

The Conditional Sentence Option

Chief Justice Michael MacDonald
Chief Justice of Nova Scotia
May 2003, Updated August 2013

As a result of an amendment made to the Criminal Code in 1996, judges are now permitted to order that a term of imprisonment of less than two years be served in the community on conditions. This sentencing option was sharply circumscribed by Parliament through *An Act to Amend the Criminal Code (Conditional Sentence of Imprisonment)* and *The Safe Streets and Communities Act*, which came into force in late 2007 and 2012 respectively. Conditional sentencing continues to be the subject of healthy public debate. Appellate Courts, including the Supreme Court of Canada, have helped delineate the role and responsibility of trial judges who are called upon to consider this form of sentence. This paper will proceed from a short background discussion to a brief consideration of some frequently asked questions.

Here, as with other forms of sentence in the criminal sphere, the source of the law is Parliament, guidance on its application comes from the appellate courts, and the discretion in any given case reposes in the sentencing judge.

Conditional (Community) Sentences - A Brief History

Several years ago, Canada's Parliament identified two concerns with our justice system as it applies to sentencing:

- a. our perceived over reliance on institutional incarceration, and
- b. the need to look beyond the offender in ways that also address the needs of victims and the community generally (commonly referred to as "restorative justice").

Parliament responded with legislation addressing both concerns. It passed a series of Criminal Code amendments establishing general sentencing principles and other complementary initiatives. These can now be found in sections 718 of the Criminal Code:

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.

Clauses (d) and (f) above are designed to promote “restorative justice”. Clause (c) addresses the overincarceration concern by limiting imprisonment to situations “where [it is] necessary”. This issue is also addressed in s. 718.2 which provides in part:

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

- (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...

The Supreme Court of Canada considered these new amendments in a case called *R. v Gladue*, [1999] 1 S.C.R. 688. At paragraph 57 they identified the overincarceration problem:

Thus, it may be seen that although imprisonment is intended to serve the traditional sentencing goals of separation, deterrence, denunciation, and rehabilitation, there is widespread consensus that imprisonment has not been successful in achieving some of these goals. Overincarceration is a long-standing problem that has been many times publicly acknowledged but never addressed in a systematic manner by Parliament. In recent years, compared to other countries, sentences of imprisonment in Canada have increased at an alarming rate. The 1996 sentencing reforms embodied in Part XXIII, and s. 718.2(e) in particular, must be understood as a reaction to the overuse of prison as a sanction, and must accordingly be given appropriate force as remedial provisions.

At paragraph 43, they identified the restorative justice issue:

Clearly, s. 718 is, in part, a restatement of the basic sentencing aims, which are listed in paras. (a) through (d). What are new, though, are paras. (e) and (f), which along with para. (d) focus upon the restorative goals of repairing the harms suffered by individual victims and by the community as a whole, promoting a sense of responsibility and an acknowledgment of the harm caused on the part of the offender, and attempting to rehabilitate or heal the offender.

One of the main complementary initiatives passed in 1996 is the community (conditional) sentence. In certain circumstances, it gives judges the discretion to have an offender serve his or her sentence in the community as opposed to “behind bars”.

This provision is designed to address both the perceived problem of overincarceration and the need to promote restorative justice. The Supreme Court of Canada in a case called *R. v. Proulx*, [2000] 1 S.C.R. 61 at paragraphs 21 and 22 elaborated on its purpose:

The conditional sentence was specifically enacted as a new sanction designed to achieve both of Parliament's objectives. The conditional sentence is a meaningful alternative to incarceration for less serious and non-dangerous offenders. The offenders who meet the criteria of s. 742.1 will serve a sentence under strict surveillance in the community instead of going to prison. These offenders' liberty will be constrained by conditions to be attached to the sentence, as set out in s. 742.3 of the Code. In case of breach of conditions, the offender will be brought back before a judge, pursuant to s. 742.6. If an offender cannot provide a reasonable excuse for breaching the conditions of his or her sentence, the judge may order him or her to serve the remainder of the sentence in jail, as it was intended by Parliament that there be a real threat of incarceration to increase compliance with the conditions of the sentence.

The conditional sentence incorporates some elements of non-custodial measures and some others of incarceration. Because it is served in the community, it will generally be more effective than incarceration at achieving the restorative objectives of rehabilitation, reparations to the victim and community, and the promotion of a sense of responsibility in the offender. However, it is also a punitive sanction capable of achieving the objectives of denunciation and deterrence. It is this punitive aspect that distinguishes the conditional sentence from probation.

Since 2006, however, there have been limitations placed on the use of conditional sentences. On May 4th, 2006, the Government introduced amendments to section 742.1 of the *Criminal Code* through *An Act to Amend the Criminal Code (Conditional Sentence of Imprisonment)*, which came into force on December 1st, 2007. The amendments eliminated conditional sentences for terrorism offences, offences associated with a criminal organization, and serious personal injury offences prosecuted by way of indictment and punishable by a maximum term of imprisonment of ten years or more.

In March 2012, the Government passed *The Safe Streets and Communities Act*, which included an expanded list of offences for which

conditional sentences are no longer available. Additions to the list of offences ineligible for conditional sentences include: (a) All offences for which the law prescribes a maximum sentence of 14 years or life including: manslaughter, aggravated assault, arson and fraud over \$5,000; (b) offences that result in bodily harm, involve the export/import, trafficking and production of drugs, or involve the use of weapons that are prosecuted by way of indictment and punishable by a maximum term of imprisonment of ten years or more; and (c) a listed offence punishable by a maximum term of ten years or more where prosecuted by indictment (ex. theft over \$,5000).

In a recent case relating to the availability of conditional sentences for serious personal injury offences (R v. Perry, R v. Beaulieu, R v. Boisclair and R v. Pelletier), the Quebec Court of Appeal upheld the constitutionality of the 2007 amendments to the *Criminal Code*, overturning the trial judges' finding that limitations on the use of conditional sentences entailed an unconstitutional encroachment upon judicial discretion. The Court of Appeal rejected challenges under sections 7, 9 and 12 of the *Canadian Charter of Rights and Freedoms*. The Court of Appeal emphasized deference to legislative intent, holding that the exercise of judicial discretion could not override the clear and express will of the legislative branch. (R v. Perry et al, at paras. 44-5).

The Ongoing Debate

In returning to the ongoing public debate, the courts' role has understandably come into focus. To provide a better understanding in this regard, we have identified and attempted to answer several prevalent questions. They are:

1. In what circumstances will a judge consider a conditional sentence?

Provided there is no minimum prescribed punishment, a judge must consider a community sentence when,

- a. it would be consistent with the above principles of sentencing,
- b. the offence would otherwise warrant a prison term of less than two years,
- c. the community would not be endangered, and
- d. the offence does not fall within the list of offences for which conditional sentences are unavailable.

2. Are certain types of offences excluded from consideration i.e. sexual assaults?

Yes. The following indictable offences punishable by a maximum term of imprisonment of ten years or more are excluded: serious personal injury offences; terrorism offences; criminal organization offences; offences which result in bodily harm, involve the import/export, trafficking and production of drugs, or involve the use of weapons; prison breach; motor vehicle theft; criminal harassment; sexual assault; kidnapping and forcible confinement; trafficking in persons for material benefit; abduction of a person under 14; theft over \$5,000; breaking and entering with intent; being unlawfully in a dwelling-house; arson for fraudulent purposes. Moreover, all offences for which the law prescribes a maximum sentence of 14 years or life including manslaughter, aggravated assault, arson and fraud over \$5,000 are excluded.

3. Should the length of the community sentence be the same as a prison term?

Not necessarily. Courts recognize that community sentences may be more lenient than prison sentences and they may be lengthened accordingly - but the term cannot exceed two years. Again we refer to the Supreme Court of Canada in [Proulx](#) at paragraphs 40 and 41:

Although a conditional sentence is by statutory definition a sentence of imprisonment, this Court, in *R. v. Shropshire*, [1995] 4 S.C.R. 227, at para. 21, recognized that there "is a very significant difference between being behind bars and functioning within society while on conditional release". See also *Cunningham v. Canada*, [1993] 2 S.C.R. 143, at p. 150, per McLachlin J. These comments are equally applicable to the conditional

sentence. Indeed, offenders serving a conditional sentence in the community are only partially deprived of their freedom. Even if their liberty is restricted by the conditions attached to their sentence, they are not confined to an institution and they can continue to attend to their normal employment or educational endeavours. They are not deprived of their private life to the same extent. Nor are they subject to a regimented schedule or an institutional diet.

This is not to say that the conditional sentence is a lenient punishment or that it does not provide significant denunciation and deterrence, or that a conditional sentence can never be as harsh as incarceration. As this Court stated in *Gladue*, supra, at para. 72:

... in our view a sentence focussed on restorative justice is not necessarily a "lighter" punishment. Some proponents of restorative justice argue that when it is combined with probationary conditions it may in some circumstances impose a greater burden on the offender than a custodial sentence.

A conditional sentence may be as onerous as, or perhaps even more onerous than, a jail term, particularly in circumstances where the offender is forced to take responsibility for his or her actions and make reparations to both the victim and the community, all the while living in the community under tight controls.

4. What is house arrest?

This is an informal expression generally used to describe a court-ordered confinement to a dwelling place. In connection with conditional sentences it means that the offender is required to remain in his or her home for all or certain designated hours of the day for a set period of time. This is a common requirement for at least a part of the term of the conditional sentence. The offender, while on house arrest, is sometimes permitted to leave the home during this time for limited purposes such as for medical treatment or court appearances.

5. What happens if the person breaks one of the conditions?

When an offender breaches a conditional sentence (without a reasonable excuse) he or she is brought back before the court. The court can change the conditions of the sentence or order the offender to serve all or part of the remaining term of the sentence in jail.

Conclusion

Sentencing remains one of the most challenging tasks for judges. With these comments, we hope to provide a better understanding of our role particularly as it relates to the area of conditional sentences.

Readers interested in an actual case may wish to link to the following reported decisions:

[R. v. Proulx, \[2000\] 1 S.C.R. 61](#)

[R. v. Shropshire, \[1995\] 4 S.C.R. 227](#)

[R. v Gladue, \[1999\] 1 S.C.R. 688](#)

[R v MacDonald, \[2003\] NSCA 36](#)

[R v Perry, \[2013\] Q.C.C.A. 212](#)

Chief Justice Michael MacDonald
Chief Justice of Nova Scotia
May 2003, updated August 2013