THE CONDITIONAL SENTENCE OF IMPRISONMENT: THE NEED FOR AMENDMENT

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THE CONDITIONAL SENTENCE OF IMPRISONMENT: THE NEED FOR AMENDMENT

I. Introduction

The introduction of the conditional sentence of imprisonment created a needed midway point between imprisonment and sanctions such as probation or fines. The primary goal stated was to reduce the unnecessary reliance upon incarceration by providing an alternative sentencing mechanism to the courts. In addition the conditional sentence was also intended as an opportunity to further incorporate restorative justice concepts into the sentencing process.

As a result of the application of the new sanction by the courts, many provinces have become increasingly disturbed with the wide ambit of the legislation in terms of the types of offences and offenders that are receiving a conditional sentence. The Supreme Court of Canada's interpretation of the legislation has in fact, confirmed that there are very few crimes for which the court cannot impose this sentence.

Alberta, British Columbia, Manitoba, Ontario, and Nova Scotia supported conditional sentences of imprisonment as an effective and appropriate mechanism to divert minor offences and offenders away from the prison system. Overuse of incarceration was recognized as problematic. Restorative justice concepts were seen as beneficial and there was considerable support to have these principles take a greater role in the criminal justice process. It was for these reasons that these provinces worked with the federal government to develop the conditional sentence of imprisonment option.

However, what was intended, by Parliament, as a method to address minor crime without resorting to imprisonment has become, in practice, a sanction used in cases of very serious crime. It is submitted that this situation was not Parliament's intention and must be ameliorated by amending the current legislation.

Offenders are currently receiving conditional sentences of imprisonment for crimes of serious violence, sexual assault and related offences, driving offences involving death or serious bodily harm, and theft committed in the context of a breach of trust.

Concerns about the use of conditional sentencing for serious violent offences have been voiced by Alberta, British Columbia*, Manitoba, Ontario, and Nova Scotia at Federal/Provincial/Territorial meetings of Ministers, Deputies and Senior Officials responsible for justice. These provinces have agreed to jointly address this issue. To this end, Alberta has prepared this paper . This is not to say that other provinces do not share some or all of the concerns identified. Their comments on these materials are most welcome. Ultimately, however, all five provinces listed strongly recommend that the legislation be amended.

Alberta, British Columbia*, Manitoba, Nova Scotia and Ontario certainly support the use of conditional sentences in appropriate cases as a way to reduce jail populations and more effectively incorporate restorative justice principles. Allowing persons not dangerous to the community, who would otherwise be incarcerated, and who have not committed serious or violent crime, to serve their sentence in the community is beneficial. However, there comes a point where the very nature of the offence and the offender should result in actual incarceration. To do otherwise brings the entire conditional sentence regime, and hence the criminal justice system, into disrepute. It is not the existence of conditional sentences that is problematic, but rather the use of conditional sentences in cases which should result in actual jail.

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* The Legislative Assembly of BC agreed to a motion as amended on April 7, 2003 which read "...This House call on the federal government to amend the Criminal Code so that those convicted of serious crimes of violence, including the offence of criminal negligence causing death, arising out of street racing, cannot receive a conditional sentence."

II. Legislation

The conditional sentence was not introduced in isolation but as part of a review of the entire sentencing provisions of the *Criminal Code*. As such, it must be considered in its relationship to the entire sentencing regime.

The *Criminal Code* sets out the fundamental purpose of sentencing as follows:

> ***718.*** *The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:*
>
> *(a) to denounce unlawful conduct;*
>
> *(b) to deter the offender and other persons from committing offences;*
>
> *(c) to separate offenders from society, where necessary;*
>
> *(d) to assist in rehabilitating offenders;*
>
> *(e) to provide reparations for harm done to victims or to the community; and*
>
> *(f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.*

The *Criminal Code* also incorporated the concept of proportionality:

> ***718.1*** *A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.*

The court was also to consider mitigating and aggravating circumstances, similarity to other sentences for similarly situated offenders, that consecutive sentences should not be unduly harsh, a caution to use the least restrictive deprivation of liberty that the circumstances allow and to consider all other sanctions other than imprisonment that could reasonably be used, especially for aboriginal offenders (Section 718.2).

Section 742.1 created the new conditional sentence of imprisonment. Three hurdles had to be passed before it could be used. First, it could not be used for an offence that was punishable by a minimum term of imprisonment.

Second, the sentence could not be used if the court thought that two years or more imprisonment was appropriate. And finally, the sentence could not endanger the safety of the community. Later the section was amended to add a fourth hurdle to clarify that the use of a conditional sentence had to be consistent with the fundamental purpose and principles of sentencing. This amendment ended arguments of inconsistency with other sections of the sentencing regime.

The above sections are those that are germane to the discussion of whether or not there should be further restrictions on the court on when a conditional sentence may be used. There are however other legislative provisions that are important to consider with respect to this issue. These are contained in the *Youth Criminal Justice Act* (YCJA) which came into force on April 1, 2003.

Under the YCJA:

> *42 (2) When a youth justice court finds a young person guilty of an offence and is imposing a youth sentence, the court shall, subject to this section, impose any one of the following sanctions or any number of them that are not inconsistent with each other and, if the offence is first degree murder or second degree murder within the meaning of section 231 of the Criminal Code, the court shall impose a sanction set out in paragraph (q) or subparagraph (r)(ii) or (iii) and may impose any other of the sanctions set out in this subsection that the court considers appropriate:*
>
> > *(p) subject to subsection (5), make a deferred custody and supervision order that is for a specified period not exceeding six months, subject to the conditions set out in subsection 105(2), and to any conditions set out in subsection 105(3) that the court considers appropriate;*
>
> *42 (5) The court may make a deferred custody and supervision order under paragraph (2)(p) if*
> > *(a) the young person is found guilty of an offence that is not a serious violent offence; and*
> > *(b) it is consistent with the purpose and principles set out in section 38 and the restrictions on custody set out in section 39.*
>
> *2(1) ``serious violent offence'' means an offence in the commission of which a young person causes or attempts to cause serious bodily harm.*

The YCJA version of the conditional sentence, deferred custody and supervision, clearly, cannot be used for a serious and violent offence.

III. The Supreme Court of Canada Decision in Proulx

The Supreme Court of Canada dealt with conditional sentences in *R. v. Proulx 30 C.R. (5th) 1 (SCC)(2000)*. The nature and scope of this decision cannot be overstated. It forms the basis of using conditional sentences for every criminal court in Canada.

Chief Justice Lamer delivered the judgement of the Supreme Court of Canada on January 31, 2000. The case was an extensive review of the conditional sentence regime. Very helpfully, Chief Justice Lamer, at Pages 46-47 of the judgement, includes a summary of what this case decides:

At this point, a short summary of what has been said in these reasons might be useful:

1. Bill C-41 in general and the conditional sentence in particular were enacted both to reduce reliance on incarceration as a sanction and to increase the use of principles of restorative justice in sentencing.

2. A conditional sentence should be distinguished from probationary measures. Probation is primarily a rehabilitative sentencing tool. By contrast, Parliament intended conditional sentences to include both punitive and rehabilitative aspects. Therefore, conditional sentences should generally include punitive conditions that are restrictive of the offender's liberty. Conditions such as house arrest should be the norm, not the exception.

3. No offences are excluded from the conditional sentencing regime except those with a minimum term of imprisonment, nor should there be presumptions in favour of or against a conditional sentence for specific offences.

4. The requirement in s. 742.1(a) that the judge impose a sentence of imprisonment of less than two years does not require the judge to first impose a sentence of imprisonment of a fixed duration before considering whether that sentence can be served in the community. Although this approach is suggested by the text of s. 742.1(a), it is unrealistic and could lead to unfit sentences in some cases. Instead, a

purposive interpretation of s. 742.1(a) should be adopted. In a preliminary determination, the sentencing judge should reject a penitentiary term and probationary measures as inappropriate. Having determined that the appropriate range of sentence is a term of imprisonment of less than two years, the judge should then consider whether it is appropriate for the offender to serve his or her sentence in the community.

5. As a corollary of the purposive interpretation of s. 742.1(a), a conditional sentence need not be of equivalent duration to the sentence of incarceration that would otherwise have been imposed. The sole requirement is that the duration and conditions of a conditional sentence make for a just and appropriate sentence.

6. The requirement in s. 742.1(b) that the judge be satisfied that the safety of the community would not be endangered by the offender serving his or her sentence in the community is a condition precedent to the imposition of a conditional sentence, and not the primary consideration in determining whether a conditional sentence is appropriate. In making this determination, the judge should consider the risk posed by the specific offender, not the broader risk of whether the imposition of a conditional sentence would endanger the safety of the community by providing insufficient general deterrence or undermining general respect for the law. Two factors should be taken into account: (1) the risk of the offender re-offending; and (2) the gravity of the damage that could ensue in the event of re-offence. A consideration of the risk posed by the offender should include the risk of any criminal activity, and not be limited solely to the risk of physical or psychological harm to individuals.

7. Once the prerequisites of s. 742.1 are satisfied, the judge should give serious consideration to the possibility of a conditional sentence in all cases by examining whether a conditional sentence is consistent with the fundamental purpose and principles of sentencing set out in ss. 718 to 718.2. This follows from Parliament's clear message to the judiciary to reduce the use of incarceration as a sanction.

8. A conditional sentence can provide significant denunciation and deterrence. As a general matter, the more serious the offence, the longer and more onerous the conditional sentence should be. There may be some circumstances, however, where the need for

denunciation or deterrence is so pressing that incarceration will be the only suitable way in which to express society's condemnation of the offender's conduct or to deter similar conduct in the future.

9. Generally, a conditional sentence will be better than incarceration at achieving the restorative objectives of rehabilitation, reparations to the victim and the community, and promotion of a sense of responsibility in the offender and acknowledgment of the harm done to the victim and the community.

10. Where a combination of both punitive and restorative objectives may be achieved, a conditional sentence will likely be more appropriate than incarceration. Where objectives such as denunciation and deterrence are particularly pressing, incarceration will generally be the preferable sanction. This may be so notwithstanding the fact that restorative goals might be achieved. However, a conditional sentence may provide sufficient denunciation and deterrence, even in cases in which restorative objectives are of lesser importance, depending on the nature of the conditions imposed, the duration of the sentence, and the circumstances of both the offender and the community in which the conditional sentence is to be served.

11. A conditional sentence may be imposed even where there are aggravating circumstances, although the need for denunciation and deterrence will increase in these circumstances.

12. No party is under a burden of proof to establish that a conditional sentence is either appropriate or inappropriate in the circumstances. The judge should consider all relevant evidence, no matter by whom it is adduced. However, it would be in the offender's best interests to establish elements militating in favour of a conditional sentence.

13. Sentencing judges have a wide discretion in the choice of the appropriate sentence. They are entitled to considerable deference from appellate courts. As explained in M. (C.A.), supra, at para. 90: "Put simply, absent an error in principle, failure to consider a relevant factor, or an overemphasis of the appropriate factors, a court of appeal should only intervene to vary a sentence imposed at trial if the sentence is demonstrably unfit.

It is submitted that this last point, the restriction on the power of Courts of Appeal to intervene only where the sentence is demonstrably unfit, means that the power of Courts of Appeal as an instrument to correct inappropriate conditional sentences is severely limited.

Notwithstanding legal limitations with respect to the role of Appellate Courts in reviewing sentences, there are numerous examples found in the Appendices where Courts of Appeal have allowed appeals by offenders from sentences where the trial judge imposed a custodial sentence and replaced it with a conditional sentence, yet denied appeals by the Crown to overturn a conditional sentence imposed by the trial judge. This has made the need for legislative direction more significant where attempts have been made to clarify the intended scope of the conditional sentence.

The decision of the Supreme Court of Canada in *Proulx* indicates that the wording of the legislation does not exclude any category of offences other than those with a minimum period of incarceration, nor is there a presumption for or against its use for any category of offence. The Supreme Court of Canada can of course only interpret the existing words of the legislation. If the legislation goes beyond what Parliament intended only Parliament is able to change that. The Supreme Court indicated (at page 32) that:

Section 742.1 does not exclude any offences from the conditional sentence regime except those with a minimum term of imprisonment. Parliament could have easily excluded specific offences in addition to those with a mandatory minimum term but chose not to. ...Thus, a conditional sentence is available for all offences in which the statutory prerequisites are satisfied.

IV. What Was the Intention of Parliament?

It is submitted that when Parliament brought forward and supported the concept of the conditional sentence in Bill C-41, it did not intend that it be used to address serious and violent crimes. Support for this assertion can be found in the debate in the House of Commons on the second reading of Bill C-41 (Debates House of Commons 1st Session 35th Parliament Vol. VII), which took place on September 20, 1994. Then Minister of Justice and Attorney General of Canada, The Honourable Allan Rock, moved that the bill be given second reading and began the debate (pg. 5870). He had first tabled the bill on June 13, 1994. Towards the end of his comments he addressed the issue of conditional sentences as follows (at page 5873):

...There will be a new sentence provided for in Bill C-41 called the conditional sentence. I will speak to that remedy for a few moments. Where a court imposes a sentence of imprisonment of less than two years and where the court is satisfied that serving the sentence in the community would not endanger the safety of society as a whole, the court may order that the offender serve the sentence in the community rather than in an institution.

Offenders who do not comply with such conditions as may be imposed at that time can be summoned back to court to explain their behaviour, to demonstrate why they should not be incarcerated. If the court is not satisfied with that explanation, it can order the offender to serve the balance of the sentence in custody. This sanction is obviously aimed at offenders who would otherwise be in jail but who could be in the community under tight controls.

It seems to me that such an approach would promote the protection of the public by seeking to separate the most serious offenders from the community while providing that less serious offenders can remain amoung other members of society with effective community based alternatives while still adhering to appropriate conditions. It also means that scarce funds can be used for incarcerating and treating more serious offenders.

Shortly thereafter he indicated:

Jails and prisons will be there for those who need them, for those who should be punished in that way or separated from society. But we must remember as well that only 10 per cent of all crime is violent and that over 53 per cent of all crime involves property, not people. Therefore this bill creates an environment which encourages community sanctions and the rehabilitation of offenders together with reparations to victims and promoting in criminals a sense of accountability for what they have done.

Mr. Rock used the term "less serious offenders" and then referenced the fact that violent crime makes up only 10 per cent of all crime. He did this in explaining that Bill C-41 was intended to encourage community sanctions such as conditional sentences in those types of situations. The problem is that the language of the statute does not adequately reflect this limitation nor does it convey the explanation by Mr. Rock of what the new sentence was intended to address.

V. Nature of the Problem

The wording of the statute is problematic because of its wide scope with regard to the nature of the offences and offenders eligible for conditional sentences. Further, as a result of the interpretation of the Supreme Court of Canada in *Proulx,* conditional sentences are now routinely being imposed on persons who have been convicted of offences involving:

- Serious violence
- Sexual assault and similar offences, including sexual assault on vulnerable victims such as children
- Impaired driving, dangerous driving and criminal negligence involving death or serious bodily harm
- Theft committed in the context of a breach of trust

Finally, the legislation lacks any prohibition on the use of conditional sentences in cases involving organized crime or terrorist activity.

VI. Why This is a Problem

It is submitted that Parliament intended that conditional sentences be used to reduce reliance upon incarceration to address less serious crime, but not to allow persons who commit very serious crimes to escape incarceration. However, when the legislation was drafted, no restrictions were placed upon the use of conditional sentences based on the offence for which the accused was found guilty, other than it could not be an offence for which a minimum period of incarceration was provided. The Supreme Court of Canada has examined the language of the conditional sentence provision. They have interpreted that language to conclude that only this restriction on use apply before the sentence can be considered.

This interpretation does not reflect the true intent of Parliament. Parliament intended that a conditional sentence be used for minor crime not for very serious offences and offenders but failed to clarify this point in the legislation. Only Parliament can correct this.

As indicated above, the result of the *Proulx* decision is that there is no presumption against the use of a conditional sentence if the crime does not have a mandatory period of incarceration. However, very few crimes in the Criminal Code have such a provision. For example, aggravated sexual assault and attempted murder do not. Clearly it is a concern that the legislation prevents a court from considering a conditional sentence for a person who is convicted of a second impaired driving charge (and hence subject to a minimum period of incarceration of fourteen days), while it allows the court to consider imposing a conditional sentence for an individual who deliberately tries to kill someone or severely beats a person and commits a sexual assault. Did Parliament really intend that court could consider conditional sentences for these very serious offfences?

Courts can of course conclude for very serious offences that more than two years incarceration is warranted, or the accused is a danger to the community, or that the principles of sentencing indicate that a conditional sentence is not appropriate. Any of these factors can result in courts using actual imprisonment rather than a conditional sentence. Courts however, through finding mitigating circumstances, can ultimately impose a

conditional sentence even though a very serious offence has been committed.

If the court finds mitigating circumstances and inappropriately imposes a conditional sentence this creates a great difficulty for the Crown. It is argued by some that appellate courts, through sentence appeals, can correct inappropriate use of conditional sentences by trial courts but *Proulx* has affirmed that a court of appeal should only intervene to vary a sentence imposed at trial if the sentence is demonstrably unfit. The use of appellate courts to provide guidance with respect to conditional sentences is limited since the test that the sentence is demonstrably unfit is very difficult for the Crown to meet. With this very high test, Crown Counsel are often discouraged from bringing sentence appeals. Only Parliament can restore the proper role of conditional sentences in the sentencing regime by legislative amendments to more clearly indicate to trial courts the boundaries for the use of this sanction.

Unfortunately, the present language of the statute has not produced results consistent with the original intention of Parliament. Courts throughout Canada have used the conditional sentence in cases of serious crimes of violence including those involving death, sexual assault and similar offences, including cases where the victim is a child, driving offences involving death or serious bodily harm to the victim, and cases where persons in a position of trust steal substantial amounts of money. Clearly this is not what Parliament intended.

In the appendices to this paper a number of cases are listed as examples of quite serious crime that have resulted in the imposition of a conditional sentence. There are many more such cases. All of these cases were decided after the *Proulx* decision.

On a different note, the Youth Criminal Justice Act creates the problem of a youth justice court being prohibited from accessing the equivalent of a conditional sentence of imprisonment, the deferred custody and supervision order, in cases involving a serious violent offence. An adult court under the Criminal Code is not precluded automatically from a conditional sentence in such a situation. The principles of the Youth Criminal Justice Act indicate that a young offender should not be treated more harshly than an adult offender but this is the ironic result when the two acts are compared.

When conditional sentences of imprisonment are being used instead of incarceration for serious offences such as the killing of the offender's mother, driving a car while impaired and causing death, sexually assaulting a child, or the stealing of $86,000 of trust money by a lawyer, then the mechanism itself comes into disrepute with the people of Canada. Alberta, British Columbia, Manitoba, Nova Scotia and Ontario support the use of conditional sentences in appropriate cases concerning less serious offenders and offences. It is agreed that there needs to be less reliance upon incarceration and more use of restorative justice principles. **What these provinces do not agree with is the use of conditional sentences for very serious offences.**

The intent of Parliament was to reduce the use of custody for less serious offenders. They intended to reduce levels of incarceration. It is submitted that placing restrictions on the use of conditional sentences for persons who commit crimes involving serious violence, sexual assault, driving offences involving death or serious bodily harm, theft involving a breach of trust, organized crime activities, and terrorist activities will not have a significant effect on the total number of conditional sentences that are imposed. As the Honourable Allan Rock indicated, violent crime only forms 10 per cent of overall crime in Canada. The non-violent offences, such as theft in a breach of trust situation, also represent only a small portion of all the criminal offences committed. The conditional sentence will still be available to reduce unnecessary use of incarceration and will not be greatly affected in this task by imposing some relatively modest restraints on its use.

The use of a conditional sentence must be proportionate to the gravity of the offence and the circumstances of the offender. It should not be used when it fails to adequately denounce unlawful conduct. It should not be used where it will not deter the offender from committing offences. It should not be used where it will not deter other persons from committing offences. Unfortunately, with the present use of conditional sentences for very serious crime, this is not always the reality in the courtrooms of Canada.

VII. Options

The following options are put forward for consideration:

1. **Prohibit the use of conditional sentences for offences involving serious violence, sexual assault and related provisions, driving offences involving death or serious bodily harm, offences involving organized crime or terrorist activity and theft involving a breach of trust.**

   This could be done by way of reference to specific sections in the provision itself or reference to specific sections in a schedule. It could, in the alternative, be done by more generic wording. This latter option would of course lend itself to creating greater scope for court interpretation.

2. **Create a presumption that the accused may rebut that a conditional sentences may not be used for offences involving serious violence, sexual assault, driving offences involving death or serious bodily harm, offences involving organized crime or terrorist activity and theft involving a breach of trust. (Note this option was developed by British Columbia through a paper "Conditional Sentences and legislative presumptions of unavailability for certain offences" by Brock Martland, Criminal Appeals and Special Prosecutions, Ministry of the Attorney General for British Columbia, April 20, 2001 and circulated to Federal/Provincial/Territorial senior officials)**

   Once again this could be done by way of reference to specific sections in the provision itself or reference to specific sections in a schedule or, in the alternative, be done by more generic wording.

   The advantage of a presumption is that it recognizes that there are some offences that are committed that should not result in a sentence of incarceration because of exceptional facts.

   This option does not close the door on the use of a conditional sentence but places the burden on the accused in cases of very serious

crime. In order to even consider a conditional sentence the court must have decided that jail of less than 2 years is appropriate. This is sometimes decided upon the basis of pre sentence custody rather than the seriousness of the crime. It is not too onerous to expect that if the court decides that a very serious offence has been committed that warrants incarceration, that the onus should be on the accused to demonstrate that a conditional sentence is appropriate.

3. **Place the same limitations on the use of conditional sentences as are contained in the new deferred custody and supervision orders under the Youth Criminal Justice Act (not exceeding six months and only for an offence that is not a serious violent offence).**

   At present a youth cannot receive a deferred custody and supervision order that exceeds six months while an adult can get a two years less one day conditional sentence. A youth cannot get a deferred custody and supervision order as a sentence for a serious violent offence while an adult can receive a conditional sentence for such an offence. This could bring about the odd result that a youth who has committed an offence for which more than six months custody is appropriate or a serious violent offence cannot get deferred custody while a similarly situated adult could get a conditional sentence of imprisonment instead of actual imprisonment.

4. **Lower the two years less a day limit on the use of conditional sentences to cases where the court is considering imprisonment**

   This type of option has been commented on by Julian V. Roberts, Professor of Criminology, University of Ottawa in Justice Report Volume 18 No. 1 in his article *Reforming Conditional Sentencing: What Are The Options*. He indicated that:

   > *This reform uses the length of custody as a measure of crime seriousness, rather than the category of offence. It also represents an adjustment to a limit already established by Parliament. There is nothing magical about the two years less one day limit; having created it, Parliament can revise it.*

Reducing the limitation to cases where the court is considering a sentence of one year or less imprisonment would not greatly reduce the total number of conditional sentences since most are now for 12 months or less, but it would eliminate many of the more serious offenders from consideration.

APPENDIX A
CASES INVOLVING SERIOUS VIOLENCE

R. v. Carman (E.S.) (2001), 290 A.R. 74 (ProvCt)

An 18 year old offender robbed bank using a threatening note (saying he had a gun and would kill people if he did not get his way). He received a 2yrs less a day conditional sentence, plus 1 year probation.

R. v. Mo, [2002] A.J. No. 296 (CA)

The-offender pled guilty to robbery (during robbery he hit the obviously pregnant store owner 3 times with a 12-14 inch metal pipe and pushed her to the floor). The trial judge imposed 3 years imprisonment. The offender appealed based on sentence being demonstrably unfit. The Court of Appeal allowed the appeal and imposed a 2yrs less a day conditional sentence.

R. v. Chern, [2002] A.J. No. 1095

-The offender was convicted at trial on 4 counts of assault on his wife. The court acknowledged the seriousness and prevalence of domestic violence, and abuse of a spouse while in position of trust or authority. The Crown asked for 6-9 months of imprisonment. The offender had previous convictions for assault against his wife for which he had been given a conditional sentence and probation. Two of the current charges arose while offender was on probation for previous offences. The trial judge had "serious reservations about safety of complainant" and imposed an 8 month conditional sentence.

R. v. C.S. 2002 ABPC 99

A young offender pled guilty to aggravated assault. The court acknowledged a "noticeable shift toward the use of conditional sentences in serious adult matters" which influenced the decision to impose a 15 month probation term.

R. v. Jarvis (C.J.) (2001), 153 Man.R.(2d) 314 (CA)

The offender was convicted of robbery (offender and four others, while drunk, attacked and robbed an 18 year old man, stealing his jacket, ball cap and running shoes) and was sentenced to six months imprisonment plus two years' probation. The offender appealed the sentence, submitting that a conditional sentence should have been imposed. The offender served

21 days in custody before being released pending the appeal. The Manitoba Court of Appeal allowed the appeal, substituting an eight month conditional sentence plus two years' probation.

R. v. Capistrano (C.L.) (2001), 154 Man.R.(2d) 140 (QB)

-The offender was convicted of manslaughter. The Crown sought a five year penitentiary term and the offender sought a conditional sentence. The Manitoba Court of Queen's Bench held that a conditional sentence of two years less a day with very stringent conditions followed by a lengthy period of closely supervised probation was appropriate.

R. v. Ledoux, 2001mbca72

The offender entered a plea of guilty to a charge of aggravated assault, and after a sentencing hearing at which evidence was tendered to establish whether the offender or a co-offender was the main offender, the offender was sentenced to 18 months' imprisonment and a further two years' supervised probation. He appealed his sentence and the Court of Appeal allowed the appeal and converted the balance of the sentence to be served conditionally.

R. v. Simcoe (B.S.) (2002), 156 O.A.C. 190 (CA)

The offender pled guilty to manslaughter in the death of her father and was sentenced to four years' imprisonment in addition to eight months' pre-trial custody. The offender appealed her sentence. The Ontario Court of Appeal allowed the appeal and substituted a sentence of time served (one year plus 16 months' credit for eight months' pre-trial custody). The Ontario Court of Appeal held that a conditional sentence would have been appropriate.

R. v. Turcotte (R.) (2000), 131 O.A.C. 311 (CA)

The offender killed his mother while both were severely intoxicated. He was tried for second degree murder, and convicted of manslaughter. The offender was sentenced to two years less a day, to be served as a conditional sentence. The Crown appealed sentence. The Ontario Court of Appeal, MacPherson, J.A., dissenting, dismissed the appeal. The court ruled that a conditional sentence for a manslaughter conviction was acceptable in certain circumstances and that although the crime committed was very serious, the sentence imposed was not demonstrably unfit.

R. v. Habib (N.) (2000), 135 O.A.C. 329 (CA)

A jury convicted the offender of aggravated assault. She received a conditional sentence of two years less a day and three years probation. The offender appealed her conviction and sentence. The Crown appealed the sentence. The Ontario Court of Appeal dismissed the appeals by the Crown and the offender.

R. v. Medeiros (M.), [2002] O.A.C. TBEd. SE.019

The appellants pled guilty to criminal negligence causing death and abandoning four children under the age of ten years. They were sentenced to six months' imprisonment concurrent on each count. They appealed their conviction and sentence. The sentence appeal was allowed and a conditional sentence imposed.

R. v. Hall 2001 BCCA 0074

The offender was found guilty of aggravated assault, assault with a weapon, possession of a weapon for the purpose dangerous to the public peace, and attempting to obstruct justice. He was sentenced to 18 months on the aggravated assault concurrent with two twelve-month sentences for each of the weapons offences and three months consecutive on the attempting to obstruct justice offence, all to be served conditionally. The Crown appealed. This was a swarming attack. The victim was surrounded and attacked. He received a stab in the back. He was struck in the back. He was stabbed in the lower back and was forced to his knees. He looked up and saw a meat cleaver aimed at his head. He put his arm up to protect himself and, as a result, his elbow bone was cut cleanly in two. One of the bones went some distance up his arm. He managed, nevertheless, to run away and obtained help. An ambulance was summoned and he was taken to the hospital. He was operated on. He spent a week or so in hospital. His school activities were affected as well as his sporting activities and his impact statement describes the continuing affect the injury has had on his life, as well as indirectly on his family. The Court of Appeal maintained the conditional sentence but increased the restrictions on liberty.

R. v. Reid 2002 BCCA 268

Mr. Reid was sentenced to three years' imprisonment after pleading guilty before a Supreme Court judge to one count of aggravated assault. Mr. Reid appealed sentence. Mr. Reid had a chance encounter with his estranged wife, S.R., on the street. After visiting at the home of friends, Mr. Reid and S.R. returned to the trailer where Mr. Reid was living at the time. Although

Mr. Reid was sober when he encountered S.R., both he and S.R. were extremely intoxicated by the time they arrived at Mr. Reid's trailer. Shortly after their arrival there, Mr. Reid assaulted S.R. with a knife, apparently because he was angry with her for associating with other men. The assault was of a very serious nature, involving Mr. Reid striking and kicking the victim and stabbing her three times with knife. Two of the stab wounds were to S.R.'s legs, and one was to her left shoulder. All of the wounds required stitches. Immediately following the attack, Mr. Reid realized the seriousness of what he had done and he attempted to dress S.R.'s wounds. Ultimately, he told S.R. to go to the hospital, but in so doing, he threatened her with further harm if she implicated him in the assault. Although the hospital authorities suspected that S.R. had been assaulted and called the police, it was not until approximately one month later that S.R. acknowledged to the police that Mr. Reid had assaulted her. Mr. Reid's record included two prior convictions for assault of his former wife (in 1989) and one prior count of assault of S.R. in 1998. In addition, Mr. Reid had convictions for failure to comply with a probation order (1990), a further unrelated assault (1998), mischief (1999), and breach of a recognizance (2000). The Court of Appeal set aside the three-year sentence of imprisonment, and substituted a 21-month conditional sentence, to be followed by two years' probation. In substituting a 21-month conditional sentence, the court took into account the fact that Mr. Reid had spent approximately three months in custody.

R. v. Poulin [2002] NSJ No. 302

The respondent, Clement Poulin, was found guilty of counseling the offence of murder, which offence was not committed, contrary to s. 464(a) of the Criminal Code. He was sentenced to a term of imprisonment for two years less a day to be served as a conditional sentence in the community, and subject to certain conditions, including house arrest for the first 12 months; house arrest from 12:00 noon to 9:00 a.m. everyday for the following six months; and curfew of 6:00 p.m. to 9:00 a.m. for the last six months less a day, followed by a period of three years probation. A lifetime firearms prohibition under s. 109(2)(a) of the Criminal Code was also imposed. The Crown appealed the sentence, submitting that the sentence inadequately reflects the objectives of denunciation and deterrence, and that the judge failed to provide sufficient reasons for the sentence.

The Court of Appeal found, after considering the record and the submissions of counsel, that the trial judge committed no error in principle and that the

sentence imposed, while at the very low end of an acceptable range is not demonstrably unfit in the circumstances. In this matter the offender on at least one occasion offered money to have his wife killed after a heated argument with her.

R. v. Bratzer 2001 NSJ No. 461

The offender was an eighteen year old who had committed three armed robberies in a period of one week. He was sentenced to the maximum conditional sentence on each count and they were to be served concurrently. While recognizing the sentence is seemingly lenient, the Court of Appeal said at para. 56 A...*While admittedly a troubling case, I am not persuaded that this conditional sentence is demonstrably unfit or reflective of error in principle.*

R. v. Clemons 2003 MBCA 51

This was a Crown appeal from a conditional sentence of two years less one day plus a period of probation of three years, imposed following a plea of guilty to a charge of manslaughter. The Crown had sought a penitentiary sentence of five years at trial and at appeal. The Crown appeal was dismissed.

1 The accused pled guilty. He had killed of an individual in the early morning hours of September 13, 2001, while in a highly intoxicated state and after having been provoked by the deceased over a period of time. In answer to the provocation, the accused "sucker punched" the victim who then proceeded to draw a knife on the accused. The accused managed to get the knife away from the victim and then "snapped," proceeding to inflict nine stab wounds to the deceased both with the knife and a broken beer bottle. The Court of Appeal described the attack as vicious.

At the time of sentencing, in August of 2002, the accused was 23 years of age and the father of a young child. He had a Grade 11 education with a record of involvement as a youth and a limited adult record. Notwithstanding the record, his past was not a violent one and there was agreement that his conduct on the night of the incident was out of character.

APPENDIX B
CASES INVOLVING DRIVING OFFENCES INVOLVING DEATH OR SERIOUS INJURY

R. v. Francis (J.W.) 2001 ABPC 142

The offender pled guilty to dangerous driving causing death. The court imposes a 15 months conditional sentence.

R. v. Perez, [2001] A.J. No. 312

-The offender pled guilty to four charges of dangerous driving causing bodily harm and 1 charge of dangerous driving causing death. The offender was on probation at time of the offences. The trial judge imposed a 2 years less a day conditional sentence.

R. v. Thomson, [2002] A.J. No. 600

The offender while driving his vehicle, hit and killed an 11 year old boy, then left the scene, and filed a false report to the police. He pled guilty to hit and run, public mischief, and careless driving. The trial judge imposed an 18 months conditional sentence.

R. v. McKenzie (T.A.) (2000), 148 Man.R.(2d) 63 (CA);
224 W.A.C. 63

-The 18 year old aboriginal offender pled guilty to impaired driving causing death after he struck and killed a 14 year old boy. He received a 20 month conditional sentence and a two-year driving prohibition. The Crown appealed from sentence. The Manitoba Court of Appeal dismissed the appeal.

R. v. Higgins (K.J.) (2001), 160 Man.R.(2d) 105 (CA);
262 W.A.C. 105

Higgins, 50 years of age, caused the death of his 21 year old passenger by driving at a reckless speed while impaired by alcohol. The lack of a criminal record, the injuries he suffered in the accident and other mitigating factors resulted in Higgins being sentenced to an 18 month conditional sentence. The Crown appealed sentence, arguing that the optional conditions imposed were so lenient that the sentence did not adequately reflect the principles of deterrence and denunciation. The

Manitoba Court of Appeal allowed the appeal and varied the optional conditions.

R. v. Mould (M.) (2000), 135 O.A.C. 294 (CA)

An offender was convicted of impaired driving causing death and impaired driving causing bodily harm. The Ontario Superior Court, in a decision reported at [2000] O.T.C. TBEd. FE.087, sentenced the offender to a term of 15 months to be served in the community. The conditions of the sentence included abstention from alcohol and 100 hours of community service over 15 months, including counseling young people on the dangers of drinking and driving. The court also imposed a five year driving prohibition. The Crown appealed. The Ontario Court of Appeal dismissed the appeal.

R. v. Godfree (C.) (2000), 136 O.A.C. 49 (CA)

The offender was given a conditional sentence of 20 months for impaired operation of a motor vehicle causing death. The Crown appealed the sentence. The Ontario Court of Appeal, Weiler, J.A., dissenting, dismissed the appeal.

R. v. Stone 2001 BCCA 728

The appellant Mr. Stone was sentenced to two years' imprisonment upon his conviction for dangerous driving causing bodily harm, contrary to s. 249(3) of the *Criminal Code*. The trial judge found that he had hit the victim intentionally - i.e., that he had deliberately run down "a man who had become the object of his hatred as a result of an incident of road rage, an incident in which both men had been equal participants." As a result of being knocked down, the victim spent four days in the hospital. He suffered a compression fracture in his vertebrae and significant pain in his head, back and legs. He was unable to walk unassisted for some months and, in his victim impact statement, said he felt isolated and alienated from his peer group as a result of his inability to participate in sports. The Court of Appeal substituted a conditional sentence of 22 months.

R. v. Duchominsky 2003 MBCA 19

The appellant was convicted of two counts of dangerous driving causing death and three counts of dangerous driving causing bodily harm after a trial by a judge sitting without a jury. He was sentenced to a period of incarceration of two years less a day. He appealed from this sentence on the

ground that the trial judge did not give proper consideration to the imposition of a conditional sentence.

On October 20, 2000, the appellant, accompanied by a co-worker, was driving a large truck, which was towing a trailer, in the course of his employment with the Province of Manitoba Highways Department. The time of day was approximately noon and the day was bright and clear. He was driving south on the Perimeter Highway at the boundary of the City of Winnipeg. His vehicle was in sound condition, and the trial judge found that he was driving his vehicle prior to the incident in question "normally and responsibly." The appellant was not exceeding the speed limit, and he had not been drinking.

As the appellant approached the intersection of the Perimeter Highway and the east entrance of Assiniboia Downs, there were flashing warning lights indicating that the intersection lights ahead were either red or would shortly be turning red. The appellant had been traveling in the right-hand lane. He pulled his vehicle into the left-hand lane, passed a truck that had already stopped at the intersection, proceeded into the intersection against the red light and struck a small compact car. The evidence is that the red light had already been on for up to half a minute before the appellant's vehicle entered the intersection. Tragic consequences ensued. Two occupants of the compact car were killed, and the other three occupants were seriously injured.

The Manitoba Court of Appeal overturned the sentence and substituted a conditional sentence of two years less a day.

APPENDIX C
CASES INVOLVING SEXUAL ASSAULT AND RELATED OFFENCES

R. v. Morris, [2001] A.J. No. 1711 (ProvCt)

The offender was found guilty at trial of sexual assault with a weapon and unlawful confinement. The common law wife was victim. He received an 18 mos. conditional sentence on the sexual assault with a weapon charge and 90 days jail to be served intermittently for the unlawful confinement.

R. v. P.D.U. (2000), 150 Man.R.(2d) 309 (CA)

The offender was convicted of indecently assaulting the complainant over a four year time period between 1977 and 1981. The offender was a school guidance counselor and the male complainant had been referred to him with depression. The Manitoba Court of Queen's Bench sentenced the offender to 30 months' imprisonment. The offender appealed his conviction and sentence. The Manitoba Court of Appeal, in a decision reported at [2000] Man.R.(2d) Uned. 121, dismissed the conviction appeal. The Manitoba Court of Appeal, Twaddle, J.A., dissenting, reduced the sentence to two years less a day and ordered that it be served conditionally.

R. v. Robinson (E.) (2002), 159 O.A.C. 286 (CA)

An offender was convicted of sexual assault and sexual touching and sentenced to one year's imprisonment and two years' probation. The offender appealed the conviction and sentence. The Ontario Court of Appeal dismissed the appeal. While the offender was not in a position of trust, he more than most people should have understood the harm done to children by the kind of sexual conduct in which he engaged.

R. v. Fisher (G.J.) (2000), 129 O.A.C. 92 (CA)

An offender was convicted on two counts of sexual assault and sentenced to a conditional sentence of two years' less one day. One of the conditions of the sentence was that the offender must spend weekends in jail for one year. The Ontario Court of Appeal allowed the appeal and varied the sentence by deleting the condition that weekends must be served in jail.

R. v. Pine (C.R.), 2002 OAC Uned 16 (CA)

The appellant was convicted after a trial of sexual assault and received a sentence of fifteen months to be served conditionally. The appellant appealed a portion of two of the conditions that were imposed upon him by the court. The Court of Appeal allowed his appeal (he does not have to write a letter of apology to the victim; he can leave the house for work – curfew of 7:00pm to 7:00am).

R. v. Pecoskie (P.), 2002 OAC Uned 175 (CA)

The appellant was convicted of sexual assault. He appealed his conviction. The Crown cross-appealed the sentence imposed by the trial judge, a conditional sentence of 2 years less a day with 180 hours of community service work. The conviction appeal was dismissed. The sentence appeal by the Crown was dismissed.

R. v. G.B., 2000 OAC Uned 150 (CA)

The Court of Appeal did not read the trial judge's reasons as indicating that a conditional sentence can never be imposed in cases of sexual assault. These, however, were serious offences involving grave breach of trust on a vulnerable victim. The trial judge did not make any error in principle in refusing to impose a conditional sentence. Appeal dismissed.

R. v. D.W.C., 2000 OAC Uned 354 (CA)

The offender was charged with three counts of sexual assault and one count of sexual exploitation (14 years old victim). He received a sentence of two years less a day, to be served conditionally. The offender appealed his conviction. The Crown appealed the sentence as being unfit. The Court of Appeal found that a conditional sentence should not have been imposed, but that it would not serve the interests of justice to incarcerate the offender at this point in time. Both appeals were dismissed.

R. v. M.H. 2002 BCCA 248

The appellant received a sentence of 9 months custody followed by 2 years probation on one count of sexual assault (fondling the victims breasts) and one count of making a child pornography videotape (surreptitious recording of victim). The victim was the appellant's stepdaughter, then 13 years old. The Court of Appeal set aside the sentence of imprisonment and imposed a conditional sentence of the same length.

R. v. Belrose 2001 BCCA 427

Mr. Belrose was convicted of sexual assault on a sleeping victim. He had a substantial record including a conviction for sexual assault 15 years ago for which he was sentenced to three years in prison. At the time of the sentencing he was 49 years old. He was a member of the Spallumcheen Band at Enderby, B.C. At the root of his criminal record was a lifelong alcohol abuse problem. The assault had a devastating effect on the victim. He received a two years less a day conditional sentence. The Court of Appeal indicated that although this may have been an inappropriate sentence when imposed they would not interfere with it and dismissed the appeal.

R. v. Bremner 2000 BCCA 345

The appellant received 18 months incarceration on four counts of indecent assault committed in the late 1960's and early 1970's. The appellant was an officer in a quasi-naval organization and the victims were sea cadets between 13 and 16 years of age. The Court of Appeal changed the incarceration to a conditional sentence.

R. v. White 2000 BCCA 516

The appellant was convicted of one count of sexual assault. He was sentenced to 9 months imprisonment to be followed by probation for one year. The appellant, a friend of the complainant's common law husband, had been drinking with a number of friends at the complainant's home for most of the day. The appellant's 18 years old son had committed suicide two months before, and his friends were attempting to help him deal with his inconsolable grief. At 9:00 p.m. the complainant, feeling the effects of alcohol, went to sleep in her bedroom. Her 7 years old daughter had gone to sleep there earlier in the evening. The complainant awoke to find the appellant having intercourse with her. At first she thought that it might be her common law husband, but when she learned that it was the appellant, she hollered and kicked the appellant away. The appellant left the room. The complainant was uncertain whether her 7 years old daughter had witnessed what had happened. The Court of Appeal imposed an 18 months conditional sentence.

R. v. W.H.M.C. [2002] NSJ No. 412

In September 2002, the offender, a 57 years old male Doctor in a rural area, was convicted of indecently assaulting three male patients who were between the ages of 13 and 15 while they were seeking medical attention. The assaults included masturbation and in one case an unnecessary rectal examination. The Doctor was found guilty and in the words of the court

showed no remorse and was in a position of trust. The Crown asked a period of incarceration from three to five years. The Doctor was sentenced to an eighteen months conditional sentence on each count to be served concurrently. The court stating the offences did not include violence or threats of violence.

APPENDIX D
CASES INVOLVING THEFT OR FRAUD IN A BREACH OF TRUST SITUATUION

R. v. Finch, [2001] A.J. No. 1163 (CA)

The offender was a Customs Officer convicted of fraud (false shipments of liquor – evaded the Canadian taxes)-This was an over $330,000 fraud. The trial court imposed 2 years imprisonment. The Court of Appeal overturned the sentence and substituted a 12 mos. conditional sentence. There was one dissent.

R. v. Grundy, [2001] A.J. No. 1670 (CA)

The offender pled guilty to fraud over $5,000. The trial judge imposed 2 yrs less a day conditional sentence. The Court of Appeal acknowledged that the sentencing judge under-emphasized the gravity of the offence and that a significant period of incarceration should have been given but only varied the conditional sentence to the extent of making house arrest a condition. The court upheld the $218,000 restitution order.

R. v. Armstrong, [2001] A.J. No. 770 (ProvCt)

The offender, employed by a bank, pled guilty to fraud involving $186,000. The court imposed a 2 yrs less a day conditional sentence. It declined to order restitution.

R. v. Watkinson [2001] A.J. No. 394 (CA)

The offender pled guilty to fraud and accepting secret commissions The trial court gave 18 month and 12 month sentences of imprisonment to be served concurrently The Court of Appeal substituted a conditional sentence instead and allowed the compensation order to stand. There was one dissent.

R. v. Bordeleau (2001), 297 A.R. 330 (ProvCt)

The offender stole $33,000 from her employer over 3 yrs (while she was the general manager). She pled guilty to theft over $5000. The court imposed an 18 month conditional sentence with house arrest for 1 year and then after that to obey a curfew.

R. v. Lucardie, [2002] A.J. No. 217 (ProvCt)

The offender pled guilty to theft. Over $95,000 was taken over 15 years. The offender was a bank teller in position of trust. The trial judge

gave a 2 years less a day conditional sentence with house arrest for first 8 months then curfew for remainder of the order.

R. v. Sywak (L.V.) (2000), 145 Man.R.(2d) 132 (CA)

The offender pled guilty to a total of 18 counts of fraud and impersonation. The sentencing judge imposed an 18 months conditional sentence, the conditions mandated by the Criminal Code and additional conditions. The offender appealed two of the non-mandatory conditions. The Manitoba Court of Appeal allowed the appeal in part (allowed her to have contact with her husband who was incarcerated; upheld the searches by police of her home but placed restrictions on those searches).

R. v. Normand (L.D.) (2001), 160 Man.R.(2d) 324 (CA)

An offender was convicted of theft (while employed at a centre for persons needing assistance and support, stole several thousands of dollars from clients whom she helped with banking) and sentenced to 15 months' imprisonment. The offender appealed. The Manitoba Court of Appeal allowed the appeal and sentenced the offender to a conditional sentence of two years less one day (less time served) and 18 months of supervised probation.