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CONDITIONAL SENTENCES

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NOTE:

THIS POLICY DOCUMENT IS TO BE READ IN THE CONTEXT PROVIDED BY THE **PREFACE** TO THIS PART OF THE MANUAL.

CERTAIN WORDS AND PHRASES HAVE THE MEANINGS ESTABLISHED IN THE "**WORDS & PHRASES**" SECTION OF THIS PART OF THE MANUAL.

CONDITIONAL SENTENCES

The Supreme Court of Canada in Regina v. Proulx (2000), 144 C.C.C.(3d) 449, and in a number of other judgments issued shortly thereafter, has established what amounts to an implementation guide in regard to conditional sentencing. Chief Justice Lamer, at paragraph 127 of the judgment, summarizes his instructions (excerpts from those instructions are appended to these Guidelines). The instructions from the Supreme Court of Canada, however, are in general terms and many issues continue to require Crown Attorneys to exercise careful judgment. These guidelines are intended to assist in the exercise of that judgement and to ensure consistency in approach.

A number of principles emerge from the developing jurisprudence and from the Criminal Code provisions describing the conditional sentence regime. Policy positions have been developed to assist in the application of those principles to particular cases. The key principles which have been identified, and the related policy provisions, are as follows:

- (1) If the offence carries a minimum term of imprisonment or if the offence, having regard to the established principles of sentencing, calls for a penitentiary sentence, the offence is excluded from the conditional sentencing regime.

Crown Attorneys should continue to press for penitentiary sentences in the same cases where penitentiary sentences were appropriate prior to the introduction of conditional sentencing in to the Criminal Code. The conditional sentencing regime does not impact these cases.

- (2) As a condition precedent to the imposition of a conditional sentence, the court must be satisfied that the offender would pose no danger to the community while the sentence is being served. Crown Attorneys have a duty to ensure that the court is fully informed in regard to (1) the risk of the offender re-offending, and (2) the danger that could ensue in the event of re-offending. **If the offender poses a risk to the community, the Crown Attorney must oppose a conditional sentence.** Consideration of the risk imposed by the offender should include the risk of **any** criminal activity.
- (3) Although a conditional sentence can provide significant denunciation and deterrence, there may be some cases in which the need for denunciation or deterrence is so pressing that incarceration will be the only suitable way in which to express condemnation of the offender's conduct or to

deter similar conduct in the future. Very often, the following cases fit into this category:

- cases of violence involving serious bodily harm or death, whether intended or not
- sexual offences which cause significant psychological or physical harm
- sexual offences against children
- driving offences causing death, wherein the consumption of alcohol is a factor
- cases involving corruption or a breach of trust, wherein there is planning or deliberation and a substantial loss of money.

In these cases, and in other cases that raise similar concerns, Crown Attorneys must not, absent exceptional circumstances, advocate for or agree to the imposition of a conditional sentence. [See the attached Practice Notes]

“Exceptional circumstances” cannot be defined in absolute terms but they are those circumstances wherein public safety, including that of specific victims, or the overall public interest is demonstrably better served by the imposition of a conditional sentence. When Crown Attorneys form a tentative opinion that exceptional circumstances exist, they should consult with supervisors and experienced colleagues to confirm their position. The exceptional circumstances should be noted in the prosecution file, and in appropriate cases, they should also be placed on the record in court. Examples of the public interest factors which may be considered in determining whether exceptional circumstances exist are the following:

- the physical health, mental health or infirmity of the accused or a victim
- a victim who will be particularly traumatized and potentially re-victimized by testifying in court
- the victim strongly opposes incarceration for the accused
- significant problems of proof, even though a reasonable prospect of conviction exists.

- (4) Where the punitive and deterrent objectives of sentencing are less pressing, conditional sentences may be appropriate. When conditional sentences are appropriate, it is intended that conditional sentences include both punitive and rehabilitative aspects.

Generally, Crown Attorneys should recommend conditions such as house arrest which are restrictive of the offender’s liberty. Sentence recommendations should also reflect the proposition that the more serious the offence the longer and more onerous the conditional

sentence should be. Crown Attorneys should ensure that the court is accurately of the level of supervision available in the community. **If the available supervision cannot ensure public safety, the Crown Attorney must oppose a conditional sentence.**

A history of failure by the accused to abide by the terms of supervision orders (parole, probation, judicial interim release, etc.) should be drawn to the attention of the sentencing judge and should cause the prosecutor to resist a conditional sentence.

PRACTICE NOTES:

Criminal Code Amendments (2007)

Criminal Code amendments effective December 1, 2007 exclude certain offences from the conditional sentence regime. The following offences, if committed on or after December 1, 2007, are excluded:

- terrorism offences;
- offences for the benefit of, or at the direction of, or in association with a criminal organization; and
- some serious personal injury offences, as defined in section 752, including
 - (a) sexual assaults, **if** the Crown proceeds by **indictment**, and
 - (b) the use, or attempted use of violence against another person, or conduct endangering the life or safety of another person, or inflicting severe psychological damage upon another person, **if** the Crown proceeds by **indictment** and the offender may be sentenced to imprisonment for **ten years** or more.

It should be noted that in regard to offences such as sexual assault (section 271) or assault causing bodily harm (section 267), a conditional sentence will be precluded only if the Crown proceeds by indictment. The policy of the PPS has been, and continues to be, that conditional sentences are not appropriate in cases of sexual assault involving children or the infliction of significant physical or psychological harm, whatever the mode of procedure. The same is true in regard to other forms of assault which cause serious bodily harm.

Although the elimination of the possibility of a conditional sentence is a factor which may be considered when deciding whether or not to proceed by indictment, it is only

one of many factors to be considered and it need not be the determining factor. As in all cases, the decision as to mode of procedure must provide the court with sentencing options which adequately reflect the gravity of the alleged conduct and the background of the offender. The *Criminal Code* amendments referred to above do not alter this approach.

Note re sexual assaults:

The English version of the *Criminal Code* amendments (S.C. 2007, C.12) clearly excludes all sexual assaults from the conditional sentence regime. The French version of the amendments excludes sexual assaults only if the Crown proceeds by indictment. The rules of statutory interpretation require the court to follow the narrower, less punitive version; accordingly, only the indictable offences are excluded.

Resolution Discussions Involving Conditional Sentences

Because conditional sentences usually permit the offender to reside at home and to enjoy many of the benefits available to persons at large in the community, they are often viewed by the offender and defence counsel as a very attractive outcome. In resolution discussions, Crown Attorneys are reminded of the importance of ensuring that any agreement in regard to sentence achieves a sentence which is proportionate to the nature of the criminal conduct of the accused [see the PPS Policy on Resolution Discussions and Agreements].

When the anticipated evidence in support of a charge is weak or uncertain (even though there is a realistic prospect of conviction), it may be tempting for a Crown Attorney to hastily accept an offer of a guilty plea with a joint recommendation for a conditional sentence. Such decisions must be made carefully, and all of the ramifications of any sentence agreement must be considered. Although the strength of the case is a legitimate factor when sentence is being discussed, Crown Attorneys must not agree to a conditional sentence unless the resulting conditional sentence provides denunciation, deterrence and punitive elements appropriate to the offence and offender. Resolution agreements which result in inadequate sentences tend to undermine public confidence in the justice system. It is never appropriate to accept an inadequate sentence proposal simply to avoid a trial, or to obtain a guilty plea when the evidential threshold is not met. It is sometimes necessary to take weak cases to trial, if the evidential threshold is met. If the threshold is not met, the case should be discontinued. If a contemplated resolution appears to lie outside the usual range of sentence for a particular charge, consultation with the Chief Crown Attorney for the region or branch should occur prior to finalization.

Early Variation of Conditions

When Crown Attorneys agree to a conditional sentence, it is usually done on the assumption that the onerous and restrictive conditions will continue for the duration of the order. This should be clearly stated on the record in court in order to reduce the likelihood of the accused successfully applying to vary the conditions soon after the

sentence is imposed.

Aboriginal Offenders

Crown Attorneys are also reminded of the provisions of Section 718.2(e) of the Criminal Code which alters the method of analysis which each sentencing judge must use in determining the nature of a fit sentence for an aboriginal offender. The court must consider the unique situation of each aboriginal offender. Even where counsel do not adduce this evidence, e.g. when the offender is unrepresented, it is incumbent upon the sentencing judge to attempt to acquire information regarding the circumstances of the offender as an aboriginal person. Crown Attorneys should assist the court in this regard in order to avoid the error in law which will necessarily arise if the court does not consider the unique situation of the aboriginal offender.

Appendix

Excerpts from R. v. Proulx (2000), 140 C.C.C. (3d) 449, para.127

1. Bill C-41 in general and the conditional sentence in particular were enacted both to reduce reliance on incarceration as a sanction and to increase the use of principles of restorative justice in sentencing.
2. A conditional sentence should be distinguished from probationary measures. Probation is primarily a rehabilitative sentencing tool. By contrast, Parliament intended conditional sentences to include both punitive and rehabilitative aspects. Therefore, conditional sentences should generally include punitive conditions that are restrictive of the offender's liberty. Conditions such as house arrest should be the norm, not the exception.
3. No offences are excluded from the conditional sentencing regime except those with a minimum term of imprisonment, nor should there be presumptions in favour of or against a conditional sentence for specific offences. [Note: This dictum has been superceded by a *Criminal Code* amendment - see Practice Notes, *infra*.]
4. ... In a preliminary determination, the sentencing judge should reject a penitentiary term and probationary measures as inappropriate. Having determined that the appropriate range of sentence is a term of imprisonment of less than two years, the judge should then consider whether it is appropriate for the offender to serve his or her sentence in the community.
5. ... A conditional sentence need not be of equivalent duration to the sentence of incarceration that would otherwise have been imposed. The sole requirement is that the duration and conditions of a conditional sentence make for a just and appropriate sentence.
6. The requirement in s.742.1(b) that the judge be satisfied that the safety of the community would not be endangered by the offender serving his or her sentence in the community is a condition precedent to the imposition of a conditional sentence, and not the primary consideration in determining whether a conditional sentence is appropriate. In making this determination, the judge should consider the risk posed by the specific offender, not the broader risk of whether the imposition of a conditional sentence would endanger the safety of the community by providing insufficient general deterrence or undermining general respect for the law. Two factors should be taken into account: (1) the risk of the offender re-offending; and (2) the gravity of the damage that could

ensue in the event of re-offence. A consideration of the risk posed by the offender should include the risk of any criminal activity, and not be limited solely to the risk of physical or psychological harm to individuals.

7. Once the prerequisite of s.742.1 are satisfied, the judge should give serious consideration to the possibility of a conditional sentence in all cases by examining whether a conditional sentence is consistent with the fundamental purpose and principles of sentencing set out in ss.718 to 718.2. This follows from Parliament's clear message to the judiciary to reduce the use of incarceration as a sanction.
8. A conditional sentence can provide significant denunciation and deterrence. As a general matter, the more serious the offence, the longer and more onerous the conditional sentence should be. There may be some circumstances, however, where the need for denunciation or deterrence is so pressing that incarceration will be the only suitable way in which to express society's condemnation of the offender's conduct or to deter similar conduct in the future.
9. Generally, a conditional sentence will be better than incarceration at achieving the restorative objectives of rehabilitation, reparations to the victim and the community, and promotion of a sense of responsibility in the offender and acknowledgment of the harm done to the victim and the community.
10. Where a combination of both punitive and restorative objectives may be achieved, a conditional sentence will likely be more appropriate than incarceration. Where objectives such as denunciation and deterrence are particularly pressing, incarceration will generally be the preferable sanction. This may be so notwithstanding the fact that restorative goals might be achieved. However, a conditional sentence may provide sufficient denunciation and deterrence, even in cases in which restorative objectives are of lesser importance, depending on the nature of the conditions imposed, the duration of the sentence, and the circumstances of both the offender and the community in which the conditional sentence is to be served.
11. A conditional sentence may be imposed even where there are aggravating circumstances, although the need for denunciation and deterrence will increase in these circumstances.