S E R V I N G C A N A D I A N S

RESEARCH AND STATISTICS DIVISION

THE FUTURE OF CONDITIONAL SENTENCING: PERSPECTIVES OF APPELLATE JUDGES

Department of Justice Canada
Ministère de la Justice Canada

Canada

The Future of Conditional Sentencing: Perspectives of Appellate Judges

rr04-8e

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April 30, 2004

Research and Statistics Division

Table of Contents

Acknowledgments

We would like to express our great appreciation to the appellate judges who took the time from their onerous duties to participate in this study, and to the Chief Justices for permitting us to conduct this research. We are most grateful to Mr. Damir Kukec and Mr. David Daubney from the Department of Justice Canada for their help in bringing this research project to fruition, as well as for providing feedback on a previous draft. We also thank Professor Patrick Healy for facilitating the seminar in Montreal.

Highlights

- This report describes findings from a series of focus groups held with appellate judges in three Canadian jurisdictions in early 2004.
- The focus of the discussions was upon conditional sentencing, and in particular the future of this sanction.
- Judges were asked to consider a number of potential statutory amendments, all of which would have the effect of circumscribing the ambit of the sanction.
- In general, there was considerable opposition to the proposed changes. For example, judges were opposed to the creation of statutorily excluded offences.
- Most judges opposed amending the *Criminal Code* provisions to restrict trial judges from imposing a conditional sentence in certain cases. Participants were of the view that such restrictions would unduly restrict the discretion of sentencing judges.
- A number of judges did however express reservations about the use of the conditional sentence for cases serious enough to warrant a term of custody up to two years less one day.
- As well, many participants expressed concern about the supervision of offenders serving conditional sentences in the community. A number of participants expressed a desire for better information in the area.
- When asked about the ability of the courts of appeal to guide trial judges, most participants were of the view that guidance was being provided, even though the "standard of review" established by the Supreme Court was high.
- The report concludes with a number of proposals for future research in the area of conditional sentencing. At present, little is known about the effectiveness of the sanction, or many other issues of interest to judges and other criminal justice professionals. The authors believe that current databases at the provincial level contain sufficient information to answer some important questions about the conditional sentencing regime in Canada.

Executive Summary

Purpose of Study

- Seven years after the creation of the conditional sentence of imprisonment, the sanction remains controversial. Criticism has been directed at courts that have imposed conditional sentences in cases involving serious personal injury offences. This had led to calls to amend the conditional sentence provisions in the *Criminal Code*, with a view to circumscribing the ambit of the sanction.

- Since its inception in 1996, the conditional sentence of imprisonment has attracted a considerable amount of commentary and research, as well as appellate judgments. Although a considerable number of research studies have been conducted on the issue, no study has explored the perceptions of the appellate courts.

- Courts of Appeal play a critical role in the evolution of any sanction. This is particularly true in Canada, where the appellate courts represent the principal source of guidance for trial judges. In other common law jurisdictions such as England and Wales, guidance also comes from bodies such as the Sentencing Advisory Panel, and, more recently the Sentencing Guidelines Council.

Methodology

- This report describes the findings from a series of focus groups with Court of Appeal judges in three jurisdictions (Quebec, Manitoba and Ontario). We included at least five appellate judges from each jurisdiction. Participants were asked to respond to a series of questions about conditional sentencing, as well as to offer any suggestions to improve the current regime. In total, 18 Court of Appeal judges participated in the study.

Summary of Principal Findings

- Almost all judges were opposed to the creation of a list of offences (statutory exclusions) for which a conditional sentence would not be available. They saw this proposal as representing an unwarranted intrusion by Parliament into the exercise of judicial discretion.

- Most participants were also opposed to the creation of statutory presumptions against the imposition of a conditional sentence of imprisonment. An alternate proposal was made to create a statutory presumption in favour of a sentence of institutional imprisonment for terms of imprisonment in excess of 12 months.

- There was less consensus regarding a proposal to lower the current ceiling of two years less one day, with some judges expressing support for such a proposal. However, as with the other proposals, the majority opinion appeared to be that the limit was not too high.

- One participant suggested that the limit should be retained at its current level, unless there was research to demonstrate that conditional sentences become less effective after a given period, such as 12 months.

- The *Youth Criminal Justice Act* includes a sanction similar to the conditional sentence of imprisonment. The Deferred Custody and Supervision Order (DCSO) is a sentence in which a young offender spends time in the community under supervision. It has a maximum of six months and may not be imposed for a serious violent offence. When asked whether this created an anomaly (in that youth courts have access only to the more restrictive sanction), the consensus from participants was that youth court sentencing was a different matter. They saw no necessity to create the same sanction at both the adult and youth court levels; they perceived the YCJA as having little or no bearing on the sentencing of adult offenders.

- With respect to the standard of review, there was less consensus in response to this question than the others posed during the sessions, but it did generate an interesting discussion. Most judges agreed that although appellate discretion had been constrained by the high standard of review, appellate courts were still able to intervene when necessary. One participant summarized this perspective by saying that "Principled interference is still possible and present".

- There was a general consensus that reform should focus on improving the administration and supervision aspects rather than on statutory reforms, such as the creation of statutory exclusions.

Future Research Suggestions

- The report concludes with a number of suggestions for future research in the area of conditional sentencing. At the very least judges should have better information about the following matters:

    - the level of supervision of conditional sentence orders;
    - the "failure" or "success" rate of conditional sentence orders;
    - the kinds of non-statutory conditions that are imposed;
    - the conditions most likely to be associated with a breach hearing;
    - the pattern of judicial response to substantiated allegations of breaches; and
    - the recidivism rate of offenders who have served conditional sentence orders (compared to offenders sentenced to serve terms of custody in a provincial correctional facility).

We believe that many of these issues can be answered with data currently available in the provincial correctional databases; they simply have not been extracted to date. For this reason, we strongly recommend that the Department of Justice undertake, in conjunction with provincial correctional authorities and the Canadian Centre for Justice Statistics, a research project to answer some of the most basic questions about conditional sentencing that have remained largely unanswered since 1996. Such a project would be of benefit to all parties with an interest in the sentencing process.

1.0 Introduction

Since its addition into the Canadian sentencing regime on September 3, 1996, the conditional sentence of imprisonment has attracted a considerable amount of research, commentary and controversy.[1] Most of the scholarship to date has focused upon the evolution of conditional sentencing as developed by the courts, as well as on sentencing patterns at the trial court level[2] including conditions[3] and breach rates.[4] In 2000, the Department of Justice Canada sponsored a one-day seminar on conditional sentencing[5] that contributed to the public debate regarding conditional sentencing.

In 2000, the case of *R. v. Proulx*[6] required the Supreme Court of Canada to address many of the conceptual and methodological issues created by the enigmatic statutory framework.[7] Some might question whether the Supreme Court should play such a substantial role in sentencing reform.[8] Still, this benchmark decision has highlighted the importance of judicial attitudes to the development of this new sanction that was a key element of the 1996 sentencing legislation. Currently, we know very little about these judicial attitudes. Only one research project has explored the perceptions and experiences of this most critical constituency.[9] The project's described findings from a quantitative survey of trial court judges across Canada.

However, that survey is of limited use today since it was conducted before *Proulx*, wherein the Supreme Court decision resolved a number of divisive questions about the methodology to impose a conditional sentence. The judgment also affirmed the position that no category of offence was presumptively precluded from eligibility for a conditional sentence (so long as the statutory criteria were met), and promoted the use of house arrest as an optional condition. Currently, our major source of insight into judicial reaction to the evolution of conditional sentencing comes from reported judgments that are constrained by the statutory framework and the kinds of questions that come forward.

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[1] See generally Allan Manson, "The Conditional Sentence: A Canadian Approach to Sentencing Reform, or Doing the Time Warp Again" (2001) 44 Crim. L. Q. 375; Julian V. Roberts, "Conditional sentencing: issues and problems" in Julian V. Roberts & David P. Cole, eds., *Making Sense of Sentencing* (Toronto: University of Toronto Press, 1999); Julian V. Roberts & Patrick Healy, "The Future of Conditional Sentencing" (2001) 44 Crim. L. Q. 309.
[2] See Julian V. Roberts, "The Evolution of Conditional Sentencing in Canada" (2002) 3 C.R. (6th) 267.
[3] Julian V. Roberts, Daniel Antonowicz & Trevor Sanders, "An Analysis of Optional Conditions Imposed in Conditional Sentence Orders" (2000) 30 C.R. (5th) 113.
[4] Dawn North, "The 'Catch 22' of Conditional Sentencing" (2001) 44 Crim. L. Q. 342.
[5] Department of Justice Canada, *The Changing Face of Conditional Sentencing: Symposium Proceedings* (Ottawa: Department of Justice Canada, Research and Statistics Division, 2000).
[6] [2000] 1 S.C.R. 61, 140 C.C.C. (3d) 449 (SCC) [*Proulx*].
[7] See also subsequent cases *R. v. Wells*, [2000] 1 S.C.R. 207, (2000), 141 C.C.C. (3d) 368 (SCC); *R.* v. *Knoblauch*, [2000] 2 S.C.R. 780, 149 C.C.C. (3d) 1 (SCC).
[8] Manson, *supra* note 1.
[9] Department of Justice Canada, *Judicial Attitudes Towards Conditional Sentences of Imprisonment: Results of a National Survey* by Julian V. Roberts, Anthony N. Doob & Voula Marinos (Ottawa: Department of Justice Canada, 2000).

While scholars have started to consider the roles, culture and practices of appellate courts,[10] sentencing researchers in Canada[11] have yet to survey or interview appellate judges. In fact, the scholarship on appellate courts and sentencing is very limited, and has relied mostly on an assessment of functions that can be discerned from an historical review of reported cases.[12] Certainly, there is a considerable volume of case commentary[13] that has accumulated since 1996 with the introduction of statutory sentencing principles and the creation of the conditional sentence. But judgments from the Courts of Appeal reveal only so much about the reactions of appeal court judges. They are constrained by the cultures specific to each jurisdiction, the questions and material placed before them, and the fact that only a very small proportion of all sentences imposed come before the appellate courts on appeal.

Sentence appeals have been available in Canada since 1921.[14] On a sentence appeal,[15] s. 687(1) requires the court to "consider the fitness of the sentence appealed against" and empowers the court to "vary the sentence within the limits prescribed by law for the offence".[16] Because sentence appeals to the Supreme Court are uncommon, the appellate courts represent the major source of guidance for trial judges. Other common law jurisdictions have created sources of guidance for judges. In England and Wales for example, guidance also comes from bodies such as the Sentencing Advisory Panel, and, more recently the Sentencing Guidelines Council, which was created by the *Criminal Justice Act 2003*.[17]

In the U.S., most states have Sentencing Guidelines Commissions[18] that devise (and revise) numerical sentencing guidelines. At the federal level, the U.S. Sentencing Guidelines Commission administers guidelines for sentences imposed in federal courts. While Canada had a Sentencing Commission from 1984 to 1987, its mandate ended with the publication of its report and no permanent replacement has been established. Accordingly, there is no non-judicial body with a sentencing mandate in Canada. Supervisory guidance must come from the Courts of Appeal. This means that appellate review plays a more important role in Canada than in most other common law countries.

[10] Ian Greene *et al.*, *Final Appeal: Decision-Making in Canadian Courts of Appeal* (Toronto: James Lorimer & Co. Ltd., 1998) [*Final Appeal*].

[11] For research on appellate courts in England and Wales, see M. Wasik, "Sentencing Disparity and the Role of the Court of Appeal" (1981) 145 *Justice of the Peace* 348; R. Henham, "Sentencing Policy and the Role of the Court of Appeal" (1985) 34 *The Howard Journal* 218.

[12] See *e.g.* Department of Justice Canada, *The Role of an Appellate Court in Developing Sentencing Guideline* (Research Reports of the Canadian Sentencing Commission) by A. Young (Ottawa: Department of Justice Canada, 1988); *Final Appeal*, *supra* note 10.

[13] See *e.g.*, Allan Manson, "The Supreme Court Intervenes in Sentencing" (1996) 43 C.R. (4th) 306; Gary Trotter, "Appellate Review of Sentencing Decisions" in Roberts & Cole, *supra* note 1.

[14] Allan Manson, *The Law of Sentencing* (Toronto: Irwin Law, 2001).

[15] For appellate purposes, both an order under s.742.1 and a breach disposition under s.742.6(9) are included by s.673 under the definition of "sentence".

[16] *Criminal Code*, R.S.C. 1985, c. C-46, s. 687(1) [*Criminal Code*].

[17] *Criminal Justice Act 2003* (U.K.), 2003 c. 44.

[18] This is not to say that these non-judicial vehicles are either essential or even conducive to the rational development of sentencing policy; however, no one can debate their influence.

However, providing substantive sentencing guidance is not the only role that appellate courts play. In *Final Appeal*,[19] a broad-based study of appellate decision-making,[20] Greene et al. noted the different approaches of Canadian appellate courts to sentence appeals, especially with respect to willingness to intervene.[21] In addition to these traditional practices, the authors observed that Parliament and the constitution determine the jurisdiction of appellate courts, and the parties determine which cases are heard and what issues are litigated. This, however, does not suggest a simplistic notion of passivity: "By their very decisions and practices, appellate judges signal to litigants a willingness or unwillingness to respond to certain types of claims. Thus, while the flow of incoming cases confines the discretion of judges, the discretion that judges exercise within those confines can expand or contract the flow of future cases".[22] Thus, appellate judges not only make substantive case-by-case decisions and provide general sentencing guidance, they also exercise a subtle influence on the size and nature of their dockets.

No study to date has explored the experiences and attitudes of appellate judges, with respect to conditional sentencing or any other sentencing issue, although Courts of Appeal play a critical role in the evolution of any sanction. The present study was designed to fill this void in the area of conditional sentencing. Although appellate judges have not participated in research projects of this nature in Canada, it is worth noting that in other jurisdictions this is far from a rare occurrence. In England and Wales, senior members of the judiciary are often consulted about policy developments. For example, a number of members of the judiciary were consulted during the course of the sentencing policy review conducted by the Home Office in 2001.[23]

1.1 Conditional Sentencing at the Crossroads

1.1.1 Origin and Definition of Conditional Sentence of Imprisonment

The conditional sentence of imprisonment is a term of imprisonment that the offender serves in the community. This community-based form of imprisonment was created by Parliament to reduce the number of admissions to prison without endangering the safety of the community. A number of statutory pre-requisites must be met before a court may impose a term of conditional imprisonment. The conditional sentence provisions in the *Criminal Code*[24] have been amended twice since their creation in 1996. The first amendment (in 1997) appeared to introduce a fourth statutory pre-requisite requiring conformity with the purpose and principles of sentencing, as outlined in sections 718-718.2 of the *Criminal Code*. The 1999 amendments dealt primarily with the breach mechanism and other procedural matters.

[19] *Final Appeal*, *supra* note 10 at 49-52.
[20] Using data obtained before the sentencing reforms introduced in 1996.
[21] *Final Appeal*, *supra* note 10 at 49-52.
[22] *Ibid*. at 51.
[23] See U.K., Home Office, *Making Punishments Work (*Report of a Review of the Sentencing Framework for England and Wales) (London: Home Office, 2001) at Annex C. In addition, the majority of members on the Sentencing Guidelines Council, which devises guidelines, are drawn from the judiciary.
[24] *Supra* note 16, s. 742.1.

According to section 742.1:

> *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, and*
>
> *(b) is satisfied that serving the sentence in the community would not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing set out in sections 718 to 718.2,*
>
> *the court may, for the purposes of supervising the offender's behaviour in the community, order that the offender serve the sentence in the community, subject to the offender's complying with the conditions of a conditional sentence order made under section 742.3.*

All offenders serving conditional sentences of imprisonment have to abide by a set of statutory conditions. In addition, courts may craft specific conditions to respond to the needs of individual offenders. In the event that a breach of conditions is alleged, a breach hearing will be expeditiously conducted. If the court finds that the offender breached a condition of the order without reasonable excuse, it has a number of options to exercise. The court may simply admonish the offender and let the sentence continue in the community; the court may amend the conditions of the order, or the court may cancel the conditional sentence order and commit the offender to custody for some portion of, or the remaining time on the order.[25]

1.1.2 Use of Conditional Sentence

Although over 100,000 conditional sentences have been imposed since 1996, the sanction continues to attract some criticism, especially when it is applied to crimes involving death, bodily harm and violations of sexual integrity. Another controversial category is drug trafficking. On empirical examination, however, offences such as manslaughter, sexual assault, assault causing bodily harm or aggravated assault account for a very small percentage of all conditional sentences imposed across Canada. Nevertheless, some Victim Rights' Advocates and a number of provincial Attorneys General have called for Parliament to introduce restrictions that would limit the application of the sanction to less serious cases, or to cases that do not involve the infliction or threat of bodily harm.

1.1.3 Proposed Changes to the Conditional Sentencing Regime

In 2003, a group of five provincial Attorneys General submitted a position paper to the Standing Committee on Justice and Human Rights, in which they advocated limiting the ambit of the conditional sentence.[26] The Alberta initiative included offences involving serious violence, sexual offences and driving offences causing death or bodily harm. It does not include drug trafficking but extends to "offences involving organized crime or terrorist activity and theft involving a

[25] See generally *supra* note 14.

[26] Alberta Justice and Attorney General, *The Conditional Sentence of Imprisonment: The Need for Amendment* (Paper submitted to Standing Committee on Justice and Human Rights) (Alberta Justice and Attorney General, 2003) [Alberta initiative report].

breach of trust". In 2003 the Standing Committee announced a review of the operation of the conditional sentencing regime. However, the Committee has been busy with other business and its consideration of the conditional sentencing regime has been suspended for the present.

1.1.4 Need for research into Judicial Perceptions of Conditional Sentencing

There is a particular value in exploring appellate judges' views with respect to conditional sentencing because the ambit of the sanction is potentially broad. Since *Proulx*, it has been clear that no offences are categorically excluded from consideration except those carrying a minimum sentence of imprisonment. Assuming the other statutory criteria have been met, only cases that warrant penitentiary terms are excluded, but these represent a very small percentage of all admissions to custody: in 2001/02, less than 4% of all admissions were for terms of two years or longer.[27] Judges have a great deal of discretion to exercise with respect to this disposition. Appellate guidance therefore plays the critical role of determining entry thresholds for the sanction by establishing the factors that may preclude its use.

[27] Statistics Canada, *Adult Correctional Services in Canada, 2001/02 (Juristat)* by Denyse Carrière (Catalogue No. 85-002-XPE, Vol. 23 (11)) (Ottawa: Minister of Industry, 2003).

2.0 Methodology

Our initial research plan called for focus groups composed of trial judges as well as appellate judges. This proved impossible within the temporal constraints upon the project. This research adopted a qualitative approach to focus on understanding the reactions of appellate judges. This approach was considered more appropriate than a survey in light of the subject population, and the issue under scrutiny. A written survey generates information in response to specific questions, but does not permit researchers to probe responses. A request to conduct small focus groups was sent to Chief Justices in five provinces across Canada.[28] A positive response was received from four jurisdictions; the fifth Chief Justice indicated that it would not be possible to conduct the study at this time. The letter of information requested a focus group meeting with at least five members of the court. In one of the four jurisdictions it appeared that this criterion would not be met within the current time frame. Accordingly, we conducted discussions in the remaining three provinces (Manitoba, Ontario and Quebec).[29] Although we were not able to include any additional provinces, these three jurisdictions contain over half the general population. In total, 18 court of appeal judges participated, with at least five in each jurisdiction.

A brief background paper[30] was circulated and the meetings took place in February and March 2004. The background document was intended to provide a context for the meeting. Participants were asked to address a series of questions, after which a general discussion was held with regard to the issue of conditional sentencing. The first four questions came directly from the Alberta position paper noted above:[31]

1. Would it be a good idea to limit the use of conditional sentences for certain offences (e.g., to introduce a statutory exclusion for offences involving serious violence, sexual assault, driving offences involving death or serious bodily harm, offences involving organized crime or terrorist activity, thefts involving breach of trust)?

2. Instead of using a statutory bar for the offences listed in Question 1, would it be a better idea to create a presumption against the imposition of a conditional sentence unless rebutted by the offender?

3. Should the "two year less a day limit" set by s.742.1(a) be lowered to 12 or 18 months?

[28] We had hoped to visit additional jurisdictions. However, this proved to be impossible given the short timeframe placed upon the project.
[29] Participants were assured that no individual judge would be identified.
[30] See Appendix A.
[31] Alberta initiative report, *supra* note 26.

4. The *Youth Criminal Justice Act*[32] proclaimed into law in 2003 contains a sanction that is similar to the conditional sentence. The Deferred Custody and Supervision Order (DCSO) provides for supervision in the community rather than custody, but non-compliance can result in the offender being admitted to custody. However, this provision is not available for a serious violent offence and is limited to six months. Is it a problem that an adult has greater access to the option of serving a custodial term in the community (the conditional sentence) than a young offender (the deferred custody and supervision order)?

5. Do you think the current statutory framework contains any elements that restrict sentencing judges or otherwise prevent conditional sentences from achieving their proper objectives? What are they, and how could they be rectified?

6. Do you think the current standard of review for sentencing established by the Supreme Court in *R.* v. *Proulx* and earlier judgments undermines the ability of Courts of Appeal to provide adequate review of sentencing at the trial court level?

At the conclusion, participants were asked whether they had other views on conditional sentences, especially any existing obstacles to the proper use of the sanction, and whether they could propose any changes to the conditional sentencing regime in Canada.

Our findings cannot be generalized to all appellate courts across Canada, but this was never our intention. Rather we hoped to include a diverse sample of individuals. Of course, since participation was voluntary, participants self-select themselves in a study of this nature. However, we do not see this as a limitation upon the findings; it simply indicates that our study included the appellate judges with an interest in the issue of conditional sentencing. This approach may have included individuals with the most experience hearing sentence appeals. As will be seen, with a couple of important exceptions to which we shall later draw attention, a considerable degree of consensus emerged around the issues discussed.

[32] S.C. 2002, c. 1, ss. 1-165 and Schedule [YCJA].

3.0 Findings

We shall summarize the discussions in the order of the questions posed.

3.1 Statutorily Excluded Offences

> *(1) Would it be a good idea to limit the use of conditional sentences for certain offences (e.g., to introduce a statutory exclusion for offences involving serious violence, sexual assault, driving offences involving death or serious bodily harm, offences involving organized crime or terrorist activity, thefts involving breach of trust)?*

The answers to this question were virtually unanimous. Almost all participants replied that a schedule of statutory exclusions would not improve the conditional sentencing regime. One participant described this proposal as "a solution to a problem that isn't there". Several judges noted that trial courts need as much discretion as they have at present, and that this latitude to select a fit disposition should not be circumscribed by Parliament in this fashion. One participant noted that there were personal injury offences committed in "very sympathetic" circumstances – for example, where self-defence had been raised unsuccessfully at trial. Generally, the view expressed was that it would be wrong to deny judges the discretion to impose a conditional sentence in these unusual cases. Other comments included the following:[33]

- A statutory exclusion is inconsistent with the philosophy and rationale behind conditional sentences;
- A schedule of excluded offences would reflect the position that a conditional sentence is always more lenient than institutional imprisonment, and this is untrue;[34]
- A schedule of offences would emasculate the statutory regime as it now stands (by introducing a degree of rigidity which would change the nature of the sanction);
- A schedule would convey a message of non-confidence in the judiciary;[35]
- While there may be a debate about conditional sentences generally, if you are going to have them, then don't exclude such a wide range of offences as those identified in the background document and
- If an offence is so egregious by nature then Parliament can impose a minimum sentence of custody, as it has done for other offences.

[33] Except where indicated with quotation marks, we have paraphrased the comments of the participants.
[34] Participants cited cases in which the offender had requested "jail" over a conditional sentence. Some offenders may prefer to "get the sentence over with", and be concerned that by breaching the order, they may end up in prison anyway, and possibly for a longer period.
[35] One participant suggested that "people should have more trust in their judges", and a schedule of this kind would be unnecessary.

3.2 Statutory Presumptions

> *(2) Instead of using a statutory bar for the offences listed in Question 1, would it be a better idea to create a presumption against the imposition of a conditional sentence unless rebutted by the offender?*

This proposal generated a more diverse debate but there was still a consensus that it would probably not have a salutary effect on the conditional sentencing regime. It was perceived as "neither fish nor fowl", a half measure rather than a potentially useful reform. Participants in two jurisdictions did suggest that if presumptions existed, this would "make defence counsel work harder" in terms of their sentencing submissions.[36] Although the view was expressed that this proposal could make sentencing somewhat easier for trial judges, most judges disagreed. They were of the view that trial courts were able to distinguish the appropriate cases for a conditional sentence without the additional direction of statutory presumptions. Several participants noted that in a sense, presumptions exist in the case law already; certain offences for which denunciation is most important carry a "judge-made" presumption in favour of custody.[37]

Participants also acknowledged the problem of the unrepresented accused person who may be disadvantaged if convicted of an offence carrying a presumption of custody rather than a conditional sentence. A number of participants were of the view that statutory presumptions would make the process of sentencing an offender far more complicated, with no actual benefit. Finally, the view was also expressed that the experience in the U.S. suggests that guidelines of this kind undermine the sentencing process by restricting the ability of the trial court judge to impose an appropriate sanction.[38] Other comments included the following:

- Presumptions would change things for the worse, by making the sentencing hearing longer and more complicated;
- Politically, it would do more harm than good;
- Let the jurisprudence define criteria for which offences should have a presumption, and this should be sufficient guidance for judges; and,
- "It's just another example of how politicians mistrust judges".

[36] This view softened when the individual was reminded about the growing number of unrepresented accused.
[37] See *Proulx*, *supra* note 6, the Supreme Court noted that: "there may be certain circumstances in which the need for denunciation is so pressing that incarceration will be the only suitable way in which to express society's condemnation of the offender's conduct" at para. 106 and "where objectives such as denunciation and deterrence are particularly pressing, incarceration will generally be the preferable sanction" at para. 127.
[38] This participant was referring to the fact that judges in the U.S. had lost a great deal of discretion as a result of the sentencing guideline schemes. See Michael Tonry, *Sentencing Matters* (New York: Oxford University Press, 1996).

3.2.1 An Alternate Proposal Involving Statutory Presumptions

During one session, a modified version of the presumptive reform proposal emerged. One judge suggested an arrangement whereby the first stage of analysis would be to determine the co-relative custodial term. There then would be a presumption in favour of a conditional sentence for terms of custody within the 12-month range, but for the more serious cases which would result in terms of imprisonment in excess of 12 months but still within the two years less one day range, there would be a presumption of custody rather than the community.

Terms of custody under 12 months	*Terms of custody 12 months < 2years*
Presumption in favour of a conditional sentence	Presumption in favour of institutional imprisonment

While this approach is novel, it would add another stage to the methodology for imposing a conditional sentence[39] by requiring the trial judge, after rejecting both non-custodial options and a penitentiary term, to then stipulate at least whether the co-relative custodial term is within or without the presumptive range.

3.3 Lowering the Statutory Limit

> *(3) Should the "two year less a day limit" set by s.742.1(a) be lowered to 12 or 18 months?*

There was less agreement with respect to this proposal, but as with the others, the majority opinion appeared to be that the limit was not too high. Several participants drew attention to the historical significance of the two-year threshold for the imposition of a penitentiary term. They noted that judges, and indeed the criminal justice culture, is most familiar with the two year threshold; a new ceiling of 12 or 18 months would seem unnatural, and would not carry a precise, or at least accepted, meaning. One participant suggested that the limit should be retained at its current level, unless there was research to demonstrate that conditional sentences become less effective after a given period, such as 12 months.[40]

Comments included the following:

- There's always been a difference between two years and two years less a day.
- It would be a revolution (in the negative sense).
- It may be arbitrary but we've always known what a penitentiary term is.

The participants who believed that the limit was set too high (and therefore should be lowered) argued that some offences within the two-year range were too serious to justify a community

[39] See *Criminal Code, supra* note 16, s. 742.1.
[40] We are not aware of any studies that examine this issue or if there are sufficient data available to explore the effectiveness of conditional sentences over time and for different offences.

sanction. In addition, it was noted that if the limit remains at two years less one day, cases that might attract a penitentiary term of three or even four years imprisonment could be eligible for a conditional sentence if the offender had spent a year in pre-trial custody which was subsequently credited on the basis of "two for one". Participants who supported this proposal also observed that trial judges seemed to believe that lengthy conditional sentences (near the limit) were not a good idea. They felt that this was implicit in the fact that long conditional sentences included a curfew in the first few months, but this condition was often relaxed after a year.

3.4 The Conditional Sentence of Imprisonment and the Deferred Custody and Supervision Order

> (*4) The Youth Criminal Justice Act proclaimed into law in 2003 contains a sanction that is similar to the conditional sentence. The Deferred Custody and Supervision Order (DCSO) provides for supervision in the community rather than custody, but non-compliance can result in the offender being admitted to custody. However, this provision is not available for a serious violent offence and is limited to six months. Is it a problem that an adult has greater access to the option of serving a custodial term in the community (the conditional sentence) than a young offender (the deferred custody and supervision order)?*

Although there has been very little experience to date with the *Youth Criminal Justice Act* and particularly the DCSO, it could be argued that there should be a consistent relationship between the DCSO and the conditional sentence of imprisonment for adults. That is, the differences between them create an inappropriate anomaly. Under the YCJA, young offenders are denied a DCSO for offences for which an adult is eligible for a conditional sentence (assuming the other statutory criteria have been satisfied). Similarly, a young offender facing a term of custody of nine months may not receive a DCSO, while nine months is well within the range of a conditional sentence in adult court. On the other hand, a competing perspective holds that the separate sentencing regime, with different objectives and principles[41], means that there is no substantive reason why the sanctions available in youth court should correspond exactly to those available to judges in adult court.

This question did not generate a lot of interest amongst participants. For this reason, it was not raised in the third jurisdiction. The lack of interest is perhaps due to the newness of the *Youth Criminal Justice Act*. In any event, there was a consensus that no particular relationship existed between sentencing in youth and adult courts. In addition, a number of specific points were noted:

- the two sanctions (DCSO and Conditional Sentence of Imprisonment) carry different names, notwithstanding certain similarities. This suggests that Parliament envisaged

[41] Or perhaps, a different mix of principles, since one of the goals of the YCJA is to harmonize, to a limited degree, sentencing at the two levels. Rehabilitation is more important for sentencing in youth court, and proportionality is somewhat less important. See Julian V. Roberts, "Harmonizing the Sentencing of Young and Adult Offenders: A Comparison of the *Youth Criminal Justice Act* and Part XXIII of the *Criminal Code*" (2004) 46 Can. J Crim. & Crim. Just. 301.

a different range of application for the two dispositions. It makes no sense to allow one regime to influence the future of the other;

- the DCSO is, by definition, a *deferred* custodial sanction; whereas the conditional sentence of imprisonment is a term of custody, but simply one that is served in the community rather than a correctional institution; and

- comparing the two sanctions was, in light of the separate statutory principles, an exercise of comparing "apples and oranges".

3.5 Standard of Review

> *Do you think the current standard of review for sentencing established by the Supreme Court in R. v. Proulx and earlier judgments undermines the ability of Courts of Appeal to provide adequate review of sentencing at the trial court level?*[42]

In the mid-1990s, the Supreme Court of Canada became interested in the standard of appellate review of sentences. It is now clear that there are two avenues of review. The first is unfitness: if a sentence is demonstrably unfit, this constitutes grounds for intervention by an appellate court. The second avenue is error in principle. These grounds were articulated clearly in *R. v. M. (C.A.)*[43] wherein the Court noted that: "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 vary a sentence imposed at trial if the sentence is demonstrably unfit".[44] In other words, an appellate court may not intervene in a sentence unless one of these grounds exists. As the Supreme Court noted in *Proulx*, "Sentencing judges have a wide discretion in the choice of the appropriate sentence. They are entitled to a considerable deference from appellate courts".[45] Some commentators have suggested that this relatively high standard of review may prevent appellate courts from providing as much guidance as might otherwise be possible. For this reason we explored this question in this study.

There was less agreement in response to this question than the others posed during the sessions, but it did generate an interesting discussion. Most judges agreed that although appellate discretion had been constrained by the high standard of review, appellate courts were still able to intervene when necessary. One participant summarized this perspective by saying that: "principled interference is still possible and present". Another referred to sentencing judges and commented that: "we have always had a lot of respect for their experience and judgment".

On the other hand, one participant expressed the view that the high standard of review made it somewhat harder for appellate courts to ensure that the codified principle of parity in sentencing was respected. The reason for this is that the high standard of review (the sentence must be "demonstrably" or "unreasonably" unfit) permits a wide range of disparity. No participants saw any need for Parliament to respond to the standard of review established by the Supreme Court.

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[42] This question was not derived from the Alberta position paper.
[43] [1996] 1 S.C.R. 500, 105 C.C.C. (3d) 327, 46 C.R. (4th) 269.
[44] *Ibid* at para. 90.
[45] *Proulx*, *supra* note 6 at para. 127.

However, some participants did comment on the fact that the *Criminal Code* provision directed appellate courts to a fitness review,[46] not an error of law review.

With respect to the guidance issue, most judges were confident that the current standard of review did not impair their ability to offer guidance to sentencing judges on the general issue of thresholds for conditional sentences. This is important given that *Proulx* opened up arguments for all kinds of offences to be considered for a conditional sentence. However, very few examples of guidance were given[47]. This may be a function of a number of factors including the relatively brief period since *Proulx*. On the other hand, we may be seeing a cautious approach that is respectful of the trial judge's role and requires waiting for appropriate benchmark cases.

Two other comments are worthy of note with respect to this issue. First, some participants in one jurisdiction offered the impressionistic view that the standard of review had resulted in fewer sentence appeals during recent years. Secondly, in another jurisdiction some judges felt that the "error of law"/ "demonstrably unfit" standard made it harder to persuade other panel members to allow appeals based on offender or offence characteristics.

3.6 Other Issues Emerging from the Discussions

Breach Rates

A number of individuals expressed concern about the absence of reliable data with respect to the breach rates of conditional sentence orders. The limited breach data[48] were described by one individual as "not real", in the sense that it was simply the proportion of orders that had resulted in an official breach hearing. The phrase "sentencing in the dark" was used in one jurisdiction to describe the absence of reliable statistical information about conditional sentencing outcomes. A participant from another court noted the need to have a full time sentencing commission that could collect and distribute such data.[49]

Supervision Resources

Considerable concern was also expressed about the existence of adequate supervision. A number of participants felt that supervision was inadequate, especially with respect to house arrest, but a few judges questioned whether this issue had been over-stated.[50] Some judges felt that the federal government had "created this thing [the Conditional Sentence] and then walked away from it". Everyone agreed that the absence of adequate support resources, or a perception of inadequate

[46] See *Criminal Code*, *supra* note 16, s.687 that directs courts to "consider the fitness of the sentence appealed against".

[47] The examples that were discussed were drug trafficking cases and possession of child pornography. It should be noted, however, that the major case *R. v. Hamilton*; *R. v. Mason* (2003), 172 C.C.C. (3d) 114 (Ont. Sup. Ct.) dealing with a difficult conditional sentence threshold for "drug mules" had been argued in the Ontario Court of Appeal but not decided at the time of this research.

[48] See Appendix A.

[49] Sentencing statistics and sentencing related information is collated and distributed to judges in other jurisdictions. In the U.S., for example, sentencing commissions perform this task.

[50] The discussion about supervising house arrest ranged from: "How difficult is it to telephone someone to check if they're at home?" to "what about cell phones?"

resources will undermine any sanction. There was a general consensus that reform should focus on improving the administration / supervision aspects rather than on statutory reforms.

Public Opinion

The public's misconception of conditional sentencing (and the courts) was identified as a challenge in several sessions. A number of participants remarked that the new sanction had not been "properly sold" by Ottawa prior to its introduction. It was suggested that the public was opposed to the imposition of a conditional sentence in the more serious cases of violence, and that this created pressure upon the courts, which were, to some degree, sensitive to community views. Participants noted that sentences imposed need to generate public respect, even if they do not attract wholesale agreement. Uncertainty about the role of conditional sentences affects public opinion. Many members of the public, it was suggested, fail to see the important differences between a conditional sentence of imprisonment and a term of probation.[51] Some participants objected to the name "conditional sentence of imprisonment" which suggests a term of custody, when in fact a conditional sentence is unlike imprisonment in a number of important respects. For example, even the most rigorous conditional sentence order allows the offender more freedom than would be the case if he or she were confined in a correctional facility.

[51] The two sanctions are (or should be) quite distinct. A conditional sentence carries punitive and restorative objectives, and is a form or custody, while probation applies to cases for which imprisonment is not an appropriate sanction.

4.0 Future Research Suggestions

1.1 Courts of Appeal

The nature of the focus group method precludes us from making generalizations to all appellate judges in Canada. We are unable to determine the extent to which the findings reported here apply to other jurisdictions. For example, we did not visit the smallest provinces, where the experience with conditional sentencing may well be quite different. In addition, it would be useful to know whether the other provincial courts of appeal have the same reactions as the participants in our study. We would also encourage the Department of Justice to consider approaching some of the remaining provinces to see whether they would be willing to participate in focus groups on this important subject.

4.2 Trial Court Judges

Our initial research plan called for focus groups composed of trial judges as well as appellate judges. This proved impossible within the temporal constraints upon the project. Our only insight into the attitudes and experiences of trial court judges with respect to conditional sentencing comes from the survey conducted in 1999.[52] As noted, that research was conducted prior to the Supreme Court judgment in *Proulx*. Accordingly it is now out of date. For this reason, we feel it important to undertake further research with judges at the trial court level. Research of this nature does not have to be expensive. An efficient way of exploring the views of trial judges is to distribute a survey, or conduct focus groups, at judicial education seminars. Several such seminars are held every year across Canada, and offer an ideal opportunity to obtain insight into the perceptions of the judiciary.

Research of this nature would yield enormous practical benefits for the judiciary. For example, it would enable researchers to identify the kinds of issues for which judges seek additional information. It was clear from the discussions we held with judges – and from informal meetings with judges at education seminars over the past few years – that members of the judiciary want more information about the supervision and outcome of conditional sentence orders. However, it is only by means of a systematic research project that we can ensure that the right kind of information is made available to judges across the country.

[52] *Supra* note 9.

At the very least judges should have better information about:

- the level of supervision of conditional sentence orders;
- the "failure" or "success" rate of conditional sentence orders;[53]
- the kinds of non-statutory conditions that are imposed within each jurisdiction;
- the conditions most likely to be associated with a breach hearing;
- the pattern of judicial response to substantiated allegations of breaches; and,
- the recidivism rate of offenders who have served conditional sentence orders (compared to offenders sentenced to serve terms of custody in a provincial correctional facility).

We believe that many of these issues can be answered with data currently available in some of the provincial correctional databases; they simply have not been extracted to date. For this reason, we strongly recommend that the Department of Justice undertake, in conjunction with provincial correctional authorities and the Canadian Centre for Justice Statistics, a research project to answer some of the most basic questions about conditional sentencing that have remained largely unanswered since 1996. These questions spring from the issues identified above. The data contained in a Statistics Canada report published in 2003[54] makes an important start towards a comprehensive database. At the same time, data pertaining to breach and judicial response to breach were not available for certain jurisdictions.

In jurisdictions with a sentencing commission (such as the United States), this research would be conducted by such a body. However, Canada does not have such an organization. Accordingly responsibility for such research is shared among a number of parties, including the Department of Justice Canada, Statistics Canada and provincial correctional agencies. In addition, private researchers or academics also have been involved in compiling conditional sentencing data. We believe that the time has come for an integrated effort that would involve all or many of these participants.

[53] Of course the term "failure" as applied to conditional sentencing can be defined in different ways, just as it is for parole. When an offender violates a condition of parole, and is returned to prison, some (but not all) researchers would consider this a failure of parole; others might point to the success of parole authorities in revoking conditional release in appropriate cases.

[54] Statistics Canada, *Conditional Sentencing in Canada: A Statistical Profile 1997-2001* by Dianne Hendrick, Michael Martin & Peter Greenberg (Catalogue No. 85-560-XIE) (Ottawa: Ministry of Industry, 2003).

5.0 Conclusions

This project has afforded a unique insight into the experiences and perceptions of appellate judges in three provinces. But what conclusions can we reasonably draw from it? First, it seems clear that most, but by no means all, of the participants saw little to be gained from amending the statutory framework of the conditional sentence, either in terms of statutory exclusions, statutory presumptions, or new statutory limits. More importantly, they saw much that would be lost in terms of undermining the ability of sentencing judges to impose a fit disposition. In other words, with respect to imprisonment, the Canadian approach to sentencing requires ample discretion to permit judges to make individualized assessment in hard cases. Controversial decisions that overstep the bounds of fitness will be reversed by appellate courts. Over time, appellate courts will generate sufficient threshold criteria. Second, it was equally clear that there was considerable concern about the administration of the sentence, either in actual terms or at least at the level of public perception. Third, many judges expressed a desire to know more about the breach rates, and a number were skeptical about the limited data on breach dispositions.

A skeptic might say that there is nothing unusual in finding that judges favour judicial discretion. However, the results of these discussions carry important consequences. On the one hand, there was a real respect shown by appellate judges for the experience of trial judges. On the other hand, there was inherent confidence that, with time, appellate courts can adequately compare situations and sort out those factors that place an eligible case beyond the scope of a conditional sentence.
[55] The judges were comfortable with this 'guideline' function and preferred its flexibility to any form of statutory intervention.

[55] Examples discussed were drug trafficking and possession of child pornography.