CONDITIONAL SENTENCES

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EXECUTIVE SUMMARY

The conditional sentence, introduced in 1996 after the passing of Bill C-41, provides sentencing courts with an alternative to incarceration. To be eligible for a conditional sentence, the offender must not pose a threat to the community, and the offence for which the offender is convicted cannot carry a minimum sentence. The conditional sentence allows custody-bound offenders to serve their prison terms in the community under strict conditions. An offender who breaches any mandatory or optional conditions attached to the sentence order may be required to finish serving the term in a correctional facility. Parliament designed the new sentence as a means to reduce the incarceration rate of adults in Canadian prisons, a rate that is one of the highest in the world.

Controversy has surrounded the conditional sentencing regime since its introduction. The sentence is seen by some as being too soft a disposition for offenders who are custody-bound because it is no more severe or intrusive than probation. As the legislation reads, the differences between probation and a conditional sentence are hardly noticeable. The courts may be unwilling to hand down conditional sentences in most cases because of the perception that, if probation is an inappropriate sentence, then the conditional sentence (which is very similar to probation) is also inappropriate. Additionally, the courts have encountered many difficulties when interpreting the conditional sentencing provision. For instance, it is not clear whether certain offences such as sexual assault or dangerous driving causing death make an individual ineligible for the conditional sentence. Other questions have been raised concerning the procedure to be followed by the sentencing court when deciding on the suitability of a conditional sentence. The legislation states that before a conditional sentence can be handed down, the court must impose a custodial sentence of two years or less, then determine that the safety of the public would not be endangered if the offender served his sentence in the community. But does the judge have to simply state that a custodial sentence is appropriate for the offender, or does he or she actually have to hand down a custodial sentence first, then proceed to the next step? And who is to prove that the offender is or is not a threat? Does the onus fall on the defence to show that the offender is not a threat or does the Crown have to prove that he is a threat and should not be eligible for a conditional sentence?

Five cases dealing with the conditional sentencing regime were handed down by the Supreme Court of Canada in January of 2000 and these cases attempted to address some of the confusion surrounding the new sentence. In the first of the five cases (R. v. Proulx, 2000), in the reasons given for the court's decision in the case, the Supreme Court stated that a judge need only rule out probation as a disposition and decide that incarceration is appropriate before handing down a conditional sentence. Further, the term of imprisonment that would be suitable for the offender need not be the same as the length of the conditional sentence that is given to the offender. Additionally, the court stated that there are no types of offences for which an offender is ineligible for a conditional sentence, except those that carry a minimum sentence, provided that the court is satisfied 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. The Supreme Court, in R. v. Proulx, clarified a number of other issues that had been causing the judiciary a great deal of difficulty with respect to the conditional sentencing provisions of the Criminal Code.

In November 2000, the Supreme Court handed down a sixth decision, R. v. Knoblauch, regarding the applicability of conditional sentences to cases involving treatment in a mental health institution. The case confirmed that a conditional sentence can be appropriate where the offence is serious and the offender is considered dangerous provided that the principles of community safety and sentencing in general are upheld.

Since the implementation of Bill C-41, custody rates have actually risen. There is also some evidence that it is not custody-bound offenders but those who would have received probation who are being given conditional sentences, contrary to the intent of the law. It is fair to say that Parliament's goal of reducing incarceration rates through the use of the conditional sentence has failed.

Even though the Supreme Court has clarified the legislation in several areas, the conditional sentencing provisions remain problematic. There is still no clear distinction in the law between probation and the conditional sentence, and therefore, it is illogical for judges to have to rule out probation as inappropriate and then determine that a similar sanction--the conditional sentence--is suitable. Further, 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 have 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 the courts may look to the conditions typically attached to a conditional sentence and then apply them to probation.

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INTRODUCTION

On September 3, 1996, Bill C-41 was proclaimed in force, providing for the conditional sentence, a new sentence of imprisonment, now included in Part XXIII of the Criminal Code of Canada. This legislative innovation was intended by Parliament to reduce the rate of incarceration in provincial institutions while promoting principles of restorative justice (R. v. Proulx, 2000). In the fiscal year 1995/96, prior to the implementation of the Act, the total daily offender count in provincial correctional facilities and federal penitentiaries reached 33,785, while the total adult population of Canada was approximately 22,758,100(Canadian Centre for Justice Statistics (CCJS), 1998a). Thus, the rate of incarceration immediately prior to the implementation of the conditional sentencing regime was 148 per 100,000, one of the highest rates in the world. A conditional sentence now allows offenders, who would otherwise be given a custodial sentence of less than two years, to serve their sentences in the community under strict conditions. The use of conditional sentences is intended to promote restorative justice for offenders who are not seen to be a threat to the public by including the community in the offenders' punishment and rehabilitation.

While Bill C-41 was formulated by Parliament with the best of intentions, this legislation has presented the judiciary with a number of difficulties. First, the conditional sentence provisions are almost indistinguishable from those governing the sentence of probation. Because of this, many sentencing courts have declined to impose a conditional sentence in cases where a custodial disposition is appropriate. Further, various interpretations of the procedures to be followed when handing down a conditional sentence have been given since the implementation of Bill C-41. Whether the commission of serious offences precludes the possibility of a conditional sentence is another point of contention. Difficulties in interpreting the law have led to disparity in the sentences given to offenders with similar offences and criminal histories. It is hoped that the recent decisions of the Supreme Court, in five appeals dealing with the conditional sentence heard in January, 2000, will alleviate confusion surrounding the new sentence, while making a firm distinction between the conditional sentence and probation. Unless the conditional sentence can be presented as a realistic alternative to prison, while being more punitive than probation, our nation's use of incarceration will not decline and the new sentence might be used as a more intrusive alternative for probation instead.

CONDITIONAL SENTENCING: THE LEGISLATION

Part XXIII of the Criminal Code was amended by Bill C-41 to include the conditional sentence, which allows offenders to serve their prison sentence in the community. Section 742.1 of the Criminal Code of Canada provides that the court may hand down a conditional sentence only under certain circumstances:

> 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 safety of 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 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.

The purpose of sentencing, according to section 718 of the Code:

> ...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 principles of sentencing with which a conditional sentence should be consistent are set out in sections 718.1 and 718.2 of the Criminal Code of Canada. As stated in section 718.1, the fundamental principle of sentencing is proportionality: sanctions handed down by criminal courts must be proportionate to the offence committed and to the offender's moral culpability. Other principles to be considered by the courts are found in section 718.2 of the Code. Here, it is provided that a sentence may be reduced or increased if there is evidence of mitigating or aggravating circumstances. If an offender was motivated to commit a criminal act by hate or prejudice, if the offender harmed his child or spouse, if he abused a position of authority or if the offence was committed for the benefit of, or in association with, a criminal organization, a sentence may be increased because these circumstances are all considered to be aggravating. A second principle is that similar sanctions should be given to similar offenders who have committed similar offences. Third, imposition of consecutive sentences should not result in a sentence that is "unduly long or harsh." Fourth, a convicted offender should not be imprisoned if a sanction that does not deprive an offender of his liberty is found to be appropriate. Finally, sanctions other than imprisonment should be given consideration, particularly for Aboriginal offenders.

The conditional sentence carries mandatory conditions. These conditions are set out in section 742.3 (1) of the Criminal Code. The offender must:

> (a) keep the peace and be of good behaviour;
> (b) appear before the court when required to do so by the court;
> (c) report to a supervisor
>
> > (i) within two working days, or such longer period as the court directs, after the making of a conditional sentence order, and
> > (ii) thereafter, when required by the supervisor and in a manner directed by the supervisor;
>
> (d) remain within the jurisdiction of the court unless written permission to go outside that jurisdiction is obtained from the court or the supervisor; and
> (e) 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.

An offender given a conditional sentence may also be subject to optional conditions. Section 742.3(2) provides that the court can impose any of the following in addition to the mandatory conditions above:

> (a) abstain from
>
> > (i) the consumption of alcohol or other intoxicating substances, or
> > (ii) the consumption of drugs except in accordance with a medical prescription;
>
> (b) abstain from owning, possessing, or carrying a weapon;
> (c) provide for the support or care of dependants;
> (d) perform up to 240 hours of community service over a period not exceeding eighteen months;
> (e) attend a treatment program approved by the province; and
> (f) comply with such other reasonable conditions as the court considers desirable... for securing the good conduct of the offender and preventing a repetition by the offender of the same offence or the commission of other offences.

The offender must meet all of the conditions imposed by the sentencing court, whether they are mandatory or optional. If one or more of the conditions is breached, the Crown is required to act within 30 days. A hearing to determine whether the breach occurred then takes place. The offender may or may not be remanded into custody until the time of the hearing. No new charges are laid for a breach, but the offender is subject to further sanction by the court unless he can show that he did not breach a condition of his sentence, or that he had a reasonable excuse for breaching the condition. The court must make its determination on the balance of probabilities. If the court decides that a breach has occurred, no further action may be taken, the conditions of the sentence

may be altered, the conditional sentence may be suspended or terminated, or the offender may be remanded to custody.

On the surface, imposing a conditional sentence seems to be straightforward. First, the sentencing court decides that a prison sentence of less than two years is appropriate; if it is not, no conditional sentence may be handed down. Then the court considers the safety of the community if the offender were to serve the sentence in the community. If the court finds that the offender does not pose a significant physical threat to the public, then the court may impose a conditional sentence, unless the sentence is inconsistent with the purpose and principles of sentencing. When the determination is made that a conditional sentence is appropriate, mandatory and optional conditions are imposed. The offender is then supervised in the community for the duration of the sentence.

While Parliament intended for the conditional sentencing provisions contained in Bill C-41 to be straightforward, a number of difficulties have arisen in the interpretation of these provisions by both trial and appellate courts. For instance, the law is not clear as to who has the onus of showing that the offender is or is not a threat to the community. Some cases have held that the offender must provide evidence that he does not pose a threat to the community, while others have placed responsibility on the Crown to prove that the offender is a threat. There has also been a question concerning the standard of proof with respect to the threat that the offender poses: need it be proven beyond a reasonable doubt, or on the balance of probabilities?

Another question that has been raised concerns the appropriateness of a conditional sentence for violent or sexual offences. If an offender has, for example, committed a sexual offence under aggravating circumstances, can a conditional sentence provide sufficient deterrence and denunciation? Some cases have held that prison (and only prison) is appropriate for offenders found guilty of violent or sexual offences, even if they are technically eligible for the conditional sentence, because the imposition of a conditional sentence could not, in such cases, be consistent with the purposes and principles set out in sections 718 to 718.2 in any event.

There has also been some confusion surrounding the need to hand down a prison sentence before deciding that a conditional sentence is appropriate. Section 742.1 suggests that a court must impose a prison sentence of less than two years, after finding all alternatives to be inappropriate, and then decide that a conditional sentence (a community-based alternative to incarceration) is appropriate. In other words, the court must make a contradictory determination. Generally speaking, law is based on logic, yet judges are asked to use illogical methods in deciding whether to impose a conditional sentence. This situation, referred to as a penological paradox (Gemmell, 1997), is a source of considerable debate amongst academics and members of the judiciary.

Another difficulty faced by the courts in implementing the provisions of Bill C-41 is the absence of a significant distinction between probation and the conditional sentence. Only 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 a condition. 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 conditional sentences, the objectives are the good conduct of the offender and the prevention of recidivism. For probation, the objectives are successful reintegration and the protection of society. 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.

Aside from the above differences, the conditional sentence, as set out in the Criminal Code, is almost a duplicate of probation. It is, therefore, difficult to argue that a conditional sentence is a more punitive sanction than probation and a true alternative to incarceration. In one respect, probation may be more punitive, as any breach of a condition set out in an offender's probation order leads to a new charge (Roberts, 1997); if an offender given a conditional sentence breaches a condition, no new offence is committed. Both offenders may be sent to jail for breaching conditions, but only the probationer's criminal record will be lengthened. It is understandable, then, that many judges have been hesitant to impose conditional sentences in cases in which imprisonment has been deemed appropriate.

THE CONDITIONAL SENTENCING REGIME AS INTERPRETED BY THE SUPREME COURT OF CANADA

In May 1999, the Supreme Court of Canada heard five appeals that centred on the new conditional sentencing provisions contained in the Criminal Code. Typically, sentence appeals are not heard by the Supreme Court but, because of the widespread confusion surrounding the new conditional sentencing provisions, the Supreme Court of Canada considered five cases. Many issues pertaining to the use of conditional sentences, including the steps to be followed when determining whether such a sentence is appropriate, the application of the principles of sentencing and the burden of proof that is required to show that a conditional sentence should be imposed were resolved by the Supreme Court in the cases. The most pertinent questions in need of resolution by the Supreme Court deatl with the relationship between the conditional sentencing regime and the purposes and principles of sentencing and the necessity of individualization or consistency in the application of conditional sentences (Healy, 1999).

The five decisions, R. v. Proulx (2000), R. v. L.F.W. (2000), R. v. R.N.S. (2000), R. v. R.A.R. (2000) and R. v. Bunn (2000) were all handed down on January 31, 2000. The most comprehensive discussion of the conditional sentencing provisions is contained in R. v. Proulx (2000), the first of the five cases heard by the Supreme Court. At trial, the defendant pleaded guilty to dangerous

driving causing bodily harm and dangerous driving causing death, and was subsequently sentenced to 18 months of incarceration. The sentence was appealed to the Manitoba Court of Appeal. The Court of Appeal decided that the trial court had erred, and imposed a sentence of 18 months conditional imprisonment. The Court of Appeal held that the trial court placed inordinate emphasis on the principle of deterrence and appeared to be suggesting that a conditional sentence is never an appropriate punishment for certain offences such as dangerous driving causing death. In contrast, the Court of Appeal emphasized that there was a great deal of evidence that the offender was not a threat to the community: he had no prior criminal record, and alcohol was not a significant factor in the offence. Further, the defendant was employed and was preparing for the birth of his first child. In the opinion of the Manitoba Court of Appeal, a conditional sentence was appropriate for Mr. Proulx, and he served his sentence in the community. The Crown appealed to the Supreme Court of Canada, who overturned the Court of Appeal's decision and reinstated the 18 month prison sentence. The sentence was stayed, however, because the respondent had already completed the conditional sentence.

The Supreme Court, in its decision to reinstate the original sentence of incarceration, stated that deference must be given to the decision of the trial court because that court is meant to receive wide discretion in sentencing. The trial court has closer ties to the community in which the offender and his victims reside than the appellate court, and so it is in the interest of the trial court to sentence the offender appropriately for the sake of the community. Only when the sentence is demonstrably unfit can it be overturned by an appellate court. According to the Supreme Court, the original sentence handed down to the defendant was not unfit because his offences were serious: they caused death and severe physical injury. Chief Justice Lamer pointed out that, despite the severity of the offences committed by the respondent,

> Were I a trial judge, I might have found that a conditional sentence would have been appropriate in this case...To make sure that the objectives of denunciation and general deterrence would have been sufficiently addressed, I might have imposed conditions such as house arrest and a community service order requiring the offender to speak to designated groups about the consequences of dangerous driving. (p. 38)

The Court suggested that, while a conditional sentence could have been applied in this case, the trial court had not erred in sentencing the respondent to 18 months in prison because it was a fit sentence for two serious offences.

In R. v. Proulx, the Supreme Court clarified the meaning of the conditional sentencing provisions and provided a framework for trial courts to use in structuring their decisions. The principles that govern the conditional sentencing regime set out in R. v. Proulx include the following:

> 1) The conditional sentence was enacted to reduce the rate of incarceration in Canada, and should not be used to "widen the net." Only offenders for whom incarceration has been deemed appropriate should receive a conditional sentence.

2) Probation and a conditional sentence, while similar on several levels, are distinct dispositions. Probation is appropriate when rehabilitation is the focus of the sentence, whereas conditional sentences have both rehabilitative and punitive elements. Conditional sentences should be much more restrictive of the offender's liberty. House arrest should be a common requirement of the conditional sentencing regime.
3) There are no types of offences, except those that carry a minimum sentence, for which a conditional sentence is *necessarily* inappropriate. Even if there were aggravating circumstances related to the offence, a conditional sentence may be appropriate.
4) A trial court judge does not need to decide on a fixed term of incarceration before deciding that a conditional sentence should be handed down. He or she must simply rule out all less restrictive measures such as probation and decide that a prison term of less than two years would be appropriate.
5) A conditional sentence need not be of the same duration as the sentence of incarceration that would have otherwise been given.
6) The safety of the community is a necessary condition to the imposition of a conditional sentence. Once it has been determined that the offender does not pose a threat, the court may then consider the purpose and principles of sentencing, and if it is consistent with these, a conditional sentence may be imposed.
7) A conditional sentence can satisfy the principles of deterrence and denunciation, if punitive conditions are imposed.
8) Conditional sentences are suited to meet the objectives of restorative justice including "rehabilitation, reparations to the victim and the community, and promotion of a sense of responsibility in the offender and acknowledgment of the harm done to the victim and the community" (p. 37).
9) Where a sentence requires both punitive and restorative elements, a conditional sentence is more appropriate than other sanctions.
10) Neither the Crown nor the Defence are under an onus to prove that a conditional sentence is or is not appropriate. The judge may consider all evidence presented by both sides in determining the appropriateness of a conditional sentence.
11) Trial court judges have considerable discretion in sentencing, and their decisions should be deferred to in the case of an appeal, unless the sentence is demonstrably unfit.

In the four subsequent appeals heard by the Supreme Court, R. v. L.F.W. (2000), R. v. R.N.S. (2000), R. v. R.A.R. (2000) and R. v. Bunn (2000), the guidelines established in R. v. Proulx were applied. However, in R. v. L.F.W, it became apparent that even the highest court in the nation was experiencing conceptual difficulties with the conditional sentence. L.F.W. was convicted of molesting his cousin over a period of 6 years when she was between the ages of 6 and 12. The accused had been convicted of indecent assault and gross indecency and subsequently sentenced by a Newfoundland trial court to a conditional sentence of 21 months. The Crown appealed the sentence given by the trial court, arguing that a prison sentence was necessary given the severity of

the offence and the offender's abuse of his position of trust and authority as the victim's older relative. The Newfoundland Court of Appeal dismissed the case, which was then appealed to the Supreme Court of Canada. On equal division, it was decided that the appeal should be dismissed (eight out of the nine Supreme Court judges took part in the decision). The reasons stated for dismissing the case refer to several of the principles of the conditional sentencing regime outlined in R. v. Proulx. Chief Justice Lamer wrote, in R. v. L.F.W., that

> The sentence imposed by a trial judge is entitled to considerable deference from appellate courts. In the present case, although the accused committed very serious offences, the conditional sentence imposed by the trial judge was nevertheless within the acceptable range of sentences that could have been imposed in the circumstances. The trial judge's reasons were very thorough, taking into account all relevant sentencing principles, including denunciation and deterrence...Since the trial judge committed no reversible error in principle and thoroughly considered all appropriate factors, there is no reason to disturb the sentence. (pp. 2-3)

Four Supreme Court justices dissented, arguing that the trial judge handed down a sentence that was demonstrably unfit. They contended that the sentencing judge did not give sufficient weight to the principles of denunciation and deterrence, or to the proportionality principle (that the sentence given be proportional to the harm done). Further, the aggravating circumstances of the case militated against a conditional sentence. Despite the dissent of half of the justices, the appeal was dismissed.

A sixth decision dealing with conditional sentencing was heard by the supreme Court in 2000. R. v. Knoblauch addressed the question of whether an offender with serious mental health issues and potential for dangerousness could be eligible for a conditional sentence and whether the court can require that a conditional sentence be served in a psychiatric facility. The accused had a lengthy history of mental illness and of dangerous handling of explosives. He also had a long history of treatment for mental illness. In the case in question, the accused pleaded guilty to unlawful possession of an explosive substance and to possession of a weapon for a purpose dangerous to the public peace. The sentencing court imposed a conditional sentence of two years less a day followed by three years of probation. Both the sentence and the probation required the accused to reside in a locked psychiatric treatment unit at the Alberta Hospital Edmonton. The Crown appealed the decision and the Alberta Court of Appeal substituted a period of incarceration of two years less a day followed by three years of probation for the conditional sentence. For the next seven months, the accused served his sentence in jail rather than at the Alberta Hospital Edmonton. He was then released on full parole and, according to the terms of his parole, he was moved back to the Hospital. The question for the Supreme Court was whether a conditional sentence was appropriate in this fact situation and, if so, whether the conditional sentencing regime allows a court to require that the conditional sentence be served in a secure mental institution.

In a 5-4 decision, the Supreme Court answered both questions in the affirmative. The majority of the court held that, provided that the court is satisfied that the principles of sentencing have been

met and that there is no danger to the community in allowing an offender to serve jail time outside of a correctional facility, a conditional sentence will be appropriate in this type of fact situation. Further, section 742.3(2)(f) allows the court to include as optional conditions "such other reasonable conditions as the court considers desirable...for securing the good conduct of the offender and for preventing a repetition by the offender of the same offence or the commission of other offences." The Supreme Court held that residence in a secure mental hospital was an appropriate potential condition under this section.

The implications of the Knoblauch decision are not clear yet. The case reveals the problems that arise when the criminal justice and the mental health care systems collide. On the one hand, the case creates a new avenue by which mentally ill offenders can get necessary psychiatric treatment while they are in the criminal justice system. The case also affirms the principles inherent in the conditional sentencing regime of decarceration balanced with an assurance of community safety. Further, the case affirm's the ruling in Proulx that serious offenders are not automatically ineligible for community based sentencing. On the other hand, the case may create confusion about the meaning of community based sentencing. Although a conditional sentence meant that Knoblauch did not have to go to jail, he was still institutionalized and his institutionalization was imperative to the assurance of community safety. The minority judgment in Knoblauch indicated that "community" within the meaning of section 742.1 must be interpreted as including members of the general public. It remains to be seen whether this difference of opinion will have practical significance in future applications of the judgment.

It is also not yet clear whether any of the recent decisions of the Supreme Court will reduce confusion among the judiciary when considering a conditional sentence. A trial court must still grapple with the "penological paradox" as described by Jack Gemmell (1997): the court must first decide that imprisonment is the only appropriate sentence for a particular offender and then release him into the community to serve his sentence. The Supreme Court indicated that, while a conditional sentence is served in the community, it is still deemed by Parliament to constitute imprisonment and should carry restrictive conditions such as house arrest. The paradox remains, however, because the conditions that can be applied to an offender as part of a conditional sentence are not significantly different from conditions attached to a sentence of probation. As stated previously, there are only three minor distinctions between the conditions that can be attached to a conditional sentence order and those that can be attached to a probation order. It is understandable, then, that courts have difficulty considering the conditional sentence to be equivalent to a prison sentence. Clearly, conditional sentences must be distinguished from probationary measures; otherwise, trial courts will be loathe to hand down a conditional sentence if probation is out of the question. The Supreme Court suggested that trial court judges impose restrictive conditions such as house arrest when handing down conditional sentences so that these dispositions will be qualitatively different from probation.

USE OF CONDITIONAL SENTENCES ACROSS CANADA

In the first three years following the implementation of Bill C-41, 42,941 conditional sentences were handed down across the nation (LaPrairie, 1999). As can be seen in Table 1 below, Québec and Ontario made the most conditional sentence orders, accounting for approximately 55% of all conditional sentences handed down (LaPrairie, 1999). Also worthy of note is the disparate use of conditional sentences. For instance, the total count of offenders given a conditional sentence in Alberta (3,414) is quite similar to the total count for Saskatchewan (3,121), even though Alberta has a significantly higher number of criminal convictions. Data from other sources also reveal that Alberta favours incarceration as a disposition to a much greater extent than Saskatchewan does. From Table 1, it appears that Alberta also imposes the longest conditional sentences: for the first 3 years after implementation, Alberta had the highest mean sentence length at 9.3 months (LaPrairie, 1999), which has risen to 14.4 months as of January, 2000 (Alberta Justice, personal communication, February 9, 2000).

There is also some disparity in the implementation of the conditional sentencing regime between Ontario and Québec, even though the two provinces have handed down a similar number of conditional sentences (11,443 and 12,690, respectively) between September, 1996 and September, 1999. The disparity arises from the large gap in the number of people who are convicted of criminal offences. In 1997/98, Ontario convicted 111,207 adults of criminal offences; Québec, which has a similar population base, convicted 56,185 (CCJS, 2000). Because Québec convicts almost half of the number of offenders that Ontario convicts, we would expect that the number of conditional sentences given in Québec would be half as many as the number given in Ontario, but this is not the case. Ontario strongly favours incarceration: in 1998/99, 42% of convicted offenders, or approximately 46,707 individuals were sentenced to a term in prison, while in Québec, 28% of those found guilty of a criminal offence (15,732 individuals) were given custodial sentences (CCJS, 2000). From this data, it appears that Ontario is less willing than other provinces to use the conditional sentence for custody-bound offenders.

Table 1. Number and length of conditional sentences: September, 1996 through September, 1999

Jurisdiction	Number	Median length in months	Mean length in months
Canada	42, 941	5	8
Québec	12, 690	-	-
Ontario	11, 443	6.1	7.3
British Columbia	6, 334	6	7.5
Alberta	3, 414	6	9.3
Saskatchewan	3, 121	6.1	8.9
New Brunswick	1, 578	4	6
Nova Scotia	1, 486	4.1	6.2
Manitoba	1, 245	-	-
Newfoundland	1, 078	-	-
Yukon	305	-	-
Northwest Territories	146	-	-
Prince Edward Island	101	-	-

Source: LaPrairie, 1999.
Note: sentence length data for Newfoundland, P. E. I., Québec, Manitoba, Northwest Territories and the Yukon is not available.

Table 2 shows the distribution of conditional sentences by offence type. Across Canada, offenders found guilty of property crimes received conditional sentences more than any other group. Property offences and break and enter convictions accounted for almost one third (32%) of all conditional sentences granted. All offences classified as neither violent nor sexual in nature accounted for a total of 72% (31, 077 offences). Violent, non-sexual offences accounted for almost 24% of conditional sentences given since the introduction of Bill C-41 (10,140 offences). Only 4.4% of conditional sentences were given in cases where the offence committed was sexual in nature.

Table 2. Total number and percentage of total conditional sentences per offence category September, 1996 through September, 1999

Offence category	Number of conditional sentences	% of total conditional sentences
sexual	1, 870	4.4
manslaughter	24	0.1
against the person	9, 877	23.1
family violence	239	0.6
property/ B&E	13, 781	32.2
fraud	3,702	8.6
admin. of justice	1, 772	4.1
impaired driving	730	1.7
drug offences	5, 727	13.4
other	5, 126	12
total	42, 848	100

Source: LaPrairie, 1999.

THE IMPACT OF CONDITIONAL SENTENCING ON ADMISSIONS TO CUSTODY

While the Canadian judiciary has imposed thousands of sentences of conditional imprisonment since the implementation of Bill C-41, there is strong evidence that the new sentencing regime has done little to reduce the use of incarceration in Canada. In the fiscal year 1998-99, the most recent year for which incarceration data are available, 35% of adult offenders found guilty of a criminal offence were sentenced to prison (CCJS, 2000). The year before (1997-98), 33% of cases with a conviction resulted in a custodial sentence (CCJS, 1998c). This figure was the same (33%) in 1996-97, following the introduction of Bill C-41 (CCJS, 1998b) and in the fiscal year prior to the Bill's introduction (CCJS, 1997). Incarceration data, presented in Table 3, show that in most provinces the use of incarceration has either increased or remained the same since the implementation of conditional sentencing. Evidently, the primary goal of the conditional sentence, to reduce the use of custody, is not being achieved.

Table 3. Use of custody in cases with convictions, by jurisdiction

	CONVICTED OFFENDERS SENTENCED TO CUSTODY (%)			
Jurisdiction	**1995-96**	**1996-97**	**1997-98**	**1998-99**
Canada	33	33	33	35
Newfoundland	31	31	30	30
Prince Edward Island	48	50	60	62
Nova Scotia	21	21	22	23
Québec	30	29	28	28
Ontario	37	38	39	42
Saskatchewan	25	25	25	25
Alberta	30	28	28	32
Yukon	43	42	44	46
Northwest Territories	37	-	39	41

Sources: CCJS 2000, 1998b, 1998c and 1997 .
Note: data from British Columbia, Manitoba and New Brunswick are not available.

A 1998 study in the province of Québec found that cases which resulted in the imposition of a conditional sentence were most similar to offences that, before the implementation of Bill C-41, were met with a sentence of probation, not incarceration. The author of the study argued that, in light of the research findings, "it may therefore be suggested that if conditional sentencing had not been available, a good number of persons on whom it was imposed would have received a probation sentence" (d' Auteuil, cited in Roberts, 1999). The proportion of offenders sentenced to custody in Québec has been reduced somewhat since the introduction of the conditional sentence (see Table 3 above), but the number of conditional sentences given in that province up to September, 1999 (12,690) is greater than the reduction in offenders given custodial sentences.

Ontario judge David Cole has spoken out recently, claiming that the conditional sentencing regime has "widened the net" of the justice system in that province, drawing in more offenders for longer periods than ever before. He argues that "many judges have seized on it as a convenient punishment for cases where jail terms seem too harsh but mere probation would likely be perceived as too soft" (Makin, 1999). Admissions to custody have increased in Ontario since the year prior to the introduction of the conditional sentence, from 37% of convicted offenders (CCJS, 1997) to 42% (CCJS, 2000). According to Cole, the new sentence is not a realistic alternative to incarceration

and, until more strict conditions are placed on offenders given conditional sentences, such as house arrest and electronic monitoring, the sentence will continue to be underused.

DISCUSSION

Evidence of net widening, as a result of the implementation of Bill C-41, can be found across Canada. As previously mentioned, the proportion of offenders sentenced to custody has increased nationally, a clear indication that the legislation has failed in its central goal. The law states that before a conditional sentence can be imposed, the court must rule out all non-custodial options such as probation; theoretically, the conditional sentence should not be given to those who would otherwise be given a community-based sentence. But it is becoming apparent that the introduction of the conditional sentence is responsible for net widening because the courts do not see it as a true alternative to incarceration. And even though the Supreme Court of Canada, in its decision in R. v. Proulx, stated that the conditional sentencing regime must not be used to widen the net of the justice system in Canada, there is still a risk that the courts will continue to impose the new sentence on offenders who are not custody-bound.

Without a doubt, Canada is incarcerating more individuals than is warranted for the protection of the public. Canada's reliance on incarceration for offenders who do not pose a threat to public safety is not necessary, and the existence of alternatives to incarceration is important if any substantial reduction in our nation's incarceration rate is to occur. But it appears that the conditional sentence is not being used as an alternative to incarceration because it is not distinct from probation. If a judge decides that probation is too lenient a sentence, then why should he or she impose a disposition that is virtually identical?

Some argue that the conditional sentence cannot bring about a significant reduction in the use of custody unless provisions for its use are amended. It has been proposed that a clear distinction must be made between conditional sentences and probation. One way to make these sanctions clearly different could be to remand offenders who breach a conditional sentence order into custody for the remainder of their sentence. In six provinces reporting breach data up to September 30, 1999, less than half (44%) of the breaches resulted in imprisonment (La Prairie, 1999). If the legislation were changed to provide for mandatory custody for all breaches, then a conditional sentence would be a distinct sentence from probation.

Julian Roberts (1997) has taken this idea even further by suggesting that the "penal bite" of a conditional sentence order can be improved by compelling all offenders who breach to serve the entire duration of their sentence in prison, not just the remaining portion of the sentence. The threat of incarceration would be much greater for an offender subject to a conditional sentence than probation. Unfortunately, Roberts' suggestion, if put into practice, would likely result in a further widening of the net. If offenders breach their conditions at the end of their sentence, they would, in effect, serve a sentence twice as long as they would have otherwise. Roberts also contends that

penal equivalences should be established to ensure that a conditional sentence would be as severe a punishment as the prison term it replaces. For instance, a 12 month term of imprisonment might be equal in severity to a 15 month conditional sentence. The Supreme Court, in R. v. Proulx, has opened the door for the courts to formulate these equivalencies.

Another recommendation that has been made to tighten conditional sentencing provisions is that offenders given a conditional sentence should have their liberty severely restricted. As stated by the Supreme Court in R. v. Proulx, house arrest should be a common requirement of the conditional sentence. Electronic monitoring has been touted by some, including Ontario judge David Cole, as the most effective means by which to supervise offenders and restrain their movement. If a provision for house arrest was explicitly made in the legislation and if resources were available in the community for the intensive supervision of offenders under house arrest, the courts might come to see a conditional sentence as a realistic alternative to incarceration. It is notable, though, that electronic monitoring is not a necessary component of house arrest, and is not currently available in most jurisdictions. Alberta's house arrest program has been quite successful without electronic monitoring of offenders, so it is reasonable to argue that supervising offenders in the community can be effectively implemented in other provinces without electronic monitoring.

Making the conditional sentence a harsher penalty than probation may, however, have no impact on admissions to custody. Even if conditionally sentenced offenders are automatically remanded into custody when they breach, and even if house arrest is made mandatory for these offenders, judges may continue handing down conditional sentences to individuals who would have been given probation if Bill C-41 had not passed. In the long run, the proportion of incarcerated offenders would remain as high as it is today. Historically, the introduction of community-based sanctions has served to do little other than widen the net of corrections (Gomme, 1995) and no matter how tough these sanctions are, they are not seen as being equivalent to incarceration. It does not make sense, then, to insist that community sanctions be equivalent to the custodial sentence that the offender theoretically would have received. The conditional sentence and custody are inherently different and the net widening potential of the sentence would be inordinately increased if conditional sentence lengths were stretched out in an effort to make them equivalent to a prison term.

As it stands, the conditional sentence is not being used as intended by Parliament. Canada can no longer afford to incarcerate non-dangerous offenders at its current rate but, unfortunately, few solutions are apparent. Perhaps the nation-wide implementation of attendance centre programs targeting conditionally sentenced offenders could give the sentence more legitimacy. Attendance centre programs for adults under a conditional sentence order have been operational in Alberta since 1997, and provide program participants with intensive supervision and treatment programming. The problem with this idea is that similar attendance centre programs target probationers as well and, as long as this is the case, the use of attendance centres to supervise a conditional sentence order is unlikely to make the sentence more palatable to judges. A conditional sentence is supposed to be a more onerous penalty than probation, but if a probationer and an offender given a conditional sentence both participate in an attendance centre program in which each is under the same degree

of surveillance and given similar programming, the distinction is lost. If the court must first decide that probation is inappropriate before it can apply a conditional sentence, why should it hand down a community-based sentence similar to probation to offenders for whom probation is inappropriate?

What can be done to reduce the number of inmates in Canadian correctional facilities? Should the conditional sentence provisions in the Criminal Code be amended to make the sentence tougher? Should the conditional sentence be scrapped altogether? After all, the sentence has had no impact on the proportion of offenders sentenced to custody on a national level. With or without the conditional sentence, approximately one third of convicted offenders are sent to prison. The conditional sentence provisions are virtually identical to the provisions for probation: the Criminal Code allows the court to suspend a custodial sentence in a case where the offence committed has no minimum sentence and give the offender probation instead; in the same case, the court could, alternatively, hand down a conditional sentence. The mandatory and optional conditions attached to probation and conditional sentence orders are virtually identical. In essence, probation and the conditional sentence are the same type of sentence. To reduce confusion within the judiciary, the conditional sentence could be removed from the Criminal Code and, essentially, the correctional system would be none the wiser. Whether or not the conditional sentence is amended, repealed or left as is, the judiciary must do its best to ensure that community-based sanctions intended as alternatives to custody are used only for custody-bound offenders. Otherwise, these sanctions are not truly alternatives to custody. The corrections net cannot be trimmed unless the courts are willing to seriously consider community-based sanctions like the conditional sentence as alternatives to prison. What it will take to bring about this change within Canada's courtrooms remains open for debate.

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