

POSTSCRIPT

Conditional Sentencing: Recent Developments

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We thank the editors for permitting us a brief coda in which to comment on recent developments.⁵⁵

In general terms it now seems clear that the courts have followed *Proulx*⁵⁶ by ensuring that conditional sentences include a punitive element. It is commonplace that they now have terms for curfews or house arrest. Anomalies can be found, but the trend seems to be consistent. There is no reason in principle why the punitive aspects of conditional sentences should be inconsistent with aims of restorative justice, but the injunction declared in *Proulx* is that restorative aims must be realised; if at all, within a conditional sentence that has a conspicuous punitive element. This is not likely to give expression to a rich or full notion of restorative justice, but might accommodate some aspects of rehabilitation.

Another general point made in *Proulx* was that appellate courts should be reluctant to interfere with the decision of the trial judge unless the sentence or its terms were manifestly unfit or unsound. This is always sensible advice, but it remains true that there is an irreducible margin for disagreement on what is or is not unfit. Accordingly, it is not surprising to find among recent appellate decisions some disagreements on this point. Nothing will change this.

R.v. Knoblauch

*Knoblauch*⁵⁷ is a unique case which may nevertheless prove important. The offender had assembled a collection of explosive devices and, according to expert testimony, represented a threat to the community. Nevertheless, the Court upheld a conditional sentence that included a condition that the offender reside in a secure psychiatric facility (although the offender had consented to the condition). Some commentators have expressed dismay that a community-based sanction can now encompass detention in a locked psychiatric ward. Others have praised the Court for authorizing a conditional sentence for such an offender. *Knoblauch* might have a broader impact in several ways, however.

⁵⁵ The interested reader is directed towards a special issue of the *Criminal Law Quarterly*, Volume 44, number 3, which contains three articles on the conditional sentence. See also A. Manson, *The Law of Sentencing* (Toronto: Irwin Law, 2001).

⁵⁶ *R. v. Proulx*, [2000] 1 S.C. R. 61.

⁵⁷ *R. v. Knoblauch*, [2000] 25 C.R. 780.

Judges might be emboldened to order residential treatment in a range of cases that would otherwise be bound for prison. Second, the decision underlines an important, overlooked message in *Proulx*. In determining whether the offender poses a risk to the community, the court should consider not risk in the absolute sense, but risk as it might be constrained by the conditions imposed.⁵⁸ There was little doubt that Knoblauch was dangerous, but that was not at issue: the question addressed by the majority was whether conditions could be crafted which would reduce the danger to an acceptable level.⁵⁹ The Court's position with respect to risk to the community might encourage trial judges to be more creative in the conditions that they impose, with the result that the conditional sentencing regime will include offenders whose risk had previously excluded them from consideration of a conditional term of imprisonment.

Blended Sentences

One question with implications for both the theory and practice of sentencing is whether a conditional sentence can be combined with a term of custody. Can a judge, for example, order an offender to serve 6 months in prison, to be followed by 6 months in the community under a conditional sentence order? A judge can impose a term of custody to be followed by a term of probation, so why not institutional incarceration followed by community imprisonment?

There is an immediate appeal to such an arrangement, as it might create a useful progressive diminution of control over the offender who begins the sentence in custody, is released on parole subject to conditions, and then completes the sentence until warrant expiry, adhering to the compulsory and optional conditions of a conditional sentence order. There are some conceptual and administrative difficulties, however. One is that a conditional sentence of imprisonment *is* a form of imprisonment, not a sanction distinct from imprisonment (like probation). The administration of a blended sentence of this kind is also complex, as the offender moves through various restrictions of his or her liberty.

It had been anticipated that the Court would address the issue of blended sentences, and the opportunity arose in *Ploumis*.⁶⁰ Unfortunately, leave was denied, and the ambiguity remains. Moldaver J.A. made clear that a blended sentence was a possibility for multiple but not single charge cases. One of the issues raised in the *factum* filed by the Attorney General of Canada,⁶¹ was that

⁵⁸ *R. v. Proulx*, supra note 2 at para 72.

⁵⁹ Bastarache J. dissented from this interpretation of the question of risk: *Knoblauch*, supra note 3, at para 113. For additional commentary on the *Knoblauch* decision, see J. V. Roberts, J.V. & S. Verdun-Jones (2001) "Directing traffic at the crossroads of criminal justice and mental health: Implications of the Supreme Court judgment in *R. v. Knoblauch*" *Alta. L. Rev.*, in press.

⁶⁰ *R. v. Ploumis* (2000), 39 C.R. (5th) 344, leave to appeal ref'd [2001] S.C.C.R. No. 69.

⁶¹ *Factum* in Court of Appeal at para. 19.

this position creates an anomaly: the more culpable offender has access to a combination of sanctions denied the single-charge offender.

Allan Manson notes⁶² that the circumstances giving rise to a blended sentence involving a conditional sentence would presumably involve a case in which different, possibly conflicting, sentencing purposes are applicable to different offences for which the offender is being sentenced. Let us hope that the Court addresses the issue in the future.

Supervision of Offenders serving Conditional Sentences

There is a new emphasis, since *Proulx*, on sentence administration. One lesson of that case was that the optional conditions imposed as part of a conditional sentence should have significant impact on the offender, and that there should be a presumption in favour of incarceration following unjustified breach of any condition.⁶³ This direction will encourage judges to be more creative with respect to the conditions that they impose, and more punitive with respect to breach of the conditions. The effect will be to create more work for conditional sentence supervisors. If the conditional sentence regime is to thrive, and eventually achieve the parliamentary goal of reducing the use of incarceration as a sanction, the provincial correctional authorities must invest more in probation services. As well, electronic monitoring must be made available across the country, and not just in certain jurisdictions. Judges cannot be expected to impose optional conditions without some assurance that correctional authorities have the resources and the technology to ensure compliance.

Empirical research on conditional sentencing

Have conditional sentences (and the judicial response to breach) changed as a result of *Proulx*? We cannot answer authoritatively, since data on the number and nature of optional conditions are not currently available from Statistics Canada. The only research comparing conditional sentences pre- and post-*Proulx* comes from British Columbia, and suggests, in that province at least, that the number of punitive (as opposed to restorative or rehabilitative) conditions increased in 2000.⁶⁴ Although *Proulx* permits judges to impose a longer term of conditional imprisonment (than would have been imposed had the imprisonment been institutional), the statistics from B.C. show no increase in the length of orders imposed. Finally, with respect to judicial response to

⁶² A. Manson, "Blending Conditional Sentences and Custody" 39 *Criminal Reports*, (5th) 352.

⁶³ *Ibid.* at para 39.

⁶⁴ D. North, "Conditional Sentencing post *R. v. Proulx*" (Department of Criminology: Simon Fraser University, 2001).

breach, the B.C. study shows little evidence of change. The conditional sentence order is terminated in approximately half the breach hearings conducted.

And, of course, the ultimate question surrounding conditional sentencing has yet to be resolved: has the introduction of this penal innovation reduced the incarceration rate across the country? Once again, the statistical evidence to date does not permit an unequivocal answer.⁶⁵ We can at least say that more conditional sentences are being imposed now than at the beginning of the conditional sentence regime. The most recent statistics reveal that in the fiscal year 1999-2000, there were 15,792 conditional sentence "admissions" recorded in correctional statistics. This represents an 11% increase from the 14,608 cases in 1997-1998.⁶⁶

The Politics of Sentencing Reform

Another development is political. The House of Commons Committee on Justice and Legal Affairs will likely undertake a review, with hearings, of the conditional sentencing regime. Some witnesses will be hostile to imprisonment in the community. Some may recommend creation of a schedule of offences that could not give rise to a conditional sentence. Indeed several provincial Ministers of Justice have called for such a reform.⁶⁷ Unless such a list were quite circumscribed, containing just a few, serious offences that account for small numbers of cases, an amendment would impair the future of the conditional sentence by undermining its ability to reduce the number of admissions to provincial correctional institutions.

Conditional sentencing has yet to assume its place in the mainstream of sentencing in Canada. Developments within the next few years will be critical if the sanction is to thrive and fully enter the popular and professional lexicon of legal punishments.

⁶⁵ The latest Statistics Canada publication from the Adult Criminal Court Survey provides information on sentencing patterns, but contains no data on conditional sentences. See L. Pent, "Adult Criminal Court Statistics, 1999/00" 21:2 *Juristat*.

⁶⁶ C. Lonmo, "Adult Correctional Services in Canada, 1999-00" 21:5 *Juristat*, at Table 8.

⁶⁷ Minister Hancock called for guidelines that say that "in cases of serious or violent crime, they [conditional sentences] aren't available" (quoted in *Edmonton Journal*, "Hancock hasn't made his case" (6 September 2001, A6.)