

Conditional Sentencing : A Change in Direction

The Honourable Mr. Justice Omer ARCHAMBAULT*

En pensant au sujet de cette conférence la première question que je me suis posée fut la suivante : est-il possible dans la conjoncture canadienne de changer effectivement notre orientation et notre pratique en ce qui a trait à la détermination de la peine pour faire en sorte que l'incarcération devienne vraiment une solution de dernier recours au sein de notre système de justice pénale? Certains prétendent que le système de justice pénale du Canada souffre de ce que j'appellerais « l'incarcéromanie ». Parmi les démocraties occidentales, le Canada a eu et continue d'avoir un des plus hauts taux d'incarcération.

Does our criminal justice system suffer from "incarceromania"? If not, many would opine that it certainly exhibits symptoms of paranoia, given its apparent love/hate relationship with incarceration. As is well illustrated by the recommendations of numerous committees and commissions, as well as by the pronouncements of all levels of courts in this country, we frequently subscribe to the notion that imprisonment should be a measure of last resort, that it should be used with parsimony and only when all other measures have failed or are inadequate. Hence we profess to loathe incarceration and view it as a "necessary evil". Yet, despite frequently espousing such views, we continue to be a frontrunner in using imprisonment to punish offenders. Have we become so addicted to the use of incarceration, that we will only reluctantly let go, in our quest for more humane, rehabilitative and cost-efficient measures?

It strikes me that in *Bill C-41*, now Part XXIII of the *Criminal Code*, Parliament has officially adopted, as part of the sentencing policy for Canada that incarceration be used as a measure of last resort. I believe that is abundantly clear from a reading of subsections 718.2(d) and (e). Not only has Parliament adopted principles explicitly endorsing a policy of restraint, it has created the new sanction of the conditional sentence, thus giving the courts a concrete measure to allow for the application of those principles in daily practice.

Although, on the face of it, section 742.1 of the *Criminal Code* governing the use of the conditional sentence of imprisonment, appears fairly clear, Canadian courts are struggling with this new concept and its application to the day-to-day cases which we all have to deal with. The application of section 742.1 has already generated a relatively large amount of jurisprudence. There are important questions to be answered and, not surprisingly, some of the answers are inconsistent and confusing.

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It think it is fair to say that there is general agreement in the case law that the conditional sentence must be used as an alternative to imprisonment and not in lieu of any other type of community-based sanction. Cases like *R. v. Scidmore*¹, *R. v. Sénécal*², *R. v. Everitt*³ and *R. v. McDonald*⁴ attest to that.

Other questions, however, are more controversial. Let me mention two of the most problematic. Firstly, does the requirement that the court be "satisfied that serving the sentence in the community would not endanger the safety of the community" have a restrictive meaning, that is protection of the public from the particular offender to be sentenced, or should it be given a wider meaning encompassing denunciation and general deterrence? The preponderance of authority appears to favour the wider definition. See, for example, *R. v. Chisogne* (Que. C.A.)⁵; *R. v. Pierce* (Ont. C.A.)⁶; *R. v. Kopf* (Que. C.A.)⁷; *R. v. Wallace* (Ont. S.C.)⁸; and *R. v. McDonald* (Sask. C.A.)⁹. It is my understanding that Parliament has just this week adopted an amendment to subsection 742.1(b), which may alter this debate. Professor Roberts will explain this recent amendment as part of his presentation.

Secondly, and perhaps the more controversial question is for which and what type of offences should the conditional sentence be utilized. Should it be applied in cases of large scale theft, drug trafficking, sexual assault, driving offences causing bodily harm or death? The courts have already dealt with all of these offences but the decisions are inconsistent as to the propriety of using the conditional sentence therefore.

Parliament has not given any direction on the type of offences for which a conditional sentence can be imposed, nor has it excluded any particular offence from its applications other than one "punishable by a minimum term of imprisonment" (section 742.1). It has, however, stipulated the condition that the appropriate sentence for the offence being dealt with be a period of imprisonment of less than two years. In addition, the sentencing court must evaluate the situation and determine that the protection of the public will not be jeopardized by the imposition of a conditional sentence. Is it then open to the courts to eliminate certain offences from the applicability of section 742.1? Would that not defeat the intent of Parliament? Another crucial question is whether or not the courts will use the conditional sentence to effectively reduce the level of incarceration in

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1. *R. v. Scidmore* (1997), 112 C.C.C. (3d) 28 (Ont. C.A.).
 2. *R. v. Sénécal*, 25 novembre 1996, Mtl n° 600-01-000750-948 (C.Q.).
 3. Unpublished.
 4. *R. v. McDonald*, [1997] C.C.L. 5219 (Sask. C.A.).
 5. *R. v. Chisogne*, [1997] R.J.Q. 1263.
 6. *R. v. Pierce* (1997), 97 O.A.C. 253.
 7. *R. v. Kopf*, J.E. 97-808.
 8. Unpublished.
 9. *Supra* note 4.

this country. Will the availability of the conditional sentence cause a change in direction in the way we envisage imprisonment?

We are fortunate in having with us today two prominent and learned scholars to help us along as we struggle to define and chart a course for the use of this new sanction. I am certain that we all welcome the opportunity to hear their views and their prognosis on the future of the conditional sentence of imprisonment.

We will firstly hear from Professor Allan Manson, who is currently a professor at the Faculty of Law of Queen's University, in Kingston, Ontario. He obtained his LL.B. from the University of Western Ontario in 1972 and his Masters of Law from the University of London in 1973. Professor Manson is not only a well published author in the area of criminal law and corrections, he is as well a practitioner who has acted as counsel in numerous criminal and correctional law cases. He has also served as a deputy judge of the Yukon Territory. Hence, he combines scholarship and practical experience.

I believe Professor Manson will express a cautious optimism as to the fate and anticipated effect of the conditional sentence. You can judge that for yourself.

I am pleased to now present to you our other panelist, Julian Roberts, who is a professor at the University of Ottawa, Department of Criminology. Professor Roberts obtained his Ph.D. in psychology from the University of Toronto in 1983. He is bilingual, being fluent in both French and English. He has specialized and done extensive research in the field of criminal law. I had the pleasure of working with him a few years ago when he was recruited as a member of the research team of the Canadian Sentencing Commission, which I had the honour and privilege of chairing. Professor Roberts is also the author of numerous publications and research reports, many of which deal with sentencing and other criminal justice issues. While I believe Dr. Roberts is of the view that the conditional sentence has the potential to make a significant contribution in reducing Canada's reliance on incarceration, he will share with us his thoughts and insight on the challenge and pitfalls which judges must face in applying this new sanction.