

CONDITIONAL SENTENCES

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CONDITIONAL SENTENCES

INTRODUCTION

Conditional sentencing, introduced in Canada in September 1996, allows for sentences of imprisonment to be served in the community, rather than in a correctional facility.⁽¹⁾ It is a midway point between imprisonment and sanctions such as probation or fines. The conditional sentence was not introduced in isolation, but as part of a review of the sentencing provisions in the *Criminal Code*. These provisions included the fundamental purpose and the principles of sentencing. The fundamental principle of sentencing is that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. The sentencing review set out further sentencing principles, including a list of aggravating circumstances which should increase sentences.

The primary goal of conditional sentencing is to reduce the reliance upon incarceration by providing an alternative sentencing mechanism to the courts. In addition, the conditional sentence provides an opportunity to further incorporate restorative justice concepts into the sentencing process by encouraging those who have caused harm to acknowledge this fact and to make reparation.

At the time of their introduction, conditional sentences were generally seen as an appropriate mechanism to divert minor offences and offenders away from the prison system. Overuse of incarceration was recognized by many as problematic while restorative justice concepts were seen as beneficial. In practice, however, conditional sentences are sometimes viewed in a negative light when they are used in cases of very serious crime.⁽²⁾

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- (1) Conditional sentences were introduced by Bill C-41, now S.C. 1995, c. 22, proclaimed in force on 3 September 1996, amending the *Criminal Code*, R.S.C. 1985, c. C-46. Amendments to the conditional sentencing regime were made by Bill C-51, An Act to amend the Criminal Code, the Controlled Drugs and Substances Act and the Corrections and Conditional Release Act, S.C. 1999, c. 5. The relevant part (clauses 39-42) came into force on 1 July 1999.
- (2) Alberta Justice and Attorney General, *The Conditional Sentence of Imprisonment: The Need for Amendment*, 17 June 2003.

Concern has been raised that some offenders are receiving conditional sentences of imprisonment for crimes of serious violence, sexual assault and related offences, driving offences involving death or serious bodily harm, and theft committed in the context of a breach of trust. While most people would agree that allowing persons not dangerous to the community, who would otherwise be incarcerated, and who have not committed serious or violent crime, to serve their sentence in the community is beneficial, some consider that in certain cases the very nature of the offence and the offender require actual incarceration. The fear is that to refuse to incarcerate an offender can bring the entire conditional sentence regime, and hence the criminal justice system, into disrepute. In other words, it is not the existence of conditional sentences that is problematic, but, rather, their use in cases that seem clearly to call for incarceration.

THE LEGISLATIVE BASIS FOR CONDITIONAL SENTENCING

The provisions governing conditional sentences are set out in sections 742 to 742.7 of the *Criminal Code*. These set out four criteria that must be met before a conditional sentence can be considered by the sentencing judge:

1. The offence for which the person has been convicted must not be punishable by a minimum term of imprisonment;
2. The sentencing judge must have determined that the offence should be subject to a term of imprisonment of less than two years;
3. The sentencing judge must be satisfied that serving the sentence in the community would not endanger the safety of the community; and
4. The sentencing judge must be satisfied that the conditional sentence would be consistent with the fundamental purpose and principles of sentencing as set out in sections 718 to 718.2 of the *Criminal Code*.

Insofar as the fourth criterion is concerned, among the objectives of sentencing are:

- The denunciation of unlawful conduct;
- The deterrence of the offender and others from committing offences;
- The separation of the offender from the community when necessary;

- The rehabilitation of the offender;
- The provision of reparation to victims or the community; and
- The promotion of a sense of responsibility in the offender.

The fundamental principle underlying sentencing is proportionality – the sanction imposed by the court must be proportionate to the gravity of the offence and the degree of responsibility of the offender. Other sentencing principles require that aggravating and mitigating factors be taken into account, that there be similarity of sentences for similar offences, that the totality of consecutive sentences should not be unduly long, and that the least restrictive sanction short of incarceration should be resorted to whenever possible.

In addition to meeting the criteria set out above, conditional sentences involve a number of compulsory conditions, as set out in section 742.3 of the *Criminal Code*. These conditions compel the offender to:

- Keep the peace and be of good behaviour;
- Appear before the court when required to do so;
- Report to a supervisor when required;
- Remain within the jurisdiction of the court, unless written permission to go outside that jurisdiction is obtained from the court or the supervisor; and
- Notify the court or the supervisor in advance of any change of name or address, and promptly notify the court or the supervisor of any change of employment or occupation.

Furthermore, optional conditions are designed to respond to the circumstances of the individual offender. Such conditions may include an order that the offender abstain from the consumption of alcohol or drugs, abstain from owning, possessing or carrying a weapon, perform up to 240 hours of community service, or any other reasonable condition that the court considers desirable for securing the good conduct of the offender and for preventing a repetition by the offender of the same offence or the commission of another offence. The court must ensure that the offender is given a copy of this order and an explanation of the procedure for changing the optional conditions and the consequences of breaching the conditions.

Section 742.6 of the *Criminal Code* sets out the procedure to be followed when one or more of the conditions of a conditional sentence is breached. The section contemplates that the allegation of the breach may be made out by documentary evidence. The allegation must be supported by a written report of the supervisor including, where possible, signed witness statements. The offender must be given a copy of this report. If the court is satisfied that a breach of a condition has been proved on a balance of probabilities, the burden is then on the offender to show a reasonable excuse. Where the breach is made out, the court may: take no action; change the optional conditions; suspend the conditional sentence for a period of time and require the offender to serve a portion of the sentence, and then resume the conditional sentence with or without changes to the optional conditions; or terminate the conditional sentence and require the offender to serve the balance of the sentence in custody.

The *Youth Criminal Justice Act*⁽³⁾ includes a sanction similar to the conditional sentence of imprisonment. The Deferred Custody and Supervision Order (DCSO)⁽⁴⁾ is a sentence in which a young offender spends time in the community under supervision. It has a maximum duration of six months and may not be imposed for a serious violent offence, defined as an offence in the commission of which a young person causes or attempts to cause serious bodily harm.

The DCSO must be consistent with the purpose and principles set out in section 38 of the *Youth Criminal Justice Act* and the restrictions on custody set out in that Act's section 39. The purpose of sentencing young offenders, as set out in section 38, is to hold a young person accountable for an offence through the imposition of just sanctions that have meaningful consequences for the young person and that promote his or her rehabilitation and reintegration into society, thereby contributing to the long-term protection of the public. The sentencing principles enunciated in section 38 include the proportionality doctrine outlined above, as well as the necessity of imposing a sentence that is most likely to rehabilitate the young person and reintegrate him or her into society. Section 39 states, *inter alia*, that a youth justice court shall not use custody as a substitute for appropriate child protection, mental health or other social measures.

(3) S.C. 2002, c. 1.

(4) Section 42(2)(p).

A DCSO is also subject to the conditions set out in subsection 105(2) and to any conditions set out in subsection 105(3) that the court considers appropriate. The mandatory conditions set out in subsection 105(2) include a requirement that the young person appear before the youth justice court when required, report to the provincial director immediately on release, advise the provincial director of the young person's address on release and any subsequent changes in address, occupation, or financial situation, and not own any weapons except as authorized by the order. The optional conditions under subsection 105(3) include orders to make reasonable efforts to obtain and maintain suitable employment, attend school or any other place of learning, reside in any place that the provincial director may specify, and remain within the territorial jurisdiction of one or more courts named in the order.

SUSPENDED SENTENCES AND PROBATION ORDERS

As an alternative to the possibility of imposing a conditional sentence, a court may suspend sentence and impose a probation order. Section 731 of the *Criminal Code* indicates that, where a person is convicted of an offence, a court may, having regard to the age and character of the offender, the nature of the offence, and the circumstances surrounding its commission, suspend the passing of sentence and direct that the offender be released on the conditions prescribed in a probation order. This possibility is open to the court only if no minimum punishment is prescribed by law.

The court has the power to revoke a suspended sentence where the offender is convicted of an offence while on probation. The court also has the option of directing that the offender comply with the conditions prescribed in a probation order, in addition to imposing a fine or sentencing the offender to imprisonment for a term not exceeding two years. The term of imprisonment may be a conditional one, in which case the probation order comes into force at the expiration of the conditional sentence. A court may also make a probation order where it discharges (either absolutely or conditionally) an accused under subsection 730(1). The maximum period of probation is three years.

As with conditional sentences, there are mandatory and optional conditions for a probationary order. Section 732.1 of the *Criminal Code* states that the mandatory conditions are that the offender keep the peace and be of good behaviour, appear before the court when required, notify the court or the probation officer in advance of any change of name or address, and promptly notify the court or the probation officer of any change of employment or occupation.

The optional conditions available to the court include a requirement that the offender report to a probation officer when required to do so, abstain from alcohol or drugs, abstain from owning, possessing or carrying a weapon, participate actively in a treatment program, if the offender agrees, and comply with such other reasonable conditions as the court considers desirable for protecting society and for facilitating the offender's successful reintegration into the community. As is the case with conditional sentences, the court is required to furnish the offender with a copy of the probation order, an explanation of the consequences for breaching the order, and an explanation of the procedure for applying to vary the optional conditions.

Section 733.1 of the *Criminal Code* sets out the consequences of an offender's failing to comply with the terms of a probation order, without reasonable excuse. Such a failure is either an indictable offence and makes the offender liable to imprisonment for a term not exceeding two years, or is a summary conviction offence and makes the offender liable to imprisonment for a term not exceeding 18 months or to a fine not exceeding \$2,000, or both.

A COMPARISON OF CONDITIONAL SENTENCES, SUSPENDED SENTENCES AND PROBATION ORDERS

The provisions set out above demonstrate some important differences between conditional sentences, suspended sentences, and probation orders. Firstly, unlike the suspended sentence under section 731(1)(a), the court acting under the conditional sentences provision actually imposes a sentence of imprisonment. This sentence, however, is served in the community, rather than in a correctional facility.

Secondly, under section 742.3(2)(e) the court may order the offender to attend a treatment program as part of a conditional sentence. There is no statutory requirement for the offender's consent as there is under section 732.1(3)(g) for probation orders.

Thirdly, the wording of the residual clause in section 732.1(3)(h) dealing with optional conditions in probation orders states that one of their goals is to facilitate the offender's successful reintegration into the community. This is unlike the residual clause in section 742.3(2)(f) dealing with conditions of conditional sentences, which does not focus principally on the rehabilitation and reintegration of the offender and therefore authorizes the imposition of punitive conditions such as house arrest or strict curfews. This again emphasizes that conditional sentences are considered to be more punitive than probation orders.

Finally, the punishment for breaching the conditions of a conditional sentence range from the court taking no action to the offender being required to serve the remainder of his or her sentence in custody. By contrast, breach of a probation order is made its own offence, with imprisonment a possible punishment. The differing consequences for breach of a condition is related to the fact that breaches of conditional sentence orders need be proved only on a balance of probabilities, while breaches of probation orders, since they constitute a new offence, must be proved beyond a reasonable doubt.

CONDITIONAL SENTENCING DATA

Statistics Canada reports that conditional sentences still represent a small proportion of all sentences. A conditional sentence was imposed in 5% of all cases resulting in a conviction, and a much smaller percentage of all sentences. Thus, in 2003, of the 104,183 sentences of custody imposed across Canada, 13,267 or 12.7% were conditional sentences of imprisonment.⁽⁵⁾ Of these, 4,215 conditional sentences were imposed for property offences while 3,619 were imposed for crimes of violence.

On an average day in 2003-2004, 154,600 adults were under the supervision of correctional services agencies in Canada, down 3% from the previous year. Four out of five of these adults, or just under 122,600, were being supervised in the community. The vast majority, 82%, were on probation, 11% were on conditional sentences and 7% were on parole or statutory release. The remaining one in five adults, about 32,000, were in a federal penitentiary or in a provincial or territorial jail. This total was 2% lower than in 2002-2003, and more than 5% below the level a decade earlier.⁽⁶⁾ Statistics Canada states that the implementation of the conditional sentence in 1996 provided the courts with a community-based alternative to imprisonment, and has had a direct impact on the decline in the number of sentenced prison admissions.⁽⁷⁾

(5) See Statistics Canada, *Canadian Statistics* Web site, <http://www40.statcan.ca/101/cst01/legal22a.htm>. Note that Quebec does not report conditional sentencing data.

(6) See Statistics Canada, *The Daily*, 16 December 2005, <http://www.statcan.ca/Daily/English/051216/d051216b.htm>.

(7) *Ibid.*

Statistics Canada also reports, however, that in 2003-2004, for the first time since conditional sentences were introduced in 1996, the total number of offenders admitted to a conditional sentence dropped, falling 2% from 19,200 to 18,900 offenders. In spite of this drop from the previous year, the number of conditional sentence admissions was 17% higher than in 1999-2000. These admissions have been the largest contributing factor to the 4% increase in community supervision admissions during this period. Changes in the number of admissions to conditional sentences from the previous year varied substantially among the provinces and territories. They ranged from a 57% increase in Prince Edward Island to an 11% decline in British Columbia.⁽⁸⁾

The imposition of conditional sentences will not only reduce the rate of incarceration, it should also represent a significant monetary saving; the average annual inmate cost for persons in provincial/territorial custody (including remand and other temporary detention) in 2002-2003 was \$51,454, while the average annual cost of supervising an offender in the community (including conditional sentences, probation, bail supervision, fine option, and conditional release) was \$1,792.⁽⁹⁾ Unfortunately, no recent national statistics are publicly available on the proportion of orders breached or the nature of the judicial response to breaches. An earlier survey found that the successful completion rate of conditional sentence orders fell from 78% in 1997-1998 to 63% in 2000-2001. This failure rate was largely attributed to breaches of the increasing number of conditions placed upon offenders rather than allegations of fresh offending.⁽¹⁰⁾

A study of the trial courts in Ontario and Manitoba reveals an increase in the proportion of offenders being committed to custody and a corresponding decline in the proportion of offenders being permitted to continue serving their sentences in the community, following an unjustified breach of conditions. In 1997-1998, for example, 65% of offenders in Manitoba found to have breached their orders without reasonable excuse were subsequently committed to custody for some period of time; in 2000-2001, this proportion rose to 74%. In Ontario, the proportion rose from 42% to 50% over the same period. These data – the most

(8) *Ibid.*

(9) Canadian Centre for Justice Statistics, *Adult Correctional Services in Canada, 2002/03*, Table 11, <http://dsp-psd.communication.gc.ca/Collection-R/Statcan/85-002-XIE/0100485-002-XIE.pdf>.

(10) Julian V. Roberts, "The Evolution of Conditional Sentencing in Canada: An Empirical Analysis," *Criminal Reports*, 6th Series, Vol. 3, 2002, pp. 267-283 (Table 7).

recent breach statistics currently available – demonstrate a more rigorous judicial response to the breach of a conditional sentence order following the judgment of the Supreme Court in the *Proulx* case (see below).⁽¹¹⁾

Due to the relatively recent introduction of conditional sentencing, few academic studies have been completed of its impact upon the criminal justice system. Furthermore, there is a dearth of sentencing statistics in Canada, with even the Adult Criminal Court Survey of Statistics Canada lacking important data. One study that has been done found that conditional sentencing has had a significant impact on the rates of admission to custody, which have declined by 13% since its introduction.⁽¹²⁾ This represents a reduction of approximately 55,000 offenders who otherwise would have been admitted to custody. The same study, however, found evidence as well of net-widening; approximately 5,000 offenders who prior to 1996 would have received a non-custodial sanction were sentenced to a conditional sentence, which is a form of custody.

Considerable variation in incarceration rates was found between provinces: in some jurisdictions, net-widening was quite significant; in other provinces, the opposite occurred.⁽¹³⁾ In several provinces, the reduction in the number of admissions to custody exceeds by a considerable margin the number of conditional sentences imposed. Thus, there has been a general shift towards the greater use of alternatives to imprisonment, possibly as a result of the statutory reforms introduced in 1996.⁽¹⁴⁾ One of these changes was the codification of the principle of restraint with respect to the use of imprisonment.

In a study that concentrated upon the victims of crime and their attitudes towards conditional sentencing, the following benefits of conditional sentencing were cited:

- Most rehabilitation programs can be more effectively implemented when the offender is in the community rather than in custody;

(11) David M. Paciocco and Julian Roberts, *Sentencing in Cases of Impaired Driving Causing Bodily Harm or Impaired Driving Causing Death*, Canada Safety Council, Ottawa, 25 February 2005, <http://www.safety-council.org/info/traffic/impaired/sentencing.pdf>.

(12) Julian V. Roberts and Thomas Gabor, “The Impact of Conditional Sentencing: Decarceration and Widening of the Net,” *Canadian Criminal Law Review*, Vol. 8, 2004, pp. 33-49.

(13) *Ibid.*

(14) Roberts (2002).

- Prison is no more effective a deterrent than more severe intermediate punishments, such as enhanced probation or home confinement;
- Keeping offenders in custody is significantly more expensive than supervising them in the community;
- The public has become more supportive of community-based sentencing, except for serious crimes of violence;
- Widespread interest in restorative justice has sparked interest in community-based sanctions. Restorative justice initiatives seek to promote the interests of the victim at all stages of the criminal justice process, but particularly at the sentencing stage; and
- The virtues of community-based sanctions include the saving of valuable correctional resources and the ability of the offender to continue or seek employment and maintain ties with his or her family.⁽¹⁵⁾

The study concluded that, while it was clear that there was an acceptance amongst victims of the *concept* of community-based sentencing, the acceptance does not extend to the most serious crimes of violence.⁽¹⁶⁾ The seriousness of such offences appeared to warrant a custodial term in the eyes of the victims. Research on conditional sentencing suggests that only a small percentage of conditional sentences are imposed for the most serious crimes of violence. Yet greater attention to the interests of victims in crafting conditional sentences could advance the restorative purposes of sentencing by providing reparation, acknowledgment of harm, and protection to crime victims. It could also help offenders understand the harms caused by their crimes and enhance the credibility of the conditional sentence as a meaningful alternative to imprisonment.

CONDITIONAL SENTENCE CASE-LAW

The criticism that has been directed at sentencing practices in Canada tends to focus on the nature of the offence. It often omits consideration of how the courts weigh the aggravating and mitigating factors relevant to the offender, and the circumstances surrounding the offence, in crafting an appropriate sentence. Through the sentencing provisions of the

(15) Julian V. Roberts and Kent Roach, "Conditional Sentencing and the Perspectives of Crime Victims: A Socio-Legal Analysis," *Queen's Law Journal*, Vol. 30, 2005, pp. 560-600.

(16) *Ibid.*, p. 599.

Criminal Code, Parliament has placed a major emphasis on a “least restrictive measures” approach and has directed the courts to use incarceration only where community sentencing alternatives are not adequate. This is consistent with Parliament’s concern to address the overuse of incarceration as a response to crime in Canada and to provide for a restorative justice approach to sentencing. Collectively, these principles encourage flexibility in the exercise of judicial discretion. Over time, the Courts of Appeal and the Supreme Court of Canada are providing more detailed guidance as to how the various principles should be applied to categories of offences and offenders. Examples of the cases that have considered various aspects of conditional sentencing are set out below.

A. *R. v. Proulx*⁽¹⁷⁾

The most important case to consider conditional sentencing is the decision of the Supreme Court in *R. v. Proulx*. Here, the Court examined the issue of conditional sentences in a case that concerned a charge of dangerous driving causing death and bodily harm. Prior to this decision, judges had little guidance on when it was appropriate to impose a conditional sentence, outside of the criteria set out in the *Criminal Code*. The Supreme Court made it clear that a number of changes needed to be made to the way in which the sanction was used. But the judgment also consists of a strong endorsement of conditional sentencing. The Supreme Court set out a number of principles, which may be summarized as follows:

1. Unlike probation, which is primarily a rehabilitative sentencing tool, a conditional sentence is intended to address both punitive and rehabilitative objectives. Accordingly, conditional sentences should generally include punitive conditions that restrict the offender’s liberty. Therefore, conditions such as house arrest or strict curfews should be the norm, not the exception.
2. There is a two-stage process involved in determining whether to impose a conditional sentence. At the first stage, the sentencing judge merely considers whether to exclude the two possibilities of a penitentiary term or a probationary order as inappropriate, taking into consideration the fundamental purpose and principles of sentencing. At the second stage, having determined that the appropriate range of sentence is a term of imprisonment of less than two years, the judge should then consider whether it is appropriate for the offender to serve his or her sentence in the community.
3. “Safety of the community,” which is one of the criteria to be considered by a sentencing judge, refers only to the threat posed by a specific offender and not to a broader risk of undermining respect for the law. It includes consideration of the risk of any criminal activity, including property offences. In considering the danger to the community, the judge

(17) [2000], 1 S.C.R. 61.

must consider the risk of the offender re-offending and the gravity of the damage that could ensue. The risk should be assessed in light of the conditions that could be attached to the sentence. Thus, the danger that the offender might pose may be reduced to an acceptable level through the imposition of appropriate conditions.

4. A conditional sentence is available for all offences in which the statutory prerequisites are satisfied. There is no presumption that conditional sentences are inappropriate for specific offences. Nevertheless, the gravity of the offence is clearly relevant to determining whether a conditional sentence is appropriate in the circumstances.
5. There is also no presumption in favour of a conditional sentence if the prerequisites have been satisfied. Serious consideration, however, should be given to the imposition of a conditional sentence in all cases where these statutory prerequisites are satisfied.
6. A conditional sentence can provide a significant amount of denunciation, particularly when onerous conditions are imposed and the term of the sentence is longer than would have been imposed as a jail sentence. Generally, the more serious the offence, the longer and more onerous the conditional sentence should be.
7. A conditional sentence can also provide significant deterrence if sufficient punitive conditions are imposed, and judges should be wary of placing much weight on deterrence when choosing between a conditional sentence and incarceration.
8. When the objectives of rehabilitation, reparation and promotion of a sense of responsibility may realistically be achieved, a conditional sentence will likely be the appropriate sanction, subject to considerations of denunciation and deterrence.
9. While aggravating circumstances relating to the offence or the offender increase the need for denunciation and deterrence, a conditional sentence may be imposed even if such factors are present.
10. Neither party has the onus of establishing that the offender should or should not receive a conditional sentence. However, the offender will usually be best situated to convince the judge that such a sentence is appropriate. It will be in the offender's interest to make submissions and provide information establishing that a conditional sentence is appropriate.
11. The deference to which trial judges are entitled in imposing sentence generally applies to the decision whether or not to impose a conditional sentence.
12. Conditional sentencing was enacted both to reduce reliance on incarceration as a sanction and to increase the principles of restorative justice in sentencing.

The key result of the *Proulx* decision, therefore, is that there is no presumption against the use of a conditional sentence if the crime does not have a mandatory period of incarceration.

B. R. v. Wells⁽¹⁸⁾

Another key decision of the Supreme Court concerned the role that conditional sentencing should play in relation to Aboriginal offenders. The case of *R. v. Wells* involved a sentence of 20 months' imprisonment imposed on an Aboriginal man convicted of sexual assault. In upholding this sentence as appropriate in the circumstances, the Supreme Court found that the proper approach to 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 no offence is presumptively excluded from the possibility of a conditional sentence, as a practical matter, and notwithstanding s. 718.2(e) of the *Criminal Code*, particularly violent and serious offences will result in imprisonment for Aboriginal offenders as often as for non-Aboriginal offenders. Although 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 himself or herself.⁽¹⁹⁾ In this case, the sentencing judge did properly inform himself. The application of subsection 718.2(e) does not mean that Aboriginal offenders must always be sentenced in a manner that gives greatest weight to the principles of restorative justice and less weight to goals such as deterrence, denunciation, and separation. The offence in this case was a serious one, so the principles of denunciation and deterrence led to the imposition of a term of imprisonment.

(18) [2000] 1 S.C.R. 207.

(19) Allan Manson, *The Law of Sentencing*, Irwin Law, Toronto, 2001, pp. 274-275.

C. R. v. Knoblauch⁽²⁰⁾

Mentally ill offenders are not excluded from access to conditional sentences. In the case of *R. v. Knoblauch*, an offender with a long history of mental illness was found to be in possession of a substantial arsenal capable of causing great harm to the public and damage to property. He pleaded guilty to unlawful possession of an explosive substance and to unlawful possession of a weapon for a purpose dangerous to the public peace. In its decision, the Supreme Court upheld the imposition by the trial judge of a conditional sentence of two years less a day to be followed by three years of probation. The offender was required to spend the period of the conditional sentence in a secure psychiatric treatment unit, unless and until a consensus of psychiatric professionals made a decision to transfer him from the locked unit.

The focus of the analysis in the *Knoblauch* case was on the risk posed by the individual offender while serving his sentence in the community. Danger to the community is evaluated by reference to the risk of re-offence and the gravity of the damage in the event of re-offence. While the gravity of the damage in this case could be extreme, the conditions imposed by the trial judge, including that the accused reside in a secure psychiatric facility, reduced the risk to a point that it was no greater than the risk that the accused would re-offend while incarcerated in a penal institution. *Knoblauch* expanded the scope of conditional sentences by using the new sanction to produce what is essentially confinement, albeit in a psychiatric facility rather than in a prison or penitentiary.

In this case, the optional conditions that may be imposed as part of a conditional sentence order were used to assess an offender's dangerousness and reduce the threat of recidivism. This is in contrast to the optional conditions of a probation order that are directed towards "facilitating the offender's successful reintegration into the community."⁽²¹⁾ The appropriateness of confining the offender to a secure psychiatric facility flows from the intent of Parliament, in creating conditional sentences, to hold offenders accountable for offending while respecting the statutory purpose and principles of sentencing; this is to be done without subjecting the offender to penal confinement.⁽²²⁾ The importance of *Knoblauch* may lie in the ability of courts to send more offenders to mental health facilities and not prisons.

(20) [2000] 2 S.C.R. 780.

(21) *Criminal Code*, section 732.1(3)(h).

(22) Julian V. Roberts and Simon Verdun-Jones, "Directing Traffic at the Crossroads of Criminal Justice and Mental Health: Conditional Sentencing after the Judgment in *Knoblauch*," *Alberta Law Review*, Vol. 39, No. 4, 2002, pp. 788-809.

D. R. v. Fice⁽²³⁾

In the case of *R. v. Fice*, the Supreme Court ruled that a woman who attacked her mother with a baseball bat and strangled her with a telephone cord should have been sent to prison rather than allowed to serve her sentence in the community. This case should serve to restrict the availability of conditional sentences across the country. Ms. Fice pleaded guilty to aggravated assault on her mother after the pair's argument turned violent. She also pleaded guilty to fraud, personation, forgery and breach of recognizance. The Supreme Court held that the time Ms. Fice had spent in pre-trial custody was not a mitigating factor that can affect the range of sentence and, therefore, the availability of a conditional sentence. The Court held that, in considering whether to impose a conditional sentence, a court must first decide that a sentence of less than two years is appropriate. The conditional sentence regime was not designed for those offenders for whom a penitentiary term is appropriate. When a sentencing judge considers the gravity of the offence and the moral blameworthiness of the offender and concludes that a sentence in the penitentiary range is warranted and that a conditional sentence is therefore unavailable, time spent in pre-sentence custody ought not to disturb this conclusion.

E. R. v. F.(G.C.)⁽²⁴⁾

The case of *R. v. F.(G.C.)* is illustrative of the manner in which the Courts of Appeal in Canada have developed guidelines for the use of conditional sentencing by the lower courts. In this case, the accused was convicted of sexual assault and sexual interference for his grooming of two 13-year-old girls to become sex objects. This eventually led to the offender having sexual intercourse with one of the complainants. The trial judge imposed a conditional sentence of 12 months. The Crown successfully appealed this sentence to the Ontario Court of Appeal, which varied it to one year in custody, after giving credit for the one-year sentence already served. In its reasons for decision, the Court of Appeal pointed out that it had repeatedly indicated that a conditional sentence should rarely be imposed in cases involving sexual assault of children, particularly where the accused was in a position of trust. Moreover, cases that involve multiple sexual activity over an extended period of time and escalating in obtrusiveness generally warrant a severe sentence. The trial judge had also failed to take into consideration the fundamental sentencing principle in section 718.1 of the *Criminal Code* that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

(23) [2005] 1 S.C.R. 742.

(24) (2004), 71 O.R. (3d) 771 (C.A.).

F. R. v. Bhalru; R. v. Khosa⁽²⁵⁾

The case of *R. v. Bhalru; R. v. Khosa* is an example of a Court of Appeal upholding a trial judge's imposition of a conditional sentence in the face of a Crown appeal. Here, two individuals were convicted of criminal negligence causing death arising out of a street race in which they participated. In the course of the race, a pedestrian was struck and killed. The trial judge ordered the two drivers to serve conditional sentences of two years less a day, followed by probation for three years. The terms imposed as part of the conditional sentences included house arrest with limited exceptions and an order to perform 240 hours of community work over a period of 18 months. A five-year driving prohibition was also imposed.

The Crown argued that the sentences were unfit. This appeal was denied by the Court of Appeal. The Court followed the principles articulated in *Proulx* and the judicial recognition that conditional sentences may, in some circumstances, achieve general deterrence and denunciation in relation to driving offences; consequently, it concluded that the sentence was consistent with the sentencing principles and was not demonstrably unfit. The Court of Appeal also found that there was an absence of aggravating factors beyond the street racing in this case; that finding, in addition to the strict nature of the conditional order that the trial judge fashioned, indicated that it was not unreasonable to order the two convicted persons to serve their sentence in the community.

DIFFERING VIEWS OF CONDITIONAL SENTENCES

Objections have been raised to the use of conditional sentences for certain crimes. One example is that of impaired driving. The organization Mothers Against Drunk Driving (MADD) Canada has circulated a petition asking Parliament to eliminate the availability of conditional sentences for those convicted of impaired driving causing death or impaired driving causing bodily harm.⁽²⁶⁾ MADD believes that for violent crimes in which persons have been killed and/or injured, a conditional sentence does not adequately address the severity of the crime. There is a perception that the justice system is tilted towards concern for the offender and not enough is said about the value of the human life that has been taken away.

A different viewpoint was taken by the Canada Safety Council after it commissioned a study (released on 25 February 2005) to examine the link between sentencing

(25) [2003] BCCA 645.

(26) MADD Canada, News Release, "Over 33,000 Petitioners Urge End to Conditional Sentences," 16 November 2004, <http://www.madd.ca/english/news/pr/p041116.htm>.

and safety. The study, entitled *Sentencing in Cases of Impaired Driving Causing Bodily Harm or Impaired Driving Causing Death, With a Particular Emphasis on Conditional Sentencing*,⁽²⁷⁾ found that conditional sentences were used very selectively. They were ordered when there were no aggravating factors such as a poor driving record or high blood alcohol level, and typically issued to individuals who, given their character or circumstances, were good candidates for restorative justice.⁽²⁸⁾ In 2003-2004, over two-thirds of offenders convicted of impaired driving causing death and almost half of those convicted of impaired driving causing bodily harm received prison sentences. The data reveal only 9 conditional sentences were handed out for impaired driving causing death (out of a total of 53 cases), and 84 for impaired driving causing bodily harm (out of a total of 339 cases). The study suggests that the main reasons why conditional sentences are not used more often are denunciation and general deterrence. Prison sentences are perceived as harsher (and more appropriate) punishment.

The researchers also cited recent studies that confirm there is little correlation between the severity of sentences and the number of offences. What has the greatest impact on patterns of offending is publicizing apprehension rates, or increasing the probability of being caught. A review of cases and research found no empirical or scientific basis for eliminating the conditional sentence as an option in aggravated impaired driving cases. The study concludes that the only rationale for removing the conditional sentencing option would be that a conditional sentence is simply not harsh enough to address the seriousness of the offence. This is a subjective perception and, therefore, not amenable to academic study.

A vital issue concerning conditional sentences is the supervision of offenders serving terms of custody in the community. Effective supervision would seem to be critical to the success of the entire conditional sentencing regime. If judges lack confidence that the conditions they impose as part of conditional sentence orders are adequately enforced, they will be less likely to use the sanction. In addition, low public confidence in the adequacy of supervision is likely to undermine faith in the administration of justice. The issue of the enforcement of the conditions of a conditional sentence order took on added importance after the Supreme Court decision in the *Proulx* case. After this 2000 decision, which said that conditions such as house arrest or strict curfews should be the norm, there was a significant increase in the use of curfews or house arrest and the number of optional conditions imposed by courts rose significantly.⁽²⁹⁾ A conditional sentence is a term of imprisonment and should, therefore, attempt

(27) Paciocco and Roberts (2005).

(28) Canada Safety Council, "New Study Examines Conditional Sentences for Impaired Driving Causing Death or Bodily Harm," <http://www.safety-council.org/info/traffic/impaired/condsent-summary.html>.

(29) Roberts (2002), Table 5.

to re-create, in the community, some of the restrictions on an offender's life that prison imposes. This creates additional work for conditional sentence supervisors. Judicial concern with the adequacy of this supervision has been expressed repeatedly.⁽³⁰⁾ A survey of the judiciary has indicated that if more community and supervisory resources were available, courts would impose the conditional sentence of imprisonment more often.⁽³¹⁾

In a survey of probation officers in Ontario, who are responsible for ensuring compliance with conditional sentences, almost half of the respondents reported being unable to ensure compliance with house arrest or curfew conditions.⁽³²⁾ This would seem to undermine the idea that a liberty restriction is a defining characteristic of the sanction. The Province of Ontario is currently inaugurating electronic monitoring, which should lower the risk of re-offending, but this technology will probably apply only to high-risk cases.⁽³³⁾ If a sanction is inadequately administered, no statutory amendment (such as limiting conditional sentences to certain types of offence) will save it from failing to achieve its goals.

BILL C-70, AN ACT TO AMEND THE CRIMINAL CODE (CONDITIONAL SENTENCE OF IMPRISONMENT)

Bill C-70, An Act to amend the Criminal Code (conditional sentence of imprisonment), was given first reading in the House of Commons on 27 October 2005. The bill's intention was to create a presumption that courts shall not make conditional sentence orders when sentencing offenders convicted of serious personal injury offences, as defined in section 752 of the *Criminal Code*, terrorism offences, criminal organization offences or any other offences whose nature and circumstances are such that they require the paramount sentencing objective of the court to be the expression of society's denunciation. Courts would be required to explain in writing any exceptional circumstances that lead them to believe it would be in the interests of justice to use a conditional sentence in such cases.

The bill would also have allowed a court to suspend a conditional sentence order pending appeal, and, before doing so, to order the accused to enter into an undertaking or recognizance. In addition, the bill would have clarified that the minimum punishment provided

(30) *R. v. Patterson* (2000), 33 C.R. (5th) 45 (Ont. C.J.).

(31) Julian V. Roberts, A. N. Doob and V. Marinos, *Judicial Attitudes To Conditional Terms of Imprisonment: Results of a National Survey*, Department of Justice Canada, Ottawa, 2000.

(32) Julian V. Roberts, Cathy Hutchison and Rebecca Jesseman, "Supervising Conditional Sentence Orders: The Perceptions and Experiences of Probation Officers in Ontario," *Criminal Reports*, 6th Series, Vol. 29, 2005, p. 107.

(33) *Ibid.*

for offences under sections 253 and 254 of the *Criminal Code* (impaired driving and demands for breath samples) applies to impaired driving offences causing bodily harm or death and provides that a court may order that the time served under an order prohibiting the operation of a means of transport be served consecutively to the time served under any other similar order that is in force.

The then Minister of Justice has defended the approach taken by Bill C-70, stating that not all violent crimes are equal.⁽³⁴⁾ This is the reason why conditional sentences were not banned for all cases of violent crime. Opposition to the bill stems from the conclusion that violent and repeat offenders will still be given the opportunity to argue that they should be allowed to serve their jail sentences at home.

Some opponents of Bill C-70 recommend the use of mandatory minimum sentences as an alternative to conditional sentencing. In response, Justice Department officials have denied that mandatory minimum prison sentences work and have pointed to figures indicating that conditional sentencing is not used frequently. In 2003-2004, for example, it was used in only 4.6% of all *Criminal Code* cases and 6.3% of all cases involving crimes against the person, which include various forms of assault and robbery.⁽³⁵⁾ The Justice Department also argues that mandatory minimum sentences lead to more plea bargaining, an increase in costs as incentives to plead guilty are removed, rigidity in the sentencing process which reduces courts' ability to craft individualized sentences that take into account both aggravating and mitigating circumstances, increased racial disparities in inmate populations, and an increased number of charges going to trial. Moreover, they simply transfer discretion from the judiciary to the police and/or Crown attorneys.⁽³⁶⁾

Another criticism of Bill C-70 concerns its alleged fettering of judicial discretion. It has been pointed out that the proposed legislation is contrary to the Supreme Court of Canada's decision in *R. v. Proulx*, where no restrictions were placed on the availability of a conditional sentence except for what is in the legislation.⁽³⁷⁾ When judges do not impose sentences that are appropriate for the offender and the offence, the appellate courts are able to review the case. It is also not a fair assessment of conditional sentences to say that they are easy to get or that they do not constitute an appropriate punishment.

(34) Stephen Thorne, "New crime bill doesn't eliminate conditional sentences," *Vancouver Sun*, 28 October 2005, p. A1.

(35) *Ibid.*

(36) Department of Justice Canada, Background, "Fair and Effective Sentencing – A Canadian Approach to Sentencing Policy," http://canada.justice.gc.ca/en/news/nr/2005/doc_31690.html.

(37) *Law Times*, 7 November 2005, p. 1.