CONDITIONAL SENTENCING AND THE NEED FOR A PRINCIPLED SYSTEM OF NON – CUSTODIAL SANCTIONS

BY

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Abstract

In 1996 Canada implemented a comprehensive sentencing reform. *Bill C-41* was enacted to introduce a systematic approach to sentencing policy and process, to provide consistency in sentencing, and to enhance the transparency and public understanding of the sentencing regime. The stated purpose of *Bill C-41* was to provide courts with more options in an effort to distinguish serious from less serious offences and offenders through the imposition of expanded range of sentencing alternatives. A major step in that direction was the introduction of a new type of sanction, the conditional sentence of imprisonment. In a series of recent decisions the Supreme Court of Canada addressed certain contentious issues surrounding the new sentencing regime. While conditional sentencing was readily embraced by the courts as an alternative to imprisonment, the need to fill the legislative gap in the use of non-custodial sanctions remains. One way to advance Parliament's intent is to develop a system of non-custodial intermediate sanctions, that is sanctions beyond conditional discharge, ordinary probation or small fines, but short of imprisonment. A system of intermediate sanctions is proposed, based on rough equivalencies among sanctions, with reference to a set of detailed sentencing guidelines. Ranking non-custodial sanctions will enable judges to individualise the sentence and to preserve proportionality by first deciding how severe the sanction ought to be and then electing the most appropriate one from the group of sanctions at that level of severity. An important measure for evaluating of such sanctions is acceptance by offender, victim and public. As the majority of provincial and territorial prison admissions are for less than six months, the proposed system of non-custodial

sanctions will have its greatest impact on this segment of the prison population. An elaborate system of non-custodial measures will ensure fairer allocation of sanctions and consistency in sentencing, and will further Parliament's goal of reducing the use of prison.

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This thesis is dedicated to my wife Svetla Ikonomova and to our children Ivan and Maria. Without their patience and encouragement, this thesis would never have come to be.

Introduction

The first comprehensive codification of sentencing principles in Canadian law did not take place until 1996. Until *Bill C-41*,[1] most sentencing policies and practices were developed by the judiciary. The lack of structure and overall direction in sentencing necessitated the legislative changes established by Bill C-41. With its enactment, the judicial role changed in a significant way, in that Parliament now sets sentencing policy.[2] As a result of these legislative changes, the need for guidelines from the highest court is more pressing than ever. That explains the recent string of decisions from the Supreme Court of Canada on sentencing and particularly on conditional sentences.[3]

In *Gladue*, *Proulx*, *Wells*, and *Knoblauch* the Court linked the need for alternatives to imprisonment to the high rate of incarceration. In *Gladue* it observed, "Canada is a world leader in many fields, particularly in the areas of progressive social policy and human rights. Unfortunately, our country is also distinguished as being a

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[1] Bill: C-41, Royal Assent July 13, 1995. Proclaimed in force, September 3, 1996, except s. 718.3(5) and ss. 747 to 747.8 of the Criminal Code (P.C. 1996-1271) [hereinafter Bill C-41].

[2] Anthony N. Doob, "Sentencing Reform: Where Are We Now?" *in Making Sense of Sentencing*, ed. by J. V. Roberts and D. P. Cole (Toronto: University of Toronto Press, 1999), 332 at 359.

[3] In 1999 and 2000 the Supreme Court handed down a series of decisions: *R. v. Gladue*, [1999] 1 S.C.R. 688, [hereinafter *Gladue*]; *R. v. Proulx*, [2000] 1 S.C.R. 61, [hereinafter *Proulx*]; *R. v. Wells*, [2000] 1 S.C.R. 207, [hereinafter *Wells*]; and *R. v. Knoblauch* [2000] 2 S.C.R. 780, [hereinafter *Knoblauch*].

world leader in putting people in jail."[4] These words sum up the sad reality that Canada's prisons contain a disproportionately high numbers of offenders.

It has long been known that Canada's high rate of incarceration falls mainly on such disadvantaged groups as youth, and Aboriginal and Black peoples.[5] This record of imprisonment contrasts sharply with the views of experts in the field, as well as every inquiry and commission on the justice system in the past 150 years.[6] The findings and recommendations of these reports reveal that imprisonment should be reserved for the most serious crimes because it is both harsh and ultimately ineffective in reducing crime.

Despite these findings, the legislative changes to Part XXIII of the *Criminal Code*,[7] and the clear directions from the Supreme Court of Canada that imprisonment should be used with restraint and as a last resort, the latest information from Statistics Canada on incarceration rates is disconcerting. It indicates either unchanged or, worse, increased use of incarceration. Despite the fact, that as a result of a falling crime rate, overall fewer offenders have been sentenced to prison in the last five-year period (1994 - 1999), the percentage sentenced to prison has increased from 33% to 35% over the five-year period. As well, the length of custodial sentences has been substantially increased.[8]

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[4] *Supra* note 3, at para. 39.

[5] National Council of Welfare, *Justice and the Poor* (A National Council of Welfare Publication Spring 2000), at 62.

[6] Canadian Sentencing Commission, *Sentencing Reform: A Canadian Approach*, (Ottawa: Supply and Services, Canada, 1987) at 40-44.

[7] R.S.C. 1985, c. C-46 [hereinafter *Criminal Code*].

[8] Canadian Centre for Justice Statistics, "Adult Criminal Court Statistics, 1998 - 99" (Ottawa: Statistics Canada, 1999, vol. 20, no.1) at 18; Canadian Centre for Justice Statistics, "Adult Correctional Services in Canada 1999-00" (Ottawa: Statistics Canada,

These findings indicate that Canada is continuing to use incarceration to an even greater extent than in the past. The Canadian Centre for Justice Statistics observes that this trend comes at the time when most western nations are attempting to expand the use of alternatives to incarceration.[9]

To understand why incarceration ranks so prominently in the sentencing landscape in Canada, we need to put the entire sentencing regime in perspective. Sentencing practice and theory following enactment of the *Criminal Code* in 1892 revealed a penal structure developed over the years in a piecemeal fashion.[10] Imprisonment has been the standard penalty for all indictable and summary offences, with alternative sanctions largely left to the discretion of the courts. The level of dependence on incarceration in the general sentencing scheme helped to maintain a punitive justice system in which prison has come to be seen as the ultimate sanction, even though there might be no necessity for it in the individual case.[11]

Bill C-41 was the result of years of research and consultation. In 1984 the Canadian Sentencing Commission was created to examine sentencing and parole processes. After three years of intensive studies, the Commission tabled its report in Parliament. The report contained a comprehensive package of recommendations – a statement of the purpose and principles of sentencing, the creation of a permanent sentencing commission, a revision of the maximum penalties and the elimination of

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2001, vol. 21 no. 5), at 7.

[9] *Ibid.*

[10] Canadian Sentencing Commission, *supra* note 6 at 38.

[11] *Ibid.*, at 77-79.

minimum sentences except for murder, the abolition of full parole, and an increased use of community sanctions.

Following the report of the Canadian Sentencing Commission, the House of Commons Standing Committee on Justice and the Solicitor General (the "Daubney Committee") published a report in 1988, "*Taking Responsibility*."[12] Many of its recommendations reflected the model proposed by the Sentencing Commission. The Daubney Committee endorsed its own statement of purpose, ultimately enacted in s. 718 of the Criminal Code in Bill C-41. Instead of the guidelines suggested by the Canadian Sentencing Commission, the Committee recommended creation of a permanent sentencing commission. It argued strongly for a greater use of community-based intermediate sanctions. The title of the report reflected the Committee position that justice in the community would be better achieved by community-based sentences, particularly where offenders accepted and demonstrated responsibility for their acts.

In 1994, the Department of Justice introduced Bill C-41. It received royal assent on 13 July 1995 and came into effect on September 3, 1996. The Act created a new Part XXIII of the *Criminal Code*, containing the following elements:

- enabling provisions intended to encourage the diversion of adults from the criminal process (sections 716 –717.1);
- the statement of purpose, and sentencing principles and objectives (sections 718 – 718.2);
- amendments related to procedure and evidence for sentencing hearings (section 724);

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[12] Daubney Committee, *Taking Responsibility*: *The Report of the Standing Committee on Justice and Solicitor General on its review of sentencing, conditional release and related aspects of corrections* 1988 (Ottawa: Supply and Services Canada, 1988).

- a new monetary fine regime (section 743(1));
- amendments to the existing restitution regime (sections 738 to 741.2);
- other modified provisions dealing with imprisonment, eligibility for parole, pardons and disabilities; and,
- a new conditional sentence of imprisonment (sections 742.1 to 742.7).

The stated purpose of the Bill was:

> To implement reforms to the Criminal Code respecting sentencing. To provide the courts with more options to distinguish between serious violent crime requiring jail and less serious, non-violent crime that could be dealt with in the community more effectively.[13]

These sentencing reforms were intended to provide consistency in sentencing, introduce a principled approach to sentencing policy and process, and to increase the transparency and public understanding of the sentencing regime. The Department of Justice in a news release explained:

> This amendment would make the Criminal Code more understandable and accessible to criminal justice professionals and to the public. The reordering would provide better direction on the range of sentences available -- which ones are appropriate for more serious offences and which for less -- and will set out a more detailed procedure for handling sentencing. This should help to improve consistency in sentencing and improve public understanding of the process. [14]

Bill C-41 stated the statement of the purposes and principles of sentencing be to contribute to the maintenance of a just, peaceful and safe society and to promote respect for the law by imposing just sanctions. The objectives for sentencing are protection of the public, rehabilitation, promoting a sense of responsibility in offenders, making

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[13] Bill C-41, *supra* note 1.

[14] Department of Justice, News Release Ottawa, June 13, 1994, online (QL).

reparations to victims and the community, and deterrence. These sentencing goals, derived from common law, were codified in section 718 of the *Criminal Code*. The Bill also defines a number of sentencing principles. Proportionality was elevated as a fundamental principle in section 718.1. It dictates that a sentence must be proportionate to the seriousness of the offence and the degree of the offender's responsibility. Another principle calls for alternatives to imprisonment to be used where appropriate, particularly for Aboriginal offenders (section 718.2(e)).

Two of Bill C-41 objectives were to reduce the use of prison as a sanction and to expand the use of restorative justice principles in sentencing.[15] Expanding the latter ranked prominently in the sentencing research and consultations preceding the enactment of Bill C-41. The general failure of incarceration to rehabilitate offenders and reintegrate them into society has been recognised for a long time. In its 1988 report, the Standing Committee on Justice and the Solicitor General in *Taking Responsibility* (1988), wrote:

> The use of imprisonment as a main response to a wide variety of offences against the law is not a tenable approach in practical terms. Most offenders are neither violent nor dangerous. Their behaviour is not likely to be improved by the prison experience. In addition, their growing numbers in jails and penitentiaries entail serious problems of expense and administration, and possibly increased future risks to society. Moreover, modern technology may now permit the monitoring in the community of some offenders who previously might have been incarcerated for incapacitation or denunciation purposes. *Alternatives to imprisonment and intermediate sanctions, therefore, are increasingly viewed as necessary developments*[16] [Emphasis added].

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[15] *Proulx*, *supra* note 3, at paras. 16 and 20.

[16] Daubney Committee, *supra* note 12.

During the second reading of Bill C-41, Minister of Justice Allan Rock made the following comments:

> A general principle that runs throughout Bill C-41 is that jails should be reserved for those who should be there. Alternatives should be put in place for those who commit offences but who do not need or merit incarceration.
>
> . . . .
>
> Jails and prisons will be there for those who need them, for those who should be punished in that way or separated from society.... [T]his bill creates an environment which encourages community sanctions and the rehabilitation of offenders together with reparation to victims and promoting in criminals a sense of accountability for what they have done.[17]

The new restorative objectives, set out in section 718, paragraphs (e) and (f), were introduced in recognition of the evolving concepts of restorative justice and Aboriginal justice initiatives focused on victims and harm. As the Supreme Court of Canada stated in *Gladue*:

> ...[a]s a general matter restorative justice involves some form of restitution and reintegration into the community. The need for offenders to take responsibility for their actions is central to the sentencing process.... Restorative sentencing goals do not usually correlate with the use of prison as a sanction. In our view, Parliament's choice to include (e) and (f) alongside the traditional sentencing goals must be understood as evidencing an intention to expand the parameters of the sentencing analysis for all offenders. [18]

While restorative models hold potential for victim participation in non-adversarial proceedings and empower victim participation, the inclusion of restorative goals raise questions of their compatibility with the conventional criminal justice system. Phillip Stenning and Julian V. Roberts observe that restorative objectives were introduced with

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[17] September 20, 1994 (House of Commons Debates, vol. IV, 1st Sess., 35th Parl., at 5873).

[18] *Gladue*, *supra* note 3 at para. 43.

little parliamentary debate.[19] Courts across the country have since struggled with the interpretation and application of restorative objectives in the mainstream sentencing process.[20]

Community-based or intermediate sanctions are sanctions beyond conditional discharge, ordinary probation or small fines, but short of imprisonment, whether based on conventional or restorative justice models. The expanded use of such non-custodial sanctions requires a detailed sentencing regime based on sound principles and judicial guidelines. A major step in that direction was the introduction in Bill C-41 of a new type of sanction, the conditional sentence of imprisonment. In the past, the absence of effective, community-based alternatives to imprisonment led to less serious offenders routinely being sent to prison. The rationale for introducing the conditional sentence was to develop a true alternative to imprisonment.[21] It was designed for non-dangerous offenders and for less serious offences upon satisfying specific conditions. The court must first impose a term of imprisonment of less than two years. The offence for which this sentence is imposed must not carry a statutory minimum sentence of imprisonment. The court must be satisfied that serving the sentence in the community would not endanger the safety of the community. Finally, the court must be satisfied that serving the sentence in the community would not offend the purpose and principles of sentences found in ss. 718 to 718.2 of the *Criminal Code*.

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[19] Philip Stenning and Julian V. Roberts, "Empty Promises: Parliament, The Supreme Court, and the Sentencing of Aboriginal Offenders," (2001), 64 Sask. L. Rev. 137 at 39.

[20] *Ibid.*

[21] Allan Manson, "Conditional Sentences: Courts of Appeal Debate the Principles" (1998), 15 C.R. (5th) 176, at 182 –84.

The conditional sentence is a unique sanction. It incorporates elements of non-custodial sanctions as well as some features of incarceration. It is a punitive sanction capable of achieving the objectives of denunciation and deterrence, as set out in subsections 718 (a) and (b) of the *Criminal Code*. More importantly, because it is served in the community, it can achieve the restorative objectives of rehabilitation, reparation to the victim and community, and the promotion of a sense of responsibility in the offender, as set out in subsections 718 (d), (e) and (f) of the *Criminal Code*.[22]

When the conditional sentence became available, drafters of the Bill believed courts would use it to replace imprisonment. However, early statistics tend to indicate that while conditional sentences have been readily embraced by the courts as an alternative to imprisonment, the rate of incarceration after the introduction of the new sentencing option remains high. [23]

While it is still early to conclude that conditional sentencing has failed to live up to the expectations of its drafters, some developments are visible. First, the new option has not been always used as a replacement for imprisonment. Although it was designed for less serious offences, courts, particularly in the early stages, applied it in circumstances where other community-based sanctions short of imprisonment would be more appropriate. One reason for that is the absence of fully-developed guidelines governing its use. Second, the length of conditional sentences has increased beyond the term of imprisonment it was supposed to replace. Third, conditional sentences have often been given in addition to other sanctions such as fine and probation. The problem of

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[22] *Proulx*, *supra* note 3, at para. 22.

[23] Canadian Centre for Justice Statistics, *supra* note 8, at 18.

sanction- stacking and net-widening has not been addressed, yet these could discredit the entire conditional sentencing regime.

Penalties for breaches of conditional sentences have also posed difficulties. On the one hand, the need for effective back-up sanctions necessitates a threat of subsequent imprisonment following a breach of the imposed conditions. On the other hand, a too ready imposition of prison terms for breaches of conditional sentences leads to the very over-incarceration that this sentencing option is supposed to avoid. Finally, the conditional sentence was introduced without thorough consultations with the institutions which were directly responsible for the administering and financing of the conditional sentence regime – provincial Attorneys Generals and provincial correctional institutions.

The dual character of the conditional sentence, if fully explored, holds promise. It could help in developing an elaborate system of intermediate sanctions as true alternatives to imprisonment. Likewise, experience with a well-developed conditional sentence regime could pave the way to a model of non-custodial sanctions and to a system of rough equivalencies among non-custodial sanctions and between terms of imprisonment and other intermediate penalties. These developments could lead to a more elaborate sentencing system in which rough equivalencies among sanctions are articulated in advance, with reference to general sentencing principles. Because the legislative approach to sentencing is still in the early stages of development, establishing guidelines is one way to fill the legislative gap in the use of non-custodial sanctions. As the vast majority of provincial admissions (eighty percent) is for less than six months and the average length of admission is one month,[24] the guidelines will have the greatest

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[24] *Supra* note 8, at 13.

impact on this segment of prison population. Sending a large number of offenders to a short stint of imprisonment indicates that either the offences committed are not serious or the offenders are not dangerous. In either case, the rationale behind the shock incarceration of short and sharp sentences is deterrence, denunciation or incapacitation. The same rationale could be advanced through the imposition of equally onerous, if not more onerous, non-custodial sanctions, where the utility of non-custodial penalties lies in the nature of the conditions attached.[25]

Judges already consider alternatives to imprisonment before they send offenders to prison (section 718.2 (e)), but they are not in a position to impose non-custodial orders in the absence of any specific statutory statement of their role and use. It would be advisable to adopt a more specific statement or guidelines to ensure that a custodial sentence is imposed only where, on account of the seriousness of the offence and the circumstances in which it was committed, any other sentence would clearly be inadequate. The Supreme Court of Canada came close to this point in the context of sentencing Aboriginal offenders (*Gladue* and *Wells*), but arguably this approach ought to expand to include all offenders within this category.

A series of academic publications and judicial decisions clarified important points of the new sentencing regime, but other contentious issues still remain. It is the intention of this thesis to examine the continuous controversy surrounding conditional sentencing. A further objective is to propose a set of guidelines specifically aimed at non-custodial dispositions and the potential for developing a system of intermediate sanctions. To address the issues raised, I will situate conditional sentencing in the broader context of

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[25] Julian V. Roberts, Dan Antonovicz and Trevor Sanders, "Conditional Sentences of

the criminal justice system. I will consider the nature of the conditional sentence and will contrast it with other similar sentencing options. Next, I will examine requirements for the imposition of a conditional sentence and consider the question of consequences for breach. In a separate chapter, I will study the process through which a sentencing judge considers the appropriateness of the conditional sentence, with particular attention to general sentencing principles and objectives. Thereafter, I will consider the judicial discretion, sentence disparity and the standard of review as they apply to this sentencing option. In turn, I will examine some pressing issues and problems facing this sentencing regime, such as the need for a system of intermediate sanctions and penal equivalencies, and the problem of net-widening and sanction-stacking. I will conclude with a summary of my findings and observations as a guide for future penal policies.

Imprisonment: An Empirical Analysis of Optional Conditions," 30 C.R. (5th) 113, at 116.

Chapter 1

Part 1: The Nature of the Conditional Sentence

The most novel and most controversial aspect of Bill C-41 was its creation of the conditional sentence of imprisonment. The debate, both academic and judicial, has mostly revolved around whether a conditional sentence was a free standing sentencing option or, as the name suggested, an alternative mode of serving a term of imprisonment. One view is that a conditional sentence was an "alternative mode of serving a sentence of imprisonment available in some cases where imprisonment was previously mandated."[26] Another view is that a conditional sentence was "another intermediate sanction, lying on a continuum of severity somewhere between a term of probation and a term of custody in a provincial correctional institution."[27]

In *Proulx*, a unanimous decision authored by Chief Justice Lamer, the Supreme Court of Canada clarified many of the controversies surrounding the new sentencing option. In that case a young and inexperienced driver consumed alcohol and drove his car into ongoing traffic. One of his passengers was killed and the driver of the other vehicle was seriously injured. Proulx was convicted of dangerous driving causing death and bodily harm. The trial judge rejected a conditional sentence on the ground that it would be inconsistent with the principles of denunciation and deterrence. The accused appealed. The Manitoba

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[26] Allan Manson, *supra* note 21, at 184.

[27] Julian V. Roberts, "The Hunt for the Paper Tiger: Conditional Sentencing after Brady," Criminal Law Quarterly, [1999] v. 42, 38 at 60.

Court of Appeal allowed the appeal and substituted a conditional sentence.

On appeal by the Crown, the Supreme Court of Canada restored the trial judge's order. After examining the legislative history of conditional sentencing and comparing and contrasting it with other similar sanctions, the Court held that the new sentencing regime has a life of its own. It could be as onerous as imprisonment, yet fulfill a function which is broader than the objectives of deterrence and denunciation. Through the imposition of restrictive conditions such as curfew and house arrest, and positive conditions such as such as treatment, reparation and restoration, conditional sentencing has a purpose and effect which makes it different from prison. Its application is directed at offenders who would otherwise be at jail. The offenders who meet the requirements of section 742.1 of the *Criminal Code* will serve a sentence of imprisonment in the community instead of going to prison. To achieve the punitive equivalent of imprisonment, the offender's liberty is constrained by mandatory and optional conditions set out in section 742.3 of the *Criminal Code*. The punitive conditions attached to conditional sentence distinguish it from probation. Tough provisions for breaches of conditional sentence as set out in section 742.6 of the *Criminal Code* serve to ensure compliance with the conditions of the sentence.

According to Chief Justice Lamer, conditional sentencing could be construed as onerous as, or perhaps even more onerous than, a jail term, provided that it is accompanied by stringent conditions.[28] The replacement alternative ought to be seen as equally demanding and 'credible' by both sentencers and the public

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[28] *Proulx*, *supra* note 3, at para. 41.

in order to win support for reduction in the use of imprisonment.[29]

Measuring a conditional sentence in terms of how onerous the imposed conditions are, indicates that conditional sentencing could be the penal equivalent of a jail term.[30] This aspect, plus the fact that its role is distinct from that of imprisonment, is significant. It could shed light on how to construct a system of community-based and intermediate sanctions regime, based on severity, to ensure that courts apply a scale of comparison between penalties to curb reliance on incarceration and to ensure compliance with the principles of restraint and parity.[31] An examination of related sentencing options will further help to clarify this sentence.

Part 2: Comparing the Conditional Sentence with the Suspended Sentence

Conditional sentences closely resemble suspended sentences with probation, or fine. The similarities between them have caused courts to grant conditional sentences to situations and offenders where the more lenient suspended sentence was appropriate. Section 731(1) (a) of the *Criminal Code* describes the effect of a suspended sentence. Pursuant to this section, the judge who convicts the offender can suspend the passing of sentence and instead impose only a fine or a period of probation but not both. If, before the period of probation expires, the offender is convicted of another offence, including the offence of breaching any of the terms of the probation order (s. 733), the suspension

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[29] *Ibid.*

[30] *Ibid.*, at para. 44.

[31] See a discussion of intermediate sanctions and a proposed model in Chapter 4.

can be revoked and replaced with any sentence that could have been awarded in the first place. It is not the sentence itself, but its passing that is suspended by the court.

By contrast, the court making an order for a conditional sentence under s. 742.1 imposes a sentence of imprisonment. Under a conditional sentence, the court can require an offender to take certain treatment programs, even without the offender's consent,[32] but a suspended sentence cannot require treatment without consent.[33] For a suspended sentence, enforcement is more difficult. A court can revoke a suspended sentence and re-sentence the offender, but only after the offender has been convicted of a new criminal offence, after he has been brought before the sentencing court, and after a reallocation hearing has been held. Unlike the suspended sentence, the back-up sanctions for breaches of conditional sentence orders are relatively easy to enforce. [34]

The Court ruling in *Proulx* and its companion cases[35] made it clear that the courts should consider a conditional sentence only after rejecting both probation and custody options. Apparently the Court was mindful that courts had routinely imposed conditional sentences in circumstances where less onerous provisions, such as suspended sentences, would be more appropriate.

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[32] Section 742.3(2).

[33] Section 732.1(3)(g).

[34] *Infra* Chapter 1, Part 6: Procedure Following Breaches of Conditional Terms.

[35] *R. v. L.F.W* [2000] 1 S.C.R. 132, *R. v. R.N.S.* [2000] 1 S.C.R. 149 [hereinafter *S.(R.N.)*], *R. v. R.A.R.* [2000] 1 S.C.R. 163, *R. v. Bunn* [2000] 1 S.C.R. 183.

Part 3: Comparing the Conditional Sentence with the Probation Order

Probation is a form of controlled release into the community. The offender is bound by a probation order with three mandatory terms – keep the peace and be of good behaviour, appear before the court when required to do so, notify the court or probation officer of any change of name, address, employment or occupation (s. 732.1(2)) – and any number of optional terms (s. 732.1(3)). A conditional sentence includes the same mandatory terms and has others – e.g., to report to a supervisor and remain within the jurisdiction unless permission is granted to leave – and other reasonable conditions for protecting society or rehabilitating the offender.

Another difference between probation and a conditional sentence is in enforcement. Breach of probation is an offence resulting in the laying of that charge (s. 733.1(1)). It is often hard to prove because of the rule against hearsay evidence, the presumption of innocence, and the criminal standard of proof beyond a reasonable doubt. Conditional sentences are easier to enforce than either probation orders or suspended sentences.[36] The third difference between probation and a conditional sentence is, as noted above, that according to s. 742.3(2), an offender can be ordered to undergo treatment without his consent, while under the conditions of a probation order (s. 732.1(3)(g)), the offender's consent is necessary, with the exception of drug and alcohol addiction programs (since the amendment to s. 732.1 S.C. 1999, c. 32, s. 6).

The Supreme Court in *Proulx* emphasised the need to distinguish a conditional sentence from probation through the more punitive conditions attached to the conditional

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[36] *Infra* Chapter 1, Part 6: Procedure Following Breaches of Conditional Terms.

sentence. According to the Court, the conditional terms will and should be more onerous than the terms of the routine probation because it is this punitive aspect that distinguishes the conditional sentence from probation.[37]

Part 4: Comparing the Conditional Sentence with Parole

The correlation between a conditional sentence and parole was examined by the Manitoba Court of Appeal in *R. v. Dew.*[38] It observed:

> The idea of permitting a sentence of imprisonment to be served in the community is not entirely new. It has been the practice for many years to release a prison inmate on parole after he or she has served a mere fraction of the sentence. The balance of the sentence is served in the community so long as the prisoner does not commit a breach of the terms of parole.
>
> The conditional sentence is merely an extension of parole. Instead of serving a fraction of the sentence in a prison, the prisoner is released into the community immediately, but on stringent terms which are intended to be penal in nature as well as remedial. A breach of the terms of the release exposes the prisoner to an order that the balance of the term be served in prison.[39]

Despite the above overlaps, a conditional sentence differs substantially from parole. To the extent that parole and probation are different forms of controlled release into the community of offenders who continue to present risks of re-offending, parole is much closer to probation than to a conditional sentence. Section 102 of *Corrections and Conditional Release Act*[40] sets out the test for conditional release. The Board may grant parole:

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[37] *Proulx*, *supra* note 3, at para. 22.

[38] [1998] M.J. No. 472 (QL), (Man. C.A.).

[39] *Ibid.*, at paras. 6 and 7.

[40] S.C. 1992, c. 20.

> ...if in its opinion, the offender will not, by reoffending present an undue risk to society before the expiration according to law of the sentence the offender is serving; and the release of the offender will contribute to the protection of society by facilitating the reintegration of the offender into society as a law- abiding citizen.[41]

As opposed to conditional sentence and probation, which are part of the sentencing process, parole begins only at the post-sentencing stage. The *Corrections and Conditional Release Act* grants inmates the right to apply for parole only after serving a significant portion of the sentence. Parolees may be suspended for a variety of reasons, including suspicion of re-offending, breach of release conditions or any behaviour that suggests any possible risk for the community.[42]

Unlike breach of parole which will automatically lead to suspension or revocation of parole and trigger apprehension of the offender, requiring his or her re-commitment into custody, breach of a conditional sentence may or may not lead to imposition of a custodial term.[43]

Part 5: Comparing the Conditional Sentence and Incarceration

The principle distinction between a custodial sentence of imprisonment and a conditional sentence of imprisonment is that in a conditional sentence an offender is not confined to an institution. It is a community-based sanction meant as an alternative to incarceration.[44] The distinction between institutional and non-institutional sentences was

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[41] *Ibid.*

[42] Clayton C. Ruby, *Sentencing*, 5th edition (Toronto: Butterworths, 1999), at 464.

[43] *Infra* Chapter 1, Part 6: Procedure Following Breaches of Conditional Terms.

[44] *Proulx*, *supra* note 3 at paras. 40, 43 and 56.

revisited by the Supreme Court of Canada in *Knoblauch*.[45] In this case the accused was convicted of possession of an explosive substance and possession of a weapon. The accused had a history of mental illness and of dangerous handling of explosives. The defence called two forensic psychiatrists at the sentencing hearing in support of its request that a conditional sentence be imposed, under the terms of which the accused would reside in a secure mental health institution under the care and supervision of psychiatrists. The trial judge imposed a conditional sentence of two years less one day followed by three years' probation. The conditional sentence included a condition that the accused reside in the locked secure psychiatric treatment unit of the hospital. The Alberta Court of Appeal reversed the conditional sentence and ordered that the accused be incarcerated for two years less one day.

On appeal by the accused, the Supreme Court of Canada, in a sharply split decision, upheld the trial judge's order. Justice Arbour, for the majority, was prepared to expand the ambit of the conditional sentence in order to accommodate the needs of the offender with mental health problems. According to her, the essence of imprisonment was best captured by "emphasizing the involuntary constraints" of imprisonment rather than "the actual degree of confinement."[46] As Knoblauch voluntary agreed to a treatment under s. 742.3 (2) (e) of the *Criminal Code*, and because the treatment program served the end expressed in s. 718, a conditional sentence was available even though it was served in a locked psychiatric institution. In contrast, the minority judgement cited *Proulx*

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[45] *Supra* note 3.

[46] *Ibid.*, at para. 40.

and identified the degree of confinement as the principle distinction between a custodial sentence and a conditional sentence.[47]

In *Proulx* the Supreme Court of Canada stressed that offenders serving a conditional sentence in the community are only partially deprived of their freedom as another distinction between custodial and conditional sentences.[48] The Court further observed that as opposed to the custodial sentences, conditional sentences are not subject to reduction through parole.[49] It also pointed out that a conditional sentence, even with the stringent conditions, would usually be the more lenient sentence than a jail term of equivalent duration.[50]

Part 6: Statutory Prerequisites for Imposing the Conditional Sentence

Section 742.1 of the *Criminal Code* sets out the criteria for imposition of a conditional sentence

(i) The court must have decided to impose a term of imprisonment of less than two years;

(ii) The offence for which this sentence is imposed must not carry a statutory minimum sentence of imprisonment;

(iii) The court must be satisfied that serving the sentence in the community would not endanger the safety of the community; and,

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[47] *Ibid.*, at paras. 97-100.

[48] *Proulx*, *supra* note 3, at para. 40.

[49] *Ibid.*, at paras. 42-43.

[50] *Ibid.*, at para. 44.

(iv) The court must be satisfied that serving the sentence in the community would be inconsistent with the purpose and principles of sentencing found in ss. 718 and 718.2.

The first three conditions determine whether or not a conditional sentence is possible in the circumstances. Once these criteria are met, the sentencing judge must consider the fundamental purpose and principles of sentencing set out in s. 718 to 718.2. The last condition determines whether a conditional sentence is appropriate.[51]

(i) Imprisonment of Less Than Two Years

Courts are permitted to use conditional sentences when the jail term that would otherwise be imposed would be less than two years. Some courts of appeal have applied a so-called two step approach in deciding to impose a conditional sentence.[52] In the first stage, the judge decides that a sentence of less than two years is appropriate, with reference to the purpose and principles of sentencing as set out in ss. 718 to 718.2. In the second stage, the judge considers whether the sentence should be served in the community pursuant to section 742.1.

Proulx rejected this two-step process in favour of a purposive interpretation of section 742.1. Chief Justice Lamer stressed that Parliament's intent was "to identify the type of offenders who could be entitled to a conditional sentence" and that section 742.1(a) should be read in conjunction with s. 718.2(d) and 718.2(e). According to Lamer

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[51] On general sentencing principles and objectives, see Chapter 2 *infra*.

[52] *R. v. Scidmore* (1996), 2 C.R.(5th) 280 (Ont. C.A.), *R .v. Arsiuta* (1997), 115 Man. R. (2d) 105, 139 W.A.C. 105 (Man.C.A.).

C.J.C., such a purposive approach would ensure against "widening the net" and undermining Parliament's objective of reducing incarceration.[53]

The purposive approach still requires the judge to proceed in two stages. At the first stage, the judge considers and rejects two possible alternatives: a probation order and a penitentiary term. In making this preliminary determination, the judge is guided by the principles of sentencing as set out in ss. 718 to 718.2. While the focus of the first stage is to eliminate possible alternatives, the second stage centers on whether a conditional sentence would be consistent with the fundamental purpose and principles of sentencing set out in ss. 718 to 718.2. At the second stage the duration and venue of the sentence is determined, as well as the conditions to be imposed. The purposive approach, taken literally, allows for length to exceed the original custodial term. As noted above, length escalation, plus imposition of restrictive conditions, leads to net-widening.

(ii) No Statutory Minimum Sentence of Imprisonment

Offences with a mandatory minimum term of imprisonment are statutorily excluded from conditional sentencing. The category of offences most often excluded are repeat drink and driving offences. The proportion of jail admissions attributable to drinking and driving offences varied between 5 to 24 percent in 1998-99, yet mandatory imprisonment for second and subsequent convictions for drinking and driving prevent the imposition of conditional sentence.[54] This weakens the goal of reducing incarceration.

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[53] *Proulx*, *supra* note 3, at paras. 55 and 56.

[54] Canadian Center for Justice Statistics, *supra* note 8 at 13 –15.

(iii) Serving The Sentence in Community Would Not Endanger Safety

The sentencing judge must be satisfied that serving the sentence in the community will not endanger its safety. Danger is evaluated by reference to the risk of the offender re-offending and the gravity of the damage that could ensue in the event of any re-offence. Once the judge finds that the risk of recidivism is minimal, the second factor to consider is the gravity of the potential damage in the event of re-offence.

The risk that a particular offender poses to the community is assessed in each case on its own facts. The list of relevant factors in assessing the risk of recidivism include the nature of the offence, the relevant circumstances of the offence, which can put in issue any prior and subsequent incidents, the degree of participation of the accused, the relationship of the accused with the victim, the profile of the accused, that is, his [or her] occupation, lifestyle, criminal record, family situation, mental state, his [or her] conduct following commission of the offence, and the danger which the interim release of the accused represents for the community, notably that part of the community affected by the original offence.[55]

Equally important for risk assessment are the conditions attached to the sentence. *Proulx* underscored the importance of the conditions attached to the sentence being considered when weighing the risk of re-offence.

> Where an offender might pose some risk of endangering the safety of the community, it is possible that this risk be reduced to a minimal one by the imposition of appropriate conditions to the sentence.... For example, a judge may wish to impose a conditional sentence with a treatment order on an offender with a drug addiction, notwithstanding the fact that the offender has a lengthy criminal record linked to this addiction, provided the judge is confident that there is a good

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[55] *R. c. Maheu* (1997), 116 C.C.C. (3d) 361 (Que. C.A.) at 374.

> chance of rehabilitation and that the level of supervision will be sufficient to ensure that the offender complies with the sentence.[56]

The Court stressed the importance of the last point, the adequate level of supervision in the community, and quoted with approval a *dictum* from *R. v. Brady*: [57]

> A conditional sentence drafted in the abstract without knowledge of what actual supervision and institutions and programs are available and suitable for this offender is often worse than tokenism: it is a sham.[58]

The Court also quoted with approval a portion of a paper prepared by Rosenberg J.A., in which the author raised concerns about the need for effective enforcement for this sentencing option.[59]

The adequacy of resources available to supervise a conditional sentence in the community is a cause of considerable concern. Because control of the conditional sentencing regime is vested with the provincial ministries of correctional services, these institutions are responsible for designating resources. The danger of not allocating sufficient resources for the conditional sentencing regime was underscored by Hill J. in *R. v F.(R.)*:[60]

> Protection of society and the rehabilitation of offenders requires control, monitoring and compliance evaluation of those serving sentences other than in jail. The community is entitled to this assurance. At some point, a failure to

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[56] *Proulx*, *supra* note 3, at para 72.

[57] 121 C.C.C. (3d) 504, 209 A.R. 321, 160 W.A.C. 321, 15 C.R. (5th) 110, 59 Alta. L. R. (3d) 133, [1998] 7 W.W.R. 272, (Alta. C.A.) at para.138 [hereinafter *Brady*].

[58] *Proulx*, *supra* note 3, at para. 73.

[59] *Ibid.*, at para. 117.

[60] (1997), 10 C.R. (5th) 394, 33 O.T.C. 136 (Ont Cen. Div.).

> provide reasonable enforcement mechanisms equates to an abdication of responsibility for the operation of conditional sentences – in effect, public protection is rendered illusory.[61]

As courts are mindful of the inadequacy of resources, the viability of conditional sentencing may hinge on extra-judicial considerations instead of judicial determination. If judges find that there is a real risk of re-offending on account of lack of resources and because public protection is the overwhelming aim of sentencing (s.718), they may impose imprisonment for otherwise deserving conditional sentence offenders.

The second factor is the gravity of the potential damage in case of re-offence. In the case of violent offenders, a small risk of very harmful future crime may well warrant a conclusion that the prerequisite is not met.[62] Thus, where the offender represents an extreme danger to the physical or psychological safety of others, a conditional sentence is not appropriate. The Court in *Proulx* stated that the meaning of the phrase, "would not endanger the safety of the community "should not be restricted to a consideration of the danger to physical or psychological safety of persons, but should be construed broadly to include the risk of any criminal activity, *e.g.*, risk of economic harm.[63]

Proulx underscores the danger of elevating safety of the community as primarily consideration. On the one hand, conditional sentence provisions allow the sentencing judge to choose conditional sentence if the offender appears unlikely to offend again. The emphasis on this factor allows courts flexibility to impose conditional sentence to

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[61] *Ibid.*, at 410.

[62] *Proulx*, *supra* note 3, at para. 74.

[63] *Ibid.*, at paras. 75 and 76.

virtually all categories of offences. Thus conditional sentences have been granted in cases involving manslaughter,[64] impaired driving causing death,[65] serious economic crimes such as fraud,[66] and sexual assaults, including sexual assaults of children.[67] On the other hand, the focus on risk of recidivism routinely sends to prison a large group of non-dangerous and non-serious offenders. These offenders are imprisoned for repeat commission of minor offences as they are not considered low risk offenders largely because of their criminal record. The Court in *Proulx* warned against such practices:

> Rather than being an overarching consideration in the process of determining whether a conditional sentence is appropriate, the criterion of safety of the community should be viewed as a condition precedent to the assessment of whether a conditional sentence would be a fit and proper sanction in the circumstances.[68]

The Court specifically emphasized that some degree of risk should be tolerated, particularly when supervision and treatment conditions are attached.

Part 7: The Scope of Conditional Sentencing

The Court in *Proulx* held that a conditional sentence is available in principle for all offences in which the statutory prerequisites are satisfied. The Court rejected the argument that a conditional sentence was inappropriate for more serious offences

> Offence-specific presumptions introduce unwarranted rigidity in the determination of whether a conditional sentence is a just and appropriate sanction.

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[64] *R. v. Turcotte* (2000) 1444 C.C.C. (3d) 139 (Ont. C.A.)(QL).

[65] *R. v. Godfree* [2000] O.J. No. 3409 (Ont. C.A.)(QL).

[66] *R. v. Bogart* [2001] O.J. No.2323(Ont.S.Ct.J.) (QL).

[67] *R. v. Shrupka* (2000) 149 C.C.C. (3d) 410, AR 00-30-04684 (Man.C.A.) (QL).

[68] *Proulx*, *supra* note 3, at para. 65.

> Such presumptions do not accord with the principle of proportionality set out in s. 718.1 and the value of individualization in sentencing, nor are they necessary to achieve the important objectives of uniformity and consistency in the use of conditional sentences.[69]

This is consistent with the purpose of minimising the use of incarceration and reducing the number of offenders imprisoned for less serious crimes. At the same time, in giving conditional sentencing a broad scope, the Court added a number of reassurances that serious offences will be excluded. It rejected the argument for a presumption in favour of a conditional sentence and then set out narrow eligibility criteria, followed by tough conditions and even tougher back-up sanctions to ensure public acceptance and offender compliance. The Court also vested a broad discretion to judges to decide whether a conditional sentence is appropriate once the pre-conditions are met.

The Court was faced with a strong argument for the exclusion of certain categories of offences from the ambit of conditional sentencing. The Attornies-General of Canada and Ontario argued that offences such as driving offences causing bodily harm, violent offences, sexual offences, abuse of children, breach of trust and some forms of economic crimes (*e.g.*, drug and money laundering offences and fraud) needed to be excluded from the ambit of the conditional sentence. They argued the principle of proportionality and the objectives of denunciation and deterrence dictate the imposition of custodial sentences.[70]

The Court's reluctance to exclude specific categories of offences from the scope of the conditional sentence may have been rooted in the unsettled state of ss. 718 - 718.2

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[69] *Ibid.*, at para. 81.

[70] *Ibid.*, at para. 80.

and particularly how does the principle of proportionality relate to the other sentencing rationales. Both the intervenors' argument for exclusion of serious offences and the Court's response were based on the principle of proportionality, although from different perspectives. The intervenors were concerned that, given the serious nature of these offences and the conduct giving rise to them, a court might reasonably conclude that, based on proportionality, denunciation could only be achieved through a custodial sentence. The Court's rejection of this approach appears to stem from the realisation that any combination of broadly defined offences with high maximum penalties, coupled with an inflexible reliance on the principle of proportionality, could lead to invariably imposing custodial sentences.[71]

Since *Proulx* the uncertainty with respect to the spheres of operation of proportionality and the other sentencing rationales remains. If some categories of offences are to be excluded from the ambit of the conditional sentence, it is for Parliament to indicate the types of offences in which courts might deviate from the fundamental principle of proportionality in favour of other sentencing rationales. A comparison with other jurisdictions may help explain the last point. Swedish sentencing law makes special provisions for courts to pursue the rationale of incapacitation when offences of drunk driving causing serious bodily harm are involved. These provisions specifically exempt conditional sentences.[72] Likewise, English law

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[71] *Proulx*, *supra* note 3, at para. 88.

[72] Andrew von Hirsch and Nils Jareborg, "The Swedish Sentencing Law," in *Principled Sentencing*, 2nd ed., ed. by Andrew von Hirsch and Andrew Ashworth, (Oxford: Hart Publishing, 1998), at 240.

elevates incapacitation when sentencing violent and sexual offenders.[73] To ensure consistency of approach and, in the long run, to achieve public acceptance of an expanded system of intermediate penalties, requires that Parliament intervene to delineate the spheres of operation of other sentencing rationales. If Parliament wishes to exclude certain offences from the scope of the conditional sentence, it could explicitly do so or, in the alternative, create presumptive custodial sentences for some offences. Parliament in effect created the presumption for incarceration with respect to some drug offences in subsection 10(3) of the *Controlled Drugs and Substances Act*. That provision reads:

> 10.(3) Where pursuant to subsection (1), the court is satisfied of the existence of one or more of the aggravating factors enumerated in that subsection, but decides not to sentence the person to imprisonment, the court shall give reasons for that decision.

Such presumptive custodial sentences, however, represent a turning point away from the objectives of 1996 sentencing reform.[74]

Part 8 : The Problem of Net-Widening

Because the ambit of the conditional sentence is defined in broad terms (*e.g.*, two years less a day), it has been applied to virtually all categories of offences, from minor disturbances to manslaughter. The flip side of an expanded scope is the potential for net-widening. The problem was recognised in *Proulx* where the Court noted that

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[73] Andrew Ashworth, *Sentencing and Criminal Justice*, 2nd ed. (London: Butterworths, 1995) at 126.

[74] Jean-Paul Brodeur, "Sentencing Reform: Ten Years after the Canadian Sentencing Commission," *supra* note 2, at 336.

"erroneously imposing conditional sentences could undermine Parliament's objective of reducing incarceration for less serious offenders."[75]

Net-widening can occur at the initial sentencing stage, where the sentencing judge applies intermediate sanctions for offenders who would not otherwise have attracted jail, and imposes a conditional sentence instead of probation or a very short term of incarceration. *Proulx* made it clear that a sentencing judge should first consider and reject probation and imprisonment before turning his or her mind to the conditional sentence.[76] Another and more subtle form of net-widening occurs as a result of the interactions of several factors: the increased length of the conditional sentence as opposed to the duration of the custody that it replaces, unrestrained use of punitive or risk control conditions and back-up sanctions.

Sentencing statistics show that the average sentence length for conditional sentences is substantially greater than the average time in provincial custody. For example, in Quebec, the average sentence length on admission to provincial custody was one month (thirty days) while the average length of conditional sentences was eight months, or eight times greater. In Ontario, the average custodial sentence was one and one-half months (45 days) while the average length for conditional sentences was six months or four times greater. In Newfoundland, the length of the average custodial sentence was three months and the length of the average conditional sentence was four and a one-half months.[77] The imposition of longer conditional sentences reflects the trend

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[75] *Proulx*, *supra* note 3, at para. 56

[76] *Ibid.*, at para. 58.

[77] Jenifer Thomas, "Adult Correctional Services in Canada, 1998-99" (Ottawa: Statistics

towards increased punitiveness. It also carries the risk that if the offender breaches the conditions of the conditional sentence, he or she could end up serving significantly longer jail time than in the case where the offender is sent directly to jail at the outset. *Proulx* has in effect created a presumption in favour of imprisonment for breaches of conditions.[78]

Unnecessary punitive and risk-control conditions, imposed in addition to increased length, further elevate the onerousness of the conditional sentence. It makes severity more difficult to assess and compliance more complicated, thereby increasing the likelihood of breach. As Andrew von Hirsch observed,

> ...[t]he more different kinds of things the offender is called upon to do, the less likely he or she will do them all. The individual whose transgressions stems from difficulty in abiding by the normal rules of civil existence is not likely to abide by a plethora of new penal requirements.[79]

Proulx makes it clear that recruitment for conditional sentencing ought not come from the probation pool of offenders.[80] In practice, however, the directives from the Court are not easy to follow, given the potential for overlap between conditional sentence and supervised probation. These sentencing options could be virtually indistinguishable in their severity when a probation order with intrusive conditions is compared with a

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Canada, 1999, vol. 20., no. 3) at 12.

[78] *Proulx*, *supra* note 3, at para. 39.

[79] Andrew von Hirsch, *Censure and Sanctions*, (Oxford: Clarendon Press, 1993), at 67.

[80] *Proulx*, *supra* note 3, at para. 58.

conditional sentence. Developing penal equivalencies appears to be the most promising approach to addressing the problem created by net-widening.[81]

Part 9: Procedure Following Breach of Conditional Terms - Section 742.6

An alleged breach of a conditional sentence order is to be dealt with within thirty days of the offender's arrest, or as soon thereafter as practicable (section 742.6 (3)). Proof may be based on documentary evidence including hearsay evidence (section 742.6 (4)) and guilt is established on a balance of probability (section 742.6(9)). The burden of establishing a reasonable excuse for the breach rests upon the offender (section 742.6(9)) who also must justify his or her release on bail (section 742.6(2)).

Where the court is satisfied that the offender breached the order it may take no action, change the optional conditions, suspend the conditional sentence order and direct that the offender serve in custody a portion of the unexpired sentence, and that the conditional sentence order resume on the offender's release from custody, either with or without changes to the optional conditions; or it may terminate the conditional sentence order and direct that the offender be committed to custody until expiration of the sentence (section 742.6(9)).

The relaxed evidentiary rules, reverse onus clauses and standard of proof of breach are problematic.[82] While these may accord with Parliament's intent in Bill C-41,

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[81] Julian Roberts, "Conditional Sentencing: Issues and Problems," *supra* note 2 at 92-3, and see Chapter 4, *infra.*

[82] See the reasons of Stuart, Terr. Ct. J., in *R. v. Elias* [2001] Y.J. No. 45, Reg. No. T.C. 0000699 (QL).

they also create problems on their own. *Proulx* clarified the provisions dealing with breaches of conditional sentences, but created a presumption in favour of jail.

> Where an offender breaches a condition without reasonable excuse, there should be a presumption that the offender serves the remainder of his or her sentence in jail. This constant threat of incarceration will help to ensure that the offender complies with the conditions imposed....It also assists in distinguishing the conditional sentence from probation by making the consequences of a breach of condition more severe.[83]

While the emphasis on jail does serve as a constant reminder of the need to comply, the automatic invocation of jail for any breach, no matter how minor or under what circumstances, can lead to injustice. A presumption in favour of jail may appear likely to induce compliance, but it conceals the real inconsistency of dealing with less serious breaches. A presumption of incarceration could have unintended consequences because such sanctions could routinely become invoked for relatively minor or non-intentional breaches. In *R. v. Bannab* [84] the court set out a test for determining the seriousness of the breach: "Was the breach of condition a willful breach which shows an intention by the offender to withdraw herself from the control of the authorities administering her sentence?"[85] This puts the focus on the intention of the offender, while addressing the need for compliance. Incarceration for breach may be appropriate in a case of commission of a subsequent offence, but it should not be the presumption underlying all breaches.

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[83] *Proulx*, *supra* note 3, at para. 39.

[84] (1997), 36 W.C.B. (2d) 459, [1997] S.J. No. 778 (QL) (Sask. Prov. Ct.), affd 38 W.C.B. (2d0 342 (C.A.).

[85] *Ibid.*, at para. 8.

The need for consistency in sentencing, and for restraint in the use of custody, would be advanced if the enforcement mechanisms for breaches of conditional sentences allow sentencing judges in full or in part, to take a course other than jail where, for example, the breaches are unintentional or minor, or involve strong extenuating circumstances. The need for restraint should be determinative. The Council of Europe sentencing guidelines recommend that, where there is a non-intentional failure to comply with the requirements of a non- custodial order, an offender should not be sent to prison unless the court is satisfied that all other legally prescribed methods have been used or are inappropriate, and that the offender has had the ability to comply with the order.[86] The presumption in favour of jail for breach of conditional sentence should be linked to the point at which a condition has been broken. In that sense, there should be a sliding scale of enforcement measures depending on the point at which the conditional term is broken: the longer the sanction-free period, the less the punishment for breach should be. If the average length of a conditional sentence in Canada is one year and if breach of the term comes after a substantial portion of the sentence has been already served, in the words of Stuart J., "We need to place less emphasis on what offenders fail to do, and more on what they succeed in doing, and correspondingly place less emphasis on punishing what is wrong and more on celebrating what is right."[87]

This by no means eliminates the need for onerous back-up sanctions where

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[86] Council of Europe, "Consistency in Sentencing: Recommendation to Member States and Explanatory Memorandum", 4 Crim. L. F. 355, at 378-79.

[87] *Supra* note 82, at para. 63.

serious breaches occur. It is of the utmost importance to devise a back-up sanctions regime which will ensure public acceptance and approval of conditional sentencing as a viable alternative, while at the same time attending to the ability of the offender to comply with the order.

Part 10: Financial Support

Conditional sentences require resources for supervision and enforcement. Convicted offenders are released into the community, subject to significant controls. This is labour intensive and cost sensitive. To be effective, conditional sentencing requires its own budget with adequate allocations for treatment programs, supervision, enforcement and administration. Figures from Statistics Canada show that 82 percent of correctional spending is on custodial services, while only 14 percent is spent on community supervision.[88] At the same time the overwhelming majority (80 percent) of provincial custodial admissions is for less than six months, with an average length of one month.[89]

Offenders serving conditional sentences are placed under community supervision within the provincial correctional system. Given that the success of this new sentencing option depends on supervision and adequate financial support, the question of how these resources are allocated becomes critical. The provincial correctional services may share

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[88] Canadian Centre for Justice Statistics, "Adult Correctional Services in Canada 1997-98"(Ottawa: Statistics Canada, 1999, vol. 19. no. 4), at 6; Canadian Centre for Justice Statistics, " Justice Spending in Canada"(Ottawa: Statistics Canada, 1999, vol. 19 no. 12), at 9-10. The authors of the latter report observed the growing case load pressure on correctional employees responsible for carrying out non-custodial sanctions. While the number of employees working in non-custodial services were down, the average number of adults in community-based sanctions increased, *ibid.*, at 14.

[89] *Supra* note 8.

values and goals that differ from the penal or policy objectives behind the new sentencing regime.[90] On the one hand, corrections are in the business of controlled post-sentencing release of selected, low risk offenders amenable to risk control techniques and they have full control over the way imprisonment sanctions are executed. On the other hand, assuming control over a large group of not necessary low risk offenders, most with treatment needs, may be too exacting for correctional authorities. Conditional sentences are community-based sanctions in which judiciary and community exercise some degree of control over specifying conditions, treatment and placement. Loading on provincial correctional services the responsibility to administer supervision and treatment programs, while at the same time allowing judiciary and communities to exercise some control over the way these sanctions are carried out, raises questions of balancing authorities.

In addition to the value and priority differences between the judiciary and the correctional services, there are disparities among provinces as to the financial resources available for proper supervision of the conditional sentences. Only two provinces – Saskatchewan and British Columbia – allocate resources for electronic monitoring, with Ontario expected to follow. These resources, however, may not be available or if available, correctional services may not be obliged to follow judges' recommendations in the absence of specific statutory provisions. In *R. v. Charlish* [91] the accused with no criminal record was convicted of trafficking of small amount of marijuana to an inmate in the visitor's room. The trial judge imposed a sentence of six months' imprisonment and

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[90] See the comments of Cole J. in *R. v. Patterson*, [2000] O.J. No. 736, 33 C.R. (5th) 45, paras. 75 –76.

[91] [2001] B.C.J. No. 83, 151 C.C.C. (3d) 185 (B.C.C.A.).

two years' probation, but recommended that the period of incarceration be served on an electronic monitoring program. The British Columbia Court of Appeal allowed the accused's appeal, set aside the term of incarceration and imposed a conditional sentence. In addressing the utility of the trial judge's recommendations to correctional authorities, the Court was concerned that these recommendations could have been rejected by the correctional officers, leading to disrepute of the judicial system:

> While I should like to think that those in charge of classification respect judicial recommendations, I am doubtful about the worth of such recommendations because if the recommendation is not honoured, not only will a prisoner have a legitimate sense of grievance, but also the judicial office is demeaned.
> In my opinion, unless and until judicial recommendations receive statutory recognition by, for instance, a provision that if such a recommendation is not honoured the prisoner and the judge shall each be informed why, it would be better if judges made no recommendations.[92]

Lack of resources was addressed in *R. v. Knoblauch.*[93] In response to the Crown argument that conditional sentences would have "serious resource implications for the provinces," the majority held:

> There is nothing in the material before us...to suggest that the interpretation given by Chrumka Prov. Ct. J. to ss. 742.1 and 742.3 of the Code would create a non-manageable drain on resources. If successful, the alternative measures to incarceration will reduce the rate at which offenders are imprisoned and particularly will reduce the rate of incarceration in provincial correctional facilities where sentences under two years are served, obviously creating a substantial saving of public funds.[94]

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[92] *Ibid.*, at paras. 10,11.

[93] *Knoblauch, supra* note 3.

[94] *Ibid.*, at para. 46.

Justice Bastarache, for the minority, examined the structural reasons for the lack of treatment funding for the mentally ill offenders. He traced the problem to the absence of provisions of treatment for mentally disabled offenders in the *Criminal Code*.[95] He observed:

> It is particularly unfortunate that medical order provisions have not been proclaimed and that the treatment needs of mentally ill offenders, and ultimately the safety of the public when the offenders are released from prison, have been sacrificed because of intergovernmental financial disputes.[96]

Justice Bastarache concluded with the need for an appropriate scheme to provide for the treatment of mentally ill offenders.[97]

Until such legislation is implemented and correctional institutions or communities are allocated sufficient resources to supervision and treatment of offenders serving conditional sentences, sentencing judges will follow the guidelines provided in *Proulx*: to consider first the available resources before imposing any conditional sentence. A rigid adherence to this view, however, could defeat the purpose of this sanction. If judges are aware that resources are lacking, they have no choice but to resort to the old paradigm of sending offenders to jail.[98]

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[95] *Ibid.*, at para. 115.

[96] *Ibid.*

[97] *Ibid.*, at paras. 115 and 116.

[98] *Proulx*, *supra* note 3, at para. 73.

Chapter 2: Section 742.1 of the Criminal Code and the Purpose and Principles of Sentencing

Once the sentencing judge finds the offender guilty and is satisfied that the offender meets the three pre-conditions for imposition of a conditional sentence – no minimum term of imprisonment, a sentence of imprisonment of less than two years, and no danger to the safety of the community – then the judge must consider whether a conditional sentence will be consistent with the fundamental purpose and principles of sentencing set out in ss. 718 to 718.2. This will determine whether the offender should serve his or her sentence in the community or in jail, the duration of the sentence and, if a conditional sentence is imposed, the nature of the attached conditions.[99]

Part 1: Sections 718-718.2, Part XXIII of the Criminal Code

Section 718 states

> 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.

The section was introduced in 1996 through Bill C-41, based on sentencing reforms set out a decade earlier by the Canadian Sentencing Commission, the Daubney Committee, and the House of Commons Committee in 1988.[100] In introducing the Bill, the Department of Justice noted

> No statement of purpose and principles of sentencing currently exists in the Criminal Code. While court rulings have determined principles, these may vary

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[99] *Proulx*, *supra* note 3, at para. 77.

[100] Julian V. Roberts and Andrew von Hirsch, "Sentencing Reform in Canada: Recent Development" (1992) 23 Revue Generale de Droit 23: 319-55.

> from province to province. To date, Parliament's role has largely been limited to setting maximum penalties for specific offences rather than dealing with the policy objectives of the sentencing process. Under the proposals, a statement of purpose and principles of sentencing would be added to the Criminal Code. This statement would provide direction to the courts on the fundamental purpose of sentencing: to contribute to the maintenance of a just, peaceful and safe society....Adding a statement of purpose and principles makes the sentencing process responsive to public concerns by ensuring that it is governed by principles set out by Parliament. Clearly defining the purpose of sentencing also makes the system more understandable, predictable and accessible to the public. Finally, a national policy statement on sentencing will provide the legal community with a more consistent direction on how to approach sentencing in Canada.[101]

Section 718 contains elements from the two principal perspectives in sentencing: utilitarianism and retributivism. Utilitarianism attempts to prevent crime by reforming, deterring or incapacitating the offender.[102] It is forward-oriented because utility is measured by the legal system's ability to prevent future crime. In contrast, retributivism looks backwards to the actual crime and measures the gravity of the offence and the offender's responsibility.[103]

Reference to crime prevention indicates Parliament's commitment to the utilitarian goal of reducing crime through governmental policies. At the same time, section 718 requires that sanctions be just, demonstrating an emphasis on retributivism. Just sanctions, imposed in accordance with established sentencing principles, are

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[101] Department of Justice, *supra* note 14.

[102] Julian V. Roberts, "Utilitarinism versus Desert in the Sentencing Process," 4 Can. Crim. L. R., 143, at 144.

[103] *Ibid.*

designed to "reinforce the basic communal values shared by all Canadians."[104] Courts must avoid imposing a sentence that will undermine respect for the law. In *Brady,*[105] the accused was convicted for cultivating marijuana and possessing marijuana for the purpose of trafficking. He asked to be permitted to serve any sentence of imprisonment in the community. The trial judge imposed a nine-month conditional sentence with restrictive conditions. The Alberta Court of Appeal dismissed the appeal by the Crown against the sentence and took the opportunity to examine the new sentencing regime. It recognised the correlation between the use of the conditional sentence and respect for the law, observing, "Properly used and carefully crafted, a conditional sentence will serve its intended purpose. Improperly used or skimpily drafted, it will undermine respect for the law."[106] If the conditional sentence is accompanied by conditions that are "tough, effective, creative and realistic," then the public is likely to be far more accepting.[107]

The statement of purpose could have far-reaching symbolic and practical effects upon the sentencing system. Professors Roberts and von Hirsch highlight the significance of a clearly defined purpose:

> The statement of purpose is the compass and guidelines the road map. Without the guidelines, judges know roughly where they are going but not necessarily how to get there. Without the statement, judges would be following instructions in the absence of a clear sense of over-all direction. [108]

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[104] *R. v. Priest* (1996), 110 C.C.C. (3d) 289, 30 O.R. (3d) 538, 93 O.A.C. 163 (Ont.C.A.).

[105] *Supra* note 57.

[106] *Ibid.*, at para. 47.

[107] *Ibid.*

[108] Julian V. Roberts and Andrew von Hirsch, "Statutory Sentencing Reform: The Purpose and Principles of Sentencing," 37 Crim L .Q., (1995), 220, at 223.

The current statement of purpose is ambiguous. The blend of utilitarian and desert-based considerations presents a sentencing judge with the dilemma of satisfying conflicting objectives.[109] One consequence is disparity in outcome, as judges choose different sentencing goals. In its current state, the formulation of the purpose of sentencing is of little assistance to a sentencing judge. Professors Roberts and von Hirsch suggest an alternative version: "The purpose of sentencing is to promote justice through the imposition of fair sanctions upon offenders convicted of criminal conduct."[110] According to the authors, this proposition resolves any conflict between utilitarian and just desert considerations in favour of doing justice. It also underlines the desirability of sentences being determined by reference to the fundamental purpose of sentencing.

Can this proposal reflect the objectives of restorative justice expressed in paras. (e) and (f) of section 718 of *the Criminal Code*? Promoting justice may have different meanings depending on who the offenders and their victims are. This was stressed by the Supreme Court in *Gladue*:

> A significant problem experience by aboriginal people who come into contact with the criminal justice system is that the traditional sentencing ideas of deterrence, separation and denunciation are often far removed from the understanding of sentencing held by these offenders and their community...most traditional aboriginal conceptions of sentencing place a primarily emphasis upon the ideas of restorative justice.[111]

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[109] See the reasons of Lambert J.A. in *R. v. S. (R. N.)*(1997), 121 C.C.C. (3d) 426, 163 W.A.C. 120 (B.C.C.A.) rejected by the majority of the Supreme Court of Canada, *supra* note 35.

[110] *Supra* note 108, at 235.

[111] *Gladue supra* note 3, at para.70.

Clearly the two concepts of justice – retributive and restorative – are not easily reconcilable. While the concept of fairness and justice in the restorative justice model depends on the degree of satisfaction for victims, retributive justice turns on consistent and proportionate treatment of offenders.

The purpose must clearly spell out the primary policy and penal goal. As the aim of the criminal law, and thus of sentencing, is the protection of the public by prevention of crime, the emphasis on just sanctions premised on "just deserts" is not convincing. Once protection of the public is elevated above other sentencing considerations, it becomes much easier to set out the conditions under which different sentencing considerations can apply. This is an inclusive approach because it can accommodate not only the emerging restorative justice model but can also justify different treatment for disadvantaged offenders, as I will explain in the next chapter.

Part 2: Sentencing Objectives

Just sanctions are to be realised through a host of sentencing objectives set out in section 718:

> (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 an acknowledgment of the harm done to victims and to the community.[112]

[112] Section 718 (a) – (f).

This requires judges in each case to examine each objective and consider the interplay among them.[113] Inconsistencies in the case law reflect the fact that different judges favour some over others.

(a) Denunciation: Section 718(a)

David Garland points out that,

> A penalty does more than police the boundaries in which social relations take place: it also helps to define the nature and the quality of these relations themselves. Through its practices and its symbolic forms, penal practice helps gibe meaning and definition – as well as a certain tone and colouring – to the bonds which link individuals to each other and to society's central institutions.[114]

In that sense, denunciation underlines the role of punishment as "an institution through which society defines and expresses itself at the same time and through the same means that it exercises power over deviants."[115]

One goal of denunciation is to communicate society's condemnation of the offender's conduct. Lamer C.J.C. in *R. v. M.(C.A.)* [116] stated the objective as follows:

> A sentence with a denunciatory effect represents a symbolic, collective statement that the offender's conduct should be punished for encroaching on our society's basic code of values as enshrined within our substantive criminal law.[117]

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[113] Allan Manson, *The Law of Sentencing*, (Toronto: Irwin Law, 2001), at 83.

[114] David Garland, *Punishment and Modern Society: A Study in Social Theory*, (Oxford: Clarendon Press, 1990), at 271.

[115] *Ibid.*, at 391.

[116] [1996], 1 S.C.R. 500, 105 C.C.C. (3d) 327, (S.C.C.) at 368, [hereinafter *M.(C.A.)*].

[117] *Ibid.*

In condemning the offender's conduct, denunciation communicates and reinforces a shared set of values. Chief Justice Lamer elaborated on its educative value:

> Our criminal law is also a system of values. A sentence which expresses denunciation is simply the means by which these values are communicated. In short, in addition to attaching negative consequences to undesirable behaviour, judicial sentences should also be imposed in a manner which positively instills the basic set of communal values shared by all Canadians as expressed by the *Criminal Code*. [118]

Denunciation serves another general preventive aim in that a condemnatory sanction treats the actor as a person who is capable of such understanding.[119] The emphasis on punishment's 'moral' and 'educational' effects might reinforce people's inhibitions against criminal behaviour. The offenders' sense of moral self-restraint might well be enhanced if they are treated as responsible for their conduct and are sanctioned in a manner that reflects an ordinary offender's own sense of justice.[120] The last point presupposes that guilty parties do take responsibility for their actions and view themselves as responsible and lawful members of their communities.

The recent re-emergence in Canada of the denunciation rationale, however, cannot be explained alone with reference to the above considerations. The current emphasis on denunciation appears to reflect the fact that denunciation itself carries political overtones of retribution and, to that extent, encompasses much of the current

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[118] *Ibid.*

[119] Andrew von Hirsch, *supra* note 79, at 11.

[120] Andrew von Hirsch, "Guiding Principles for Sentencing: The Proposed Swedish Law," 1987 Crim. L. R., 746, at 751.

punitive rhetoric.[121] Denunciation 'legitimises' the punitive model of justice in which the criminal sanction is asserted against the due-process interests of the offenders on the basis of rights claimed by crime victims.[122] Although a reliance on denunciation alone is not appropriate in gauging the severity of punishment, the reference to denunciation could make the difference between imposing a conditional sentence or a custodial term. In *R. v. S. (R. N.)*, the accused was convicted of sexual assault and invitation to sexual touching involving his step-daughter. The accused had no criminal record, was in poor health, and was supported by his community. The trial judge imposed a sentence of nine months' imprisonment. The British Columbia Court of Appeal substituted a nine-month conditional sentence. The Crown's appeal was allowed and the Supreme Court of Canada restored but stayed the trial judge's order on the ground of time served. The Court held:

> The amount of denunciation provided by a nine-month conditional sentence was clearly insufficient in the circumstances to signify society's abhorrence for the acts the respondent committed, despite the fact that his liberty was restricted by the conditions imposed. [123]

The Court clarified in *Proulx* that the principle of denunciation could be satisfied by the imposition of punitive conditions in the conditional sentencing order. According to the Court, these punitive conditions should be the norm, not the exception. Second, a term of

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[121] Kent Hatt, "Strategies of Governance and Canadian Sentencing Legislation, 1984-1997," 14.2. Canadian Journal of Law and Society, (1999), 101 at 121.

[122] Kent Roach, *Due Process and Victims' Rights: The New Law and Politics of Criminal Justice,* (Toronto: University of Toronto Press, 1999) at 32.

[123] *S. (R. N.) supra* note 35, at para. 18.

conditional imprisonment could be longer than a jail term. Finally, the Court stressed the stigma of house arrest attached to the conditional sentence order.[124]

(b) Deterrence: Section 718 (b)

Punishment can exert an overall restraining effect by deterring offences which would be committed without this educative power. In this sense, deterrence, as one of the several objectives of punishment, looks to the preventive consequences of sentencing. General deterrence aims at deterring others from committing this kind of offence, while individual deterrence is concerned with deterring the offender from re-offending. [125] The notion of individual deterrence has problematic penal value in justifying current sentencing practices. Professor Ashworth explains:

> A system which regards individual deterrence as the main goal would presumably escalate sentences for persistent offenders, on the reasoning that if non-custodial penalties fail to deter then custody must be tried....*It would not be the gravity of the crime but the propensity to reoffend which would be the main determinant of the sentence* [126] [Emphasis added].

General deterrence implies that potential offenders consider penal consequences before they act. A paper prepared by the United Kingdom Home Office, however, cast doubts on this proposition:[127]

> There are doubtless some criminals who carefully calculate the possible gains and risks. But much crime is committed on impulse, given the opportunity presented

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[124] *Proulx*, *supra* note 3, at paras. 103-105

[125] Andrew Ashworth, *supra* note 73, at 62.

[126] *Ibid.*

[127] *On Crime, Justice and Protecting the Public* (London: U.K. Home Office, 1990).

> by an open window or unlocked door, and it is committed by offenders who live from moment to moment....[Thus] it is unrealistic to construct sentencing arrangements on the assumption that most offenders will weigh up the possibilities in advance and base their conduct on rational calculation. Often they do not. [128]

There is evidence that general deterrence can be improved if potential offenders perceive that strong likelihood of detection.[129] If the risk of detection is thought to be so low as to make the threat of the penalty remote, the risk is readily discounted. Subjective perception of the risk of detection explains, for example, why general deterrence is more likely to be effective for planned or 'professional' crimes than for impulsive crimes. Thus, for the majority of crimes, the general deterrent effect is less pronounced.

The Supreme Court of Canada questioned the effectiveness of custodial sentences as a deterrent. In *Proulx* the Court began its analysis on deterrence with a caution:

> Judges should be wary of placing too much weight on deterrence when choosing between a conditional sentence and incarceration....The empirical evidence suggests that the deterrent effect of incarceration is uncertain.[130]

The Court stressed that a conditional sentence could produce significant deterrence "if sufficiently punitive conditions are imposed and the public is made aware of the severity of these sentences." In addition, deterrence could be achieved through the use of community service orders.[131] The Court endorsed the notion of individual deterrence in appropriate circumstances:

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[128] *Ibid.*, at para. 2.8.

[129] Andrew Ashworth, *supra* note 73, at 63.

[130] *Proulx*, *supra* note 3, at para. 107.

[131] *Ibid.*

> There may be circumstances in which the need for deterrence will warrant incarceration. This will depend in part *on whether the offence is one in which the effects of incarceration are likely to have a real deterrent effect* [132][Emphasis added].

Thus, in imposing or rejecting a conditional sentence, the sentencing judge should be always mindful when considering deterrence.[133] Stressing individual deterrence could lead to unjustifiable escalation of sanctions contrary to the Parliament's intent in Bill C-41. Stressing general deterrence is problematic because it is premised on unreliable theoretical and empirical grounds. It is one thing to espouse the deterrence rationale of preventing future crime 'as good politics.' It is a different thing to subscribe to the view that the amount of punishment imposed by the current system is justifiable on the basis of deterrence.[134] The Court in *Proulx* endorsed a more restrained approach to deterrence in view of the limited value of deterrence in pursuing crime prevention objectives.

(c) Incapacitation

Conditional sentences do not sequester the offender from the community. In this sense, the objective of incapacitation, to ensure that the offender is physically removed and thus deprived from any opportunity to commit further crimes for the duration of the sentence, is not applicable. In appropriate circumstances, a conditional sentence may not be granted even though some offenders do not pose a danger to the community. In such cases, the objectives of denunciation and deterrence alone, and not the separation

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[132] *Ibid.*

[133] See Allan Manson, *supra* note 113, at 44-46.

[134] Andrew Ashworth *supra* note 73 at 62-66.

objective, may warrant incapacitation of some offenders.[135] Even though the incapacitation objective is not applicable to conditional sentences, in practice partial incapacitation is achieved through the imposition of restrictive conditions, *e.g.*, conditions prohibiting contact with certain social sectors, such as children or attending at certain places.

The Supreme Court of Canada set "danger to community" as a condition precedent or prerequisite for a conditional sentence.[136] Studies suggest that incapacitative sentencing will draw into its net more 'non-dangerous' than 'dangerous' offenders, with a 'false positive' rate that has often reached two out of every three.[137] Because a conditional sentence is reserved for low-risk and non-dangerous offenders,[138] the risk of over-prediction of what constitutes a danger to the community could deny otherwise deserving offenders this option on grounds extrinsic to sentencing considerations.[139] An example of over-prediction was *R. v. Helstrom*.[140] In this case, the accused was convicted of assault causing bodily harm against his wife. The trial judge imposed a six-month term of incarceration, followed by two years of supervised probation. She concluded, based on the pre-sentencing report, that the accused would pose a danger to his community if he were to serve his sentence in that community. On appeal by the accused, the Manitoba Court of Appeal overturned the prison sentence and substituted a conditional sentence, on

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[135] *Proulx*, *supra* note 3, at par. 108.

[136] *Ibid.*

[137] Andrew Ashworth, *supra* note 72, at 68.

[138] *Proulx*, *supra* note 3, at para. 21.

[139] Allan Manson, *supra* note 113, at 46-48.

[140] *R. v. Helstrom*, [1999] M.J. No. 122 (QL), (Man. C.A.).

the ground that evidence of the danger was not convincing. Instead, the Court imposed restrictive conditions which amounted to partial incapacitation.

(d) Rehabilitation

Rehabilitation has a long and checkered history in penal policy and practice. The dominant sentencing objective of the sixties and seventies, it has been for the most part on the defensive ever since. Empirical studies suggest that penal measures intended to reform offenders were no more effective in preventing recidivism than were punitive measures.[141] More recently, however, rehabilitation has experienced a revival. As opposed to the traditional focus on the offender, the current focus is on risk management and control, using multiple techniques of classification.[142] The new style of rehabilitation is also more punitive. It ranks prominently in recent decisions of the Supreme Court of Canada on conditional sentences. In *Proulx* the Court held that "[w]here a combination of both punitive and restorative objectives may be achieved, a conditional sentence will likely be more appropriate than an incarceration."[143] The Court further elaborated:

> There are any number of conditions a judge may impose in order to rehabilitate an offender. Mandatory treatment orders may be imposed, such as psychological counseling and alcohol and drug rehabilitation. It is well known that sentencing an offender to a term of incarceration for an offence related to a drug addiction, without addressing the addiction, will probably not lead to the rehabilitation of the offender....House arrest may also have a rehabilitative effect to a certain extent insofar as it prevents the offender from engaging in habitual anti-social

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[141] Michael Cavadino and James Dignan, *The Penal System An Introduction*, 2nd ed.(London: Sage Publications, 1997), at 36.

[142] Kent Hatt, *supra* note 118, at 123.

[143] *Proulx*, *supra* note 3, at para. 113.

> associations and promotes pro-social behaviors such as attendance at work or educational institutions. [144]

The realistic possibility of rehabilitation may justify imposing a non-custodial sentence for an offence generally requiring a term of imprisonment (*Proulx*, *Knoblauch*, *Preston*).[145] Circumstances may justify 'grafting' a rehabilitative sentence onto a denunciatory sentence (*Sandercock*) [146]. Thus, a crucial question for the sentencing judge is the perceived needs of the offender rather than the gravity of the offence committed.

Even though empirical studies do not support rehabilitation as a paramount justification in the penal system, it remains a utilitarian aim within the current range of sentencing goals. Rehabilitation remains the primary sentencing objective for young offenders[147] and young adults.[148] A conditional sentence regime seems to be particularly well disposed to endorse rehabilitation.[149]

718 (e) and (f): Restoration and Reparation

Sections 718 (e) and (f) provide for " reparations for harm done to victims or to the community" and promoting a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community." A major

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[144] *Ibid.*, at paras. 110 and 111.

[145] (1990) 79 C.R. (3d) 61, 47 B.C.L.R. (2d) 273 (B.C.C.A.).

[146] (1985) 22 C.C.C. (3d) 79 at p. 114, 48 C.R. (3d) 154, (Alta. C.A.)

[147] Section 3, *Young Offenders Act*, R.S.C. 1985, c. Y-1.

[148] *R. c. Gagnon*, 19 C.R. (5th) 309, (sub nom. R .v. Gagnon) 130 C.C.C. (3d) 194, [1998] R.J.Q. 2636 (Que. C.A.).

[149] *Proulx*, *supra* note 3, at paras. 110 and 111; see also Allan Manson, *supra* note 113, at 49.

development in criminal justice in the last decades has been the growing importance of restorative theories of justice. The inclusion in the *Criminal Code* of restorative objectives, along with conventional sentencing objectives, demonstrates Parliament's intent to accommodate justice for victims as one goal of the criminal justice system and of sentencing. Lucia Zedner writes:

> Criminal justice should be less preoccupied with censuring code-breakers and focus instead on the process of restoring individual damage and repairing ruptured social bonds. In place of meeting pain with the infliction of further pain, a truly reparative system would seek the holistic restoration of the community. It would necessarily also challenge the claim of the state to respond to crime and would instead invite (or perhaps demand) the involvement of the community in the process of restoration. [150]

Rehabilitation, reparations and promotion of a sense of responsibility in the offender are restorative objectives. In *Proulx*, Chief Justice Lamer endorsed a wider use of restorative objectives in sentencing:

> As this Court held in *Gladue, supra*, at para. 43, "[r]estorative sentencing goals do not usually correlate with the use of prison as a sanction". The importance of these goals is not to be underestimated, as they are primarily responsible for lowering the rate of recidivism. Consequently, when the objectives of rehabilitation, reparation, and promotion of a sense of responsibility may realistically be achieved in the case of a particular offender, a conditional sentence will likely be the appropriate sanction, subject to the denunciation and deterrence considerations outlined above....The objectives of reparations to the victim and the community, as well as the promotion of a sense of responsibility in offenders and acknowledgment of the harm done to victims and to the community may also be well served by a conditional sentence.... In my view, the use of community service orders should be encouraged, provided that there are suitable programs available for the offender in the community. By increasing the use of community service orders, offenders will be seen by members of the public as paying back their debt to society. This will assist in contributing to public respect for the law. [151]

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[150] Lucia Zedner, "Reparation an Restitution: Are They Reconcilable?," 57 Modern Law Review, 228 at 233.

[151] *Proulx*, *supra* note 3, at para. 112.

The objectives of restorative justice are not easily reconciled with conventional objectives of denunciation, deterrence and incapacitation. Although the Court endorsed restorative justice in *Gladue*, *Wells* and *Proulx*, it did not elaborate on how the conventional model of justice should accommodate it. Andrew Ashworth describes differences between conventional and restorative models of justice:

> The restorative model emphasizes satisfaction for the victim, whereas the conventional model focuses on the wider public interest. The restorative model would allow the victim to forgive the offender and forget the sentence, whereas the conventional model would look at the crime in the public context. The restitutive model emphasizes the harm done, whereas culpability is a primarily determinant of 'seriousness' on the conventional model. Thus one conception of fairness and justice depend on the degree of satisfaction for victims, whereas the other turns on the consistent and 'proportionate' treatment of offenders. In many practical situations the two models would lead to completely different outcomes, notably an 'unlawful act 'manslaughter where death resulted from a minor assault or an attempted murder in which no injury was caused.[152]

The restorative goals set out in para. (e) and (f) of s. 718 do not easily co-exist with established sentencing objectives. The application of one to the exception of the others will create further frictions in penal theory and practice and resentment by public and offenders perceived to be disadvantaged by its application.[153] Further legislative guidelines are needed to show how the principle of proportionality can be reconciled with restorative goals.

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[152] Andrew Ashworth, "Victim Impact Statements and Sentencing," 1993 Crim. L.R., 498, at 503-4.

[153] Stenning and Roberts, *supra* note 19 at 159 –164.

Part 3: Proportionality

Section 718.1 states, " A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender." Along with the fundamental purpose, the principle of proportionality was at the centre of 1996 sentencing reform. While sections 718 -718.2 contain elements of the two sentencing traditions, the inclusion of proportionality as a fundamental principle indicates Parliament's intent to structure the sentencing process around a just desert model.[154] In *R. v. Brady*, the Court of Appeal endeavoured to clarify this point:

> Only one of the sentencing principles in Part XXIII is mandatory. Though others are to be taken into account, they are assigned no relative weight. Every sentence, conditional or not, must meet the fundamental and overarching sentencing principle: proportionality.[155]

According to this view, Parliament has singled out the retributive concept of proportionality as controlling in the sentencing process. The reason may be pragmatic, in that Parliament's intent is to build a structured sentencing framework, moving away from the common law sentencing model which provided judges with the liberty to pursue different goals. A uniform approach to sentencing, organised around the principle of proportionality, would deliver consistency, accountability and fairness to sentencing process.

The notion of proportionality is not new. It reflects the long-standing conceptions of equality and fairness in the allocation of punishment.[156] Just desert theory holds that

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[154] Julian V.Roberts, "Utilitarism versus Desert in the Sentencing Process," 4 Can. Crim. L. R., 143, at 144.

[155] *Supra* note 57, at para. 25.

[156] Clayton Ruby, *supra* note 42, at 26.

punishment is condemnatory and that penalties should be allocated according to the blameworthiness of the criminal conduct.[157] In order to reflect blameworthiness, the sentencing process should punish reprehensible criminal conduct equally and should grade punishments so that their severity matches the rank ordering of seriousness.[158] Desert theory distinguishes between ordinal and cardinal proportionality. Cardinal proportionality refers to the issue of anchoring the penalty scale or fixing the absolute levels of severity for various crimes. Ordinal proportionality relates to the use of comparative punishments. A central requirement of ordinal proportionality is that of parity – persons convicted of crimes of comparable seriousness should receive penalties of comparable severity.[159]

The primacy of proportionality in the hierarchy of sentencing principles is subject to considerable controversy, both academically and judicially. Given the uncertainty with respect to its role in the overall sentencing scheme, courts do not always refer to it in their sentencing determinations despite the fact it is mandated. The principal theoretical debate has been between retributivists, like Andrew von Hirsch, who argue that proportionality is a central feature of any system of punishment, and limiting retributivists, like Norval Morris, who argue that proportionality is one valid concern

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[157] Julian V. Roberts, Andrew von Hirsch, "Conditional Sentences and the Fundamental Principle of Proportionality in Sentencing," 10 C.R.(5th),1998, 222 at 226-230.

[158] *Ibid.*, at 228.

[159] *Ibid.*

among many and serves only to set outer limits on morally justifiable punishments.[160] Speaking from a feminist perspective, Nicola Lacey accepts that "proportionality to socially acknowledged gravity could serve a useful function in underlining community values," even if other functions would remain equal or more important.[161] According to Lacey, the seriousness of offences forms one scale and the severity of punishment another. There is no natural or inevitable relationship between them – the relationship can only be conventional and symbolic.[162]

In *Proulx* the Attornies-General of Canada and Ontario argued that the fundamental purpose and principles of sentencing support a presumption against conditional sentences for certain more serious offences. This "followed from the principle of proportionality as well as from a consideration of the objectives of denunciation and deterrence."[163] The Court held that the position taken by these intervenors ignored the clear words of the proportionality principle:

> My difficulty with the suggestion that the proportionality principle presumptively excludes certain offences from the conditional sentencing regime is that such an approach focuses inordinately on the gravity of the offence and insufficiently on the moral blameworthiness of the offender. This fundamentally misconstrues the nature of the principle. Proportionality requires that full consideration be given to both factors.[164]

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[160] On the debate between retributivists and limiting retributivists, see *infra,* principle of restraint and the debate between Professors J. Roberts, A. Hirsch and A. Manson

[161] Nicola Lacey, *State Punishment* (London: Routledge, 1988), at 194.

[162] *Ibid.*, at pp. 20-21.

[163] *Proulx*, *supra* note 3, at para. 80.

[164] *Ibid.*, at para. 83.

Part 4: Parity, Totality and Restraint

Section 718.2 (b) states that " a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances." This is the principle of parity. Disparity in sentencing is not always unwarranted. Disparity might be an unavoidable result of change in the process of developing new, more appropriate sentencing patterns (*Gladue*, *Wells*, *Proulx*, and *Knoublauch* or sentencing disadvantaged offenders). The Supreme Court of Canada in *R. v. M.(C.A.)*[165] set a standard of review of marked and substantive departure.

> Sentencing is an inherently individualized process, and the search for a single appropriate sentence for a similar offender and a similar crime will frequently be a fruitless exercise of academic abstraction. As well, sentences for a particular offence should be expected to vary to some degree across various communities and regions in this country, as the "just and appropriate" mix of accepted sentencing goals will depend on the needs and current conditions of and in the particular community where the crime occurred. For these reasons...a court of appeal should only intervene to minimize the disparity of sentences where the sentence imposed by the trial judge is in substantial and marked departure from the sentences customarily imposed for similar offenders committing similar crimes.[166]

This standard gives considerable scope for trial judge discretion and allows for some degree of disparity.[167]

Section 728.2 (c) provides that "where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh." This is the principle of totality. Its effect is to require that a sentencing judge who has passed a series of sentences, and

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[165] *M.(C.A.)* [1996] 1 S.C.R. 500, (S.C.C.), at 567.

[166] *Ibid.*, at 567.

[167] Judicial discretion and sentence disparity will be examined in greater detail in Chapter 3.

orders consecutive sentences for multiple offences, ensure that the cumulative sentence does not exceed the overall culpability of the offender.

> Similarly section 718 paras. (d) and (e) urge restraint in providing that
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> an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and 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.

These provisions enhance the aim of Bill C-41 to reduce incarceration.[168]

Restraint has a long tradition in penal theory and practices. Classical utilitarians, led by Jeremy Bentham (1748-1832), adopted a punishment limiting moral principle termed "parsimony" which would achieve a utilitarian quantity of deterrence. "Whatever mischief is guarded against, to guard against it at as cheap a rate as possible: therefore the punishment ought in no case to be more than what is necessary to bring it into conformity with the rules here given."[169]

To be morally justified a punishment ought to take into account the suffering it imposes on the offender. In the last decades, Andrew von Hirsch and Norval Morris, the principle proponents of retributivism and limiting retributivism, offered their respective views on the role of parsimony in punishment. Von Hirsch argues for strict limits of punishment and pursuit of equality and proportionality in punishment. "Parsimony, correctly understood, should not presuppose a particular set of penal aims. Desert can be applied parsimoniously, provided its criteria are applied so as to scale penalties down."[170]

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[168] *Proulx*, *supra* note 3, at para. 17.

[169] Jeremy Bentham, *Punishment and Deterrence*, quoted in *supra* note 71, at 53.

[170] Andrew von Hirsch, *supra* note 79, at 4-5.

Norval Morris, on the other hand, argues that desert is a limiting, not a defining principle and that policy should prescribe imposition of the least severe "not undeserved" sanction that meets legitimate policy ends. Within these outer bounds of "not undeserved" sanctions, Morris supports parsimony.[171] Likewise, Professor Allan Manson comments that proportionality should be considered in tandem with the principle of restraint: "If we always strive to impose the least pain, the least burden, we stand a better chance of producing proportionate sentences than if we strive to do what is proportionate."[172]

Michael Tonry contrasts principles of just desert and parsimony in order to reconcile proportionality and parsimony. He writes:

> Punishment raises at least two important conflicts between ideas - between the principles of proportionality and parsimony, between the quest for criminal justice and social justice... Principles of proportionality and parsimony may simply conflict, with resolutions between them necessary partial and provisional. [173]

The crucial point of Tonry's model is the idea of 'rough equivalence' or 'interchangeability of sanctions'. The theoretical underpinnings behind these debates can assert major influences on the sentencing judges in imposing or rejecting one or the other sentencing option, including a conditional sentence. I will return in greater detail to Tonry's concept of interchangeability, and also to the notion that desert can be applied parsimoniously, in Chapter 4.

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[171] Norval Morris (1974), *The Future of Imprisonment* (Chicago: University of Chicago Press).

[172] Allan Manson, "The Reform of Sentencing in Canada," in *Towards a Clear and Just Criminal Law*, ed. by D. Stuart, R. Deslisle and A. Manson (Toronto: Carswell, 1999) at 492-3.

[173] Michael Tonry, "Parsimony and Desert in Sentencing," *supra* note 72, at 199.

Part 5: Sentence Determination

In determining whether a conditional sentence is consistent with the sentencing provisions in ss. 718-718.2, a trial judge considers which objectives figure most prominently in the factual circumstances of the particular case.[174] According to *Proulx*, "Where a combination of both punitive and restorative objectives may be achieved, a conditional sentence will likely be more appropriate than incarceration." The trial judge must consider:

> ...the offender's prospects of rehabilitation, including whether the offender has proposed a particular plan of rehabilitation; the availability of appropriate community service and treatment programs; whether the offender has acknowledged his or her wrongdoing and expresses remorse; as well as the victim's wishes as revealed by the victim impact statement (consideration of which is now mandatory pursuant to s. 722 of the Code.[175]

Conversely,

> ...where punitive objectives are particularly pressing, such as cases in which there are aggravating circumstances, incarceration will generally be the preferable sanction. It would be a mistake, however, to rule out the possibility of a conditional sentence *ab initio* simply because aggravating factors are present as each case must be considered individually.[176]

The trial judge must further consider whether a conditional sentence is likely to achieve these sentencing goals.[177] To understand the last point, we need to examine the 'expressive' or 'communicative' function of punishment. David Garland writes:

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[174] *Proulx*, *supra* note 3, at para. 113.

[175] *Ibid.*, at para. 113.

[176] *Ibid.*, at para. 114.

[177] Julian V. Roberts and David P. Cole, "Introduction to Sentencing and Parole," *supra* note 2, at 12.

> If one wishes to understand the prison as an institution - and the same arguments apply to the fine, probation, the death penalty, and the rest - it does little good to do so on a single plane or in relation to a single value. Instead, one must think of it as a complex institution and evaluate it accordingly, recognizing the range of its penal and social functions and the nature of its social support. [178]

Although a conditional sentence may be appropriate in the circumstances of the case, it might not be acceptable in the particular social context in which it is imposed. Conditional sentencing may not serve an expressive function in some categories of offences, irrespective of the severity of the conditions attached. This explains why some offences are seen by judges and the public as requiring harsher sanctions.[179] Whether a sentencing option is acceptable depends not only on whether it is appropriately severe as denunciation, for example, but also on whether it is appropriate as a punishment for the particular act.[180] Nicola Lacey discusses symbolic meaning of punishment:

> ...[o]n our conception of punishment, in which a central function is its reaffirmation of social values, punishment might well be expected to be, at least to a greater extent than is now the case, of a formal or symbolic nature.... [I]t may often be the case that, in order to fulfil its important functions of fostering the central values of community and supporting the community itself, it will be necessary to punish more severely in order to satisfy strong grievance-desires on part of the victims, to prevent resort to self-help, to underline a social judgement of behaviour as especially injurious, or to emphasize a generally deterrent threat in the case of a particularly advantageous form of offending.[181]

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[178] David Garland, *supra* note 114, at 290.

[179] See the comment by Anne McGillivray, "R. v. Bauder: Seductive Children, Safe Rapists, and Other Justice Tales," (1997-1998) 25 Man. L. J. 359-383, (QL), paras. 42-44.

[180] Anthony N. Doob, Voula Marinos, "Reconceptualizing Punishment: Understanding the Limitations on the Use of Intermediate Punishments," 2 U. Chi.L.Sch. Roundtable 1995, 413, at 421-26.

[181] Nicola Lacey, "Punishment and Community," *supra* note 71, at 405-6.

The Supreme Court of Canada in *R. v. S.(R.N.)* used a similar rationale in setting aside a conditional sentence.[182] Sentencing judges are often confronted with situations in which some objectives favour conditional sentence, whereas others favour incarceration. In fashioning a fit sentence, the sentencing judge is faced with the need to reconcile mutually exclusive objectives. The Court in *Proulx* observed:

> There is no easy test or formula that the judge can apply in weighing these factors. Much will depend on the good judgment and wisdom of sentencing judges, whom Parliament vested with considerable discretion in making these determinations pursuant to s.718.3.[183]

This *dictum* summarises the Supreme Court's views on sentencing discretion.

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[182] *Supra* note 34, at para.18.

[183] *Proulx*, *supra* note 3, at para.18.

Chapter 3: The Conditional Sentence, Judicial Discretion, and Appellate Review

Part 1: The Conditional Sentence as Discretionary Disposition

Apart from offences with mandatory or minimal sentences, the courts generally have wide discretion to vary the sentence to reflect any aggravating and mitigating factors in an individual case. Several provisions of Part XXIII confirm that Parliament intended to confer similarly discretion in imposing or rejecting a conditional sentence. Section 742.1 provides that the judge "may" impose a conditional sentence and enjoys a wide discretion in the drafting of the appropriate conditions, pursuant to s. 742.3(2). This is reinforced by discretion in the degree or kind of punishment imposed. Subsections 718.3(1) and 718.3(2) provide that the degree and kind of punishment to be imposed is left to the discretion of the sentencing judge.

Subsection 718.3(1) provides that

> Where an enactment prescribes different degrees or kinds of punishment in respect of an offence, the punishment to be imposed is, subject to the limitations prescribed in the enactment, in the discretion of the court that convict a person who commit the offence.

Subsection 718.3 (2) provides that

> Where an enactment prescribes a punishment in respect of an offence, the punishment to be imposed is, subject to the limitations prescribed in the enactment, in the discretion of the court that convict a person who commits the offence, but no punishment is a minimum punishment unless it is declared to be a minimum punishment.

The opening words of s. 718 specify that the sentencing judge must seek to achieve the fundamental purpose of sentencing "by imposing just sanctions that have one or more of the following objectives." The recent series of decisions from the Supreme Court of

Canada on conditional sentencing have further reinforced Parliament's intent to respect the fundamental principle of judicial independence. In *Proulx*, the Court justified the trial judge's discretion in its comments on proportionality, noting: "As a by-product of such an individualized approach, there will be inevitable variation in sentences imposed for particular crimes."[184] In another recognition of discretion, the Court also noted that the sentencing judge was better positioned than the appeal court to assess the need and conditions of and in the community.[185]

Part 2: Judicial Discretion and Sentence Disparity

One goal of sentencing reform was to bring into scrutiny sentencing discretion and reduce unwarranted disparity. In a 1971 survey, Professor John Hogarth found "enormous differences among magistrates in nearly every aspect of the sentencing process."[186] Parliament was mindful of the problems arising from unstructured discretion, yet the 1996 sentencing reform did not promote parity to the exclusion of other goals. While Parliament provided judges with codified purposes and principles of sentencing, it retained such traditional principles as deterrence and denunciation.[187] As a result, the current sentencing regime is a complex web of statutory and common law principles which cannot easily be satisfied in a single sentence.[188]

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[184] *Proulx*, *supra* note 3, at para. 82.

[185] *Ibid.*, at para. 126.

[186] Canadian Sentencing Commission, *supra* note 6, at 75.

[187] Roberts and Cole, *supra*, note 2, at 13.

[188] Clayton Ruby, *supra* note 42, at 5.

If judges are allowed to choose freely between two or more sentencing goals, this inevitably produces inconsistency at a basic level. If different judges favour different purposes, the result invariably will be disparity in sentencing. "Unwarranted disparity" refers to differences in sentencing which result from variable approaches which do not form part of the sentencing policy of the jurisdiction; for example, variations stemming from personal views, unjustified local or regional traditions, or influence of the mass media.[189] The significance of unwarranted disparity derives not only from the social importance of the sentence imposed, but also from the impact of sentences on the offenders. Disparity may arise in the process of developing new sentencing patterns. The introduction of the conditional sentence was in response to the need to develop alternatives to incarceration capable of occupying the middle range of the continuum of sanctions. This legislative innovation is still in the early stages of development. Technical imperfections or rigid application in pioneering the new regime implies at least temporary disparities.

Focussing on disparity has the potential to divert attention from more important issues such as high rates of incarceration. It endorses a 'starting point' or 'tariffs' approach as a solution to the problem and perpetuates imprisonment as the norm. Until *Bill C-41*, much of the sentencing policy and practice was developed by the judiciary on an *ad hoc* basis. Provincial courts of appeal exercised a supervisory role over sentencing policy and practices in each province and established appropriate ranges of sentences. Appellate courts in Alberta, Saskatchewan, Manitoba and Nova Scotia sought to enhance consistency in sentencing by providing some kinds of indicators for judges. They

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[189] Council of Europe, *supra* note 86, at 366.

grouped similar cases together and established sets of 'starting points' or tariffs' for certain categories of offences.[190] Such guidelines acquired their authority through the system of binding judicial precedents. The Court of Appeal for Ontario and the Supreme Court of Canada refused to follow the starting point approach.[191] The main concern was that the court should generally be allowed to vary the sentence, beneath the 'tariff' minimum, so as to reflect any aggravating and mitigating factors in the individual case. In *R. v. McDonnell*, Justice Sopinka gave two main reasons why it could never be an error in principle to fail to place a particular offence within a judicially created category for purposes of sentencing: deference to the trial judge has profound functional justifications and provincial courts of appeal have no legal basis for the creation of sub-categories of offence within the a statutory offence.[192]

In *Proulx*, Chief Justice Lamer discussed the appropriateness of the starting point approach to the conditional sentence:

> An individualized sentencing regime will of necessity entail a certain degree of disparity in sentencing ....The potential disparity of sentence between those offenders who were candidates for a conditional sentence and received a jail term, and those who received a conditional sentence, is relatively small.
> The minimal benefits of uniformity in these circumstances are exceeded by the costs of the associated loss of individualization in sentencing. By creating offence-specific starting points, there is a risk that these starting points will evolve into de facto minimum sentences of imprisonment. This would thwart Parliament's intention of not excluding particular categories of offence from the

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[190] *E.g., R. v. Johnas et al* (1982, 2 C.C.C. 490, 32 C.R. (3d) 1, 41 A.R. 183 (Alta. C.A.); *R. v. Sandercock*, (1985) 22 C.C.C. (3d) 79 (Alta. C.A.); *R. v. C.D.* (1991), 75 Man. R. (2d) 14 (Man C.A.), *R. v. Owen* (1982) 50 NSR (2d) 696 (N.S.C.A.).

[191] *R. v. Glassford* (1988), 42 C.C.C. (3d) 259 (Ont. C.A.); *R. v. M.(C.A.)*, *supra* note 116; *R .v. Shrophsire* (1994), 90 C.C.C. (3d) 234 (B.C.C.A.); *R .v. McDonnell* (1997), 114 C.C.C. (3d) 436, 6 C.R. (5th) 231, [1997] 1 S.C.R. 948[hereinafter *McDonnell*].

[192] *McDonnell, ibid.*, at paras. 32 and 33.

> conditional sentencing regime. It could also result in the imposition of disproportionate sentences in some cases.[193]

The Court rejected the offence-specific presumption because of the narrow range of application for conditional sentences and the need to consider the principles of sentencing which can provide sufficient guidance as to whether a conditional sentence should be imposed.

> It is the task of this Court to articulate, in general terms, which principles favour each sanction. *Although it cannot ensure uniformity of result, the articulation of these principles can at least ensure uniformity in approach to the imposition of conditional sentences*[194] [Emphasis added].

This suggests that disparity in non-custodial measures and conditional sentences should not be the focus of judicial scrutiny. The pronouncement is echoed in Julian Roberts' observation:

> If sentencing disparity exists, then guidelines are necessary to promote greater uniformity in sentencing. If sentencing disparity is not a problem, reformers should concentrate their attention on other issues, such as the excessive use of imprisonment as a sanction.[195]

Public concern about disparity is largely confined to custodial sentences and may be based on imperfect or incomplete information. Consider cases of manslaughter reported in the mass media. Public reaction to sentences reported was measured against a maximum penalty that was far above the average sentence for similar cases. If sentences reported in the media were placed in the context of average sentences for the specific

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[193] *Proulx*, *supra* note 3, at paras. 86 -88.

[194] *Ibid.*, at para. 89.

[195] Roberts, *supra* note 2, at 147-8.

offence, public reaction to the sentencing process could have been muted.[196] Concerns about sentence discrepancies created by the conditional sentence can be addressed through the imposition of adequate conditions and through the development of guidelines for their use.

Parliament's intent in Bill C-41 was to develop an integrated sentencing system guided by codified sentencing purpose, principles and objectives. At the same time, the Supreme Court of Canada endorsed the consistency of approach to sentencing over the arithmetic consistency of outcome. While the approach taken by the Court to sentence discrepancy is fundamentally sound, the provisions in Part XXIII of the *Criminal Code* do not provide sufficient guidelines for trial judges. In furtherance of the uniformity in approach to the imposition of conditional sentences, consideration should be given to development of guidelines addressing the most contentious issues.

One such source of controversy is the appropriate scope for conditional sentences. Guidelines should be able to answer the basic question posed by judges and the public: " Which offences or varieties of offence are too serious for non-custodial sanctions?" *Proulx* left the question for another day, or for Parliament, to elaborate guidelines for cases in which non-custodial sanctions are not appropriate. The vacuum left after *Proulx* will inevitably require legislative or judicial intervention from the highest court. As it is a matter of general sentencing policy, legislative change instead of 'judicial development' is the preferred option. In the long run, the *Proulx* approach also needs to be revisited on other practical grounds. One is the development of a system of intermediate sanctions. If

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[196] Julian V. Roberts, "Sentencing Trends and Sentencing Disparities," *supra* note 2, at 157-158.

the objective is to curtail reliance on jail, we will be better off with more elaborate sentencing guidelines ranking different penalties in terms of their severity and outlining their prospective scopes, rather than the 'hit –and- miss' of judicial case-by-case development.

Part 3: The Appeal Review of Conditional Sentences

While the trial judge is charged by statute with the duty of sentencing, the responsibility of the appellate judge is to assess the fitness of that sentence.[197] Section 687 (1) of the *Criminal Code* provides:

> 687(1) Where an appeal is taken against sentence, the court of appeal shall, unless the sentence is one fixed by law, *consider the fitness of the sentence appealed against*, and may on such evidence, if any, as it thinks fit to require or to receive,
> (a) vary the sentence within the limits prescribed by law for the offence of which the accused was convicted; or
> (b) dismiss the appeal [Emphasis added].

Provincial courts of appeal hold different views on what constitutes a fit sentence and what is the appropriate standard of review. Some hold that fitness of sentence should be given broader interpretation, permitting the appellate court to substitute its own view. Jackson J.A. in *R. v. Laliberte*[198] justified the need for an appellate intervention in appropriate cases "not only when there is an arguable cause for intervention but also to

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[197] Clayton Ruby, *supra* note 42, at 573.

[198] (2000) 143 C.C.C. (3d) 503, 31 C.R. (5th) 1, [2000] 4 W.W.W. 491, 216 W.A.C. 190, 189 Sask.R. 190, 45 W.C.B. (2d) 552, (Sask.C.A.).

settle an issue of significance either in practice or law,"[199] and endorsed an expanded role for appellate sentencing guidelines.[200] This non-deferential approach to a sentencing judge in the interest of setting provincial and local standards was evident in *R. v. Morales.*[201] The Manitoba Court of Appeal held:

> If a trial judge assesses the evidence, makes findings, and applies the proper principles to those findings, the sentence he pronounces may be unassailable, unless unreasonable. But if a trial judge misses a step in the exercise of his discretion, if he fails to reconcile the serious factors that are relevant to the issue he must decide, this Court need not defer to the trial judge's decision[202]

This contrasts with a review standard which shows considerable deference to sentencing judges. The British Columbia Court of Appeal in *R .v. Sidhu* [203] observed:

> The courts are still in the relatively early stages of applying the conditional sentencing provisions of the Code and there is a considerable benefit to having issues such as this fully canvassed before the trial court before this Court pronounces on them.[204]

There are compelling reasons supporting both approaches. On the one hand, provincial appellate courts have played an important role in regulating sentencing at the trial court

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[199] *Ibid.*, at paras 117 –120.

[200] *Ibid.*

[201] *R. v Morales*, (1998) 32 M.V.R. (3d) 1, 167 W.A.C. 46, 126 Man. R. (2d) 46, 37 W.C.B. (2d) 129, (Man.C.A.).

[202] *Ibid.*, at paras. 21 and 22.

[203] *R. v. Sidhu*, (1998) B.C.J. No. 2039, 111 B.C.A.C. 253, 129 C.C.C. (3d) 26, 19 C.R. (5th) 334, 39 M.V.R. (3d) 15, (B.C.C.A.).

[204] *Ibid.*, at para. 50.

level and influencing sentencing practices on a broader level. Presumptive sentencing guidelines have been shown to be an effective way to establish standards, to reduce sentencing disparities, to assure judicial accountability, and to provide a basis for appellate sentence review. On the other hand, such guidelines could lead to a rigid sentencing model and could challenge Parliament's primacy in setting sentencing policy. It is also far from clear whether the appellate courts have time and resources to address all sentencing matters in a principled way.

In a series of decisions the Supreme Court of Canada considered the appropriate standard of review.[205] In *M. (C.A.),* Lamer C.J.C. stated:

> Put simply, absent an error in principle, failure to consider a relevant factor, or an overemphasis of the appropriate factors, a court of appeal should only intervene to vary a sentence imposed at trial if the sentence is demonstrably unfit. Parliament explicitly vested sentencing judges with a discretion to determine the appropriate degree and kind of punishment under the Criminal Code. [206]

This deferential view of the Court to the sentencing judge was upheld in *Shropshire*:

> An appellate court should not be given free reign to modify a sentencing order simply because it feels that a different order ought to have been made....A variation in the sentence should only be made if the court of appeal is convinced it is not fit. That is to say, that it has found the sentence to be clearly unreasonable.[207]

In *Proulx*, the Court restated this standard in the context of the new conditional sentence regime:

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[205] *M.(C.A.), supra* note 116; *Shrophsire, McDonnell, supra* note 191.

[206] *M.(C.A.), supra* note 116, at para. 90.

[207] *Ibid.*

> Although an appellate court might entertain a different opinion as to what objectives should be pursued and the best way to do so, that difference will generally not constitute an error of law justifying interference. Further, minor errors in the sequence of application of s. 742.1 may not warrant intervention by appellate courts. Again, I stress that appellate courts should not second-guess sentencing judges unless the sentence imposed is demonstrably unfit.[208]

The Supreme Court invoked two rationales to justify deference to the sentencing judge in imposing or rejecting a conditional sentence. The Court considered starting points, concluding that they do not apply to the new sentencing option. It admitted that a deferential standard could result in greater disparity, but dismissed this concern with respect to conditional sentences because of the statutory safeguards in s. 742.1.[209] The Court also stressed the needs and conditions of and in the community and the fact that the sentencing judge is generally more knowledgeable about the needs and resources of the community.[210] Thus, in the Court's view, the trial judge's decision whether or not to impose a conditional sentence is not subject to review unless the sentence was 'clearly unreasonable', 'demonstrably unfit' or 'based on erroneous principles.' Appellate courts should not intervene unless the sentence comes within the ambit of the allowable grounds for appeal.

There is reason to support this position. In restricting the scope of appellate review to the enumerated grounds, the deferential standard ensures the primacy of Parliament in setting sentencing policy. It acknowledges that deference towards trial judges may encourage innovative sentencing, especially as they relate to certain

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[208] *Proulx*, *supra* note 3, at paras. 123 to 126.

[209] *Ibid.*, at paras. 86 and 87.

[210] *Ibid.*, at para. 131

offenders. It reinforces the view that a certain degree of disparity justifiably reflects regional or local conditions and norms. Sentencing Aboriginal offenders in the prairie provinces is a good example.

On the other hand, given that 'clearly unreasonable', 'demonstrably unfit' or 'based on erroneous principles' grounds justify appellate intervention, there is always room for appellate courts to remedy unfit sentences and, in the process of doing so, to develop sentencing guidelines. The problem is that appellate courts are not fully equipped to deal with all sentencing matters. So wide is the range of matters which have bearing on sentencing that certain areas of sentencing should be left to an independent commission to formulate guidelines. This is particularly important in view of declared parliamentary policy encouraging non-custodial sanctions and reserving custodial sentences for the most serious offences.

Part 4 : Sentencing Aboriginal Offenders

Sentencing Aboriginal offenders raises questions of discretion and parity. A disproportionately large percentage of Canada's prison population is Aboriginal. The total Aboriginal community in Canada represents 2% of the adult population, but Aboriginal people account for 17% of admissions to federal, provincial, and territorial custody.[211] There is considerable disparity between jurisdictions as well. The proportion of offences which result in penitentiary sentences is much higher in the Territories, Saskatchewan and Manitoba than the rest of the country. In the Northwest Territories, it

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[211] Canadian Centre for Justice Statistics, *supra* note 77, at 9.

is nine to ten times higher than Ontario and British Columbia.[212] Aboriginal people account for the majority of admissions in Saskatchewan (76%) and Manitoba (59%).[213] These statistics show that over-representation is mostly localised to the prairies and the territories where the largest proportion of the Aboriginal adult population live. Aboriginal people are most likely to be victims of crime committed by other Aboriginal people. This double over-representation has been recognised as a problem within both the Aboriginal community and the criminal justice system.

This over-representation in both prison and victim population, led to enactment of provisions enabling diversion programs in ss. 716-717.1, restorative and reparative justice in s. 718 and s. 718.2(e), aimed at accommodating the needs of Aboriginal offenders. Section 718.2(e) provides:

> 718.2(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.

Section 718.2(e) was tested by the Supreme Court of Canada in *Gladue* and *Wells*. In *Gladue* the accused, a young Aboriginal woman, was convicted of manslaughter for causing the death of her common law husband. The trial judge imposed three years of imprisonment, given the seriousness of the offence and aggravating factor of spousal violence. The trial judge considered as mitigating factors intoxication, prior domestic violence, ill health of the accused and provocation by the deceased. The British Columbia Court of Appeal upheld the trial judge ruling and the accused appealed to the Supreme Court of Canada, arguing that the lower courts erred by improperly applying s. 718. 2(e).

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[212] *Ibid.*, at 4.

[213] *Gladue*, *supra* note 3, at para. 64.

In *Wells*, an Aboriginal offender was convicted of sexual assault committed on an unconscious victim. The trial judge characterised the offence as a 'major' or 'near major' sexual assault. Given the serious nature of the offence, he imposed twenty months imprisonment despite the accused's favourable pre-sentencing report recommending a conditional sentence. The Alberta Court of Appeal upheld the conviction and the accused appealed to the Supreme Court of Canada on the ground that s. 718.2 (2) was not fully considered. Although the Supreme Court found that s. 718.2 (e) was improperly applied, it dismissed both appeals on the basis that these cases involved serious offences.

The key points of these decisions can be summarised as follows. First, s. 718 .2 (e) is remedial in nature and "may properly be seen as parliament's direction to members of the judiciary to inquire into the causes of the problem and to endeavour to remedy it, to the extent that a remedy is possible through the sentencing process."[214] Second, a sentencing judge is required to take judicial notice of systemic or background factors that have contributed to the "difficulties faced by aboriginal people in both the criminal justice system, and throughout society at large." Further, the judge is obliged to inquire into any unique circumstances of aboriginal offenders.[215] When the information, contained in pre-sentencing reports is insufficient, a sentencing judge may on his or her own initiative request witnesses to present reasonable alternatives to a custodial sentence.[216] Third, restorative justice is more appropriate than retributive justice to

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[214] *Gladue*, *supra* note 3, at para. 64.

[215] *Ibid.*, at para. 53.

[216] *Ibid.*, at para. 54.

Aboriginal offenders and should be explored by the sentencing judge. An approach based on restorative justice would place a premium on rehabilitation and prevention of future crime beyond the conventional model of sentencing. In that sense, the restorative approach is consistent with the fundamental purpose of sentencing in s. 718, that the ultimate justification and objective is the control or prevention of crime, served by mixed strategies. Finally, a sentencing judge must explore and reject all alternatives to imprisonment before sending Aboriginal offenders to jail.

Predictably, such decisions as *Gladue* are condemned in the mass media as creating a separate and preferential sentencing regime for a selected group of Canadians.[217] The decisions were also either hailed or criticised by commentators on Aboriginal justice issues.[218] These decisions reveal the extraordinary commitment of the Supreme Court of Canada to a new approach to sentencing Aboriginal offenders, particularly less serious offenders. Although this represents a step in the right direction, many questions remain. For example, the Court in *Gladue* went beyond all high courts in western democracies in endorsing restorative principles.[219] This is a departure from Canada's pattern of building sentencing theory and practice based on consensus and incremental changes. Even so, more is desired in terms of exploring key factors and variables in the restorative justice model. The enhanced role of the victim, a central aspect of restorative justice, was given scant attention. Victim empowerment through an

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[217] *Globe & Mail*, February 21, 2000, at A14.

[218] Kent Roach and Jonathan Rudin, "Gladue: The Judicial and Political Reception of a Promising Decision," (2000) Canadian Journal of Criminology, 355; Phillip Stenning and Julian V. Roberts, *supra* note 19.

[219] *Ibid.*, Kent Roach and Jonathan Rudin, at 363-4.

informal process of participation is all the more important in view of the fact that victimisation within Aboriginal communities perpetuates the plight of Aboriginal people.[220]

Both the legislative changes and recent decisions from the Court present sentencing judges with opportunities and challenges. Nowhere are these issues more pressing than in the western provinces. It is estimated that the Aboriginal population of Winnipeg in 2025 will comprise 25 % of the total population.[221] Inevitably, a portion of this population will experience the effect of criminal justice or will be victimised. The latest figures from both Manitoba and Saskatchewan indicate that courts in these provinces are using probation and conditional sentencing in increasing numbers.[222] Although this indicates that reforms are having some salutary effect, the need to develop alternatives to imprisonment in the Aboriginal communities and in urban settings populated by Aboriginal peoples remains. Both *Gladue* and *Wells* mandate sentencing judges not to use lack of treatment and other programs as excuses that justify the use of incarceration, particularly in less serious cases. Many Aboriginal offenders do not qualify for conditional sentences or probation because of their previous records, perceived risk of re-offending, or both. Such petty and persistent offenders are routinely incarcerated for a short period because judges have few options. This keeps the incarceration rate high and helps perpetuate reliance on imprisonment. The situation is one of the most compelling

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[220] Anne McGillivray and Brenda Comaskey, *Black Eyes All of the Time* (Toronto: University of Toronto Press, 1999), particularly Chapter 5, at 114.

[221] *Winnipeg Free Press*, January 1, 2000, at A1.

[222] Canadian Centre for Justice Statistics, *supra* note 77, at 10.

arguments for introducing a system of community-based and intermediate sanctions for less serious offenders.

Chapter 4 : The Need for Intermediate Sanctions and a Rough Equivalencies Model

Part 1: The Need to Develop A System of Intermediate Sanctions

Bill C-41 introduced a policy of encouraging the use of non-custodial sanctions[223] and reserving incarceration for the most serious offences.[224] One way to advance these twin objectives is to create a system of non-custodial or intermediate sanctions that allows for comparability and interchange among penalties. The need for a system of intermediate sanctions was addressed in the reports of the Canadian Sentencing Commission and the House of Commons Standing Committee on Justice and Solicitor General (the "Daubney Report"). Both recommended an integrated system of community based sanctions for less serious offences. Intermediate sanctions, as the name indicates, are measured in terms of severity or 'punitive bite'. They occupy the space between ordinary probation or small fines at one end and imprisonment at the other, and consist of non-custodial sanctions more substantial than small fines or routine probation. Short stints of confinement may also be included.[225] Andrew von Hirsch draws a distinction between intermediate and non-custodial sanctions:

> The term 'non-custodial penalty' has an overlapping but somewhat different meaning: it refers to any penalty not involving full custody in an institution of confinement. Non-custodial penalties thus include most kind of intermediate sanctions (except short stints of confinement), but include lesser punishments (such as small fines) as well.[226]

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[223] Subsection 718.2(d).

[224] Subsection 718.2(e).

[225] Andrew von Hirsch, *supra* note 79, at 57.

[226] *Ibid.*

Michael Tonry defines intermediate sanctions as:

> ...punishment lying between imprisonment and "ordinary" probation. These include fines, community service orders, intermittent confinement, "split" sentences combining a short term of confinement with a non-custodial disposition, and intensive supervision probation buttressed where appropriate by electronic and other monitoring techniques.[227]

Conditional sentences can be described as both intermediary and non-custodial. The current system includes the intermediate sanctions of fine, community service, probation, and conditional sentence. In a developed system of intermediate sanctions, these would be graded in terms of severity, with the objective of developing penal equivalencies. Each penalty could be measured in terms of its severity, compared to other sanctions, and in appropriate cases substitute for other penalties with same penal effect. Michael Tonry argues that:

> If fairness, rationality and improved crime control are to be achieved in our system of justice, the near vacuum between ordinary probation and incarceration must be filled by a graduate series of intermediate punishments imposed in a principled way. Until judges have adequate guidance directing them, to use intermediate punishments in appropriate cases and select among them, and between them and prison terms, these sanctions will continue to be underused and little respected.[228]

Norval Morris and Michael Tonry explore the need to develop a comprehensive system of sentencing based on expanded use of the intermediate sanctions and note:

> So far, much prevailing thought and practice concerning the relations between imprisonment and other punishments have been constrained by prison-or-nothing simplicities, and most scholarly analysis of the exercise of sentencing discretion and of disparity in the exercise of discretion has confined itself to two issues: disparities between those who are and those who are not sentences to prison, and

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[227] Michael Tonry, "Interchangeability, Desert Limits and Equivalence of Function," *supra* note 72, at 291.

[228] *Ibid.*

> disparities in the lengths of the prison terms imposed. Comprehensive analysis, however requires recognition of the need for a continuum of punishment and for the principled exercise of discretion in sentencing which covers the entire range of punishments [229]

Developing such a system of intermediate sanctions is advantageous for a number of reasons. First, it can restrain the use of imprisonment. At the middle range of severity, these sanctions are employed for offences of medium and upper-medium seriousness. As the lesser offences fall outside the scope of intermediate sanctions, they would receive lesser sanctions.[230] For example, trivial theft or public mischief offences that normally attract some form of probation or short terms of imprisonment under the proposed system will receive milder responses.

Second, a system of intermediate sanctions addresses the problem of net-widening. Developing rough equivalencies will enable fairer distribution of sanctions so that the gravity of offences matches the range of severity of the penalties. Third, it can help guide sentencing judges in choosing a sanction on a principled basis with reference to established sentencing principles. Judges need adequate guidelines on intermediate sanctions before they can make use of them in appropriate cases. If a judge has various intermediate sanctions at his or her disposal, he or she could select the most appropriate penal equivalent from the group of sanctions to replace the term of imprisonment at that level of severity, without violating the principle of proportionality.

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[229] Norval Morris and Michael Tonry, *Between Prison and Probation, Intermediate Punishments in a Rational Sentencing System* (New York: Oxford University Press, 1990), at 38-40.

[230] Andrew von Hirsch, *supra* note 79, at 67.

The theory of intermediate sanctions is relatively new and standards for intermediate sanctions are evolving. The two principle models of intermediate sanctions, that of Tonry and Morris [231] and of von Hirsch, Martin Wasik and Judith Greene,[232] reflect the continuing divide between retributivist and utilitarian models. Anthony Doob and Voula Marinos have added a social perspective to the ongoing discussions between the two schools of thought.[233]

Writing from a utilitarian perspective, Tonry and Morris put forward a theory on intermediate sanctions which is premised on 'limiting retributivism.'[234] The two crucial conceptions in their model are those concerning desert limits and interchangeability of function. According to the authors, there should be some desert-based constraints on the use of intermediate punishments. One proposed limit is that interchangeability should not be permitted for offences presumptively punished by imprisonment of 24 months or more. Such offences are considered too serious to warrant intermediate sanctions and interchangeability would lead to an unacceptable disparity.[235] A further desert-based constraint is that the penalty must neither depreciate the severity of the crime nor the

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[231] Tonry and Morris, *supra* note 229, Morris, *supra* note 171, Tonry, *supra* note 72, at 199.

[232] "Punishment in the Community and the Principle of Desert," (1989) 20 Rutgers Law Journal 595; Andrew von Hirsch, *supra* note 79, Martin Wasik and Andew von Hirsch, "Non-Custodial Penalties and the Principle of Proportionality," *supra* note 72, at 279.

[233] *Supra* note 176.

[234] Michael Tonry, *supra* note 227, at 291 –297.

[235] *Ibid.*

prior criminal record.[236] The second point in the authors' model is the notion of the interchangeability of sentencing options. Morris and Tonry propose 'exchange rates' to permit principled interchangeability between prison and non-prison sentences and among non-prison sentences. The authors speak of equivalency of function: one penalty may be substituted for another if they serve the same or similar penological purposes in the circumstances.[237]

Andrew von Hirsch, Martin Wasik and Judith Greene put forward an alternative model of intermediate sanctions based on "just desert." According to this model, desert can serve as the guiding principle in scaling non-custodial penalties. The desert theory permits most offences to be dealt with by non-custodial penalties. As the desert theory is concerned with measuring the severity of the offence and not the mode of the sanction, it allows considerable flexibility and permits substitution of sanctions.[238] If incarceration, for example, is an appropriate sanction for robbery, and a conditional sentence with conditions attached is roughly of the same severity, then conditional sentence can be substituted for incarceration without infringing desert limits. Substitution of sanctions of equivalent onerousness – rough equivalents – is permitted subject to pre-determined sentencing principles and rules.[239] Both models stress the need for intermediate sanctions to be considered as sanctions in their own right, not mere 'alternatives' to custody. This

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[236] *Ibid.*

[237] *Ibid.* at 292-3.

[238] Martin Wasik and Andew von Hirsch, "Non-Custodial Penalties and the Principle of Proportionality," *supra* note 72, at 279-280.

[239] *Supra* note 79, at 59.

follows from the recognition that intermediate sanctions involve both deprivation and censure. To promote acceptance of intermediate sanctions, both models favour development of clear implementary standards.[240]

Anthony Doob and Voula Marinos suggest a more elaborate intermediate sanctions regime, premised on severity but also measured in terms of acceptance by the offender, the victim and the public:

> We must first explore the meaning of a punishment to the public (and perhaps to the offender and victim) before we can decide which intermediate sanctions can be substituted for imprisonment for which offenses. Thus, for example, it may be that fines and community service orders can be seen as accomplishing somewhat different goals, as Morris and Tonry suggest. In addition, the public may see them as qualitatively different sanctions.[241]

Part 2 : The Potential for Developing a Rough Equivalencies Model

The recent Supreme Court decisions on conditional sentences clarify the new sentencing option and provide insight into how a system of intermediate sanctions based on penal equivalents could be developed. In *R. v. R.(S.N.)* Chief Justice Lamer observed:

> In circumstances where either a sentence of incarceration or a conditional sentence would be appropriate, a conditional sentence should generally be imposed.... I would note, however, that there may be circumstances in which a short, sharp sentence of incarceration may be preferable to a lengthy conditional sentence.[242]

This suggests that two sanctions of different types, one a term of incarceration, the other a conditional sentence, could be compared in their severity. This also opens the possibility that penal equivalencies or sanctions with equal 'penal bite' could be

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[240] *Ibid.*, at 58.

[241] *Supra* note 180, at 426-7.

substituted in appropriate circumstances. In these cases, even though rough equivalencies in principle can substitute for each other, nonetheless there will be sentencing considerations limiting the substitution between sanctions of equal severity. It also suggests that prison is more serious than a conditional sentence.

A system of intermediate sanctions includes two key elements: penal equivalencies and detailed guidance for their use. Non-custodial sanctions can be related to the principle of proportionality and graded in terms of relative severity. It is possible to rank intermediate penalties into groups of relative severity, with each group containing different types of sanctions (*e.g.*, conditional sentence or probation with substantial fine or community hours work). Such a ranking would enable judges to individualise the sentence and to preserve proportionality by first deciding how severe the sanction ought to be and then to select the most appropriate one from the group of penalties at that level of severity.

Both models of intermediate sanctions have their drawbacks. The 'just desert' model permits restrictive use of sanction interchange and restricts judicial discretion. If such a model is introduced, it will conflict with the current view of the Supreme Court of Canada on deference to sentencing judges by appellate courts. On the other hand, one of key underpinning of the Morris and Tonry model – function equivalencies – is not easily reconciled with proportionality and thus may be difficult to implement.

It appears that some form of compromise between the two models will accord with practical realities. Such a model will include introduction of a detailed grid of sanctions ranked according to their severity, to provide judicial accountability. In

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[242] *S. (R. N.)*, *supra* note 35, at para. 21.

addition, the model will require stricter rules of sanctions interchange and rules for departure from the presumptive sanctions for each level of sanctions.

Consider, for example, two offenders who are being sentenced for level one assault. The offences are minor and the sentencing judges consider a fit sentence to be either a conditional sentence or a short incarceration. Under the 'desert' model, substitution rules do not permit substituting penalties from the 'deeper end' of the pool. The Morris and Tonry model would allow functional interchange if sentencing objectives are satisfied. The current sentencing regime in Canada allows sentencing judges to exercise discretion and choose between these sentencing options. The example shows that we may have two sentences – one conditional sentence and one of incarceration which are equally fit. How will a system of intermediate sentences work in these circumstances?

In general, the system of intermediate sanctions will not change significantly the results in the 'deep end' of the pool of the offences, at the most severe level. Such a system is helpful at the intermediate and lower level of severity. Figures from Statistics Canada show that the vast majority of provincial admissions to custody are for a very brief period.[243] There is accordingly a greater promise for reducing the number of such admissions at the lower crime level.

A system of intermediate sanctions will contain bands or zones of sentencing discretion depending on the level of severity. Penalties could be divided into severe, intermediate and mild, and further subdivided, *e.g.*, in the upper and lower intermediate bands. We may, for example, create a basic model for such a system by using the grid based on the 'desert' model, grading sanctions on two axes – offence's seriousness and

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[243] Canadian Centre for Justice Statistics, *supra* note 8.

previous criminal record. We may divide penalties into four bands or zones, with the top zone reserved for the most serious sanctions and the bottom for minor ones.

Level 4 will includes penalties for offences which usually call for imprisonment between 18 and 24 months. Level 4 is the 'deep end' pool of sanctions for offences which are so serious that any punishment less than imprisonment would depreciate their seriousness. At this level rough equivalencies are most difficult to construct, given the conflicting objectives. On the one hand, one must devise penal equivalencies which are perceived by judges and the public as being as demanding and credible as the term of imprisonment they replace; and, on the other hand, to ensure that alternative sanctions remain within the parameters of the principle of proportionality without an unnecessary penalty increase. A rough equivalent to a custodial sentence at this level would be, for example, twenty-four months conditional sentence with curfew or house arrest and or probation.

Level 3 will include penalties for offences that usually call for imprisonment between twelve and eighteen months. Level 3 includes sanctions with upper intermediate severity. The same principles as Level 4 apply, except that there is no presumption in favour of incarceration. A rough equivalent to a custodial sentence at this level would be, for example, eighteen months conditional sentence with curfew or house arrest and or probation.

Level 2 will include penalties for offences that usually call for between six and twelve months of imprisonment. Level 2 includes penalties with lower-intermediate severity. As opposed to levels 4 and 3, non-custodial penalties have priority over

custodial ones. At this level, a rough equivalent to a custodial sentence would be, for example, twelve months conditional sentence with curfew or house arrest.

Level 1 includes penalties for offences that usually call for imprisonment under six months. Given that the overwhelming admissions to provincial custody are for brief periods, this band of sanctions is particularly important for the proposed model. Offences at this level of sanctions are less serious and the need for deterrence and denunciation is less pronounced. The effect of a short and sharp imprisonment would be achieved through other sanctions. In this sense, any punishment harsher than ordinary probation, small to moderate fine, community service or short conditional sentence would be unjust. At this level, not only imprisonment is one sanction among others, but non-custodial sanctions have priority over incarceration, unless imprisonment is justified: as a back-up sanction for intentional breach or committing further serious offences, or where there is a pressing need for denunciation or deterrence.

In our example, one of the sentences for assault could be either a short incarceration or, in the alternative, a conditional sentence. Care has to be taken to ensure that the conditional sentence is not combined with a cocktail of onerous conditions making this alternative to imprisonment harsher than the sanction it was designed to replace. This reflects the fact that offenders faced with the possibility of serving long conditional sentences with demanding conditions, or any other non-custodial sanctions, may well consider serving their prison terms instead.

Approximate ranking does not mean necessarily the formulation of precise interchanges or rules, but only that a framework of goals and standards be established to

provide guidance and perspectives.[244] Attempts to do so have been made. In *R. v. Visanj*,[245] Cole J. offered his analysis of the interchange between community work and a term of imprisonment. He considered 240 hours of community work to be the rough equivalent of 6 months imprisonment. More relaxed interchanges between community work and imprisonment is provided in *R. v. Lawrence*,[246] where the English Court of Appeal held that an order of 190 hours community work was an equivalent to one year's imprisonment. Andrew Ashworth gives an example of rough equivalencies among three non-custodial penalties: 150 hours community service equals one year's probation with attendance at a probation centre equals a combined order of one's year probation with 50 hours community service.[247] From *Proulx* and its companion cases we know that a conditional sentence must be at least as onerous as the custodial term. Current sentencing practice in Canada shows that a ratio between the length of conditional sentence and a term of imprisonment could be as great as eight times.[248] This high ratio is unjustified. Extensive conditional sentences have the potential to undermine the very objectives that *Proulx*'s purposive interpretation sought to enhance. If we use the principles of proportionality and restraint as our starting point, we could equate six month prison sentence to a twelve month conditional sentence, provided that only the compulsory and optional conditions in s. 742.3 (1) and (2) are imposed. Consistency in sentencing dictates that, if additional onerous conditions such as a curfew or a house arrest are imposed, they

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[244] Andrew Ashworth, *supra* note 73, at 290.

[245] [1997] O.J. No. 2771, 9 C.R. (5th) 388, (QL) (Ont. Prov. Ct.).

[246] (1982), 4 Cr. App. R (S.) 69 (Eng. C.A.).

[247] *Supra* note 73, at 289.

should be considered to reduce the length ratio between the conditional sentence and the term of imprisonment.

According to *Proulx*, no offence-specific or offender-specific categories of offences is excluded from the scope of the conditional sentence. Likewise, we may assume that, given that by definition intermediate penalties occupy the middle range of sanctions, less serious variants of offences will be included in the system of intermediate sanctions. As a matter of general policy, however, it is important that this model specifically addresses sub-categories of offences, if any, within the system of intermediate sanctions that are too serious for non-custodial sanctions. Unless a more detailed guidance is developed, judges may be hard pressed to choose among equally appropriate sanctions.

In addition to penal equivalencies, a more specific statement of policy with respect to the purpose and objectives of the system of intermediate sanctions needs to be adopted. The purpose is to achieve consistency and fair distribution in sentencing of non-dangerous offenders and less serious offences. The objective is to ensure that a custodial sentence is imposed only where, in terms of proportionality and restraint, any other sentence would be clearly inadequate. This will, in effect, create a presumption in favour of non-custodial sanctions, particularly at the intermediate and lower levels.

Under the proposed model, judges selecting sanctions from the lower and intermediate levels are still free to pursue their sentencing objectives. Judges can still adopt denunciation or deterrence as a sentencing goal and invoke a short sentence of imprisonment as the preferred sanction. Such a short, sharp sentence is both denunciatory

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[248] Canadian Centre for Justice Statistics, *supra* note 77, at 12.

and acts as individual deterrence. On the other hand, given the sliding scale of severity, jail for less serious crimes may be difficult to justify, as the shock effect of short imprisonment could be met by other sanctions. Because penal equivalencies satisfy both the requirements of proportionality and parity, the system of intermediate sanctions provides judges with the sanction alternative to short term incarceration. As the presumptive sanction of choice at the intermediate and lower level of severity is not the custodial sentence, judges may also be required to explain their departure from the norm. Thus in *Proulx*, Chief Justice Lamer ruled that failure to turn judges' minds to the possibility of conditional sentencing "may well constitute reversible error."[249]

The recurring problem of sending non-dangerous offenders to prison for less serious offences is the single most important factor mitigating against introduction of a system of intermediate sanctions. In 1998-99, the average sentence length was 44 days and more than 80 percent of the provincial admissions were for less than 6 months in length.[250] In the same period, 29, 514 adults or 19 percent of provincial and territorial admissions were admitted to provincial custody for failure to pay fines. Among the offences which routinely attracted short jail terms were minimum sentence offences. A first offence for impaired driving, for example, imposes a $300 minimum fine and many low-income people who could not pay the fine were sent to prison.[251] A court's decision to impose a fine usually implies that the case falls well below the level of seriousness required for a custodial sentence, and yet imprisonment was used as a back-up sanction

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[249] *Proulx*, *supra*, note 3, at para. 90.

[250] Canadian Centre for Justice Statistics 1999, *supra* note 8, at 13.

[251] *Ibid.*, at 82.

for non-payment of fines. As the original offence was either not serious enough for imprisonment or was inappropriate for custody, a system of intermediate sanctions should enable judges to explore other non-custodial sanctions for fine enforcement which do not involve imprisonment. The example of day fine options in other jurisdictions shows that such options almost completely eliminate imprisonment for fines. In Germany the policy of using structured fines in lieu of incarceration led to a 90 percent decrease in prison sentences shorter than six months. In Sweden, similar day fine programs led to sharp reductions of imprisonment for fines. Even though prosecutors can still convert unpaid day fines into prison days, by the late 1980s only 20 to 50 people were jailed annually.[252] In contrast, the latest statistics in Canada indicate that courts are placing lesser reliance on fine options.[253] We don't make good use of this sentencing option and continue to send people to prison for fines, despite many justice inquiries and the recommendation from the Canadian Sentencing Commission that prison for fine default should be restricted to offenders who can afford and willfully refuse to pay fines.[254]

Offences ranking lower on the penalty scale are also among the offences sending the largest number of offenders to prison. Latest statistics show forty four percent of provincial and territorial offenders were admitted for property crimes or other non-violent

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[252] National Council of Welfare, *supra* note 5, at 84.

[253] *Supra* note 8, at 16 and 17.

[254] *Supra* note 6, at 380.

Criminal Code offences (*e.g.*, offences against the administration of justice such as failing to appear or to comply with an undertaking).[255]

Offenders with a record for similar offences are most likely to receive prison sentences, given that a criminal record is an indicator of risk, which is used to decide that the mode of penalty for subsequent convictions is prison. Invariably invoking prison for recidivists offenders fails to distinguish serious from non-serious offenders.[256] Persistent petty offenders are often sent to custody for repeat commission of minor offences despite the fact that these people pose no risk of serious harm to the public. The proposed model of intermediate sanctions will empower and require courts to take a different approach to sentencing petty and persistent offenders or other non-dangerous and less serious offenders. It will exclude prison terms of up to six months unless, under the departure rules, imprisonment is justified. In general, custody will be limited to crimes in the upper-middle serious range (Level 4 and 3). The system will retain the presumption in favour of custody for repeat and serious offenders, but no such presumption will apply to petty offenders or to offenders in need of treatment.

Can the current practice of short jail sentences be reconciled with a system of intermediate sanctions? Andrew von Hirsch warns that "if imprisonment is a permissible option for lower-level crimes, the whole scheme of non-custodial sanctions is endangered."[257] One reason is that, if short term imprisonment is used as the basis for penal equivalencies interchange, this custodial sanction will exert upward pressure on the

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[255] Canadian Centre for Justice Statistics 2001, *supra* note 8, at 7.

[256] Andrew Ashworth, *supra* note 73, at 167.

[257] Andrew von Hirsch, *supra* note 79, at 59.

rest of non-custodial penalties, with the final result being that such non-custodial sanctions have to be as tough as the jail option. Given the current trend towards increased punitiveness, the idea behind the system of intermediate sanctions will be undermined if judicial and public acceptance hinges on more intrusive, non-custodial penalties than the imprisonment that they were supposed to replace. The belief that any reduction in the use of imprisonment requires a corresponding increase in the severity of non-custodial measures could have a chilling effect on alternatives to prison sanctions. Incarceration is used as a yardstick to measure the severity of non-custodial measures, albeit in one direction only – upwards. In a system of intermediate sanctions, incarceration is one sanction among others. If we want a workable system of intermediate sanctions, we have to deal first with the pitfalls of unrestricted use of imprisonment, particularly for middle and lower level offences.

The proposed model of intermediate sanctions will impose strict restrictions against any combination of different sanctions. The restrictions against combining different sanctions stem from the potential for overuse of 'cocktail sentencing'. The model must provide sufficiently clear interchange rates, so as to prevent proliferation of non- custodial measures. Fewer non-custodial penalties with developed penal equivalencies and rules set out for their use will be sufficient in a system of intermediate sanctions. Introduction of non-custodial measures will be both redundant and counterproductive if they will tend to widen the net. With the exception of day fine option, Canada has in its sentencing arsenal sufficient non-custodial options. There is no

need for new alternative sanctions over and above those that already exist in the sanction system: fines, probation, community service and conditional sentence.

Conclusion

Conditional sentencing was introduced, along with other legislative amendments in *Bill C-41*, in large part as a response to the problem of over-incarceration in Canada. It was designed as a community-based alternative to imprisonment for less serious offenders. Early statistics on the use of this sentencing option do not support the hope of its drafters that fewer offenders would be sent to jail as a result of its application. Two of the reasons for this unsatisfactory state are the problems created by net-widening and sanction-stacking and the lack of commitment and financial support from the institutions responsible for carrying on this sentencing regime. Courts view conditional sentences as a substitute for imprisonment and use imprisonment as a yardstick to measure severity. In *Proulx* the Supreme Court of Canada confirmed the need for tough conditions approximating the severity of the original prison term. Viewed as such, this sanction does not appear to have a purpose and effect *per se* beyond simply resembling incarceration.

Conditional sentences are not, however, just a substitution for imprisonment. They are distinct community based intermediate sanctions. Through the combination of imposed positive and negative conditions in 742.3 (2) of the *Criminal Code*, this sentencing option could fulfill objectives beyond deterrence and denunciation. Its creative use has the potential to address the need and interests of both victims and offenders. Conditional sentencing allows for greater victim participation and enables the offenders to maintain their ties with the community. The imposition of adequate conditions can further alleviate public concerns that this sanction is a soft option.

The persistent high rate of incarceration attests to the need for greater use of non-custodial sentencing alternatives. In its 1987 report, the Canadian Sentencing

Commission suggested greater use of community-based sanctions.[258] This recommendation should be revisited in light of latest developments since the 1996 sentencing reform. One way is to clarifying the inconsistencies in the current conditional sentencing. Another is to develop a coherent system of non-custodial and community - based sanctions. Other western democracies are focusing their attention on developing alternative systems to imprisonment and adopting policies declaring restraint and imprisonment as a source of last resource. The state of California is contemplating sentencing changes geared towards sentencing less serious offenders to treatment facilities. We have a number of sentencing options short of imprisonment, some of which are as onerous as, or more onerous than prison. Yet Canada has neither a coherent sentencing policy nor sentencing guidance for judges for non-custodial sanctions. Although the principle of restraint is now codified in ss. 718.2(d) and (e), we need to adopt a more specific statement of policy for such sanctions. This would ensure that prison is imposed only where on principles of proportionality and restraint, any other sanction would clearly be inadequate. Judges are in agreement that different sanctions accomplish different functions but they are uncertain about how to measure these sanctions without referring to the standard of imprisonment. Anthony Doob observes that, "Principles are necessary, but they do not provide sufficient guidance for the sentencing judge."[259] The proposed model is based on measuring non-custodial sanctions in terms of relative severity and on detailed guidelines for their use. Ranking of

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[258] Canadian Sentencing Commission, *supra* note 6, at 345.

[259] Anthony N. Doob, "Community Sanctions and Imprisonment: Hoping for a Miracle but not Bothering Even to Pray for It," (1990) Canadian Journal of Criminology 415, at 425.

community based and intermediate sanctions can be based on proportionality by first determining how severe the sanction ought to be and then selecting the most appropriate one of the group of sanctions at that level of severity. Sentencing guidelines would enable judges both to individualise the sentence and to preserve proportionality.

Whether such a system will be accepted much depends on public acceptance, attitudes of the judiciary and correctional authorities, and on government funding. The evidence suggests that the public and judges are generally supportive of the greater use of non-custodial sanctions.[260] To be effective, non-custodial measures ought to be adequately funded with financial support linked to the way resources are allocated within the correctional services with greater emphasis on alternatives to imprisonment.

We already have a range of acceptable non-custodial alternatives and ensuring that they are used in consistent way can be achieved. The existing legislative vacuum in the area of community based and intermediate sanctions, however, ought not be left to individual cases or judicial development. The lack of congruent sentencing practices attests to why sentencing should be reformed as a matter of general policy by Parliament, through, for example, sentencing commissions. An elaborate system of community based and intermediate sanctions will ensure consistency in sentencing and further Parliament's intent to reduce the use of prison.

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[260] Roberts, Antonovics and Sanders *supra* note 25; Canadian Sentencing Commission

supra note 8, at 370.

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