

SENTENCING IN CANADA

**JOHN HOWARD SOCIETY OF ALBERTA
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EXECUTIVE SUMMARY

Sentencing is defined as "the judicial determination of a legal sanction upon a person convicted of an offence." There is a wide range of sanctions that can be imposed in Canada. The Criminal Code contains a statement of purpose and principles of sentencing that provides direction to the courts in making sentencing decisions. The statement of purpose and principles is found in Section 718 and is an important touchstone for sentencing decisions and reform.

In some cases, the court has the option to impose a conditional or absolute discharge. A conditional discharge requires the offender to follow certain rules for a specified length of time as set out in a probation order. Once the duration of the conditional discharge has passed and the conditions of the probation order have been followed successfully, the discharge becomes absolute. If the court imposes an absolute discharge, the offender will be regarded as not having been convicted of the offence. The offender cannot be subsequently charged with the offence.

Offenders placed on probation are released into the community and must follow certain conditions as set out in a probation order. Probation can not be longer than three years.

Restitution is a payment made by an offender to the victim to cover expenses resulting from the crime, such as property loss or damage or personal injury. Restitution is available to victims of crime who have suffered property loss or damage or personal injury.

The fine is the most frequently used sentencing option in Canada; 45% of convicted adult offenders in Canada are fined. Any person convicted of an offence, except an offence punishable by a minimum term of imprisonment, may receive a fine in addition to or instead of any other sentence imposed.

A conditional sentence is a prison sentence that is served in the community. An offender serving a conditional sentence is released into the community and must follow a set of rules imposed by the court for a specific period of time.

Imprisonment is the most serious sentencing option in Canada. Imprisonment is intended as a last resort to be used only when less restrictive alternatives are inappropriate.

Another sentencing option newly available in Canada is the Long-Term Offender designation. Any person who meets the following criteria can be found a long-term offender: it would be appropriate to impose a sentence of two years or more for the offence; there is a "substantial risk" that the offender will reoffend; there is a reasonable possibility of eventual control of risk in the community. Long term offenders must serve at least two years in prison, followed by up to ten years supervision in the community.

A very serious sentencing option is the dangerous offender designation. Any person convicted of a serious personal injury offence but not yet sentenced who constitutes a danger to the life, safety or physical/mental well being of others may be subject to a dangerous offender application by the crown.

Section 753 of the Criminal Code allows the court to sentence those offenders to an indefinite period of incarceration.

Sentencing is one of the more controversial aspects of the Canadian criminal justice system. The John Howard Society believes that community based sentences can and should be imposed on the great majority of offenders. The range of community based sanctions available in Canada is a credit to our country's belief in a rational, principled based sentencing scheme. The Statement of Purpose and Principles incorporated in 1996 was an important achievement for groups like the John Howard Society who look for rational and principled sentencing.

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INTRODUCTION

Sentencing is defined as "the judicial determination of a legal sanction upon a person convicted of an offence" (Canadian Centre for Justice Statistics, 1997, February). There is a wide range of sanctions that can be imposed in Canada. Sentencing options available to the courts include absolute discharge, conditional discharge, probation, restitution, fines, community service, conditional sentence, intermittent imprisonment, imprisonment, long term offender designation and dangerous offender designation. The Criminal Code contains a statement of purpose and principles of sentencing that provides direction to the courts in making sentencing decisions. The purpose and principles of sentencing and the range of sentencing options in Canada are detailed in this paper. The paper concludes with a discussion of the future of sentencing in Canada.

PURPOSE AND PRINCIPLES OF SENTENCING

Section 718 of the Criminal Code deals with the purpose and principles of sentencing. The section is intended to provide direction to the courts in making sentencing decisions. The following is the text of the purpose of sentencing:

718. The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

- (a) to denounce unlawful conduct;
- (b) to deter the offender and other persons from committing offences;
- (c) to separate offenders from society, where necessary;
- (d) to assist in rehabilitating offenders;
- (e) to provide reparations for harm done to victims or to the community; and
- (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.

The fundamental principle of sentencing is as follows:

718.1 A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

Other sentencing principles include the following:

718.2 A court that imposes a sentence shall also take into consideration the following principles:

(a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,

(i) evidence that the offence was motivated by bias, prejudice or hate based on the race, nationality, colour, religion, sex, age, mental or physical disability or sexual orientation of the victim, or

(ii) evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim

shall be deemed to be aggravating circumstances;

(b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;

(c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;

(d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and

(e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

SENTENCING OPTIONS IN CANADA

Absolute and Conditional Discharge

In some cases, the court has the option to impose a conditional or absolute discharge. The court will consider whether it would be in the best interests of the offender and not contrary to the public interest. Offenders excluded from consideration for a conditional or absolute discharge are those convicted of an offence punishable by a minimum term of imprisonment, a term of imprisonment of 14 years or life imprisonment.

A conditional discharge requires the offender to follow certain rules for a specified length of time as set out in a probation order. Once the duration of the conditional discharge has passed and the conditions of the probation order have been followed successfully, the discharge becomes absolute

(see below). If the conditions of the probation order are not followed or the offender commits a new offence while bound by the probation order, the offender can be convicted of the original offence and sentenced.

If the court imposes an absolute discharge, the offender will be regarded as not having been convicted of the offence. The offender cannot be subsequently charged with the offence. However, a record is kept of the absolute discharge and can be used against the offender if the offender commits another offence.

Probation

Probation is a sentencing option that may be imposed on its own, as a suspension of sentence, or in addition to other sentencing options. For example, a period of probation may follow a term of imprisonment of less than two years. Offenders placed on probation are released into the community and must follow certain conditions as set out in a probation order. Probation can not be longer than three years.

All probation orders contain the following mandatory conditions:

- keep the peace and be of good behaviour,
- appear before the court when required to do so by the court, and
- 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.

Probation orders may also contain the following option conditions:

- report to a probation officer by a certain date and thereafter as directed by the probation officer,
- remain within the jurisdiction of the court unless written permission to go outside of that jurisdiction is obtained from the court or the probation officer,
- abstain from alcohol or drug use,
- abstain from owning, possessing or carrying a weapon,
- provide for the support or care of dependants,
- perform up to 240 hours of community service over a period not exceeding one year,
- participate in a treatment program, and
- comply with any other reasonable conditions set by the court.

Offenders who break the conditions of their probation order may be charged with a breach of probation. There are stiff penalties for a breach of probation. A breach of probation is punishable by a term of imprisonment of up to two years.

Restitution

Restitution is a payment made by an offender to the victim to cover expenses resulting from the crime, such as property loss or damage or personal injury. Restitution is available to victims of crime who have suffered property loss or damage or personal injury. Restitution is also available to persons acting in good faith who unknowingly become victims of criminal activity. For example, a person may unknowingly purchase stolen property which is later confiscated by police. Or, a person may unknowingly loan the offender money on the security of stolen property which is later returned to the lawful owner.

The amount of restitution is equal to the replacement value of the property. When someone is injured, the restitution may cover medical bills and lost income. In the case of people acting in good faith who unknowingly become victims of criminal activity, the amount of restitution may be equal to the amount paid for the stolen goods or the total amount of the outstanding loan secured by the stolen property. Victims are responsible for providing documentation of expenses incurred to the court.

Crime victims can make an application to the court for restitution. A restitution application form is available from police services and victims' services units. Crime victims can return completed restitution applications to the police, who will forward the forms to the Crown Prosecutor. Applications for restitution can also be made by the Crown Prosecutor or the court can decide to impose restitution on its own. Restitution orders can be enforced by the civil courts.

Restitution for pain and suffering is not available through the criminal courts. Victims seeking compensation for pain and suffering must make their claims in civil court.

Fines and Community Service

The fine is the most frequently used sentencing option in Canada; 45% of convicted adult offenders in Canada are fined (Canadian Centre for Justice Statistics, 1997, May). Any person convicted of an offence, except an offence punishable by a minimum term of imprisonment, may receive a fine in addition to or instead of any other sanction imposed. A court may fine an offender only if the court is satisfied that the offender is able to pay the fine or work it off in a fine option program. For the least serious crimes (summary conviction offences), the maximum fine is \$2000. For more serious offences (indictable offences), there is no limit to the amount of the fine. The court will also normally impose a victim fine surcharge. A victim fine surcharge is an additional payment of up to 15% in addition to the fine. This money goes into a special victims' fund to pay for programs for all victims of crime.

A court that fines an offender will make an order which clearly sets out the amount of the fine, the way the fine is to be paid and the time(s) by which the fine, or portion of the fine, must be paid. A copy of the order will be given to the offender. A number of options are available to assist in the collection of fines. The federal and provincial governments can refuse to issue or renew permits or licenses until the fine is paid. In addition, the payment of fines can be enforced through the civil courts.

A fine option program is a program that allows offenders to work off their fines. A fine option program typically involves community service. Work is done in the community and credits are earned at a specified amount per hour. These credits go toward paying off the fine. The work may include snow shovelling, cleaning up the park or delivering meals to the elderly.

If an offender, without reasonable excuse, refuses to pay his/her fine or work it off in a fine option program within the time allotted, and the court is satisfied that mechanisms such as the civil judgement option or refusing to issue licenses or permits are not appropriate in the circumstances, the offender will have to serve a term of imprisonment. The term of imprisonment to be served will be determined based on the following calculation:

$$\frac{\text{the unpaid amount of the fine} + \text{the costs and charges of committing and conveying the defaulter to prison}}{8 \text{ hours per day} \times \text{provincial minimum hourly wage}}$$

8 hours per day X provincial minimum hourly wage

The term of imprisonment served for not paying the fine must not exceed what the court could have imposed at the time of sentencing for the offence committed. Any payments of part of the fine or work done in a fine option program will result in a proportionate reduction of the prison term.

Conditional Sentence

A conditional sentence is a prison sentence that is served in the community. An offender serving a conditional sentence is released into the community and must follow a set of rules imposed by the court for a specific length of time. The prison sentence is 'suspended' as long as the offender abides by the rules imposed by the court. Offenders serving conditional sentences are closely supervised by probation officers.

A conditional sentence can be imposed as an alternative to incarceration for those offenders who would have been given a jail sentence of less than 2 years and who the court is satisfied will not pose a threat to public safety. Certain offenders are not eligible to receive a conditional sentence, including those convicted of an offence that is subject to a mandatory minimum prison sentence. An example of an offence subject to a minimum prison term is a second conviction for impaired driving.

When a judge imposes a conditional sentence, certain conditions are imposed, similar to the conditions of a probation order. All conditional sentence orders contain the following mandatory conditions:

- keep the peace and be of good behaviour,
- appear before the court when required to do so by the court,

- report to a supervisor by a specified date (usually within 2 working days) as directed by the court and thereafter when required by the supervisor and in the manner directed by the supervisor,
- remain within the jurisdiction of the court unless written permission is obtained from the court or the supervisor to go outside of that jurisdiction, 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.

Optional conditions that may or may not be included in a conditional sentence order include the following:

- abstain from alcohol or drug use,
- abstain from owning, possessing or carrying a weapon,
- provide for the support or care of dependants,
- perform up to 240 hours of community service over a period not exceeding one year,
- attend a treatment program approved by the province, and
- any other reasonable condition that the court considers desirable.

If an offender serving a conditional sentence breaks the rules imposed by the court, the suspension of the prison sentence may be cancelled and the offender may be required to serve the remainder of his/her sentence in prison.

Intermittent Imprisonment

Section 732 of the Criminal Code allows the court, where it has imposed a term of imprisonment for ninety days or less, to order that the sentence be served intermittently. The court will specify the times when the term of imprisonment will be served. For example, the court may direct that the offender serve his/her prison sentence on weekends. When the offender is not in custody, the offender must comply with the conditions set out in a probation order.

Imprisonment

Imprisonment is the most serious sentencing option available in Canada. Imprisonment is intended as a last resort to be used only where less restrictive alternatives are inappropriate. The courts are to consider all available sanctions other than imprisonment that are reasonable under the circumstances.

For the least serious offences, called summary conviction offences, the maximum term of incarceration that may be imposed is six months. For more serious offences, called indictable offences, the term of incarceration that may be imposed varies by offence. Some offences carry minimum incarceration terms, such as a second conviction for impaired driving. The most serious penalty that can be imposed is life imprisonment. Life imprisonment is the mandatory penalty for first and second degree murder. Other offences subject to life imprisonment include robbery, manslaughter, aggravated sexual assault and breaking and entering (dwelling-house).

Offenders sentenced to prison terms of less than two years serve their sentences in provincial prisons. Sentences of two years or more are served in federal penitentiaries. However, in some cases federal offenders may be permitted to serve their sentences in provincial prisons under federal/provincial exchange of service agreements. This arrangement may allow an offender to be closer to family, for example.

Long Term Offender

Another sentencing option newly available in Canada is the Long-Term Offender designation. Section 753.1 of the Criminal Code describes those offenders who may be subject to a long-term offender application by the Crown. Any person who meets the following criteria can be found a long-term offender:

- it would be appropriate to impose a sentence of two years or more for the offence;
- there is a “substantial risk” that the offender will reoffend;
- there is a reasonable possibility of eventual control of risk in the community.

Substantial risk has two components to it, the first of which involves the offender being convicted of one of a list of sex offences. The second criteria used to evaluate “substantial risk” is that the offender:

- (i) shows a pattern of repetitive behaviour, of which the current conviction forms a part, that shows a likelihood that the offender will cause death or injury to other people or inflict severe psychological damage on other people, OR:
- (ii) by conduct in any sexual matter including that involved in the current conviction, has shown a likelihood of causing injury, pain or other evil to other people in the future through similar offences.

If the court finds an offender to be a long-term offender, the offender will be given a sentence of imprisonment of at least two years, followed by a period of supervision in the community not exceeding 10 years.

Dangerous Offender Declaration

A very serious sentencing option available in Canada is the dangerous offender designation. Section 753 of the Criminal Code describes those offenders who may be subject to a dangerous offender application by the Crown. Any person convicted of a serious personal injury offence but not yet sentenced who constitutes a danger to the life, safety or physical/mental well being of others may be subject to a dangerous offender application by the Crown. A serious personal injury offence, as defined in Section 752, is an offence involving violence or attempted violence which can or will inflict mental or physical injury on another. The offence must also be subject to a sentence of ten or more years of imprisonment. Section 752 also includes a list of sexual offences deemed to be serious personal injury offences.

The determination of dangerousness is based on evidence, including behaviour associated with the present offence, displaying one of three possible results: there may be a pattern of unrestrained behaviour that is likely to cause danger; a pattern of aggressive behaviour with indifference as to the consequences of this behaviour; or behaviour that is "of such a brutal nature" (Section 753(a) (iii)) that ordinary standards of restraint will not control it. Alternatively, a person may be a dangerous offender if the offence for which the application is being made shows a failure on the person's part to control sexual impulses that is likely to result in harm to another.

Section 753 of the Criminal Code allows the court to sentence those offenders who receive the dangerous offender designation to an indefinite period of incarceration. Section 761 provides for a parole eligibility review every two years after seven years of incarceration have been served.

DISCUSSION

Sentencing is one of the more controversial aspects of the Canadian criminal justice system. In determining the legal sanction to be imposed on a person convicted of an offence, the courts have the unenviable task of trying to balance the needs of offenders, victims and the greater society. The John Howard Society believes that community based sentences can and should be imposed on the great majority of offenders. The range of community based sanctions available in Canada is a credit to our country's belief in a rational, principled based sentencing scheme. The new conditional sentence and the availability of restitution introduced in 1996 offer the courts a wider range of satisfactory options to ensuring offenders have the opportunity to remain in community making a contribution while accepting the consequence for their behaviour.

The Statement of Purpose and Principles incorporated in 1996 was an important achievement for groups like the John Howard Society who look for rational and principled sentencing. These statements act as a reference for sentencing decisions and a touchstone against which potential sentencing law amendments should be examined. Canada's proposed Youth Criminal Justice Act (YCJA) not only incorporates a statement of purpose and principles for the Act, but it further defines the statements throughout the Act related to the various forms of sentencing such as custody and

adult sentencing. We are hopeful that these statements will help clarify sentencing for the public, the legislators and the judiciary.

REFERENCES

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