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A Preliminary Legislative Evaluation of the Conditional Sentence of Imprisonment: The Case of Ontario, 1996-97

"Submitted to the Department of Criminology,
University of Ottawa, in partial fulfillment of the
requirements for the degree of Masters of Arts"

Fall 1998

ACKNOWLEDGMENTS

The author wishes to thank Professor Julian Roberts, from the University of Ottawa, Criminology Department and Carole LaPrairie, from the Sentencing Review Team, Department of Justice, Research and Statistics Section, for their guidance in this research endeavor. In addition, I wish to thank all those who provided me with pertinent information. First and foremost, Cathy Underhill, from the Ministry of Correctional Services, who provided me with the Ontario data base on conditional sentences, which constitutes the primary basis of this thesis. Second, thank-you to Cindy Lee Olah and Micheline Reed, at Statistics Canada, Canadian Centre for Justice Statistics, for access to information on sentencing and corrections. Third, I'd like to thank Mr. Berzins, the head Crown attorney in Ottawa for allowing me to interview crowns about their experiences and perceptions on conditional sentencing, as well as the 11 crowns who gave me their time and insight. Also, I'd like to thank Dan Antonowicz, from Carleton University, for his help with SPSS. Finally, thank you to friends and family for their patience.

Abstract

Bill C-41, the Sentencing Reform Act became law on September 3, 1996. The legislation represents the culmination of nearly two decades of sentencing reform efforts. The conditional sentence of imprisonment, one of the Bill's provisions, is the focus of this thesis. The conditional sentence represents Parliament's response to Canada's high incarceration rate. This research examined the application of conditional sentences across the province of Ontario during the first fifteen months of its implementation. The basis of this analysis of conditional sentences is a data set of 4,633 conditional sentence orders imposed between September 1996 and November 1997. The sentencing data are complemented by an analysis of the case law from four Appellate Courts. Finally, a number of interviews were conducted with judges and crown prosecutors from Ottawa and Toronto in order to elicit their perceptions about conditional sentences. The findings present a portrait of the early application of the sanction in Ontario. It is clear that opinions respecting the conditional sentence and its application continue to evolve. Although the new sanction has often been imposed for property offences, it has not been restricted to these type of offences; the judiciary has demonstrated its willingness to apply the sanction to a variety of offences, including some very serious offences, such as sexual assault and manslaughter. The length of the average conditional sentence falls between the average prison and probation sentence, which supports the view that conditional sentences are considered to be intermediate sanctions, rather than prison alternatives in the strict sense. Finally, there is some preliminary evidence that the conditional sentence may contribute to "widening the net" of penal control; for instance, prison admission counts in Ontario did not decrease in direct proportion to the number of conditional sentences imposed. However, this conclusion is preliminary and further analyses of net-widening awaits more data relating to corrections as well as data pertaining to breaches of conditional sentence conditions.

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Chapter One

INTRODUCTION

On September 3, 1996, Bill C-41, the Sentencing Reform Act, was proclaimed in force. This legislation, which represents the federal government's first comprehensive sentencing reform scheme, became Chapter 22, Part XXIIII, of the *Canadian Criminal Code.* Bill C-41 represents the culmination of nearly two decades of sentencing reform efforts.[1]

A. The Canadian Sentencing Commission and the House of Commons Standing Committee on Justice and Solicitor General

The two most influential bodies of inquiry which contributed to the new sentencing legislation were the Canadian Sentencing Commission, which commissioned a number of studies about the sentencing process for the final report of its three year inquiry and. The Daubney Committee, which undertook a series of hearings across the country over a one year period.

The Canadian Sentencing Commission, created by an Order in Council in May 1984, consisted of nine part time commissioners working under the direction of Judge Omer Archambault of the Provincial Court of Saskatchewan. The Royal Commission was the first in Canadian history with a mandate dedicated entirely to reviewing the sentencing process. The Commission released the results of its inquiry in a 1987 report entitled *Sentencing Reform: A Canadian Approach.* The Commission concluded that the problems identified with the sentencing process and structure have existed for years;

[1] For a Chronology of Sentencing Reform, see "Appendix A".

reforms to date have been piecemeal in nature; in fact, the overall structure of sentencing had remained the virtually the same for over a century despite the presence of recurrent problems identified by previous Commissions and other bodies of inquiry. Therefore, the Commission believed that a comprehensive overhaul of the process and structure of sentencing was necessary to address these recurring issues and to effectuate significant change. (Summary Report of the Canadian Sentencing Commission, 1987;1).

Concerns about the sentencing process have been voiced for years in academic and professional circles as well as by the public. One of the most commonly identified concerns is the issue of *disparity,* that is, unwarranted variation among sentences, either within or across jurisdictions. The Sentencing Commission confirmed, based on responses by judges, defense and crown counsel and other criminal justice professionals, that unwarranted variation in sentencing is a problem in Canada (*Sentencing Reform: A Canadian Approach,* 1987: 56-59). A second important related concern with sentencing is Canada's incarceration rate, which ranks above that of most other Western-based countries (National Crime Prevention Council, September 1996; 9). In addition to the high incarceration rate, due in part to longer sentences and longer periods of time served, attention has turned towards over-reliance on prison as a penal sanction. Consequently, the need for more creative sentences, or alternative measures to imprisonment, has become a major focus for policy makers.

As professional circles awakened to the growing burden placed upon the justice system, particularly on corrections, the public was also voicing dissatisfaction with the judiciary and the parole systems. The judiciary was perceived by many members of the public as being "out of touch" with public sentiment. This perception was attributed in

part to an absence of knowledge about the operation of the criminal justice system, especially about the courts; distorted representations about the sentencing process; and certain sensational cases highlighted in the media. In short, the sentencing process was perceived as arbitrary, unfair and misleading. For instance, critics pointed to the discrepancy between the sentence imposed in court and the subsequent release of offenders by the parole system as an example of a lack of truth, fairness and consistency throughout the system. Finally, much dissatisfaction has been voiced by crime victims who are receiving greater attention due to political mobilization. In short, victims felt excluded from the justice process - uninformed, uninvolved, except in the capacity of witness and rarely compensated in any form.

The Sentencing Commission's (1987) report identified many of these recurring problems - lack of public confidence in the court system, perceived lack of equity, accountability and predictability; over-reliance on imprisonment; lack of attention to victims' rights and needs; as well as a need to develop and implement alternative forms of sentencing. These fundamental problems in the sentencing system were attributed to the inherent structure of the sentencing process and to an absence of adequate information about the process. Until Bill C-41, no statutory guidance existed about the role of sentencing and the proper judicial application of this role. The absence of such a policy was perceived by reformers as the greatest deficiency in the system. Therefore the development and inclusion of a statement of the purposes and principles of sentencing was considered essential to help guide judges.

With respect to the structure of sentencing, the minimum and maximum penalty structures were identified as problematic. In brief, the former were perceived as unfair

and the latter as outdated. The provincial Courts of Appeal, despite their important function of reviewing the fitness of sentences, were not considered a realistic or practical arena to develop national sentencing policy. There are ten different Courts of Appeal; the review process is individualistic; and the timeliness of issues and decisions is constrained. Finally, these courts tend to review only unusual cases. They do no see the more typical cases sentenced at the trial court level. In addition, the Supreme Court of Canada does not hear sentence appeals, regardless of different standards applied across provinces (Doob, 1997; 240). Therefore, among its many recommendations, the Commission suggested the implementation of a statement of sentencing policy from Parliament. According to the Commission, the statement provided by Parliament should represent a clear articulation of the purpose and principles of sentencing in order to structure the sentencing process within a clear framework.

An absence of adequate "information systems" was also identified as a fundamental deficiency. Judges, other criminal justice professionals, academics and the public need regular and accessible data about sentencing practices. Sentencing data would help the judiciary standardize the sentencing process by allowing individual judges to ground sentencing decisions in relation to those made by their colleagues across Canada. In addition, regular information systems permit the monitoring and meaningful evaluation of sentencing practices. The evaluation and analyses of sentencing practices is important in order to measure the effectiveness of sentencing policies, to assess the effects of sentencing on other areas of the criminal justice system, as well as to provide the public with more accurate information.

Conditional Sentencing

In its report, the Commission emphasized the need for *proportionality* in sentencing; the severity of a sentence should be proportionate to the gravity of the offense and the degree of responsibility of the offender. The Commission also emphasized the *principle of restraint* in imposing just sanctions, the purported goal of sentencing. The House of Commons Standing Committee on Justice and Solicitor General, which released its report in 1988, also produced a number of recommendations. Like the Commission, the Daubney report emphasized the need for proportionality in the sentencing process. However, the Committee placed greater emphasis on the principle of *accountability,* for both the offender and the criminal justice system itself, hence the report's name *Taking Responsibility.*

In summary, both reports provided rich insight into the sentencing process and structure in Canada and both reports offered a number of recommendations on how to improve the system in a comprehensive manner. At the heart of reform initiatives and re-emphasized in the federal government's 1990 report *Directions for Reform*, was the need to articulate the role of sentencing in the criminal justice system. Sentencing reform efforts have sought to answer the following questions: 1) What should judges try to accomplish when they sentence offenders? and 2) How should judges go about doing this? In short, what are the purposes and principles of sentencing?

Despite Canada's lag in sentencing reform compared to other countries such as the United States and some European countries, Bill C-41 was not the first attempt by the federal government to introduce changes to the sentencing system. In 1984, the Trudeau government introduced Bill C-19 and in 1992, the Mulroney government also tried to legislate changes to the sentencing process with Bill C-90, introduced by federal Minister

of Justice Kim Campbell. However, neither Bills were passed. Therefore, Bill C-41, passed by then-Justice Minister Allan Rock, under Jean Chretien's Liberal government, represents the first major legislated sentencing reforms in years.

B. Bill C-41: The Sentencing Reform Act

According to background information provided by the federal government, the package of sentencing reforms reflects a totally reorganized and rationalized sentencing system (*Backgrounder Sentencing Reform,* June 1994; 1). Bill C-41, now Chapter 22 of the *Criminal Code,* contains the provisions relating to sentencing from ss. 718 to 751.1 As recommended by all of the major bodies involved in consultations, the new sentencing section contains a statement of policy about the purpose and principles of sentencing:

STATUTORY STATEMENT OF
THE PURPOSE AND PRINCIPLES OF SENTENCING

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

a) to denounce unlawful conduct;

b) to deter the offender and other persons from committing offenses;

c) to separate offenders from society, where necessary;

d) to assist in rehabilitating offenders;

e) to provide reparations for harm done to victims or to the community; and

f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to the community.

Fundamental Principle
718.1 *A sentence must be proportionate to the gravity of the offense and the degree of responsibility of the offender.*

Other Sentencing Principles

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

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

i-evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, color, religion, sex, age, mental or physical disability or sexual orientation or any other similar factor, or

ii-evidence that the offender, in committing the offence, abused the offender's spouse or child, or

iii-evidence that the offender in committing the offense, abused a position of trust or authority in relation to the victim shall be deemed aggravating circumstances;

iv-evidence that the offence was committed for the benefit of, at the direction of or in association with a criminal organization;

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

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

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

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

Section 718 of the *Criminal Code* thus identifies the fundamental purpose of sentencing. This provision reflects a compromise between the two sentencing philosophies. For instance, sentencing should contribute to crime prevention, which reflects the government's commitment to a crime prevention approach, a utilitarian sentencing philosophy. However, the fundamental purpose also makes reference to "just

sanctions" which reflect a "just deserts" philosophy. In order for judges to achieve "just sanctions", Parliament has provided a list of sentencing objectives. The list includes the traditional sentencing objectives which have guided Judges for years and which are reflected in the case law - denunciation, deterrence, incapacitation and rehabilitation. In addition, the list contains two relatively new concepts. According to s. 718 e), sentencing should help provide reparations for harm done to victims and to the community. This objective is consistent with the concept of restitution and/or compensation and reflects the influence of victims' rights and an interest in restorative approaches to deal with crime. Finally, the last objective, s.718 f) reflects the influence of the House of Commons report (1988) which, as mentioned previously, stresses the notions of responsibility and accountability.

In section 718.1 and 718.2, Parliament has also provided the judiciary with a number of guiding principles. The fundamental principle is proportionality, a concept advocated by both landmark reports. The proportionality principle clearly reflects a "just deserts" philosophy. Despite the fact that proportionality remains the fundamental sentencing principle, Parliament has also included a number of other "secondary" principles. In an unusual step, the government also took the opportunity to make policy pronouncements about certain offences. For instance, being motivated by hate, or crimes that involve an abuse of trust or positions of authority are specified as aggravating factors. The secondary principles reflect the principle of equity or parity, as embodied by section 718.2 b), consistent with a "just deserts" philosophy. Finally, the last three secondary principles, section 718.2 c) d) and e) represent a statutory embodiment of the

principle of restraint, particularly with regards to the use of incarceration, one of the Bill's most important policy goals.

The rest of Bill C-41 contains a number of changes to various sentencing-related options and procedures: s. 720 - s. 729(1) of the *Criminal Code* contain a codification of the rules of procedure and evidence to follow at sentencing hearings. The probation provisions were modernized and reorganized to address a number problems in the former regime. The fine system underwent a number of changes in order to prevent its application against those who are unable to pay and consequently are imprisoned, a significant contributing factor to the incarceration problem in provinces such as Ontario[2] *(Sentencing and Corrections Reforms, Speaker's Kit*; 1). The new fine scheme also allows officials to deal more effectively with offenders who are deemed able to pay but who default. Sections 738 through 741.2 introduced the option of a restitution order as a stand alone non-carceral penalty. And, most importantly, the provisions included a brand new sentencing option, - the new conditional sentence of imprisonment outlined in s. 7421. to 742.7 of the *Code.*

Taken as a whole, what does Bill C-41 represent? According to the federal government, Bill C-41 represents part of an effort to overhaul the Canadian criminal justice system. The federal government summarizes the reforms as representing a ... "balanced, sensible and broad range of options that address the public's need for safety, victims' desire for restitution and the important principle that serious offenders should be

[2]Canada, Solicitor General. 'Module 3 - Sentencing Reforms', *Speaker's Kit, Sentencing and Corrections Reforms*, 1p. According to the report, a third of all the people in provincial prisons are there for failure to pay fines.

treated differently from minor or first time offenders" (Backgrounder Sentencing Reform, 1994; 1).

Following the implementation of Bill C-41, a number of commentaries were written about the legislation. The reforms were considered a disappointment by many writers, given the extensive work conducted by the main bodies of inquiry. Although a complete analysis of these commentaries is not possible here, a few observations are worth mentioning. First, it was noted that the government failed to implement a structured guideline system, whether precatory or presumptive in nature. As a result, the statutory statement of purpose and principles remains the principal basis upon which judicial decision-making occurs. Second, the list of sentencing objectives is an eclectic one which includes all the traditional objectives. Therefore, arguably, s. 718 simply represents a codification of the status quo. Individualization, judicial discretion, remains a dominant feature of the sentencing process in this country, at the expense of greater structure and standardization. The relative merits of judicial discretion over greater standardization remain unresolved. For the perspective of the bench, discretion is generally welcomed. However, given the tendency toward the former, there is risk that the overall impact of the legislation on the sentencing process will be largely symbolic and that some of problems which have arisen from an absence of greater structure, such as unwarranted disparity will continue to exist.

Despite the various critiques of the Sentencing Reform Act, Bill C-41 marks a number of important steps. First and foremost, the Bill represents Parliament's re-entry into the arena of sentencing policy. In legislating a statement of the purpose and principles of sentencing, Parliament began dictating sentencing policy to the judiciary.

Judges in Canada have historically enjoyed almost sole responsibility for sentencing. Although Parliament has refrained for the time from imposing greater constraints over judicial discretion, the government has taken some responsibility for the process, a move which opens the door for further involvement. In addition, legislative involvement signifies symbolically that the public's views on sentencing are now represented through the voice of Parliament.

Parliament has codified the "principle of restraint" as expressed in sections 718.2 c) d) and e). The principle represents acknowledgment by the federal government that is costly and limited in its ability to effectuate a significant impact on the crime rate or to produce a positive change in offenders. Third, Bill C-41 contains a provision, modeled on the Young Offenders Act, for the use of alternative measures. The provision allows provinces to establish and administer their own alternative measures program. Therefore, the federal government conferred the power to develop more creative alternative sentences to the provincial level. Finally, the government introduced a new sentence. Section 742.1 of the *Criminal* Code introduces the conditional sentence of imprisonment, a specific alternative to imprisonment for certain adult offenders who might otherwise be incarcerated. In combination, these provisions embody the necessary framework to help realize the government's goals - reduce the prison population, reserve prison space and resources for high risk serious offenders and reduce Canada's reliance on imprisonment as a sanction.

This thesis will focus on the new provision, the conditional sentence, which I believe to be the most innovative and promising development within Bill C-41. Section 742.1 of the *Criminal Code* reads as follows:

Conditional Sentencing

Conditional Sentence of Imprisonment
(sections 742.1 to 742.7)

742.1 Imposing a Conditional Sentence - Where a person is convicted of an offense, except an offence that is punishable by minimum term of imprisonment, and the court

a) imposes a sentence of imprisonment of less than two years, and

b) is satisfied that serving the sentence in the community would not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing set out in sections 718 to 718.2

the court may, for the purposes of supervising the offender's behavior in the community, order that the offender serve the sentence in the community, subject to the offender's complying with the conditions of a conditional sentence order made under section 742.3.

As the legislation demonstrates, the conditional sentence is a penal option available to adult offenders who would normally be headed to provincial correctional institutions. The conditional sentence order, like a probation order, includes a number of compulsory conditions as laid out in s. 742.3(1) of the *Code*.

742.3 (1) Compulsory conditions of conditional sentence order - The court shall prescribe, as conditions of a conditional sentence order, that the offender do all of the following:

a) keep the peace and be of good behavior;

b) appear before the court when required to do so by the court;

c) report to the supervisor;

(i)within two working days, or such longer period as the court directs; after the making of the conditional sentence order, and

(ii)thereafter, when required by the supervisor and in the manner directed by the supervisor;

d) remain within the jurisdiction of the court unless written permission to go outside that jurisdiction is obtained from the court or the supervisor; and

e) notify the court or the supervisor in advance of any change of name or address, and promptly notify the court or the supervisor of any change of employment or occupation.

In addition, the Judge may add an unlimited number of other conditions, as he or she deems necessary, to ensure compliance with the order and to maintain the good behavior of the offender:

(2) Optional conditions of conditional sentence order - The court may prescribe, as additional conditions of a conditional sentence order, that the offender do one or more of the following:

(a) abstain from

(i)the consumption of alcohol or other intoxicating substances, or

(ii)the consumption of drugs except in accordance with a medical prescription;

(b) abstain from owning, possessing or carrying a weapon;

(c) provide for the support or care of dependents;

(d) perform up to 240 hours of community service over a period not exceeding eighteen months;

(e) attend a treatment program approved by the province; and

(f) comply with such other reasonable conditions as the court considers desirable, subject to any regulations made under subsection 738(2), for securing the good conduct of the offender and for preventing a repetition by the offender of the same offence or the commission of other offences.

A third very important section of the new provision is that which deals with the procedures for breaches of the conditional sentence order:

s.742.5 (3) Hearing - An allegation of a breach of condition may be heard by any court having jurisdiction to hear that allegation in the place where the breach is alleged to have been committed or in the place where the accused is found, is arrested or is in custody, but where ....and any allegation of a breach shall be heard

(a) within thirty days after the offender's arrest, where a warrant was issued; or

(b) where a summons was issued, within thirty days after the issue of the summons.

Finally, s. 742.5(9) lays out the provisions to deal with a breach once it has been confirmed:

(9) Powers of the court - Where the court is satisfied, on a balance of probabilities, that the offender has without reasonable excuse, the proof of which lies on the offender, breached a condition of the conditional sentence order, the court may

(a) take no action

(b) change the optional conditions;

(c) suspend the conditional sentence order and direct

(i)that the offender serve in custody a portion of the unexpired sentence, and

(ii)that the conditional sentence order resume on the offender's release from custody, either with or without changes to the optional conditions;

(d) terminate the conditional sentence order and direct that the offender be committed to custody until the expiration of the sentence.

As section 742.5(3) a) and b) highlight, a hearing must be held within thirty days of an alleged breach. Guilt is assessed on a balance of probabilities. Some concern has been expressed by commentators such Gemmell (1997) who explored the constitutionality of the breach provision in his article, "The New Conditional Sentence Regime". However, the credibility of the conditional sentence rests on the threat of imprisonment. Therefore, to ensure the offender's good behavior and to maintain the sanction's credibility, administrative expediency is considered necessary. Some would argue that the provisions are not strict enough because imprisonment is not guaranteed. In fact, as s. 742.5(9) illustrates, the powers of the court are wide. The court may take either of two extremes - that is, no action at all, or incarcerate the offender for the remainder of

the order. This wide discretion may undermine the power of the custodial threat, and thus the underlying basis of the provision. However, greater discretion permits judicial flexibility in response to the circumstances of the breach situation.

C. The Conditional Sentence and Sentencing Reform

Where does s. 742.1 fit within the legislation's overriding goals? Presumably, s. 742.1 represents a specific manifestation of the government's desire to develop prison alternatives. The conditional sentence can help reduce the prison population and traditional reliance on imprisonment as a sanction. A conditional sentence is supposed to be the penal equivalent to a custodial term; it represents a change in the setting of the sentence, which is in the first instance, a custodial one, much like parole is said to represent a change in the context in which the sentence is carried out, but not a change in the sentence itself.

Although the conditional sentence is consistent with the desire to effectuate a reduction in the incarceration rate and to develop community-based alternatives, whether it is consistent with other goals related to Bill C-41 is questionable. For instance, the issue of unwarranted disparity, a central concern during the review process, will be difficult to resolve given that the conditional sentence is a discretionary one. There will likely be similar offenders who have committed similar crimes, who receive different custodial sentences - one a prison term and one a conditional prison term to be served in the community. In addition, concern over victims' and public confidence in the sentencing and criminal justice systems will be tested with the new provision. Whether the new sanction will advance victim and public satisfaction will depend on how the provision is applied and how well the public understands it.

The targeted clientele of the new provision is adult offenders who have been sentenced to a prison term in a provincial correctional institution. Aside from this general designation, there is little to indicate exactly for whom the conditional sentence is appropriate. This decision is left to the discretion of the judiciary. Then Justice Minister Allan Rock stated that the conditional sentence is designed for ... "less serious, first time offenders who otherwise would be in jail, but who under tight controls, could serve their sentences in the community" (Backgrounder Sentencing Reform, 1994; 5-6). However, there are no statutory guidelines to describe who is "less serious" and there are no statutory prohibitions against any particular type of offence. Therefore, the conditional sentence is available potentially to all offenders who meet the two basic criteria, as laid out in s. 742.1 - where no minimum sentence of imprisonment is required and where the offender is eligible for a term of imprisonment of less than two years.

This unresolved state of affairs gives wide latitude to the judiciary, which is charged with the responsibility of interpreting the application of conditional sentences. The growing body of case law attempts to provide some answers to the following questions: 1) How does section 742.1 of the *Criminal Code* apply at the sentencing process? 2) How should the judiciary reconcile the application of section 742.1 with sections 718. to 718.2, the purpose and principles of sentencing? and 3) What circumstances render a conditional sentence appropriate? As Chapter three summarizes, the appellate courts have been grappling with these issues. In addition to the evolving case law, a number of scholarly articles have been published about the conditional sentence of imprisonment. These academic reflections offer interpretations of s. 742.1 and highlight important issues raised by the new provision. The scholarly literature, like

the case law, is exploring the intention behind the new provision and accordingly, the best way to structure its application in order to ensure that the provision is implemented in a principled manner.

D. Legislative Evaluation:

In *Evaluating Justice,* Hudson and Roberts highlight the fact that policy makers and practitioners in the justice system are incresingly called upon to account for their efforts. There is greater pressure to produce objective, quantifiable and public evidence about program efforts and results (Hudson and Roberts,1993;3). Evaluating new programs and policies has always been important. However, given greater emphasis on cost, as well as greater demand for accountability, the role of evaluation is essential. Program and policy evaluations help to determine whether new programs and policies are achieving their intended goals as well as to identify and monitor unintended consequences, while striving to manage resources in a more efficient manner.

One example of a new policy is legislation, passed by the federal government in the House of Commons, which then becomes law. In the case of criminal law, legislation is administered by the provinces who are responsible for most of the administration of justice. As is customary when the government introduces new legislation, follow-up evaluation is conducted to assess the impact of the changes. For instance, Bill C-127, an "Act to Amend the Criminal Code in relation to Sexual Offences and Other Offences Against the Person", was proclaimed law by Parliament on January 4, 1983. The law represented an attempt to address concerns voiced about the treatment of rape and rape victims by the criminal justice system. Like Bill C-41, the new rape laws introduced important legislative changes. Therefore, its was important to evaluate its impact. For

example, did the new laws encourage more women to report their victimization? Did changes in sentencing patterns occur as a result of the new scheme, etc. (Hudson and Roberts,1993; 136).

Despite some disappointment with the final result, the new sentencing legislation still represents the most significant Parliamentary intervention into the sentencing process in years. Therefore, it is imperative that the effects of the legislation be monitored. However, evaluating legislative change is a complex endeavor. The full impact of the new law may take years to emerge, and legislation operates at several levels (Hudson and Roberts, 1993; 141) . With this in mind, I propose to conduct a legislative evaluation of the conditional sentence, now section 742.1 of the Canadian *Criminal Code.*

The conditional sentence is the focus of this thesis for several reasons. First, the scope of the present work does not permit an evaluation of the entire Bill, which is a long and complex piece of legislation. Second, the conditional sentence is the most significant provision within the Bill, since: a) the provision is an innovative addition to the sentencing process; b) the new sanction has been popular among the judiciary;[3] c) s. 742.1 is controversial; d) the conditional sentence was the least understood provision in the Bill due to the ambiguous design of the legislation; and e) the conditional sentence tries to induce a move away from traditional reliance on custody as a sanction.

If this new sentence remains poorly understood, or even misused, it will undermine some of Parliament's other intentions, such as reducing unwarranted sentencing disparity. Public confidence in the criminal justice system is also at risk. In

[3] As of April 30th, 1998, 22, 687 conditional sentences have been imposed in Canada. Department of Justice, Research and Statistics Section.

addition, recurring misuse of the new sanction and subsequent public outcry will create political pressure for the government to amend or to remove the provision. Therefore, it is first imperative to ascertain, how the new sentence has been used by the judiciary since its implementation and that is the principal task of this thesis.[4]

Chapter two contains a description of the conditional sentence data base provided by the Ontario Probation and Parole Services. Chapter three contains a summary and analysis of the case law pertaining to conditional sentences; this analysis focuses primarily on judgments released by the Ontario Court of Appeal. However, a few important appellate decisions released by other provincial Courts of Appeal, namely, British-Columbia, Alberta and Saskatchewan are examined. Chapter four contains an overview of the Ontario data pertaining to conditional sentences. This chapter summarizes data relating to offender characteristics as well as other variables. Chapter five examines conditional sentencing data relating to the nature of the sanction, specifically in terms of length. Chapter six examines the data pertaining to conditional sentence admissions, as well as prison and probation. Finally, Chapter seven includes the last section of the statistical analysis, an overview of the type of offences granted a conditional sentence during this time period. The findings from each chapter are discussed in order to paint a preliminary portrait the application of conditional sentences in this province during the first fifteen months of their implementation. Chapter eight concludes this exploratory look at conditional sentences. The chapter returns to the issue of sentencing reform and raises some areas for future research on conditional sentences.

[4] This preliminary legislative evaluation is exploratory and descriptive. This work does not include a comparative analysis of conditional sentences and other sanctions.

Chapter Two

METHODOLOGY

This chapter describes the database which forms the basis of my analysis of the judicial application of conditional sentences across the province of Ontario. The chapter will be divided into two sections: A) The first section includes the database of information collected by probation offices across the province; B) the second section includes brief summary of interviews conducted with crown prosecutors in the Toronto area and Ottawa courts.

A. Statistical Database

This legislative evaluation of section 742.1 of the *Code* rests primarily on an examination and critique of the recorded data with respect to the new sanction. The Probation and Parole Service is the main agency delegated the responsibility to administer the new sanction. Consequently, this agency is the main source of statistical information pertaining to offenders serving a conditional sentence order and to the administration of the sanction in this province. Information regarding the above is collected by probation officers on offenders who are serving conditional sentence orders at each of the 116 probation offices across the province. The data are then forwarded to the head office of Probation and Parole services in North Bay. As a result, a database on conditional sentences is available at the Statistical Services, Correctional Services Branch of the Ministry of the Solicitor General and Correctional Services.[5]

[5] Data collection, recording and in-put was done by various probation officers across the province and the database is maintained by the Ministry of Correctional Services. Since it cannot be verified at source, I am assuming that the data collection and entry was done properly.

The data presented in Chapters four through seven, are drawn from conditional sentence orders with starting dates between September 1st, 1996 and November 7th, 1997. In total, the database includes 4,633 conditional sentence orders imposed during this time period, a database of significant size. Personal identifiers, such as names, and ministry ID numbers, have been stripped from the data records. The database was formatted and analyzed in Windows SPSS, one of the Statistical Software Packages for the Social Sciences.[6]

The data records include a number of important variables which yield pertinent information about the type of offenders who have received conditional sentences in the first year of their implementation in Ontario. The data also reveal what type of offences received a conditional sentence. Finally, the database also includes variables such as length of order, which reveal the nature of the conditional sentence itself as it is being applied by the judiciary in Ontario.

Data Limitations:

The data contains a number of shortcomings. First and foremost, the present data records do not contain any information about the possible optional conditions attached to a s. 742.1 order. According to section 742.3(2) of the *Code*, a judge can attach additional conditions to the sanction in order to secure the good conduct of the offender and to prevent a repetition of the offence or the commission of other offences. Given that the federal government has promoted the new sanction as a penal equivalent to imprisonment, the systematic collection of information about the nature of all conditions attached to conditional sentence orders would provide a more complete assessment of the

[6] Refer to APPENDIX B for the description of the file structure and a data dictionary.

nature of the sanction; for instance, such information would allow for comparisons between the nature of conditional sentences, parole, suspended sentences and probation.

The second significant source of information which is absent from the present data set concerns breaches of conditional sentence orders and the judicial reaction to these breaches. This information exists in the case files of each individual serving a conditional sentence, as does information pertaining to conditions, however, there was no systematic recording and compilation of such information at the time of my data collection. A thorough evaluation of breaches is not yet possible. Nevertheless, breach information is important in order to assess the nature of the sanction itself and its relation to other types of sanctions. The routine collection of such data would be a significant addition to the knowledge base about conditional sentences.

In addition to the lack of information about conditions and breaches, there are some limitations to the data set itself. Certain variables in the data set are missing in several cases. The missing data result either from the unavailability of the information at the time of recording, or, an omission during the recording of the information on the part of the probation officer. The variables which have the most missing cases are "employment" and the four "substance abuse" indicators. The variable "employment" indicates whether the particular offender was employed at the time of sentencing. Aside from the absence of greater detail about the nature of employment, information is unavailable in almost half of the cases. Presumably this information is available in the offender's file at his/her probation office. If so, its absence is unfortunate as it represents merely an omission on the part probation officer to include this material. However, the remaining number of cases still represent a large enough sub-set with which to conduct

some analyses. The variables pertaining to substance abuse, however, are missing values for most of the cases. Therefore, I did not include these variables in my analysis. This information is not an express requirement from the Ministry for the purpose of data collection. It is used by probation officers to help manage their cases, thus, it is recorded at the discretion of each officer.

The data structure, as provided by the probation services, was also a challenge to adopt to the requirements of my thesis. The data set is designed essentially to serve as a record keeping database for the Ministry of Corrections. Therefore, it was necessary to reorganize some of the data in order to be able to extract the information required. For instance, many of the variables were coded with alpha numeric codes rather than with numeric codes. Consequently, it was necessary to recode these variables into numeric codes in order to allow the statistical software package to perform certain statistical tests. Also, several categories were reorganized in order to simplify the analysis.[7]

Section A represents a summary of the statistical database that forms the basis of my analysis in chapters four through seven. The findings drawn from this data base are displayed in tables throughout the four chapters, which taken together, provide a descriptive representation of conditional sentence orders. The next section includes a brief summary of interviews conducted with crown counsel in Ottawa and Toronto. The interviews were conducted with the goal of eliciting the personal and professional perceptions of crowns on the use of conditional sentences. A description of the

[7] Refer to APPENDIX C for a summary of thr manipulations conducted on the data.

questionnaire/interviews is included here because some of the study's findings will be referenced throughout the thesis.[8]

B. Crown and Judge Interviews

The Department of Justice is undertaking a number of initiatives as part of its plan to monitor and to evaluate the implementation of Bill C-41. Section 742.1 is a brand new sanction in Canada. Consequently, the sentence is generating many questions with respect to its application. Some questions cannot be answered adequately with a statistical review of data records and thus require special studies. One such research study consists of interviews with crowns and judges to elicit their thoughts and experiences on the use of conditional sentences, particularly their use in cases of domestic and sexual assaults. The interviews are designed to generate responses in relation to domestic and sexual assaults because the use of conditional sentences here is most controversial. In addition, the interviews were extended to include some federal prosecutors in order to discern their perceptions about the use of conditional sentences for drug offences (LaPrairie, Koegl and Neville, 1998a; 3).

The interviews with crowns were part of a broader project into the perceptions and opinions of judges and crown prosecutors in select urban courts about the use of conditional sentences.[9] The judge's study involved in-depth interviews with 17 judges who presided in provincial courts in and around the city of Toronto; the study of crown prosecutors involved interviews with 11 crowns in Ottawa, conducted by myself and 15

[8] For a copy of the interview questionnaires with judges and crowns, refer to APPENDIX D and APPENDIX E.

[9] This broad project refers to the on-going monitoring and evaluation efforts by the Sentencing Review Team, federal Department of Justice.

interviews in the city of Toronto conducted by Chris Koegl and Carol LaPrairie (1998b), for a total of 26.

A questionnaire with a number of components was designed and pre-tested. The components related to the following issues: the sentencing legislation; the number of conditional sentences in which prosecutors have been involved (including joint submissions and/or plea bargains); breaches; offences and offenders for which a conditional sentence is appropriate and inappropriate; offences, if any, which should be explicitly excluded in the legislation; availability of supervisory and treatment resources; Court of Appeal decisions; and public perceptions of conditional sentences. Finally, there was a question about the future of conditional sentences and any changes respondents felt were required.

With respect to the crown study, each interview took approximately 45 to 60 minutes. Of the 26 interviews conducted with crown prosecutors, there were 13 males and 13 females involved. The mean number of years experience as a prosecutor was 7.6 years. Six of the respondents were federal drug prosecutors, four respondents had been or were assigned to the Child Abuse Team and six respondents had been or were presently assigned to the Domestic court. It is important to note that no attempt was made to obtain a random sample of crown attorneys. Thus, the findings cannot necessarily be generalized to all crown prosecutors. The experiences and views reflect those of a relatively small number of attorneys drawn from two urban cities in Ontario. Nevertheless, the interviews provided some preliminary findings about a number of issues surrounding the use of conditional sentences. Some of these findings will be discussed in later chapters as they relate to the data. (LaPrairie, Koegl and Neville, 1998a; 3-4).

Chapter Three

CASE LAW SUMMARY ON CONDITIONAL SENTENCES

This chapter comprises a summary of important appellate decisions relating to s. 742.1 of the *Criminal Code.* Given the large number of orders to date, (over 22,000), it is impossible to conduct a complete summary analysis of all conditional sentence orders imposed by trial courts. Therefore, the direction provided by appellate courts to trial court judges in their application of the new sanction will be the focus. After all, it is the appellate decisions that serve as guidelines. Once a decision is rendered by a trial court judge, defence or crown counsel may request leave to appeal the verdict and/or the sentence imposed. If the Appeal Court approves the leave to appeal, the verdict or the sentence is reviewed by a panel of judges who decide whether to uphold the decision made by the trial judge or to grant the appeal and render a new verdict, or in this case, a new sentence. The *Criminal Code* provides for an appeal of sentence on one ground - fitness of sentence. In deciding whether a sentence is fit, the appellate court must be guided by the decisions of the Supreme Court of Canada. Chief Justice Lamer summarized the scope and the role of appellate review in *R. v. M (C.A)*: "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 if the sentence is demonstrably unfit" (OLAP, 1997; 44-45).

Appellate decisions then are an important source of information and guidance, especially in a system without formal guidelines. Courts of Appeal provide information and direction about the appropriate sentence in nature and/or in length for particular types of offences or circumstances. Appeal courts also make pronouncements about general

principles, sentencing objectives and the proper application of sanctions. Such decisions then serve as models to guide trial court judges in their sentencing decisions. It is customary that the most recent decision represents the leading case. The leading case stands for the final word on the subject until Parliamentary intervention or until the next appellate decision. Therefore, the process is an evolving one. Trial court judges do not necessarily follow the dictates of the Courts of Appeal in their routine decision-making process. It is impossible to know with certainty how judges arrive at their decision about granting a conditional sentence. Despite the criteria outlined in s. 742.1 of the *Criminal Code*, the conditional sentence provisions and the statutory enactment of the purpose and principles of sentencing encoded in section 718 to 718.2, judicial decision-making is still characterized by a significant degree of discretion. However, in the absence of greater clarity regarding the application of s. 742.1, appellate decisions represent the most important reference point for trial court judges who must incorporate this new and potentially confusing sentencing option in their sentencing framework.

Chapter three focuses primarily on decisions released by the Ontario Court of Appeal, as this thesis is restricted to judicial activity surrounding conditional sentences in Ontario. There are ten Courts of Appeal in Canada. However, despite these provincial/territorial divisions, trial court judges and appellate judges can and do defer to other influential appellate decisions from outside their respective jurisdictions. British-Columbia, Alberta and Saskatchewan have each delivered important guideline judgments with respect to the application of conditional sentences. Therefore, the chapter includes a brief overview of a few select "out of province" judgments. The cases summarized below

are highlighted because the appellate judges have made general pronouncements about conditional sentences in addition to reviewing the particular case in question.

The chapter is divided into the following sections: Ontario Court of Appeal decisions (*R. v. Scidmore*, *R. v. Pierce*, *R. v. Wismayer* and *R. v. Biancofiore*); British-Columbia Court of Appeal (*R. v. Ursel*); Alberta Court of Appeal (*R. v. Brady*); and Saskatchewan Court of Appeal (*R. v. McDonald)*. The statutory amendment of s. 742 which was introduced by Parliament in April 1997 in discussed briefly. Each section contains a brief description of the specific case, the trial court decision, the grounds for appeal and the ultimate appellate court decision. Finally, the chapter concludes with some general conclusions about conditional sentences based on the status quo of appellate decisions, as of May 1998.

A. Appellate Courts

Ontario Court of Appeal

There are four major appellate decisions about conditional sentences from the Ontario Court of Appeal. Although the most recent decision represents the leading case, together, the decisions illustrate the ambiguous design and confusing interpretation of the provision. In addition, the four cases demonstrate a certain evolution in the interpretation of s. 742.1. The first case in particular (*R v. Scidmore)* is notable because it established a very low threshold for the application of conditional sentences. In fact, the *Scidmore* decision probably stimulated the legislated amendment to s. 742.1, introduced in the spring 1997.

Scidmore (indecent assault on a student by teacher)

[(1996), 112 C.C.C. (3d) 28. 3 C.R. (5th) 280 (Ont. C.A.), discontinuance of application for leave to appeal filed March 3, 1997, Court File No. 25844 (S.C.C.). McKinlay, Catzman and Abella, JJ.A (dissented)]

The appellant, a school teacher, was convicted of indecent assault as a result of incidents that took place with an eleven-year-old student several years earlier. The trial judge found the accused guilty of indecent assault. The accused lost his job as a result of the conviction. He was sentenced to a year in jail. Upon appeal, the court determined that the appeal for conviction was unfounded as the evidence of the complainant was accepted. In addition, the sentence of one year was not considered excessive. However, given the specific set of circumstances, the trial court judge believed the case was appropriate for the new conditional sentence. The mitigating factors cited by the court included the following: the age of the offences; the appellant's unblemished record as a teacher; the lack of evidence indicating any involvement with other students; the appellant's excellent record in the community; the loss of his job as a result of the conviction; and, the safety of the community not was not endangered. The principal aggravating factors were the serious nature of the offence and the fact that a "breach of trust" had occurred. The aggravating factors were used by the court to determine the *length* of sentence. The Honorable Justice Abella dissented from her two colleagues. Justice Abella stated that the factors used to determine the *fitness* of sentence, namely the nature and age of the offences, and the appellant's good community reputation should not trump the "breach of trust or authority" which requires a higher threshold. In this case, Justice Abella believed a term of custody was required. The sentence appeal was granted.

The sentence duration was affirmed, but the sentence was varied to allow for it to be served in the community, subject to a section 742.1 order.

Methodology:

According to *Scidmore,* where no minimum term of incarceration applies and the length of the sentence is less than two years, the offender serves the sentence in the community unless he/she poses a risk. *Scidmore* advocated a rigid two-stage process: first the court should determine the length of the prison sentence, taking into account all relevant factors, including those identified in the *Code*. In a second stage, the court must then consider the provisions outlined in s. 742.1. The majority of the Ontario Court of Appeal stated that the only test set out in s. 742.1(b) was whether the imposition of a conditional sentence would in any way "endanger the safety of the community".

Pierce (defrauding employer)

[(1997), 114 C.C.C. (3d) 23, 5 C.R. (5th) 171, 32 O.R. (3d) 321, 97 O.A.C. 253 (Ont. C.A.), application for leave to appeal dismissed (Sept. 18, 1997), 34 O.R. (3d) xv (S.C.C.) Finlayson, JA; Abella and Goudge concurred with Finlayson].

The appellate was convicted of fraud and false pretenses. Michelle Marie Pierce, as comptroller of Garfield's Fashion Limited, defrauded the company of a sum of monies, property or other valuable securities exceeding one thousand dollars contrary to section 380.1 of the *Canadian Criminal Code.* Pierce was responsible for the company's financial operations. She used her authority to sign 42 cheques payable to Spectrum, a cosmetic company she established. The money was used to purchase expensive jewelry, a fax machine, a $650 pen and a $5500 down payment on a personal car lease. The approximate value of funds taken was $270,000, although the complete amount

embezzled remained undetermined. Pierce also forged other employee signatures on cheques and/or duped them into signing.

The trial judge convicted Pierce of fraud. There was no documented evidence to support her defence. She was not deemed a credible witness - her explanation was found to be unreasonable and dishonest. Crown counsel recommended a two years less a day jail term. Defence counsel recommended a one year term. The Judge ordered 21 months of custody considering the totality of the facts: the crime was not very sophisticated but it did involve deliberate planning; the crime involved an abuse of a position of trust; the effect of the scheme was significant - employees were made redundant, creditors failed to receive payment. The funds were used to start Pierce's own cosmetics business. The appellate was very educated. There were good rehabilitation prospects in light of the appellant's family support, her teaching career and the cosmetics business. The size of the fraud was significant - planning and devious methods were used. Consequently, the Judge determined that it was necessary to deter like-minded persons and that this could only be accomplished by a term of custody. Therefore, the purpose of general deterrence took precedence over rehabilitation in this particular case.

At the appeal, the defence requested that the conviction be overturned. If the conviction was upheld, then the appellant requested a reduction in sentence length, from 21 months jail to 12 months and permission to serve the sentence in the community pursuant to section 742.1 of the *Criminal Code*. With respect to the conviction, the Court of Appeal found that the trial judge did not err in rejecting appellant's explanation. The appeal for conviction was accordingly denied. With respect to the sentence, the judgment was made prior to Bill C-41. The central issue of contention between crown and defence

counsel was the interpretation of the phrase "endangering the safety of the community". Counsel for the defence argued that the interpretation be restricted to the likelihood that this particular accused would re-offend in the community. Crown counsel however, argued for an interpretation based on the likelihood of re-offending as well as broader considerations of general deterrence.

The Ontario Court of Appeal reduced the length of the prison term to 12 months. However, the request for a conditional sentence was denied. The Court believed that Parliament clearly wished to encourage less restrictive sentences but it has not abandoned the concept of general deterrence as evidenced by the presence of specific and general deterrence in s. 718 of the *Code*. In addition, the courts have been very strict with cases involving "breach of trust". Given the serious nature of this offence, the paramount objective is the deterrent effect of the sentence. Also, "breach of trust or authority" is an express aggravating factor stated in s. 718.2 (a)(iii) of the *Criminal Code*.

Methodology:

The *Pierce* decision avoided a *rigid* two-step process. According to *Pierce,* when the circumstances of the offence and the offender are such that neither a minimum term of imprisonment nor a penitentiary sentence are called for, a trial judge should consider the full panoply of sentencing objectives to determine the appropriate sentence both in nature and in length. The application of s. 742.1 is discretionary and it must be exercised in accordance with established sentencing principles. Ultimately, the duty of the trial judge is to impose a "fit sentence". In arriving at the final custodial judgment, judges should take into consideration all the guidelines in the *Code*.

Wismayer (sexual touching of foster child by "big brother")

[(1997), 115 C.C.C. (3d) 18, 33 O.R. (3d) 225, *sub nom. W.(J)* (1997), 5 C.R.(5th) 248, 99 O.A.C. 161 (Ont.C.A.). Rosenberg, JJ.A.; Morden and Austin, JJ.A. concurred.]

The appellante was charged with touching a person under the age of 14 years for a sexual purpose. The Wismayers adopted the appellant at the age of ten when he came into their care as a foster child. The family took in about 50 children over the course of 20 years. The accused was 20-21 years of age, was living with his parents and the complainant, one of the foster children at the Wismayers' home at the time the incidents occurred. Between December 30, 1988 and March 31, 1990, Joseph Wismayer fondled the eight year old female in the foster care of the Wismayer home. The sexual touching took place in the guest room where the complainant, upon awakening from a bad dream, would visit the accused because he would give her candies. The complainant and the appellant would lie on the floor and the appellant would touch her on the vagina. The complainant reported that it happened "very often". The appellant set up baby monitors in his mother's room to hear her approaching.

At trial, the appellant denied committing the offences. The accused had no prior criminal record and suffered from obsessive-compulsive disorder, social phobia and episodic alcohol abuse. He was a poor student who required on-going, long-term treatment. He was unemployed for the three years prior to the charge. Crown counsel sought a custody sentence in the 12-15 month range. Defence counsel sought 90 days to be served intermittently. A victim impact statement was entered at trial. Wismayer was convicted and received a 12 month prison sentence. The appellant was considered a big brother to the complainant and thus in a position of trust. The judge recommended release

on a temporary release pass in the sentence order. The appellant appealed the conviction. If the conviction was upheld, he requested a reduction in sentence length and permission to serve it in the community pursuant s. 742.1 order.

The appeal against conviction was denied. With respect to sentence, the Court of Appeal agreed with the trial judge that the length was appropriate given the gravity of the offence, the planning involved, the abuse of a position of trust and the vulnerability of the victim. Therefore, the sentence length was upheld. However, the court determined that this constituted an appropriate case for a conditional sentence. Despite the gravity of the offence, there were a number of mitigating factors. Also, the offender and his circumstances had improved significantly in the four years since his conviction. The court believed that the appellant would benefit from a s. 742.1 order and that prison would cause undue hardship. The appellant was not considered a danger to the community; for instance, a temporary absence pass from prison was accepted by all parties as part of the sentence order. Finally, the court determined that the appellant was entitled to a conditional sentence even though it had been unavailable at the time. The conditional sentence order was granted. The Crown was vigorously opposed to a conditional sentence citing that the Ontario Court of Appeal has stressed repeatedly that in cases of sexual abuse, the primary objectives of sentencing are denunciation and general deterrence.

Issues and Methodology:

In *R v. Pierce*, the main issue was whether the application of s. 742.1 is bound to the prerequisites in that section of the *Code* only, or whether judges must also consider the sentencing principles and objectives articulated in s.718. In *Pierce,* Judge Finlayson

argued the latter. In *R. v. Wismayer*, the main issue raised was the *weight* to attach to these other sentencing principles, objectives and factors, especially general deterrence and denunciation. There are three minimum prerequisites that must be satisfied before a judge can consider whether s. 742.1 is permissible: 1) the offence is not punishable by a minimum term of imprisonment; 2) the court must impose a sentence of imprisonment of less than two years; 3) and the court must be satisfied that serving the sentence in the community would not endanger the safety of the community. Whether a conditional sentence order is appropriate, remains at the discretion of the judge ("*may*, for the purpose..."), depending on the circumstances of each case and having reference to all of the sentencing objectives and principles laid out in the *Criminal Code*.

In addition, the *Wismayer* decision confirmed a number of observations about conditional sentences. The conditional sentence is *not* restricted to any particular kind of offence. The conditional sentence *would* be available even where, absent appropriate controls, there may be some risk of re-offending. The conditional sentence is *not* reserved only for first time offenders of whom it can safely be said that they will never re-offend. The provisions in the *Code* provide simpler and more efficient hearing procedures, in the event of an alleged breach. The conditional sentence is a sentence of imprisonment. The offender may ultimately serve some portion of the sentence in prison. The conditional sentence is a rational response to the problem of allocating resources and it represents a tool to reduce reliance on, and use of, incarceration. Finally, section 742.1 is consistent with the principle of restraint encoded in s. 718.2 d) and e) of the *Criminal Code.*

According to the *Wismayer* judgment, rehabilitation and specific deterrence are not necessarily more likely to occur in prison than in the community. In fact, prison often

works against these two objectives. The conditional sentence represents an opportunity to promote these objectives in a community setting rather than a prison setting. Undue emphasis on the statutory aggravating factors cited in the statute should be avoided; mitigating factors are also important even though they are not encoded. The court also addressed the issue of general deterrence and denunciation; since the general deterrent effect of prison remains questionable and since ways other than prison exist to achieve this objective, general deterrence alone is not a sufficient justification to refuse a conditional sentence, especially given the potential negative effects of prison on the offender and his/her family. In any event, general deterrence can be achieved through a conditional sentence of imprisonment. With respect to denunciation, the Supreme Court of Canada explained in *R v. (M).*, that it is incorrect that the principle of societal denunciation can only be expressed by means of the offender's sentence of imprisonment. The same considerations that were raised with respect to parole, as expressed by Lamer, also apply to the conditional sentences; for instance with a s. 742.1 order, the offender's liberty is significantly restricted, the individual is under the control of a supervisor and the individual remains under the constant threat of incarceration.

Pierce held that a "rigid two step process" should be avoided. However, in *Wismayer*, Rosenberg, J.A. appears to leave an opening for some type of two-stage approach. All of the principles and objectives of sentencing laid out in s. 718-718.2 of the *Criminal Code* should be canvassed, as well as the basic requirements of s. 742.1. However, the principle consideration in imposing a conditional sentence order must be the danger to the community. Rosenberg agreed with Finlayson (*R. v. Pierce)*, that

"danger to the community" was to be read in the narrow sense, risk of re-offending, by the offender in question.

Biancofiore (dangerous driving while impaired causing bodily harm)

[(1997) O.A.C. TBEd. OC.012 (Ont.C.A).Rosenberg, JJ.A; Doherty, Laskin, JJ.A. concur]

The appellant was charged with drinking and driving and dangerous driving causing bodily harm. On April 16, 1995, at 2:35 am, following a period of heavy drinking, the respondent took his brother's car without permission. He was accompanied by two passengers. He drove at a very high speed, weaving in and out of traffic and finally lost control of the vehicle, mounted a curb and struck a concrete pole and guardrail. The two passengers were ejected and were seriously injured. The car was completely destroyed. The breathalyzer read 110-97 milligrams of alcohol in 100 millimeters of blood. His license was suspended at the time of the accident due to unpaid fines, although the respondent was unaware of the suspension. He was also on probation from a prior conviction of mischief. The female passenger suffered severe and permanent injuries which had a devastating impact on her life.

At trial, the accused plead guilty to drinking and driving causing bodily harm and "over 80" and taking a vehicle without consent. On January 2, 1997, the trial Judge imposed a sentence of 18 months imprisonment concurrent on charges of drinking and driving and "over 80", to be served subject to conditions pursuant to s. 742.1 of the *Criminal Code*. The order included the following conditions: 240 hours of community service; a curfew to reside at his residence between 6:00 and 20:00 hours; write a letter of apology to the female victim; abstain from alcohol; pay a restitution order of $41, 286 for

the loss of the car and damage to municipal property; and a prohibition from driving for three years. The Crown appealed the fitness of the sentence and requested that the conditional sentence be transformed into straight jail. The Court of Appeal found that the trial judge erred in principle. The judge was *not* bound to impose a conditional sentence because the offender did not pose a risk to the community, as believed by *Scidmore* at the time. Also, the trial judge did not consider whether or not a conditional sentence was consistent with the purpose and principles outlined in sections 718-718.2., now confirmed by *Pierce* and *Wismayer* and the amendment.

The offender did not constitute a personal risk to the community. However, in this situation, general deterrence and denunciation served as the basis of unfitness of the conditional sentence. With respect to general deterrence, the Appeal Court affirmed that the case law indicates that general deterrence is the paramount objective in sentencing drinking and driving cases, especially where serious consequences result (*R. v. McVeigh)*; the Court believes that general deterrence can have an effect on this type of offence. A custodial term is the norm for convictions of drinking and driving causing bodily harm and such a term is "necessary" for convictions of drinking and driving causing death. With respect to denunciation, the court ruled that a conditional sentence is a sentence of imprisonment and denunciation can be satisfied by such a disposition (*R v. Wismayer)*.

However, it was argued that drinking and driving is a unique offence because the stigma attached to it does not match the objective gravity of the crime. It is important to underline the serious criminal nature of the offence. There is a pressing need to ensure that drinking and driving offences are not "destigmatized". The court ruled that although there may be cases of this nature where general deterrence and denunciation are achieved

by a conditional sentence, in this particular case, they are not. There is no single factor which makes the conditional sentence unfit in this case, not even the severe consequences of the crime. Of consideration first and foremost in determining a fit sentence are the mitigating and aggravating factors. In this case, the aggravating factors (risk-taking behavior and the degree of harm caused), the high degree of moral culpability of the offender and the particular need for general deterrence and denunciation for drinking and driving combine to make a conditional sentence unfit.

The appeal was granted. The conditional sentence of 18 months was varied to 15 months incarceration concurrent on the two charges. With respect to methodology, *Biancofiore* reconfirmed *Pierce* and *Wismayer* in that even where the minimum preconditions are met, the trial judge must still consider whether imposing a conditional sentence would be consistent with the statutory purpose and principles of sentencing in determining both the nature and the length of the sentence.

British-Columbia Court of Appeal

Ursel; McNally; D. S., M.W.C. and *Virdi; Santucci; Campbell* [(1997) 117 C.C.C. (3d) Rowles, Finch and Ryan JJ.A.]

The following judgment is known as *R v. Ursel*, however, it represents a group of decisions by the British Columbia Court of Appeal. The court addressed five cases before it simultaneously because they all involved issues pertaining to the interpretation of s. 742.1 of the *Criminal Code*. The majority of the British Columbia Court of Appeal adopted the general approach taken by the Ontario Court of Appeal in *Wismayer*, with the exception of Finch J.A. Although the members of the court were aware of the amendment

to s. 742.1(b), they decided the case on the legislation as it existed prior to the amendment (OLAP, 1997; 42).

The following issues were raised on appeal:

- To what extent can the amendment's interpretation be applied retroactively to present cases?
- Are any particular offences, or classes of offences, excluded from consideration of a s. 742.1 order?
- How is "risk to the community" determined?
- Does the language of s. 742.1(b) impose on the offender the burden of proof to establish that he/she does not represent a danger to the community?
- Do the words "a court may" confer residual discretion on the sentencing judge and if so, on what criteria or principles is the discretion to be exercised to determine if an offender is a "suitable candidate"?
- What is the extent of appellate review in the decision to order or not to order a conditional sentence?

The court's findings are as follows:

- Historical antecedents to the legislation (mainly the CSC and the Daubney Committee) reveal that Parliament's main concern is to address the overuse of imprisonment and to encourage the use of alternatives. Prison is to be reserved for the most serious cases.
- Many of the arguments addressed before this court were advanced before the Ontario Court in *R. v. Wismayer* and the present court is in agreement with most of its response.
- Section 742. 1 is applicable for all crimes, provided the offence does not carry a minimum term of imprisonment and the sentence imposed is less than two years. The section has its own regulating provisions. Other interpretations would defeat the government's goal to reduce imprisonment.
- Mr. Justice Finch disagreed with the *Wismayer* judgment in the statement which suggests that a conditional sentence could be made longer than a sentence of actual imprisonment in order to enhance its deterrent or denunciatory effect.

- When considering "safety of community", judges may consider property and financial resources as well as physical or psychological harm.

- It would be in the offender's interest to put forth evidence that he/she does not pose a danger to the community however, it is the courts responsibility, based on all the evidence, to decide the matter. Therefore, the language in s. 742.1(b) does not impose a reverse onus on the accused.

- Discretion rests with the Judge to determine whether or not to impose a conditional sentence order, even when section 742 (a) and (b) are satisfied; suitability for a conditional term at this stage rests on the offender's amenability to supervision and his/her likelihood of complying with the conditions imposed. Evidence of the following factors would help the court's decision on this matter: the offender's history of compliance or non-compliance with court orders; the offender's attitude toward authority in general; indications that the offender has taken, or is willing to take, responsibility for the offence, and for future conduct; and remorse.

- Finch, J.A. dissented in advocating a three step-process for the sentencing judge to follow, while Ryan J.A. and Rowles J.A. adhered to the approach advocated in *Wismayer.*

Alberta Court of Appeal

Brady (cultivating marihuana and possession of marihuana for the purposes of trafficking]

[(1998) A.J. No. 39 Docket 96-16728, Fraser, Hetherington and Cote JJ.A.]

The *Brady* decision was released in early 1998, approximately 14 months after the sentence had been imposed at the trial court level. The case raised several questions pertaining to the interpretation and application of s. 742.1, therefore, the Alberta Queen's bench took time to deliberate and to render a thoughtful judgment that would address several outstanding questions, as well as reconfirm some other issues: a) the applicability of general sentencing principles and objectives; b) factors affecting the imposition of a conditional sentence; c) danger to the community; d) the two-step procedure; e) the

context and purpose; f) the role of a previous record; g) whether a conditional sentence is automatic or mandatory.

The Alberta Queen's bench reiterated the importance of analyzing the context in which the amendment is located. The court reminds us that the conditional sentence provisions are part of a larger package of sentencing reforms, now Part XXIII of the *Criminal Code*. Consequently, the decision to impose a conditional sentence must be anchored within the stated purpose and principles of sentencing encoded by Parliament. The court concludes that there is no rational basis for excluding or watering down the statutorally-prescribed sentencing principles when deciding on a conditional sentence. Although one objective or principle may assume more importance than another, every sentence, conditional or not, must adhere to s. 718.1, which contains the fundamental principal of sentencing, namely, proportionality.

The court revisited the issue of deterrence and denunciation. The court does not believe that the conditional sentence is comparable in severity to prison. In fact, it found greater parallels between a conditional sentence and suspended sentences. For instance, the conditions attached to most s. 742.1 orders impose little restriction on the liberty of the offender and the consequences of breaching one of these conditions are no more onerous. In addition, this court believes that a sentence without meaningful consequences would not reflect the extent of society's repudiation of the crime and may serve to undermine respect for the law. Given that both deterrence and denunciation have been included in the *Code* as important sentencing objectives, a conditional sentence would not ordinarily be available for those offences where the paramount consideration is denunciation and deterrence.

In order to impose a conditional sentence, the court must be satisfied that the offender passes the "endangerment" threshold. This is a statutory consideration for eligibility of a s. 742.1 order. However, it does not represent the primary consideration and thus it cannot trump the other sentencing principles and objectives which must still be satisfied. Although the presence of some risk is not enough to eliminate the possibility of a s. 742.1 order, the judge must take the amount and the type of risk into consideration. In addition, the judge should tailor the conditional sentence by means of appropriate conditions.

The Alberta Queen's bench also argued against a mechanical two-step process with respect to the imposition of a conditional sentence. The court argues that this approach is unprecedented. For instance, the conditional sentence provisions resemble closely the legislation which guides a request for discharges, absolute or conditional, as well as suspended sentences; neither of these cases adheres to a two-step process. Therefore, according to the court, s. 742.1 simply states that if three (now four) of the conditions are met, a sentencing judge may impose a conditional sentence. The court rejected the idea that s. 742.1 imposes any procedural limits. A sentencing judge can consider the factors in any number of stages and in any order so long as one follows the right precautions and the final result fits all the criteria (27).

The court also raises the issue of criminal record as it relates to the conditional sentence. The court does not agree with the argument that examining the previous record of an accused amounts to re-sentencing the offender for previous crimes. Quite to the contrary, the court believes that the criminal record represents an important source of information for the sentencing judge to help him/her determine whether a conditional

sentence is suitable; for instance, the previous criminal record may suggest the likelihood of an offender abiding by the terms of a conditional sentence order, or whether a conditional sentence is likely to promote the offender's rehabilitation, etc. In particular, previous failures to obey court orders should be interpreted by the court as casting serious doubt on the suitability of a conditional sentence order. Finally, although the process of rehabilitation is an important concern, it should not override considerations of general deterrence.

The Alberta Court of Appeal emphasized greater use of the optional conditions. These conditions should be used to craft tougher, more effective, more creative, more flexible, and more realistic conditional sentences. In addition, this court confirms the emerging consensus that the decision to apply a s. 742.1 order is discretionary and it is subject to the general principles of sentencing. According to this court, a conditional sentence merely represents one other sentencing option at the disposal of the judge which does not require a radical departure in its selection process. The judge must craft any sentence to be as effective as possible, always having regard to the fundamental principle of proportionality.

With respect to the defendant in this case, the trial court judge sentenced Brady to nine months imprisonment after he pleaded guilty to two charges, one of cultivating marijuana, one of having marijuana in his possession for the purposes of trafficking. Mr. Brady was granted permission to serve his sentence in the community, subject to complying with certain conditions. At the appellate review stage, the Alberta Court of Appeal affirmed that the trial judge was correct in identifying general deterrence as the primary consideration in this case. However, the Court of Appeal disagreed with the two-

step approach taken by the trial court judge in arriving at his sentence. In the first stage, the trial judge referred to traditional sentencing decisions as well as the case law relating to trafficking, possession for the purpose of trafficking and cultivation of narcotics and decided on custody. As a second step, the trial judge then decided on the s. 742.1 order without reference this time to the objective of general deterrence. The Court of Appeal disagreed with this approach. As noted already, the purpose and principles are applicable to the final sentencing decision which includes a conditional sentence. The Court decided that the trial judge erred by not taking into consideration the general deterrent impact of the final sanction. Second, the Court would vary the conditions attached to the order to adequately address the objective of deterrence.

Saskatchewan Court of Appeal

McDonald (criminal negligence causing death by driving impaired)

[(1997), 113 C.C.C. (3d) 418, 5 C.R.(5th) 189, [1997] 4 W.W.R. 318, 152 Sask.R. 81, 140 W.A.C. 81 (Sask. C.A.), Sherstobitoff, Lane and Vancise, JJ.A.]

While the defendant was extremely intoxicated, she drove a truck toward a crowd at high speed. She was a physically handicapped 33-year-old aboriginal woman who provided principal care and support to six children and an elderly parent. She had a previous conviction for impaired driving. She was remorseful, had ceased to drink, had completely rehabilitated herself and was a productive member of the band and community. However, the victim's death had divided the community. The appellate received 9 months of electronically monitored house arrest with 15 months probation after she pleaded guilty to the charge of criminal negligence causing death. The majority of the Court of Appeal held that this was not an appropriate case in which to grant a

conditional sentence order. The Court added a sentence of 6 months imprisonment in addition to the 8 months served under house arrest.

Mr. Justice Sherstobitoff held that the sentence was not fit because it was in violation of section 718.1, the fundamental principle of proportionality, as well as s. 718(b) the principle that similar sentences should be imposed on similar offenders for similar offenses committed in similar circumstances. According to Justice Sherstobitoff, the sentence imposed at the trial court level was not proportionate to the gravity of the offence or the moral blameworthiness of the offender. In addition, a sentencing judge must take into account all of the sentencing purposes, objectives and principles outlined in ss. 718, 718.1 and 718.2 of the *Criminal Code*. Mr. Justice Lane held that it was clearly Parliament's intent with the introduction of ss. 718.2(d) and (e) for the courts to make greater use of sanctions other than imprisonment. Consequently, if the statutory requirements set out in s. 742.1 were met, then imprisonment should be the exception. However, in this case, the judge ruled that a s. 742.1 order was not appropriate because s. 718.1, the proportionality principle, predominated over all of the other principles in s. 718.2. In the present circumstances, the courts have always called for a term of incarceration and anything less would fail to reflect the gravity of the offence and the degree of responsibility of the offender.

Mr. Justice Vancise dissented from his colleagues, emphasizing Parliament's commitment to the use of imprisonment as a last resort. If section 742.1 is to constitute a real alternative to incarceration and not merely a substitute for other community-based sanctions, then it cannot be reserved only for minor offences or property offences. Echoing other appellate judgments, Mr. Justice Vancise reiterated that the availability of

a conditional sentence is not offence-specific. The judge also stated that the onus of responsibility to prove, on a balance of probabilities that one did not represent a danger to the community rested on the accused. (This position has since been rejected by the British Columbia Court of Appeal in *R. v.* Ursel). Mr. Justice Vancise provided a non-exhaustive list of factors to help determine whether the accused represents a danger to the community; for instance, did the conduct of the accused cause or threaten serious harm to another person or his property; was the act, or the resultant harm planned, etc. Despite the statutory criteria in s. 742.1, the decision to allow a conditional custodial term is still discretionary. The sentencing judge must consider the special circumstances of the accused, including whether a custodial sentence would result in meaningless punishment and jeopardize, rather than facilitate, rehabilitation. Moreover, the sentencing judge can increase the order's conditions in order to reflect the greater seriousness of the offence.

B. The Statutory Amendment to s. 742.1

On May 2, 1997, para. 742.1(b) was amended by s. 107.1 of Bill C-17 (S.C. 1997, c.18). Parliament added the words "and would be consistent with the fundamental purpose and principles of sentencing set out in sections 718 to 718.2". In effect, this amendment added a fourth statutory criterion to the other three: 1) where a term of imprisonment is less than two years; 2) there is no minimum term of imprisonment required; 3) the court is satisfied that serving the term in the community would not endanger the safety of the community; 4) the sentence would be consistent with the fundamental purposes and principles of sentencing set out in sections 718 to 718.2. Two interpretations have been advanced with respect to this amendment. The first holds that the amendment represents a change in the application of the new sanction as it was

originally introduced. On the other hand, it has been argued that the amendment merely clarifies what was previously implicit.

It is evident now that judges must take ss. 718-718.2 into consideration when deciding whether to impose a conditional sentence. However, the impact of ss. 718-718.2 remains unclear. Overall, one would probably expect a decrease in the number of conditional sentences following the amendment since the inclusion of the purpose and principles raises the threshold. However, the exact manner in which the purpose and principles impact on each individual case depends on the relative importance accorded each of the statutory sentencing principles and objectives. For instance, is proportionality the overriding consideration in all cases? If rehabilitation is an issue, can it override proportionality in the final custodial decision? Or, do the facts of the particular case and the nature of the offence dictate which sentencing objectives and principles the judge should emphasize in the decision-making process? Although it is evident that the purpose and principles must play a role, given the mixed messages produced by s. 718-718.2 of the Code, combined with the significant amount of judicial discretion that remains, this role will vary from judge to judge and from case to case.

Summary and Conclusions

This chapter briefly introduced some of the major appellate decisions surrounding conditional sentences. The previous cases were emphasized because they illustrated early key questions about the interpretation and the application of conditional sentences. The summary focused on appellate courts because their function is to review cases and to provide guidance to judges at the trial court level. In doing so, Court of Appeal decisions serve as guidelines for trial court judges. As mentioned, the case law is an evolving

process and future decisions will likely be released from provincial Courts of Appeal and even from the Supreme Court of Canada.[10] All of these subsequent decisions may alter the future direction of conditional sentences. Therefore, this case law represents the status quo as of May 1998.

What can be concluded from this brief review of the case law? First and foremost, the rigid two-stage process first advocated by the Ontario Court of Appeal in *Scidmore*, has been rejected. Subsequent decisions and the Parliamentary amendment to s. 742.1(b) require judges to consider the sentencing objectives and principles outlined s. 718-718.2 of the *Code*. The conditional sentence is a discretionary one. In other words, merely satisfying the statutory criteria does not guarantee a conditional sentence.

With respect to the issue of "endangerment to the community", several issues have been resolved. First, the courts have embraced a narrow interpretation of "danger to the community"; danger refers to the risk of re-offending, by the particular offender. Second, the presence of risk need not rule out a conditional sentence entirely; if conditions can be crafted to minimize the risk of re-offending, then a conditional sentence is still an option. The third point, relating to endangerment, however, remains somewhat ambiguous. How much weight should the endangerment criteria be granted, relative to other sentencing principles and objectives? Although the final custodial decision does not rest solely on the "endangerment" question, Mr. Justice Vancise in Saskatchewan and the *Wismayer* decision from Ontario accord it primary consideration. In *Brady*, the Alberta Court stated that "danger to the community" is a statutory condition required for

[10] Five cases concerning conditional sentences were granted leave to appeal to the Supreme Court of Canada on June 4, 1998. (Manson, 1998a; 200).

eligibility for a conditional sentence, but, it cannot "trump" the other sentencing principles and objectives. Therefore, the first position appears to suggest that where the endangerment threshold is met, the decision to impose a conditional sentence is almost secured, whereas, the latter position suggests that satisfying the endangerment threshold, although necessary, by no means ensures the appropriateness and subsequent imposition of a conditional sentence.

With respect to the appropriate length of conditional sentences, the courts have endorsed the option of lengthening the term of conditional imprisonment. Finally, with respect to conditions, the Alberta Court was unimpressed by the manner in which most conditional sentences imposed to date have been constructed. The provisions in the *Code* allow the trial judge to add an unlimited number of conditions to a s. 742.1 order in order to tailor the sanction as he/she sees fit. This area has been identified as one for improvement.

The issues of general deterrence and denunciation were also raised. The consensus from most courts, except the Alberta Court of Appeal, is that general deterrence and denunciation can, in principle, be achieved through a conditional sentence. The Alberta Court, on the other hand, is skeptical of the ability of conditional sentences to achieve a comparable deterrent and denunciatory effect to that of prison.

In addition, the courts recognize that the conditional sentence is not offence-specific; it is not reserved solely for first-time or property offenders who pose absolutely no risk of re-offending. In theory, any type of offence which meets the minimum statutory requirements, is eligible for a s. 742.1 order. In fact, serious offences such as child sexual abuse and manslaughter have resulted in the imposition of a conditional

sentence. However, the situation with regard to the appropriateness of conditional sentences for different types of offences remains ambiguous and controversial. It is difficult to discern with clarity where the courts stand with respect to the breadth of application of the conditional sentence. In time, courts may clarify with greater specificity which type of offences and which circumstances surrounding such offences either encourage or discourage the imposition of a conditional sentence order. Also, the courts may eventually provide more direction, to shape conditional sentences to include and reflect the proper penal element and to foster the best prospects for rehabilitation, as dictated by the nature and circumstances of the offence and the character of the offender.

This chapter highlighted the principal assertions made by the appellate courts with respect to conditional sentences. The next few chapters undertake a overview of the application of the new sanction at the trial court level during the first fifteen months of its implementation across the province of Ontario; in the next chapter, the question of *who* received a conditional sentence is answered.

Chapter Four

CONDITIONAL SENTENCES IN ONTARIO, SEPTEMBER 1996 - NOVEMBER 1997: A STATISTICAL PORTRAIT

This chapter contains a descriptive portrait of the application of conditional sentences in the province of Ontario during the first fifteen months of its implementation. Between September 3, 1996 and November 7, 1997, 4,633 offenders were admitted to probation offices across the province to serve a conditional sentence. These 4,633 orders generated the database which forms the basis of the following portrait. At this stage, data relating to the variables outlined in Chapter two will be presented and interpreted in order to provide insight into the application and the nature of this new sanction in Ontario.

The data in Chapter four serve to answer certain questions relating to *who* has received conditional sentences, in terms of age, gender, level of supervision, employment status, native and/or racial status of offenders. The data in Chapter five illustrate one of the sanction's features, the length of conditional sentence orders. Chapter six focuses on admission counts. Finally, in Chapter seven, the data reveal the type of offences for which conditional sentences were imposed during this time frame. The findings are discussed in light of the case law and the goals of the 1996 sentencing reform legislation.

Offender-Related Characteristics

How popular were conditional sentences in Ontario compared to the other provinces and territories? An early report by the Department of Justice provides a glimpse of the number of conditional sentence orders imposed across Canada between September 1996 and August 1997. (LaPrairie, February 1998d; 26).

TABLE 1 VOLUME OF CONDITIONAL SENTENCES BY PROVINCE/TERRITORY

PROVINCE	NUMBER OF CSO	POPULATION
Nova Scotia	380	909,282
Prince Edward Island	20	134,557
New Brunswick	386	738,133
Quebec	4,083	7,138,795
Ontario	3,775	10,753,573
Manitoba	228	1,113,898
Saskatchewan	684	990,237
Alberta	1413	2,696,826
British Columbia	1831	3,724,500
North West Territories	59	64,402
Yukon	48	30,766
CANADA	13,037	28,846,761

Source: Sentencing Review Team, federal Department of Justice, Research and Statistics Division. This Table includes a count of the number of conditional sentence orders granted by the trial courts from each of the provinces/territories listed, between September 1996- August 1997.
Provincial/Territorial population counts were drawn from "Population Counts, Showing Distribution Inside and Outside Census Metropolitan Areas and Census Agglomerations, for Canada, Provinces and Territories, 1996 Census - 100% Data", www.statcan.ca, December 14, 1998.

According to Table 1, conditional sentences were popular among the judiciary in Ontario, which ranked second after the province of Quebec. In addition, the sanction proved relatively popular in British-Columbia, followed closely by Alberta. Together, these four jurisdictions account for 85% of the conditional sentences imposed during its first year. Of course, these provinces, notably, Ontario and Quebec, are the most populated; one would expect them to account for large percentages of conditional

sentences. However, despite the fact that Ontario is the most populated province, the province of Quebec made greater use of the new sanction during this time frame.

A. AGE

The mean birth year of offenders on conditional sentence in Ontario was 1959. Therefore, the average offender on conditional sentence in Ontario was 38 years old. This high number could be attributed to a few cases of much older offenders which would raise the mean age. For instance, the median age was 33. Nevertheless, the average offender on conditional sentence was somewhat older than his/her average counterpart in a provincial/territorial facility (Reed and Roberts, 1996-97; 1). According to data reported by Statistics Canada (1996), the average age of persons sentenced to provincial custody is increasing. For example, in 1995-96, persons in their twenties made up the largest proportion (40%) of those admitted to provincial custody. The proportion of those aged 35 years and older has grown from a quarter in 1986-87 to over a third in 1995-96 (83). In addition, there were more offenders above the age of 41+ in the province of Ontario serving a conditional sentence, compared to anywhere else in Canada (LaPrairie, February 1998d; 3). This increase in age probably reflects the changing demographics of an aging population.

B. GENDER

Of 4,633 offenders who received a conditional sentence order in Ontario during the first fifteen months of its implementation, 76% were male and 24% were female. The national rate for females admitted to conditional sentences was 19% (LaPrairie, February 1998d; 3). Given that females represent only 9% of total sentenced admissions to

provincial/territorial facilities[11], women were over-represented among those serving conditional sentences. According to an analysis of sentenced admissions in Ontario and British-Columbia conducted by the federal Department of Justice, females were generally over-represented (in relation to their proportion of total admissions) in conditional sentences and probation admissions, and under-represented in remand, sentenced admissions and fine default; the over-representation is particularly notable in Ontario -- females accounted for 12 % of all admissions, yet 24% of all conditional sentence admissions (LaPrairie and Koegl, 1998c; 13).

C. EMPLOYMENT STATUS

There were 2,426 conditional sentence orders with information on the offender's employment status; this sample accounts for 52% of the population in the database. Consequently, the findings do not necessarily reflect the whole group.[12] Nevertheless, of the available sample, the data indicate that 58% of these offenders were unemployed and 42% of them were employed.

The employment data do not indicate the role of this factor in the judge's decision to render a custodial term conditional. It is impossible to speculate on the number of potential candidates for a conditional sentence who may have been refused due to an absence of employment, an important stabilizing social factor. The available information on employment reveals that close to 60% of the offenders were unemployed. It is notable,

[11] Provincial/territorial admissions include inmates serving a prison sentence of two years less a day, accused awaiting trial or failing to pay a fine and those placed on probation (Reed and Morrison, 1995-96; 2).

[12] It is possible that the numbers on employment reflect a systematic reporting bias. However, the data were categorized as employed, unemployed or unknown. Therefore, the findings reflect an analysis on the first two categories, which account for just over half of the sample.

however, that just over 40% of offenders did hold employment. Therefore, one cannot speculate about the impact of this variable.

In addition, despite the fact that over 40% of the offender sample were employed, there is no information about the *quality* of employment. For instance, did the offender's employment consist of full-time work, part-time work, or seasonal work; what was the offender's wage or salary; how many jobs did the offender hold within a certain period of time, etc. The additional information about the offender's work history is probably known to probation officers. Judges should be concerned with employment history when tailoring the conditional sentence order. The period of time on conditional sentence presents an opportunity to assist the offender to become as suitably integrated and productive a member of the community as possible.

TABLE 2 GENDER OF THE OFFENDER AND EMPLOYMENT STATUS

EMPLOYMENT	MALE	FEMALE
Employed	45%	35%
Not Employed	55%	65%
TOTALS	100%	100%

SOURCE: Ontario Probation and Parole Service, Statistical Services Branch, Ministry of the Solicitor General and Correctional Services, September 1996 - November 1997. This Table compares the employment/unemployment status between the female and male convictd offenders who served a conditional sentence.

Both male and female offenders were more likely to be unemployment; and there was a statistically significant difference in the employment status between male and female offenders ($p<0.05$). Female offenders were slightly less likely than their male counterparts to be employed. The very high rates of unemployment for both male and female offenders reflect the marginalized position of many individuals who appear before

the courts. In addition, the slightly higher level of female unemployment may reflect greater obstacles faced by women in society at large, such as lack of child care, which may reduce employment opportunities to a greater extent than males.

TABLE 3	RACE OF THE OFFENDER AND EMPLOYMENT STATUS	
RACE	UNEMPLOYED	EMPLOYED
Native	63%	37%
Visible Minority	61%	39%
White	52%	48%

SOURCE: Ontario Probation and Parole Service, Statistical Services Branch, Ministry of the Solicitor General and Correctional Services, September 1996 - November 1997. This Table compares the employment/unemployment status of offenders on conditional sentence.

When the racial status of offenders on conditional sentence is divided between Natives, visible minorities and Whites, a significant distinction emerges ($p<.05$). Again, all three groups were more likely to be unemployed. Natives were most likely to be unemployed of the three groups.

D. PRIOR CRIMINAL HISTORY

As mentioned in the methodology chapter, this variable was regrouped into four categories[13]. Unfortunately, the number and nature of past offences are not included in the data base. Therefore, the findings do not represent a comprehensive or in-depth record of criminal history. However, the data offered a glimpse of this history, or lack of, in order to obtain some idea of the type of offenders who served their prison term in the community in Ontario.

TABLE 4 CRIMINAL HISTORY OF OFFENDERS ON CONDITIONAL SENTENCE

CRIMINAL HISTORY	NUMBER OF CSO	PERCENTAGE OF CSO
No priors	1697	37 %
YO secure custody	36	0.8 %
YO other	69	1.5 %
Adult Incarceration	2457	53 %
Probation	374	8 %
TOTALS	4633	100%

SOURCE: Ontario Probation and Parole Service, Statistical Services Branch, Ministry of the Solicitor General and Correctional Services, September 1996 - November 1997. This Table illustrates the criminal background of offenders who granted a conditional sentence order.

Over half of the offenders who received a conditional sentence in Ontario during the first fifteen months of its implementation had a previous experience of adult incarceration. However, close to forty percent of the offenders had no prior record listed at all. Given that the conditional sentence represents a prison sentence, this is an interesting finding. Prison is supposed to be reserved for the most serious offenders and this often includes some kind of criminal history. In this instance, the data may reflect more serious crimes, or, it may suggest some evidence of "net-widening", that is, the application of the conditional sentences were other community-based sanctions where more appropriate.[14]

[13] See APPENDIX F for a complete list of the criminal history categories.

[14] The criminal history data were collapsed into these four categories; in doing so, the various combinations of priors were obscured. Therefore, this table does not represent a complete and accurate picture of criminal history. For instance, most adult incarceration experiences are actually combined with probation. The intention here is to draw attention to the two extremes - the percentage of offenders with no priors, or those with some previous experience of incarceration.

TABLE 5	CRIMINAL HISTORY OF OFFENDERS AND GENDER	
CRIMINAL HISTORY	FEMALES	MALES
No Priors	45%	34%
YO Secure Custody	0.5%	0.9%
YO Other	0.8%	1.7%
Adult Incarceration	41%	57%
Probation	12%	7%
TOTALS	100%	100%

SOURCE: Ontario Probation and Parole Service, Statistical Services Branch, Ministry of the Solicitor General and Correctional Services, September 1996 - November 1997. This Table compared the criminal history of male and female offenders who served a conditional sentence.

There was a statistically significant difference in the criminal history of female and male offenders ($p<.05$). Female offenders who served a conditional sentence in Ontario were more likely than their male counterparts to have "no priors" listed on their record. Male offenders were more likely to have a previous experience of adult incarceration than their female counterparts. However, female offenders were almost twice as likely than their male counterparts to have served a probation sentence in their past. These findings are consistent with the fact women are more likely to receive a probation term - 17% probation admissions, while representing only 9% of sentenced admissions (Reed and Morrison, 1995-96; 12). The findings in the table are also consistent with the fact that women are less involved in serious crime compared to men (Reed and Roberts, *1996-97*;8; Statistics Canada; 13).

TABLE 6	RACE OF OFFENDERS AND CRIMINAL HISTORY		
CRIMINAL HISTORY	NATIVE	VISIBLE MINORITIES	WHITE
No Priors	18%	30%	33%
YO Secure	0.8%	1%	0.8%
YO Other	0.4%	0.3%	1%
Adult Incarceration	74%	61%	58%
Probation	7%	7%	7%
TOTAL	100%	100%	100%

SOURCE: Ontario Probation and Parole Service, Statistical Services Branch, Ministry of the Solicitor General and Correctional Services, September 1996 - November 1997. This Table compares the criminal history of the three "racial/ethnic" groups who served a conditional sentence.

There is a statistically significant difference in the criminal history of these three groups ($p<.05$). Native offenders who served a conditional sentence order were least likely to have "no priors" compared to visible minorities and Whites who served a conditional sentence in Ontario during this time period. At once, Native offenders were most likely to have already served time in prison as adults, followed by visible minority offenders and White offenders. These findings may partly explain the higher levels of supervision for Native offenders; if this group is more likely to have served time in prison already then it is not surprising that they are more likely to be classified as high risk/supervision.

TABLE 7 TYPE OF OFFENCE COMMITTED AND CRIMINAL HISTORY

OFFENCE TYPE	NO PRIORS	YO SECURE	YO OTHER	ADULT INCARCER.	PROBAT.	TOTAL
Firearms	18%		1.4%	73%	8%	100%
Adm of Justice	16%	2.2%	2.6%	71%	8.%	100%
Sexual	54%	0.3%	0.9%	38%	7%	100%
Morals and Conduct	7%			82%	11%	100%
Person and Reputation	28%	0.5%	1.1%	62%	8%	100%
Drinking and Driving	46%		3.6%	42%	9%	100%
Property	28%	1.8%	2.1%	59%	9%	100%
Fraud and Counterfeit	61%	0.3%	0.9%	30%	9%	100%
Drugs	31%	0.2%	1.3%	61%	7%	100%
Other	43%			53%	5%	100%

SOURCE: Ontario Probation and Parole Service, Statistical Services Branch, Ministry of the Solicitor General and Correctional Services, September 1996 - November 1997. This Table illustrates criminal history of offenders on conditional sentence according to the type of offence for which they were convicted.

The majority of offenders who served a conditional sentence for offences related to Firearms, Administration of Justice, Morals/Conduct, Person/Reputation, Property, Drugs and Other offences, have been to prison before. Therefore, it is evident that the conditional sentence is not reserved only for first-time offenders. On the other hand, a significant percentage of offenders did not have a criminal record: over half (54%) of the offenders who served a conditional sentence order for Sexual Offences, 60% of Fraud/Counterfeit related offenders, 46% of Drinking and/or Driving offenders, and approximately a third of offenders who served a term for Person/Reputation offences, had no recorded criminal history. These latter findings reflect serious offences in some cases. However, included among those with no prior offences were approximately one third of property offenders.

E. LEVEL OF SUPERVISION (RISK)

The LSIO-OR data highlight the assigned supervision level based in an the LSI risk assessment instrument. The Level of Supervision Inventory is an offender classification system used in the province of Ontario and the state of Colorado. The probation service uses the risk assessment instrument to help determine the appropriate level of supervision and case management requirements of offenders under their care. According to Bonta (1996), the instrument forms part of the "third generation risk-needs assessment". As the author explains, these classification instruments move beyond statistical risk prediction and link up to rehabilitation services in order to manage risk (22). The LSI represents one of two offender classification systems that intentionally targets *criminogenic needs* - a subset of needs which are linked to criminal behavior. Criminogenic needs represent actual risk predictors, but they are dynamic in nature (i.e. living accommodations) rather than static. The LSI is composed of criminogenic needs that are integrated with more traditional risk items; 54 items ranging from static, criminal history variables to more dynamic items such as the offender's present employment and financial situation. Scoring follows the Burgess 0 to 1 method where the presence of a risk factor is scored 1. The scores are then summated to provide a total risk needs score. High scores on sub-components suggest criminogenic needs or areas to target for intervention. Successful elimination of these needs contributes to a total reduction in the risk-needs score.

As Bonta (1996) points out, one of the major tasks of a correctional agency is to enhance the protection of the public by managing the risk that offenders pose for harmful

acts and assessing effective treatment programming. The introduction of the conditional sentence heightens the importance of this task. Although the level of risk presented by the offender in question may be inferred from the LSI, the score does not represent a prediction of dangerousness per se. The LSI is largely a case management tool. The score highlights problems in offenders' lives which render them more or less vulnerable to criminal activities. However, given enhanced concern about community safety, despite a trend toward community alternatives, this variable offers important insight into the type of offenders who served their prison sanction in the community.

TABLE 8 LEVEL OF SUPERVISION OF OFFENDERS ON CONDITIONAL SENTENCE

LEVEL OF SUPERVISION	NUMBER OF CSO	PERCENTAGE OF OFFENDERS
Low	2050	50%
Medium	1360	33 %
High	693	17%
TOTAL	4103	100%

SOURCE: Ontario Probation and Parole Service, Statistical Services Branch, Ministry of the Solicitor General and Correctional Services, September 1996 - November 1997. There are 536 missing values (11.6% of the offender sample). This Table illustrates the breakdown of risk/supervision assigned to the group of offenders who served a conditional sentence order.

Half of the offenders who served a conditional sentence of imprisonment across Ontario between September 1996 and November 1997 were classified as low risk. Just over a third of offenders were medium risk for supervision and 17 % were high risk. These figures translate into 693 medium risk offenders and 87 high risk offenders in communities across this province.

TABLE 9 LEVEL OF SUPERVISION/RISK AND CRIMINAL HISTORY OF OFFENDERS

CRIMINAL HISTORY	LEVEL OF SUPERVISION/RISK		
	LOW	MEDIUM	HIGH
NO PRIORS	80%	18%	3%
YO SECURE	7%	62%	31%
YO OTHER	50%	41%	9%
ADULT INCAR.	30%	43%	28%
PROBATION	52%	36%	11%

SOURCE: Ontario Probation and Parole Service, Statistical Services Branch, Ministry of the Solicitor General and Correctional Services, September 1996 - November 1997. This Table illustrates the level of supervision/risk of offenders according to their criminal history.

Offenders with no prior criminal history were significantly more likely to labeled low risk. Among offenders with a previous Young Offender secure term, the majority (90%) were labeled medium risk or high risk. Approximately a third of the offenders who had served time as a youth or as an adult, were labeled high supervision/risk offenders according to the LSI-OR instrument. However, a previous sentence of adult custody does not necessarily predict the likelihood of being labeled high risk for the purposes of serving a sentence in the community; almost a third of these offenders were labeled low risk, 43% were labeled medium risk and the last third were labeled high risk.

TABLE 10 GENDER OF OFFENDERS AND LEVEL OF SUPERVISION/RISK		
LEVEL OF SUPERVISION	MALES	FEMALES
Low	49%	53%
Medium	34%	31%
High	17%	16%
TOTAL	100%	100%

SOURCE: Ontario Probation and Parole Service, Statistical Services Branch, Ministry of the Solicitor General and Correctional Services, September 1996 - November 1997. This Table compares the supervision/risk level of male and female offenders on conditional sentence.

The differences in the level of supervision among male and female offenders are minimal. It appears that women are slightly more likely to be labeled low supervision, however the difference was not statistically significant.

TABLE 11 LEVEL OF SUPERVISION/RISK AND OFFENCE COMMITTED				
OFFENCE TYPE	LOW	MEDIUM	HIGH	TOTAL
Firearms	33%	48%	20%	100%
Adm. of Justice	30%	44%	27%	100%
Sexual	65%	30%	5%	100%
Morals and Conduct	8%	46%	46%	100%
Person and Reputation	48%	33%	20%	100%
Drinking and Driving	58%	33%	10%	100%
Property	40%	23%	24%	100%
Fraud and Counterfeit	72%	23%	6%	100%
Drugs	42%	38%	20%	100%
Other	70%	29%	1.4%	100%

SOURCE: Ontario Probation and Parole Service, Statistical Services Branch, Ministry of the Solicitor General and Correctional Services, September 1996 - November 1997. This Table illustrates the level of superivion/risk according to the type of offence for which offenders were serving a conditional sentence.

The findings in Table 11 do not reveal a great deal about the conditional sentence per se, however, there were a few interesting results. Only 5% of offenders who served a conditional sentence for a sexual offences were classified as requiring high supervision. In fact, two thirds of the sexual offenders (65%) were considered low risk and the remaining third were considered medium risk. These figures reveal an interesting

paradox: the sexual offences were serious enough to warrant a prison term, yet not so serious that the majority of these offenders, usually *perceived* to pose a high risk, were in fact labeled low risk and permitted to serve their custodial term in the community.

Also surprising is the number of "person" offenders (almost 50%), a category which includes violent crimes such as manslaughter and assault, who were considered low risk and over a third who were considered medium risk. Likewise, property offenders who tend to be high recidivists, were also labeled low risk/supervision more often than medium or high risk. Given that these offenders represent the traditional "prison-bound population", the findings illustrate that many of the offenders who have traditionally been sentenced to prison do not pose a great risk to the community. Of course, risk is only one of the factors which judges use to determine whether prison is a necessary punishment.

TABLE 12 LEVEL OF SUPERVISION AND EMPLOYMENT STATUS OF OFFENDERS ON CONDITIONAL SENTENCE

EMPLOYMENT STATUS	LOW	MEDIUM	HIGH
Not Employed	47%	35%	29%
Employement	53%	65%	71%
TOTAL	100%	100%	100%

SOURCE: Ontario Probation and Parole Service, Statistical Services Branch, Ministry of the Solicitor General and Correctional Services, September 1996 - November 1997. This Table illustrated the connection between level of supervision/risk and employment status of offenders on conditional sentence.

There is a significant difference in the level supervision according to employment status ($p<.05$). The data in Table 11 illustrate that offenders who were employed were more likely to be labeled low risk/supervision and those who were unemployed were more likely to be labeled high risk/supervision. Employment plays a stabilizing role in peoples' lives and it is included in the LSI. In this respect, these findings are consistent

with what one would expect - if an offender is not employed, he/she is more likely to be vulnerable to criminal activity.

TABLE 13 RACE OF OFFENDERS ON CONDITIONAL SENTENCE AND LEVEL OF ASSIGNED SUPERVISION/RISK

RACE	LOW	MEDIUM	HIGH	TOTAL
Native	19%	47%	34%	100%
Visible Minority	63%	28%	8%	100%
White	45%	35%	19%	100%

SOURCE: Ontario Probation and Parole Service, Statistical Services Branch, Ministry of the Solicitor General and Correctional Services, September 1996 - November 1997. This Table compares the risk/ supervision level of the three "racial/ethnic" groups on conditional sentence.

There is a statistically significant difference in the supervision/risk level of these "racial" groups ($p<.05$). According to Table 13, visible minorities were most likely to be considered low risk and least likely to be labeled high risk/supervision. White offenders were more than twice as likely to be labeled high risk offenders compared to visible minorities and Native offenders were more than four times more likely to be considered high supervision than visible minorities. Of the three groups, Aboriginals were the most high risk.

Information pertaining to Aboriginal offenders represents a particular interest because this group has traditionally been over-represented in Canadian prisons, particularly in Western Canada. According to section s. 718.2 (e) of the *Criminal Code*, "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*". This particular attention to the situation of Aboriginals represents legislative recognition of the historical marginalization of Aboriginals in society and

consequently their over-representation in prison populations. While Aboriginal persons represents 3% of the population in Canada, they represent 16% of total provincial/territorial admissions (Reed and Roberts, 1996-97; 7).

However, this over-representation is not distributed evenly across the country. In the Western provinces and the Northern part of the country, where the largest Aboriginal populations are found, their over-representation is most pronounced. According to an analysis conducted by the federal Department of Justice using micro-data from Ontario and British-Columbia, remand and sentenced admissions are similar for Aboriginal and White groups in Ontario. Other visible minority groups however are over-represented in remand admissions in both provinces but more so in Ontario. Therefore, with respect to Ontario, limited data suggest that the problem of over-representation pertains more to visible minorities than Aboriginals.

Summary and Conclusions

Chapter four focused on the characteristics of offenders who served a conditional sentence order in Ontario during the first fifteen months of its implementation. The following points summarize the findings generated by the micro data base:

- Ontario ranked second among the provinces/territories for the sheer volume of conditional sentences delivered in the first year of its implementation which is consistent with the fact the Ontario is the most populated province.
- The typical offender serving a conditional sentence order was a 33 year old White male, slighty older than his custodial counterpart.
- Women are over-represented among those serving a conditional sentence order compared to their numbers in total admissions.
- Aboriginals are not over-represented in conditional sentence admissions in this province; however, other visible minorities are over-representation in this province.

- Almost sixty percent of offenders who received a conditional sentence order were unemployed; women were more likely than their male counterparts to be unemployed as well as Natives and visible minorities.

- Just over half of offenders on conditional sentence had served time in prison as adults; however, 37% have no criminal record; Native offenders were most likely to have served time in prison as adults.

- Half of the offenders on conditional sentence were considered low risk/supervision; Aboriginal offenders were most likely to be labeled high risk and visible minority offenders were most likely to be labeled low risk.

- Sixty five percent of sexual offenders on conditional sentence were classified as low risk as well as 50% of offenders convicted of a Person offence.

- Offenders who were employed were more likely to be labeled low supervision and offenders who were unemployed were more likely to be labeled high supervision.

Chapter Five

STATISTICAL PORTRAIT OF CONDITIONAL SENTENCES: LENGTH

Chapter five focuses on the length of conditional sentences. The chapter is divided into the following sections: A) the length of conditional sentence orders in Ontario; B) the length of conditional sentences by province and territory; C) the length of conditional sentence orders, probation orders and prison; D) the length of conditional sentences and the case law; E) lengthening the conditional sentence: program failure and net-widening; and F) conditional sentence length and offence type.

A. The Length of Conditional Sentence Orders in Ontario

TABLE 14 LENGTH OF CONDITIONAL SENTENCE ORDERS IMPOSED BY ONTARIO COURTS BETWEEN SEPTEMBER 1996-OCTOBER 1997

LENGTH OF CONDITIONAL SENTENCE	PERCENTAGE OF CSO
30 days or less	11.1%
31 to 60 days	10.1%
61 days to 90 days	12%
< 3 months	33 %
< 3 months > 6 months	17 %
< 6 months > 9 months	23 %
< 9 months > 12 months	18 %
< 12 months > 15 months	0.6 %
< 15 months > 18 months	2.0 %
< 18 months > 21 months	4 .0%
< 21 months > 25 months	3 .0%
< 25 months *	0 .2 %
TOTAL	100%

SOURCE: Ontario Probation and Parole Service, Statistical Services Branch, Ministry of the Solicitor General and Correctional Services, September 1996 - November 1997. *These conditional sentence orders must include a subsequent term of probation because section 742.1 provides for a maximum sentence of two years less a day.

The mean length of conditional sentence orders granted by Ontario courts between September 1996 and November 1997 is 197 days and the median length is 181 days. Therefore, the average offender on conditional sentence in this province served a

six month term. As Table 13 indicates, 11% of conditional sentence orders constituted a term of less than 30 days, just over a third of conditional sentence orders in Ontario were under three months; and fifty percent conditional sentence orders were under 6 months. Less than 10% of conditional sentence orders during this time frame, exceeded one year.

During the course of a small study conducted with crowns in Ottawa and Toronto, the length of conditional sentence orders was mentioned within the context of breach enforcement.[15] Although the reaction of crown prosecutors to the breach provisions which accompany a s. 742.1 order was generally positive, several crowns were concerned about two key aspects (LaPrairie, Koegl and Neville, 1998a; 10). The breach provisions are outlined in s. 742.6(3) of the *Criminal Code*:

(3) Hearing - an allegation of a breach of condition may be heard by any court having jurisdiction to hear that allegation in the place where the breach is alleged to have been committed or in the place where the accused is found, is arrested or is in custody, but where the place the accused is found, is arrested or is in custody is outside the province in which the breach is alleged to have been committed, no proceedings in respect of that breach shall be instituted in that place without the consent of the Attorney General of that province, and any allegation of a breach shall be heard

(a) within thirty days after the offender's arrest, where a warrant was issued; or

(b) where a summons was issued, within thirty days after the issue of the summons.

(4) Report of supervisor - An allegation of breach of condition must be supported by a written report of the supervisor, which report must include, where appropriate, signed statements of witnesses.

(5) Notice of intention to produce report - No report shall be admitted in evidence unless the party intending to produce it has, before the hearing, given the offender reasonable notice and a copy of the report.

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[15] See Chapter 2 for a description of the study.

(6) Proof of service - Service of any report referred to in subsection (4) may be proved by oral evidence given under oath by, or by affidavit or solemn declaration of, the person claiming to have served it.

(7) Attendance for examination - Notwithstanding subsection (6), the court may require the person who appears to have signed an affidavit or solemn declaration of, the person claiming to have served it.

(8) Requiring attendance of supervisor or witness - The offender may, with leave of the court, require the attendance, for cross-examination, of the supervisor or of any witness whose signed statement is included in the report.

1995, c. 22, s. 6.

The two key enforcement issues described as problematic were the thirty day requirement period for a hearing, as well as the fact that the clock does not stop, following a breach allegation. The thirty day clause, which mandates a hearing to review allegations within a thirty day period, was included to ensure swift and efficient consequences for violations. This swift response is desired in order to preserve the sanction's credibility and to avoid further court delays. In addition, the simpler breach provisions were designed to convey to the offender, to criminal justice practitioners, as well as to the public, the message that the conditional sentence represents a "Sword of Damocles"[16]. Nevertheless, certain procedures are required for a breach hearing - preparing a report of the allegation, providing the report to the offender in order to answer to the allegation, the possibility of a leave granted to the defence in order to cross-examine witnesses. Also, in practical terms, all parties involved must be accommodated.

[16] Damocles was struck with fear by awareness of a sword suspended over his head which was hanging by a single horsehair. Therefore, the metaphor of the "Sword of Damocles" has been used to describe the suspended sentence in England and Wales, as well as the conditional sentence in Canada. (Roberts, 1997; 186).

All of these pragmatic considerations represent an administrative challenge to upholding this provision.

The second point of concern mentioned by crown interviewees, was the fact that the clock does not stop, after a breach allegation is made. The sanction continues to runs its course. Therefore, a short conditional sentence order will not be very meaningful if a breach is involved; for instance, if an offender receives a conditional sentence of one month, by the time the hearing is held, the sanction has expired. [17]

The challenge of administering a short conditional sentence order is not restricted to breach situations. Time is required by the probation office to process the offender's case in terms of paper work or assessing case management needs. One crown counsel in Ottawa summarized this problem when he explained what he did *not* like about the conditional sentence provisions:

> *In practice..timely delivery - adm. process to deal with breaches - too difficult to do within 30 days. If sentence less than 90 days - wouldn't want a c.s. - Impossible for probation to adm. within such a short time period. If sentence low, rather see intermittent sentence than c.s.*

In short, this crown would rather propose an intermittent jail sentence rather than what he perceives as an "unworkable" alternative to prison. Although the study of crowns was restricted to a small sample of individuals from Ottawa and Toronto, the comments are worth noting. As the conditional sentencing data reveal, during the first fifteen months of the its implementation in Ontario, a third of conditional sentence orders were under three months and just over ten percent of orders were less than one month long.

Section B

TABLE 15 THE LENGTH OF CONDITIONAL SENTENCES BY PROVINCE/TERRITORY

	MEAN LENGTH	MEDIAN LENGTH
Newfoundland		
Nova Scotia	6.5	6.1
Prince Edward Island		
New Brunswick		
Quebec	8.1	
Ontario	6.6	6.0
Manitoba	8.9	6.0
Saskatchewan		
Alberta	8.3	6.0
British Columbia	7.1	6.0
North West Territories	4.0	3.0
Yukon	4.0	3.0
CANADA	7.1	5.7

SOURCE: LaPrairire, Carol. (February 1998) "Conditional Sentence Orderes by Province and Territory September 1996 - December 1997", prepared for Research and Statistics Section, Department of Justice. This Table compares the provinces/territories in terms of the mean/median length of time granted for conditional sentences.

Although the data are incomplete, it is apparent that the median length of conditional sentence orders is fairly consistent across the provinces, except in the Yukon and the North West Territories where the sanction is half the length of the other jurisdictions listed. However, the mean length of sentence reveals greater variation among the provinces; Ontario's mean sentence length ranks below the national mean, placing fifth after Manitoba, Alberta, Quebec and British Columbia. (LaPrairie, February 1998d; 11).[18]

[17] Parliament is introducing legislation to address these administrative issues. First, the clock will stop when a breach allegation is made; and second, the thirty day hearing clause will be extended.

[18] The mean represents the average length and the median represents the fifty percent mark. The median is a more reliable indicator. For instance, the higher mean lengths may be attributable to a few cases of much longer sentences.

C. The Length of Conditional Sentences, Probation Orders and Prison

The conditional sentence was promoted as the "penal equivalent" to prison. However, it has been argued that the conditional sentence is much more similar to a probation order than to a prison term. Therefore, this next section will examine briefly how the length of the new sanction compares to these other two penal sanctions.

The median sentence length for conditional sentences is six months. The median sentence length on admissions to provincial facilities in 1995-96 was 31 days (*Adult Correctional Services*, March 1997; 11); in Ontario, it was 30 days in 1995-96 (62). The average probation order was 12 months long in 1995-96, a statistic which is unchanged since 1991-1992 (Reed and Morrison, 1995-96; 12). Furthermore, 37% of admissions to custody were for a period of less than one month, compared to 11% of all conditional sentence admissions; 83% of all admissions to custody were for a period of six months or less, compared to 50% of all admissions to conditional sentences. Therefore, the typical offender is bound to jail for one month, the typical offender placed on a conditional sentence order serves six months and the typical probation offender serves 12 months. Of course, there is great variation within each of the reported categories and across jurisdictions (*Adult Correctional Services*, March 1997; figure 6).

As Reed and Roberts summarized in the 1996-97 *Juristat* on Adult Correctional Services, incarceration at the provincial/territorial level is brief; for instance, there are over 100,000 sentenced admissions to custody annually and less than 15,000 people actually in provincial/territorial facilities on an average daily count. The authors point out that most inmates do not serve their entire sentence in prison - many serve the last portion in the community. The median length of time actually served in jail was 24 days in 1996-

97 (6). The authors also highlight the variation in sentence lengths across jurisdictions. This variation may be explained by the different use of prison made by the judiciary and the nature and case load of offences in a given jurisdiction. Also important to note is that the median prison sentence figures may have been inflated on the short side due to the large numbers of fine defaulters (24%) who serve a short jail sentence in default of payment. However, the sentencing reform Bill includes amendments to the fine system designed to rectify this situation and a number of jurisdictions have introduced "fine option" programs to divert fine defaulters from jail (7).

D. The Length of Conditional Sentences and the Case Law

The previous figures established two points: 1) prison terms at the provincial level are short; 2) offenders who go to jail generally serve less time than those who serve their sentence in the community. This finding provides some evidence to support the interpretation of the conditional sentence as an intermediate sanction rather than a penal equivalent to prison. For instance, when interviewed, certain crowns and judges believed the conditional sentence was useful because it offered an additional sentencing option; the sanction was cited as an ideal alternative to prison for certain offences, but more often, it was perceived as an ideal option for cases where jail is traditionally warranted, although somewhat harsh given the circumstances, but where probation is not quite harsh enough. In other words, an intermediate penalty between prison and probation as the following comments from crowns illustrate:

> *"provides another sentencing option other than strictly probation for offenders where there isn't a history of criminal activity"*
>
> *"additional flexibility - another sentencing option"*

> *" provides some additional flexibility in cases where the case law demands custody but the circumstances are such that (a) c.s. may be appropriate".*
>
> *"another sentencing option - helpful for cases where custodial sentence justified by facts, but person not a real risk - for the 'in between cases' which previously posed some dilemma".*

Of course, these are the views of a minority of crowns and judges. However, they suggest that for at least some crowns and judges, the conditional sentence is recognized as an intermediate option for those "in between cases". Strictly speaking, if the conditional sentence were a true alternative to provincial custody, the length of both sanctions would be more comparable. However, the average length of a conditional sentence order in Ontario was shorter than a probation order, yet longer than a typical prison term, falling in between the two. Of course, intermediate sanctions include other aspects aside from length, such as level of intrusiveness and degree of control exercised over the offender.

The debate over the appropriate length of conditional sentences is on-going. The data reveal clearly that the average conditional sentence in Ontario during this time frame, is longer than the average prison sentence, especially given the reality that offenders sentenced to jail rarely serve their full time in custody. Views differed about the proper length of conditional sentence orders. The key question is whether it is appropriate to lengthen the conditional sentence in order to compensate for the fact that the prison sentence is served in a community context rather than an enclosed carceral setting.

In Saskatchewan, Justice Vancise expressly forbade lengthening the term of service for a conditional sentence. In *McDonald*, he argued that the type and length of the sanction are determined at once, prior to the decision to render a term conditional. In this

scenario, the same period of service applies whether the term is served in custody or in the community.

In *R. Ursel*, the British Columbia Court of Appeal advocated caution, particularly Judge Finch, J.A. who appeared to discourage such a practice: "Judges should be careful not to impose longer terms of imprisonment for conditional sentences than they would if the sentence were to be served in custody, although this does not preclude the possibility of exceptional circumstances calling for a longer, or a shorter conditional sentence that might have been imposed were the time to be served in prison"(290). Judge Ryan, J.A. also addressed this issue in *Ursel*. Although he preached caution, he argued that section 742.1 of the *Criminal Code*, does not mandate a sentencing judge to fix the length of sentence before considering whether it will be served in jail or in the community (290); thus, the door is left open to vary the length of sentence depending on the context in which it is served.

In *Pierce* Judge Finlayson appeared to encourage lower courts to lengthen conditional sentences: "The length of a sentence served in the community should not necessarily be the same length as that served in custody. Ultimately, the duty of the trial judges is to impose a fit sentence" (39). Subsequently, in *Wismayer*, Judge Rosenberg reiterated the following:

> *However, the fact that the offender may end up serving the sentence in prison suggests to me that the court must carefully assess the appropriate length of the sentence . . . Finally, it should be kept in mind, that unlike a normal sentence of imprisonment, a conditional sentence of imprisonment is not subject to reduction through parole, at least while the offender is serving the sentence in the community . . it also suggests that the length of the sentence of imprisonment cannot be completely divorced from the decision whether or not the sentence should be served in the community . . . the conditional sentence may be extremely harsh if*

no regard is had to the fact that ordinarily the entire sentence must be served (33).

Therefore, the position of the Ontario Court of Appeal, while not against the practice of lengthening the conditional sentence, given the community context, is sensitive to the implications for the offender and warns the lower courts to exercise caution when determining the proper length of sentence.

Finally, in *Brady*, the most recent major Court of Appeal decision reviewed in this thesis, Chief Justice Fraser states that the court sees no reason why the same duration should be considered for both jail and the community. "Parliament only says that the sentence ultimately imposed is the one which can be conditional. Parliament does not forbid the sentencing judge from thinking about, or discussing with counsel, possible jail of a different length, depending on where the sentence is to be served" (141). Therefore, the position of the Alberta Court of Appeal legitimates the practice of lengthening the sentence of imprisonment should it be served in the community. This position is consistent with the fact that the Alberta views the conditional sentence as a free standing sanction, not strictly as an alternative mode of servicing a prison term (Manson, 1998a; 188). Although the Ontario Court of Appeal advocates a cautious approach to this issue, it also sanctions such a practice. Therefore, the higher courts have essentially validated the imposition of longer sentences to compensate for the community context.

E. Lengthening the Conditional Sentence: Program Failure and Net-Widening

A good argument exists for prolonging the duration of a prison sentence served in the community in terms of the nature of the sanction. After all, it is difficult to accept that a conditional sentence order is comparable to prison in terms of the reality of the experience. Of course, this statement does not negate the fact that punishment outside

prison walls can be severe and effective, depending on the conditions and the personal circumstances of the offender. However constricted and punitive a conditional sentence order is, it cannot replicate the experience of incarceration within a correctional institution. In fact, to suggest that two experiences are equivalent may serve to demean the harshness of prison. (Roberts 1999) This lack of equivalency undoubtedly factors into a judge's decision with respect to the length of sentence, whether it is consciously acknowledged in reasons for sentence.

It is reasonable for a judge to consider whether a sanction will be served in jail or in the community prior to determining the final sanction. Defence counsel should make their intentions to seek a conditional sentence known prior to the Judge's decision to impose a sentence of imprisonment. There is nothing in the legislation, or dictated by Parliament, that would forbid such a practice.

In fact, as Roberts (1999) suggests that certain advantages may ensue from imposing a longer community-based sanction, relative to the length of its custodial counterpart; for instance, to preserve the principle of parity, an element of proportionality, the fundamental sentencing principle according to the *Criminal Code*; or to reassure the public and the judiciary that a conditional sentence is a "real punishment", which in turn, may increase and/or broaden its application (11-13). In addition, there are pragmatic reasons which may justify prolonging a community-based sanction; for instance, to accommodate rehabilitation, such as drug treatment, self-improvement programs relating to education, employment and/or life skills. Therefore, while there is nothing inherently bad about lengthening a conditional sentence, it presents a risk. Longer conditional sentences should not be enshrined practice; for instance, it should not

become an established rule that three months in prison equals six months on conditional sentence. As emphasized by Roberts (1999), any prolongation of sentence should be done on an individual basis and it should be justified. Of course, the present discussion presupposes that judges are targeting the prison bound population.

On an individual level, the conditional sentence presents an opportunity for the offender to avoid serving time in prison. Therefore, if the offender breaches the order and is consequently imprisoned, such a punishment may be deserved; after all, the "Sword of Damocles" was activated by the offender, him or herself. However, if subsequent breach data reveal widespread violations and if prison is a common response, or becomes common, as the judiciary attempts to maintain the deterrent effect of the Sword and the justice system's credibility, the wide scale impact will be adverse. Provincial correctional populations and/or costs may rise, not fall.

Ideally, the conditional sentence, should help divert the custodial population to the community and provide more effective community integration; also, alternative prison sentences such as the conditional sentence should eventually allow greater resources for adequate facilities and treatment for offenders who must be jailed. If breaches are widespread and enforced severely with prison, the desired developments will not occur; however, the present penal crisis - inadequate facilities, resources, administrative challenges, may be exacerbated.

Gemmell's (1997) article on conditional sentences raises this issue in the context of the English experience with the "suspended sentence" in England. As Gemmell highlights in the article, the work of Bottoms (1979) demonstrated that the length of suspended sentences in Magistrates Courts were significantly higher than sentences of

immediate imprisonment; in addition, the disproportionately long terms of suspended imprisonment may have been swelling rather than diminishing the jail population (343-344). Canadians should be cognizant of the English experience since re-occurrence here would be contrary to the impetus behind the federal government's sentencing legislation - to reduce reliance on prison as a penal option and to reduce Canada's incarceration rate. The absence of adequate breach information on breaches render this scenario purely speculative in Canada for the moment. In order to avoid an experience similar to that of England and Wales, it is imperative to gather and analyze breach data.

Another source of net-widening may result from linking conditional sentence orders to probation orders. Unfortunately, this thesis does not include such information for the province of Ontario. However, a Quebec study which analyzed the implementation of conditional sentences over the past two years found that during the second budget year, there was a greater tendency to combine the sanction with other sentences, such as probation and community service (Auteuil, 1998;7). Given the fact that a conditional sentence is a prison sentence, probation can follow. Therefore, the two sanctions combined provide for a significant period of time during which the offender is under supervision by a correctional authority. According to section 718.2(c) of the *Code*, where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh.

In addition, the available research literature on similar community-based sanctions such as Intensive Probation Supervision (IPS) and electronic monitoring (EM), is consistent in revealing a common sense truth - the greater the level of supervision over someone's behavior, the greater number of violations that will be detected; additional

costs of renewed prosecution, trial and imprisonment make proposed savings uncertain (Cullen, Wright and Applegate, 1996; 87-88). Aside from cost issues, this finding also highlights a fundamental dilemma for conditional sentencing: the goal of cost efficiency and the goal of public protection are often incompatible.

F. Conditional Sentence Length and Type of Offences

TABLE 16 LENGTH OF CONDITIONAL SENTENCE AND OFFENCE TYPE

OFFENCE CATEGORY	MEAN LENGTH	MEDIAN LENGTH
Sexual	317	273
Other	300	273
Fraud	221	182
Drugs	199	181
Property	195	167
Firearms	184	181
Person/Reputation	159	92
Drinking and Driving	152	90
Administration of Justice	119	90
Morals and Public	104	90

SOURCE: Ontario Probation and Parole Service, Statistical Services Branch, Ministry of the Solicitor General and Correctional Services, September 1996 - November 1997. This Table illustrates the length of conditional sentences by category of offence type.

Sexual offences received the longest sentences, followed by other offences, fraud and drug offences, whereas offences pertaining to morals and public order received the shortest sentences, followed by administration of justice offences. [19]

Summary/Conclusion

This chapter focused on the issue of sentence length. The chapter was divided into six sections.

- Conditional sentences are fairly short; for example, 50% of orders were less than six months long. The six month median sentence length in Ontario is consistent with that in other jurisdictions across the country.

- Administrative concerns about processing short term orders were raised by crown prosecutors. However, recent Parliamentary amendments will extend the thirty day breach hearing period and stop the clock once a breach allegation is made.

- The average conditional sentence length falls in between the average prison sentence and the average probation sentence. This finding supports, in conjunction with the views of certain crowns and judges, the claim that conditional sentences are being lengthened by judges. Also, the findings support the argument that conditional sentences may be perceived as an intermediate sanction, rather than an alternative in the mode of serving a prison term.

- A review of the case law reveals that the appellate courts essentially approve of prolonging conditional sentences relative to their custodial counterpart.

- Program failure, combining conditional sentence orders with probation orders and accommodating pragmatic goals were also identified as possible sources of net-widening.

- Sexual offences received the longest sentences and offences regarding morals/public received the shortest sentences.

[19] For a list of mean sentence lengths for specific offences, see APPENDIX G.

Chapter Six

STATISTICAL PORTRAIT OF CONDITIONAL SENTENCES: ADMISSIONS

The following chapter includes an overview of data and issues relating to admissions. Section A includes a monthly count of conditional sentences imposed by trial courts in Ontario during the first thirteen months. Section B examines the preliminary findings which speak to the impact of conditional sentences on imprisonment, particularly in light of the legislation's goals to reduce reliance on, and use of, imprisonment. Section C raises again the issue of net-widening in light of the preliminary findings in section B; the concept of net-widening is elaborated and its relation to alternatives in general and to the conditional sentence in particular is discussed; Finally, the related issue of resource allocation is discussed in light of concerns voiced by crown prosecutors, as well as the federal government's intent to pursue a bifurcated approach to criminal justice

A. The Volume of Conditional Sentences

TABLE 17 THE NUMBER OF CONDITIONAL SENTENCE IMPOSED BY LOWER COURTS IN ONTARIO BY MONTH, SEPTEMBER 1996-OCTOBER 1997

MONTH PERIOD	NUMBER OF ORDERS
September 1996	161
October 1996	241
November 1996	259
December 199	201
January 1997	354
February 1997	345
March 1997	290
April 1997	412
May 1997	390
June 1997	430
July 1997	345
August 1997	292
September 1997	403
October 1997	440
TOTAL	4563

SOURCE: Ontario Probation and Parole Service, Statistical Services Branch, Ministry of the Solicitor General and Correctional Services, September 1996 - November 1997. This Table illustrates the monthly volume of conditional sentence imposed by Ontario courts.

The above table provides a monthly count of conditional sentence orders imposed in Ontario between September 1996 and October 1997. The table demonstrates an overall pattern toward increased use of the conditional sentences.[20] The relatively small monthly fluctations may be a reflection of any number of factors; the volume and the nature of cases before the courts, increased familiarity with a new sanction, judicial and public attitudes towards the conditional sentence, judgements delivered by the Courts of Appeal which relate to conditional sentences and/or Parliamentary intervention.

It is interesting to observe however, that there is no apparant effect on the volume of conditional sentences following the implementation of the Parliamentary amendement in early May 1997. As mentioned previously, the amendement was a response to the

earlier interpretation of the conditional sentences in *R. v. Scidmore*. This first major appellate judgement from the Ontario Court of Appeal, arguably conveyed a permissive application of conditional sentences and thus the Court set a very low threshold. The Parliementary amendenment represented an attempt to raise that threshold. However, the amendement did not interrupt the overall pattern of growth in the use of conditional sentence by the Ontario judiciary during the first thirteen months of its implementation.

Whether the appellate decisions exert an influence on the volume of conditional sentences imposed at the trial court is an interesting question. After all, part of the role of the Court of Appeal is to provide guidance to the lower courts in their interpretation and application of the law. However, the answer is speculative. Future analyses should focus attention towards fluctuations in the volume of conditional sentence admissions in order to discern to the rate of its application over time. In addition, a more specific analysis of Court of Appeal decisions by offence type would help discern the impact, if any, of appellate court decisions on certain types of offences, offenders and/or circumstances

B. Conditional Sentence Admissions, Probation Admissions and Prison Admissions

In Chapter one, the context which precipitated the sentencing reform legislation and the conditional sentence was outlined. Bill C-41 reflected the federal government's recognition that prison has failed to achieve significant success in rehabilitation, and often has exacerbated the situation; and its commitment to uphold the "principle of restraint", as well as to implement and develop alternative options to prison. The conditional sentence represents a specific manifestation of this commitment. The sanction

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[20] The low volume of conditional sentences for the month of August appears to represent a break in the overall pattern of growth, However, the low count is probably a reflection of less court acitivity during this

constitutes a new approach towards offenders who traditionally would have been incarcerated; it also constitutes a pragmatic vehicle that offers the possibility of reducing reliance on, and use of, imprisonment and ultimately of reducing provincial prison populations.

With that in mind, the rest of this chapter will examine briefly what impact, however preliminary, the conditional sentence has exerted on prison admissions. If one of the main objectives of the new provision is to reduce the court's reliance on, and use of, imprisonment, then the conditional sentence should result in fewer people in provincial correctional facilities (counts) as well as fewer offenders sent to prison (sentenced admissions) with a corresponding increase in the number of offenders in community-based sanctions, such as the conditional sentence. The logic behind diverting some of the prisoners into the community, is that cheaper punishment will incur savings which can then be filtered into better treatment for those who *must* be imprisoned. This process, if successful, may result in the redirection of correctional funds for treatment inside provincial and federal prisons.

Admission Data

i)Correctional Activity

Traditionally, there are two indicators of the utilization of correctional facilities: "inmate admissions" and "average counts". The first indicator, "inmate admissions", or "intakes" represents data collected when offenders enter an institution, such as sentence length, offence(s), as well as some basic personal characteristics. These data describe and measure the changing case flow of correctional agencies over time. The second indicator,

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summer month.

"average counts" or "daily counts" describes the number of inmates in institutions at a given time - providing the average daily population count in institutions. Daily counts are then used to calculate annual average counts. These counts are a major operational indicator for correctional managers (*Adult Correctional Services, 1995-1996*, 15).

ii)Probation Services

There are also two indicators used to describe the utilization of probation services. The first indicator, "probation intakes", represents the number of persons receiving a term of probation. The second indicator is called "probation case counts"; these counts are usually taken monthly and are expressed as "month-end counts". As with institutional counts, these "month-end counts" are used for operational and administrative purposes (*Adult Correctional Services, 1995-96*, 18).

As mentioned previously, adult correctional services encompass more than the custodial care of offenders sentenced to prison. Correctional authorities are responsible for the care of accused persons awaiting trial (remand), offenders sentenced to probation, offenders serving part of their custodial sentence in the community, on conditional sentence, on probation or on a conditional release program (parole). Correctional authorities are responsible for the supervision of all such offenders until their sentence expires. For the present analysis, federal inmates and the Correctional Services of Canada are excluded, as stipulated by the legislative criteria outlined in s. 742.1 of the *Criminal Code*.

New legislation is only one factor which affects correctional populations; law enforcement practices and changes in the crime rate; changes in the conviction rate; court practices and evolving judicial attitudes; and finally, early release practices will help

determine the volume and the nature of correctional populations. In addition, the conditional sentence of imprisonment is still young. September 1998 marked two years since its implementation. However, given the structure and the timing of data collection, available sentencing statistics on conditional sentencing are still sparse and consist of preliminary findings. Nevertheless, a few sources offer some insight into the state of corrections and the impact of the new conditional sentence.

First, as stated already, Canada has a high incarceration rate (115 per 100,000 total population) compared to other countries, England/Wales (100), France (95), Germany (85), Sweden (65) Japan (37). The exception is the United States (600). In addition, correctional populations have grown steadily over the last decade. The number of admissions to custody peaked in 1992-93 at 251,329 and the average daily number of people under correctional supervision peaked in 1993-94 at 154,453. However, since then, the trend has stabilized and the past few years have recorded small declines in counts and the number of admissions (Reed and Roberts, 1996-97; 3).

Overall, provincial prison counts were down in 1996-97, while federal prison counts were up. This overall decrease in the number of people in provincial correctional facilities in 1996-97 could partly be explained by the introduction of s. 742.1 which offered an alternative to custody, at the provincial level, where the decline was noted (Reed and Roberts, 1996-97; 5). Despite the fourth consecutive annual decline in the number of offenders sent to prison, admissions were still 21% higher than a decade ago.[21] Also, the decline in admissions preceded the introduction of Bill C-41 and the conditional sentence of imprisonment. In addition, the incarceration rate, the number of offenders

imprisonment per 10,000 adults charged, recorded a marginal increase in 1996-97 (0.8%); four jurisdictions, experienced an increase in the sentenced incarceration rate: Northwest Territories (21%), Ontario, Quebec and Yukon (1% each) (*Adult Correctional Services, 1996-97,* 24).

What about conditional sentences? There was some very preliminary information about admission rates from the Sentencing Review Team, of the federal Department of Justice. Due to the potential impact of conditional sentencing on prison populations, correctional admissions data are collected systematically every six months, in five provinces and one territory, to monitor changes in the correctional population (LaPrairie and Koegl, 1998b; 14). As LaPrairie and Koegl observe, if the conditional sentence is applied as a true alternative/replacement to custody, strictly speaking, one would expect some "fit" in the same period of time between the number of conditional sentences imposed and decreases in the number of provincial sentenced admissions to custody because these are the only type of admissions that should be affected (14).

In other words, in 1996-97 and 1997-98, following the implementation of conditional sentences, prison populations should record a decline that is consistent with the number of conditional sentences imposed. The data from the federal study reveal that for the six jurisdictions in question, BC, Alberta, Saskatchewan, Manitoba, Ontario and the Yukon, the number of conditional sentences imposed did not produce the predicted decrease in admissions. In other words, given the number of conditional sentences imposed in these jurisdictions, there should have been even fewer offenders in prison.

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[21] See APPENDIX D for a breakdown of community and custody admissions from 1987-1997.

There was a large discrepancy between the number of conditional sentences imposed compared to the declines in the number of admissions to prison. The smallest discrepancy was recorded in the province of Manitoba and the largest discrepancy was found here in Ontario. In the latter province, 6000 conditional sentence orders were granted during the period in question compared to a decline of 310 sentenced admissions to provincial custody (LaPrairie and Koegl, 1998b; 14-15). The early data suggest that the conditional sentence did not replace a provincial jail term as much as would be expected given its intended role by the legislation.

In Quebec, the province which ranks first in terms of the number of conditional sentences granted, a brief analysis of the implementation of the sanction from September 1996 to January 1998 was prepared for Correctional Services. In the report, the author noted that in 1996-97, admissions into custody for continuous sentences and supervised probation increased 11.7% and 10.8% respectively, compared with the previous year. On the other hand, there was a decrease of almost 2000 admissions of persons sentenced to an intermittent sentence (-36% compared with the previous year) (Auteuil, 1998; 4). Therefore, the report demonstrates that the conditional sentence did not produce a decrease in the number of admissions to custody in Quebec. Rather, an increase was recorded. Furthermore, the report notes several possible forms of net-widening occurring. For instance, in this case, conditional sentences may be replacing intermittent sentences.

C. Conditional Sentences: Net-Widening and Resources

There are other indications that such a pattern of net-widening may persist or develop. First, the Quebec report (Auteuil, 1998) suggested that the conditional sentence is contributing to net-widening on several fronts - "over sentencing" by appropriating

offenders from the probation population and those sentenced to intermittent jail terms; a lengthening of the sanction over the period of time studied, as well a longer conditional sentences than custody; and a greater tendency in the second year to combine conditional sentences with other sentences, in particular with probation and community service (Auteuil, 1998).

Second, the positions held by Alberta Court of Appeal as well as some judges in the Toronto area, vis-à-vis conditional sentences, suggest the possibility of net-widening. For instance, in *Brady*, the Alberta Queen's Bench portrayed the new sanction as an intermediate one, not necessarily as a true alternative to imprisonment: "We view a conditional sentence in perspective. It is only one more in a range of sentencing options for trial judges in this country. It is a welcome addition, as it fills a small gap which previously existed"(5). Another source which shares this perspective of the conditional sentence comes from the judges' in Toronto who were questioned about their opinions with reference to conditional sentences. The most common response in the report pertaining to the question of what judges *like* about conditional sentences is as follows: ... "they provided another option, another tool for judges and that judges are greatly in need of more options" (LaPrairie and Koegl, February 1998b; 3). Although one should avoid reading too much into the previous statement, (especially since the sample of judges is not representative of all judges), it does suggest nevertheless that, for these judges, the conditional sentence is an *additional* option, not an *alternative* option as the legislation proposes.

Third, the research conducted by Bottoms (1979) underscores the net-widening experience in England following the passage of the *Criminal Justice Act* 1967 which

created a similar sentencing option to the conditional sentence. As Gemmell (1997) underlines, the "suspended sentence" was also introduced as an explicit alternative to imprisonment. Nevertheless, Bottoms demonstrated that judges treated the suspended sentence not as an alternative to imprisonment, but rather as a sanction in its own right - a rung in the penalty ladder lying just below the ultimate sanction of imprisonment (Gemmell, 1997; 344).

The history of alternatives in general, as well as alternatives to imprisonment in particular, reveals a tendency toward widening the net of social control. The concept of net-widening is very difficult to measure; following the analogy of nets, the concept may refer to wider, stronger and/or different nets. Of relevance here are stronger nets, which relate to offenders who would have been placed on probation had the higher level sanction not existed; and on larger nets, which relates to the general expansion of social control following the introduction of alternative sanctions (*Smart Sentencing*, 1992; 237-239). The first type of net-widening mentioned is "offender-focused". For instance, in this case, it would apply either to offenders who receive a conditional sentence, but who normally would have received probation, and/or to offenders who receive a jail term instead of a conditional sentence, despite the latter being an appropriate sanction. However, there is also another type of net-widening which can be described as "system-focused". Stronger nets do not necessarily detract significantly from cost-effectiveness, but larger nets may exert a significant impact on costs. In addition, the issue of program failure, discussed in Chapter five, becomes relevant from both an individual and a systems-vantage perspective, as an element to be weighed in a costs-benefit analysis.

Given the fact that part of the impetus behind the movement towards alternative sanctions, such as the conditional sentence, is a fiscal one, it is important to examine cost effects from a system vantage point. The "per diem costs" of offenders serving their punishment in the community are important, however, sufficient levels of offender substitution from prison to conditional sentences would have to occur in order to effectuate a reduction in the costs of running an institution. There are only two ways in which real savings can occur: the first is the complete or partial closure of a prison and the second is to prevent the construction of new prisons. Ian Gomme, who has evaluated electronic monitoring programs, explains that institutional costs do not vary significantly with fluctuations in the number of prisoners. Gomme points to figures that indicate almost 80% of institutional costs are fixed, with the lions' share of operating costs devoted to staff salaries (75% in Canadian provincial institutions); certain staffing requirements are necessary for these institutions to function, regardless of the numbers incarcerated. Berry and Mathews estimate that the inmate population would have to be reduced by 50% before significant staff cuts could be made and the associated savings realized (Gomme, 1992; 261).

If a conditional sentence is a cheaper "per diem" option to incarceration, then eventually, greater resources should be liberated to deal with more serious offenders inside prison. Presumably, some of this extra money would also be redirected to probation services which will experience an enhanced workload as a function of the conditional sentence. This additional responsibility will stretch the agency's ability to manage offenders effectively. There is a lack of attention towards this latter shift of demand. A real or perceived lack of resources will not promote good faith on behalf of

criminal justice officials and the public about the usefulness and the appropriateness of a prison sanction served in the community. For instance, the small study of crowns in Ottawa and Toronto revealed that the over-riding sentiment held by prosecutors was that resource levels for probation, supervision and treatment are inadequate, and that it is difficult to meet the needs of offenders and the objectives of the legislation without more resources (LaPrairie, Koegl and Neville, 11). The corollary study with judges also stressed concern about the future of conditional sentences in relation to the availability of resources (LaPrairie, Koegl, February 1998; 6, 7, 11-12).

Summary and Conclusions

In this chapter, the following issues were addressed: the volume of conditional sentences, as well a measure of the impact of appellate courts and/or Parliament intervention on the lower courts. The volume of conditional sentences appears to have been influenced by judgments made by appellate courts in the early stages of the conditional sentence regime. The second goal of this chapter was to assess the preliminary impact of conditional sentences on prison admissions. The early findings indicate that although admissions did decline slightly in the immediate aftermath of the new sentencing option, the decline is not commensurate with the number of conditional sentences imposed. Since this finding suggests that conditional sentence may not have been used as a true alternative, the issue of net-widening was raised. Although it is still premature to draw conclusions, history, experience abroad and the attitudes of some judicial members suggest that the conditional sentence is vulnerable to the net-widening phenomenon; several sources of "net-widening" were identified: longer sentences, combining sentences, giving would-be probation probationers conditional sentences,

refusing to grant conditional sentences where appropriate and program failure. Finally, the issue of resource levels and resource distribution was raised, given the reallocation of responsibilities for supervision and care of offenders within correctional services.

Researchers and policy-makers should monitor the use of conditional sentences in order assess the extent of its use, as well as to assess its application in relation to that of prison and probation. Such monitoring would also help ensure proper allocation of resources. In addition, the complexity of the issue of net-widening and cost-effectiveness is such that a more comprehensive analysis of the impact of conditional sentences would involve the following elements: "per diem costs", operational expenditures for corrections, a measure of the cost of program failure, (which requires the collection of breach data), as well as a cost analysis of resources made available or reallocated for various rehabilitation purposes - employment, education, drug treatment, anger management, etc.

The next section will examine the type of offences which received a conditional sentence in Ontario during the first fifteen months of its implementation.

Chapter Seven

STATISTICAL PORTRAIT OF CONDITIONAL SENTENCES: OFFENCES

The conditional sentence data in this chapter highlight the type of offences granted a conditional sentence order in Ontario by the trial courts between September 1996 and December 1997. Part A explores the type of offences granted conditional sentences, by category, as well as certain specific offences; Part B presents a brief discussion about the controversial application of conditional sentences for cases of domestic/sexual assault, impaired driving and drug offences. Part C concludes the discussion on questions pertaining to the application and purpose of conditional sentences and the sentencing reform legislation.

First, as stated already, the statutory regime provides that the conditional sentence is available for almost all offences. Over the past two years, the higher courts have confirmed this fact. Offences are excluded from a s. 742.1 order only if they do not comply with the minimum statutory criteria outlined in the *Criminal Code*:

a) an offence not punishable by minimum term of imprisonment, and the court

b) imposes a sentence of imprisonment of less than two years, and

c) serving the sentence in the community would not endanger the safety of the community

d) serving the sentence in the community would be consistent with the fundamental purposes and principles of sentencing set out in sections 718 to 718.2

Although the criteria outlined in c) and d) contain important directives, they remain a matter of judicial discretion. Consequently, only the first two criteria contained in a) and b) establish the prohibitory threshold necessary for a s. 742.1 order. Therefore,

all but those offences requiring a minimum term of imprisonment are eligible for a conditional sentence order. For instance, robbery, which carries the possibility of life imprisonment according to s. 344 of the *Criminal Code*, is eligible for a conditional sentence; in fact, Ontario courts granted a conditional sentence for 71 robbery offences during the first fifteen months. However, if a firearm is employed during the commission of a robbery, the offence is no longer eligible for a conditional sentence. According to the robbery provisions in the *Code*, a minimum term of four years imprisonment is required where a firearm is used in the commission of an offence, thus violating the first minimum statutory criteria in s. 742.1. of the *Criminal Code*.

There are 4,633 cases of conditional sentence orders in the Ontario database. The orders encompass some 213 *Criminal Code* offences.[22] The offences included in the date set represent the most serious offence for which the offender received a conditional sentence. The first table provides a breakdown of the type of offences which were granted a conditional sentence. The second table examines the gender and race variables in relation to the type of offence.

[22] For a breakdown of these 213 *Criminal Code* offences, refer to APPENDIX H.

A. Conditional Sentences and Offence Type

TABLE 18 THE MOST SERIOUS OFFENCE GRANTED A CONDITIONAL SENTENCE IN ONTARIO BETWEEN SEPTEMBER 1996-NOVEMBER 1997

MOST SERIOUS OFFENCE	NUMBER OF CSO	PERCENTAGE OF CSO
Firearm Related Offences	146	3
Administration of Justice	228	5
Sexual Offences	329	7
Morals and Conduct	28	0.6
Person and Reputation	941	20
Drinking and/or Driving	219	5
Property Related Offences	1155	25
Fraud and Counterfeit	893	19
Drug Related Offences	607	13
Other Offences	87	2
TOTAL	4633	100%

SOURCE: Ontario Probation and Parole Service, Statistical Services Branch, Ministry of the Solicitor General and Correctional Services, September 1996 - November 1997. This Table illustrates the type of offences for which conditional sentences were granted.

As Table 18 demonstrates, the bulk of conditional sentence orders were granted for property offences (property/fraud, 44%). Although fraud is a property offence, it was separated to highlight the judiciary's particular use of the new sanction for fraud offences; almost 20% of conditional sentences granted by the courts during this time period involved some type of fraud. Personal injury offences also represent 20% of the conditional sentences granted by the courts during this time frame: 941 offenders who committed some type of person-related offence, were diverted from custody and served their term of imprisonment in the community. This category of offences includes, for the most part, various types of assault charges (80%); simple assault alone, both summary and indictable, represent 42% of person offences. Although rare, the person offence category included a few cases of attempted murder (3), manslaughter [23](3), criminal harassment (38), hostage taking (2) and kidnapping (2). In addition, 329 (7%) of the

conditional sentences during this time period were granted to persons convicted of sexual offences; the bulk of this category of offences consisted of sexual assault, indictable and summary (60%).

Drug related offences make up 13% of conditional sentences during the first fifteen months; the most significant charges in this category were "possession over indictable" (19%) and "traffic narcotics"(19%). With respect to the 219 conditional sentences for "drinking and driving", 42% of these involved some form of impaired driving. Finally, the firearms offences which received a conditional sentence, consisted mainly of "possession of offensive weapons" or "failing to comply with a permit".

Although a significant portion of conditional sentences imposed by the lower courts in Ontario consisted, predictably, of property offences, the sanction was not reserved for these type of offences. Although the nature and circumstances of each offence and offender are unknown, Ontario judges provided opportunities for community-based sanctions across the spectrum of offence seriousness, including some controversial offences which will be discussed in the next section.[24]

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[23] In Ottawa during the past year, there have been two manslaughter cases which have resulted in a conditional sentence.

[24] This widespread use of the sanction is in contrast to a description provided by Allan Rock, in relation to the application of conditional sentences. For this description, refer to Chapter one, 16.

TABLE 19 GENDER AND MOST SERIOUS OFFENCE FOR WHICH A CONDITIONAL SENTENCE WAS SERVED IN ONTARIO, SEPTEMBER 1996 - NOVEMBER 1997

OFFENCE CATEORY	MALES	FEMALES
Firearms	3.5	2.2
Administration of Justice	5.0	2.2
Sexual	9.0	2.4
Morals and Conduct	0.2	2.0
Person and Reputation	23	12
Driving	5.0	3.0
Property	24	27
Fraud and Counterfeit	14	36
Drugs	14	11
Other	2.1	1.3
TOTAL	100%	100%

SOURCE: Ontario Probation and Parole Service, Statistical Services Branch, Ministry of the Solicitor General and Correctional Services, September 1996 - November 1997. This Table compares the type of offences for which male and female offenders served a conditional sentence. The findings in the Table reflect the pattern of offender among the sexes.

As Table 19 illustrates, female offenders were more likely than their male counterparts to have been convicted of offences against "morals and public conduct". This figure is consistent with the fact that the primary offence in this category is "communicating for the purposes of prostitution" which more often involves women than men. In addition, female offenders were more likely to have been convicted of fraud than the male offenders. Unfortunately, there is no information about the type of fraud committed by the women, that is, the circumstances surrounding the commission the offence. The overrepresentation of women in this category may be due to the greater likelihood of women finding themselves in circumstances, i.e. an abusive relationship, or the sole parental provider, where they feel compelled to commit certain types of fraud, such as welfare fraud or writing bad cheques.

Male offenders in the sample were more likely than their female counterparts to receive a conditional sentence for sexual offences. This finding is consistent with the fact that men are most often the perpetrators of sexual offences. In addition, more male

offenders received a conditional sentence for person-related offences. These findings are also consistent with the fact that women, as a whole, are less involved in serious crime compared to men (*Juristat*, 1996-97/Overview; 13).

TABLE 20 RACE AND MOST SERIOUS OFFENCE FOR WHICH OFFENDERS SERVED A CONDITIONAL SENTENCE IN ONTARIO, SEPTEMBER 1996-NOVEMBER 1997

OFFENCE CATEGORY	ABORIGINAL	VISIBLE MINORITY	CAUCASIAN
Firearms	10	1.6	3.0
Adm. of Justice	8	4.1	5.3
Sexual	7.0	3.5	7.4
Morals	0.4	0.5	0.7
Person	36	20	20
Driving	1.5	2.2	5.5
Drugs	5.0	16	13
Property	22	21	26.5
Fraud	9.0	26	17
Other	1.1	4.3	1.4
TOTAL	100%	100%	100%

SOURCE: Ontario Probation and Parole Service, Statistical Services Branch, Ministry of the Solicitor General and Correctional Services, September 1996 - November 1997. This Table compares the type of offences for which the three "racial/ethnic" groups served a conditional sentence. The Table's findings reflect the existing patterns of offending.

Aboriginal offenders were more likely to receive a conditional sentence for firearm offences, administration of justice offences and especially, person-related offences than Caucasians or visible minorities. Perhaps the lower courts in Ontario are striving harder to divert Aboriginal offenders from prisons in light of the provision in the *Criminal Code*. According to section 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".

Visible minority offenders were half as likely as Native and White offenders to have been sentenced to a conditional sentence for sexual offences. However, a much

greater number of visible minorities who served a conditional sentence at this time, did so for fraud offences, compared to their White and Native counterparts.

B. Domestic Assault, Drinking and Driving and Drugs

The application of conditional sentences for certain offences is controversial. Among the most controversial offences are domestic/sexual assaults, drinking and driving and drug offences. These three types of offences share a special status. In the past two decades, the behaviour subsumed under each label has become recognized and treated as a serious social problem. Governments and various interest groups have exerted great effort to draw attention to the prevalence of the behavior in question, as well as the harmful consequences it produces on individuals and on society at large. The message is that such behavior is wrong, harmful and most importantly, it is criminal and subject to serious legal sanctions.

Since the criminal justice system in general and prison in particular have been relied upon so heavily to deal with major social problems, seriousness became equated with incarceration. Therefore, the appearance of conditional sentences, a potentially progressive alternative to imprisonment, is greeted by some as suspect. As an alternative to imprisonment, the conditional sentence is perceived by some as a retreat from the gains accomplished over the past two decades. Within the framework of a system where incarceration is the most powerful tool to convey social disapproval, the conditional sentence could mean the criminal justice system may no longer take these issues "seriously". This fear is at the root of the controversial use of conditional sentences for cases of domestic/sexual assault, drinking and driving and drug offences.

Domestic and Sexual Assault

Women's groups have succeeded in moving the issue of violence against women to the forefront of public debate. These days, no one disputes the fact that violence against women constitutes a serious social problem. However, due to its sensitive political nature, the appropriateness of conditional sentences in this area is controversial. Therefore, the federal Department of Justice conducted a small study to explore the perceptions and opinions of judges and crown prosecutors in select urban courts. This study has been discussed in other chapters; however, its main goal was to elicit opinions with respect to the issue of domestic/sexual assault. In both jurisdictions, Ottawa and Toronto, special "domestic courts" have been established to handle such cases, therefore, crowns and judges are very attuned to the issue.

In response to concerns about the appropriateness of conditional sentences for cases of domestic/sexual assault, the majority of crowns conceded that ... "despite their initial reactions to the use of conditional sentences for domestic and sexual offences, almost all prosecutors were able to see situations and circumstances in which the use of a conditional sentence might be justified." Some of theses mitigating factors were: a) it was a first offence; b) no injury was involved; c) there was remorse and the intent to seek treatment on the part of the offender; d) there were economic considerations such as the offender being the sole support of the family; and e) the relationship between the victim and the offender. However, the point was made that where all or some of these mitigating circumstances were not present, a conditional sentence would not be appropriate and could cause social damage (LaPrairie, Koegl and Neville, June 1998a; 9).

The corollary study involved judges from the Toronto area courts. Apart from two judges who felt that all domestic and sexual assaults should be excluded, the remaining judges believed that certain mitigating circumstances would allow consideration of a conditional sentence for cases of domestic and sexual assaults. The most prominent consideration mentioned was the offender's willingness and responsiveness to treatment. However, with respect to sexual assault, especially child sexual abuse, the threshold was higher. The majority of judges responded that if conditional sentences were used at all, it would only be for the less serious offences (LaPrairie and Koegl, 1998b; 7).

In all, it appears that the introduction of the conditional sentence option was greeted by the interviewees with some skepticism, but with an open mind. There were few respondents, whether judges or crowns, who wished for a complete statutory exclusion of offences from the purview of the new sanction. In addition, the conditional sentence, as representing an opportunity to pursue the treatment angle, was recognized by most. Of course, the absence of a widespread desire to completely exclude these types of offences is probably a function of wanting to retain discretionary power at the court level, rather than relegate entirely the decision making power to Parliament.

In both reports, responses to another question shed some doubt on the extent to which these criminal justice officials really perceive the conditional sentence as appropriate. For instance, in reply to the question of which offences are *least* appropriate for conditional sentences, both judges and crowns cited crimes of violence, such as domestic and sexual assaults as being inappropriate candidates for conditional sentences. These views were justified largely on the basis of denunciatory and deterrent goals;

conditional sentences were not considered appropriate ... "*Where strong repudiation and individual and general deterrence are required*" (LaPrairie and Koegl, 1998b; 6)

Drinking and Driving

As with the issue of violence against women, drinking and driving came to the forefront in the 1980s. Largely aided by interests groups, for instance, *M.A.D.D.*, a number of public education campaigns sought to underline the inherent risks and potential costs to individuals and to society at large of engaging in such irresponsible behavior. The drinking and driving movement, like the anti-smoking movement, has succeeded in attaching a social stigma to certain behavior. This social stigma was the dominant concern for the Ontario Court of Appeal in *Biancofiore*, as underlined in Chapter three. The case law developed thus far dictates a presumption of incarceration where bodily harm and/or death result from impaired and/or dangerous driving (*R. v. McPhee, R. Mcveigh; R. v. Hollinsky; R. v. Larocque, R. v. Jacobs, R. v. Bernshaw*). These judgments, which emphasize the necessity of incarceration, represent an effort to sustain this social stigma and with it, hopefully, a general deterrent effect.

According the s. 255 (1) of the *Criminal Code*, offences involving the operation of a motor vehicle while impaired, whether the offence is punishable by indictment or punishable on summary conviction, convicted offenders are liable to the following minimum punishment:

(i) for a first offence, to a fine of not less than three hundred dollars,

(ii) for a second offence, to imprisonment for not less than fourteen days, and

(iii) for each subsequent offence, to imprisonment for not less than ninety days;

Therefore, only first time offenders are eligible for a conditional sentence. If offenders hold previous convictions for impaired driving offences, the minimum statutory criteria in section 742.1 of the *Code* preclude the possibility of a conditional sentence. Nevertheless, a number of conditional sentences were granted to offenders convicted of drinking and driving offences during the first fifteen months of the sanction's implementation in Ontario; in fact 38% of the 219 driving offences involved impaired driving. In addition, serious incidents, such as bodily harm and/or death can occur, as the result of a first time conviction.

In *Biancofiore*, the Ontario Court of Appeal ruled that a conditional sentence was inappropriate based on the fact that general deterrence is the paramount objective in sentencing drinking and driving offences, especially where serious harms result (208). A conditional sentence was also refused for denunciatory reasons, based in the perceived need to maintain the stigma attached to drinking and driving offences. However, Judge Rosenberg made it clear that the court did not preclude the possibility of satisfying these sentencing objectives in the community. The court ruled that based on the totality of the facts involved with respect to Mr. Biancofiore, general deterrence and denunciation would not be satisfied within the community.

Drugs

As with the offences outlined in the first two categories, the issue of drugs has been identified as a major social ill, often cited as the root of social disorder in North American society. A "war on drugs" was declared in the 1980s and millions of dollars have been spent on law enforcement, research, addiction centers, rehabilitation efforts and education campaigns. Drug abuse, like alcohol abuse, has come to be perceived as an

addiction. Therefore, the consumers, individuals with drug problems, are seen to require treatment. However, the heavy hand of the criminal justice system is reserved for the suppliers. The intended message to those who cultivate, import and/or traffic in drugs, particularly the so-called hard drugs such as heroin and cocaine, is to expect harsh treatment.

The *Brady* judgment, a central reference point throughout this thesis, involved drug offences, specifically one count of cultivating marijuana and one count of possession for the purposes of trafficking. The Alberta Court of Appeal summarized the case law as well as the proper sentencing objectives. The trial judge in Brady referred to previous drug cases from that province, (*R. v. Jackson (1989); R. v. Burchnall (1980); R. v. Maskill (1981)* and concluded: deterrence traditionally, has been the fundamental objective of sentencing in trafficking, possession for the purposes of trafficking, and since *R. v. Jackson and Lavine*, in cultivation cases (156). Given the importance of deterrence in drug cases, the case law had established (*R.v. Maskill)* that jail is to be imposed in all cases of trafficking, or possession for the purposes of trafficking, except in exceptional circumstances (177). However, the court did not suggest a point of departure or a range. Therefore, the possibility for sentences of less than two years, remains open.

Trial courts in Ontario did apply the new sanction to drug offences in some cases. For instance, almost 600 conditional sentences were granted for drug offences; of these, 63% involved cultivation, possession for the purposes of trafficking and trafficking itself. In *Brady*, the Alberta Court ruled that the trial judge had not considered the objective of general deterrence in the decision to impose a conditional sentence; and since this constituted an error, the conditional sentence was unfit. However, the Court did not

preclude in and of itself, the possibility of conditional sentences for such cases, depending on the optional conditions that shape the order/sanction.

Offences involving domestic/sexual assault, drinking and driving and serious drug offences share several features: 1) the behavior defined within these categories has been identified as a serious social problem; 2) the criminal justice system has been relied upon to convey the seriousness of such behavior; 3) the case law has developed presumptions of incarceration, particularly at the serious end of the spectrum, thus equating seriousness and imprisonment; 4) the application of conditional sentences for these offences is controversial; 5) and finally, the position of the courts vis-à-vis the importance of incarceration is justified primarily by the need to uphold denunciatory principles and general deterrence.

Judicial reliance on denunciation and general deterrence as a basis for precluding, or restricting the use of the conditional sentence is problematic for several reasons. First, the status of research on the general deterrent value of incarceration is suspect. The government recognizes this, as evidenced by the move to create and implement sentencing reforms. The judiciary, including the Supreme Court of Canada, also recognizes the fact that the specific deterrent effect of harsher sentences does not necessarily produce a significant, or even a modest, general deterrent impact.

Second, there is no legislative basis to accord predominance to denunciation and general deterrence over the other objectives now encoded in the *Criminal Code*. As mentioned at the beginning of the thesis, one of the most significant short-comings identified in our sentencing system prior to Bill C-41 was the absence of official direction about the purpose and principles of sentencing. Bill C-41 fell short of including a genuine

guideline system. However, Parliament did include a statement of the purpose and principles of sentencing. Once again, according to section 718 of the *Criminal Code:*

Purpose

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

a) to denounce unlawful conduct;

b) to deter the offender and other persons from committing offenses;

c) to separate offenders from society, where necessary;

d) to assist in rehabilitating offenders;

e) to provide reparations for harm done to victims or to the community; and

f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to the community.

As section 718 illustrates, several sentencing objectives are listed from which judges may select in order to achieve this fundamental purpose. The traditional common law goals are included: general and specific deterrence, rehabilitation, denunciation and separation; in addition to the traditional objectives, two new goals are included, reparation and responsibility, which can be linked to a more restorative approach to criminal justice. The sentencing objectives are not ranked. Therefore, there is no justification for continuous over-reliance on general deterrence and denunciation, while neglecting the other sentencing objectives.

Special attention to general deterrence and denunciation are justified for cases involving domestic violence, impaired driving, drugs and other offences on the basis of their serious nature. As the need for general deterrence and denunciation of certain

offences rises, so does the need for reparation, responsibility and rehabilitation. The three latter objectives are not in juxtaposition to the first three. Ironically, the type of offences discussed in part B, although serious, are also ideal to activate the inherent potential of the conditional sentences to accomplish more restorative and rehabilitation goals, as well as punitive goals.

The debate about the appropriateness of conditional sentences in cases of domestic assault, impaired driving and drugs, raises a couple of dilemmas: The first is the role of the case law developed prior to Bill C-41 in terms of presumptions of incarceration; in other words, which of the following principles now predominates: the established presumptions of incarceration contained in the case law or the principle of restraint contained in the *Criminal Code*? This question in turn points to a larger one, the unresolved status and role of the conditional sentence and the new sentencing legislation. Part C) will close the chapter with a brief discussion of these questions.

C. Bill C-41 and the Conditional Sentence: A "New Dawn in Sentencing" or Business as Usual?

As Justice Rosenberg pointed out in *Wismayer*, the enactment of the conditional sentence regime represents a concession to the view that the general deterrent effect of incarceration has been and continues to be speculative (36). The *Report of the Canadian Sentencing Commission* (1987), as well as previous Commissions (Ouimet Committee, 1969; LeDain Commission, 1973; Solicitor General of Canada, 1973), have expressed similar concerns. In conducting its research on sentencing, the Archambault Commission (1987) summarized the literature on general deterrence:

a) *Taken together, legal sanctions have an overall deterrent effect which is difficult to evaluate precisely.*

b)*The proper level at which to express strong reservations about the deterrence efficacy of legal sanctions is in their usage to produce particular effects with regard to a specific offence. It is extremely doubtful that an exemplary sentence imposed in a particular case can have any perceptible effect in deterring potential offenders.*

c) *The old principle that it is more the certainty than the severity of punishment which is likely to produce a deterrent effect has not been invalidated by empirical research* (*Wismayer,* 39).

Given that the deterrent efficacy of incarceration is suspect, it is not likely that Parliament would endorse a restriction of conditional sentences on this basis. Furthermore, a number of judgments have affirmed that general deterrence and denunciation can be satisfied outside of prison. In *Wismayer,* Justice Rosenberg cites a judgment by the Ontario Court-General Divisions (*R v. G.*) in which Judge Donnelly summarizes how general deterrence can be satisfied in a number of ways:

> *The stigma of trial and conviction is a major deterrent. A conditional order must be, and must be seen to be, more onerous than suspended sentence by way of probation. To achieve goals of denunciation and general deterrence, the punishment must be meaningful by being visible, sufficiently restrictive, enforceable and capable of attracting stern sanction for failure to comply with the conditions (38).*

With respect to the objective of denunciation, Justice Rosenberg underlines the fact that like general deterrence, other avenues are available to satisfy this important aspect of sentencing. Rosenberg, J. argues that it is a misapprehension that social denunciation can only be expressed by requiring the offender to serve a sentence of imprisonment in custody. Chief Justice Lamer of the Supreme Court, affirmed this position in *R.v.M. (C.A.)* when he articulated the similarities between parole which, like conditional sentences, represents an alteration of the conditions of sentence:

> *... the deterrent and denunciatory purposes which animated the original sentence remain in force, notwithstanding the fact that the conditions of sentence have been modified ... As well, the goal of denunciation continues to operate, as the offender still carries the societal stigma of being a convicted offender who is serving a criminal sentence"* (*Wismayer*, 39).

In *R. v. L.F.W.*, the Newfoundland Court of Appeal rejected the Crown's argument against a conditional sentence for an appellant convicted of historical child sexual abuse. The Crown argued that this Court has repeatedly affirmed that the application of denunciation and general deterrence are required in cases of child sexual abuse and have, with rare exception, resulted in jail terms. Judge Marshall refuted the Crown's argument for custody on the basis that continued reliance on imprisonment assumes that general deterrence and denunciation cannot be achieved through a conditional sentence; in addition, the judge rejected the Crown's position on the basis that it reflected the "traditional mind set that these objectives can be achieved only through incarceration in a jail"(18).

The issue of specific deterrence is not addressed here because it is accounted for within the provisions encoded in s. 742.1. Although specific deterrence is one of the sentencing objectives listed in s. 718.1, the statutory criteria proper to a conditional sentence do not allow such an order if serving the sentence in the community would endanger public safety, specific deterrence is addressed within the criteria, "risk to the community".

If reliance on imprisonment reflects the "old mind set", then how are judges to proceed in the "new mind set"? Over the years, courts have developed certain sentencing guidelines pertaining to controversial issues. However, the presumptions of incarceration

contained therein were established prior to the implementation of Bill C-41. The new emphasis on the "principle of restraint" poses a dilemma where presumptions of incarceration were established. An article by Manson (1998a), as well as Chapter one of this thesis, elaborate clearly that the overall thrust of the sentencing reforms is one of restraint. This emphasis on restraining the use of, and reliance on, incarceration and its corollary push towards alternatives is evident in the legislation. For instance s. 718.2 c), d) and e) embody this principle:

> c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;
>
> d) an offender should not be deprived of liberty, if less restricted alternatives may be appropriate in the circumstances; and
> e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

Even the sentencing objective in s. 718 c) which permits judges to separate offenders from society, qualifies the objective with the condition, *where necessary*. Therefore, a policy of restraint is a legislated obligation, and judges must accord primary consideration to the principle of restraint over the established presumptions of incarceration. In practice, the case law continues to represent a source of guidance. Judges should consult the case law to determine *which* objectives are paramount in certain types of cases; for instance, denunciation and general deterrence in cases of child sexual abuse. However, judges can no longer begin with a presumption of incarceration; rather, they are obligated to determine if the stated objectives can first be satisfied in the community by a conditional sentence order, (assuming the basic statutory criteria is met). Once the community option is canvassed and the judge determines that there is no set of conditions

that can create a justified conditional term of imprisonment, then he/she may resort to incarceration. In essence, the "new mind set" represent the reverse process, in principle and in practice, from the "old mind set".

Finally, the aforementioned dilemma draws attention to the unresolved issue of the exact nature and purpose of the conditional sentence. This issue was summarized succinctly in *Brady*: the application of conditional sentences depends on what the conditional sentence is and what it is supposed to do (120). In response to this question, there are two broad positions advocated. The first position, and the one suggested by *Brady,* interprets the conditional sentence as an intermediate sanction, little more than an additional sentencing option made available to judges in order to fill a gap. As such, the status quo prior to Bill C-41, remains essentially in effect. By contrast, the position forwarded by others, such as Justice Vancise from the Saskatchewan Court of Appeal, Justice Marshall from the Newfoundland Court of Appeal and Professor Manson, interprets the conditional sentence as representing a departure from the status quo prior to Bill C-41; in fact, the sentencing legislation as a whole is perceived to represent a "new Dawn" in sentencing in the words of Justice Vancise. According to this view, the principle of restraint predominates over the old presumptions of incarceration and the conditional sentence represents a creative an alternative mode of serving a prison term. In addition, this perspective recognizes that the driving force behind sentencing reform was a desire to overcome Canada's over reliance on, and overuse of, incarceration, rather than the desire to establish uniformity in sentencing, as suggested in Brady.

Uniformity in sentencing was one of the sentencing reform goals. According to 718.2 (b), one of the encoded sentencing principles states that "a sentence should be

similar to sentences imposed on similar offenders for similar offences committed in similar circumstances". However, Parliament failed to introduce any guideline system which would permit any realistic implementation of such a policy. According to Chief Justice Lamer of the Supreme Court, uniformity is unrealistic. In qualifying the role of appellate courts in reviewing and minimizing disparity, Lamer, C.J. states: "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" (*R. L.F.W.* 30). The sentencing legislation implemented in the *Code* clearly demonstrates that Parliament preferred to maintain an individualized process by allowing the judiciary to retain a significant amount of discretion, even at the expense of uniformity.

Even if one adopts the view of a conditional sentence as an alternative prison sanction, the issue of its exact application is not resolved conclusively. A debate rages on about whether the conditional sentence is, or can ever be, the "penal equivalent to imprisonment". The obvious fact that the sanction is not a "penal equivalent" is a major bone of contention in *Brady,* although this is mostly due to the perceived under utilization of the optional conditions. First of all, serving a prison term in the community is not a novel concept - parole exerts the same function and its is understood to represent a continuation of the prison sentence in the community. Second, it is evident that there are no conditions which can emulate the exact nature of punishment experienced within a correctional facility. The obsession with whether or not we are re-creating, a "penal equivalent" to prison is a fruitless exercise; it also misses the basic point of conditional sentences and the sentencing legislation as a whole. If Bill C-41 in fact ushered in "a New

Dawn" in sentencing then it should be followed by a new way of thinking and a new way of acting. The failure of prison to achieve its intended goals and the negative effects it can produce were the motivation behind the movement to reform the sentencing system. Therefore, the remedy does not lie in trying to recreate prison, or trying to justify an alternative to prison, based on the pre-reform status quo.

The post Bill-C41 sentencing environment requires a different understanding of the concept of imprisonment. As Judge Marshall underscored in his judgment (*R. v. L.F.W.)*, paragraph 742.1 (a) refers to a "sentence of imprisonment" and not to a sentence in prison"(15). Therefore, the goal lies not in trying to create a "penal equivalent" to prison, but to search for other ways which will better serve victims' needs, or make offenders take responsibility for their actions, outcomes that won't happen by having the offender serve time in prison. The potential to create these conditions, as well as punitive elements, lies within the discretion and creativity of the judiciary.

Summary and Conclusions

This was the last chapter which analyzed data from the Ontario Probation services. Part A listed the types of offences granted a conditional sentence in Ontario between September 1996 and November 1997. The findings revealed that by and large, the conditional sentence was applied to various property offenders, a significant portion of which were convicted of fraud. However, the conditional sentence was by no means reserved to property offenders; a number of offenders convicted of crimes which spanned the offence spectrum were also granted the opportunity to serve their sentence of imprisonment in the community.

In part B, the controversy over the use of conditional sentences was examined in relation to three types of offences - domestic/sexual assault, drinking and driving offences and drug offences. It was argued that the root of the controversy with regards to these offenders can be traced to the entrenched societal reliance on incarceration to deal with serious social problems and to convey serious moral approbation for certain behavior. Although the conditional sentence has raised some concerns about its application is these areas, few crowns and judges among a select sample in Ottawa and Toronto would wish to exclude such offences from the purview of conditional sentences. In addition, the therapeutic, or rehabilitative potential inherent in the new sanction is recognized as a promising element by most interviewees, provided adequate levels of resources are made available for treatment and supervision.

Finally, in part C, the role and status of the conditional sentence was debated. There are two broad positions elaborated with respect to this. I argue in favor of the position which views the status of the conditional sentence an alternative mode of serving a term of imprisonment; the motivating drive behind the sentencing legislation being one of implementing a policy of restraint. Finally, the conditional sentence represents an opportunity to expand our conception of imprisonment, punishment, retribution, rehabilitation, restoration, and responsibility.

Chapter 8

CONCLUSION

This chapter concludes the preliminary analysis of conditional sentences. The purpose of this thesis was to undertake a descriptive examination of the application of the conditional sentence of imprisonment; this exploratory and descriptive endeavor focused on the province of Ontario, during the first fifteenth months of the new sanction's implementation. At the beginning of this project, the conditional sentence was very new. Data was limited. However, the Ontario Probation and Parole Services provided a database of conditional sentence orders, which contained the conditional sentences imposed by the Ontario judiciary between September 1996 and November 1997. Consequently, this data set offered a first glimpse at conditional sentences in this province. The data base was drawn upon to answer basic questions about the conditional sentence; for instance, to whom was the new sanction applied, in terms of offender characteristics; and, what for type of offences did the judiciary impose conditional sentences? This thesis represents a record of the use of conditional sentences in Ontario during the early stages of its implementation .

The findings from the data base disclosed that the typical offender who served a conditional sentence in Ontario during the first fifteen months of its application was a 33 year old White male who served a six month sentence for a property offence. This typical offender was unemployed at the time of the sentence. He has been to prison on a previous occasion and he was considered low risk/supervision.

Since the conditional sentence of imprisonment is innovative, the case law pertaining to conditional sentences was a focus of the analysis, complimented by

interviews with judges and crown prosecutors. The Courts of Appeal were a focal point of the thesis because their role is one of providing guidance to the lower trial courts. The fact that the conditional sentence is a brand new sanction, one which is ambiguous, heightens the importance of this advisory role by the Courts of Appeal. In addition, the statutory criteria relating to conditional sentences is such that the sanction may be applied to many offences; the potentially wide application has generated controversy over what constitutes an appropriate application of conditional sentences.

Two key informants, judges and crown prosecutors, were interviewed to elicit their perceptions about the conditional sentence, particularly with respect to its application in cases of domestic and sexual assaults. Although the interviews were informative and generated some interesting insights, the sample was small and it was restricted to two urban areas in southern Ontario. Therefore, the perceptions of these crowns and judges are not necessarily representative of all judges and crowns with respect to the proper application of the conditional sentence and the new sentencing legislation in general. In addition, the views of other important key informants are missing. For example, defence counsel, probation officers, and especially, offenders themselves. Probation officers in particular may represent an important source of information for policy makers in terms of providing knowledge and experience about the level and type of resources required to function adequately, what constitutes a realistic level of supervision and the volume and nature of breaches of conditional sentences orders, as well as their reactions the these breaches.

This project focused on a description of the conditional sentence itself, as well as its application; it did not conduct a comparative analysis of the conditional sentence. Now

that this preliminary groundwork has been laid, forthcoming data will allow researchers and policy makers to answer further questions about the nature of conditional sentences relative to other sanctions, such as probation, parole and suspended sentences. For instance, a critical question is whether, and in what respect, the conditional sentence is distinct from other sentences. In other words, why did Parliament create a new sentence? What does the conditional sentence offer that is different from what the status quo already provided? Research is being undertaken now by Professor Julian Roberts and myself on this issue; the conditions attached to conditional sentence orders and probation orders are being compared systematically in order to assess the difference between the two sanctions in terms of the nature of punishment - level of supervision, number and type of restrictions, etc.

Researchers and policy makers will also want to assess the impact of conditional sentences on offenders, as well as on the criminal justice system, particularly on corrections. For instance, are conditional sentences producing a decline in prison populations? Are judges sending less people to jail as a result of this innovative alternative, or, is the correctional system expanding as a result of the introduction of yet another sentencing option, or as a result of the failure of the sentence to generate compliance and successful reintegration?

These questions brings us back to issue of sentencing reform. The conditional sentence was but one provision within Bill C-41: The Sentencing Reform Act, which took effect on September 3, 1996. Bill C-41 is a long and complex piece of legislation. It was the result of an ambitious effort to overhaul and re-organize the sentencing system in Canada. Although the reforms fell short of the expectations of many involved in the

consultation process, the legislation still represented the most significant reforms to the sentencing system in decades. The context leading up to the legislation was outlined in Chapter one. The work of the Canadian Sentencing Commission (1984-87) and the House of Commons Standing Committee on Justice and Solicitor General (1988), as well as previous reports, emphasized the need to enforce the legal principle of restraint, especially with respect to incarceration. As such, one of the most important policy goals advanced by the conditional sentence and the legislation as a whole, is to reduce Canada's over-reliance on imprisonment and ultimately, to reduce the number of offenders in prison. This reduction is contingent on shifting a significant number of offenders into community-based sanctions.

Despite the apparent emphasis on the principle of restraint in Chapter 22 of the *Criminal Code*, the newly reorganized sentencing scheme, the legislation embodies a number of competing interests. For instance, uniformity in sentencing was an important issue during the consultation process. The problem of unwarranted disparity was brought to the attention of the Canadian Sentencing Commission (1987) and it was noted in its report. Section 718.2 (b) captures this concern which reflects the principle of equity. Equity is an ideal. In reality, Parliament's priorities lie elsewhere. The federal government clearly would rather pursue other pressing policy goals, such as reducing imprisonment and promoting alternatives, rather than trying to achieve uniformity, standardized sentencing. Therefore, judges were spared the implementation of a more rigorous sentencing guideline system. Judicial discretion and individualized sentencing remain a feature of the judicial system in Canada, even at the risk of enduring disparity and discrimination in the application of sanctions before the court.

Conditional Sentencing

Although Bill C-41 includes several features, the evil aimed at ultimately is prison. Parliament recognizes and affirms that prison has been relied upon too strongly in Canada. Without the positive results to justify continued reliance upon this costly and severe sanction, prison should be reserved only for those who must be separated from society. Hence the creation of the conditional sentence and the alternative measures program, introduced in s. 717 (1) of the *Criminal Code*. According to s. 717(1) of the *Code*, the provinces are authorized to create a program of alternative measures which allows them to apply a number of remedies/options to divert individuals from the traditional court system. The introduction of section 742.1, the conditional sentence and s. 717(1), the alternative measures program, are a concrete manifestation of the federal government's commitment to restraint and a greater shirt towards community-based sanctions.

As argued in Chapter seven, Bill C-41 represents a "new dawn" in sentencing because it forces a reversal of the old mind set where a presumption of, and reliance on, incarceration permeated in many cases. The new mind set requires the judiciary to canvass all other measures before resorting to imprisonment *as a last resort*. During the course of interviews with crown prosecutors, one crown explained to me that one of the reasons he did not like the new sentencing legislation and the conditional sentence in particular was because it made his job harder; this crown argued that in certain situations where prison was virtually a given in the past, he now felt that he had to argue harder in court in order to justify the use of prison. That is exactly the point. The "new dawn in sentencing" introduced by Bill C-41 does not operate on the premise that prison is the norm and thus any "alternatives" are reserved only for exceptional circumstances. Rather,

the new mind set requires that the use of prison be justified. Bill C-41 confers on judges a statutory obligation to exercise restraint. This reversed premise, in and of itself, represents a significant shift in attitude.

The conditional sentence and the sentencing legislation as a whole hold enormous potential. However, the new legislation also created a number of challenges which, if not met, may produce negative consequences. Witness the fundamental purpose of sentencing; According to s. 718 of the *Code*, sentencing must contribute to respect for the law and the maintenance of a just, peaceful and safe society. It is clear that the federal government is concerned with public perception/opinion. The conditional sentence has the potential to undermine this goal, if the sanction is poorly understood or applied in cases which generate significant controversy. There have already been some cases which have produced public outcry over the imposition of a conditional sentence. It is unlikely that the general public will appreciate the legal distinctions between conditional sentences, probation and suspended sentences. A prison sentence it is not. An unwelcome reception to the conditional sentence is a reflection of many factors: the limited and unbalanced coverage of sentencing cases reported in the media, a lack of knowledge about the context from which the conditional sentence arose and finally, a limited vision of what the conditional sentence can be.

Simply put, the conditional sentence represents an opportunity. When a conditional sentence is imposed, the judge states in effect that the offender has been convicted of a crime for which he/she could be imprisoned; nevertheless, the court is placing the offender under the control and supervision of correctional authorities in the community, rather than confining the offending within a correctional institution. The rest

is a blank cheque. Imagination, reluctance and resources, are the only factors that will limit the sanction's application. There is nothing in the *Criminal Code* that prohibits the judiciary from shaping the conditional sentence into an experience that will attempt to provide greater satisfaction to both the offender and the victim, however that may be defined. The conditional sentence is time, and time on conditional sentence can be used for many purposes: service to the community, experimenting with various restorative justice measures such as mediation or sentencing circles, crafting strict conditions that will clearly be interpreted as punishment by the particular offender, etc.

The issue of resources however is a real limiting factor. The shift toward the use of more community-based sanctions for a wider variety of offenders presents several challenges at the provincial and local levels, where justice is administered. The federal government has created the opportunity, but if the provinces do not, or cannot, ensure the necessary resources are present for treatment, rehabilitation, restorative measures, supervision, another missed opportunity will occur. Where will the money come from to support community-based sanctions? As mentioned previously, the bi-furcated approach to justice pursued by the federal government suggests that diversion away from costly prison sentences will liberate resources. If this actually happens, will these resources be re-invested into the community? Correctional personnel and probation personnel are increasingly in competition for the same clientele and resources. In addition, the strategy being undertaken rests on a number of assumptions which remain to be proven; the prison bound population will be diverted to conditional sentences; compliance with conditional sentences orders will be significant and breaches will be limited; the prison population

will be reduced in size to the extent where savings will occur; part of the savings incurred will be reinvested into community-based support programs.

To date, there is nothing in the preliminary findings to suggest that this is happening; for example, findings highlighted in this thesis suggest that the conditional sentence is not always used as an alternative to prison as the legislation intended it to be; and second, provincial prison populations did not decline as expected. Data and time are required to assess compliance/success rates of conditional sentences and to further assess the impact of conditional sentences on prison admissions. The conditional sentence promised to reduce Canada's over-reliance on, and use of, imprisonment while producing cheaper, better results. So far, this promise remains to be fulfilled.

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APPENDIX A

A Chronology of Sentencing Reform

1979 - The federal government and the provinces undertake a comprehensive review of the *Criminal Code*, known as the Criminal Law Review.

1982 - The Government of Canada publishes *The Criminal Law in Canadian Society*, which provides a basic framework of principles of criminal law.

1984 - The Sentencing Project produces a White Paper on sentencing as part of the overall Criminal Law Review.

1986 - 1992 The Law Reform Commission produces a number of publications in the area of sentencing.

1985 - 1988 The Canadian Bar Association plays a role in reforming the sentencing and parole systems through the Special Committee on Imprisonment and Release.

1984 - 1987 The Canadian Sentencing Commission, a three year Royal Commission of Inquiry with a mandate to review the sentencing and parole systems is established in 1984 its reports are released in 1987.

1987 - 1988 The House of Commons Committee on Justice and Solicitor General, headed by conservative MP David Daubney, undertakes a review of sentencing, conditional release and related aspects of the correctional systems and produces a report in 1988.

1990 - The departments of Justice and Solicitor General release a major discussion paper following reports by the Canadian Sentencing Commission and the Daubney Committee.

1992 - A five year review of the *Corrections and Conditional Release Act* in undertaken.

1996 - Bill C-41: The Sentencing Reform Act comes into effect September 3, 1996.

APPENDIX B

DATA DICTIONARY: CONDITIONAL SENTENCE DATA (ONTARIO)

NUMBER OF CONDITIONAL SENTENCE ORDERS (CASES): 4,633.

VARIABLES	DESCRIPTION OF VARIABLES
LOCATION:	This variable includes all of the probation offices across the province which send data records to head office. There are 116 offices represented which have been further broken down into seven districts according to the standard administrative court location breakdown by the Ministry of Corrections.
AMDYEAR	The year of the offender's admission to the probation office to carry out the conditional sentence order. All records include start dates between September 1st, 1996 and November 7th, 1997. However, there are 5 cases included for the month of December, 1997.
ADMMTH:	The month of the offender's admission to the probation office to commence the conditional sentence order.
ADMDAY:	The day of the offender's admission to the probation office to commence the conditional service order.
CSLGTH:	The length of the conditional sentence order recorded by number of days.
MSO:	The most serious offence for which the offender is serving a conditional sentence order. This category includes a cross section of 213 *Criminal Code* offences for which convicted persons may receive a conditional sentence of imprisonment.
PRIORS:	The number of prior convictions. This variable illustrates the offender's recorded criminal history including Young Offender history.

GENDER:	The gender of the offender serving a conditional sentence order.
LSIOR:	The level of supervision. The assigned level of risk, - very low, low, medium, high and very high, represents the offender's risk level of the as determined by this particular probationary risk assessment instrument used in the province of Ontario.
BIRTHYR:	The offender's year of birth which indicates his/her age.
BIRTHMTH:	The offender's month of birth.
BIRTHDAY:	The offender's day of birth.
RACE:	The offender's race, categorized as follows: Aboriginal, Arabian, Black, White, East Indian, Oriental, Other and Unknown.
NATVSTAT:	The native status of the offender, categorized as follows: Inuit, Metis, Non-Status, Status and Non-Native.
EMPLYMT:	The employment status of the offender at the time of sentence.
SUBH:	This variable indicates whether the offender has a known history of drug/alcohol abuse.
SBTC:	This variable indicates whether an offender is under treatment for drug/alcohol abuse at the time of admission.
SUBI:	This variable indicates whether there was evidence of drug/alcohol impairment upon admission to the probation agency.
SUBW:	This variable indicates whether there was evidence of drug/alcohol withdrawal upon admission to the probation agency.

APPENDIX C

Summary of Data Manipulation

Before	*After*
LOCATION	
116 Probation Offices	1.Toronto/Don Valley 2. Bronte/Credit Valley 3. Guelph/Grand River 4. Huron/Thames Valley 5. Oshawa/Kowaitho 6. St. Lawrence/Ottawa Valley 7. North
ADMMTH/ADMYEAR	
	These two variables were combined to produce a monthly admission count from September 1996 to December 1997.
LSIOR	
1. Very Low 2. Low 3. Medium 4. High 5. Very High	1. Low (Very Low and Low) 2. Medium 3. High (High and Very High)
NATVSTAT	**NNATVSTAT**
1. Inuit 2. Metis 3. Non-Status 4. Non-Native 5. Status	1. Native (Inuit, Metis, Status and Non-Status) 2. Non-Native

RACE	NRACE
1. Aboriginal 2. Arabian 3. Black 4. White 5. East Indian 6. Oriental 7. Other 8. Unknown	1. Aboriginal 2. Visible Minority (Black, Arabian, East Indian, Oriental, Other) 3. White 4. Unknown/Missing

PRIORS	NPRIORS
32 categories	1. No priors 2. YO secure 3. YO open 4. Adult Incarceration 5. Probation

CSLGTH	NCSLGTH
Number of days listed consecutively	Length of cso regrouped on a monthly basis. i.e. 1 - 30 days = 1 (month) 31-60 days = 2 (months)

MSO	CRIMES
213 *Criminal Code* offences	1. Firearms 2. Administration of Justice 3. Sexual Offences 4. Morals and Conduct 5. Person and Reputation 6. Drinking and Driving 7. Property 8. Fraud and Counterfeit 9. Drugs 10. Others

APPENDIX D

JUDGES QUESTIONNAIRE: CONDITIONAL SENTENCES AND DOMESTIC/SEXUAL OFFENCES

I work for the federal Department of Justice and I'm conducting research on the use of conditional sentences and, particularly, their use in cases of domestic and sexual assaults. I would like to ask you a few questions about your thoughts on this. It will take about 30 minutes. Everything you tell me is confidential and neither your name nor any identifying information will be used.

Court: _____

Gender:
1. male
2. female

Length of time on Bench: _____

1. Can you tell me in general, what you think of the new sentencing legislation and especially the conditional sentence provisions?

First, what do you **like** about the legislation?

What do you **not like** about it?

2. In approximately how many of the following offenses have you imposed a conditional sentence order?

(a) b&e
(b) fraud
(c) impaired driving
(d) common assault
(e) aggravated assault
(f) administration of justice (breach, failures)
(g) domestic assaults
(h) dangerous driving
(I) sexual assault - adult victim
(f) sexual assault - child victim

3. Do you feel that *all, most, some,* a *few* or *no* offenders who breach a conditional sentence order are being back to court on the breach?

4. Do you feel the breach provisions in the legislation are adequate?

If no, how should these be improved?

5. Do breaches and the provisions for dealing with them in any way influence your attitude toward imposing a conditional sentence?

6. Would you automatically impose a jail sentence in the case of a breach?

7. In general, for which offenses do you think conditional sentences are appropriate? Why?

8. In general, for which offenses do you think c.s. are inappropriate? Why?

9. Are there any offenses which you feel should be <u>explicitly</u> excluded from the imposition of conditional sentences?

10. What do you consider to be the most important risk factors for these excluded offenses (i.e., likelihood of re-offending; need for general deterrence; need for denunciation; concerns about community reaction)

11. Would your views about excluding these offenses be different if there were more resources available to treat offenders who commit these kinds of offenses?

12. Would your views about excluding these offenses be different if the breach provisions in the legislation were more effective?

13. If you believe that conditional sentences may be useful for some offenders who commit domestic and sexual assaults, can you differentiate these offender/offenses for me?

What aggravating circumstances would cause you to send someone to custody? What mitigating circumstances might cause you to grant a conditional sentence?

14. Second, in which <u>sexual assault</u> cases do you think c.s. may be appropriate to use?

What aggravating circumstances would cause you to send someone to custody?

What mitigating circumstances would cause you to grant a conditional sentence?

15. Do you have any sense that offenders on c.s. actually will get treatment?

16. Have you received guidance on the use of conditional sentences from the Court of Appeal decisions?

yes, for most cases ____
yes, in some cases ____
yes, in a few cases ____
in no cases ____

17. What do you believe is the future for conditional sentences?

18. Do you think the public understands conditional sentences?

Do you have any other comments?

Thank you for your time.

APPENDIX E

CROWN'S QUESTIONNAIRE: CONDITIONAL SENTENCES AND DOMESTIC/SEXUAL OFFENCES

I work for the federal Department of Justice and I'm conducting research on the use of conditional sentences and, particularly, their use in cases of domestic and sexual assaults. I would like to ask you a few questions about your thoughts on this. It will take about 30 minutes. Everything you tell me is confidential and neither your name nor any identifying information will be used.

Court: _____

Gender:
1. male
2. female

Length of time Prosecuting _____

1. Can you tell me in general, what you think of the new sentencing legislation and especially the conditional sentence provisions?

First, what do you **like** about the legislation?

What do you **not like** about it?

2. How many of the following types of offences have you prosecuted which resulted in a c.s?

(a) b&e
(b) fraud
(c) impaired driving
(d) common assault
(e) aggravated assault
(f) administration of justice (breach, failures)
(g) domestic assaults
(h) dangerous driving
(I) sexual assault - adult victim
(f) sexual assault - child victim

3. In how many c.s. have you been involved in a plea bargain?

4. Do you feel that *all, most, some,* a *few* or *no* offenders who breach a conditional sentence order are being brought back to court on the breach?

5. Do you feel the breach provisions are adequate?

If no, how should these be improved?

6. Do breaches and the provisions for dealing with them influence you attitude toward the use of c.s.?

7. Would you automatically recommend jail in the case of a breach?

8. In general, for which offenses do you think conditional sentences are appropriate? Why?

9. In general, for which offenses do you think c.s. are inappropriate? Why?

10. Would you say the views you have expressed about the inappropriateness of using c.s. for certain offenses are commonly shared in this court?

Which group(s) **shares** these views (e.g. other crowns, judges, victim witness people, police)

11. Are there any offenses which you feel should be explicitly excluded from using conditional sentences?

12. Would you say the views you have expressed about excluding certain offences are widely shared in this court?

Which group(s) **shares** these views (e.g. other crowns, judges, victim witness people, police)

13. What do you consider to be the most important risk factors for these excluded offenses (i.e., likelihood of re-offending; need for general deterrence; need for denunciation; concerns about community reaction)

14. Would your views about excluding these offences be different if there were more resources available to treat offenders who commit these kinds of offenses?

Would your view about excluding these offenses be different if the breach provisions in the legislation were more effective?

15. If you believe that conditional sentences may be useful for some offenders who commit domestic and sexual assaults, can you differentiate these offender/offences for me?

First, in which domestic assault cases do you think it may be appropriate to use?

What aggravating factors would push you to ask for custody?
What mitigating factors would allow you to consider a conditional sentence?

Second, in which sexual assault cases do you think c.s. may be appropriate to use?

What aggravating circumstances would cause you ask for a custody term?
What mitigating factors would allow you to consider a conditional sentence?

16. Do you have any sense that offenders on c.s. actually will get treatment?

17. Have you received guidance on the use of conditional sentences from the Court of Appeal decisions?

yes, for most cases ____
yes, in some cases ____
yes, in a few cases ____
in no cases ____

18. What do you believe is the future for conditional sentences?

19. Do you think the public understands conditional sentences?

Do you have any other comments?

Thank you for your time

APPENDIX G

Length of Conditional Sentences for Certain Offences

Group 1: Firearms and Other Offences (Part III of CCC)

Possession Offensive Weapons (POW): 182.5 days

Group 2: Offences Against the Adminsitration of Justice (Part IV of the CCC)

Fail to Comply - Probation Order (FTCP): 90 days

Group 3: Sexual Offences (Part V of the CCC)

Indecent Act (IA): 181 days
Invitation to Sexual Touching (ITST): 365 days
Sexual Assault - Indictable (SAI): 290 days
Sexual Assault - Summary (SAS): 182 days
Sexual Interference (SEXI): 258.5 days
Sexual Touching (SEXT): 212 days

Group 4: Public Morals, Disorderly Conduct and Disorderly Houses, Gaming and Betting (Part V and VII)

Communication for the Purposes of Prostitution (CFPP): 90 days

Group 5: Offences Against the Persons and Reputation (Part VII of CCC)

Aggravated Assault (AA): 365 days
Assault - Simple (AS): 92 days
Assault Simple - Indictable (ASI): 91 days
Assault Simple - Summary (ASS): 90 days
Assault with a Weapon (AWW):122.5 days
Assault with a Weapon Summary (AWWS): 91 days
Criminal Harassment (CHAR): 181 days
Forcible Confinement (FC): 243 days
Utter/Threathen Death/Serious Harm (UDT): 187 days

Group 6: Drinking and Driving Offences (Part VII)

Dangerous Operation Motor Vehicle - Bodily Harm (DOBH): 184 days
Dangerous Operation Motor Vehicle (DOMV): 90 days
Drive While Prohibited (DWP): 90 days
Impaired Driving (ID): 90 days
Impaired Driving Over 80mgs (IDO): 60 months
Operate Motor Vehicle Impaired - Bodily Harm (OIBH): 365 days

Group 7: Offences Against Rights of Property and Wilful and Forbidden Acts in Respect of Certain Property (Part IX and XI)

Arson - Damage Property (ADP): 365 days
Break and Enter and Commit (BEC): 183 days
Robbery (ROB): 365 days
Theft Under - Summary (TUS): 90 days
Theft Over - Indictable (TOI):183 days
Theft Under - Indictable (TUI): 90 days

Group 8: Fraudulant Transactions Relating to Contracts and Trade and Offences Relating to Currency (Part X and Part XII of the CCC).

Fraud Over - Indictable (FOI): 183 days
Fraud Under - Summary (FUS): 92 days
Fraud Under - Indictable (FUI): 122.5 days

Group 9: Instruments & Literature for Illicit Drug Use, Proceeds of Crime, Controlled Drugs and Substance Act (NCA) and Food & Drugs Act. (Part XII.1 and Part XII.2 of the CCC).

Cultivate Narcotics (CN): 181 days
Possession Cocaine (PCOC): 60 days
Possession Narcotics (PNAR): 61 days
Possession Over - Indictable (POI): 118 days
Possession Under (PU): 92 days
Possession Under - Summary (PUS): 184 days
Possession Under - Indictable (PUI): 123 days
Possession for Purposes of Trafficking (PFPT): 181 days
Possession for Purposes of Trafficking (PFT): 228.5 days
Traffic Narcotic (TN): 182.5 days

APPENDIX H

Most Serious Offences

Group 1: Firearms and Other Offensive Weapons (Part III of the CCC)

Carry Concealed Weapon (CCW)
Careless Handling/Storage of Firearm (CHSF)
Deliver Firearm Without Acquisition Certificate (DFWA)
Fail to Comply with Permit - Indictable (FCPI)
Fail to Comply with Permit - Summary (FCPS)
Illegal Storage/Disposal/Transport Firearm (SFAS)
Import/Export Prohibited Weapon (IEN)
Import Restricted Weapon (IRW)
Point Firearm (PF)
Possession Offensive Weapon (POW)
Possession Prohibited Weapon (PPW)
Posssession Restricted Weapon Elsewhere (PRWE)
Possession Weapon Prohibited - Indictable (PWPI)
Possesssion Weapon Prohibited - Summary (PWPS)
Possession of Firearm While Prohibited (PFWP)
Possess Explosive Substance (PES)
Use Firearm During Commission of Offence (UFCO)

Group 2: Offenses Against the Administration of Justice (Part IV of the CCC)

Accept Bribe - Government (ABG)
Acknowledge Bail in False Name (ABFN)
Attempt to Obstruct Justice (AOJ)
Breach Recognizance (BR)
Breach of Trust by Public (BTPO)
Bribe Fare Taker (BFT)
Contempt of Court (COC)
Corruption - Accept Advantage/Benefit (CAAB)
Escape Lawful Custody (ELC)
Fail to Appear - Recognizance (FTA)
Fail to Attend - Court/Summons (FTAC)
Fail to Appear on Promise to Appear (FTAP)
Fail to Comply - Court Order (FTCO)
Fail to Comply - Probation Order (FTCP)
Fail to Comply - Recognizance (FTCR)
Fail to Comply - Undertaking (FTCU)

Fail to Report Accident (FTRA)
False Return by Peace Officer (FRPO)
Give Contradictory Evidence (GCE)
Make False Statement (MFS)
Obstruct Justice (OJ)
Obstruct Lawful Execution (OLE)
Obstruct Peace Officer (OPO)
Perjury (PER)
Permit/Assist Escape - Indictable (PAEI)
Permit/Assist Escapte - Summary (PAES)
Public Mischief - Indictable (PMI)
Public Mischief - Summary (PMS)
Unlawfully at Large (UAL)
Service Term for Escape (STFE)

Group 3: Sexual Offences (Part V of the CCC)

Anal Intercourse (AINT)
Child Pornography - Sell/Distribute (CPS)
Exposing to Minor (EM)
Incest (INC)
Indencent Act (IA)
Invitation to Sexual Touching (ITST)
Gross Indency (GI)
Obtain Sex - Under 18 (OSSA)
Possession Child Pornography - Film/Video (CPF)
Possession Child Pornography (CPPO)
Sexual Assault - Causing Bodily Harm (SABH)
Sexual Assault Indictable (SAI)
Sexual Assault - Summary (SAS)
Sexual Assault - Threaten Harm to 3rd Party (SATH)
Sexual Assault With a Weapon (SAW)
Sexual Exploitation - Invite Touch (SEIT)
Sexual Interference (SEXI)
Sexual Touching (SEXT)

Group 4: Public Morals , Disordely Conduct and Disorderly Houses, Gaming and Betting (Part V and VII)

Cause Disturbance (CD)
Communitcation for Purposes of Prostitution (CFPP) -
Keep Common Bawdy House (KCBH)
Procure (PP)
Possession/Procure Obscene Material (PPOM)

Prowl by Night (PBN)

Group 5: Offences Against the Person and Reputation (Part VIII of the CCC)

Abandon/Endanger Child (AC)
Abduct Person Under 14 (APUF)
Abduct Without Order - Indicatble (AWOI)
Adminster Noxious Substance (ANOX)
Aggravated Assault (AA)
Assault - Bodily Harm (ABH)
Assault Peace Officer on Duty (APOD)
Assault - Resist Arrest (ARA)
Assault - Simple (AS)
Assault Simple - Indictable (ASI)
Assault Simple - Summary (ASS)
Assault with a Weapon (AWW)
Assault with a Weapon Summary (AWWS)
Attempt Murder (AM)
Cause Indignity to Dead Body (CIDB)
Criminal Harrasment (CHAR)
Criminal Harassing Conduct (CHC)
Criminal Negligence Causing Bodily Harm (CNBH)
Criminal Negligence Causing Death (CNCD)
Fail to Provide the Necessities of Life (FNL)
Forcible Confinement (FC)
Harassing Telephone Calls (HTC)
Hostage Taking (HOST)
Kidnap with Intent to Forcibly Confine (KIFC)
Manslaughter (MAN)
Publish Defamatory Libel (PDL)
Render Home Unfit for Child (RHUC)
Unlawfully Cause Bodily Harm (UCBH)
Utter/Threaten Death/Serious Harm (UDT)
Utter Threat Against Hostage (UTAH)
Utter Treat Destroy Property (UTDP)

Group 6: Drinking and Driving Offences (Part VII)

Dangerous Operation Motor Vehicle - Bodily Harm (DOBH)
Dangerous Operation Motor Vehicle - Cause Death (DOCD)
Dangerous Operation Motor Vehicle (DOMV)
Drive While Prohibited (DWP)
Fail to Stop at Accident (FTSA)
Impaired Driving (ID)
Impaired Driving - Cause Bodily Harm (IDB)

Impaired Driving - Cause Death (IDD)
Impaired Driving Over 80 mgs (IDO)
Operate Motor Vehicle Impaired - Bodily Harm (OIBH)

Group 7: Offences Against Rights of Property and Wilful and Forbidden Acts in Respect of Certain Property (Part IX and XI)

Arson - Cause Bodily Harm (ACBH)
Arson Fraudulant Purposes (AFFP)
Arson - Damage Property (ADP)
Arson - Own Proporty (AROP)
Arson - Reckless with Respect to Property (ARRP)
Attempt Break and Enter (ABE)
Attempted Theft (AT)
Breach of Trust (BOT)
Break Enter & Commit (BEC)
Break and Enter with Intent (BEWI)
Cause Unncessary Suffering Animal (CUSA)
Commit Theft - False Pretences (CTFP)
Convey False Message (CFM)
Conversion Over - Indictable (CONO)
Disguise with Intent to Commit Offense (DICO)
Extortion (EXT)
False Firealarm - Summary (FFS)
False Pretences (FPD)
Forcible Entry (FORE)
Forgery (FORG)
Forge Credit Card (FCC)
Make Cheque - False Pretences (MCFP)
Mischief Cause Danger to Life (MCDL)
Mischief Property (Indicatble) (MPI)
Mischief Property Over - Indictable (MPOI)
Mischief Property Over - Summary (MPOS)
Mischief Property - Summary (MPS)
Obtain Credit Card - False Pretences (OCFP)
Obtain Property - False Pretences (OPFP)
Possession Break-in Instruments (PBII)
Possession Stolen Credit Card (PSCC)
Personation with Intent to Take Property (PIOP)
Robbery (ROB)
Stop Mail With Intent to Rob (SMIR)
Theft Under - Summary (TUS)
Take Vehicle Without Consent (TVWC)
Theft Credit Card (TCC)

Theft - Intent to Deprive (TID)
Theft Over - Indictable (TOI)
Theft of Mail (TOM)
Theft Over - Summary (TOS)
Theft - Person Required Account (TPRA)
Theft Under $5000 - Indictable (TUFI)
Theft Under - Indictable (TUI)
(TUFS) ? (Misssing Explanation - Theft)
Unlawfully in Dwelling House (UID)
Use Computer to Commit Offence (UCCO)
Use Cancelled Credit Card (UCCC)
Utter Forged Document (UFDO)

Group 8: Fraudulant Transactions Relating to Contracts and Trade and Offences Relating to Currency

Attempted Fraud (AF)
False Pretences (FPD)
False Prospectus - Entice Shareholders (FPIS)
False Statement - Bank Act (FSBA)
Falsifying Employment Record (FER)
Fraud Concealment (FRC)
Fraud - Intercept Computer Service (FICS)
Fraud Over - Indictable (FOI)
Fraud Transportation (FT)
Fraud Under - Indictable (FUI)
Fraud Under - Summary (FUS)
Make Counterfeit Money (MCM)
Personation with Intent to Take Advantage (PWI)
Possession of Counterfeit Instrument (PCI)
Possession of Counterfeit Mark (PCMK)
Possession Counterfeit Money (POCM)
Utter Counterfeit Money (UCMO)
Utter Document with Intent to Defraud (UDID)

Group 9: Instruments & Literature for Illicit Drug Use, Proceeds of Crime, Controlled Drugs and Substance Act (NCA) and Food & Drugs Act.

Cultivate Narcotics (CN)
Conspire - Proceeds of Crime - NCA (CP)
Conspire to Traffic Controlled Drug (CTCD)
Double Doctoring (DOUB)
Food & Drug Act - Devices (FDA)
Food & Drug Act - Drugs (FDAD)

Import/Export Narcotics (IEN)
Possession Cocaine (PCOC)
Possession Marijuana (PMAR)
Possession Narcotics (PNAR)
Possession Over - Indictable (POI)
Possession Proceeds of Crime Over (PPO)
Possession Proceeds of Crime Under (PPU)
Possession Under (PU)
Possession Under - Indictable (PUI)
Possession Under - Suumary (PUS)
Possession for Purposes of Trafficking (PFPT)
Possession for Purposes of Trafficking (PFT)
Traffic Controlled Drug (TCD)
Traffic Narcotic (TN)
Traffic Restricted Drug (TRD)

Group 10: Other - Attempts, Conspiracies & Accessories, Other Acts, Unknown and YOA Transfers

Accessory After the Fact (AAFE)
Accessory After the Fact - Indictable (AAFI)
Attempt an Indictable Offense (AI)
Conspire to Commit Indictable Offense (CCI)
Counsel to Commit Indictable Offence (CO)
Customs Act (CA)
Excise Act (EA)
Immigration Act Offense (IMA)
Income Tax Act (ITA)
Other Federal Statutes (OFS)
Unknown - (UNK)
Unemployment Insurance Act (UI)

APPENDIX I

Average Daily Count and Total Number of Admissions to Provincial/Territorial and Federal Corrections, 1987-88 to 1996-97

	Average Daily Counts				Total Number of Admissions			
Year	Custody	Cty	Total	% Change	Custody	Cty	Total	% Change
1987-88	26,634	83,318	109,952	2.8	198,638	64,651	263,289	2.9
1988-89	27,466	81,859	109,325	-0.6	206,891	63,893	270,784	2.8
1989-90	29,150	90,314	119,464	9.3	209,555	68,792	278,347	2.8
1990-91	29,233	99,658	128,891	7.9	217,238	76,000	293,238	5.3
1991-92	30,723	111,682	142,405	10.5	249,091	89,691	338,782	15.5
1992-93	31,709	120,116	151,825	6.6	251,329	91,902	343,231	2.3
1993-94	32,803	121,650	154,453	1.7	246,376	94,609	340,985	-0.7
1994-95	33,759	120,542	154,301	-0.1	243,785	93,077	336,862	-1.2
1995-96	33,785	120,411	154,196	-0.1	234,732	90,082	324,814	-3.6
1996-97	34,167	117,683	151,850	-1.5	230,031	89,248	319,279	-1.6

Source: *Adult Corrections, 1996-96, Canadian Centre for Justice Statistics, Statistics Canada.*