Bill C-41 : An Overview and Some Introductory Thoughts

The Honourable Judge David P. COLE*

* Ontario Court of Justice (Provincial Division), Scarborough, Ontario.

I. WHAT IS BILL C-41?

Bill C-41 represents the federal government's reform to the legislation respecting the sentencing of adult offenders for offences under the Code and related statutes. Following the Report of the Canadian Sentencing Commission (Chair : Judge O. Archambault, 1987) and the House of Commons Standing Committee on Justice and Solicitor General (Chair : D. Daubney, 1988), the Mulroney Government introduced *Bill C-90*. Although there was a belated attempt to complete the process of parliamentary review of that Bill at the end of that government's mandate, ultimately the Bill died on the Order Paper.

Apart from the provisions respecting conditional sentences *Bill C-41*, introduced in Parliament June 13, 1994, does not substantially differ from *Bill C-90*, either in its initial draft or in the final text. After considerable public and parliamentary debate (principally over the "sexual orientation" clause contained in the Statement of Purpose and Principles), the Bill cleared the various legislative stages in the summer of 1995 (Royal Assent given July 13, 1995). Proclamation was delayed until September 3, 1996 (P.C. 1996-1271) to permit the provinces to develop policies, procedures and forms, as well as to provide training to probation and court personnel.

II. ALTERNATIVE MEASURES (Sections 717-717.4)

The alternative regime contained in section 4 of the *Young Offenders Act* provides the model for this new form of pre-trial diversionary scheme for adults. Although there is slightly more emphasis on "the protection of society" (section 717(1)), one suspects that in practice there will be little difference in the ways the various progress will be established and administered.

The essential elements of the legislation are as follows : both the prosecution and the offender must agree to participate in the program, and the offender must be aware of the right to counsel, sections 717(1)(a) - (d); the prosecution of the offence may not be barred at law, section 717(1)(g); there must be sufficient evidence to proceed with the charge, section 717(1)(f); and the offender must accept responsibility for the offence, section 717(1)(e).

If the offender either denies participation in the offence or wishes to have the charge dealt with by the court, alternative measures cannot be used, sections 717(2)(a) and (b).

Where a court is satisfied on a balance of probabilities that the offender has complied with the conditions of the alternative measurers program it shall dismiss the charge, section 717(4)(a). The court has a residual discretion to dismiss the charge if it is satisfied on a balance of probabilities that the offender has partially completed the conditions of the alternative measures program and that a subsequent prosecution would be unfair, section 717(4)(b).

Provided that the charge is not dismissed by a court according to the criteria set forth in section 717(4), the prosecution of the charge may proceed, section 717(5).

The offender's admission of responsibility for an offence may not be used as evidence in a subsequent civil or criminal proceeding, section 717(3). However, a judge or court that deals with the offender in relation to another offence may consider the records of the previous offence and the alternative measures program, section 717.4(1)(a). Sections 717.1-717.4 establish rules for the collection and disclosure of records of alternative measures.

Since the provisions are not mandatory, provincial Attorneys General are not obliged to establish an alternative measures program. In *R.* v. *S.* (S)[1] the Supreme Court of Canada concluded that section 15 of the Charter was not contravened by the failure of the Ontario government to introduce the program. In those provinces where alternative measures are not proclaimed for adults, one may expect that similar challenges may be launched.

Is there scope for judicial intervention to ensure that those programs which exist are equally available? This might arise, for example, where there are allegations that an alternative measures regime is differentially available based on the offender's race. Although Ontario's recent report of the *Commission on Systemic Racism in the Ontario Criminal Justice System* at page 195 found no current evidence that alternative measures programs for youth were being applied in a racially discriminatory manner, there is at least anecdotal evidence available in other Canadian jurisdictions to suggest that this may be the case (see, for example, *R.* v. *L. (J.)*.[2] It is thus conceivable that challenges based on the need for judicial scrutiny of the equality of availability of such programs may be forthcoming. Professor Allan Manson[3] has suggested that arguments seeking to create what he refers to as a "residual discretion" in the court to ensure that programs are applied equally may be made.

---

1. *R.* V. *S.(S).* (1990), 57 C.C.C. (3d) 115 (S.C.C.)

2. *R.* v. *L. (J.)*, an unreported decision of Lilles, T.C.J., released April 7, 1992.

3. A. Manson, "*Bill C-41* : Smoke, Mirrors and Canadian Sentencing Reform". Paper prepared for the Ontario Court of Justice (Provincial Division) (1996 Winter Seminars); "Finding a Place for Conditional Sentences", (1997) 3 C.R. (5th) 283.

III. THE STATEMENT OF PURPOSE AND PRINCIPLES (Sections 718-718.2)

Since the enactment of the Bill, various commentators have suggested that this legislative initiative does little more than codify common law principles of sentencing, particularly given the Supreme Court of Canada's recent decision in *R.* v. C.A.M.;[4] as such, the various statutory justifications for punishment will have little effect on the daily reality of sentencing in busy provincial courts. Others have suggested that the insertion of the concept of proportionality, combined with the enunciation of principles to be applied will (or at least should) cause judges to be more reflective about the need for consistency in the sentences they impose. In applying the legislation, the following points should be kept in mind :

1. Although there is a hierarchy indicated in the legislation ("purpose", "fundamental principle", "other sentencing principles"), there is no suggestion of any hierarchy in the statement of objectives;

2. Note that sections 718(e) and (f) appear to provide legislative imprimatur for the development of reparative and conciliatory models of sentencing;

3. Note the express direction judges are given to pay "particular attention to the circumstances of aboriginal offenders", section 718.2(e). This appears to be consistent with the federal government's recognition of the special circumstances of incarcerated aboriginal offenders contained in the 1992 *Corrections and Conditional Release Act*, see sections 79-84;

4. Given the express reference to "crime prevention initiatives" in section 718, are courts likely to hear applications to conduct under inquires into the existence and/or efficacy of local crime prevention programs? What standards of proof should be applied? If judges find that such programs or initiative are non-existent or inadequate, what "remedy" should be applied?;

5. The recent decision of the Ontario Court of Appeal in *R.* v. *Wismayer*[5] has noted that the objective of incapacitation is qualified by the words "when necessary", section 718(c), that this phrase, when combined with the directions in sections 718.2(d) and (e), to the effect that "an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances", and that "all available sanctions other than imprisonment that are reasonable in the circumstances should be considered [...]" indicates that, in appropriate cases, sentencing judges should explore and exhaust all other dispositions before imposing incarceration. Can it not also be argued that, by differentiating between "liberty" and "imprisonment", Parliament has intended that judges make liberal use of the new conditional sentence ?;

---

4. *R.* v. *C.A.M.* (1996), 105 C.C.C. (3d) 327.

5. *R.* v. *Wismayer* (April 8, 1997), (Ont. C.A.) [yet unreported].

6. While allowing for the historic discretion vested in the sentencing court, Parliament has now codified the following aggravating factors :
    a) Offences motivated by bias, prejudice, or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation or any other similar factor, section 718.2(a)(i);
    b) Domestic and child abuse, section 718.2(a)(ii);
    c) Breach of trust, section 718.2(a)(iii);

7. The express inclusion of abuse to the "offender's spouse or child" as an aggravating factor does not appear to apply to "simple" cases of domestic assault, since it is triggered only by evidence of "abuse", which must, definitionally, mean something more than evidence of an apparently one-time assault;

8. Section 726.2 requires the sentencing judge to state "the reasons for [...] the sentence imposed, and enter those [...] reasons into the record of proceedings". Will or it be sufficient compliance with the section to say "I adopt the joint submission" or "suspended sentence, 6 months probation 50 hours community service", or directing that they be attached to the Information? Or will judges be expected in each case to review why they are/are not applying denunciation, deterrence, incapacitation, rehabilitation, reparations and "promot(ing) a sense of responsibility"? Or, as proposed in the Report of the Canadian Sentencing Commission, should judges be prepared to give more detailed reasons only where they differ substantially from the "tariff" (whatever that is)?;

9. What is the effect of the failure of the sentencing judge to give reasons for sentence? The previous version of Part XXIII of the *Code*, section 668, required the sentencing judge to ask the accused (personally, not through counsel) if s/he had anything to say before sentence was pronounced. However, that section had a saving clause, which indicated that a failure by the judge to make such an inquiry of the accused did not vitiate the proceedings. However this has been removed in the new legislation; it would now appear that both 726 (providing reasons) and 726.2 (asking the accused if s/he has anything to say) procedures are required to be followed by sentencing judges. Appellate guidance on these issues would appear to be necessary.

IV. PUNISHMENT (Sections 718.3 to 719)

These sections generally replicate section 717 as it appeared in the previous version of the statute. However, the following changes should be kept in mind :

1. The manner of calculating the period of imprisonment to be imposed in default of the payment of a fine has been amended by sections 734(4) and 734(5). These sections are reviewed below;

2. The amended sections apply where the court orders that a term of imprisonment in default of payment of a fine is to be served consecutively to another sentence, section 718.3(4);

3. Section 719(2) has been amended to provide that any time during which the accused is unlawfully at large does not count towards the service of any part of a term of imprisonment imposed. This may be particularly significant in cases where conditionally sentenced offenders breach their sentences by not reporting to their supervisors. I would suggest that offenders granted conditional sentences who are later found to have breached the conditional sentence order by refusing to report can be unlawfully at large within the meaning of section 145 of the Code.[6] If this is correct, section 719(2) appears to apply to prevent sentences from running. However, it remains to be determined at what point the sentence is deemed to have stopped running. Is it the date when the offender last reported? Or when the supervisor requests the offender to report again and the offender does not report? Or when the supervisor files the written Allegation of a Breach of Conditional Sentence with the court? Or when the fact of the breach is established to the satisfaction of the court judging the breach? Will equitable explanations (such as existed in *R*. v. *Stanton*,[7] allow judges to deem the sentence to have continued to run?;

4. The previous version of the legislation dealing with victim impact statements, section 735 did not require a sentencing judge to consider such a report. This has now been changed. Section 722(1) now directs that "the court shall consider [a victim impact statement]". The record of proceedings should reflect that the judge has at least considered any such report;

5. Section 722.1 appears to direct that pre-sentence reports and victim impact statements can only be distributed by the clerk following a direction by the court (presumably the sentencing judge). Judges might wish to consider whether :
   a) In respect to pre-sentence reports, they might wish to develop procedures similar to those under the Y.O.A. to prevent "leakage" to unauthorized persons;
   b) In respect to victim impact statements, they might wish to work out protocols with Crown Attorney's offices to arrange for such statements to be delivered to the clerk upon completion and to arrange for such statements to be delivered to the clerk upon completion and prior to distribution. See also section 743.2 of the *Code*, referring to the obligation to forward "relevant reports" to the Correctional Service of Canada, in cases involving sentences to penitentiary, and the various sections of the *Corrections and Conditional Release Act* enshrining"victims rights";

---

6. See *R*. v. *Seymour* (1980), 52 C.C.C. (2d) 305 (Ont. C.A.).

7. *R*. v. *Stanton*, 49 C.C.C. (2d) 177 (Ont. H.C.).

6. Although most of section 724 appears to codify existing practice and case law, Charter challenges, presumably based on section 7 and perhaps section 11, may be raised given the obligation on an offender to "prove" a mitigating factor;

7. Quaere whether the opening words of section 724(1) "a court may accept any information disclosed at the trial or at the sentencing proceedings [...]" would survive a challenge based on *R.* v. *Gardiner*;[8]

8. Strictly speaking, section 725 appears to apply only to other offences charged or facts arising out of the same offence, section 725(1)(c); to that extent the section does not completely codify the *R.* v. *Garcia and Silva*.[9] Does the codification prevent a court (on consent) from considering uncharged offences not part of the principle offence? Since Parliament is presumed to know the law at the time it passes amendments, it can be argued that Parliament has deliberately decided not to incorporate that principle (this argument takes on some added significance when one considers that there were changes to section 725 between C-90 and C-41, especially in relation to the difference between "charge" and "offence"). At the very least one might wish to ensure that the accused's consent and the Crown's undertaking not to proceed with other charges are clearly specified on record.

9. Regardless of whether uncharged offences can be taken into account, note the obligation contained in section 725(2) to ensure that other facts taken into account on a plea are "note[d] [...] on the information". An endorsement on the information to the effect that additional facts where considered, and that such facts might be found in the transcript of the proceedings, would appear to be sufficient;

10. Note the legitimation in section 729 of the use of certificates of analysis in breach of probation cases and breaches of conditional sentences by using drugs. These certificates are similar to those currently used in drinking and driving cases and under the drug statutes. (Note also that, since this is an evidentiary provision it applies to offences committed prior to the proclamation date);

11. Apart from inconsequential changes in nomenclature, the discharge provisions, section 730, remain as they were under the previous legislative scheme;

12. From time to time judges have been persuaded to defer the imposition of sentence for rehabilitative purposes to assess such matters as "treatment

---

8. *R.* v. *Gardiner* (1982), 68 C.C.C. (2d) 477 (S.C.C.).

9. *R.* v. *Garcia and Silva* principle, [1970] 3 C.C.C. 124 (Ont. C.A.).

sincerity". For example, in *R.* v. *Nunner*[10] sentencing was adjourned for some months in order that an accused might complete his school year. Such remands have generally been disapproved by appellate courts. Despite a lengthy article suggesting that such remands are both permissible and useful,[11] Parliament has expressly legislated in section 720 that the court "shall, as soon as practicable after an offender has been found guilty, conduct proceedings to determine the appropriate sentence". Quaere whether, in an appropriate case, it could be argued that all this section says is that the sentencing hearing is to be convened as soon as practicable, and that it says nothing about an obligation of the sentencing judge actually to impose the sentence.

V. PROBATION (Sections 731-733.1)

The circumstances under which probation is available as a sentencing option have not been modified. If there is no minimum sentence the judge may suspend the passing of sentence and make a probation order. Also, in addition to fining or sentencing the offender for a term of not exceeding two years the judge may make a probation order. However, a judge still cannot impose a fine, probation and jail at the same time, section 731(1)(b) :

— Note that section 731.1 requires the sentencing judge to consider whether a section 100 order should be made before making an order of probation in each case (including shoplifting!). This process is presumably designed to ensure that such order are not forgotten during the process of making a probation order. Note also that a probation order may include restriction on the possession of weapons including, but not restricted to firearms.

— Under the previous version of the *Code*, section 737(1), there were only two mandatory conditions of probation. Section 732.1(2) now expands the number of mandatory conditions to four. Subsections (a) and (b) essentially replicate the two previous mandatory conditions. Subsection (c) creates two further mandatory conditions — "notify the court or probation officer in advance of any change of name or address" and "promptly notify the court or probation officer of any change of employment or occupation".

— If reporting to a probation officer is ordered by the sentencing judge section 732.1(3)(a)(i) requires the judge to specify whether the reporting is to be within two working days of the making of the order, or at some later date. In other words, the judge cannot direct that the date of first reporting be at the discretion of the probation officer. Conversely, unless the sentencing judge wishes to resort to use of the basket clause in section 732.1(3)(h) to establish a defined schedule of reporting,

---

10. *R.* v. *Nunner* (1976), 30 C.C.C. (2d) 199 (Ont. C.A.).

11. G. Renaud "*R.* v. *Fuller* : Time to Brush Aside the Rule Prohibiting Therapeutic Remands" (1993), 35 C.L.Q. 91 and 156).

section 732.1(3)(a)(ii) would appear to leave the issue of determining the frequency of reporting up to the probation officer.

— Note the optional condition of requiring the offender to remain within the jurisdiction; if such a condition is imposed section 732.1(3)(b) requires an offender who wishes to do so to obtain written permission from the court or probation officer before leaving the jurisdiction. This could be compared with the mandatory "remain within the jurisdiction" condition contained in a conditional sentence order.

— Note the new inter-relationship between probation and restitution, consequent upon the repeal of section 737(2)(e). Restitution orders are now freestanding orders not necessarily dependent upon the existence of probation. However, an order of restitution may still be made part of a probation order under section 732.1(3)(h).

— Section 732.1(3)(f) is a new clause which caps the number of community service hours which can be ordered at 240, which must be performed within 18 months of the commencement of the probation order (compare to the Y.O.A. maximum of 1 year to complete up to the same number of hours). Quaere whether if the probationer is convicted of more than one offence, more hours could be ordered in an appropriate case.

— Section 732.1(3)(g) provides that in certain limited circumstances a probationer can be ordered to take "treatment". Presumably because of such cases as *R*. v. *Rodgers*[12] and *R*. v. *Kieling*[13] this is not as broadly worded as some judges had construed the previous sections — "take such treatment for alcohol abuse as may be directed by your probation officer [...]" Note first, the offender must consent; following such Supreme Court of Canada decisions as *R*. v. *Korponey*[14] any such consent must be informed and freely given. The second problem is what comprises "treatment". It may be that the offender's consent is only required if an order for medical treatment is being contemplated by the sentencing judge. Other treatment programs, such as (for example) anger management or credit counselling, because they are less intrusive, could be ordered under the basket clause in section 732.1(3)(h). At least in Ontario the new probation forms have been designed with these options in mind. However, there may be some types of programs which combine "medical" with other forms of "rehabilitative" treatment. For example, could it be said that an alcohol treatment program which requires the person being treated to ingest medically prescribed antabuse at regular intervals, might trigger the need to secure an offender's consent must be secured? Does it make any difference it the therapy is conducted by a medical doctor, or by a registered psychologist, or by an unlicensed "therapist"?

— The combination of section 718.2(e), directing courts to consider "all available sanctions other than imprisonment that are reasonable in the circumstances" and the

---

12. *R*. v. *Rodgers* (1990), 61 C.C.C. (3d) 481 (B.C.C.A.).

13. *R*. v. *Kieling* (1990), 61 C.C.C. (3d) 82 (Sask. C.A.).

14. *R*. v. *Korponey* (1982), 65 C.C.C. 65 (Section C.C.).

basket clause in the probation order section has already encouraged some courts to impose "house arrest/home detention" as an alternative to incarceration. In some cases this has been done in provinces where such programs have been formally established by probation and penal officials.[15] Other courts have imposed such conditions where no programs have been established, delegating this function to probation officials[16] of family members[17] or even making such an order without specifying how it is to be monitored and enforced.[18] Quaere whether, in the absence of some indication from correctional authorities that they have the mandate and resources to and enforce such orders, a court is "contribut[ing] [...] [to] the maintenance of a just, peaceful and safe society", section 718.

— The previous section 737(4)(a)) required the court to cause a probation order to be read by or to an accused. The Supreme Court of Canada decision in *R*. v. *Sterner*[19] established that a sentencing judge is not required to advise an offender of the terms and ramifications of a probation order (including breaches) in open court, such function being properly delegable to court officials. Section 732.1(5)(b) now directs that the court is to "take reasonable measures" to ensure that the offender understands the probation order, how to apply to vary it, the potential effect of a breach of probation, and the effect of committing a subsequent criminal offence. Presumably the Sterner decision would continue to apply. Quaere whether courts might expect to hear arguments in defence of breach of probation charges based on the fact that the offender did not have an interpreter available at the time the conditions were explained by the designated court official (a scenario which is becoming all too frequent as beleaguered court administrators seek to save a few dollars), or that the explanations provided by the no doubt over-burdened court official were not comprehensible?

— The amended version of section 732.2(1)(b) corrects the misconceptions engendered by the Manitoba Court of Appeal in *R*. v. *Constant*,[20] making it clear that probation commences (a) immediately upon release from prison if the prisoner does not earn any (or loses all) remission and is not granted parole (b) upon the expiry of the full term of imprisonment if released subject to any form of condition release. If the offender is sentenced to imprisonment during a period of probation, the probation order is not interrupted; the prisoner continues on probation during incarceration.

---

15. See *R*. v. *McLeod* (1993), 81 C.C.C. (3d) 83 (Sask. C.A.); *R*. v. *M (D.E.S.)* (1993), 80 C.C.C. (3d) 371 (B.C.C.A.).

16. See *R*. v. *Denneny* (16 October 1995), (Ont. Ct. (Prov. Div.), Renaud Prov. J. [unreported].

17. See *R*. v. *Wismayer*, (8 April 1997) (Ont. C.A.) [as yet unreported].

18. See *R*. v. *Finlay* (11 October 1996), (Ont. Ct. (Gen. Div.)), McIsaac J. [unreported].

19. *R*. v. *Sterner* (1982), 64 C.C.C. (2d) 160.

20. *R*. v. *Constant* (1978), 40 C.C.C. 329. See the discussion in D.P. Cole & A. Manson, *Release From Imprisonment : The Law of Sentencing, Parole and Judicial Review* (Carswell, 1990) at 248-250.

— Probation may also be ordered in addition to a conditional sentence in which case the conditional sentence is served first. Probation commences once the conditional sentence has expired. Since in effect a conditional sentence is like probation (so long as the offender behaves) this means that the potential combined length of a conditional sentence and a probation order can be as long as 5 years less 1 day, sections 742.1(a) and 732.2(2)(b).

— Section 733.1(1) expands the potential penalties for breach of probation in two ways. First, it becomes a Crown election offence (through triable in the absolute jurisdiction of provincial courts), with a maximum 2 year penalty. Second, if the Crown elects to proceed summarily, the maximum potential penalty has been raised from 6 to 18 months (and/or a fine of up to $2000). Note that unlike convictions for subsequent substantive offences, further probation (for up to 3 years) cannot be imposed under that section upon conviction for breach of probation; in such a case a judge wishing to consider imposing further probation — say, following a conviction for wilfully contacting a victim — must use section 732.2(5)(e), which provides that any optional condition may be extended for up to 1 year beyond the expiry date of the probation period originally imposed.

VI. INTERMITTENT SENTENCES OF IMPRISONMENT (Section 732)

Although the availability of intermittent sentences has not been altered,[21] the section has been amended to include a list of factors which the sentencing judge may wish to consider in deciding whether to impose such a sentence. Some of the criteria are obvious ("age and character of the offender", "nature of the offence and the circumstances surrounding its commission"); however, the inclusion of "the availability of appropriate accommodation" appears to amount to a statutory reversal of the decision of the Ontario Court of Appeal in *R*. v. *Wortzman*.[22] In that case the then Minister of Correctional Services had spoken to a meeting of judges, at which he pointed out that the Ministry was experiencing extreme difficulties housing large numbers of prisoners serving intermittent sentences (usually on weekends). He requested that henceforth judges should instead impose "straight time" sentences; he "undertook" that if sentencing judges endorsed the committal warrant with a recommendation for immediate temporary absence for work or employment, the Ministry would release such offenders during the week. Following this speech, one of our judges took the view that he could no longer impose an intermittent sentence. The Court of Appeal reversed this decision, holding that it amounted to an improper fettering of the trial judge's discretion; if an intermittent sentence is called for, a sentencing judge should impose it, regardless of the Ministry's preferences.

I would suggest that in most circumstances judges should generally decline to take the availability of "appropriate accommodation" into account. As the Canadian Bar Association argued in its brief on *Bill C-41*, at a policy level, correctional systems should be responsive to sentencing needs, rather than the reverse. Further, what about the

---

21. 90 days or less.

22. *R.* v. *Wortzman* (1979), 12 C.R. (3d) 115 (Ont. C.A.).

practicalities, such as the onus of making the requisite inquiries?[23] There may however be some circumstances in which a judge should have information about the availability of appropriate accommodation — accurate information about the lack of appropriate accommodation might lead a judge to impose "straight time" at least where minimum mandatory sentences are involved. I would caution, however, that there are many misconceptions on the part of judges, crowns and defence counsel about the supposed impact of arriving as late as possible at the jail to avoid serving sentence because the facility is overcrowded. Accurate, up to date information in the form of evidence under oath should be made available to the sentencing judge.

Where non-mandatory minimum sentences of imprisonment are being considered, I would suggest that an intermittent sentence will only be necessary in extremely rare circumstances. Surely the very nature of an intermittent sentence is that the offender is not a risk to the public.

The section also fixes two other anomalies. First, it often transpired that an offender serving an intermittent sentence discovered that s/he preferred to serve the balance of the sentence as "straight time"; prior to the amendments, an offender would have to launch a sentence appeal, as the trial judge would be functus. Section 732(2) now permits an offender (not the Crown) to apply to the court (not necessarily the original sentencing judge) for an order permitting service of the balance of the sentence on consecutive days. Second, where an offender serving an intermittent sentence is sentenced to "straight time" for another offence, the remnant of the intermittent sentence is to be served on consecutive days "unless the court otherwise orders".

VII. FINES AND FORFEITURES (Sections 734-737)

Parliament has removed some of the by now archaic distinctions as to when a fine could be ordered. Section 734(1) provides that a fine can now be imposed in addition to or in lieu of any other sentence (except, obviously, a minimum mandatory custodial sentence).

— Since the proclamation of the legislation several commentators have noted that there appears to have been an unintended loophole, in that the new wording would appear to prohibit the imposition of a fine in addition to imprisonment for a second or subsequent drinking and driving offence. This error has already been brought to the attention of the federal authorities, and a "housekeeping" amendment is planned.

— Because section 734(2) now requires judges to impose a fine only where the judge is satisfied that the offender has the means to pay it, courts will need to develop some procedures for ensuring that a proper inquiry is conducted. Quaere where

---

23. Hello, Crowbar Hotel room bookings? I'm Judge X and I'm thinking about imposing an intermittent sentence starting this weekend. Would you have a bed available? What do you mean you don't know because it is only Tuesday today and you don't know how many other Judges might like to register "guests" for this weekend? No, I'm afraid I don't know the offender's Visa number".

counsel is available to represent the offender, can a sentencing judge assume that counsel will advise if a proposed fine is too onerous? Where the offender is unrepresented, or is represented by duty counsel, however, I would suggest that judges should now be prepared to undertake some inquiry beyond "Can you pay $100 per month for 10 months?" (Note that section 734.3 contemplates the delegation of changing terms of a fine order (other than the amount) to a court official. Quaere whether such official would be an appropriate person to conduct a pre-disposition inquiry into the offenders ability to pay a fine?)

— Another option to be considered by the sentencing judge under section 734(2) is whether an offender is able to "discharge" a fine through a fine option program. Some provinces have very active fine option programs under both provincial legislation and the *Code*; others do not. Courts may receive challenges based on the lack of availability of such programs.

— Section 743(3) provides that the offender is deemed to be in default of payment of the fine if it is not paid on the date originally established in the fine order (or to which it may have been extended under section 734.3). Once that point has been reached sections 734(4) and (5) provide that judicial discretion has been removed. The amount of time to be served in default of payment of the fine is established by a formula (amount of outstanding fine + victim impact surcharge + costs (principally those of conveying the offender to jail), divided by 8 x the provincial minimum wage at the time of the default), to a maximum equal to the maximum term of imprisonment that could have been imposed on conviction. Professor Manson[24] has suggested "an adventurous judge" could conclude that section 734.1 includes the power to order that no default time be added to a fine. The better view which he notes is that, in order to avoid the unseemly spectacle of using jail as debtor's prison or as a debt collection mechanism,[25] scrupulous adherence to the provisions of section 734.7 — ensuring that civil enforcement and licence suspensions have first been pursued, and that the offender's default is wilful — should hopefully result in far fewer committal warrants being issued. Assuming that Justices of the Peace will conduct these fine default hearings, Judges should nevertheless pay some attention to ensure that they do not become pro forma hearings.

---

24. *Supra* note 3.

25. See Judge Scullion's judgments in *R.* v. *Deeb*; *R.* v. *Wilson* (1987), 28 C.C.C. (3d) 257 (Ont. Prov. Ct.).

VIII. RESTITUTION (Sections 738-741.2)

The various sections dealing with restitution have been substantially modified, both from the previous *Code* provisions and from *Bill C-90*. The following points would seem to be of immediate interest :

— Although restitution continues to be an optional probationary term (even though previous section 737(2)(e) has been deleted), these sections of the *Code* clearly provide that restitution orders may be "freestanding", not dependent upon probation.

— The previous version of the legislation required an aggrieved party to apply (although the strict formalities were sometimes not complied with). Now, section 738 makes it clear that on the application of the Crown or of its own motion[26] a court may proceed to conduct a *R.* v. *Zelensky*[27] hearing and order restitution in addition to any other penalty imposed. Section 739 enacts an equivalent provisions for the awarding of restitution to both innocent purchasers and innocent lenders.

— Sections 738(a), (b) and (c) detail what is compensable (always keeping in mind that sentencing hearings are not to be turned into a civil trial for the assessment of damages). As there are some new areas of compensation, the sections should be read in detail.

— A province may decide to pass regulations precluding the enforcement of restitution orders through conditional sentences or probation orders (presumably for reasons related to the cost of using probation officers as debt collectors).

— Note that section 740(b) provides that where a court is contemplating a restitution order and the offender may not have the resources to satisfy both restitution and a fine, the judge is required first to consider the restitution, and then whether a fine is still appropriate.

— Section 741.2 confirms the common law principle that the existence of a restitution order does not preclude obtaining a civil remedy.[28]

IX. CONDITIONAL SENTENCES OF IMPRISONMENT (Sections 742-742.7)

Since others at this conference will be discussing the voluminous case law which has developed since the proclamation of these sections, this paper will be restricted to a brief discussion of some of the technical and procedural issues which have surfaced to date. The bibliography appended to this paper contains discussion of some of the substantive issues.

---

26. It appears that the aggrieved person no longer has formal standing to apply, as section 738 is limited to the Attorney General or the court.

27. *R.* v. *Zelensky* (1978), 41 C.C.C. (2d) 97 (S.C.C.).

28. *London Life* v. *Zavitz* (1992), 12 C.R. (4th) 267 (B.C.C.A.).

There are three formal criteria which must be met before a conditional sentence can be imposed, section 742.1 :

1. The offence must not carry a minimum mandatory term of imprisonment;

2. The sentence imposed is less than 2 years; and

3. The sentencing judge is satisfied that serving the sentence in the community would not endanger community safety.

— In considering sentence for a single offence, a judge cannot impose a conditional sentence on top of a custodial term I would argue that this necessarily arises by inference from section 742.6(9), despite one unreasoned ruling to the contrary.[29] Although in dealing with multiple offences there would not seem to be any prohibition against doing so, I would suggest that, absent highly exceptional circumstances (such as a minimum mandatory custodial sentence for one offence), it would be inappropriate to add a conditional sentence for one offence to a custodial term imposed for other offences. While some have used the term "judicial parole" to describe this new form of sentence, I would argue that this is inaccurate. The essence of the Canadian parole regime is that of an initial denunciatory period (usually 1/3 of sentence), where parole cannot usually be considered, followed by a eligibility for parole once the mandatory denunciatory portion has been served. In the process of imposing a conditional sentence, the offender must deemed by the sentencing judge to be fit to serve that sentence in the community. To say that at the same time the offender must serve a custodial sentence before being granted a conditional sentence seems contradictory.

— Service of the conditional sentence begins immediately when it is imposed. Even though it is a sentence of imprisonment for some purposes, since the sentence is served in the community, remission or other reduction of imprisonment does not apply to reduce the length of the prisoner's obligation to comply with conditions (unless the offender is breached and returned to custody to complete service of the conditional sentence). Thus, a conditional sentence order begins on the day ordered by the court and expires the number of days or months later as set by the court.

If the sentencing judge is satisfied that the three statutory criteria are met, and the judge does not choose to impose a suspended sentence and probation, the judge must impose mandatory conditions similar to probation. In addition, however, there are mandatory conditions of (a) reporting to a supervisor (probation officer), and (b) remaining within the jurisdiction unless written permission is granted by the court or supervisor. The judge may also impose optional conditions, again similar to those in the new form of probation order. The following points should be noted :

---

29. *R.* v. *Moore* (7 January 1997), (Ont. Ct. (Gen. Div.)), Stach, J.

— Consideration must be given to making a section 100 order before imposing a conditional sentence.

— Unlike probation, the offender's consent to treatment is not required where a conditional sentence is imposed (presumably because the offender can "choose" custody by refusing to take treatment and by being breached for failure to comply with the conditional sentence order).

— Note that there is a further limitation on treatment, in that section 742.3(2)(e) specifies that the treatment program must be "approved by the province". Janet Gallin has suggested that the meaning of this phrase is "medical treatment [...] by a treatment provider [...] licensed, regulated or otherwise approved by the province", and that the main purpose of this form of wording is to prevent offenders from being ordered to take treatment from a provider who may not be qualified to give such treatment. While this may well be apparent in most cases, that this may not always be clear — one common example being the "counsellor" who works under the supervision of a licenced provider.

— Since a conditional sentence is defined in section 742.1 as a sentence of imprisonment, by virtue of the wording of section 731(1)(b) a judge can impose probation in addition to a conditional sentence. The date of commencement of a probation order imposed in addition to a conditional sentence is expressly laid out in section 732.2(1)(c) — "at the expiration of the conditional sentence" — which indicates that Parliament intends that judges should use a combination of conditional sentences and probation in appropriate cases.

— Note that such combination could result in supervision in the community for up to five years less one day.

— Section 742.4 provides for variations of conditional sentence orders. This is worded differently from the procedures under the probation sections, section 732.2(3) making it clear that "the offender, the probation officer or the prosecutor may apply". Under the conditional sentence regime, if the supervisor (probation officer) applies to the court for a change, and neither the offender nor the prosecutor ask for a hearing upon being served with written notice of the proposed change (obviously to the optional conditions only), the change in conditions comes into effect automatically 14 days after being filed with the court, unless the judge decides to hold a hearing. If the proposed change is initiated by the offender or the prosecutor a hearing must be held within 30 days of receipt by the court, presumably in open court.

— The process of establishing a breach of a conditional sentence commences with the filing of a written Allegation of a Breach of a Conditional Sentence, supported (where appropriate) by signed witness statements, section 742.6(4). A summons or warrant is issued, section 742.6(1). If the offender is arrested on the strength of a warrant, section 742.6(2) provides that the reverse onus provisions of the *Code* apply at a bail hearing.

— Given the mandatory working of section 742.6(3) the hearing to determine whether a breach has occurred must be held within 30 days of the arrest of the offender (or the issuance (not the service) of the summons). In *R.* v. *Orlias*,[30] the Northwest Territories Supreme Court held that a failure to commence a breach hearing within 30 days of arrest was fatal; the court opined, however, that a properly commenced hearing could extend beyond the 30 day period. The legislation is silent on the subject of adjournments. This may take on added importance given the difficulty of arranging legal aid retainers. As the sentence continues to run while the breach hearing is pending, one might well find that offenders near the ends of their sentences will prefer not to bother with hearings, if possible.

— Because of costs and the tight time frames specified in the legislation, sections 742.6(4)-(8) envisage that the Crown can prove its case by hearsay alone. It is only if the offender can satisfy the judge hearing the allegation that the supervisor or witness should be made available for cross-examination that oral evidence will be heard from Crown witnesses.[31]

— Gemmell's article[32] suggests that there may be a significant drafting error. He points out that while the sections are modelled on similar provisions in the Code for the admissibility of other items of hearsay evidence, unlike these sections, however, there is no explicit statement that they are admissible. He also points out that there are no restrictions on the content of the supervisor's report, and that there are no guarantees for trustworthiness, such as the swearing of statements or the creation of an offence of providing a false statement.

— Assuming that section 11 of the Charter applies to breach hearings, Gemmell argues that several constitutional arguments will need to be considered. Even if section 11 does not apply, section 7 arguments will no doubt be made.

The other important issue raised by Gemmell is that the standard of proof at a breach hearing is specified in section 742.6(9) as being on a balance of probabilities. Certainly we can expect arguments based on whether the rules established in *Wigglesworth*[33] and *Shubley*[34] are applicable, or whether these hearings involve "true penal consequences". I would also expect that we can anticipate arguments based on the fact that the offender must provide a reasonable excuse for the breach, though, to my mind, the law is more settled on this issue.

---

30. *R.* v. *Orlias*, November 25, 1996.

31. See, for example, *R.* v. *Kevin Johnson* (17 March 1997), (Ont. Ct. (Prov. Div.)) O'Hara, Prov. Div. J. [unreported].

32. J. Gemmel, "The New Conditional Sentencing Regime" (1997) 39 C.L.Q. 334.

33. *Wigglesworth* v. *The Queen* (1987), 37 C.C.C. (3d) 385 (S.C.C.).

34. *R.* v. *Shubley* (1990), 52 C.C.C. (3d) 481 (S.C.C.).

If the breach is established to the court's satisfaction, the judge (who need not be the same judge as the one who imposed the conditional sentence) may :

— Take no action;

— Change the optional conditions;

— Require that a portion of the remaining period be served in custody, followed by a resumption of the conditional sentence (with or without changes to the optional conditions); or

— Terminate the conditional sentence and direct that the remaining period of the sentence be served in custody[35].

Section 742.7 is a new procedure (similar to the new "parole interrupted" procedures under the *Corrections and Conditional Release Act* amendments proclaimed as a result of the passage of *Bill C-45*). It provides that where an offender is serving a conditional sentence in the community, and is imprisoned for another offence whenever committed, the running of the conditional sentence is deemed to be interrupted during the period of imprisonment imposed for that offence, unless a court otherwise orders (either under the change of conditions section, section 742.4(3), or, more likely, under the breach of conditions section, section 742.6(9).

However, section 718.3(5), which provides that sentences for subsequent offences committed by offenders subject to conditional sentences are to be served consecutively is not being proclaimed because the Department of Justice has recognized that there were some problems with the original drafts of this section.

X. IMPRISONMENT (Sections 743-743.5)

By and large these sections replicate previews legislation with most inconsequential amendments. Section 743.5 of *Bill C-41* was amended by *Bill C-37*, proclaimed in force on December 1, 1995. Previously, section 741.1 provided that the court that imposed a sentence on an offender had the jurisdiction to order that the remainder of a disposition and under the Young Offenders Act be dealt with as if it had been a sentence imposed under the *Criminal Code*, or any other Act of Parliament. Section 743.5 provides that such an order must be made by a court of criminal jurisdiction.

35. It is anticipated that the offender would be eligible to earn remission on the now definite balance.

XI. ELIGIBILITY FOR PAROLE (Section 743.6)

This predecessor version section was narrowly interpreted. In *R.* v. *Goulet*[36] the court concluded that the power to delay parole pursuant to this section was an "exceptional measure" and should only be employed in narrow circumstances. Perhaps for that reason Parliament included further guidance for the courts by enacting section 743.6(2) in *Bill C-41* which expressly directs that the rehabilitation of the offender is subordinate to the paramount principles of denunciation and specific or general deterrence.

XII. IMPRISONMENT FOR LIFE (Sections 745-746.1)

The rules respecting parole ineligibility for persons convicted of first or second degree murder who were under the age of eighteen at the time of the commission of the offence were amended by *Bill C-37*, proclaimed in force on December 1, 1995. The amendments are incorporated in *Bill C-41*. Pursuant to these amendments parole ineligibility is determined as follows :

— The period between 5 and 7 years, as specified by the trial judge pursuant to section 745.3, or if no such period is specified, 5 years, in the case of a person convicted of either first or second degree murder who was under the age of sixteen at the time of the commission of the offence, section 745.1(a).

— 10 years in the case of a person convicted of first degree murder who was sixteen or seventeen years of age at the time of the commission of the offence, section 745.1(b).

— 7 years in the case of a person convicted of second degree murder who was sixteen or seventeen years of age at the time of the commission of the offence, section 745.1(c).

In the case of an offender who was under the age of sixteen at the time of the commission of the offence, the judge presiding at the trial must seek the jury's recommendation regarding the period of parole ineligibility, section 745.3. The court must consider that recommendation, if any, when it imposes the period of parole ineligibility, section 745.5.

The increasingly important role of victims of crime has been recognized in by-law review hearings. Section 745.6(2)(d) provides that a jury's determination of an application to reduce the parole ineligibility period of a person convicted of first degree murder, or second degree murder where the period of parole ineligibility is more that fifteen years, includes a consideration of any information provides by the victim, either at the time of the imposition of the sentence or at the time of the hearing. The definition of victim in section 722(4) is broad. It includes a person who suffered physical or emotional loss as a result of the commission of the offence and suffered physical or

---

36. *R.* v. *Goulet* (1995), 97 C.C.C. (3d) 61 (Ont. C.A.).

emotional loss as a result of the commission of the offence and where the victim is dead, includes the spouse or relative of that person. The recognition of the importance of victims of crime in this area of the law accords with the decision of the Supreme Court of Canada in *R*. v. *Sweitlinski*[37] and amounts to a statutory reversal of the court which initially that prisoner's application.[38]

XIII. HOSPITAL ORDERS (Sections 747-747.8; 785)

The sections providing for "Hospital Orders", sections 747-747.8; 785, have not been proclaimed. Anyone interested in the progress of this legislation may wish to contact Mr. David Daubney of the Federal Department of Justice at (613) 957-4755.

37. *R.* v. *Sweitlinski* (1993), 92 C.C.C. (3d) 449 (S.C.C.).

38. *R.* v. *Sweitlinski* (1992), 73 C.C.C. (3d) 376 (Ont.Ct. (Gen. Div.).

BIBLIOGRAPHY

This is a partial list of sources which I have used in the preparation of this paper. It does not purport to be exhaustive. Copies of unpublished papers can be obtained directly from the authors or from myself. The assistance of these authors is acknowledged :

A. Edgar — "Criminal Code Amendments — *Bill C-41* — Sentencing", (August 9, 1994).

E. Ewaschuk — "Sentencing Amendments to the Criminal Code" (February, 1997).

J. Gallin — "Breaches of Conditional Sentences — The Constitutionality of the Burden of Proof" (August 16, 1996).

"Chart of *Bill C-41*" (August 16, 1996).

"Section 724(3) — The Burden of Proof on the Offender in Sentencing" (August 16, 1996).

"Treatment as a Condition of Probation on Conditional Sentence" (August 16, 1996).

"Update on Conditional Sentencing" (January 12, 1997).

J. Gemmel — "The New Conditional Sentencing Regime" (1997), 39 C.L.Q. at 334.

K. Jull — "The Brave New World of Sentencing : A Principled Approach to *Bill C-41*" (January, 1997).

O.M. Kennedy — "A Review of *Bill C-41* — An Act to Amend the Criminal Code Sentencing" Canadian Association of Provincial Court Judges (April, 1995, revised October, 1995).

P. McDermott — "*Bill C-41* : New Directions in Sentencing" 1 Crown's Newsletter (April 22, 1996).

C.D. McGinn — "Impact of Chapter 22 — Amendments to the Criminal Code of Canada" (January, 1997).

A. Manson — "*Bill C-41* : Smoke, Mirrors and Canadian Sentencing Reform". Paper prepared for the Ontario Court of Justice (Provincial Division) (1996 Winter Seminars).

"Finding a Place for Conditional Sentences", (1997) 3 C.R. (5th) 283.

G. Renaud "An Overview of the Criteria for the Imposition of a Conditional Sentence of Imprisonment Under Section 742.1 of the *Criminal Code*" (August 31, 1996).

"To Appear Before the Court When Required to do so by the Court" : The Impact of Sentencing Reform" (1996) 20 Prov. Judges J 3:23.

"Conditional Sentences of Imprisonment and Safeguarding the Safety of the Community" (September 3, 1996).

"Conditional Sentences of Imprisonment : An Overview of the Case Law from Quebec" (April 14, 1997).

« Le Sursis d'Emprisonnement : un survol de la jurisprudence» (14 Avril 1997).

"A Guide to Probation Conditions After Sentencing Reform" (*Bill C-41*).

J.V. Roberts "New Data on Sentencing Trends in Provincial Courts" (1995), 34 C.R. (4th) 181.

J.V. Roberts & A. von Hirsh "Statutory Sentencing Reform : The Purposes and Principles of Sentencing" (1995), 37 C.L.Q. 220.

J.V. Roberts "Conditional Sentencing : Sword of Damocles or Pandora's Box?" (April 25, 1997).

R. Schneider "Mental Disorder in the Courts : Court Ordered Treatment of Accused" (December, 1996).

Ontario Ministry of the Solicitor "*Bill C-41* Amendments to the Criminal Code : Training and

General and Correctional Services Resource Manual for Probation and Parole Officers" (September 1996).