

Conditional Sentences in Manitoba: A Prisoner in Your Own Home

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I. INTRODUCTION

Prior to September of 1996, when a judge sentenced an accused to a jail sentence, he or she was immediately incarcerated. The new inmate would then begin looking forward to some form of early release or parole. After serving a portion of his or her sentence, the inmate could be released on conditions, which, if breached, could mean a return to jail. Some of these inmates were indeed dangerous and violent; some, however, were not.

In September of 1996 Bill C-41 was proclaimed, and with the Bill came the advent of the conditional sentence. When a conditional sentence is imposed on a defendant, the entire sentence is served in the community with strict conditions attached. Usually, the defendant is only able to leave his or her home for work or medical emergencies. Unlike a term of imprisonment, where the defendant will be eligible for parole after serving a portion of the total sentence, a person on a conditional sentence must serve the entire sentence, with no possibility of parole.

Section 741.1 of the *Criminal Code of Canada*¹ allows for a conditional sentence to be handed down as long as the following prerequisites are met: the offence is not punishable by a minimum term of imprisonment; a period of incarceration of less than two years is warranted; the judge is satisfied that serving a sentence in the community would not endanger the safety of the community; and finally, the sentence is consistent with the fundamental purposes and principles of sentencing as set out in sections 718 and 718.2, including deterrence, denunciation and rehabilitation.

According to the House of Commons debates which took place prior to the passing of the new legislation, conditional sentences were created to reserve jail sentences for those offenders who "should" be there and create an alternative

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¹ R.S.C. 1985, c. C-46.

for offenders who may not require incarceration. Apparently, the cost of keeping someone in prison for one year is \$47 000. It was argued that this money could be better spent by incarcerating the more serious offenders only. The overall goal was to create a more equitable, less costly and more effective system.²

II. MANITOBA DECISIONS

The above-mentioned principles are reflected in a number of Manitoba decisions rendered since the legislation was passed. In *R. v. Stevens*,³ Mr. Justice Twaddle stated that:

[A] sentence imposed pursuant to s. 742.1 is a sentence of imprisonment. That fact should not be overlooked. It carries with it the stigma attached to any sentence of imprisonment. The order permitting the offender to serve the sentence in the community is subject to conditions which limit the offender's ability, particularly when the judge imposes a curfew or other restrictions of movement or limits on pleasurable activities. Provisions of restitution can be made—and should be whenever practical—and the offender can be—and most often should be—required to perform community service.

Unlike a conventional term of imprisonment, a conditional term is served until the end. No respite is offered by early parole. The restrictions on the offender's liberty last as long as the sentence provides.

A conditional sentence is thus, to use a colloquial expression, no walk in the park. This is particularly so because of the sentence long threat—Rousseau-Houle J.A. of the Quebec Court of Appeal called it “the Sword of Damocles”—that a breach of any condition (including that which requires the offender to commit no further crime) may result in the balance of the sentence being served in actual jail.⁴

In *R. v. Reid*,⁵ Madam Justice Helper, in converting an eight-month prison term to an 18-month conditional sentence, noted:

The accused's removal from the community to serve his sentence in an institution would do nothing to encourage the rehabilitation that he has begun on his own. It could conceivably negate the steps he has taken in his attempt to become a contributing member of society; it could destroy his newly established business. We restate what had been said before in this Court and other courts in reference to the conditional sentence. The conditional sentence, with the imposition of crafted conditions, can and does address the principle of deterrence.⁶

² *House of Commons Debates* (20 September 1994) 5872–5873, 2886.

³ *R. v. Stevens* (1997), 115 an. R. (2d) 300.

⁴ *Ibid.* at paras. 17–19.

⁵ *R. v. Reid* (1998), 131 Man. R. (2d) 152.

⁶ *Ibid.* at para. 19.

Here, the conduct of the accused since his arrest was held to be a significant factor in Helper J.'s imposition of a conditional sentence.

In *R. v. Bruyere*,⁷ the Manitoba Court of Appeal substituted a nine-month conditional sentence for a nine-month period of incarceration, with Mr. Justice Monnin stating:

I have little difficulty in finding that the amendments to the *Criminal Code* that brought about conditional sentencing provisions were meant for the type of accused presently before us. He committed a stupid act that, according to his past behaviour, is out of character for him. He is to be punished, but not in a manner and place that might ultimately serve to reinforce his offending conduct. With conditions and supervision, there is a real possibility that this accused can be rehabilitated now, once and for all, and ultimately to the benefit of the community.⁸

In a recent Manitoba case, *R v. Hogg*,⁹ there was a large public outcry when an offender received a two-year conditional sentence for a brutal assault that resulted in the victim suffering extreme and permanent injuries. The Court of Appeal substituted a four-year term of incarceration, stating that "a crime of this magnitude must be denounced and denounced loudly. If the public is to have confidence in the administration of justice it must be apparent that a crime such as this draws a penitentiary term."¹⁰

The courts in Manitoba have considered a number of criteria in determining whether to impose a conditional sentence. Some of these include: the level of fault or moral blameworthiness of the offender's conduct;¹¹ whether there was a disregard for public safety or simply a lapse in judgment;¹² the effect of a jail sentence on the accused's efforts at rehabilitation since the incident;¹³ the degree of remorse shown by the accused;¹⁴ and the personal circumstances of the offender.¹⁵

III. THE SUPREME COURT

In *R. v. Proulx*,¹⁶ the Supreme Court of Canada had a rare opportunity to deal with the conditional sentencing regime. Proulx was an 18-year-old offender with only seven weeks of driving experience. He drove erratically after

⁷ *R. v. Bruyere* (1999), 134 Man. R. (2d) 119.

⁸ *Ib id.* at para. 12.

⁹ *R. v. Hogg* [2004] MBCA 114.

¹⁰ *Ibid.* at para. 9.

¹¹ *R. v. Duchominsky* [2003] MBCA 19.

¹² *R. v. Morales* (1998), 126 Man. R. (2d) 46.

¹³ *Supra* note 3.

¹⁴ *R. v. Hansen* (1997), 123 Man. R. (2d) 179.

¹⁵ *R. v. Candelaria* (2002), 163 Man. R. (2d) 152.

¹⁶ *R. v. Proulx* (2000), 140 C.C.C. (3d) 449.

consuming alcohol, knowing that his vehicle was mechanically unsound. While attempting to pass another vehicle, the accused collided with an oncoming car, killing a passenger in his car and seriously injuring the driver of the other vehicle. The accused had no prior record and the deceased was a friend of his. The Supreme Court of Canada restored an original 18-month sentence of incarceration, holding that a conditional sentence would not have been appropriate in this particular case. In arriving at this conclusion, the Court dealt with conditional sentences at length and set out the following principles

1. Conditional sentences are intended to be both punitive and rehabilitative.
2. They should include punitive conditions that restrict the offender's liberty such as an absolute curfew for either a portion of the sentence and in some cases the entire sentence.
3. There are no offences excluded from the conditional sentence regime once the prerequisites have been met.
4. A conditional sentence can still provide a significant amount of denunciation, especially when onerous conditions are imposed or the term is longer than a jail sentence would have been.
5. A conditional sentence can also provide significant deterrence if proper punitive conditions are imposed. The principle of deterrence should not be overemphasized as statistics suggest that the deterrent effect of incarceration is quite uncertain.
6. There are cases, however, where the increased denunciation and deterrence of normal incarceration is necessary given the nature of the crime.
7. Exceptional circumstances are not a prerequisite for a conditional sentence.
8. The absence of a criminal record is not a prerequisite.
9. The presence of a criminal record does not, on its own, preclude the imposition of a conditional sentence
10. Great deference should be shown to the sentencing judge who imposes a conditional sentence. The original sentence should only be altered if there is an error in principle or the sentence is demonstrably unfit.

IV. BREACHING A CONDITIONAL SENTENCE

Section 742.6 of the *Criminal Code* sets out the procedure for dealing with a breach of a conditional sentence. If satisfied on a balance of probabilities that an offender has, without reasonable excuse, breached a conditional sentence order, the court can either: take no action; change the optional conditions; suspend the conditional sentence; direct that the offender serve a portion of his

remaining term in custody; or terminate the conditional sentence, ordering the offender to serve the rest of the sentence behind bars.¹⁷

Section 742.6 has been challenged constitutionally on the basis that it contravenes the presumption of innocence guaranteed under section 11 of the *Canadian Charter of Rights and Freedoms*.¹⁸ In *R. v. Whitty*,¹⁹ it was held that s. 742.6(9), requiring proof of the breach on a balance of probabilities, did not violate s. 7 of the *Charter* because the guilt or innocence of the respondent was no longer an issue and no further punishment was being sought. Therefore, the requirement of proof beyond a reasonable doubt was not necessary.

In *R. v. Casey*,²⁰ a similar challenge was undertaken on the basis that the onus was on the accused to show reasonable excuse for the breach. The Court ruled that the reverse onus provision did not violate the right to be presumed innocent pursuant to s. 11(d) of the *Charter* because a person facing a breach hearing is not charged with an offence within the meaning of s. 11. The breach hearing was thus held to be part of the sentencing process. Since the accused had already been convicted of the offence, there was no contravention of the right to be presumed innocent. In *Proulx, supra*, the Supreme Court stated that where a conditional sentence is breached without reasonable excuse, there should be a rebuttable presumption that the offender serve the remaining portion of the sentence in jail.

V. STATISTICS

A Justice Canada research report on conditional sentences states that between 1996 and 1999 there were 1245 conditional sentences imposed in Manitoba; 39% were for personal injury offences, 33% for property offences, 3% for driving offences and 21% for drug offences. By comparison, in British Columbia, over the same period of time, there were 6334 conditional sentences handed out, with 28% for personal injury offences, 37% for property offences, 3% for driving offences and 15% for drug offences.²¹ Statistics, of course, can be quite misleading. The disparity for drug offences in Manitoba and British Columbia can be attributed to the fact that, in British Columbia, far fewer offenders are incarcerated for drug offences than in Manitoba. The national average across the same categories is 31% for personal injury offences, 39% for property

¹⁷ *Supra* note 1, s. 742.6(9).

¹⁸ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c. 11.

¹⁹ *R. v. Whitty* (1999), 135 C.C.C. (3d) 77.

²⁰ *R. v. Casey* (2000), 141 C.C.C. (3d) 506.

²¹ Julian Roberts and Carol La Prairie, *Conditional Sentencing in Canada: An Overview of Research Finding* (RR2000-6e) April 2000.

offences, 4% for driving offences, and 31% for drug offences.²² According to the above statistics, it appears that conditional sentences have been handed out most often for violent offences, and least often for driving offences. However, very few driving offences result in a jail sentence, whereas jail sentences are more likely for violent offences, thus accounting for more conditional sentences. Imposing a jail sentence is a pre-requisite for a conditional sentence, as discussed previously.

VI. CONCLUSION

The conditional sentence is, in my view, misunderstood by the public. A conditional sentence is clearly a form of punishment. It is served in its entirety without early reprieve and is often longer than a traditional jail sentence would have been. In essence, the defendant is incarcerated but is granted an immediate parole.

Few *Criminal Code* amendments have fostered more controversy, resentment and anger among the public than this new way of serving a jail sentence. I suspect one result has been more guilty pleas in exchange for no "real jail", thus relieving the courts somewhat of their backlog. The public, however, generally has no concern for sentencing principles nor any actual knowledge of the facts of a particular case. What the public knows is what the media chooses to selectively, and often inaccurately report. To the majority of Canadians, no jail means no punishment. To a convicted person and his or her family, they know all too well that there are other punishments that cannot be measured by time spent behind bars, including such things as:

- a) A criminal record and all the obstacles it brings;
- b) Legal fees, which may be quite onerous, particularly for individuals who are too wealthy to qualify for legal aid and too poor to afford legal fees;
- c) Loss of a job, often upon being charged and certainly upon conviction
- d) A family break-up or a family left to struggle financially, which can often lead to more crime; and
- e) Loss of respect in the community.

Defence counsel would be well-advised to suggest imaginative conditions that address the fundamental principles of sentencing. Counsel should be able to suggest conditions that are realistic, reasonable and at the same time punitive, rehabilitative and denunciatory.

Overuse or under-use of the conditional sentence might actually lead to more individuals being incarcerated, thus defeating its own purposes. If imposed when a suspended sentence is appropriate, incarceration rates may actually increase as a result. If the intended conditional sentence is significantly longer, just because it is served at home, the chances of eventual incarceration also

²² *Ibid.*

increase. If a principled approach is adopted by the courts, the conditional sentence may well have the desired effect of reducing incarceration rates by incarcerating only those from whom society needs protection.

