certain serious crimes, Chief Justice Lamer has strongly and in my view rightly concluded that such an approach "focuses inordinately on the gravity of the offence and insufficiently on the moral blameworthiness of the offender. This fundamentally misconstrues the nature of the principle. Proportionality requires that full consideration be given to both factors."[9]

The Crowns may have lost the proportionality war only to win significant battles on the issues of deterrence and denunciation. In *RNS*[10], an unanimous Court ruled that a 9 month conditional sentence was insufficient to deter sexual touching and sexual assault of a child. Four judges (admittedly in dissent) were of the same view in the similar case of *LFW*[11] and the decision to uphold the conditional sentence was related to deference to the trial judge, the fact that the offender had not re-offended in 25 years since the assault and the 21 month duration of the conditional sentence. In *Wells*[12], an unanimous Court upheld a 20 month imprisonment sentence for sexual assault as based on the need to deter and denounce such a crime. In *Proulx*, the Court again stressed general deterrence and denunciation in upholding a 18 month prison sentence for dangerous and drunken driving causing death and bodily harm. The message implicit in these decisions seems to be that imprisonment is well suited and perhaps necessary to deter and denounce serious crimes.

The Court has, however, left the door open a crack for trial judges to demonstrate that restorative sanctions can send a message to the community that both deters and denounces serious crimes. In a recent post-*Proulx* case, Vancise J.A. of the Saskatchewan Court of Appeal has concluded that punitive conditions in a conditional sentence can deter and denounce

[7] *Ibid.* at para. 39.
[8] See *R.* v. *M.(C.A.)* (1996), 46 C.R. (4th) 269.
[9] *Proulx, supra* note 4 at para. 83 [emphasis in original].
[10] *R.* v. *R.N.S.* (2000), 30 C.R. (5th) 63 (S.C.C.).
[11] *R.* v. *L.F.W.* (2000), 30 C.R. (5th) 73 (S.C.C.).
[12] *R.* v. *Wells* (2000), 30 C.R. (5th) 254 (S.C.C.).

drug trafficking.[13] As will be suggested in the third part of the paper, some forms of restorative justice may not only be a proportionate form of accountability for the offender but may help denounce and deter some crimes in some communities. As such the Court's connection of imprisonment with deterrence and denunciation is somewhat less absolute than would have resulted had the Crowns been successful in arguing that imprisonment is the only proportionate response to serious crimes. Nevertheless, trial judges and policymakers have some work to do in displacing the Supreme Court's implicit assumption that imprisonment is necessary to deter and denounce serious crimes.

Given the Supreme Court's recent pronouncements, is it necessary to amend the legislation to prevent the use of conditional sentences to respond to serious crimes such as sexual assault? At a superficial level, the answer may be yes because the Court has refused to declare that conditional sentences will always be a disproportionate response to such serious crimes. It has left open the possibility that trial judges can order conditional sentences in serious cases but only if they are satisfied 1) that the conditional sentence will respond to the gravity of the offence and the offender's degree of responsibility; 2) that it will achieve all the purposes of punishment including the deterrence and denunciation of the crime and 3) that the public will not be endangered by the prospect of the offender re-offending while on the conditional sentence. In the vast majority of serious cases, trial judges may conclude that all of the above requirements are not satisfied. A legislative amendment would, however, prevent trial judges from using conditional sentences in those exceptional cases where the above requirements are all satisfied. In such exceptional cases, the community, including Aboriginal communities, may often have made a real commitment to deal with the crime seriously. Thus an amendment preventing the use of conditional sentences in serious cases would achieve little, but frustrate trial judges and communities in those rare cases where they are both convinced that a conditional sentence is the appropriate response to a serious crime.

III. RESTORATIVE JUSTICE

An important and intriguing feature of these conditional sentencing cases (and *Gladue*[14]) is the Supreme Court's acceptance of restorative justice as a sentencing philosophy and one that supports the use of conditional sentences. It is now no longer possible to understand the jurisprudence of sentencing without understanding restorative justice as understood by the Supreme Court.

Restorative Justice as a Sentencing Philosophy

Restorative justice is most often used to describe informal and non-adjudicative forms of dispute resolution such as victim offender mediation, family conferences and Aboriginal forms of justice which give victims, offenders and the community decision-making power. The Law Commission of Canada has recently articulated three fundamental principles of restorative justice. They are 1) crime is a violation of a relationship among victims, offenders and the community 2) restoration involves the victim, the offender and community members and 3) a consensus approach to justice.[15] Restorative justice taken in its pure sense is more a form of diversion than a sentencing philosophy for judges who take their definitions of crime

[13] *R.* v. *Laliberte*, [2000] S.J. No.138

[14] *R.* v. *Gladue*, *supra* note 1.

[15] Law Commission of Canada, *From Restorative Justice to Transformative Justice: Discussion Paper* (Ottawa: Law Commission of Canada, 1999).

from the *Criminal Code* and caselaw, who hear submissions in the context of an adversarial system of justice and who, in theory, do not act on the basis of consensus. Restorative justice as employed by judges at sentencing may be more coercive and more conducive to net widening than when employed as a form of diversion.

The emergence of restorative justice as an approach to sentencing has been quick and dramatic. One need only to re-read the 1987 report of the Canadian Sentencing Commission to see how little impact restorative justice played in that important discussion of sentencing reform. The 1988 Daubney Committee did, however, express interest in restorative justice and this eventually found its way in the 1996 sentencing reforms in s.718(e) and (f) which provide that sentences may provide "reparations for harm done to victims or to the community and to promote a sense of responsibility in offenders, and acknowledgement of the harm done to victims and the community." With some notable exceptions[16], most of those who contributed to the voluminous commentary that accompanied Bill C-41 did not see these provisions as a revolutionary new change in sentencing or one that ushered in restorative justice as a new paradigm for sentencing.

The Supreme Court, however, took these new provisions very seriously. In *Gladue*, Cory and Iacobucci JJ. observed that while the other objectives in s.718 were "in part, a restatement of the basic sentencing aims", ss.718(e) and (f) are new and along with rehabilitation (s.718(d)):

> …focus upon the restorative goals of repairing the harm suffered by individual victims and by the community as a whole, promoting a sense of responsibility and an acknowledgement of the harm caused on the part of the offender, and attempting to rehabilitate or heal the offender. The concept of restorative justice which underpins paras (d), (e), and (f)….involves some form of restitution and reintegration into the community. The need for offenders to take responsibility for their actions is central to the sentencing process…Restorative sentencing goals do not usually correlate with the use of prison as a sanction. In our view, Parliament's choice to include (e) and (f) alongside the traditional sentencing goals must be understood as evidencing an intention to expand the parameters of the sentencing analysis for all offenders. The principle of restraint expressed in s.718.2(e) will necessarily be informed by this reorientation. [17]

Most of this crucial passage is quoted with approval by Lamer C.J. in *Proulx*[18], who adds that "Parliament has mandated that expanded use be made of restorative principles in sentencing as a result of the general failure of incarceration to rehabilitate offenders and reintegrate them into society. By placing a new emphasis on restorative principles, Parliament expects both to reduce the rate of incarceration and improve the effectiveness of sentencing."[19] These are crucial passages which deserve close analysis.

The Court interprets ss.718(e) and (d) as adding something genuinely new to sentencing and that is a desire to achieve restorative justice. The Court in *Proulx* defines restorative justice as attempts "to remedy the adverse effects of

[16]See E. Bayda, "The Theory and Practice of Sentencing: Are They On the Same Wavelength? Bill C-41 and Beyond" in P. Healy & H. Dumont, *Dawn or Dusk in Sentencing* (Montreal: Les Editions Themis, 1997) at pp. 3–20; see also K. Jull, "Reserving Rooms in Jail: A Principled Approach" (1999) 42 Crim. L.Q. 67.

[17]*Gladue*, *supra* note 1 at para. 43.

[18]*Proulx*, *supra* note 4 at para. 19.

[19]*Ibid.* at para. 20.

crime in a manner that addresses the needs of all parties involved. This is accomplished, in part, through the rehabilitation of the offender, reparations to the victim and to the community, and the promotion of a sense of responsibility in the offender and acknowledgement of the harm done to victims and to the community."[20] Restorative justice has become so important in these recent conditional sentence cases that the Court has articulated the balance to be achieved between punitive and restorative goals as the key feature in determining whether a conditional sentence will be appropriate.

The Supreme Court has gone beyond the New Zealand Court of Appeal in its recognition and embrace of restorative justice. This is ironic because New Zealand with its use of Maori inspired family conferences is in many ways the home of the recent movement towards restorative justice and has institutionalized restorative justice to a greater extent than Canada. Nevertheless, its highest court, the New Zealand Court of Appeal, has given restorative justice more limited recognition than the Supreme Court of Canada. In the *Clotworthy* case, it overturned a restorative sanction that would have given the victim of a violent robbery a $15,000 compensation order for cosmetic surgery to repair an embarrassing scar caused by six stab wounds in favour of a four year imprisonment sentence designed to deter others from offending.[21] The New Zealand Court of Appeal concluded that "a wider dimension must come into the sentencing exercise than simply the position as between victim and offender" including "the public interest in consistency, integrity of the criminal justice system and deterrence of others."[22] Although the New Zealand Court of Appeal added that its decision was not based on "any general opposition to the concept of restorative justice"[23], it was hardly a ringing endorsement as compared to *Gladue* and *Proulx*.

The Many Faces of Restorative Justice

Popular ideas in criminal justice will frequently mean different things to different people. The retributive 'just deserts' movement in the 1970's and 1980's made contradictory appeals to liberals who believed that it would decrease sentencing disparity and restrain the use of imprisonment imposed for reasons of deterrence and rehabilitation and conservatives who believed that it would legitimate the societal demand for meaningful and severe punishment. Restorative justice similarly has contradictory appeals to both those who see it as an onerous form of accountability and reparation for victims and those who emphasize that it is a less coercive alternative to imprisonment and a means to promote the rehabilitation of offenders. It will be important for policy makers to be sensitive to the way that restorative justice develops.

The Supreme Court's understanding of restorative justice is complex and multifaceted. On the one hand, the Court has revived traditional concerns about rehabilitation and restraint and placed them under the new rubric of restorative justice. This will allow judges to focus on the offender at least in cases where the crime is not so serious as to require a focus on deterrence and denunciation of the crime to others. Another face of restorative justice is harder on offenders. The Court has stressed that restorative sanctions are not easy and may involve shame and stigma as well the obligations to provide reparation to

[20] *Ibid.* at para. 18.

[21] See J. Braithwaite, "Restorative Justice: Assessing Optimistic and Pessimistic Accounts" in M. Tonry, ed., *Crime and Justice A Review of Research* (Chicago: University of Chicago Press, 1999) at 1–127.

[22] *R.* v. *Clotworthy* New Zealand C.A. 114/98 (29 June 1998).

[23] *Ibid.*

victims. As discussed below, these conditions can be particularly onerous if enforced by means of conditional sentences. Even the focus on rehabilitation may encourage judges to use conditional sentences to respond to offenders' needs without adequate consideration of the coercion involved or the consequences and likelihood of a breach. The Court's understanding of restorative justice and its attraction to conditional sentences as an instrument to achieve restorative justice could contribute to net widening, especially if as discussed above, conditional sentences are not used in the most serious cases.

RESTORATIVE JUSTICE AND REPARATION TO VICTIMS AND THE COMMUNITY

The textual basis for using restorative justice as a sentencing philosophy is ss. 718(e) and (f) of the *Criminal Code*. The idea of reparation to victims and the community is a fundamental part of restorative justice as the Court understands it, but these provisions are quite ambiguous and the Court has yet to clarify them.

An important issue will be the relative emphasis that is placed on reparation and acknowledgement of harm to victims on the one hand and to the community on the other. The latter can quite easily degenerate into more traditional punitive concerns that focus on the relationship between the offender and the state. In other words the idea of reparation to the community could be collapsed into the more punitive idea that the offender should pay his or her debt to the community through a fine or other sanction.[24]

Another issue will be the emphasis that is placed on reparation contemplated under s.718(e) and acknowledgement of harm and acceptance of responsibility under s.718(f). Many offenders may be in a better position to fulfill the objectives of s.718(f) than s.718(e). There is a danger that reparation in s.718(e) will be defined narrowly as monetary reparation through restitution. In *RAR*, the Court indicated that a $10,000 payment by an employer to an employee who had been assaulted and sexually assaulted "weighed in favour of restorative objectives and therefore of a conditional sentence".[25] The Court then indicated that the restorative objective of the compensation "was not so important as to outweigh the need for a one year sentence of incarceration in order to provide sufficient denunciation and deterrence."[26]

The *RAR* case raises many interesting questions about the Court's understanding of restorative justice and the ability of courts to achieve restorative justice. The first is the question of how many offenders would be in a position of the "successful entrepreneur" in *RAR* to make such a $10,000 reparation payment? When combined with the Court's decision in *Bunn* to allow a conditional sentence for a lawyer's breach of trust[27], this raises the issue of class or socio-economic bias in the use of conditional sentences particularly if reparation is limited to monetary payment. I have argued elsewhere that although reparation is a valuable goal for sentencing, there is a need for something akin to a fine option programme where less advantaged offenders can have a fair opportunity to make reparation to their victims:

[24]K. Roach, "Crime Victims and Sentencing" in D. Stuart *et al*, eds., *Towards A Clear and Just Criminal Law: A Criminal Reports Forum* (Toronto: Carswell, 1999) at 513–519; T. Quigley, "Are We Doing Anything about the Disproportionate Jailing of Aboriginal People?" (1999) 42 Crim. L.Q. 129.

[25]*R.* v. *R.A.R.*, (2000), 30 C.R. (5th) 49 (S.C.C.) at para. 30. See also s.718(f) of the *Criminal Code* and *Proulx supra* note 4 at para. 30.

[26]*Ibid.*

[27]*R.* v. *Bunn* (2000), 30 C.R. (5th) 86 (S.C.C.).

> The fine option concept contemplated under s.736 could also be employed in terms of restitution so that an impecunious offender would be allowed to work off a restitution order that was perhaps initially paid by the state to the crime victim. All offenders regardless of class should have opportunities to repair the harm caused to victims. Victim compensation and restitution provisions could be dovetailed so that public funds would be available to top up or front load the monies that an offender could pay by way of restitution.[28]

RAR is intriguing because there were other forms of restoration (apart from the $10,000 in compensation) that might have been tried but were not considered. In this case, the victim was assaulted and sexually assaulted, but she was also subject to degrading taunts in front of others. It is unfortunately not clear what the victim wanted or if she would have been willing to sit down with the offender. What would have happened had there been a conference in which the offender faced the victim and her supporters, acknowledged the full impact of the harms he had caused and made a genuine apology? The Court of Appeal which had ordered the conditional sentence did not devise any such reparative conditions, but simply ordered 100 hours of community service, house arrest and attendance at a sexual offender course. These orders were all focussed at the offender and did nothing for the victim. In her majority decision, Justice L'Heureux Dube observed that "many members of the respondent's community supported him and tended to deny that the respondent could have committed the offence of which he was convicted."[29] A carefully structured conference ending in a formal and public apology may have responded to these real concerns and have sent "a sufficiently strong message"[30] to those most directly affected about the unacceptability and consequences of such crimes. The potential of restorative justice was not realized in *RAR*.

In my view, restorative justice can hold offenders accountable for serious crime and effectively deter and denounce crimes. Nevertheless, it is significant that these options were never really considered in *RAR*. Even the Court of Appeal which devised a conditional sentence focussed on the offender's needs and not the victim's. The Supreme Court's decision overturning the conditional sentence reflects the idea that only imprisonment will sufficiently denounce and deter serious crimes. It discusses reparation only in terms of monetary compensation and it does not explore the possibility that a properly conducted conference might have acknowledged the harm done to the victim and held the offender morally and socially, not just monetarily, accountable for the harms he inflicted on the victim.

Restorative Justice, Stigma and Shame

Although the Court does not discuss the possibilities of a restorative conference in a case such as *RAR*, it does engage the controversial idea that one of the features of restorative justice is its use of stigma and shame. The idea of stigma and shame play an important role in academic discussions of restorative justice. On the one hand, John Braithwaite has argued that shame can be an important and positive force, but only if it is exercised in a re-integrative manner.[31] On the other hand, Dan Kahan has argued that shame can have a potent force, but more because it imposes stigma and public

[28] *K. Roach*, "Crime Victims and Sentencing" *supra* note 23 at 517.
[29] *R.A.R., supra* note 24 at para. 29.
[30] *Ibid.* at para. 28.
[31] See J. Braithwaite, "Shame and Criminal Justice" (2000) Can. J. Crim. [forthcoming].

humiliation rather than provides a prelude to reintegration.[32]

Where is the Supreme Court on the controversial and emotive issue of shame and stigma? In *Proulx*, Chief Justice Lamer held that "the stigma of a conditional sentence with house arrest should not be underestimated. Living in the community under strict conditions where fellow residents are well aware of the offender's criminal misconduct can provide ample denunciation in many cases. In certain circumstances, the shame of encountering members of the community may make it even more difficult for the offender to serve his or her sentence in the community than in prison."[33] This understanding of shame seems more related to stigmatization than re-integration and caring. It may even inspire some trial judges to impose shaming penalties that rely on public forms of humiliation. These have been popular in the United States and may soon come to Canada.

Other parts of Chief Justice Lamer's opinion seem more supportive of re-integrative shaming. For example he comments about the importance of offenders being forced "to take responsibility for his or her actions and make reparation to both the victim and the community, all the while living in the community, under tight controls."[34] This seems to hold out the possibility not just of shame and stigma but re-integration as the offender accepts responsibility and makes reparation.[35] The Supreme Court's understanding of the role of shame and stigma is quite ambiguous. Stigma and shame are inherently social concepts. The Supreme Court also suggests that house arrest and curfews should be routinely used as punitive conditions. Being under house arrest and even being forced to return to your home at a time when people begin to socialize are anti-social interventions. Some forms of house arrest seem designed to isolate the offender from those beyond his or her immediate family. Braithwaite and others would argue that this deprives offenders of some of the more positive influences on their behaviour and is based on an unrealistic view of the "normal environment" to which offenders will eventually return. Not enough is known about the effects of house arrest on women. It is possible that sentencing a male offender to house arrest will increase the danger that his female companion will suffer various forms of abuse.

Restorative Justice and Rehabilitation

Another important feature of the Court's discussion of restorative justice is that it links restorative justice with the objective of rehabilitating the offender. Restorative justice thus helps revive the idea of rehabilitation which since the Ouimet Commission report in 1969 has been out of favour. Because restorative sanctions rarely will result in imprisonment, the idea of rehabilitation does not have to be tied to the dubious idea that correctional facilities can rehabilitate offenders. The Court has made clear that a conditional sentence that requires an offender to receive treatment for his or her addiction to drugs would be a restorative sanction even though it may not involve victims or surro-

[32]See D. Kahan, "Punishment Incommensurability" (1998) 1 Buffalo Crim. L.*R.* 490.

[33]*Proulx*, *supra* note 4 at para. 105.

[34]*Ibid.* at para. 41.

[35]In *R.* v. *Laliberte*, *supra* note 13 at para. 48, Vancise J.A. also stresses this as he defines restorative justice "as the creation of a positive environment for change, healing and reconciliation for offenders, victims and communities. It is a condemnation of criminal actions rather than perpetrators and integration of offenders into the community rather than a stigmatization or marginalization of them."

gate victims in its delivery. The Court's new enthusiasm for rehabilitation is an important component of its understanding of restorative justice and will require more study.

One danger is that the revived interest in rehabilitation may contribute to net widening. Trial judges may be tempted to impose restorative and rehabilitative conditions on offenders who might not otherwise have been sent to jail because they "need" such conditions. Conditions requiring treatment and education, especially if they are extended over a long period of time, may very well be breached. This is especially true of conditions which require an offender not to possess or drink alcohol. The noble aspirations of restorative justice to respond to the needs of offenders, victims and communities means there will inevitably be failures and false starts. For example, offenders who "need" intensive substance addiction treatment may not complete the treatment. Offenders who "need" anger management or life style training may get mad and not show up for a training session. If a conditional sentence has been imposed, they may quickly be breached and imprisoned for the duration of a sentence that is longer than if they had been imprisoned in the first place. In the enthusiasm for restorative justice, we must be careful not to repeat the mistakes that came from past enthusiasm for rehabilitation.

Restorative Justice and Restraint

The Court has also linked restorative justice with restraint in the use of imprisonment. In *Gladue*, the Court related the restorative goals of sentencing to data about Canada's relatively high rate of incarceration and its dramatically high levels of overincarceration of Aboriginal people. Cory and Iacobucci JJ. observed that "the existing overemphasis on incarceration in Canada may be partly due to the perception that a restorative approach is a more lenient approach to crime and that imprisonment constitutes the ultimate punishment."[36] The idea that restraint in the use of imprisonment is tied to the use of restorative justice and conditional sentences has implications for net-widening. In *Wells*, the connection between the general and specific principles of restraint in s.718.2(e) and the concept of restorative justice implicit in s.718(e) and (f) became even stronger as Iacobucci J. stated that s.718.2(e) "has a remedial purpose for all offenders, focussing as it does on the concept of restorative justice, a sentencing approach which seeks to restore the harmony that existed prior to the accused's actions. Again, the appropriateness of the sentence will take into account the needs of the victims, the offender and the community as a whole."[37] An alternative understanding of restraint would simply be that all alternatives to imprisonment, including many that do not have restorative or rehabilitative objectives, should be used whenever possible.

IV. ABORIGINAL OFFENDERS

In *Wells*, the Court remains committed to the idea in *Gladue* and s.718.2(e) that the sentencing of Aboriginal offenders requires a different methodology than non-Aboriginal offenders. At the same time, the Court indicates that in most serious cases, the result will be the same. In the case, the Court upheld a sentence of 20 months imprisonment for an Aboriginal offender convicted of sexual assault. James Wells had received a favourable pre-sentence report which recommended a conditional sentence and suggested that he would not be a danger if he could control his alcohol addiction. Nevertheless, the trial judge found that imprisonment was necessary with particular reference

[36] *Gladue, supra* note 1 at para. 72.

[37] *Wells, supra* note 12 at para. 36.

to the need to deter and denounce the serious crime of sexual assault. The Supreme Court held that this sentence was not unreasonable.

Iacobucci J. stated: "The more violent and serious the offence, the more likely as a practical matter that the appropriate sentence will not differ as between aboriginal and non-aboriginal offenders, given that in these circumstances, the goals of denunciation and deterrence are accordingly increasingly significant."[38] This equates the achievement of denunciation and deterrence with the use of imprisonment, something that may be questionable in some of the contexts that Aboriginal people find themselves in. It remains open, however, for individual trial judges to demonstrate how restorative sanctions can deter and denounce particular crimes. As suggested above, in cases such as *RAR*, a properly conducted restorative proceeding might achieve these aims of punishment as well as ensure that the offender is held accountable and accepts responsibility for his crime.

The Court in *Wells* did not rule out the possibility that in some cases a sanction other than imprisonment may be justified for serious crimes in large part "because of the community's decision to address criminal activity associated with social problems, such as sexual assault, in a manner that emphasizes the goal of restorative justice, notwithstanding the serious nature of the offence in question."[39] Thus in cases such as the Hollow Water Community Holistic Circle Healing where the community has devoted enormous resources to attempting to heal wide-spread sexual abuse, the Court may accept non-incarceration for serious offences. Where there is no extraordinary community intervention, imprisonment may remain the norm for Aboriginal offenders convicted of serious offences.

Wells suggests that the unavailability of treatment and other programmes may be one factor that justifies the use of incarceration in serious cases. The fact that the accused was apparently considered an "inappropriate client" for treatment in the Tsuu T'ina Nation Spirit Healing Lodge because he had been convicted of sexual assault and the lack of specific "anti-sexual assault programs" in his community were factors which justified the sentence of imprisonment.[40] This may place pressure, at least in more serious cases, for programmes to be available. Given the limited availability and capacity of many programmes, this may undermine some of the promise of both *Gladue* and s.718.2(e). *Gladue* can be read as mandating all reasonable alternatives to imprisonment even if they do not have a cultural or restorative component and even if Aboriginal specific programmes are not available. *Wells*, however, can be read as suggesting that in serious cases at least, the community will have to have developed programmes to deal with the crime.

Another potential barrier to the implementation of *Gladue* is the requirement that conditional sentences not be used if they would endanger the safety of the community. The Supreme Court has indicated that this refers to the risk of any re-offending and the gravity of the damage caused by anticipated re-offending. The Court hints that prior records and breach of court orders may suggest that offenders will not abide by conditional sentences.[41] These factors may make it more difficult for Aboriginal offenders to obtain conditional sentences. At the same time, however, the Court has indicated that

[38] *Ibid.* at para. 42.
[39] *Ibid.* at para. 50.
[40] *Ibid.* at para. 52.
[41] *Proulx*, *supra* note 4 at para. 70.

courts should consider the ability of conditions to secure community safety. "For example, a judge may wish to impose a conditional sentence with a treatment order on an offender with a drug addiction, notwithstanding the fact that the offender has a lengthy criminal record linked to this addiction, provided the judge is confident that there is a good chance of rehabilitation and that the level of supervision will be sufficient to ensure that the offender complies with the sentence."[42] Again, much will depend on the programmes that are available in the community as the Court has warned that "if the level of supervision in the community is not sufficient to ensure safety of the community, the judge should impose a sentence of incarceration."[43]

The ability to keep Aboriginal offenders out of jail in serious cases may depend on the resources available in the community and the ability of trial judges to demonstrate that restorative sanctions will be a proportionate response to serious crimes and will help deter and denounce the crime in the community. In other cases, Aboriginal offenders may be subject to the same net-widening effects as other offenders and perhaps more so. Trial judges may be tempted to impose restorative and rehabilitative conditions on Aboriginal offenders who would not normally have gone to jail. The conditions may be imposed for a lengthy period because of the "needs" of the offender. As the severity and length of the conditions increases, the chance for breach also increases. Aboriginal offenders may be disproportionately subject to be breached and to be breached at an earlier stage of their conditions because of a variety of factors including systemic discrimination in policing and parole. Following the Supreme Court's presumption in *Proulx*, trial judges will now be encouraged to require Aboriginal offenders who have breached to serve the rest of their conditional sentence in jail. Given that the conditional sentence may be longer than a jail sentence, this could even increase the over representation of Aboriginal offenders in jail.[44]

CONCLUSION

Although the Court has not prohibited the use of conditional sentence as a disproportionate response to serious crime for Aboriginal and other offenders, it has suggested that imprisonment will frequently be justified in such cases for reasons of deterrence and denunciation. Whether conditional sentences are used as a real alternative to jail will largely depend on local circumstances including the availability of treatment and restorative justice programmes and the exercise of discretion by sentencing judges and prosecutors.

Although the Court does indicate that conditional sentences should only be used as an alternative to imprisonment, there are real concerns that net widening may continue and unintentionally be increased by the Supreme Court's recent cases. Offenders will face onerous punitive and restorative conditions for a longer period than if they had been imprisoned. For Aboriginal offenders in particular, this increases the chances for breach. The Court has then created a presumption that offenders who breach conditions should be imprisoned for the duration of the conditional sentence. Contrary to both Parliament and the Supreme Court's intent, conditional sentences could even increase the imprisonment of Aboriginal and other offenders.

[42] *Ibid.* at para. 72.

[43] *Ibid.* at para. 73.

[44] K. Roach & J. Rudin, "*Gladue*: The Judicial and Political Reception of a Promising Decision"(2000) Can. J. Crim. [forthcoming].

DISCOVERING THE SPHINX: CONDITIONAL SENTENCING AFTER THE SUPREME COURT JUDGEMENT IN *R.* V. *PROULX*[1]

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INTRODUCTION

After almost four years in which over 40,000 conditional sentences were imposed[2], the Supreme Court of Canada has given some clear directions regarding the use of the new sanction. The unanimous judgement in *Proulx*[3] addresses four principal questions: (i) what is a conditional sentence of imprisonment? (ii) how should a conditional sentence be constructed? (iii) what is the appropriate judicial response to an unjustified breach of the order? and (iv) for what kinds of offences (and offenders) is a conditional sentence particularly appropriate (or particularly inappropriate)? In this commentary, I shall be concerned with the Court's response to the first three questions. Wherever possible, I shall relate the position taken by the Court in *Proulx* with the results from empirical research into conditional sentencing to date.

The first question identified above may seem straightforward enough: Section 742.1 of the *Criminal Code* provides a relatively clear statutory framework, including pre-requisite conditions and exclusions. But the clarity masks a degree of malleability. As the judgement notes: "There has been some confusion among members of the judiciary and the public alike about the difference between a conditional sentence and a suspended sentence with probation".[4] The Court therefore set out to locate the place that a conditional sentence occupies in the range of sanctions available at sentencing. This exercise necessitated creating a clear distinction between a suspended sentence with probation and a conditional sentence. By distancing the conditional sentence from a term of probation, the Court was compelled to move the new sanction closer to a term of imprisonment served in a provincial institution. In short, after the *Proulx* judgement, we can expect conditional sentences to become more rigorous, but not, I shall argue, as harsh as some authorities fear.

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[1]I am most grateful to Professor Patrick Healy for his insightful feedback on the issues raised in this paper.This paper is based on a presentation to the Ottawa Conditional Sentencing Seminar, held at the Faculty of Law, University of Ottawa, May 27, 2000.

[2]Department of Justice, *Conditional Sentencing in Canada: An Overview of Research Findings* by J. Roberts & C. La Prairie (Ottawa: Department of Justice Canada, Research and Statistics Division, 2000) at Table 3.1.

[3]*R.* v. *Proulx* [2000], S.C.J. No.6, 140 C.C.C. (3d) 449, 30 C.R. (5th) 1 (S.C.C.).

[4]*Proulx, supra* at para. 23. Public opinion research sustains the view expressed by the Court. A nationwide survey conducted in 1999 found that most Canadians failed a simple multiple choice question about conditional sentencing (see T. Sanders & J. Roberts, "Public attitudes toward conditional sentencing: Results of a national survey", Can. Journal of Behavioural Science [forthcoming in 2000].

1. THE NATURE OF A CONDITIONAL SENTENCE

Number and Nature of Conditions determines the severity of a conditional sentence

Determining the location of the conditional sentence on a scale of severity is far from easy. By virtue of its inherently labile nature, the onerousness of a conditional sanction of any kind is determined by the nature of the conditions imposed and the judicial response to any subsequent breach of those conditions. For this reason, a conditional sentence is hard to fix on a spectrum of the severity of sanctions.

The onerousness of a prison term is largely determined by its duration (leaving aside for the moment the issue of custody level which will affect the impact on the prisoner). A sentence of one-year in custody is, *ceteris paribus*, more onerous than a six-month sentence or six months of probation. But whether a six-month conditional sentence of imprisonment is more or less onerous than a twelve-month conditional sentence will depend on the number, nature and intrusiveness of the conditions attached to the two orders. This is just one reason why it is imperative to have good statistical information on the optional conditions attached to conditional sentence orders. Regrettably, at the present, although the number of conditional sentence orders imposed to date is available[5], Statistics Canada does not collect information on the nature of conditions attached to the orders.

Conditional sentence is a hybrid sanction, unlike any other

Conflicting interpretations of the nature of a conditional sentence have been advanced since the sanction was created in1996. For some it is a restorative, community-based alternative to imprisonment. Others have adopted a more conservative interpretation, and regard the new sanction as a form of imprisonment (and therefore a sanction with a punitive element) which is served in the community, much as parole is a form of imprisonment even though the prisoner is not actually confined to a correctional institution.

Chief Justice Lamer makes it clear in *Proulx* that a conditional sentence is a hybrid disposition, which carries punitive *and* restorative elements. The judgement notes that the conditional sentence "will generally be more effective than incarceration at achieving the restorative objectives of rehabilitation, reparations to the victim and community, and the promotion of a sense of responsibility in the offender. However, *it is also a punitive sanction capable of achieving the objectives of denunciation and deterrence*" (emphasis in original).[6]

Like most hybrids, this confluence of characteristics makes the sanction hard to characterise: is the Sphinx a lion with human features or a man infused with leonine characteristics? Was the centaur more horse than man? At the same time, the hybrid nature of the conditional sentence makes it a supple disposition, which can be used (if properly constructed, see discussion below) for a wide range of offenders.

The judgement in *Proulx* makes it clear then that a conditional sentence must have a punitive element. The reason for this is that unlike probation or other community-based punishments, a conditional sentence is a term of imprisonment, and as such should serve the function of a term of custody. In order to match the penal value of

[5]For statistical information on conditional sentences, see J. Thomas, "Adult Correctional Services in Canada, 1998–99" (2000) 20:3 Juristat; M. Reed & J. Roberts, "Adult Correctional Trends in Canada, 1997–98" (1999) 19:4 Juristat.
[6]*Proulx, supra* at para 22.

imprisonment, the conditional sentence must perforce share at least some of the characteristics of custody (such as tight restrictions on the offender's lifestyle).

Neither punishment nor restoration carries primacy in a conditional sentence

The fact that a conditional sentence must carry a punitive element does not mean that it is a punitive sanction with secondary restorative characteristics, as some writers have suggested[7], anymore than Centaurs could be described as "primarily" men albeit ones with equine bodies. While it is true that the Court stresses that each conditional sentence must carry a punitive element, this is a long way from saying that a conditional sentence is *primarily* punitive. Indeed, the Chief Justice is careful to avoid according primacy to punitive or restorative elements. The clearest statement can be found in the judgement's summary, which simply notes that "Parliament intended conditional sentences to include both punitive and restorative aspects".[8] This can be taken as a rejection of any attempt to privilege one aspect over another.[9] At the end of the day, whether a particular conditional sentence is primarily restorative or primarily punitive will depend on the nature of optional conditions imposed.

Origin of Court's interpretation to be found in original construction of the sanction

The Court's interpretation of section 742 takes us back to a dilemma confronting the architects of the sentencing reform of 1996. The sanction introduced by Bill C-41 could have been called by another name. If the conditional sentence had been defined as "enhanced probation supervision", or "intensive community punishment", or some similar construction, then there would have been no necessity to invest the disposition with a punitive element. The debate over whether a conditional sentence is a term of custody or not would have been avoided. But creating an alternative along these lines would have carried a clear danger. There would be no guarantee that judges would use the new sanction in place of, rather than in addition to, sentences of imprisonment. *In order for the conditional sentence to achieve the goal set by Parliament of reducing the number of custodial sentences, the sanction must be used as a replacement for, and not an addition to imprisonment*. And, as a replacement, it needs to convey the same, or nearly the same penal value.

Section 742.1 makes it clear that prior to imposing a conditional sentence, the court must have decided to impose a term of imprisonment.[10] If judges respect this direction, it follows that every offender sentenced to a conditional sentence is an individual that would have been sent, prior to the inception of conditional sentencing, to serve a term of custody in a provincial institution. Research suggests that this is not what has transpired; it would appear that many of the conditional sentences to date have been imposed on offenders who would

[7]See P. Healy, "The Punitive Nature of the Conditional Sentence", to be published in the forthcoming issue of the Canadian Bar Review.

[8]*Proulx, supra* at para. 127.

[9]Elsewhere in the judgement restorative elements appear to be accorded primacy, by adding the punitive element almost as an afterthought: "[the conditional sentence] affords the sentencing judge the opportunity to craft a sentence with appropriate conditions that can lead to the rehabilitation of the offender, reparations to the community, and the promotion of a sense of responsibility in ways that jail cannot. However, it is also a punitive sanction" (*Ibid.* at para. 99).

[10]"Where a person is convicted of an offence, except an offence that is punishable by a minimum term of imprisonment, and the court

(a) imposes a sentence of imprisonment of less than two years…"

have received probation. Otherwise, how can we explain the fact that over 40,000 conditional sentence orders have been handed down, and yet the provincial incarceration rate has not declined?[11] By naming the new sanction a term of imprisonment, the federal Department of Justice created a disposition that the Court would have to characterise as partly punitive in nature, *because it is a form of imprisonment*.

Having clarified the nature of the conditional sentence, the Chief Justice in *Proulx* proceeds to resolve a number of issues relating to the imposition of a conditional sentence. These are practical questions such as whether a conditional sentence may be longer than the sentence of custody that it replaces. After *Proulx*, judges should have a much clearer idea of the nature of a conditional sentence, and should be better equipped to use the sanction. This is just as well, since the judgement also contains a ringing endorsement of the principle of deference to the trial judge. This will surely amplify the autonomy of the trial courts with respect to sentencing.

2. CHANGES TO THE PRACTICE OF CONDITIONAL SENTENCING

The changes wrought by the judgement in *Proulx* affect three features of the conditional sentence: Duration, Conditions and Breach. I shall briefly review the likely impact of the changes with respect to these three issues.

a) Duration: A conditional sentence may now be longer than the term of custody it replaces

Having established that a conditional sentence is not, in most cases, the penal equivalent of a term of custody, it was inevitable that the Court would reject the one-to-one correspondence between a conditional sentence order and the term of conventional custody that is replaced.[12] Indeed, some judgements in the case law, as well as scholarly articles had already advocated as much, and section 742 in no way excludes the possibility of making a conditional sentence longer.

However, it is worth noting that the judgment does not *require* judges to prolong the duration of a conditional sentence beyond the term of custody that would have been imposed; it simply *permits* the former to exceed the latter. The key passage is the following: "When a judge decides that a term of imprisonment of "x months" is appropriate, it means that this sentence is proportional. If the sentencing judge decides — in the second stage — that the same term can be served in the community, *it is possible* that the sentence is no longer proportional to the gravity of the offence and the responsibility of the offender" (emphasis added).[13]

In many, perhaps most cases, the conditional sentence order will remain in the range that would have been imposed had the offender been sentenced to custody. Nor does the judge-

[11] Preliminary data suggest that the admissions to provincial custody were unaffected by the inception of conditional sentencing. For example, in the year prior to the creation of the conditional sentence, 35% of sentences involved a term of custody. Two years later, by which time over 22,000 conditional sentences had been imposed, the incarceration rate was still 35%. See M. Reed & J. Roberts, "Adult Correctional Services in Canada, 1997–98", *supra* note 5.

[12] "[A] conditional sentence need not be of equivalent duration to the sentence of incarceration that would otherwise have been imposed" (*Proulx*, *supra* at para. 127).

[13] *Ibid.* at para. 54.

ment envisage a crude two or three for one ratio as has been suggested for crediting pre-trial custody. The judgement is also sensitive to the relationship between the onerousness or intrusiveness of the conditional sentence order, and the length of the sentence. The imposition of a conditional sentence order carrying a number of punitive conditions that restrict the offender's freedom to a high degree would surely obviate the need to prolong the duration of the order. Indeed, the closer the conditions approximate the severity of detention in a correctional facility, the more likely it is that the duration of the conditional sentence will mirror the duration of the custodial term that would otherwise have been imposed.

Trial judges will be mindful, when determining the length of the conditional sentence order, that an unjustified breach will probably result in committal to custody (in light of the judgement's direction with respect to breach — see below). Imposing an 18-month conditional sentence order in place of a six-month term of custody in a correctional facility may well place great pressure on the offender and provoke a breach of the conditions. As well, since the number and onerousness of optional conditions have been increased, uncoupling the duration of the order from the duration of custody is unlikely to have a huge impact on the average duration of orders imposed. For a variety of reasons then, we certainly shall not witness a doubling or tripling of conditional sentence lengths, although the average length of orders may increase. Finally, the limited statistical evidence on this issue suggests that the *Proulx* judgement is simply recognizing what has often transpired at the trial court level (in Ontario at least): the lengths of conditional sentence orders in the pre-*Proulx* period were significantly longer than terms of custody imposed for the same offence.[14]

b) Nature of Conditions Imposed

Conditions imposed will be more numerous and more punitive

It is in the area of optional conditions that the *Proulx* judgement has attracted the sharpest criticism from legal academics. Having established that a conditional sentence must be more punitive than probation, the Court specified the ways in which this could be achieved: "conditional sentences should generally include punitive conditions that are restrictive of the offender's liberty. Conditions such as house arrest or strict curfews should be the norm, not the exception".[15] And further: "There must be a reason for failing to impose punitive conditions when a conditional sentence order is made."[16]

The general result of the Court's direction is that the optional conditions attached to conditional sentence orders should be quite onerous. The Court did not have the benefit of empirical research into the number and nature of conditions imposed, but the limited evidence available suggests that curfews and house arrest (in Ontario at least) have been imposed in a minority of conditional sentences imposed to date.[17] There is of course a reason for the reluctance of trial judges so far to order the offender to remain at home after a specified time of day.

[14]See J.Roberts & D. Antonowicz, *Conditional Sentences of Imprisonment and Terms of Probation: An Empirical Comparison* (Ottawa: Department of Criminology, University of Ottawa, 2000).

[15]*Proulx*, *supra* at para. 36.

[16]Ibid. at para. 37.

[17]See J. Roberts, D. Antonowicz & T. Sanders, "Conditional Sentences of Imprisonment: An Empirical Analysis of Optional Conditions" (2000) 30 C.R. (5th) p. 122 at Table 2

Unless adequate supervisory resources are available, a curfew cannot be verified, and unverifiable conditions will invite violation and attract further media attention and public criticism. Electronic monitoring solves the problem of verification, but it is not an option available in most jurisdictions across Canada. By making it clear that house arrest or a strict curfew should be the norm, and not the exception, the Court in *Proulx* has sent an unequivocal message to provincial governments: in order to work, the sanction must be supported by adequate resources.[18] We can only hope that the message has been received, and will be acted upon.

c) Judicial Response to Unjustified Breach

Incarceration following proven breach of conditions will become the norm

Section 742.6(1) provides judges with considerable discretion in terms of responding to unjustified breaches of the conditions of a conditional sentence order. They may commit the offender to custody for the remainder of the sentence, commit for some portion of the remainder, do nothing, or amend the optional conditions. Given this wide range of options, it is not surprising that the Court offered some advice as to the exercise of discretion. The message in *Proulx* could not be clearer: "[W]here an offender breaches a condition without reasonable excuse, there should be a presumption that the offender serve the remainder of his or her sentence in jail".[19] In short, the Court recommended adopting the most severe of the options available to a court after an unjustified breach has been established.

However, the impact of *Proulx* on the question of judicial response to breach may be less drastic than some commentators have suggested. Although the Chief Justice made it clear that committal for the duration of the order should be the norm, by definition there will be many exceptions to this rule. In addition, nothing in *Proulx* undermines the discretion of the trial judge with respect to breach; the court still has the same options of amending the optional conditions, or simply returning the offender to the community. As well, the increase in the number (and the onerousness) of the optional conditions imposed may work to counter the presumption in favour of committal to custody following a breach. Being practical individuals, judges may not wish to incarcerate an offender for an unjustified breach of a single condition (particularly a minor one), when the individual has successfully respected all the other optional and compulsory conditions.

Finally, it is also possible that conditional sentence supervisors may respond to breach allegations with more indulgence than in the Pre-*Proulx* era. There are two reasons for this. First, probation officers will be aware that the optional conditions imposed upon offenders serving conditional sentences have become more numerous and more onerous. Second, if conditional sentence supervisors believe that a proven breach will almost certainly result in the incarceration of the offender, they may be inclined to exercise their discretion with respect to invoking the intervention of the state, and turn a blind eye to a violation of the less substantive optional conditions.

[18]There is some evidence that judges are backing away from using conditional sentences for the very reason that adequate supervision is not available.

[19]*Proulx*, *supra* at para. 39.

3. RELATIONSHIP BETWEEN DURATION, CONDITIONS AND RESPONSE TO UNJUSTIFIED BREACH

To summarize, conditional sentence orders will likely become more onerous, somewhat longer and breaches will be treated with more severity than in the pre-*Proulx* era. It is important to note that there is a coherence to the Court's direction in these three areas: the conditions imposed as part of conditional sentence orders will become more onerous, but this may obviate the need to prolong the duration. On the other hand, if minimal conditions are seen to be appropriate, extending the duration of the order will help to preserve the principles of proportionality and parity in sentencing.[20] And while judicial response to a proven breach of conditions may become more rigorous, judges retain the discretion to amend the conditions (perhaps by lending more structure to the offender's life) and to return the offender to the community to continue serving his sentence.

One last comment is in order with respect to the "toughening" of the conditional sentence regime laid down in *Proulx*. Critics of the judgement might argue that imposing more (and stricter) conditions constitutes a marked (and gratuitous) departure from judicial practice to date. But this analysis assumes that the kinds of conditional sentences imposed by trial judges to date were "correct". And that is a matter open to debate. It is only in light of the fact that many conditional sentence orders have resembled slightly tougher probation orders (in terms of the optional conditions imposed[21]) that the *Proulx* judgment appears "tough". Had the judgement been handed down in January 1997, before trial judges had imposed many conditional sentence orders, the direction taken by the Supreme Court may have attracted more support from advocates of conditional sentencing.

Let us briefly pursue the *Proulx* directions to trial judges in light of this analysis. Consider an offender sentenced to one year in prison, and who then is allowed to serve the sentence in the community (provided he or she abides by a number of conditions). Let us suppose that after six months, she wilfully and without justification violates those conditions. Assuming that the conditions were not unreasonable to begin with, and that the offender was supervised appropriately, is it excessively harsh of the State to commit the individual to custody for some portion of the unexpired term?

Or consider the Court's direction that calls for the imposition of a curfew as an optional condition in most conditional sentence orders.[22] Take, for example, the case of an offender who otherwise would have been confined in a provincial correctional institution. Such an offender would be unable to leave the institution and be subject to many intrusions into his liberty, including fixed meal and visiting times, unpredictable cell searches, and a host of institutional rules, the violation of which may result in harsher treatment and the possible deferment of conditional release. The use of a conditional sentence will permit the offender to serve the sentence in the community, at home. Is it unreasonable to require the offender to remain at home after, say, eight in the evening? The offender's *rayon d'action* remains considerable relative to that offered in the institutional setting.

Justifying the Changes to Conditional Sentencing

The changes to conditional sentencing recommended by the Court are important because

[20] *Ibid.* at para. 54.

[21] See J. Roberts, D. Antonowicz & T. Sanders, *supra* note 17 at Table 2.

[22] *Proulx*, para. 36.

they remind judges of the point of departure for the imposition of any sentence: the statement of the purpose and principles of sentencing found in sections 718–718.2 of the *Code*. Section 718.1 lies at the heart of that statement. The principle of proportionality is central to the sentencing process in Canada and other common law jurisdictions. Indeed, the principle permeates the case law, as well as popular conceptions of justice. As Rosenberg J.A. noted in *R.* v. *Priest*, "[t]he principle of proportionality is rooted in notions of fairness and justice".[23] Any ambiguity about the primordial role of proportionality should have been dispelled when Parliament codified the principle and designated it as "fundamental". The changes with respect to section 742 advocated by the Court have the effect of moving the conditional sentence further from a term of probation (and closer to a term of custody). The benefit of this direction is that it will help to preserve the principles of proportionality and parity in sentencing, both now codified in Part XXIII.

Proportionality requires that the severity of sanctions imposed comport with the seriousness of the crime, and to a lesser extent, the culpability of the offender. If a conditional sentence with minimal conditions is imposed in a case that would otherwise have resulted in custody, the principle of proportionality is violated. Similarly if comparably-situated offenders receive respectively, a term of provincial custody and a conditional sentence of equal duration and carrying few optional conditions, then the principle of parity is violated. The Court's direction with respect to section 742 is therefore consistent with the statement of the purpose and principles of sentencing found in sections 718–718.2.

4. EFFECTS OF THE *PROULX* JUDGMENT ON THE NUMBER OF CONDITIONAL SENTENCES IMPOSED

At the end of the day, the critical question is whether the Supreme Court's direction will lead to an increased or decreased use of conditional sentences. If the number of conditional sentences imposed declines, this will spell the end of the sanction as a tool to reduce the use of incarceration. After all, the current level of usage has, as noted, failed to lower the percentage of sentences involving custody.[24] Some commentators are pessimistic about the impact the *Proulx* judgement will have on the use of the conditional sentence. Allan Manson, for one, argues that there will be fewer conditional sentences imposed.[25]

For my part, I am unconvinced, for two reasons, that the judgement will have the chilling effect on trial judges predicted by Professor Manson. First, many trial judges were, before *Proulx*, unconvinced that a conditional sentence could adequately convey a message of deterrence or denunciation.[26] The Court has addressed this skepticism, and provided practical guidance as to how this message may be achieved, even for serious cases in which statutory aggravating factors are present. Second, the Court has provided a ringing endorsement of the concept

[23]110 C.C.C. (3d) 289 (Ont. C.A.) at 297.

[24]M. Reed & J. Roberts, *supra* at note 11.

[25]See A. Manson, "The Conditional Sentence: A Canadian Approach to Sentencing Reform, or, Doing the Time-warp, Again", in this volume.

[26]For example, a national survey found that only one third of judges thought that a conditional sentence could be as effective as imprisonment in terms of achieving deterrence or denunciation; see Department of Justice, *Judicial Attitudes to Conditional Terms of Imprisonment: Results of a National Survey by* J.Roberts, A. Doob & V. Marinos (Ottawa: Department of Justice Canada, 2000) at Table 5.

of deference to the trial judge.[27] As Rosenberg, J.A. has noted: "there seems no doubt that the Supreme Court has instructed the appellate courts to draw back from what the Supreme Court obviously perceived as excessive appellate interference in the sentencing function".[28] This may embolden judges to become more creative in the construction and imposition of conditional sentences.

5. CONDITIONAL SENTENCING AND PUBLIC OPINION

Community reaction to conditional sentencing is an issue that will not go away. Indeed, it has become more, not less important as a result of the judgement in *Proulx*. Why are the views of the public relevant? One answer can be found in the fundamental purpose of sentencing articulated in section 718 of the *Criminal Code*, which states that "[t]he fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, *to respect for the law*" (emphasis added). When a conditional sentence is imposed with minimal conditions and for a personal injury offence, the public is likely to perceive it as little different from a term of probation, and as further evidence of leniency in sentencing. If this occurs, respect for the sentencing process will be undermined. There is clear evidence that the news media have reported a number of conditional sentences in a way that can only inflame public opposition to the conditional sentence.[29]

The issue of public reaction is taken up by the Chief Justice as a reason why a conditional sentence must be more severe than, and clearly distinguishable from, a term of probation:

> If a conditional sentence is not distinguishable from probation, then these offenders will receive what are effectively considerably less onerous probation orders instead of jail terms. Such lenient sentences would not provide sufficient denunciation and deterrence, nor would they be accepted by the public. Section 718 provides that the fundamental purpose of sentencing is "to contribute....to respect for the law and the maintenance of a just, peaceful and safe society." Inadequate sanctions undermine respect for the law. Accordingly, it is important to distinguish a conditional sentence from probation by way of the use of punitive conditions.[30]

Public opposition to conditional sentencing is often overstated

Before proceeding further, it is worth noting another important way in which the judgement in *Proulx* mirrors the results of empirical research. In 1999, a national survey of Canadians explored public reaction to conditional sentencing.[31] People were asked to choose between two sentences that might be imposed on an offender convicted of break and enter. Respondents were asked to answer one of two versions of the question. In version "A", participants were asked to consider a case in which "*An offender is to be sentenced for the crime of breaking into a hardware store and stealing $1,500. He has committed similar offences in the past.*" They were further told that "*The judge is trying to decide*

[27]The judgement does not mince words on this issue: "Sentencing judges have a wide discretion in the choice of the appropriate sentence. They are entitled to considerable deference from appellate courts" (*Proulx*, *supra* at para 127).

[28]M. Rosenberg, "Developments in Sentencing: the Legal Framework" (National Judicial Institute Seminar, Newfoundland, June 2, 2000 [unpublished].

[29]For example, "Sexual Assault Victims Slam Law that Set Molester Free" *Ottawa Sun* (13 March 1999); "Sentence Sparks Outrage" *Calgary Herald* (1 March 2000); "The victim suffers more than the attacker" *London Free Press* (18 January 2000).

[30]*Proulx*, *supra* at para. 30.

[31]For further information on the survey see T. Sanders & J.Roberts, *supra* at note 11.

between a 6-month prison sentence, or 6 months to be served in the community as a conditional sentence of imprisonment."

The second group of subjects were given the identical description, but some optional conditions were noted. Respondents were told that "*If the offender receives the conditional sentence, he will have to remain at home every night after 7. p.m., and on weekends. As well, he will have to pay back the money he stole, perform some community work and report to authorities twice a week for 6 months.*" The second condition, with its curfew and more rigorous reporting conditions corresponds closely to the directions regarding a conditional sentence provided in the *Proulx* judgement. That is, it is clearly more onerous than a term of probation which would not carry so many conditions.

The results dramatically supported the experimental hypothesis. In the absence of any mention of the optional conditions, the public supported the imposition of a prison sentence over the conditional sentence by a ratio of almost 3:1 (72% favoured incarceration, 28% the conditional sentence). When the conditions of the order appeared in the description, the pattern of results was a complete reversal: now only 35% of respondents supported incarceration, 65% the conditional sentence. The lesson would seem clear. The addition of onerous conditions such as frequent reporting and curfews confers two benefits: (a) it clearly distinguishes a conditional sentence from a term of probation, and (b) it promotes public support of the sanction.[32]

There is a second, perhaps less principled way in which, according to the *Proulx* decision, trial judges should consider the views of the community. It relates to the emphasis placed on deference to the trial judge. As noted, the Court reiterated the position taken in *R.* v. *M.(C.A.)*[33] that a trial judge was far better placed than appellate courts to devise an appropriate sanction. The reason for this is that a sentencing judge still enjoys a position of advantage over an appellate judge in being able to directly assess the sentencing submissions of defence and Crown counsel, to accurately assess the seriousness of the offence, and to relate the specific case to others.

However, there is an additional direction in *Proulx* with respect to the role of the community that emerges not from the guideline body of the judgment, but in the application to the facts of the case that gave rise to the specific appeal. The judgement notes that "trial judges are closer to their community and know better what would be *acceptable to their community*" (emphasis added).[34] This seems to suggest that public acceptability has a role to play in terms of whether a conditional sentence is imposed, and also in the specific terms of the conditional sentence.[35]

If trial judges interpret this direction in this way, it can only have deleterious effects. The degree of variation in terms of the use of conditional sentence will surely increase. In addition, the position taken by the Court assumes that because trial judges live in a particular community, they are able, absent any formal mechanism, to discern whether a particular conditional sentence will prove acceptable to the public. Judges have no special insight into the tenor of local public opinion. Indeed, it can be argued that their professional experiences render them less able to know whether, for example, imposing

[32]See also V. Marinos & A. Doob, "Understanding Public Attitudes Toward Conditional Sentences of Imprisonment" (1999), 21 C.R. (5th) 31–41.

[33][1996] 1. S.C.R. 500, 105 C.C.C. (3d) 327, 46 C.R. (4th) 269.

[34]*Proulx*, *supra* at para. 131.

[35]This point was first brought to my attention by Mr. Allen Edgar.

a conditional sentence for a serious personal injury offence is likely to prove unacceptable to the community.

Renaud J. makes the point crystal clear in his paper in discussing the role of community sentiment: "On the assumption that I can actually take these feelings into account, the question remains: how do I gauge the pulse of the community? Do I read the media reports, listen to on-air talk shows, or is there a website to be consulted? Are my neighbours representative of the community?" [36] Even local politicians or newspaper editors, who, it might be argued, have more contact with members of the public, have no systematic way of establishing the limits of public acceptability.

To summarize, a conditional sentence without punitive conditions may well attract public criticism, particularly if it is imposed for a serious personal injury offence. People are likely to perceive such a sanction as another form of probation. The judgement in *Proulx* has addressed this general concern in its directions regarding the construction of a conditional sentence, and the appropriate judicial response to breach. However, to further argue that trial judges should contemplate community reaction when considering a conditional sentence is in my view a most retrograde step, fraught with dangers. It may introduce an unwelcome element of populism into sentencing decisions and can only exacerbate the problem of unwarranted sentencing disparity.

6. TRANSFORMING THE PENAL LANDSCAPE

If we wish to effect a transformation in societal response to offending from one which emphasizes punishment to one which favours restorative measures, we have to recognize that this transformation is likely to be gradual. The conditional sentence may well serve as a useful judicial tool with which to promote this transformation, but it is not a device that is going to rapidly revolutionize sentencing. The movement towards a more restorative response to crime will not occur overnight, nor will it occur without some resistance. In order to convince members of the judiciary, and indeed the community at large of their value, restorative initiatives must be both plausible and workable.

If the sentencing system wishes to replace imprisonment as a sentencing option (except for offenders who pose a significant danger to the community), it must offer a substitute that performs the functions of incarceration without necessitating the detention of the offender. A sentence of imprisonment has limited utility in terms of deterrence, and none at all in terms of restoration or rehabilitation. But for denouncing culpable criminal conduct, for expressing censure, custody has no peer. That said, there is, however, no natural connection between prison and censure; rather, it is simply an association that has arisen over centuries.

The link between prison and punishment in the public mind will surely change. Indeed, it is changing already. There used to be an equally strong relationship between deterrence and imprisonment. When physical punishment and public executions were replaced by terms of imprisonment, it was argued that the fear of a sustained period of custody was necessary to deter potential offenders. The limits on the deterrent efficacy of imprisonment have been acknowledged by Commissions of Inquiry[37],

[36] G. Renaud, "The Changing Face of Conditional Sentencing: Some Sentencing Concerns of a Front Line Judge" in this volume.

[37] Canadian Sentencing Commission, *Report of the Canadian Sentencing Commission, Sentencing Reform: A Canadian Approach* (Ottawa: Supply and Services Canada, 1987).

appellate courts[38], as well as by academic commentators.

In the future we shall be able to censure blameworthy conduct in ways that do not entail the separation of offender from his or her community. This will be accomplished even for serious personal injury offences. The key lies in the systematic development of penal equivalences, a subject to which Judge Cole has recently drawn our attention.[39] Once community-based "equivalent" sanctions are accepted, imprisonment will become a very rare sanction[40], one imposed exclusively for the protection of society, in a way that civil orders are rarely invoked in order to quarantine individuals who pose a health risk to the community. We will incarcerate offenders primarily to protect, seldom to denounce. In the short term, a more modest goal might consist of the erosion in the use of custodial sentences. And that is the function of the conditional sentence of imprisonment.

The contribution of the conditional sentence to a more community-based sentencing process then is clear: it will promote public and professional acceptance of the concept of punishment in the community. To this end, the judgement in *Proulx* may well have a critical role to play. Chief Justice Lamer made it quite clear that a conditional sentence can, if properly constructed and administered, achieve the goals of denunciation and deterrence. This may be obvious to advocates of restorative justice and related initiatives, but for many criminal justice professionals, and not a few members of the community, the message may come as a surprise.

CONCLUSIONS

In 1996, Parliament created the conditional sentence of imprisonment with the express intention of reducing the number of admissions to provincial custody in a safe and principled way.[41] Four years later, research suggests that that intention has yet to be fulfilled. The judgement in *Proulx*, although criticized by some writers for converting a restorative sanction into a punitive one, may well represent an important step towards realizing Parliament's intention. Conditional sentences will in all probability become somewhat longer and somewhat more onerous. As well, offenders can expect a more rigorous response from courts in the event that they breach conditions of the order without reasonable excuse. But the judgement is not simply about making a community-based sanction tougher. It is about "finding a place" for the new sanction, and articulating the way in which the sanction should be imposed.

Of course, many issues remain to be resolved, and some worrying questions remain:

- Will the substantial deference to trial court judges endorsed in *Proulx*[42] result in even greater disparity than existed before the guideline judgement?

[38]*R.* v. *Biancofiore* (1997), 119 C.C.C. (3d) 344, 10 C.R. (5th) 200, 35 O.R. (3d) 782 (Ont. C.A.).

[39]Mr. Justice David Cole, "What a mesh we're in: Conditional sentences after the first three years" (Regional Seminar of the Ontario Court of Justice, Fall 1999) [unpublished].

[40]It is worth recalling that at present, a term of custody is imposed in over one-third (35%) of sentences imposed in adult criminal courts across Canada (J. Roberts and C. Grimes, "Adult Criminal Court Statistics, 1998/99" (2000) 20:1 Juristat at p. 10.

[41]As recognised by the Supreme Court in *R.* v. *Gladue*, [1999] 1 S.C.R. 688 at para. 39.

[42]It will be recalled that in five of the six conditional sentence cases on appeal to the Supreme Court the trial judge's decision was upheld by the Court.

The standard of review has clearly been raised as a result of the *Proulx* judgement. The Chief Justice makes the point repeatedly: "Again, I stress that appellate courts should not second-guess sentencing judges unless the sentence imposed is *demonstrably unfit*"[43] (emphasis added). How often are appellate courts likely to be asked to review sentences in light of this direction? It is ironic that a guideline appellate judgement will likely have a chilling effect on the number of sentences appealed, and will thereby diminish the role of appellate courts in guiding sentencing practices.

In 1988, Professor Alan Young reviewed the role of appellate courts in guiding sentencing practices for the Canadian Sentencing Commission. He concluded that "Not only do lower courts disregard appellate principles but the lower courts exhibit some hostility to the entire concept of being guided by appellate courts in sentencing matters."[44] Over a decade later, the independence of trial judges has been enhanced still further. The result will inevitably be more disparity in sentencing. Speaking of this issue, Vancise, J.A. wrote the following words which may prove to be prophetic: "This deferential approach to sentence appeals is apt to produce more individualized sentences and consequently apt to produce a wider disparity of sentences".[45]

- Will the federal government resist the political pressure to introduce a schedule of offences for which a conditional sentence would not be a legal penalty?

A private member's Bill introduced last year calls for an amendment to section 742.1 to exclude 28 personal injury offences and several drug offences from eligibility for a conditional sentence.[46] Similar proposals have been advanced by other politicians. It is curious that there is so much discussion of schedules after Parliament and the Supreme Court have both rejected the concept. Introducing a schedule of excluded offences would, in my view, undermine the original intention of Parliament as well as constituting an affront to the Court and an expression of non-confidence in trial judges.[47]

The future of Conditional Sentencing: Importance of Investing in Supervision and Research

With the original statutory framework now amended (twice) and a unanimous guideline judgement from the Supreme Court of Canada, the scene now shifts to the practicalities of sentencing in trial courts across the country. Trial judges will attempt to strike a balance between implementing the guidance from the Court and placing a number of conditions on offenders serving conditional sentences that renders breach of the order probable rather than possible. The preliminary evidence on conditional sentence order breach rates (pre-*Proulx*) from one province (British Columbia)

[43] *Proulx, supra* at para. 125.

[44] A. Young, The Role of an Appellate Court in Developing Sentencing Guidelines (Ottawa: Department of Justice Canada, 1988) at p. 92.

[45] *R.* v. *Laliberte*, [2000] S.J. No.138 at para. 14.

[46] Bill C-302, *An Act to amend the Criminal Code (conditional sentencing)*, 2d Sess., 36th Parl., 1999 (1st reading 3 November 1999).

[47] The *Proulx* judgement has not prevented the Ministry of the Attorney General of Ontario from issuing a practice memorandum which directs Crown counsel in the province to oppose a conditional sentence in a wide range of offences, including "sexual offences which cause psychological or physical harm" (Ontario, Ministry of the Attorney General, Criminal Law Division, Practice Memorandum, *The Use of Conditional Sentences* PM [2000] No. 6, 24 April 2000).

is discussed in another chapter in this report, and the results are not encouraging. In her research, Dawn North reports a breach rate of nearly half the orders imposed, and this in the pre-*Proulx* era.[48] We can expect the breach rate to rise somewhat following the judgement in *Proulx*, as a result of the fact that more (and more onerous) conditions will be imposed.

In terms of the ultimate success of the sanction, the critical question is whether the provincial governments will provide their probation services with the necessary resources to adequately supervise offenders serving conditional sentences in the community. But that is a question for another day.

[48]D. North, "An Empirical Analysis of Conditional Sentencing in British Columbia" [in this volume].

SUPREME COURT OF CANADA SPEAKS ON CONDITIONAL SENTENCES[1]

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INTRODUCTION

On September 3, 1996, the federal government's major new sentencing reform bill (Bill C-41) was proclaimed in force. This Bill replaced, in its entirety, Part XXIII of the *Criminal Code*, which deals with the law of sentencing in this country. This legislation would later be characterized by the Supreme Court of Canada as "a watershed, marking the first codification and significant reform of sentencing principles in the history of Canadian criminal law".[2]

One of the most significant changes brought about by this legislation was the creation of the "conditional sentence of imprisonment", permitting those who qualified to serve their sentence of imprisonment in the community instead of behind bars. Trial courts would soon embrace this new sentencing option. In just two years, conditional sentences were imposed in nearly 30,000 cases across Canada, for offences ranging in seriousness from theft to manslaughter.[3]

Unfortunately, apart from the statutory criteria, courts had little guidance in determining when it was appropriate to impose a conditional sentence. Appellate courts across the country were in conflict over some of the most basic concepts. By far their greatest struggle was their attempt to give meaning to the statutory requirement that a conditional sentence be "consistent with the fundamental purpose and principles of sentencing".

THE SUPREME COURT SPEAKS

Trial judges and counsel practicing in the criminal courts can now breathe easy. In a recent string of cases, the Supreme Court of Canada has finally stepped into the ring, providing guidance on the proper interpretation and application of the conditional sentencing provisions of the *Criminal Code*. Although this string of cases includes seven recent judgments (all of which will be discussed in greater detail below), the most significant of these is *Regina* v. *Proulx*[4], released on January 31, 2000. In that case, writing for a unanimous Court, [former] Chief Justice Lamer set out the principles governing the new conditional sentencing regime. The decision in that case will no doubt be the guidepost for any future discussion of conditional sentences in Canadian criminal jurisprudence.

THE FORESHADOWING

The Supreme Court's first judgment touching on conditional sentences was in *Regina* v. *Gladue*[5],

[1]By Gregory J. Tweney, Counsel, Crown Law Office — Criminal, Ontario Ministry of the Attorney General. The opinions expressed are solely those of the author. This paper was originally prepared for the CBAO, Criminal Justice Section Newsletter, March 2000.

[2]*R.* v. *Gladue*, [1999] 1 S.C.R. 688 at para. 39.

[3]Based on statistics maintained by the Ontario Ministry of the Solicitor General and Correctional Services.

[4]*R.* v. *Proulx (2000), 30 C.R. (5th) 1 (S.C.C.).*

[5]*Supra* at note 2.

a judgment rendered on April 23, 1999. In that case, an aboriginal woman was accused of killing her husband in a drunken rage. She pleaded guilty to manslaughter and was sentenced to three years in the penitentiary. The issue in that case was the proper interpretation and application of s. 718.2(e) of the *Criminal Code*, the principle that all available sanctions other than imprisonment that are reasonable in the circumstances be considered, with particular attention to the circumstances of aboriginal offenders. In the end, the Supreme Court upheld the three-year sentence. Although Ms. Gladue was not eligible for a conditional sentence because her sentence was greater than two years, the case is still an important one in conditional sentence jurisprudence: it provided an early glimpse into the Supreme Court's thinking on the new sentencing regime as a whole. Indeed, Cory and Iacobucci JJ.A., writing for the Court, took the opportunity to draw some general conclusions about the new sentencing legislation, as a means of providing context to a discussion of the single principle raised in that case. In short, the Court noted that the conditional sentence was Parliament's response to the alarming (and increasing) rate of incarceration in this country.

THE "BIG FIVE" CASES

Subsequent to *Gladue*, the Supreme Court granted leave in five cases from different parts of the country, all of which raised the question of how to interpret and apply the new conditional sentence provisions of the *Criminal Code*. Three cases came from Manitoba, one from British Columbia and one from Newfoundland. The Attorneys General for Canada and Ontario were granted intervener status. The cases were heard together on May 25–26, 1999. Judgment was delivered on January 31, 2000.[6] In the end, the Court was unanimous on the principles which govern the interpretation and application of the new conditional sentence provisions. They were divided, however, on how those principles were to be applied in each case.

(a) The General Principles

R. v. *Proulx*[7]: This is the Court's main judgment on the general principles on conditional sentences. The judgment is written by [then] Chief Justice Lamer, for a unanimous Court. The main principles can be summarized as follows:

1. The new sentencing legislation (Bill C-41) in general, and the conditional sentence in particular, were enacted both to reduce reliance on incarceration as a sanction and to increase the use of principles of restorative justice in sentencing. The Court pointed to s. 718.2(e) and (f) of the *Code* as evidence that Parliament intended to expand the parameters of the sentencing analysis for all offenders.

2. A conditional sentence is not the same as probation. Probation is primarily a rehabilitative sentencing tool. By contrast, a conditional sentence was intended to be punitive as well as rehabilitative. A conditional sentence should be more punitive than a suspended sentence with probation. To achieve this objective, conditional sentences should generally include punitive conditions that restrict the offender's liberty. Conditions such as curfew and house arrest should be the norm, not the exception.

3. Where an offender breaches a conditional sentence, there is a presumption that the

[6] *R.* v. *Proulx*, *supra* note 4; *R.* v. *R.A.R.* (2000), 30 C.R. (5th) 49 (S.C.C.); *R.* v. *R.N.S.* (2000), 30 C.R. (5th) 63 (S.C.C.); *R.* v. *L.F.W.* (2000), 30 C.R. (5th) 73 (S.C.C.); *R.* v. *Bunn* (2000), 30 C.R. (5th) 86 (S.C.C.).

[7] *Proulx, ibid.*

offender will serve the balance of his or her sentence in jail. In this way, the consequences for breach distinguish the conditional sentence from a probationary sentence.

4. A conditional sentence is not the same as jail. A conditional sentence, even one with stringent conditions, will usually be a more lenient sentence than a jail term of equivalent duration.

5. No offences are excluded from the conditional sentencing regime, except those with a minimum term of imprisonment. There is no presumption in favour of or against a conditional sentence for specific offences.

6. The requirement that the judge impose a sentence of imprisonment of less than two years does not require the judge to first impose a sentence of imprisonment of a fixed duration before considering whether that sentence can be served in the community. Instead, a purposive interpretation of s.742.1(*a*) should be adopted. Judges should first satisfy themselves that neither a penitentiary term nor probation is appropriate. Once the judge determines that the appropriate range of sentence is a term of imprisonment of less than two years, he or she should then consider whether it is appropriate for the offender to serve his or her sentence in the community.

7. A conditional sentence need not be of equivalent duration to the sentence of incarceration that would otherwise have been imposed. The sole requirement is that the duration and conditions of a conditional sentence make for a just and appropriate sentence. Although the Court did not address whether it was appropriate (or legal) to "blend" a conditional sentence with a custodial sentence on a single count, they implicitly sanctioned the imposition of a custodial sentence on one count and a conditional sentence on another count (they did so, of their own accord, in *R.* v. *R.A.R.*[8]).

8. The requirement that the judge be satisfied that the safety of the community would not be endangered by the offender serving his or her sentence in the community is a condition precedent to the imposition of a conditional sentence. In making this determination, the judge should simply consider the risk posed by the specific offender, not the broader risk of whether the imposition of a conditional sentence would endanger the safety of the community by providing insufficient general deterrence or undermining general respect for the law. Two factors should be taken into account when assessing the risk posed by the specific offender: (1) the risk of the offender re-offending (ie. the risk of any criminal activity, not just the risk of physical or psychological harm to individuals); and (2) the gravity of the damage that could ensue in the event of re-offence. In some cases, the minimal risk of re-offending will be off-set by the gravity of potential harm should the offender re-offend. In such cases, a conditional sentence is precluded.

9. Once the prerequisites of s. 742.1 are satisfied, the judge should give serious consideration to the possibility of a conditional sentence in all cases by examining whether a conditional sentence is consistent with the fundamental purpose and principles of sentencing set out in ss. 718 to 718.2 of the *Criminal Code*.

10. Generally, a conditional sentence will be better than incarceration at achieving the

[8] *Supra* note 6.

restorative objectives of rehabilitation, reparations to the victim and the community, and promotion of a sense of responsibility in the offender and acknowledgment of the harm done to the victim and the community.

11. Where a combination of both punitive and restorative objectives may be achieved, a conditional sentence will likely be more appropriate than incarceration.

12. A conditional sentence may be imposed even where there are aggravating circumstances, although the need for denunciation and deterrence will increase in these circumstances.

13. A conditional sentence can provide significant denunciation and deterrence. Generally, the more serious the offence, the longer and more onerous the conditional sentence should be. However, there may be some circumstances where the need for denunciation or deterrence is so pressing that incarceration will be the only suitable way in which to express society's condemnation of the offender's conduct, or to deter others. In such cases, a conditional sentence will be inappropriate, notwithstanding the fact that restorative goals might also be achieved.

14. No party is under a burden of proof to establish that a conditional sentence is either appropriate or inappropriate. The judge should consider all relevant evidence, no matter by whom it is adduced. However, as a practical matter, it will be in the offender's best interests to establish elements militating in favour of a conditional sentence, such as the existence of remorse, or a proposed plan of rehabilitation.

15. Sentencing judges have a wide discretion in their choice of the appropriate sentence. They are entitled to considerable deference from appellate courts. Absent an error in principle, failure to consider a relevant factor, or an overemphasis of the appropriate factors, an appellate court should only intervene if the sentence is demonstrably unfit.

(b) The Application of the Principles

R. v. *Proulx*[9](8-0): In this case, the 18 year old accused pleaded guilty to dangerous driving causing bodily harm and dangerous driving causing death. After drinking at a party, he decided to drive some friends home in a vehicle that was mechanically unsound. He drove erratically for 10–20 minutes, side-swiping one car and crashing into another. The driver of the second car was seriously injured. One of the passengers in the accused's car was killed. The trial judge imposed 18 months jail, but the Manitoba Court of Appeal substituted a conditional sentence. In the end, the Supreme Court restored the jail sentence on deference grounds. A custodial sentence was not unfit, nor had the trial judge committed any error that would justify appellate interference.

R. v. *Bunn*[10] (5-3): In this case, the accused (a lawyer) was convicted of six counts of breach of trust and six counts of theft. In 145 separate transfers, he had converted $86,000 of his clients' money to his own general account. He was sentenced (prior to the enactment of the conditional sentence provisions) to two years in jail. The Manitoba Court of Appeal reduced the sentence by one day and imposed a conditional sentence. The Crown's appeal to the Supreme Court was dismissed. A majority of the Court held that the accused was entitled to the benefit

[9]*Proulx*, *ibid*. Cory J. did not participate in any of "the big five" cases, nor in the later decision rendered in *Wells*.
[10]*Bunn*, *ibid.*

of the creation of the conditional sentence. There was no basis to interfere with the Court of Appeal's decision that the principles of denunciation and general deterrence could be met by a conditional sentence in all the circumstances here.

R. v. *R.A.R.*[11] (6-2): In this case, the accused was convicted of sexual assault and two counts of common assault, all in relation to one of his employees. The conduct consisted of digital penetration, shoving his fingers up the complainant's nose, causing bleeding, and dragging her across a gravel driveway. He was sentenced (prior to the enactment of the conditional sentence provisions) to one year in jail for the sexual assault, and to fines for the two assaults, plus three years probation. The Manitoba Court of Appeal allowed his appeal and substituted a global nine-month conditional sentence. A majority of the Supreme Court, however, restored the custodial sentence. They found the sentence to be unfit in light of the gravity of the offences, and the offender's moral blameworthiness, given the abuse of his position of trust. The majority would have restored the 12 month custodial sentence for the sexual assault, imposed a three month conditional sentence for the two assaults, plus three years probation. Since the sentence had been served, the majority did not decide whether a longer conditional sentence with more restrictive conditions would also have been appropriate.

R. v. *R.N.S.*[12] (8-0): In this case, the accused was convicted of sexual assault and invitation to sexual touching in relation to vaginal fondling of the accused's step-granddaughter. At the time of the offences (6–10 years previous), the accused was between 46–50 and the victim was between 5–8. He was sentenced (prior to the enactment of the conditional sentence provisions) to nine months in jail. The B.C. Court of Appeal allowed his appeal and substituted a conditional sentence. A unanimous Supreme Court, however, allowed the Crown's appeal and restored the nine-month jail sentence on the basis of the gravity of the offence and the accused's level of moral blameworthiness. The Court noted, in passing, that a nine-month jail sentence was already lenient. In these circumstances, denunciation required the imposition of a jail sentence.

R. v. *L.F.W.*[13] (4-4): In this historical sexual assault case, the accused was convicted of indecent assault and gross indecency. The victim was the accused's cousin. The offences took place when she was between 6–12 years old, and involved 10–12 incidents of forced masturbation and fellatio. The accused was sentenced to a 21-month conditional sentence. The Crown's appeal to the Newfoundland Court of Appeal was dismissed. Because the Supreme Court was equally divided as to the result, the Crown's further appeal was also dismissed. Lamer C.J. (for one side) would have dismissed the appeal on the basis of deference to the trial judge. L'Heureux-Dube J. (for the other side) held that the objectives of sentencing could not be met in this case by a conditional sentence, citing the strong need for denunciation of sexual offences committed against children by adults in a position of trust.

THE EPILOGUE

The seventh, and most recent case, is *Regina* v. *Wells*[14]. Although the case was heard at the same time as "the big five" cases, judgment was not rendered until February 17, 2000. Like

[11] *R.A.R., ibid.*
[12] *R.N.S., ibid.*
[13] *L.F.W., ibid.*
[14] *R.* v. *Wells* (2000), 30 C.R. (5th) 254 (S.C.C.).

Gladue, the case raised the issue of the application of s. 718.2(e) of the *Criminal Code* in the context of an aboriginal offender. This time, however, the offender was sentenced to 20 months in jail. He was therefore eligible for a conditional sentence. The case therefore raised the more direct question of how the conditional sentencing provisions should be applied in the context of an aboriginal offender.

Not surprisingly, the Court relied heavily on the principles it had expressed in *Gladue* (on aboriginal offenders), and in *Proulx* (on conditional sentences). To some extent, therefore, *Wells* is another example of how the general principles surrounding conditional sentences are to be applied in any particular case.

In *Wells*, the accused was convicted of sexually assaulting an 18-year-old girl at a party while she was either asleep or unconscious from the effects of alcohol. Although there was evidence of vaginal abrasions, there was no evidence of penetration. The accused aboriginal offender was sentenced to 20 months imprisonment. The accused's appeals to both the Alberta Court of Appeal and the Supreme Court of Canada were dismissed. In the end, Iacobucci J., writing for the Court, found no basis upon which to interfere with the trial judge's decision to impose a custodial, rather than a conditional, sentence. He re-iterated that restorative justice will generally be the primary objective when sentencing aboriginal offenders, particularly in view of the need to address the problem of over-incarceration of aboriginal offenders in Canadian jails. Nevertheless, he said, while s. 718.2(e) requires a different methodology for assessing a fit sentence for an aboriginal offender, it does not necessarily mandate a different result. Principles such as deterrence, denunciation and separation do not necessarily give way to principles of restorative justice. As a practical matter, particularly violent and serious offences will result in imprisonment for aboriginal offenders as often as for non-aboriginal offenders.

TO BE CONTINUED...

Even with these seven cases, the Supreme Court of Canada has not spoken its final words with respect to conditional sentences. Leave to appeal was recently granted in *R.* v. *Knoblauch*[15], a case arising from the Alberta Court of Appeal's decision reported at [1999] A.J. No. 377 (QL). In that case, the accused pleaded guilty to weapons dangerous and possession of an explosive substance. Psychiatric evidence adduced at the sentencing hearing established that the accused suffered from a serious mental disorder and was therefore extremely dangerous. The trial judge imposed a conditional sentence of two years less one day, one of the conditions of which is to remain incarcerated at the psychiatric wing of the local hospital until such time as medical professionals determine it is safe to release him into the community. The Crown's appeal to the Alberta Court of Appeal was allowed, and the sentence was converted to a custodial sentence. At issue on appeal to the Supreme Court of Canada is whether the term "community" in the phrase "endanger the safety of the community" refers to the public in general or whether it can refer to the community in which the offender is serving his conditional sentence (in this case, the local psychiatric hospital). The case was argued on April 17, 2000 and judgment was reserved, so stay tuned.... One would expect that this will be the last time for a while that the Supreme Court considers the conditional sentence provisions of the *Criminal Code*.

[15][1995] S.C.C.A. 165 (QL).

THE CHANGING FACE OF CONDITIONAL SENTENCING: SENTENCING AS SEEN FROM THE FRONT LINES

Mr. Justice Gilles Renaud

Ontario Court of Justice
Cornwall (Ontario)

INTRODUCTION

Recently, the Supreme Court of Canada has provided definitive instruction on the sentencing of offenders to imprisonment within the community. In so doing, it has insisted that considerable deference be shown by appellate tribunals to the judgment of trial courts.[1]

Indeed, the Court confirmed and emphasized[2] the following remarks in *R.* v. *M. (C.A.)*[3] to the effect that:

> A sentencing judge also possesses the unique qualifications of experience and judgment from having served on the front lines of our criminal justice system. Perhaps more importantly, the sentencing judge will normally preside near or within the community which has suffered the consequences of the offender's crime. As such, the sentencing judge will have a strong sense of the particular blend of sentencing goals that will be 'just and appropriate' for the protection of that community.

The Court went on to note that a sentencing judge must take into account the needs and current conditions of and in the community.

Hence, the Supreme Court of Canada has clearly delineated the scope of the trial court's mandate in sentencing as embracing, among other factors, the interest and perspective of the community. In this respect, it is thought that appellate tribunals are removed from the community, and are not as advantageously situated to judge the impact of an offender's actions. Hence, appeal courts must show a measure of deference.

In this paper, attention is drawn to a number of judgments that will serve to illustrate certain concerns that arise, in the eyes of one trial judge at least, as to the proper method of giving effect to this signal instruction. In other words, my goal is to make plain a number of issues that appellate tribunals will have to come to grips with in evaluating whether trial court sentences are "demonstrably unfit" in the area of conditional sentences.

Our object is not to provide answers: that is within the province of academic commentators, of the advocates, and of the appellate tribunals. Our object is merely to point out some concerns…

DISCUSSION

1) How may I judge the temperament of the community?

Recently, in *R.* v. *Mafi*[4], Lambert J.A. remarked that trial judges are likely to be familiar with

[1] *See R.* v. *Proulx* (2000), 140 C.C.C. (3d) 449 (S.C.C.) at paras. 123–126.
[2] *Ibid.* at para. 126.
[3] [1996] 1 S.C.R. 500, 46 C.R. (4th) 269, 105 C.C.C. (3d) 327.
[4] [2000] B.C.J. No. 339 (Q.L.).

the temperament of the community as it relates to a particular crime. His Lordship added, "[T]he sentencing judge brings to the sentencing task both an institutional objectivity and a deep subjective understanding of the case".[5]

My concern is a simple one: how do I ensure that I have come to understand fully and fairly the attitude, the temperament of the community? For example, what if the offender is a member of a "motorcycle gang" involved in drug trafficking, or in a violent offence. Is there any member of the community who would not wish the community to be free of such individuals? On the assumption that I can actually take these feelings, these sentiments into account, the question remains: how do I gauge the pulse of the community? Do I read the media reports, listen to on-air talk shows, or is there a web site to be consulted? Are my neighbours representative of the community? Must it be limited to the victim impact statement?

I pause to question whether the prosecution bears the burden of this duty? In this respect, note the concluding paragraphs of *R.* v. *Wells*, wherein the Court stresses the need, on occasion, for evidence to be introduced respecting the difficulties faced by aboriginal offenders.

Of course, the question to be answered in any case in which I rely on this information is the following: how do I fairly place this information on the record to permit the parties to address themselves to it and for curial review to be meaningful in assessing the merits of a conditional sentence, the primary community-based sentence in the Code?

2) May the temperament be judged by a visiting judge?

In *R.* v. *Calderwood*, Finch, J.A., observed that "... I think a resident Provincial Court judge is entitled to take judicial notice of recent unlawful conduct in the community, and of the community's attitude towards that conduct. Such local knowledge is a relevant consideration in deciding whether a discharge should be granted, or if not, what sort of sentence would be appropriate".[7]

In addition, in *R.* v. *Carter*[8], the British Columbia Court of Appeal sought again to underscore the principle that a trial judge who has presided over criminal matters in the community in question for some time is well suited to take notice of any causes for concern and how the meting out of sentences may address the issue. As made plain by Ryan, J.A., "[t]hese offences were committed in Kelowna. The trial judge who sentenced these young men sits in the Okanagan. He has an acute understanding of the effect of these crimes upon the community. He heard the submissions and saw the accused. I would not disturb his sentences".[9]

Of interest, Her Ladyship quoted the following passage from Madam Justice Southin's judgment in *R.* v. *Mulvahill* as support for "...the importance of the position of trial judges who know what crimes are a problem in their own part of the Province and who have had the opportunity to observe the accused".[10]

When does one become a local judge, if ever, if on circuit within a large region? What of judges who preside in large urban centers: may a judge ever know what is actually going on in

[5] *Ibid.* at para. 5.
[6] (2000), 141 C.C.C. (3d) 368 (S.C.C.), at paras. 50–55.
[7] (1995), 57 B.C.A.C. 237 (B.C.C.A.) at para. 14.
[8] (1995), 61 B.C.A.C. 161 (B.C.C.A.).
[9] *Ibid.* at 239–240.
[10] (1992), 5 B.C.A.C. 1 (B.C.C.A.). at 173.

the Jane-Finch area? And, again, the question remains: how does an appellate tribunal assess our knowledge of the community?

3) Must a trial judge be experienced?

In one sense, the examples noted above may be representative of a school of thought according to which appellate courts may uphold sentences by reference to the wisdom and experience of the sentencing judge, and thus implicitly acknowledging their peculiar knowledge of the local situation. For example, in *R.* v. *Doucet*, former Chief Justice Gale observed that the trial judge was, in his view, a "wise and tolerant man" and upheld the sentence imposed.[11]

Note as well the reference to the experience of the sentencing judge in *R.* v. *Cornacchia*: "...there was a very positive presentence report in this case. It moved a most experienced trial judge to come to the conclusion that he came to and we must give his concern great weight." [12]

Of course, wise and experienced judges sometimes make mistakes. For example, in *R.* v. *Simon*, the Court of Appeal of Ontario ruled that the severe sentence imposed for a break and enter offence could not be sustained, though it was imposed by a "wise and very experienced judge", on the footing that it was excessive.[13] The Court observed, of interest to us today, the trial judge considered and rejected the community's different value or emphasis of death, in this case of manslaughter following a drinking bout. In addition, it noted that "[a]lthough there may be a local situation of which this Court is unaware, the break and enter offence is one which occurs all over this Province and not only in Northern Ontario...".[14] Hence, what if the experience of the trial judge led him or her to that conclusion? Might the result have been different if further information had been placed on record?

From my perspective, and the perspective of parties seeking to upset any decision I render respecting the merits of a conditional sentence, I must ask the question: when do I become experienced and how do I make that transparent in my reasons?

4) What if there is no "grapevine" within the community?

Consider the remarks of Judge O Hearn in *R.* v. *Collier*, with respect to the impact of general deterrence in a smaller community:

> ...there is practically no publicity given to the evidence at the trial or to the reasons given by the Judge for sentencing. The public gets only an imperfect idea, if any, of what the charge was, what facts were proved and what factors were taken into account in passing that sentence. ... to pass a deterrent sentence that has any meaning to others in such circumstances is almost impossible. The conditions of modern life are so different from those in past times, when the community was aware of what was going on in its courts, that the concept of deterring others has become greatly attenuated except for major offences that achieve wide publicity or perhaps for the kind of transmission that occurs by word of mouth between the people involved and their acquaintance.[15]

[11](1970), 2 C.C.C. (2d) 433 (Ont. C.A.) at 434.
[12](1988), 31 O.A.C. 145 (C.A.). at 146.
[13](1975), 25 C.C.C. (2d) 159 (Ont. C.A.) at 85.
[14]*Ibid.* at 160.
[15](1971), 6 C.C.C. (2d) 438 (N.S.Co.Ct.) at 444.

The court added: "This means, unfortunately, that the court, if it is going to pass a sentence deterring others, must largely ignore mitigating factors because it can rely on them not being communicated to the public effectively ... it would appear to be unjust to 'make an example' of the accused by giving him a stern punishment to deter others if it is in excess of what he merits on the facts of the case".[16]

One may ask the question: does an offender receive a sterner sentence because the media chose to follow that case, as opposed to another? Does it matter that there is a grapevine but that the trial judge knows nothing about it?

5) Does the size of the community matter?

In *R.* v. *Hinch*, Mr. Justice Norris observed: "Doubtless as a Magistrate in a smaller community appreciated better than the members of this court the effect of the sentence ... A sentence of imprisonment for one month and a fine of $2,000 imposed in one of our large urban centres has not the same effect as a similar sentence in country centres where associations are close, and community, social and religious status is judged more severely."[17] Would this comment still be appropriate today?

In *R.* v. *Wiswell*, a sentence appeal was filed by an unrepresented offender note is made in particular of the following comments: "The trial judge has had experience with this young man and obviously impressed with complete failure to comply with probation order...The gravity of this type of violent behaviour is very difficult to ignore, particularly in small towns and cities." [18]

Is it ignored in larger centres? Would an appellate tribunal intervene more readily in such cases? Since appeal courts are located in large urban centres, what is the impact of such a geographic situation?

6) What if the trial judges are suffering from a "generation gap"?

I do not know a thing about Yorkville Village, not having lived or studied in Toronto, but the Ontario Court of Appeal did observe in one case that one of the accused lived in Yorkville Village and was exposed to and apparently succumbed to excessive use of drugs and alcohol and to sexually immoral conduct.[19] How did they know this? Did they rely on outside information? Was it accurate? Was it simply a manifestation of a generation gap?

On the other hand, some judges are particularly aware of present-day events. In one of the better known examples of a judge, sitting in an appellate capacity, taking notice of the world outside the court room, *R.* v. *Heffer*, Dickson, J.A., later Chief Justice of Canada, noted the phenomenon of "peregrinating youth".[20]

7) What if the community is not capable of detached fairness?

If trial judges, in the front lines, are to take into account the wishes of the community, one cannot help but observe that a number of issues must be addressed, notably the following two.

Firstly, does it matter that the community at large may hold a different view from that held by a smaller segment of the population? On the one hand, the larger group wishes a stern sentence

[16] *Ibid.* at 445.
[17] (1968), 3 C.C.C. 39 (B.C.C.A.) at 46.
[18] (1976), 17 N.S.R. (2d) 231 (N.S.C.A.) at 235.
[19] See *R.* v. *Bailey* (1970), 4 C.C.C. 291 (Ont. C.A.) at 296.
[20] (1970), 4 C.C.C. 104 (Man. C.A.) at 106.

while the smaller one, from whom the offender emerges, wishes a lenient result? For example, in *R.* v. *Turner*, Mr. Justice Haines remarked that "Windsor has a population of 5,000 Negroes... Quite properly they watch with keen interest the relative treatment of these two accused (one of whom is black)".[21] Note as well that in *R.* v. *Fireman*, the trial judge considered and rejected the community's different value or emphasis of death, in this case of manslaughter following a drinking bout.[22]

Secondly, what if the community at large wishes undue leniency, as in cases in which the victim is ostracized and the offender is not subject to any criticism? What if the community is not sensitize to the plight of victims of domestic violence, to the harm done to seniors, to gays and lesbians, etc.?

8) Personal knowledge and prevalence

In *R.* v. *Priest*, the Court of Appeal did not find it necessary to decide the question whether the trial judge had sufficient information before him to safely conclude that there was "a serious problem of break and enter in Hearst."[23] The Court did note that "… unlike some cases that have come before this court, there were no statistics placed before the trial judge and he based his opinion on the court dockets of persons accused of the crime of break and enter."[24]

However, this was a very experienced trial judge who presides over a number of small communities. Must he spell out more than his own knowledge? Recall that in *R.* v. *Simon*, a comment was recorded by Gale, C.J.O. to the effect that "[a]lthough there may be a local situation of which this Court is unaware, the break and enter offence is one which occurs all over this Province and not only in Northern Ontario..."[25] What if the trial judge in *Priest* knew of such a local condition?

CONCLUSION:

There is much merit in the position advocated in many cases that a local trial judge having some experience of the community is ideally placed to consider and to weigh his or her knowledge of any local situation as it influences the imposition of sentences. The extent to which the doctrine should apply remains to be seen, however, as consideration must be given to the need to create a fuller record for appellate review and the potential unfairness of treating one offender more harshly (or more leniently) than another depending on the experience of a judge.

Lastly, appellate courts must provide further guidance on two issues: firstly, the extent to which the views of the community are to be ascertained and, secondly, may the community submit a form of victim impact statement.

[21](1970), 1 C.C.C. (2d) 293 (Ont. H.C.J.) at 294–295.
[22](1971), 4 C.C.C. (2d) 82 (Ont. C.A.) at 85.
[23](1996), 93 O.A.C. 163 (C.A.) at 166–167.
[24]*Ibid.* at 166–167 [emphasis in original].
[25]*Simon*, *supra* note 13 at 160.

APPELLATE REVIEW OF SENTENCING

Mr. Justice William Vancise

Saskatchewan Court of Appeal

In any discussion of appellate review of sentences in general and conditional sentences in particular, the starting point of necessity must be the *Criminal Code*. Section 718.3(1) of the *Code* gives trial judges discretion to prescribe different degrees or kinds of punishment in respect of an offence subject to the limitations prescribed in the *Code*. Section 742.1 provides that a person who is convicted of an offence except one punishable by a minimal term of imprisonment, may be sentenced to a conditional sentence of imprisonment where two pre-conditions are met: (1) that the sentence is of less than two years, and (2) the accused is not a danger to the community; and, that such sentence would not be inconsistent with the fundamental principles of sentencing.

There is no right of appeal at common law. The right to appeal a sentence is dependent upon the statutory right of appeal contained in the *Criminal Code*. Historically, the right to appeal a conviction was introduced into the *Code* of 1892, but the right to appeal sentences was limited to cases where the sentence was one "which could not by law be passed".[1] In 1921 courts of appeal were given the power to review the "fitness" of sentence as opposed to the legality of the sentence.[2] The power to review sentences is now contained in s. 687(1)[3] of the *Code* which provides that, where an appeal is taken against sentence, the court of appeal shall consider the fitness of the sentence appealed against and may either vary the sentence within the limits prescribed by law for the offence, or dismiss the appeal. Section 687(2) provides that a judgment of a court of appeal that varies the sentence has the same force and effect as if the sentence were passed by the trial court.

Prior to examining recent decisions of the Supreme Court of Canada which have limited the power of courts of appeal to vary sentences imposed by trial judges, it is useful to examine the historical interpretation by appellate courts of that statutory appeal power to review sentences. A judicial debate about the extent of the powers of courts of appeal to review sentences imposed by trial judges began almost immediately after its introduction in 1921. The two opposing points of view were later summarized by Owen J. in his dissent in *R.* v. *Deschennes*:[4]

> One point of view is that as far as sentences are concerned a Court of Appeal should interfere rarely, that sentencing is primarily

[1]See s. 744(4) of the 1892 *Criminal Code of Canada*.

[2]S.C. 1921, c. 25, s. 22; see also S.C. 1923, c. 41 s. 9.

[3]R.S.C. 1985, c. C-46 687.(1) Powers of court on appeal against sentence — Where an appeal is taken against sentence the court of appeal shall, unless the sentence is one fixed by law, consider the fitness of the sentence appealed against, and may on such evidence, if any, as it thinks fit to require or to receive,

(a) vary the sentence within the limits prescribed by law for the offence of which the accused was convicted; or

(b) dismiss the appeal.

[4][1963] 2 C.C.C. 295.

> the responsibility of the trial Judge, and that Judges of the Court of Appeal should only interfere with a sentence if it shocks their sense of justice. This is a "laissez-faire" or negative attitude. It has been referred to as the "rubber-stamp" theory: *Ponton* v. *The Queen* (1959), 127 C.C.C. 325, 31 C.R. 347, Casey, J., at p. 331 C.C.C., p. 357 C.R.
>
> Another point of view is that a Court of Appeal in carrying out its obligation to consider the fitness of the sentence appealed against has a *duty* to go into the matter fully and to consider each appeal from sentence with the utmost care even though the sentence on its face does not shock the Court by its excessiveness or its inadequacy. This point of view finds support in the wording of s. 593 of the *Criminal Code*, which provides that the Court of Appeal *shall* consider the fitness of the sentence appealed against.[5]

The restrictive approach is exemplified by the Québec Court of Appeal in such decisions as *R.* v. *Duestoor*[6] and *Cooper* v. *R.*[7] which held that a court of appeal should not interfere with the sentence imposed by the trial judge unless it can be shown that he proceeded on some wrong principle. The Saskatchewan Court of Appeal in *R.* v. *Morrissette*[8] outlined the activist approach. Chief Justice Culliton stated that the Saskatchewan Court of Appeal had never taken a "laissez-faire" or "negative attitude" in sentence appeals in exercising the powers conferred on it by the *Code* in s. 593(1) [now s. 687.(1)]. In *R.* v. *Finlay*[9] the Court held that Parliament intended a court of appeal to consider all the circumstances connected with the case and modify the sentence if in its opinion it should be modified. Martin J.A., later Chief Justice of the Court of Appeal of Saskatchewan, stated:

> A court of appeal can only exercise its best judgment after a careful consideration of all the circumstances and will always remember that the trial judge having seen the accused and heard the witnesses has an advantage… which cannot be lightly regarded.[10]

Most courts of appeal in the country took the activist approach to sentence appeals. Suffice it to say that by the early 1980s any restrictive approach to sentencing appeared to have been rejected.

In *Morrissette*, Culliton C.J., speaking on behalf of the Court, was careful to point out that a court of appeal in exercising its function, should not lightly disregard the advantage of the trial judge in having seen the accused and hearing the witnesses. He pointed out, however, that the advantage enjoyed by a trial judge is offset in circumstances where the appellant appeals his sentence, appears in person, and makes his submission. There the appellate court has as much of an opportunity as the trial judge to assess the character of the appellant. He concluded by stating:

> I think it is apparent that when the appellant appears in person before the appeal Court, that Court is in at least as good a position as was the trial Judge to assess the character of the appellant. While the Court should carefully weigh the reasons advanced by the trial Judge for the sentence he imposed, it should not be hesitant to disagree either with the reasons or conclusions of the trial

[5] *Ibid.* at 301–2.
[6] (1938), 13 Can. Abr. 1562 (Que. C.A.).
[7] (1950), 11 C.R. 208 (Que. C.A.).
[8] (1971), 1 C.C.C. (2d) 307.
[9] (1924) 43 C.C.C. 62. (Sask. C.A.).
[10] *Ibid.* at 65.

> Judge, if it feels, after a careful review of all of the circumstances, the sentence imposed was not a fitting one. Under such circumstances, the appeal Court has the right and the duty to vary the sentence to one it believes to be proper. As well, the Court of Appeal must exercise the powers granted to it to prevent unreasonable disparity in sentences for the same or similar offences.[11]

The activist approach to sentence review as articulated by Culliton C.J.C. and adopted by almost all courts of appeal changed with the decision of the Supreme Court of Canada in *R.* v. *Shropshire*[12] where Iacobucci J. examined the standard of appellate review in sentence appeals. In Shropshire the court was called upon to determine the appropriate factors for a sentencing judge to consider in determining a period of parole ineligibility for an individual convicted of second degree murder. A secondary issue, that of the appropriate standard of appellate review of that discretionary order was also raised. It is that secondary issue which has vested Shropshire with such notoriety. Iacobucci J. found that s. 744 orders are defined by s. 673 as forming part of the "sentence" and thus, are to be appealed pursuant to s. 687(1) of the *Code*. He then set out a restrictive approach to appellate review in these terms:

> An appellate court should not be given free reign to modify a sentencing order simply because it feels that a different order ought to have been made. The formulation of a sentencing order is a profoundly subjective process; the trial judge has the advantage of having seen and heard all of the witnesses whereas the appellate court can only base itself upon a written record. A variation in the sentence should only be made if the court of appeal is convinced it is not fit. That is to say, that it has found the sentence to be clearly unreasonable.[13]

Iacobucci J. adopted the analysis of Bull J.A. in *R.* v. *Gourgon*[14] that courts of appeal should be careful not to interfere with the exercise of a discretion of a trial judge unless the discretion is *patently wrong or the trial judge erred in principle or overemphasized or ignored appropriate factors*. As previously noted, that opinion had been rejected by the majority of if not all of the courts of appeal in this country, if not in express terms, certainly by deed. The activist position articulated by Culliton C.J.S. was the one favoured by courts of appeal.

Suffice it to say that courts of appeal were sensitive to the advantages of trial judges in imposing sentences but nevertheless were of the view that s. 687(1) or its predecessor imposed an obligation on courts of appeal to carefully weigh the reasons advanced by the trial judge for the sentence under appeal and to change it if the court of appeal after a careful review of all of the circumstances was of the opinion that the sentence was not fit.

Shropshire was shortly followed by *R.* v. *M.(C.A.)*[15] where the deferential approach was confirmed, refined and formally extended. Chief Justice Lamer stated:

> Put simply, absent an error in principle, failure to consider a relevant factor, or an overemphasis of the appropriate factors, a court of appeal should only intervene to

[11] *Morrissette, supra* at p. 313.
[12] [1995] 4 S.C.R. 227.
[13] *Ibid.* at 249 [emphasis added].
[14] (1981), 58 C.C.C. (2d) 193. (B.C.C.A.).
[15] [1996] 1 S.C.R. 500.

> vary a sentence imposed at trial if the sentence is demonstrably unfit. Parliament explicitly vested sentencing judges with a discretion [in s. 717(1), now 718.3(1)] to determine the appropriate degree and kind of punishment under the *Criminal Code*…This deferential standard of review has profound functional justifications.[16]

The Chief Justice then embarked on a rather remarkable justification for deference to sentences imposed by trial judges in circumstances where there has been no trial; where the accused has plead guilty; and, where the trial judge has had only the benefit of written or oral submissions on sentence. He relied on: 1) the trial judge being able to directly assess the sentencing submissions by both the defence and Crown; 2) the trial judge having served on the front lines of the justice system; and, 3) the trial judge normally residing at or near the community which has suffered the consequences of the offender's crime. All those factors led him to conclude that the sentencing judge will have a "strong sense of the particular blend of sentencing goals that will be 'just and appropriate for the protection of the community' and the sentences of trial judges should not be lightly interfered with."[17]

If one examines the position taken by Chief Justice Culliton in *Morrissette* it is readily apparent that the two views are diametrically opposed. There is no advantage to a trial judge who does not hear the evidence or the accused but relies merely on oral or written submissions. The so-called position of advantage is no different from that of a court of appeal. Frequently the court of appeal is in a better position because the appellant appears in person and makes his or her own submission on sentencing. Courts of Appeal in the various provinces are as well placed as trial judges to have a strong sense of the community and the particular blend of the sentence required to assess the fitness of the sentence. We do not live many miles away in a distant kingdom (such as Ottawa) so as to be unable to assess the relevant factors applicable in sentencing. Indeed, the decisions of Bayda C.J.S. in both *R.* v. *Taylor*[18] and his dissent in *R.* v. *Morin*[19] while upholding decisions of a sentencing judge made the point eloquently that the Court of Appeal was extremely cognizant of circumstances surrounding the sentences and what was just and appropriate for the protection of the communities involved.

Notwithstanding the approach adopted by the Supreme Court, Lamer C.J. did concede in *M.(C.A.)* that appellate courts do have useful roles to play in reducing disparity of sentencing although it is arguable that the deferential approach reduces the court's ability to minimize disparity. In my opinion, deference encourages disparity and makes it much more difficult for courts of appeal to carry out the function of minimizing differences in results of sentencing. See my comments in *R.* v. *Laliberte*.[20] Interestingly, Chief Justice Lamer concludes by stating:

> I believe that a court of appeal should only intervene to minimize the disparity of sentences where the sentence imposed by the trial judge is in substantial and marked departure from the sentences customarily imposed for similar offenders committing similar crimes.[21]

[16] *Ibid.* at 565.
[17] *Ibid.* at 566.
[18] [1998] 7 W.W.R. 704.
[19] (1995), 101 C.C.C. (3d) 124.
[20] [2000] S.J. No. 138.
[21] *M.(C.A.)*, *supra* note 15 at 567.

In effect, that is what courts of appeal have always done. The problem is that courts of appeal are now faced with the so-called "deferential standard" of sentence review which was summarized by Sopinka J. in *R.* v. *McDonnell*[22] as: 1) error of principle; 2) failure by the trial judge to consider a relevant factor; 3) an over-emphasis by the trial judge of the appropriate factors; and, 4) a demonstrable unfitness of the sentence.

The result is that courts of appeal must now substitute the strong deferential approach for the lessor deferential approach as epitomized in *Morrissette*. I described that effect in these words in *Laliberte*:

> The effect of these three Supreme Court judgments has a profound effect on how we as a court of appeal deal with sentence appeals. Suffice it to say that prior to these decisions, this Court had not followed a "strong deferential approach" to sentence appeals. The result is, as Bayda C.J.S. noted in *R.* v. *Horvath*[23], that the approach to reviewing sentences as set out by this Court in *Morrissette* and *Wenarchuk* must now be replaced by the "strong deferential" standard of appellate review as set out by the Supreme Court in *Shropshire, M.(C.A.)* and *McDonnell*. Unless the sentencing judge has erred in principle, failed to consider a relevant factor or over emphasized an appropriate factor or imposed a sentence that is demonstrably unfit this court must not intervene.
>
> This deferential approach to sentence appeals is apt to produce more individualized sentences and consequently apt to produce a wider disparity of sentences when viewed from the perspective of the "offence" as distinct from the "offender".[24]

What then is the effect of the strong deferential approach to sentencing in general and conditional sentences in particular? The British Columbia Court of Appeal recently considered the standard of appellate review in *R.* v. *Mafi*[25], in an appeal dealing with the period of parole ineligibility under s. 745.2 of the *Code*. The trial judge had imposed a period of 20 years parole ineligibility for conviction of second-degree murder involving the stabbing deaths of two individuals. In imposing the sentence, the trial judge accepted the recommendation of the jury that the period of parole ineligibility be 20 years. Chief Justice McEachern and Mr. Justice Lambert allowed the appeal and reduced the period of parole ineligibility from 20 to 15 years. Mr. Justice Braidwood upheld the trial judge's decision because in his opinion it did not fall "outside the acceptable range for this kind of second degree murder".

With respect, that is precisely the problem with the strong deferential approach to sentencing. The range determined by the trial judge and Judge Braidwood was 10 to 20 years of parole ineligibility. That is an extremely wide range which can lead to a great deal of injustice. In effect it reduces an appellant to searching for an error in principle in order to appeal.

Mr. Justice Lambert examined this question in some detail. He noted that the recent amendments to the *Criminal Code* in relation to sentencing provided in s. 718.2(b) that:

[22][1997] 1 S.C.R. 948.
[23]*R.*v. *Horvath*, [1997] 152 Sask. R. 277, para. 23.
[24]*Laliberte*, *supra* note 20 at paras. 13–14.
[25]2000 B.C.C.A. 135.

> 718.2 A court that imposes a sentence shall also take into consideration the following principles:
> . . .
> (b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances

and that there was nothing inconsistent between that section, a principle which has always been important in sentencing, and s. 745.4 which sets out the obligation of a sentencing judge in imposing a sentence for second degree murder. As he points out, the sentence for second-degree murder is life imprisonment coupled with parole ineligibility of not less than 10 and not more than 25 years. That, however, is not the "acceptable range". Surely, the "acceptable range" is determined by the range for similar murders committed by similar offenders in similar circumstances. That range is determined in the same way as for all other offences. The range is not zero to the maximum, i.e. 0–14 years but rather is determined for like crimes committed by like people in like circumstances.

The difficulty in *Mafi* is that the acceptable range as found by the trial judge was too wide. The purpose of ranges established by courts of appeal is to provide useful guidelines to trial judges when sentencing accused persons. Those ranges must however not be so wide as to effectively deprive an accused person of a right of appeal. Those ranges have been determined over time by decisions of trial judges and courts of appeal and change from time to time to reflect changing circumstances. See, for example, the decision of the British Columbia Court of Appeal in *R.* v. *Sweeney*[26] in which the British Columbia Court of Appeal considered whether the upper end of the range for sentences for dangerous driving causing death or impaired driving causing death had through creeping incrementalism been allowed to drift too high.

In the opinion of Mr. Justice Lambert, a key consideration in the determination of whether or not a sentence is demonstrably unfit, should be whether the sentence imposed is a marked departure from the mid-point of the range and not from the extremes of the range. That approach has much to commend it but the better approach is to narrow the range as was done in *Mafi*. Mr. Justice Lambert notes courts of appeal must maintain an appropriate measure of sentencing consistency by ensuring the range is kept within limits set by identifying the characteristics of the offender and the offence that are significant for sentencing purposes.

Chief Justice McEachern after noting the changes to the *Criminal Code* with respect to sentencing and the Supreme Court of Canada's decisions in *Shropshire* and *M.(C.A.)* stated:

> Thus, it seems that a sentence imposed in a given case "should" be similar to sentences imposed upon similar offenders for similar offences committed in similar circumstances. However, at the same time, we must take into account the other purposes and principles of sentencing, including any aggravating or mitigating circumstances and the impact upon the victim(s)= family and friends. Moreover, in the recent case of *R.* v. *Gladue*[27], it was emphasized that sentencing judges must take into consideration <u>all</u> the provisions in Part XXIII of the *Criminal Code*.
>
> As a result of the legislative amendments and the relevant case law, sentencing has

[26](1992), 71 C.C.C. (3d) 82

[27]*R.* v. *Gladue*, [1999] l S.C.R. 688.

> become a very complicated exercise. Further, if all of the delineated principles are properly applied, a possible result could be a sentence that, when given an adequate measure of deference, would effectively deprive an accused of an effective right of appeal. Despite these observations, the foregoing represents the law that I must endeavour to apply in this case.[28]

Chief Justice McEachern then noted that the attempt to balance all the factors of sentencing may lead to the displacement of sound judgment exercised by trial and appellate judges. He carefully examined all the relevant factors to attempt to find an appropriate range of sentence which included not only a comparison with the length of parole ineligibility imposed in other cases but the peculiar circumstances of the accused. He considered: the circumstances of the offence; the circumstances of the accused; aggravating or mitigating circumstances; the effect of denunciation and retribution; the jury's recommendation; and, the change of rehabilitation. More importantly, after a lengthy review of the principles, he concluded that the appropriate range was in the 12 to 15 year period of parole ineligibility as found by Mr. Justice Lambert. He found that notwithstanding that in his opinion the sentence was outside the range, he still had to consider whether to defer to the decision of the trial judge and dismiss the appeal. I do not agree with that position. Once he found the sentence to be outside the range the sentence is unfit. I do agree with his opinion that to defer to the trial judge in the circumstances he described would result in upholding an excessive sentence and amount to a denial of the accused's right to appeal. That is the danger. Unless courts of appeal approach these matters with a certain degree of flexibility we will create injustice rather than reduce disparities and reduce injustices in sentencing.

The Supreme Court of Canada would appear to have judicially legislated a new meaning for the word "fitness." It is not enough the sentence is not fit, it must be *demonstrably unfit* and the trial judge must have committed either some error in principle or failed to consider or overemphasized a relevant factor in imposing the sentence. That position was reemphasized by Chief Justice Lamer in *R.* v. *Proulx*[29] in dealing with an appeal concerning the imposition of a conditional sentence. Chief Justice Lamer stated: "I stress that appellate judges should not second guess sentencing judges unless the sentence imposed is demonstrably unfit."[30] This is but one more example of the Supreme Court reducing the powers of courts of appeal. This cannot in the long run produce a positive approach to sentencing.

[28] *Mafi*, *supra* note 24 at paras. 44–45.
[29] [2000] 1 S.C.R. 61.
[30] *Ibid.* at para. 125.

AN EMPIRICAL ANALYSIS OF CONDITIONAL SENTENCING IN BRITISH COLUMBIA*

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INTRODUCTION

Conditional sentence orders were designed as an explicit alternative to incarceration and introduced by way of Bill C-41 (Chapter 22 of the R.S.C. 1995), a package of sentencing reform legislation proclaimed in September 1996. This sanction, which allows offenders to serve terms of imprisonment in the community, has generated considerable scholarly debate. Early research undertaken to monitor the impact of Bill C-41 identified several important issues in terms of the introduction of conditional sentence orders.[1] Later reports, including a 'final report' which presented three years of conditional sentencing data from across the country,[2] have provided much needed information regarding the implementation of the new sanction and the perceptions of both the judiciary and the public.[3] While these research projects have contributed greatly to the body of knowledge being generated around conditional sentences, gaps remain which must be addressed in order that a comprehensive assessment of the sanction can be made. Some of the most obvious gaps relate to the need for reliable information regarding: 1) the optional conditions imposed; 2) the number, type and judicial response to breaches; and 3) the relationship between the conditions imposed and the likelihood of breach.

Research as outlined above is especially relevant in light of the recent Supreme Court of Canada judgment in *R.* v. *Proulx*.[4] This decision addressed many of the issues raised by the introduction of conditional sentence orders and clarified, among other things, the way in which a conditional sentence should be imposed and the importance of optional conditions in terms of achieving the goals of sentencing — especially denunciation and deterrence. Implicit in the judgment was the opinion that to date, the optional conditions attached to conditional sentence orders had not been sufficiently onerous and the sanction had been unable, therefore, to achieve these sentencing objectives. In order to determine whether or not the judgment has affected sentencing practices at the trial level, it is necessary to have baseline "pre-*Proulx*" (prior to January 2000)

*This is an abridged version of a report available through the Department of Justice Canada.

[1]See Department of Justice, *The use of conditional sentences: An overview of early trends* by C. LaPrairie & C. Koegl (Ottawa: Department of Justice, 1998) at p.6. Briefly, these relate to concerns that the new sanction is problematic in terms of: 1) net-widening effects which could impact incarceration rates; 2) public and offender perceptions regarding the severity of the sentence; and 3) the need for adequate treatment and supervisory resources.

[2]See Department of Justice, *Conditional sentence orders by province and territory — Final Report* (*September 6, 1996 – September 30, 1999*) by C. LaPrairie (Ottawa: Department of Justice, 1999).

[3]See V. Marinos & A. Doob, "Understanding public attitudes toward conditional sentences of imprisonment" (1999), 21(5th) C.R. 31; *and* Department of Justice, *Judicial attitudes to conditional terms of imprisonment: Results of a national survey* by J.V. Roberts, A. N. Doob, & V. Marinos (Ottawa: Department of Justice, 1999).

[4]See *R.* v. *Proulx*, [2000] S.C.J. No. 6. The judgment also addressed the construction of the sanction, the purposes it was intended to achieve and the imposition of appropriate conditions.

data. One of the purposes of this study, therefore, was to provide a systematic statistical portrait of conditional sentencing prior to the landmark judgment. This will permit a valid evaluation of the effect of the decision in 2001.

Focus of this study

This study provides an in-depth analysis of the use of conditional sentence orders in three specific court locations within British Columbia. It supplies general information regarding the use of conditional sentences (including offence type, sentence length and the nature of optional conditions imposed) and specific information in terms of the number, type and response to breaches. Knowledge regarding the latter is critical in terms of many of the issues raised by the introduction of this sanction (net-widening, prison reduction, public perception, deterrent effect).[5]

Research Questions

In addition to providing much needed baseline information regarding the use of conditional sentence orders in British Columbia, this study addresses the following specific questions:

- What was the reported breach rate?
- What types of breaches were reported?
- What were the judicial responses?

FINDINGS[6]

Number of Conditional Sentence Orders

- In 1998: judges sitting in Vancouver Provincial Court imposed 466 conditional sentence orders (covering 1019 court informations); judges in Burnaby Provincial Court imposed 81 conditional sentence orders (covering 133 "informations"); and judges in Port Coquitlam Provincial Court imposed 67 conditional sentence orders (covering 97 "informations"). Overall, slightly less than one-half (49.2%) of the orders involved single charges.[7]

Offence Information — Types of Offences (Table I)

- In all court locations the majority of conditional sentences were imposed for offences against property (most serious offence (MSO)): Vancouver (61.6%); Burnaby (65.4%); and Port Coquitlam (50.7%). Overall, offences against property accounted for 60.9% of the orders, persons offences 14.0%, drug offences (CDSA) 19.2%, administrative offences 2.9%, driving offences 1.1% and "other" 1.8%.

- When the Vancouver data were analyzed by "all offences" (not MSO) the proportions by offence category remained substantially the same, though administrative offences (i.e. fail to appear, breach probation) increased from 2.4% to 12%, apparently at the expense of person and drug offences which were reduced from 11.6% to 8% and 22.7% to 15.0% respectively.

- Analysis of "all offences" for Vancouver (466 conditional sentences / 1,059 charges) revealed that over one-half (50.2%) of the 'offences against property' charges were

[5]For a full discussion of these issues see J. Gemmell, "The new conditional sentencing regime" (1997) 39 C.L.Q. 334–361; P. Healy, "Questions and answers on conditional sentencing in the Supreme Court of Canada" (1999) 42(1) C.L.Q. 12–37; K. Jull, "Reserving rooms in jail: A principled approach" (1999), 42(1) C.L.Q. 67–115; and J.V. Roberts, "The hunt for the paper tiger: Conditional sentencing after Brady" (1999), 42(1) C.L.Q. 38–66.

[6]Carol La Prairie's findings in "Final Report" *supra* note 2 are referred to for the sake of *context*, not for purposes of comparison.

[7]This contrasts with La Prairie's finding that "the vast majority of orders involved one charge". *Ibid.* at p.2.

for theft under $5,000,[8] and 87.2% of the "drug offences" related to trafficking charges.

Sentence Length by Offence (Table II)[9]

- Of the specific offences considered,[10] the longest average sentences (conditional sentence only) were imposed on property offences: break and enter (9.3 months); and fraud over $5,000 (7.8 months).

- The average conditional sentence for a charge of theft under $5,000 was for 4.0 months. Sentence lengths for this charge had the greatest range — from one week to two years less a day.[11]

- Average sentence lengths for the 'person offences' examined were as follows: common assault (4.2 months); aggravated assault/assault causing bodily harm (5.5 months).

- The average conditional sentence imposed for trafficking or possession for the purpose of trafficking (CDSA) was 4.4 months.

Optional Conditions Imposed (Table III)

- In terms of conditional sentence orders overall (n=614): 7.3% (45) contained only the mandatory conditions; the majority (53.1%) contained from 1 to 3 optional conditions; 30.9% imposed from 4 to 6 optional condi-

TABLE I

CSO by category of offence

CSO — Category of Offence (MSO) — All Locations (n=614)

Location	Property		Person		CDSA		Admin.		Driving		Other CC		Total
	#	%	#	%	#	%	#	%	#	%	#	%	
Vancouver	287	61.6%	54	11.6%	106	22.7%	11	2.4%	2	0.4%	6	1.3%	466
Burnaby	53	65.4%	14	17.3%	6	7.4%	3	3.7%	2	2.5%	3	3.7%	81
Port Coquitlam	34	50.7%	18	26.9%	6	9.0%	4	6.0%	3	4.5%	2	3.0%	67
Overall	**374**	**60.9%**	**86**	**14.0%**	**118**	**19.2%**	**18**	**2.9%**	**7**	**1.1%**	**11**	**1.8%**	**614**

Property = theft, possession stolen property, B&E, fraud, forgery
Person = assault (common, sexual, indecent), assault w/weapon, ACBH, aggravated assault, threat/harass, robbery
CDSA = possession, trafficking, cultivating
Admin. = fail to appear, breach bail or probation
Driving = dangerous, impaired (including causing death), hit & run
Other = weapons offences, obstruct PC, communicating

[8]One-quarter (25.1%) of the Vancouver conditional sentences were imposed on charges of theft under (MSO).

[9]Derived exclusively from the 302 cases (all courts) involving conditional sentences on a single criminal charge. For orders covering multiple charges it was not always possible to know how much of a sentence was to be allocated to each charge. Of the 302 "single-charge" orders, 6 specific offences occurred in numbers large enough for analysis (deemed to be no less than 10 orders).

[10]Theft under, fraud over, break & enter, assault, aggravated assault/ACBH and trafficking (CDSA).

[11]Though it was not coded for in the file review, there were many instances where the conditional sentence length exceeded the statutory maximum jail term allowable for summary conviction offences (6 months). These were not the result of crown proceeding "by indictment" on dual offences (this was checked), and may be related to judges confusing the sanction with probation on some level.

TABLE II

CSO Length x Offence

CSO Length (months) x Offence*

Offence	# cases	Range		Mean	Median
		from	to		
fraud/over $5,000	17	3.00	18.00	7.8	6.0
theft/under $5,000	49	0.25	24.00	4.0	3.0
break & enter	63	1.00	24.00	9.3	9.0
Assault	12	0.75	6.00	4.2	4.5
ACBH/aggravated assault	12	3.00	9.00	5.5	5.0
Trafficking (CDSA)	62	1.00	18.00	4.4	3.0

* Refers to orders which cover only one charge:
- Vancouver = 217 out of 466
- Burnaby = 44 out of 81
- Port Coquitlam = 41 out of 67
- Overall = 302 out of 614

Note: Only offences which had at least 10 cases were included.

tions; and 8.6% had more than 7 conditions. On average there were more conditions imposed on the conditional sentence orders than on the probation orders that were attached to them (conditional sentence: mean=3.2 / median=3.0; probation: mean = 2.7 / median=2.0).[12]

- Overall, the top three optional conditions imposed (all locations) were related to substance abuse issues. On average, 45.1% of the orders included drug and/or alcohol counselling; 37.4% included "residential treatment/recovery house"; and 27.9% referred to "obey rules/regulations" (of recovery house/treatment center).

- With the exception of community work service (included on 20.6% of the Vancouver orders), conditions considered to be 'restorative' in nature were relatively rare: write essay (0.2%); letter of apology (3.2%); and restitution (1.7%).

- A curfew was included on 17.8% of the conditional sentences; house arrest on 7.3%. 5.6% of the orders required the offender to appear before the sentencing judge for "post-sentencing" reviews.

Models of Sentencing & Optional Conditions

One of the distinctions said to exist between conditional sentence orders and probation orders relates to the underlying purpose of the optional conditions attached to each. In theory, probation conditions are directed towards offender rehabilitation, while conditional sentence order conditions are directed towards preventing recidivism.[13] Classification of optional conditions according to the orientation they are

[12]Similar results were obtained in a study which compared optional conditions attached to conditional sentences and probation orders. See J. Roberts, D. Antonowicz & T. Sanders, "Conditional sentences of imprisonment: An Empirical analysis of optional conditions" (2000), 30(5th) C.R. at 121.

[13]*Ibid.* at 115.

TABLE III

CSO and probation conditions imposed — Vancouver

	Condition	CSO				Condition	Probation	
**	**ranked by % imposed on cso	#	%	***	**	***ranked by % imposed on probation	#	%
1	*Maintain/provide residence**	466	100.0%	1	2	*reporting — as directed**	162	34.8%
2	*Reporting — as directed**	466	100.0%	2	4	counselling — drug/alcohol	85	18.2%
3	*Travel restrict./jurisdiction of court**	466	100.0%	3	1	*maintain/provide residence**	65	13.9%
4	Counselling — drug/alcohol	206	44.2%	4	7	other — specify	45	9.7%
5	Res.treatment/recovery house	173	37.1%	5	8	area restriction (re-offence issue)	40	8.6%
6	Obey rules/regulations	144	30.9%	6	9	community work service	38	8.2%
7	Other — specify	103	22.1%	7	15	no contact (protection issue)	30	6.4%
8	Area restriction (re-offence issue)	100	21.5%	8	14	counselling — general/as directed	28	6.0%
9	Community work service	96	20.6%	9	5	res.treatment/recovery house	20	4.3%
10	Abstain drugs	94	20.2%	10	10	abstain drugs	19	4.1%
11	Submit breath/urine/blood	87	18.7%	11	11	submit breath/urine/blood	17	3.6%
12	Curfew	83	17.8%	12	13	abstain alcohol	13	2.8%
13	Abstain alcohol	64	13.7%	13	18	weapons restriction	13	2.8%
14	Counselling — general/as directed	12	12.0%	14	25	restitution	12	2.6%
15	No contact (protection issue)	38	8.2%	15	6	obey rules/regulations	11	2.4%
16	House arrest	34	7.3%	16	17	maintain/seek employment	10	2.1%
17	Maintain/seek employment	32	6.9%	17	20	counselling — psych/psych	9	1.9%
18	Weapons restriction	29	6.2%	18	3	*travel restrict./jurisdiction of court**	8	1.7%
19	Review (in court)	26	5.6%	19	22	area restriction (protection issue)	8	1.7%
20	Counselling — psych/psych	25	5.4%	20	19	review (in court)	7	1.5%
21	Letter of apology	15	3.2%	21	12	curfew	5	1.1%
22	Area restriction (protection issue)	14	3.0%	22	16	house arrest	3	0.6%
23	No contact (assoc/co-accused)	11	2.4%	23	23	no contact (assoc/co-accused)	3	0.6%
24	Reporting — specified	10	2.1%	24	26	counselling — anger management	3	0.6%
25	Restitution	8	1.7%	25	27	no contact (unknown)	3	0.6%
26	Counselling — anger management	6	1.3%	26	21	letter of apology	2	0.4%
27	No contact (unknown)	6	1.3%	27	28	area restriction (unknown)	1	0.2%
28	Area restriction (unknown)	4	0.9%	28	29	support dependents	1	0.2%
29	Support dependents	3	0.6%	29	30	education	1	0.2%
30	Education	2	0.4%	30	32	driving restriction	1	0.2%
31	Essay	1	0.2%	31	24	reporting — specified	0	0.0%
32	Driving restriction	0	0.0%	32	31	essay	0	0.0%
	Total # of orders	**466**	**100.0%**			**Total # of orders**	**178**	**38.2%**

= the number of times that condition was imposed
% = the # / the total number of orders

most consistent with (treatment/offender; punitive/protection of public; restorative/community),[14] however, suggests that conditional sentences were used primarily to achieve rehabilitative/treatment goals; then punitive/protection of public; then restorative/community (in that order). This ranking remained unchanged whether the question asked was "how many of the optional conditions imposed related to each orientation?" or "how many orders contained optional conditions related to each orientation?"

- In terms of the first question, approximately two-thirds (67.3%) of the optional conditions imposed overall (out of 1897 conditions classified) related to a treatment/offender orientation; 23.2% to a punitive/protection of the public orientation; and 9.3% to a restorative/community orientation.[15] These proportions were substantially maintained across court locations.

- When the question was re-phrased as "how many conditional sentence orders contained optional conditions related to each orientation?" the ranking remained the same. Overall, 78.0% of the orders contained optional conditions relating to a treatment/offender orientation; 49.5% to a punitive/protection of the public orientation; and 26.4% to a restorative/community orientation.

While there are obvious weaknesses with this method of establishing sentencing orientation, such an analysis serves to draw attention to the importance of optional conditions in terms of establishing and communicating the purposes and objectives of the sanction. More importantly, perhaps, a similar analysis conducted "post-*Proulx*" will clarify the impact of the decision in terms of the application of appropriate optional conditions.

CLASSIFICATION GUIDE — OPTIONAL CONDITIONS

Treatment/offender oriented conditions:	
abstain alcohol	T
abstain drugs	T
attend residential treatment/recovery house	T
counselling - anger management	T
counselling - drug/alcohol	T
counselling - general/as directed	T
counselling - psychiatric/psychological	T
education	T
maintain/seek employment	T
obey rules/regulations (of recovery house)	T
review (in court) before sentencing judge	T
submit breath/urine/blood upon demand	T
Punitive/protection of public oriented conditions:	
area restriction (protection issue)	P
area restriction (re-offence issue)	P
area restriction (unknown)	P
curfew	P
driving restriction	P
house arrest	P
no contact (association/co-accused)	P
no contact (protection issue)	P
no contact (unknown)	P
weapons restriction	P
Restorative/community oriented conditions:	
community work service hours	R
letter of apology to victim(s)	R
restitution (to victim)	R
write and submit essay (judge chooses topic)	R

[14]While there are several optional conditions which could be said to be consistent with more than one orientation (i.e. community work service as either punitive or restorative), conditions were classified according to their most generally accepted primary orientation — see *classification guide* attached after "Tables".

[15]When categorizing orders based on comparisons of the *number* of times certain conditions are imposed, you run the risk of emphasizing "quantity" over "quality". The argument could be made, for instance, that "1 count" of a relatively onerous condition (i.e. constant house arrest or a large number of community work service hours) should perhaps carry more weight than "1 count" of "take counselling for substance abuse as directed".

Known Breaches (Table IV – VI)

Breach Rate, Process, Response and Findings

- The overall breach rate for the three court locations was 37.6% (231 orders breached out of a possible 614).[16] In Vancouver there were "allegation of breach" reports filed on 40.6% (189) of the files reviewed; in Burnaby the rate was 34.6% (28); and in Port Coquitlam the rate was 20.9% (14).

- Breaches of 'optional conditions' were the most common in Vancouver (34.7%) and Port Coquitlam (57.1%), multiple breaches in Burnaby (35.7%). Analysis of these figures is complicated, however, due to the high number of allegations which set out "multiple breaches".[17] See Table IV.

- Analysis of the Vancouver data showed that the breaches alleged most frequently in the reports were: 1) not "reporting to supervisor as directed" (33.1%); 2) not attending "residential treatment/recovery house" (30.0%); and 3) committing new offences (13.7%). See Table V.

- Vancouver: There were certain conditions, or types of conditions, that were associated with higher than expected breach rates.[18] Orders which included conditions that suggested drug use, for instance, were more likely to be breached (51.2%) than orders which did not (21.2%).[19] Similar results were obtained with reference, specifically, to the requirement that an offender attend for residential drug treatment. Orders in which

TABLE IV

Number and Type of Known Breaches – All Locations

Location	#Breaches	% **	Type of Breach										Total
			Mandatory		Optional		New Off.		Multiple*		U/K		
Vancouver	189 #cs = 466	40.6%	45	23.7%	66	34.7%	12	6.3%	61	32.1%	5	2.6%	189
Burnaby	28 #cs = 81	34.6%	8	28.6%	6	21.4%	3	10.7%	10	35.7%	1	3.6%	28
Port Coquitlam	14 #cs = 67	20.9%	2	14.3%	8	57.1%	3	21.4%	1	7.1%	0	0.0%	14
Overall	**231**	**37.6%**	**55**	**23.8%**	**80**	**34.6%**	**18**	**7.8%**	**72**	**31.2%**	**6**	**2.6%**	**231**

*"Multiple" refers to allegation reports which alleged more than one "type" of breach (i.e. non-reporting and new offence)

[16]La Prairie estimated a breach rate for BC of 26% — *supra* note 2 at p.6.

[17]In Vancouver and Burnaby approximately one-third (32.1% and 35.7% respectively) of the breach reports filed alleged multiple breaches. An offender who was "AWOL" from a recovery house, for instance, was also not residing where directed, not complying with any house arrest or curfew, not obeying the rules and regulations of the house, not taking counselling as directed, etc.

[18]An obvious response to this would be that there are certain "high risk" types of offenders (i.e. those who have drug addictions) who tend to attract these conditions. Either way, the results are interesting in that they seem to suggest that certain conditions, or the need for certain conditions, is important in terms of predicting whether or not a conditional sentence will be successfully completed.

[19]Orders were only classified as "yes" on the "drug variable" if there were specific references to either attending drug abuse counselling or residential drug treatment. Conditions that referred only to abstaining from the consumption of drugs were classified as "no" on the "drug variable".

TABLE V

Specific Conditions Breached — Vancouver

No.	Condition	# imposed	% imposed	# breached	% of breaches
1	*Reporting — as directed**	466	21.1%	85	33.1%
2	Residential treatment/recovery house	173	7.8%	77	30.0%
3	Curfew	83	3.8%	24	9.3%
4	*Maintain/provide residence**	466	21.1%	16	6.2%
5	Obey rules/regulations	144	6.5%	16	6.2%
6	Area restriction (re-offence issue)	100	4.5%	13	5.1%
7	Abstain drugs	94	4.3%	6	2.3%
8	House arrest	34	1.5%	5	1.9%
9	Other — specify	103	4.7%	4	1.6%
10	Review (in court)	26	1.2%	3	1.2%
11	Community work service	96	4.3%	2	0.8%
12	Submit breath/urine/blood demand	87	3.9%	2	0.8%
13	Abstain alcohol	64	2.9%	1	0.4%
14	Counselling — drug/alcohol	206	9.3%	1	0.4%
15	No contact (protection issue)	38	1.7%	1	0.4%
16	Weapons restriction	29	1.3%	1	0.4%
	Total	**2209**	**100.0%**	**257****	**100.0%**
	New offence			26	3.8%***

* conditions mandatory on cso
** this number exceeds the # of breaches (189) because of instances of multiple breaches
*** 26/189 (calculated separately from condition breaches)

imposed = the # of times this condition appeared on an order
% imposed = the # imposed / total # of conditions imposed (2209)
# breaches = the # of times this condition was alleged to have been breached
% of breaches = the # of breaches / total # of conditions alleged to have been breached (257)

TABLE VI

Judicial Response* — All Locations

	Vancouver		Burnaby		Port Coquitlam		Overall	
	#	%	#	%	#	%	#	%
dismissed	7	4.1%	2	8.3%	0	0.0%	9	4.3%
no action	21	12.3%	3	12.5%	4	30.8%	28	13.5%
change conditions	49	28.7%	5	20.8%	2	15.4%	56	26.9%
cso suspended — part to be served I/C	26	15.2%	6	25.0%	5	38.5%	37	17.8%
cso terminated	68	39.8%	8	33.3%	2	15.4%	78	37.5%
Total	**171**	**100.0%**	**24**	**100.0%**	**13**	**100.0%**	**208**	**100.0%**

* Breach allegations which were withdrawn (by crown) or not yet dealt with have been removed.

this condition was present breached at a rate of 64.7%, as opposed to orders which did not include this conditions (26.3%).[20]

- Vancouver: 26 out of 189 (13.8%) allegation reports referred to new offences — the breach alleged being that the offender failed to "keep the peace and be of good behavior".[21] This figure is problematic, however, in that breach allegations relating solely to new offences were not regularly processed in 1998.[22]

- Vancouver: Of the offenders taken into custody as a result of the breach,[23] 27.3% were released pending the hearing, 22.7% were detained, and 50% remained in custody "by consent".

- Vancouver: Of the 84% (159) that proceeded to the hearing stage, the vast majority (93%) admitted the breach(es). Of the 7% (11) known to have disputed the breach allegation(s), six of the breaches were 'proven' and five were 'not proven'.[24]

Judicial Response

- "Judicial responses" to breach were known in 90% (208) of the 231 cases studied (the remaining 10% represented breaches that were either withdrawn by crown or not yet dealt with). Overall responses were as follows: 37.5% (78) of the conditional sentences were terminated; 26.9% (56) resulted in amendments to the conditions; 17.8% (37) of the sentences were suspended and a portion was served incarcerated; 13.5% (28) resulted in no action; and 4.3% (9) were dismissed. See Table VI.

- Vancouver judges terminated a greater percentage of conditional sentence orders than did judges at the other two court locations. The Vancouver conditional sentence termination rate (by judicial response) was 39.8%; Burnaby was 33.3%; and Port Coquitlam was 15.4%.

- Analysis of the Vancouver breach data suggested that all breaches are not treated equally in terms of judicial response. The breaches most likely to result in the conditional sentence being terminated were: house arrest (60%); new offence (58.3%); residential treatment (51.4%); and curfew (41.7%).

DISCUSSION

Breach Rates Generally

The findings of this study suggest that previous breach rate estimates for BC (26%)[25] may have been overly optimistic. There are three possible

[20]The requirement for residential treatment (as opposed to drug counselling only) is likely an indication of the perceived or actual seriousness of the drug problem being dealt with by an offender.

[21]The majority (34.6%) of the orders breached by "new offence" were originally imposed for theft/under offences (MSO); 19.2% each for B & E, trafficking (CDSA) and possession of stolen property; and 3.8% each for robbery and "other".

[22]This crown counsel practice or policy was related to the inability of the court to "stop the clock" on conditional sentences in 1998. (Personal communication with Vancouver Crown Counsel, March, 2000). Further difficulties observed in terms of "breach by new offence" are discussed in the full version of this report.

[23]93% (176) of these offenders were taken into custody as a result of the breach. The remaining 13 were cases where either: 1) a summons was issued; 2) the offender appeared out of custody without process; or 3) warrants remain outstanding.

[24]Any discrepancy between the number of allegations noted as "not proven" (5) and the number of allegations dismissed (7) is attributable to the fact that, in some cases where the allegations were dismissed, the "response" and "finding" were not clearly indicated (coded as unknown by the researcher).

[25]See C. La Prairie, *supra* note 2 at p.6.

conclusions which could be drawn from the differences observed between this estimate and the relatively high breach rates documented at two of the three court locations studied. First, it may be that the 26% estimate was based on poor or incomplete data — conditional sentence breaches in BC are not reliably tracked in either the court or corrections databases. The relatively large drug offender population in BC, particularly in the downtown Vancouver area, may be contributing to the higher than expected breach rates observed in this study.

An alternate explanation may be related to the differences observed between the 'urban' (Vancouver) and "suburban" (Burnaby and Port Coquitlam) breach rates. It is possible that the high rate reported for Vancouver (40.6%), for instance, may be offset by the lower rates found in less densely populated suburban and rural areas. If this is the case, the 26% *overall rate* could be accurate for the province.

The final possibility is that the inconsistencies observed are the result of a combination of these factors — incomplete data and variations in rates. What is clear, however, is that there remains a need for further research which collects and analyzes reliable data regarding conditional sentence breach rates. This is particularly critical in terms of responding to suggestions that the sanction has not been successful to date in reducing admissions to provincial institutions.

Though the relatively small number of orders coded (614) precludes the making of definitive statements regarding possible 'breach predictor' variables, the findings do suggest that there are some factors which are related to higher breach rates and some that are not. In terms of the latter, race, gender and category of offence appeared to be generally unrelated to the likelihood that a breach report would be filed, though exceptions were noted. In the Burnaby and Port Coquitlam cases, for instance, it appeared that property offences had a higher breach rate than would be expected and person offences had a lower breach rate than would be expected. It is also possible that specific offences within categories (i.e. break and enter) may have high breach rates which are offset by the low rates of other offences within the same category (i.e. fraud). Again, the value of comparing "averages" or "categories" when studying conditional sentence breach rates, becomes questionable.

Several factors were identified which did appear to be related to an increased likelihood that an order would be breached. These would include: prior criminal record; the presence of optional conditions which suggest drug use; and/or requirements that the offender attend for residential treatment, abide by a curfew or be subject to house arrest. While it is obvious that the presence of these conditions did not *cause* the breaches,[26] the fact that they are associated with relatively high breach rates raises serious issues around assessments of acceptable levels of "risk". Identifying which conditions are most (and least) likely to result in breach by the offender, therefore, is crucial in terms of providing judges with the tools necessary to craft creative and effective sanctions.[27]

[26]It is more likely that these conditions reflect pre-existing offender "needs" (i.e. drug treatment) which would place them in a higher risk category in any event.

[27]Would a judge's sentencing decision regarding an offender s/he is considering releasing into a residential treatment program (on a conditional sentence order) be at all affected by the suggestion that offenders who require that level of treatment breach that specific condition 44.5% of the time, or breach the order in some way in almost two-thirds (64.7%) of the cases?

In terms of the "Sword of Damocles"[28] metaphor associated with conditional sentencing, it would appear that the rope was completely 'severed' in approximately one-third (37.5%) of the orders breached overall. Whether this would amount to the degree of certainty referred to in the literature remains a matter for debate. In light of the complex calculations required to determine the time left to be served on a terminated conditional sentence, further research would be required to determine whether, in the cases in which the rope was severed, it was a sword or a butter-knife that fell.

Implications for the Future (*Proulx*)

Many of the issues relating to the application of conditional sentences were specifically addressed in *R.* v. *Proulx*,[29] a recent decision of the Supreme Court of Canada which, among other things, sets out the principles which should govern the use of the new sanction. The court's interpretation of the legislation has serious implications in terms of conditional sentence orders generally, and breaches of those orders specifically. For instance, although the court situates conditional sentences within a legislative package (Bill C-41) aimed at reducing prison populations, it potentially frustrates the attainment of that goal by: 1) allowing judges to extend the length of conditional sentences beyond the terms of incarceration they replace;[30] 2) suggesting that onerous and punitive conditions (including curfews and house arrest) should be the norm;[31] and 3) creating a presumption of incarceration in situations where an offender has breached a condition without reasonable excuse.[32]

As noted earlier, one of the purposes of this study was to provide "baseline" data regarding the use of conditional sentence orders in specific BC court locations prior to the *Proulx* decision. The decision is likely to have a significant impact in terms of the application of conditional sentences (specifically decisions relating to sentence length, optional conditions attached and judicial response).[33] Whether the impact will be seen negatively or positively in light of the original goals of the sanction remains to be seen. In terms of breach rates, for instance, it may be that those referred to in this report should be considered as *minimum* figures.

CONCLUSIONS

The findings of this study will potentially be of interest to many agencies. The Department of Justice Canada has an obvious interest in monitoring the implementation and effect of Bill C-41. Provincial corrections agencies, inasmuch as they have been greatly affected by the introduction of conditional sentences, may

[28]See J.V. Roberts, "Conditional sentencing: Sword of Damocles or Pandora's Box?" (1997), 2 Can. Crim. L.R. at p.186; see also the decision of the Alberta Court of Appeal in *R.* v. *Brady*, (1998), 15 C.R. (5th) at p.126.

[29]*Supra*, note 4.

[30]Making conditional sentences longer than the jail sentences that would otherwise have been imposed recognizes their relative leniency and maintains the fundamental principle of proportionality as set out in Section 718.1. (*Proulx, ibid*. at para. 54).

[31]The imposition of onerous and punitive conditions is necessary to: 1) distinguish conditional sentences from suspended sentences with probation (*Ibid.* at para. 30); 2) to achieve the objectives of denunciation/deterrence (*Ibid*. at para. 30); and 3) to ensure that offenders do not avoid punishment (*Ibid.* at para. 35).

[32]*Ibid.* at para. 39. Lamer C.J. noted that "…there should be a presumption that the offender serve the remainder of his or her sentence in jail".

[33]Another factor likely to contribute to an increased processing of breach allegations is related to legislation (Bill C-51) proclaimed July 1, 1999 which amended the conditional sentencing sections of the code to provide for the "stopping of the clock" on conditional sentence breaches.

be assisted by the general information provided regarding the use of this sanction, and specific information provided in terms of the number of, nature of and response to conditional sentence breach allegations. This study also provides much needed feedback to the judiciary regarding the use of conditional sentences, factors which might increase the likelihood that an offender will breach, and the responses of other judges to specific kinds of breaches.

Conditional sentence orders have become, and will likely continue to be, an important part of the sentencing landscape in Canada. While this new sanction is still in the process of finding its place and purpose within the larger criminal justice system, it is important that its use and impact continue to be systematically monitored.

APPENDIX

Recent cases that cite *R.* v. *Proulx* (2000)

(as of July 27, 2000)

Newfoundland (Attorney General) v. *Puddister* (12 April 2000), St. John's 126 (Nf.Sup.Ct. (T.D.))

R. v. *Anderson* (4 April 2000), St. Catherines 992460 (Ont. Ct. Just.)

R. v. *Auger* (31 March 2000), Peace River 9909-0020-C6 (Sk.Q.B.)

R. v. *Bannab* (25 February 2000), Prince Albert 30 (Q.B.A.)

R. v. *Beals* (31 March 2000), Halifax CAC 157138 (N.S.C.A)

R. v. *Berntson* (28 April 2000), Regina 7731 (SK.C.A.)

R. v. *Bevan* (30 March 2000), Prince Edward Island GSC-17353 (P.E.I.Sup.Ct. (T.D))

R. v. *Bjellebo* (15 February 2000), Toronto 478 (Ont.Sup.Ct.Just.)

R. v. *Brass* (26 May 2000), New Westminster X051292 (B.C.Sup.Ct.)

R. v. *Bremner* (2 June 2000), Vancouver CA026498 (B.C.C.A.)

R. v. *Byford* (17 April 2000), Sudbury 505/99 (O.Sup.Ct.Just.)

R. v. *Cameron* (23 March 2000), Halifax CR 158789 and CR 158790 (N.S.Sup.Ct.)

R. v. *C.A.P.* (4 April 2000), Kitchener 1249 (Ont.Sup.Ct.Just.)

R. v. *Cairns* (16 February 2000), Longueuil 505-01-005623-968 J.E. 2000/1721 (C.Q.(Crim. Div.))

R. v. *Chamberlin* (23 March 2000), Yellowknife CR 03817 (N.W.T.Sup.Ct.)

R. v. Clarke (14 April 2000), St. John's 673 (Nf.Sup.Ct.(T.D.))

R. v. *Coley* (14 April 2000), Iberville 755-73-000017-968, 755-73-000018-966, 755-73-000019-964, 755-73-000020-962 (C.Q. (Crim. Div.))

R. v. *Cullen* (17 May 2000), AD-0862 (P.E.I.Sup.Ct. (A.D))

R. v. *Dowden* (17 February 2000), St. John's 95 (Nf.Prov.Ct.)

R. v. *Ewen* (13 March 2000), Saskatoon 7810 and 7795 (SK.C.A)

R. v. *Fisher* (2000), 47 O.R. (3d) 397

R. v. *Forward* (1 March 2000), Vancouver CA026199 (B.C.C.A.)

R. v. *Fudge* (2 February 2000), G05676 (Ont.Sup.Ct.Just.)

R. v. *Gauthier* (23 March 2000), Montréal 500-10-001744-992 (C.Q. (A.))

R. v. *H.A.V.* (29 February 2000), St. John's 99/86 (Nf.Sup.Ct.)

R. v. *H.B.E.* (2 March 2000), St. John's 1998050158 (Nf.Sup.Ct. (T.D.))

R. v. *Huether* (18 February 2000), Oshawa C33898 (Ont.Ct.Just)

R. v. *Hunt* (2 March 2000), Saskatoon 89 (Sk.Q.B)

R. v. *Ingram* (29 May 2000), Sechelt 11649 (B.C. Prov. Ct. J.)

R. v. *Jee* (23 February 2000), Windsor 1034-99 (Ont.Ct.Just.)

R. v. *Johnston* (10 February 2000), Halifax 160149 (N.S.C.A)

R. v. *Keepness* (28 February 2000), 7765 (Sk.C.A)

R. v. *Lettroy* (2000), 47 O.R. (3d) 517

R. v. *Lush* (29 February 2000), Winnipeg 216 (Mb. Prov. Ct. Just.)

R. v. *MacDougall* (16 March 2000), GSC-17239 (P.E.I.Sup.Ct. (T.D.))

R. v. *Machado* (23 March 2000), Kitchener 1247 (Ont.Sup.Ct.Just.)

R. v. *McGillis* (17 April 2000), Cornwall 1898/99 (Ont.Ct.Just.)

R. v. *Millward* (16 March 2000), Daniel 40810533P20101 (Ab. Prov. Ct. (C.D.))

R. v. *M.M* (17 April 2000), Montréal 500-01-066897-981 (C.Q. (Crim. Div.))

R. v. *Moore* (31 May 2000), Toronto 2260 (Ont.Sup.Ct.Just.)

R. v. *M.S* (7 February 2000), Newmarket 1408 (Ont.Sup.Ct.Just.)

R. v. *Ouellet* (28 February 2000), Québec 200-01-045339-995 (C.Q. (Crim. Div.))

R. v. *Patterson* (7 March 2000), Scarborough (Ont.Ct.Just.)

R. v. *P.D.* (7 April 2000), Québec 200-01-034865-984 (C.Q. (Crim.Div.))

R. v. *Pecoskie* (10 March 2000), Brampton 1421 (Ont. Sup. Ct.Just.)

R. v. *Peterson* (11 February 2000), Calgary 9701-0904-C1 (Ab.Q.B.)

R. v. *Pham* (17 February 2000), Edmonton 80679269P10102 (Ab.Prov.Ct. (C.D.))

R. v. *Pimentel* (12 May 2000), AR 99-30-04239 and AR 99-30-04245 (Mb.C.A.)

R. v. *Ramsey* (4 May 2000), Melfort 1254 (Judicial Ct. of Melfort) (Sk.Q.B.)

R. v. *R.L.H.* (2 March 2000), Victoria V03511 (B.C.C.A.)

R. v. *Schafer* (28 February 2000), Whitehorse 99-00570 (Y.T.T.C.)

R. v. *Shacklock* (11 May 2000), Halifax CAC 163451 and CAC 163452 (N.S.C.A.)

R. v. *Sithivinayagam* (29 May 2000), Toronto 2115 (Ont.Ct.Just.)

R. v. *Skinner* (16 March 2000), 1999060107 (Nf.Sup.Ct. (T.D.))

R. v. *S.L.C.* (9 March 2000), Kentville 126 (N.S. Prov. Ct.)

R. v. *Stevenson* (11 April 2000), 98-1755 (Ont.Sup.Ct.Just.)

R. v. *Teskey* (14 April 2000), Vancouver C36320-01-1D (B.C.S.C.)

R. v. *Thompson* (8 February 2000), London 810 (Ont.Ct.Just.)

R. v. *Tremblay* (10 February 2000), Montréal 500-01-000573-995 (C.Q. (Crim. Div.))

R. v. *Tremblay* (29 March 2000), Montréal 500-10-001738-994 (C.Q.A.)

R. v. *Turcotte* (19 April 2000), Toronto C31658 (O.C.A.)

R. v. *Welcher* (29 February 2000), 1999 No. G-113 (Nf.Sup.Ct. (T.D.))

R. v. *Widow* (8 May 2000), Yellowknife CR 03842 (N.W.T.Sup.Ct.)