Unearthing the Sphinx: The Evolution of Conditional Sentencing.

Julian V. Roberts*

After almost four years in which over 40,000 conditional sentences were imposed,[1] in January 2000 the Supreme Court of Canada provided some clear directions regarding the use of the new sanction. The unanimous judgement in *R.* v. *Proulx*[2] (one of six relating to conditional sentencing) addresses four principal questions: (i) what is a conditional sentence of imprisonment? (ii) how should a conditional sentence be constructed? (iii) what is the appropriate judicial response to an unjustified breach of the order? and (iv) for what kinds of offences (and offenders) is a conditional sentence particularly appropriate (or particularly inappropriate)? In this article, I shall be concerned with the Court's response to the first three questions.[3]

The first question may seem straightforward enough: Section 742.1 of the *Criminal Code* provides a relatively clear statutory framework, including pre-requisite conditions. But the clarity masks a degree of malleability. As the judgement notes: "There has been some confusion among members of the judiciary and the public alike about the difference between a conditional sentence and a suspended sentence with probation".[4] The Court therefore set out to establish the place that a conditional sentence occupies in the range of sanctions available at sentencing. This exercise necessitated creating a distinction between a suspended sentence with probation and a conditional sentence. By clearly distinguishing the conditional sentence from a term of probation, the Court was compelled to move the new sanction closer to a term of imprisonment served in a provincial institution. In short, after the *Proulx* judgement, we can expect conditional sentences to become more rigorous, but not necessarily as harsh as some authorities fear.

* Julian V. Roberts, of the Faculty of Law, University of Ottawa, Ottawa, Ontario. I am most grateful to Professor Patrick Healy and Judge David Cole for their very helpful advice, and Trevor Brown for research assistance. This paper is based on a presentation at the Ottawa Conditional Sentencing Seminar, held at the Faculty of Law, University of Ottawa, 27 May 2000. The writing of this paper was supported by a grant to the author from the Social Sciences and Humanities Research Council of Canada.

1 *Conditional Sentencing in Canada: An Overview of Research Findings* by J. Roberts & C. La Prairie (Ottawa: Department of Justice Canada, Research and Statistics Division, 2000) at Table 3.1.

2 *R.* v. *Proulx*, [2000] S.C.J. No.6, 140 C.C.C. (3d) 449, 30 C.R. (5th) 1 (S.C.C).

3 For additional commentary on the evolution of conditional sentencing, the interested reader is directed to *The Changing Face of Conditional Sentencing* (Ottawa: Department of Justice Canada, 2000).

4 *Proulx*, *supra* note 2 at para. 23. Public opinion research sustains the view expressed by the Court. A nation-wide survey conducted in 1999 found that most Canadians failed a simple multiple choice question about conditional sentencing: (see T. Sanders & J. Roberts, "Public attitudes toward conditional sentencing: Results of a national survey", (October 2000) 32:4 Can. J. of Behavioural Science 199 at 202-203.

1. *The Nature of a Conditional Sentence*

Determining the position of the conditional sentence on a scale of severity is far from easy. By virtue of its inherently labile nature, the onerousness of any conditional sanction is determined principally by the nature of the conditions imposed and the judicial response to any subsequent breach of those conditions. For this reason, a conditional sentence is hard to fix on a spectrum of the severity of sanctions.

The onerousness of a prison term is determined largely by its duration (leaving aside for the moment the issue of custody level which will affect the experience of imprisonment). A sentence of one-year in custody is, *ceteris paribus*, more onerous than a six-month sentence or six months of probation. But whether a six-month conditional sentence of imprisonment is more or less onerous than a twelve-month conditional sentence will depend on the number, nature and intrusiveness of the conditions attached to the two orders. This is just one reason why it is imperative to have good statistical information on the optional conditions attached to conditional sentence orders. Regrettably, at the present, although the number of conditional sentence orders imposed to date is available[5], Statistics Canada does not collect information on the nature of conditions attached to the orders.

Conflicting interpretations of the nature of a conditional sentence have been advanced since the sanction was created in 1996. Some authorities regard it as a restorative, community-based alternative to imprisonment. Others have adopted a more conservative interpretation, and regard the new sanction as a form of imprisonment (and therefore a sanction with a punitive element) which is served in the community, much as parole is a form of imprisonment although the prisoner is not actually confined to a correctional institution.

In responding to these conflicting interpretations, Lamer, C.J.C. makes it clear in *Proulx* that a conditional sentence is a hybrid disposition, which carries punitive *and* restorative elements. The judgment notes that the conditional sentence "will generally be more effective than incarceration at achieving the restorative objectives of rehabilitation, reparations to the victim and community, and the promotion of a sense of responsibility in the offender. However, *it is also a punitive sanction capable of achieving the objectives of denunciation and deterrence*" (emphasis in original).[6]

Like most hybrids, this confluence of characteristics makes the sanction hard to characterize. It is akin to asking whether the legendary Sphinx was a lion with human features, or a man infused with leonine characteristics. Was the centaur a horse or a man? At the same time, the hybrid nature of the conditional

---

[5] For statistical information on conditional sentences, see J. Thomas, "Adult Correctional Services in Canada, 1998-99" (2000) 20:3 Juristat; M. Reed & J. Roberts, "Adult Correctional Services in Canada, 1997-98" (1999) 19:4 Juristat.

[6] *Proulx, supra* note 2 at para. 22 [emphasis in original].

sentence makes it a supple disposition, which can be used (if properly constructed; see discussion below) for a wide range of offenders.

The judgment in *Proulx* makes it clear then that a conditional sentence must have a punitive element. Unlike probation or other community-based punishments, a conditional sentence is a term of imprisonment, and as such should serve the function of a term of custody. In order to match the penal value of imprisonment, the conditional sentence must perforce share at least some of the characteristics of custody (such as tight restrictions on the offender's lifestyle).

However, the fact that a conditional sentence must carry a punitive element does not mean that it is a punitive sanction with secondary restorative characteristics, as some writers have suggested[7], any more than Centaurs could be described as "primarily" men, albeit ones with equine bodies. While it is true that the Court stresses that each conditional sentence must carry a punitive element, this is a long way from saying that a conditional sentence is *primarily* punitive. Indeed, the Chief Justice is careful to avoid according primacy to punitive or restorative elements. The clearest statement of the Court's position can be found in the judgment's summary, which notes that "Parliament intended conditional sentences to include both punitive and rehabilitative aspects".[8] This can be taken as a rejection of any attempt to privilege one aspect over another.[9] At the end of the day, whether a particular conditional sentence is primarily restorative or primarily punitive will depend on the number and nature of optional conditions imposed.

The Court's interpretation of section 742 takes us back to a dilemma confronting the architects of the sentencing reform of 1996. The sanction introduced by Bill C-41 could have been called by another name. If the conditional sentence had been defined as "enhanced probation supervision", or "intensive community punishment", or some similar construction, then there would have been no necessity to invest the disposition with a punitive element. The heated debate over whether a conditional sentence is a term of imprisonment or not would have been avoided. But creating an alternative along these lines would have carried a clear danger. There would be no guarantee that judges would use the new sanction in place of, rather than in addition to, sentences of imprisonment. *In order for the conditional sentence to achieve the goal set by Parliament of reducing the number of custodial sentences, the sanction must be used as a replacement for, and not an addition to imprisonment.* And, as a replacement, it needs to convey the same, or nearly the same, penal value.

---

[7] See P. Healy, "The Punitive Nature of the Conditional Sentence" in this issue of the Can. Bar Rev. at 219.

[8] *Proulx*, *supra* note 2 at para. 127.

[9] Elsewhere in the judgment, restorative elements appear to be accorded primacy by adding the punitive element almost as an afterthought: "[The conditional sentence] affords the sentencing judge the opportunity to craft a sentence with appropriate conditions that can lead to the rehabilitation of the offender, reparations to the community, and the promotion of a sense of responsibility in ways that jail cannot. However, it is also a punitive sanction." *Ibid.* at para 99).

Section 742.1 makes it clear that prior to imposing a conditional sentence, the court must have decided to impose a term of imprisonment.[10] (a) imposes a sentence of imprisonment of less than two years". If judges respect this direction, it follows that every offender sentenced to a conditional sentence is an individual that would have been sent, prior to the inception of conditional sentencing, to serve a term of custody in a provincial correctional institution. Research suggests that this is not what has transpired; it would appear that many of the conditional sentences to date have been imposed on offenders who, prior to the advent of conditional sentencing, would have received probation. Otherwise, how can we explain the fact that over 40,000 conditional sentence orders have been handed down, and yet the provincial incarceration rate has not declined?[11]

To summarize, by calling the new sanction a "term of imprisonment", Parliament created a disposition that the Court would have to characterize as partly punitive in nature, *because it is a form of imprisonment.*

Having clarified the nature of the conditional sentence, in *Proulx* the Chief Justice proceeds to resolve a number of issues relating to the imposition of a conditional sentence. These are practical questions such as whether a conditional sentence may be longer than the sentence of custody that it replaces. Judges should now have a much clearer idea of the nature of a conditional sentence, and should be better equipped to use the sanction. This is just as well, since the judgment also contains a ringing endorsement of the principle of deference to the trial judge, and this will surely amplify the autonomy of the trial courts with respect to sentencing.

2. *Changes to the practice of Conditional Sentencing*

The practical changes wrought by the judgment in *Proulx* affect three characteristics of the conditional sentence: its duration, the nature of optional conditions and the nature of judicial response to a breach of those conditions.

I. *Duration: conditional sentence may now be longer than term of custody*

The consensus prior to *Proulx* was that a conditional sentence had to be exactly the same length as the term of custody that it replaced. This interpretation only made sense if the conditional sentence was the penal equivalent of a term

---

[10] "Where a person is convicted of an offence, except an offence that is punishable by a minimum term of imprisonment, and the court

(a) imposes a sentence of imprisonment of less than two years".

[11] Preliminary data suggest that the admissions to provincial custody were unaffected by the inception of conditional sentencing. For example, in the year prior to the creation of the conditional sentence, 35% of sentences involved a term of custody. Two years later, by which time over 22,000 conditional sentences had been imposed, the incarceration rate was still 35%. (See Reed & Roberts, "Adult Correctional Services in Canada, 1997-98", *supra* note 5 at 9.).

of custody. Having established that a conditional sentence is not, in most cases, the equivalent of imprisonment, it was inevitable that the Court would reject the one-to-one correspondence between a conditional sentence order and the term of conventional custody that is replaced.[12] Indeed, some judgments in the case law, as well as scholarly articles had already advocated as much, and section 742 does not exclude the possibility of making a conditional sentence longer.

However, it is worth noting that the judgment does not *require* judges to prolong the duration of a conditional sentence beyond the term of custody that would have been imposed; it simply *permits* the former to exceed the latter. The key passage is the following: "When a judge — in the first stage — decides that a term of imprisonment of "x months" is appropriate, it means that *this* sentence is proportional. If the sentencing judge decides – in the second stage – *that the same term* can be served in the community, *it is possible* that the sentence is no longer proportional to the gravity of the offence and the responsibility of the offender" (underscore emphasis added).[13]

In many (perhaps most) cases, the conditional sentence order will remain in the range that would have been imposed had the offender been sentenced to custody. Nor does the judgment envisage a simple two or three for one ratio as has been suggested for crediting pre-trial custody. The judgment is also sensitive to the relationship between the onerousness or intrusiveness of the conditional sentence order, and the length of the order. The imposition of a conditional sentence order carrying punitive conditions that restrict the offender's freedom to a high degree would surely obviate the need to prolong the duration of the order beyond the term of custody that would have been imposed. Indeed, the closer the conditions approximate the severity of detention in a correctional facility, the more likely it is that the duration of the conditional sentence will mirror the duration of the custodial term that would otherwise have been imposed. It is hard to disagree with the Court's logic in this regard.

Trial judges will be mindful, when determining the length of the conditional sentence order, that an unjustified breach will probably result in committal to custody (in light of the judgment's direction with respect to breach — see below). Imposing an 18-month conditional sentence order in place of a six-month term of custody in a correctional facility may well place great pressure on the offender and provoke a breach of the conditions. This will inhibit judges from imposing conditional sentence orders that are much longer than the terms of custody that they replace.

It seems unlikely then that we shall witness a doubling or tripling of conditional sentence lengths, although the average length of orders will probably increase. Finally, the limited statistical evidence on this issue suggests that the *Proulx* judgment is simply recognizing what has often transpired at the trial

[12] "[A] conditional sentence need not be of equivalent duration to the sentence of incarceration that would otherwise have been imposed" (*Proulx, supra* note 2 at para. 127).

[13] *Ibid.* at para. 54.

court level (in Ontario at least): the lengths of conditional sentence orders in the pre-*Proulx* period were significantly longer than terms of custody imposed for the same offence category.[14]

II. *Nature of Optional Conditions*

It is in the area of optional conditions that the *Proulx* judgment has attracted the sharpest criticism from legal academics. Having established that a conditional sentence must be more punitive than probation, the Court specified the ways in which this could be achieved: "conditional sentences should generally include punitive conditions that are restrictive of the offender's liberty. Conditions such as house arrest or strict curfews should be the norm, not the exception".[15] And further: "There must be a reason for failing to impose punitive conditions when a conditional sentence order is made."[16] The imposition of optional conditions such as curfews, house arrest, and prohibitions against the consumption of alcohol reflects an attempt to recreate some of the privations and restrictions of imprisonment in the community. They do not represent an attempt to simply "get tough" with offenders, but rather a recognition that the conditional sentence is a sentence of imprisonment, and as such should carry at least some of the characteristics of prison life.

The general result of the Court's direction is that the optional conditions attached to conditional sentence orders should be quite onerous. The Court did not have the benefit of empirical research into the number and nature of conditions imposed, but the limited evidence available suggests that curfews and house arrest have been imposed in only a minority of conditional sentences imposed to date. For example, two studies of conditional sentence orders (pre-*Proulx*) in Ontario and British Columbia found that in both provinces a curfew was imposed in less than one case in five.[17]

There is of course a reason for the reluctance so far of trial judges to order the offender to remain at home after a specified time of day. Unless adequate supervisory resources are available, a curfew cannot be verified, and unverifiable conditions will invite violation and attract further media attention[18] and public

---

[14] See J.Roberts & D. Antonowicz, *Conditional Sentences of Imprisonment and Terms of Probation: An Empirical Comparison* (Ottawa: Department of Criminology, University of Ottawa, 2000) 73.

[15] *Proulx, supra* note 2 at para. 36.

[16] *Ibid.* at para. 37.

[17] See J. Roberts, D. Antonowicz & T. Sanders, "Conditional Sentences of Imprisonment: An Empirical Analysis of Optional Conditions", (2000) 30 C.R. (5th) 113 at 122 at Table 2; D.North, "An Empirical Analysis of Conditional Sentencing in British Columbia" in *The Changing Face of Conditional Sentencing* (Ottawa: Department of Justice Canada, 2000) 73.

[18] A headline in one B.C. paper recently stated "Breaches of house arrest 'very high'" (*Tri-City News*, 3 September 2000).

criticism. Electronic monitoring solves the problem of verification, but it is not an option available in most jurisdictions across Canada. By making it clear that house arrest or a strict curfew should be the norm, and not the exception, the Court in *Proulx* has sent an unequivocal message to provincial governments: in order to work, the sanction must be supported by adequate resources.[19] We can only hope that the message has been received, and will be acted upon.

III. *Judicial Response to Unjustified Breach*

Section 742.6(1) provides judges with considerable discretion in terms of responding to unjustified breaches of the conditions of a conditional sentence order. The court may: do nothing and allow the order to continue, amend the optional conditions, commit the offender to custody for some portion of the remaining sentence or commit the offender to custody for the remainder of the sentence. Given this wide range of options, it is not surprising that the Supreme Court offered some advice as to how to exercise this discretion.

The direction to judges with respect to the response to an unjustified breach is unequivocal and somewhat unforgiving: "[W]here an offender breaches a condition without reasonable excuse, there should be a presumption that the offender serve the *remainder* of his or her sentence in jail" (emphasis added).[20] Thus the offender should be imprisoned, and not just for a portion of the sentence, but the duration of the order. In short, the Court recommended adopting the most severe of the options available to a court after an unjustified breach has been established. If this direction is followed, it will represent a sharp change of direction: prior to the *Proulx* judgment, few breach hearings resulted in committal to custody for the duration of the order.[21]

However, the impact of the *Proulx* judgment on the question of judicial response to breach may be less drastic than some commentators have suggested. Although the Chief Justice made it clear that committal for the remainder of the order should be the norm, by definition there will be many exceptions to this rule. In addition, nothing in *Proulx* undermines the discretion of the trial judge with respect to breach; the court still has the same options of amending the optional conditions, or simply returning the offender to the community. As well, the increase in the number (and the onerousness) of the optional conditions imposed may work to counter the presumption in favour of committal to custody following a breach. Judges may be unwilling to incarcerate an offender for an unjustified breach of a single condition (particularly a minor one), when the

---

[19] There is some evidence that judges are backing away from using conditional sentences for the very reason that adequate supervision is not available.

[20] *Proulx, supra* note 2 at para. 39.

[21] In her analysis of B.C. data, Dawn North reports that in 1998 just over one-third of cases were committed to custody. See North, *supra* note 17 at 80 at Table VI.

individual has successfully respected all the other optional and compulsory conditions.[22]

Finally, it is also possible that conditional sentence supervisors may respond to breach allegations with more indulgence than in the pre-*Proulx* era. There are two reasons for this. First, probation officers will be aware that the optional conditions imposed upon offenders serving conditional sentences have become more numerous and more onerous. Second, if conditional sentence supervisors believe that a proven breach will almost certainly result in the incarceration of the offender, they may be inclined to exercise their discretion with respect to invoking the intervention of the state, and turn a blind eye to a violation of the less substantive optional conditions.

With respect to the breach issue, at least one Court of Appeal has displayed considerable deference to the trial court, and, it would appear, indulgence towards the offender. In *R.* v. *S.(B.J.)*,[23] the offender had originally been sentenced to a 20-month conditional sentence for a constellation of serious offences including sexual assault, forcible confinement, and uttering threats. The statutory aggravating factors were relevant as the victim was his wife,[24] and the offences were committed in the presence of their children. One of the optional conditions of the conditional sentence order was to have no contact with the victim, except in the context of access visits involving the children. Three months into the order the offender violated this condition by making a spontaneous visit to his wife. Denied entry, the offender broke down the door, unplugged the telephone, subjected the victim to threats, warned her not to call the police and ordered to remove her clothes. At the breach hearing the trial judge elected to simply change a condition of the order. On appeal by the Crown, the British Columbia Court of Appeal did not change the continuation of the order, and the appeal was accordingly dismissed.[25]

Three months later another violation occurred, this time involving one of the children. On the second occasion the sentencing judge elected not to change the conditions, and the Crown subsequently appealed. The Court of Appeal dismissed this second Crown appeal.[26] The unanimous judgment cites *Proulx* and makes it clear that the message of deference to trial judges includes the administration of the conditional sentence order: "local judges in the community

---

[22] In addition, one commentator has suggested that appellate courts might regard the Court's directions regarding imprisonment on breach as non-binding *obiter*; see A. Manson, "The Conditional Sentence: A Canadian Approach to Sentencing Reform, Or, Doing the Time-Warp, Again" in *The Changing Face of Conditional Sentencing* (Ottawa: Department of Justice Canada, 2000) 9 at 20.

[23] *R.* v. *S.(B.J.)*, [2000] B.C.J. No. 321, (2000) BCCA 117.

[24] Section 718.2(a)(ii): "evidence that the offender, in committing the offence, abused the offender's spouse or child" shall be deemed an aggravating circumstance.

[25] In a vigorous dissent, Southin J.A. noted that the offender's "behaviour on the occasion of the breach resembled substantially the behaviour which led to his original conviction": *S.(B.J.), supra* note 23 at para. 24.

[26] *R.* v. *S.(B.J.)*, [2000] B.C.J. No. 921, (2000) BCCA 282 at para. 8.

will usually have a very soundly based sense of what is appropriate in sentencing matters and their dispositions ought not to be lightly interfered with."[27]

The judicial response to an unjustified breach of conditions will obviously require careful consideration. The critical question of course is whether to terminate the order, and if this is answered in the affirmative, then whether the offender should be committed for the duration of the order or only some portion thereof. Limitations on space preclude a thorough discussion of the issue, but it surely makes sense for the determination of judicial response to breach to be guided by the relevant statutory principles of sentencing. These principles guide the initial decision as to whether an offender may serve his sentence in the community, and they should not be laid aside when the court has to respond to a breach of the order. As with the conditional sentence itself, the alternatives available to the Court include restorative and punitive options. Terminating the order and committing the offender to custody is clearly a punitive response; adjusting the nature of optional conditions may be purely restorative or rehabilitative.

The general rule has been laid down in *Proulx*: a presumption in favour of incarceration for the duration of the order. But as with all presumptions, many cases will constitute exceptions, and it is with respect to these cases that the principles of sentencing should apply. For example, section 718.2(d) articulates that an offender "should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances". Applied to a breach hearing, this implies that if imprisoning the offender for a fraction of the order will serve to restore compliance with the conditions and would be consistent with the principle of proportionality, then the offender should not be imprisoned for the rest of the term. Establishing the seriousness of the breach (and hence the nature of the response) should entail a consideration of section 718.2. Breaching a condition that touches a statutory aggravating circumstance is accordingly a more serious breach.[28]

What factors should *not* be considered? There is little justification to consider community reaction. Despite the position taken in *Proulx* that trial judges have strong roots in the community, there is no evidence that trial judges can, with any accuracy, divine the likely reaction of the public to specific conditional sentencing decisions (with respect to the imposition of a conditional sentence or the response to breach). As well, research has demonstrated that the public are confused about the nature of a conditional sentence[29] and it would be foolish to consider public opinion unless and until this confusion is dispelled. Finally, considering community reaction is also a clear prescription for disparity,

---

[27] *Ibid.*

[28] The timing of the breach will also play an important role in determining the judicial response. An offender who breaches a condition only late in the term of the order should be treated with far more indulgence than an offender who breaches a condition, say, *three* months into a 20 month order.

[29] A nation-wide survey found that when asked to choose among three alternatives (two of which were incorrect) less than half of the sample were able to correctly identify a conditional sentence; see Sanders & Roberts, *supra* note 4.

and it would be a violation of equity to commit an offender to prison (following a breach) just because the alternative (maintaining the offender in the community) *might appear* to engender public criticism.

3. *Relationship between duration, conditions and response to unjustified breach*

To summarize, conditional sentence orders will likely become more onerous, somewhat longer and breaches will be treated with more severity than in the pre-*Proulx* era. It is important to note that there is a coherence to the Court's direction in these three areas: the optional conditions imposed as part of conditional sentence orders will become tougher, but this may obviate the need to prolong the duration of the order. On the other hand, if minimal conditions are seen to be appropriate, extending the duration of the order will help to preserve the principles of proportionality and parity in sentencing.[30] And while judicial response to a proven breach of conditions may become more rigorous, judges retain the discretion to amend the conditions (perhaps by lending more structure to the offender's life) and to return the offender to the community to continue serving the sentence as originally imposed.

One last comment is in order with respect to the 'toughening' of the conditional sentence regime laid down in *Proulx*. Critics of the judgment might argue that imposing more (and stricter) conditions constitutes a marked (and gratuitous) departure from judicial practice to date. But this analysis assumes that the kinds of conditional sentences imposed by trial judges to date were "correct". And that surely is a matter open to debate. It is only in light of the fact that many conditional sentence orders have resembled somewhat harsher probation orders (in terms of the optional conditions imposed[31]) that the *Proulx* judgment appears 'tough'. Had this judgment been handed down in January 1997, before trial judges had imposed many conditional sentence orders, the direction taken by the Supreme Court may have attracted more support from advocates of conditional sentencing.

Let us briefly pursue the *Proulx* directions to trial judges in light of this analysis. Consider an offender sentenced to one year in prison, and who then is allowed to serve the sentence in the community (provided he or she abides by a number of conditions). Let us suppose that after six months, she wilfully and without justification violates those conditions. Assuming that the conditions were not unreasonable to begin with, and that the offender was supervised appropriately, is it excessively harsh of the State to commit the individual to custody for some portion of the unexpired term?

---

[30] See *Proulx, supra* note 2 at para. 54.

[31] See Roberts, Antonowicz & Sanders, *supra* note 17 at 122 at Table 2.

Importance of Sections 718-718.2

The changes to conditional sentencing recommended by the Court are important because they remind judges of the point of departure for the imposition of any sentence: the statement of the purpose and principles of sentencing found in sections 718-718.2 of the *Code*. Section 718.1 lies at the heart of that statement. The principle of proportionality is central to the sentencing process in Canada and other common law jurisdictions. Indeed, the principle permeates the case law, as well as popular conceptions of justice. As Rosenberg J.A. noted in *R.* v. *Priest*, "[t]he principle of proportionality is rooted in notions of fairness and justice".[32] Any ambiguity about the primordial role of proportionality should have been dispelled when Parliament codified the principle and designated it as "fundamental". The changes with respect to section 742 advocated by the Court have the effect of moving the conditional sentence further from a term of probation, and closer to a term of custody. The benefit of this direction is that it will help to preserve the principles of proportionality and parity in sentencing, both now codified in Part XXIII.

Proportionality requires that the severity of sanctions imposed comport with the seriousness of the crime, and to a lesser extent, the culpability of the offender. If a conditional sentence with minimal conditions is imposed in a case that would otherwise have resulted in custody, the principle of proportionality is violated. Similarly if comparably-situated offenders are sentenced to, respectively, a term of provincial custody and a conditional sentence of equal duration and carrying few optional conditions, then the principle of parity is violated. The Court's direction with respect to section 742 is therefore consistent with the statement of the purpose and principles of sentencing found in sections 718-718.2.

4. *Impact of the Proulx judgment on the number of conditional sentences imposed*

At the end of the day, the critical question is whether the Supreme Court's direction will lead to an increased or decreased use of conditional sentences. If the number of conditional sentences imposed declines, this will spell the end of the sanction as a tool to reduce the use of incarceration. After all, the current level of usage has, as noted, failed to lower the percentage of sentences involving custody.[33] Some commentators are pessimistic about the impact the *Proulx* judgment will have on the use of the conditional sentence. Professor Manson, for one, argues that there will be fewer conditional sentences imposed.[34]

---

[32] *R.* v. *Priest* (1996), 110 C.C.C. (3d) 289 (Ont. C.A.) at 297.

[33] Reed & Roberts, *supra* note 5 at 9.

[34] See Manson, *supra* note 22 at 22.

I am unconvinced, for two reasons, that the judgment will have the chilling effect on trial judges predicted by Professor Manson. First, many trial judges were, before *Proulx*, unconvinced that a conditional sentence could adequately convey a message of deterrence or denunciation.[35] The Court has addressed this judicial scepticism, and provided practical guidance as to how deterrence and denunciation may be achieved, even for serious cases in which statutory aggravating factors are present. The second reason for thinking that judges will continue to use the conditional sentence relates to the question of appellate review of sentencing.

In *Proulx*, the Court has provided a ringing endorsement of the concept of deference to the trial judge.[36] The key words are the following: "Again, I stress that appellate courts should not second-guess sentencing judges unless the sentence imposed is *demonstrably unfit"* (emphasis added).[37] As Rosenberg, J.A. has noted: "there seems no doubt that the Supreme Court has instructed the appellate courts to draw back from what the Supreme Court obviously perceived as excessive appellate interference in the sentencing function".[38] This may embolden judges to become more creative in the construction and imposition of conditional sentences.

The apogee to date of appellate deference to trial court discretion may be found in *Turcotte*.[39] The offender was tried for second degree murder, but the jury returned a verdict of manslaughter. The victim (who was slowly strangled to death) was the frail, inebriated, septuagenarian mother of the offender.[40]

The *Turcotte* case provides a good illustration of the conflict between desert and dangerousness in the sentencing process in general, and the conditional sentencing regime in particular. The crime of conviction was very serious, but the court obviously believed that the safety of the community would not be threatened if the offender were to serve his term of imprisonment there rather than in a correctional facility. The trial judge was clearly affected by the issue of future offending, and the offender's conduct *after* the commission of the crime. The Ontario Court of Appeal judgment cites the following extract from the trial judge's conclusions: "This offence [is] unlikely to ever reoccur... This offender presents no risk to the community".[41]

---

[35] For example, a national survey found that only one-third of judges thought that a conditional sentence could always be as effective as imprisonment in terms of achieving deterrence or denunciation; see Department of Justice, *Judicial Attitudes to Conditional Terms of Imprisonment: Results of a National Survey* by J. Roberts, A. Doob & V. Marinos (Ottawa: Department of Justice Canada, 1999) at 11 at Table 5.

[36] The judgment does not mince words on this issue: "Sentencing judges have a wide discretion in the choice of the appropriate sentence. They are entitled to considerable deference from appellate courts" (*Proulx, supra* note 2 at para. 127).

[37] *Ibid.* at para. 125.

[38] M. Rosenberg, "Developments in Sentencing: the Legal Framework" (National Judicial Institute Seminar, Newfoundland, 2 June 2000) [unpublished].

[39] *R.* v. *Turcotte* (2000), 32 C.R. (5th) 296.

[40] The wisdom of statutory sentencing factors is called into question by this case. Had the offender killed his wife rather than his mother, section 718.2(a)(ii) would have been relevant as it mandates a harsher sentence if the victim was "the offender's spouse or child". Uxoricide, it would appear, is a more serious crime than matricide.

[41] *Turcotte, supra* note 39 at para. 23.

5. *Conditional sentencing and public opinion*

Community reaction to conditional sentencing is an issue that simply will not go away. Indeed, it has become more, not less important as a result of the judgment in *Proulx*. Why are the views of the public relevant? One answer can be found in the fundamental purpose of sentencing articulated in section 718 of the *Criminal Code*, which states that "[t]he fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, *to respect for the law*" (emphasis added). When a conditional sentence is imposed with minimal conditions and for a serious personal injury offence, the public may perceive it as little different from a term of probation, and as further evidence of leniency in sentencing. If this occurs, respect for the sentencing process will be undermined. There is clear evidence that the news media have reported a number of conditional sentences in a way that can only inflame public opposition to the conditional sentence.[42]

The issue of public reaction is taken up by the Chief Justice in *Proulx* as a reason why a conditional sentence must be more severe than, and clearly distinguishable from, a term of probation:

> If a conditional sentence is not distinguishable from probation, then these offenders will receive what are effectively considerably less onerous probation orders instead of jail terms. Such lenient sentences would not provide sufficient denunciation and deterrence, nor would they be accepted by the public. Section 718 provides that the fundamental purpose of sentencing is "to contribute....to respect for the law and the maintenance of a just, peaceful and safe society." Inadequate sanctions undermine respect for the law. Accordingly, it is important to distinguish a conditional sentence from probation by way of the use of punitive conditions.[43]

This direction does not, of course, authorize judges to consider the views of the public prior to imposing a conditional sentence in a specific case; rather, it suggests that on a general level the sanction should be distinguishable from probation in a way comprehensible to the informed layperson.

However, there is a second, perhaps less principled way in which, according to the *Proulx* decision, trial judges should consider the views of the community. It relates to the emphasis placed on deference to the trial judge. As noted, the Court reiterated the position taken in *R.* v. *M.(C.A.)*[44] that a trial judge was far better placed than appellate courts to devise an appropriate sanction. The reason for this is that a sentencing judge still enjoys a position of advantage over an appellate judge in being able to directly assess the sentencing submissions of

---

[42] For example: S. Haskins, "Cushy sentence a miscarriage of justice" *Edmonton Sun* (19 September 2000) N5 ; Jason Cumming, "Sexual Assault Victims Slam Law that Set Molester Free" *Ottawa Sun* (13 March 1999) N6; D. Slade, "No Prison Time: Masseur Sentence Sparks Outrage" *Calgary Herald* (1 March 2000) B3; J. Carl, "The Victim Suffers More than the Attacker" *London Free Press,* (18 January 2000) A3.

[43] *Proulx, supra* note 2 at para. 30.

[44] *R.* v. *M.(C.A.)*, [1996] 1. S.C.R. 500, 105 C.C.C. (3d) 327, 46 C.R. (4th) 269.

defence and Crown counsel, to accurately assess the seriousness of the offence, and to relate the specific case to others.

There is an additional direction in *Proulx* with respect to the role of the community that emerges not from the guideline body of the judgment, but in the application to the facts of the case that gave rise to the specific appeal. Lamer, C.J.C. writes that "trial judges are closer to their community and know better what would be *acceptable to their community*" (emphasis added).[45] This seems to suggest that public acceptability has a role to play in terms of whether a conditional sentence is imposed, and also in the specific terms of the conditional sentence.[46]

If trial judges interpret this direction in this way,[47] it can have only deleterious effects. The degree of variation in terms of the use of conditional sentence will surely increase. In addition, the position taken by the Court assumes that because trial judges live in a particular community, they are able, absent any formal mechanism, to discern whether a particular conditional sentence will prove acceptable to the public. But judges have no special insight into the tenor of local public opinion. Indeed, it can be argued that their professional experiences render them less able to know whether, for example, imposing a conditional sentence for a serious personal injury offence is likely to prove unacceptable to the community.

Renaud J. makes the point crystal clear in a recent paper discussing the role of community sentiment: "On the assumption that I can actually take these feelings, these sentiments into account, the question remains: how do I gauge the pulse of the community? Do I read the media reports, listen to on-air talk shows, or is there a web site to be consulted? Are my neighbours representative of the community?"[48] Even local politicians or newspaper editors, who, it might be argued, have more contact with members of the public, have no systematic way of establishing the limits of public acceptability.

To summarize, a conditional sentence without punitive conditions may well attract public criticism, particularly if it is imposed for a serious personal injury offence. Members of the public are likely to perceive such a sanction as simply another form of probation. The judgment in *Proulx* has addressed this general concern in its directions regarding the construction of a conditional

---

[45] *Proulx, supra* note 2 at para. 131.

[46] This point was first brought to my attention by Mr. Allen Edgar.

[47] It is perhaps significant that the phrase from the *Proulx* judgment which links trial judges and community acceptability is echoed in the *S.(B.J.)* judgment from the British Columbia Court of Appeal: "local judges *in the community* will usually have a very soundly based sense of *what is appropriate* in sentencing matters" (emphasis added) (*S.(B.J.), supra* note 26 at para. 8). Similarly, the Alberta Court of Appeal dismissed a conditional sentence appeal noting that "trial judges are closer to the community and know better what is acceptable": *R.* v. *Rose*, [2000] A.J. No. 386, ABCA 115 (Alta. C.A.) at para 4.

[48] G. Renaud, "The Changing Face of Conditional Sentencing: Some Sentencing Concerns of a Front Line Judge" in *The Changing Face of Conditional Sentencing* (Ottawa: Department of Justice Canada, 2000) 59 at 60.

sentence, and the appropriate judicial response to breach. However, to further argue that trial judges should contemplate community reaction when considering a conditional sentence is a most retrograde step, fraught with dangers. It may introduce an unwelcome element of populism into sentencing decisions and can only exacerbate the problem of unwarranted sentencing disparity.

6. *Transforming the penal landscape*

If we wish to effect a transformation in societal response to offending from one which emphasizes punishment to one which favours restorative measures, we have to recognize that this transformation is likely to be gradual. The conditional sentence may well serve as a useful judicial tool with which to promote this transformation, but it is not an innovation that is going to rapidly revolutionize sentencing. The movement towards a more restorative response to crime will not occur overnight, nor will it occur without some resistance. In order to convince members of the judiciary, and indeed the community at large of their value, restorative initiatives must be both plausible and workable.

If the sentencing system wishes to replace imprisonment as a sentencing option (except for offenders who pose a significant danger to the community), it must offer a substitute that performs the functions of incarceration without necessitating the detention of the offender. A sentence of imprisonment has limited utility in terms of deterrence, and none at all in terms of restoration or rehabilitation. However, for denouncing culpable criminal conduct, custody has no peer. That said, there is, however, no natural connection between prison and censure; rather, it is simply an association that has arisen over centuries.

The link between prison and punishment in the public mind will surely change. Indeed, it is changing already. There used to be an equally strong relationship between deterrence and imprisonment. When physical punishment and public executions were replaced by terms of imprisonment, it was argued that the fear of a sustained period of custody was necessary to deter potential offenders. The limits on the deterrent efficacy of imprisonment have been acknowledged by Commissions of Inquiry,[49] appellate courts,[50] as well as by academic commentators.

In the future we may be able to censure blameworthy conduct in ways that do not entail the separation of offender from his or her community. The key lies in the systematic development of penal equivalences, a subject to which Cole J. has recently drawn our attention.[51] Once community-based "equivalent" sanctions are

---

[49] Canadian Sentencing Commission, *Report of the Canadian Sentencing Commission, Sentencing Reform: A Canadian Approach* (Ottawa: Supply and Services Canada, 1987) at 135-38.

[50] *R.* v. *Biancofiore* (1997), 119 C.C.C. (3d) 344, 10 C.R. (5th) 200, 35 O.R. (3d) 782 (Ont. C.A.).

[51] Mr. Justice David Cole, "What a mesh we're in: Conditional sentences after the first three years" (Regional Seminar of the Ontario Court of Justice, Fall 1999) [unpublished manuscript].

accepted, imprisonment will become a rare sanction,[52] one imposed exclusively for the protection of society, in a way that civil orders are rarely invoked in order to quarantine individuals who pose a health risk to the community. We will incarcerate offenders primarily to protect, seldom to denounce. In the short term, a more modest goal might consist of the erosion in the use of custodial sentences, and that, surely, is the principal function of the conditional sentence of imprisonment.

Conclusions

In 1996, Parliament created the conditional sentence of imprisonment with the express intention of reducing the number of admissions to provincial custody in a safe and principled way.[53] Four years later, research suggests that this intention has yet to be fulfilled. The judgment in *Proulx*, although criticized by some writers for converting a restorative sanction into a punitive one, may well represent an important step towards realizing Parliament's intention. Conditional sentences will in all probability become somewhat longer and somewhat more onerous. As well, offenders can expect a more rigorous response from courts in the event that they breach conditions of the order without reasonable excuse. However, the judgment is not simply about making a community-based sanction tougher. It is about "finding a place" for the new sanction, and articulating the way in which the sanction should be imposed. In terms of the ultimate success of the sanction, the critical question is whether the provincial governments will provide their probation services with the necessary resources to adequately supervise offenders serving conditional sentences in the community. But that is a question for another day.

Conditional sentencing is riddled with paradoxes. Indeed, the sanction itself can be described as a "penological paradox" (a term of imprisonment that is not served in prison). The ultimate paradox, however, must lie in the fact that while *Proulx* is to serve as a guideline judgment, the judgment nevertheless encourages appellate courts to refrain from interference unless and until the sentence is "demonstrably unfit". There is always the danger that deference will drift into obedience. In providing guidance to the sentencing process the Supreme Court may also have taken an important, retrograde step towards undermining the appellate review process.[54]

---

[52] It is worth recalling that at present, a term of custody is imposed in over one-third (35%) of sentences imposed in adult criminal courts across Canada: J. Roberts & C. Grimes, "Adult Criminal Court Statistics, 1998/99" (2000) 20:1 Juristat at 10.

[53] As recognised by the Supreme Court in *R.* v. *Gladue*, [1999] 1 S.C.R. 688 at para. 39.

[54] It is not just some academics who are concerned about the current standard of review. Vancise J.A. writes that: "The Supreme Court would appear to have judicially legislated a new meaning for the word "fitness". It is not enough that the sentence is not fit, it must be *demonstrably unfit* ...This is but one more example of the Supreme Court reducing the powers of courts of appeal. This cannot in the long run produce a positive approach to sentencing". See W. Vancise, "Appellate Review of Sentencing" in *The Changing Face of Conditional Sentencing* (Ottawa: Department of Justice Canada, 2000) 65 at 71.