The Punitive Nature of the Conditional Sentence.

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R. v. *Proulx*[1] and related cases[2] have settled some points, at least as a matter of abstract principle, but for some time the law and practice of conditional sentencing will remain unsettled. This is not due to apparent discrepancies among the decisions given by the Supreme Court, although those discrepancies make plain that if the Court cannot agree upon the application of its own principles there is little basis upon which to expect such consistency in other courts. The purpose of this paper is to explain why, as a result of the recent decisions, it can be expected that uncertainty in conditional sentencing will continue. The core of that uncertainty is the extent to which the punitive nature of the conditional sentence[3] can accommodate the objectives of restorative justice.

In *Proulx*, the Supreme Court of Canada situated the conditional sentence of imprisonment, among sentencing options, between a term of actual incarceration in a provincial jail and a suspended sentence with probation. For the Court, Lamer C.J.C. explained that from this characterisation it followed that a conditional sentence should express punitive objectives that are consistent with a prison order and, at the same time, objectives that are consistent with rehabilitation and restorative justice.[4] As a rule, therefore, a conditional sentence should include some restriction of liberty or confinement such as house arrest, curfew or electronic monitoring.[5] Punitive objectives should be reflected in both the length and the severity of conditions.[6] Similarly, while the presence of aggravating factors will not necessarily preclude a conditional sentence, they will be reflected in the duration and rigour of the conditions.[7]

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1 (2000), 30 C.R. (5th) 1, 140 C.C.C. (3d) 449 (S.C.C.). References are to paragraphs as numbered in the opinion.

2 *R.* v. *R.(R.A.)*. (2000), 30 C.R. (5th) 49; *R.* v. *S.(R.N.)* (2000), 30 C.R. (5th) 63; *R.* v. *W.(L.F.)* (2000), 30 C.R. (5th) 73; *R.* v. *Bunn* (2000), 30 C.R. (5th) 86. *R.* v. *Gladue* (1999) 23 C.R. (5th) 197 (S.C.C.) was decided before the five decisions of 31 January 2000 and *R.* v. *Wells* [2000] S.C.C. 10, 30 C.R. (5th) 254 was decided after them, even though heard as a companion appeal.

3 This phrase and the title of this paper are quoted from paragraph 38 of *Proulx*, *supra* note 1.

4 See, e.g., *Proulx*, *supra* note 1, paras. 22, 23, 100, 113.

5 See, e.g., *ibid.*, paras. 36, 117.

6 See, e.g., *ibid.*, paras. 114, 117.

7 See, e.g., *ibid.*, paras. 102-3, 115.

Considerable emphasis is thus placed by the Court on the need for a clear expression of denunciation and deterrence in conditional sentences.[8] Where those concerns are paramount, Lamer C.J.C. says that incarceration will be preferable, but he adds that "a conditional sentence may provide sufficient denunciation and deterrence, even in cases in which restorative objectives are of diminished importance, depending on the nature of the conditions imposed, the duration of the conditional sentence, and the circumstances of the offender and the community in which the conditional sentence is to be served."[9]

At no point does Lamer C.J.C. address the possibility that a conditional sentence should favour restorative over punitive objectives, and the contrast that he draws between conditional sentencing and probation rules out this construction.[10] Indeed, the opinion offers little exploration of the practical content of rehabilitative or restorative measures within a conditional sentence.[11] Nor does Lamer C.J.C. contemplate the possibility that punitive and restorative objectives might be of comparable or commensurate concern in the formulation of a conditional sentence. Throughout his reasons, the Chief Justice emphasises the primacy of punitive objectives in conditional sentencing.[12] The net effect of the Court's reasons is that the essential elements of denunciation and deterrence in a conditional sentence preclude the idea that this sanction is chiefly a vehicle for restorative justice. This was a view taken by many before *Proulx* and other cases went to the Supreme Court. These decisions affirm that the conditional sentence was not introduced into the Code as a form of reinforced probation.[13]

In short, the reasons in *Proulx* attempt to place the conditional sentence as a distinct sanction between actual incarceration and probation by insisting upon the punitive objectives of the former and allowing the restorative elements of the latter. It is only a slight exaggeration that the Court associates the punitive objectives with optional conditions. The basis for this is that the Court has, in effect, read into section 742.3(1) a *mandatory* term of punitive conditions and

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[8] See, e.g., *ibid.*, paras. 20, 41, 102-9, 114.

[9] *Ibid.*, para. 114.

[10] *Ibid.* at para. 19, the Chief Justice states that "Canadian sentencing jurisprudence has traditionally focussed on the aims of denunciation, deterrence, separation, and rehabilitation, with rehabilitation a relative late-comer to the sentencing analysis". He also notes that with the reform of Part XXIII, Parliament has placed a new emphasis on the goals of restorative justice. This characterisation is somewhat perplexing, because it appears to give less weight to rehabilitative aims in recent times. It is more perplexing when attention is given to probation, as described by the Chief Justice in paragraphs 32 through 35, as rehabilitative in nature. Probation, of course, has a long history in Canadian law and thus so too does the rehabilitative aspect of at least one important sentencing option. See also *ibid.*, para. 29.

[11] See *ibid.*, paras. 109-112; *cf.* paras. 18-20.

[12] See, e.g., *ibid.*, paras. 22, 23, 28-30, 35-38, 41, 99, 100, 102, 103, 113, 114, 117.

[13] See *ibid.*, para. 99.

reinforced this by saying that a judge who fails to observe this term for good reason will be subject to appeal for reversible error.[14]

The picture created by the reform of Part XXIII, as interpreted in *Proulx*, is something like this: Whereas the sentencing judge previously had a choice between actual incarceration and probation, there are now three options — two of them dominantly punitive — and each one has its distinctive characteristics. The characteristics are punitive, punitive and restorative mixed in some proportion, and restorative. For each offence and each offender the sentencing judge must find a disposition among these three that is fit. At first blush, the view of conditional sentencing expressed in *Proulx* lends greater force to the punitive options available. This follows from the definition of a conditional sentence alone and the emphasis on denunciation and deterrence. It might be noted that, from the very opening of his reasons in *Proulx*, Lamer C.J.C. emphasises that the conditional sentence applies only in respect of a limited subclass of non-dangerous offenders who would otherwise be bound for jail.[15]

But it would also *appear* that the conditional sentence has led, or will lead, to increasing emphasis on punitive objectives. Is this correct? The short answer is that it is still too early to say, because rigourous empirical detail on sentencing practices in the three categories, and in particular the conditional sentence after *Proulx*, will not be available for some time. The data for all three categories must be read together, obviously, because of the spillover between and among them. Logically, perhaps it would be desirable if these various categories were wholly distinct and it would be possible to assert *a priori* that a given case properly belongs in one category and not the others. Practically, however, the effect of introducing the conditional sentence has probably been to draw *down* some cases that would otherwise receive provincial jail and to draw *up* some cases that would otherwise receive probation. If this is so, and conditional sentences are applied according to *Proulx*, there can only be heavier reliance on punitive measures, because the concentration of dispositions is in two categories that are both characteristically punitive.

The three central variables to note are the rate of provincial admissions, the rate of conditional sentences, and the rate of probation orders.[16] Unless there is a radical increase in the rate of probation orders, and a corresponding radical decrease in the rate of provincial admissions or conditional sentences, the

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[14] See *ibid.*, para. 37.

[15] See *ibid.*, para. 12.

[16] With regard to the rate of provincial admissions, attention must focus on the rate of admissions measured against the rate of conviction (which is falling due to fewer cases). See J. Roberts & C. Grimes, *Adult Criminal Court Statistics - 1998/99* (2000) 20 Juristat 1. See also J. Roberts, D. Antonowicz & T. Sanders, *Conditional Sentences of Imprisonment: An Empirical Analysis of Optional Conditions* (2000) 30 C.R. (5th) 113, but it should be noted that the data analysed by them relate to sentences imposed before *Proulx*. One can only hope that a similar study will be conducted in due course to examine the effects of *Proulx*.

emphasis on punitive orders will remain. If the rates in all three categories remain substantially unchanged, and *Proulx* is consistently applied, the same conclusion follows. The Supreme Court's recent exhortations for appellate deference, if heeded, will only strengthen these effects.[17]

The first conclusion of this paper is based upon the text of *Proulx* and the general statement of principle that it presents. It is that the creation of the conditional sentence has not marked a shift from punitive to restorative sentencing and indeed that the current interpretation of the conditional sentence is consistent with continuing emphasis upon punitive objectives in sentencing. It bears repetition that, in any conditional sentence, the Supreme Court has concluded that restorative objectives can only complement a necessary element of punishment. Restorative objectives cannot dominate in a conditional sentence and they cannot be given equal weight either.

With respect to the conditional sentence, the next point is to gauge the extent to which restorative objectives can be addressed within a dominantly punitive context. Lamer C.J.C. concedes in *Proulx* that actual incarceration is largely inconsistent with rehabilitation and restorative justice.[18] Why should it be any different with the virtual incarceration of a conditional sentence, especially one that might be lengthened and otherwise made more onerous to reflect deterrence and denunciation? The answer, again broad and abstract, would seem to be that an offender might benefit from the restorative features of probation while serving a punishment, for purposes of deterrence and denunciation, that involves some significant restriction of liberty. But is this realistic in the general run of cases?

Only four paragraphs in *Proulx* are given to the consideration of restorative objectives within conditional sentences.[19] These paragraphs say comparatively little and almost nothing of the challenges posed by conditional sentencing. Lamer C.J.C. speaks of the "restorative objectives of rehabilitation, reparations, and promotion of a sense of responsibility in the offender"[20] and notes that in *Gladue* the Court observed that "[r]estorative sentencing goals do not usually correlate with the use of prison as a sanction".[21] Given that so much of the reasons in *Proulx* are devoted to making clear that the virtual incarceration of a conditional sentence should contain, as a rule, some very real restriction of liberty, thus creating some form of imprisonment within the offender's community, it would seem reasonable to expect the judgement to provide considerable guidance as to how the restorative and rehabilitative aspects of a conditional sentence could be joined with its punitive aspects.

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[17] See *Proulx, supra* note 1, paras. 123-31.

[18] See *ibid.*, para. 109.

[19] See *ibid.*, paras. 109-12; *cf.* paras. 18-20.

[20] See *ibid.*, para. 109.

[21] *Ibid.*, para. 109, quoting *Gladue*, *supra*, note 2, para. 43. The same passage in *Gladue* is quoted in *Proulx* at para. 19.

Four examples are given. House arrest is cited as having rehabilitative properties to the extent that it allows the offender to maintain work or studies in the community. This might better be described as a condition precedent to more conspicuous restorative measures because it might permit those measures to have effect but it does not *cause* those effects. The other three forms of restorative measures given as examples are restitution, community service, and treatment. As for the first, even after the judge is satisfied that the offender has the means to make compensation, an order of restitution that exceeds strict compensation can appear to have a punitive rather than restorative aspect. Everything will depend on the terms of the order, of course. As for community service and mandatory treatment orders, it will be noted that the Code says that a mandatory treatment order can be made, without the consent of the accused, to attend a program approved by the province. With regard to community service, Lamer C.J.C. affirms that such orders should be encouraged, "provided that there are suitable programs available for the offender in the community".[22] Thus the effectiveness of both the treatment order and the community service order will be contingent, in the long run, upon adequate programs.

Obviously, it is possible to combine within the terms of a conditional sentence both punitive and restorative aspects. Thus, for example, house arrest, curfew, or electronic monitoring are all punitive restrictions of liberty that can be readily combined with treatment, schooling, community service, and so forth. It is a difficult matter to determine what conditions are appropriate to each case, but there is no reason to suppose that punitive and restorative conditions cannot coexist in a conditional sentence.

At the same time, however, it would appear that the combination of punitive and restorative aspects in a conditional sentence can only diminish the significance of the latter in conditional sentencing as a whole. The offender is told in the judge's reasons[23] that the conditional sentence must include punitive conditions, such as house arrest, to express denunciation and deterrence. He will be told that this deprivation of liberty is a mandatory condition of the sentence that will be subject to close supervision. Further, he will be told that if no reasonable excuse is given, a breach or non-compliance with the sentence — and especially the mandatory terms — will likely lead to imprisonment for the remainder of the sentence. The offender will then be told that within the context of this punitive sanction there will be added optional conditions under which he will be given the opportunity to receive treatment, training, or otherwise to reintegrate himself within the community. He will be reminded, however, that non-compliance with these conditions might also lead to swift imprisonment.[24]

Nothing in this is calculated to subvert the restorative aspects of a conditional sentence, but it would seem somewhat obvious that the accent in such a

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[22] See *Proulx, supra* note 1, para. 112.

[23] Reasons are mandatory: see section 726.2, *Criminal Code*.

[24] Lamer C.J.C. refers at several points to the need to ensure that imprisonment for breach is a real threat: see, *e.g.*, *Proulx, supra* note 1, paras. 21, 39, 44.

disposition is most emphatically placed upon the punitive aspects. The message conveyed to the offender is that he is given a limited opportunity of rehabilitation and restorative justice while he is being punished. Thus, after *Proulx*, it is clear that conditional sentencing allows for a reduction in the rate of actual incarceration, but not of punishment and, further, that conditional sentencing allows restorative justice to coexist with punishment, but not to prevail over it.[25]

Thus, the second point of this paper is that *Proulx* has made the conditional sentence a sentence of imprisonment in two senses: In the absence of compelling reasons to do otherwise, every conditional sentence must include a significant restriction of liberty, perhaps longer than the term of actual incarceration that might otherwise have been ordered, and the "threat" of imprisonment for breach is real. The interpretation advanced by the Supreme Court is that the objectives of restorative justice are secondary in the general run of cases because they are optional, while punishment is mandatory. Against this background, what other obstacles might complicate the advancement of restorative objectives?

Four come immediately to mind, and their cumulative effect far outweighs their individual importance. First, the decision in *Proulx* would appear to give strength to prosecutors who would oppose conditional sentences or who would argue strenuously for a conditional sentence that includes a substantial punitive component. Nothing in *Proulx* would encourage prosecutors to enhance the development of restorative objectives through conditional sentencing. This now appears to be especially clear in Ontario, where prosecutors have received a practice direction to oppose conditional sentencing for a number of specified offences and, it would seem, not to agree to a conditional sentence in the form of a joint submission.[26] Here, too, one might also expect the Crown to make submissions that would underscore the punitive objectives in any case where a conditional sentence is an option. At the very least, it is improbable that Crown counsel will rise as enthusiastic proponents of restorative objectives in conditional sentencing.

Second, the development of restorative objectives requires a commitment of resources for effective programs as well as for supervision of punitive features such as house arrest, curfews, and electronic monitoring. In the absence of adequate provincial funding, the development of restorative objectives will not die; it will simply never grow, or never grow at a healthy rate. It is already the case in some jurisdictions that judges have put an informal moratorium on conditional sentences precisely because there are insufficient resources,

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[25] *Ibid.* at para. 35, there is an anomalous quotation from *R.* v. *McDonald* (1997), 113 C.C.C. (3d) 418 at 443, wherein Vancise J.A. is cited with approval for having said that conditional sentences "permit the accused to avoid imprisonment but not to avoid punishment".

[26] See Ontario, Ministry of the Attorney-General, Criminal Law Division, Practice Memorandum, *The Use of Conditional Sentences* (P.M. [2000] No. 6, 24 April 2000). Not available to general public.

particularly for supervision.[27] It does not matter how imaginative a judge might try to be in making an appropriate conditional sentence because, if the wherewithal to make it work is not there, the enterprise is largely doomed. Moreover, after *Proulx* it is entirely plausible that if increased resources are allocated to conditional sentencing, the first priority will be to fund the supervision of the punitive aspects of those sentences, not the restorative aspects. Finally, there is an ambiguity in section 742.3(2)(e) that is directly relevant to the issue of administrative and fiscal support for conditional sentencing. This provision refers to a treatment program "approved by the province". This is a concept that also appears in the provisions concerning diversion and probation[28] and thus it is obviously rather important in relation to restorative objectives. It is obvious that if there is no program, no order can be made under section 742.3(2)(e), but it is arguable that the same result would follow if there is no approval by the province. As yet, nobody knows what this phrase actually means, but we would find out as soon as Crown counsel stand up in any numbers to argue that some formal mechanism for approval by the executive arm of government must exist before a program can be considered approved. Success in this argument would have sweeping implications for any treatment order in a conditional sentence.

Third, there is the matter of deference. If the interpretation of conditional sentencing sketched in this text is sound, it follows that restorative objectives are now clearly of secondary importance. The Supreme Court has spoken at length about appellate deference, but for the moment, it might be more apt to speak of deference to the interpretation in *Proulx*. If sentencing judges are properly deferential to *Proulx*, and if appellate judges are also deferential to *Proulx* and the trial courts, it seems self-evident that the growth of restorative objectives in conditional sentencing will be slow indeed. This will not occur only if trial judges and appellate judges openly disagree with the emphasis placed by the Supreme Court upon the punitive objectives of conditional sentencing. If this occurs with any frequency, it will mean not only that the concept of deference discussed in *R.* v. *M.(C.A.)*,[29] *Proulx* and others has no force. It will also mean that there will be another period of uncertainty in conditional sentencing and disparity in sentencing generally.

Fourth, in the longer term, if the incidence of breach is significant, or if the mechanism for reviews of alleged breaches proves ineffectual, the attraction of the conditional sentence will drop quickly among sentencing judges, and with it will go the vestiges of restorative justice as an objective of conditional sentencing.

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[27] In Québec this problem has led to some blistering judicial criticism in the Cour du Québec. See *R.* v. *Fréchette* (Hull, 5 April 2000, No. 550-073-000022-997); *R.* v. *Coley*, *R.* v. *Forand*, *R.* v. *L'Heureux & R.* v. *L'Heureux* (Iberville, 14 April 2000, Nos. 755-73-000017-968, 755-73-000018-966, 755-73-000019-964, 755-73-000020-962); *R.* v. *Ménard* (Montréal, 17 April 2000, No. 500-01066897-981). Thanks to Me. François Lacasse for providing copies.

[28] See sections 717 and 732.1, respectively.

[29] [1996] 1 S.C.R. 500, 105 C.C.C. (3d) 327, 46 C.R. (4th) 269.

In short, if there is error in the initial conclusion of this paper (that the conditional sentence as interpreted by the Supreme Court is a dominantly punitive sanction), or in the following conclusion (that there is now a reduced margin for restorative objectives in conditional sentencing), the final point is certainly sound: There are real obstacles of a practical nature to making restorative objectives work significantly in conditional sentencing.

To end, it is useful to return to the statement in *R.* v. *Gladue* that is quoted with approval in *Proulx*.[30] The Court has accepted that two of Parliament's principal objectives in the reform of Part XXIII were to reduce actual imprisonment as a sanction and to enhance the importance of restorative justice in sentencing. These two points are also expressly identified as principles underlying the creation of the conditional sentence. The effect of *Proulx* is to recognise these two points and perhaps to give some support for them. As regards the first, however, while the conditional sentence might reduce reliance upon actual incarceration, the Court has insisted upon the dominance of virtual incarceration among the conditions imposed. As regards the second, restorative objectives are apparently secondary and, in any event, the advancement of those objectives is likely to be inhibited by practical obstacles for some time to come. It is for these reasons that the law and practice of conditional sentencing will present considerable uncertainty for some time to come.

[30] *Gladue*, *supra*, note 2. See *Proulx*, *supra* note 1, para. 15.