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FEATURE ARTICLE

Conditional Sentences

The conditional sentence of imprisonment was introduced to the Criminal Code in 1996. The conditional sentence is an option to allow certain offenders, who would otherwise be headed for a provincial institution, to serve their jail terms in the community under specified conditions. This new sentencing alternative was intended to reduce incarceration rates. However, since the introduction of the conditional sentence, custody rates have actually risen. There is evidence that the conditional sentence, which was intended only for custody-bound offenders, is instead being applied to individuals who would otherwise have received probation. The following is a brief overview of the legislation governing conditional sentences, a summary of the practical, logical and conceptual problems associated with the conditional sentence from the perspective of the John Howard Society of Alberta and a discussion of recent direction from the Supreme Court.

THE LEGISLATION

The conditional sentence is contained in s. 742.1 of the Criminal Code:

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 that is less than two years, and
- (b) is satisfied that serving the sentence in the community would not endanger the community and would be consistent with the purposes 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 commu-

nity, 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.

The offender must meet all conditions imposed by the court, as well as mandatory conditions such as keeping the peace, reporting to a supervisor and remaining within the jurisdiction of the court. If the court decides that an offender has breached a condition, no new charge is laid, but the conditions of the sentence may be altered, the conditional sentence may be suspended or terminated, or the offender may be remanded into custody.

AREAS OF CONCERN

On the surface, imposing a conditional sentence looks straightforward. The court must consider the following:

- that a jail term of less than two years is appropriate;
- that the offender does not pose a physical threat to the community; and
- that the sentence is consistent with the purpose and principles of sentencing set out in the Criminal Code.

If each of the above applies, then the court has the option of imposing a conditional sentence in place of jail time. However, a number of difficulties with the provisions have arisen that have caused confusion in the application of this sentence.

It remains unclear whether violent or sexual offenders are eligible for conditional sentences. Is a conditional sentence appropriate where, for example, an offender has committed a sexual offence under aggravating cir-

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cumstances? Some judges have held that only jail is appropriate for these types of offences, even if the offender would be eligible for a conditional sentence. However, other judges have handed down conditional sentences to these types of offenders. On appeal, these sentences have generally been overturned, but some still question whether the sentence would ever be appropriate for violent or sexual offenders.

There are different views about the procedures to be followed in imposing conditional sentences. Section 742.1 suggests that the court must impose a specific term of imprisonment, in effect determining that a non-custodial sentence would not be appropriate. The court then “substitutes” the conditional sentence for the custodial sentence. In other words, the court must make a contradictory determination. The process of eliminating all other sanctions except incarceration and then substituting a conditional sentence for incarceration has been described as the “penological paradox.” There are two issues arising out of this contradictory determination.

First, there is debate over the technical requirements of the first step. Does the court have to impose a *specific* jail term before substituting a conditional sentence, or could the court simply determine that the offender is custody-bound? If it is not necessary to impose a specific sentence, the temptation might be to treat the entire step superficially.

Second, the penological paradox itself is problematic. People who would not endanger the community should be eligible for a community sanction in the first instance. The fact that the court has to eliminate all non-custodial sentencing alternatives for such a person is logically unsound at best and, at worst, it legitimizes the incarceration of individuals who are not a threat to the community.

If the conditional sentence is applied according to the wording of the legislation, the penological paradox remains. In order to resolve the paradox, the first step must be eliminated entirely so that offenders who are not subject to a minimum term of imprisonment can be eligible for a conditional sentence without the necessity of imposing a jail term first. The problem with this resolution is that it removes the key feature that defines the difference between who should get a conditional sentence and who should get probation.

The conditional sentence is almost indistinguishable from probation. Two features of the conditional sentence distinguish it from probation. The first feature is with respect to the application of the offence, which involves three differences. First, an offender on a conditional sentence must report to a supervisor

and remain within the jurisdiction of the court, while an offender on probation may or may not be subject to such conditions. Second, an offender on a conditional sentence may be ordered to attend a treatment program, while an offender on probation must consent to treatment. Third, the provisions governing the imposition of optional conditions are guided by different objectives. For probation, the objectives are successful reintegration and the protection of society. For conditional sentences, the objectives are the good conduct of the offender and the prevention of recidivism. The second distinguishing feature is with respect to breach. Breach of probation constitutes a new offence and, in cases where a suspended sentence was imposed, the offender's probation may be revoked. In contrast, breach of a condition of a conditional sentence does not constitute a new offence and the maximum punishment available is incarceration for the balance of the sentence. It is interesting that, although the conditional sentence is intended to be a more severe sentence than probation, the implications of a breach may make probation more severe than a conditional sentence.

Aside from the above differences, the conditional sentence is virtually a duplicate of probation. However, the sentence was *intended* to be conceptually distinct from probation, in that the conditional sentence was intended for individuals who would otherwise be custody-bound. Probation is a community-based sanction in its own right and is not intended for the custody-bound offender.

“Since the introduction of this new sentencing alternative, custody rates have actually risen.”

Given that it is so similar to probation, the courts have been reluctant to determine that the conditional sentence is appropriate for custody-bound offenders. While the two sentences may have been intended to be distinct, their striking similarities have prevented the widespread application of this sanction to individuals who clearly would otherwise be headed for jail. Further, the fact that probation is potentially a more severe punishment than a conditional sentence would understandably cause courts to think twice before imposing a conditional sentence on a custody-bound offender.

USE OF CONDITIONAL SENTENCES ACROSS CANADA

Statistics on the use of conditional sentences across Canada highlight some of the concerns raised above. In the first three years following the implementation of Bill C-41, almost 43,000 conditional sentences were handed down in Canada. During this time, nearly three-quarters of offences for which conditional sentences were imposed were classified as non-violent and non-sexual in nature. Offenders found guilty of property crimes received conditional sentences more than any other group, accounting for almost one-third of all conditional sentences

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granted. Less than one-quarter of conditional sentences were classified as violent and less than 5% of conditional sentences were given in cases where the offence committed was sexual in nature.

Given that most non-violent, non-sexual property offenders would also be eligible for probation, this new sentence has simply served to "widen the net," or bump offenders who would otherwise have received probation into a new category of apparently custody-bound offenders. Many judges have used the conditional sentence as a convenient punishment for cases where jail terms seem too harsh but mere probation would likely be perceived as too soft. The problem with this use of the conditional sentence is that, if a jail term seems too harsh, then technically the conditional sentence is not available because it is only for people who would *otherwise have gotten a jail term*.

Further, there is strong evidence that the new sentencing regime has done little to reduce the use of incarceration in Canada. From 1995 to 1998, 33% of convicted offenders went to jail. In 1998-99, this figure rose to 35%. This trend is consistent in most provinces.

R. v. PROULX

In January, 2000, the Supreme Court, in *R. v. Proulx*, provided a framework for trial courts to use in structuring their decisions, namely:

- ◆ There are no types of offences, except those that carry a minimum sentence, for which a conditional sentence is inappropriate, but conditional sentences should only be applied to offenders who would otherwise be headed for jail. Conditional sentences should not be used for offenders who would be eligible for a community sanction anyway. That is, conditional sentences should not be used to "widen the net."
- ◆ A trial court does not have to decide on a fixed jail term before substituting a conditional sentence. The court must simply rule out a penitentiary term and probationary measures and decide that a jail term of less than two years would be appropriate. Having determined that the appropriate range of sentence is a jail term of less than two years, the court should then consider whether it is appropriate for the offender to serve his or her sentence in the community.
- ◆ The conditional sentence is distinct from probation. Probation is mainly a rehabilitative sanction, whereas the conditional sentence has both rehabilitative and punitive elements. Therefore, the conditional sentence should include conditions that are much more restrictive of the offender's liberty.

It remains to be seen whether the guidelines set out in *Proulx* will temper the trend toward "net widening" that has occurred

since the conditional sentence was introduced. Further, while *Proulx* did not resolve the penological paradox, it highlighted an important concept that has always guided the Society: incarceration is inherently flawed as a sanction for offenders who do not pose a threat to the community.

The *Proulx* case's implication that the conditional sentence must include conditions that are highly restrictive of the offender's liberty may have unintended consequences. It suggests that the conditional sentence needs to be toughened up in order to be marketable to judges who are faced with a custody-bound offender. It may be true that a custody-bound offender should be subject to stricter conditions than an offender on probation. However, given the evidence of net-widening, the unintended effects of this suggestion may be that offenders who would otherwise have been given probation will get conditional sentences with even greater restrictions on their liberty. As well, offenders who do get probation may get a stricter list of conditions simply because the conditional sentence is so similar to probation and judges may look to the conditions typically attached to conditional sentences and apply them to probation.

CONCLUSION

The conditional sentence was hailed as an advancement in sentencing because it would allow non-threatening custody-bound offenders to serve their time in the community rather than in jail. However, there is no evidence that the sanction has been applied strictly to offenders who would be ineligible for any other community-based sanction. Rather than moving more offenders into the community, it is causing more offenders to receive jail time (in the form of a conditional sentence) when they would otherwise have simply received probation.

The John Howard Society has always had reservations about conditional sentences. The Society is concerned about net widening, longer sentences, harsher sentences and the overuse of incarceration. On a broader level, the Society is analysing community-based sanctions in general. We are examining a number of these options, including electronic monitoring and attendance centres. Beyond that, we hope to interest Society members and the public in a discussion about the future of community-based punishments. Tough questions must be asked. Are these initiatives carefully thought out? Do they actually promote restorative justice and community-based sentences or are they just labelling themselves as such? Are they working as intended? What are the unintended outcomes? Do community-based punishments need to be tougher to gain acceptance? What are the implications of an ever-expanding range of community-based sentences?

Look for future newsletters that begin to explore these issues. Let us know what you think.

References available upon request.

PROGRAMS IN BRIEF

Edmonton John Howard Society Day Program at Edmonton Youth Attendance Centre

Edmonton John Howard Society, in collaboration with Alberta Justice, offers an eight-week community-based day program for youth at risk. Edmonton John Howard Society Day Program is designed to provide young people with the knowledge and skills they need to obtain employment or return to school. The Day Program is offered at the Edmonton Youth Attendance Centre and it is currently mandated as part of a disposition under the *Young Offenders Act*. The Day Program accepts referrals from youth probation officers and/or agencies who work with Alberta Justice.

The Day Program is unique in that it operates on a continuous enrolment basis, while other community-based programs in Edmonton operate on monthly cycles of two, three, or four months. The Day Program was designed on a continuous enrolment basis to accommodate the needs of youth who have had difficulty completing other programs. Continuous enrolment permits young people to begin the program at virtually any time and still complete it within the required time frame.

The program consists of four main components:

- *Personal Development* - This component covers topics such as anger management, addictions, effective commu-

nication, independent living skills, problem solving and sexual health.

- *Employment/Educational Preparation* - This component delivers an education assessment, as well as skills development in the areas of resume and cover letter building, job searches and job interviews.
- *Recreation/Leisure* - This component exposes participants to low-cost recreation and leisure activities in Edmonton and surrounding area.
- *Eight Week Follow Up* - This component ensures that participant youth have continued support and ongoing success in the community.

The Day Program requires that all participants meet a number of expectations, such as regular attendance, punctuality and positive behaviour. If those expectations are not met, a case conference may be held with the young person in order to convey the message that these expectations are serious and to discuss ways in which the young person can better meet the expectations of the program. Any number of interested adults may attend a case conference, depending on the level of concern about the young person. Examples of interested adults who may attend a case conference are parents, guardians, group home staff, probation officers and program facilitators.

CONTACT US

The John Howard Society of Alberta Reporter is distributed free of charge to a wide audience of citizens, educators, agencies and criminal justice system staff. Our goal is to provide information and commentary on timely criminal justice issues. We welcome and encourage your feedback on The Reporter.

The John Howard Society of Alberta is an agency composed of citizens in Alberta who are interested in criminal justice reform and preventing crime in our communities. We recognize that dealing with crime is as much the responsibility of the community as it is of government.

We gratefully accept donations to help offset the costs of our efforts in criminal justice reform and crime prevention. Donations are income tax deductible.

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