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Submission
of the
Canadian Association of Elizabeth Fry Societies and the
Native Women's Association of Canada
to the
Standing Committee on Justice, Human Rights, Public
Safety and Emergency Preparedness
(39th Parliament)
Regarding

**Bill C-9 - Act to amend the Criminal Code (conditional
sentences of imprisonment)**

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Introduction

The Canadian Association of Elizabeth Fry Societies (CAEFS) was originally conceived of in 1969 and was incorporated as a national voluntary non-profit organization in 1978. Today there are 25 member societies across Canada. CAEFS is incorporated pursuant to the provisions of the *Canada Corporations Act*. Local societies are incorporated under provincial statutes.

Both volunteer and paid staff are involved in governance as well as program and service delivery throughout the association. Programs and services are developed at the grassroots level, in accordance with the needs of the community and range from early intervention and crime prevention activities, to pre and post release work with criminalized and imprisoned women and girls.

In the last year, 31 volunteers, including Board members, devoted a total of 6,073 hours of work to the CAEFS' office. This supplemented the work of CAEFS' two full-time staff members. In our 25 member societies, 1,545 volunteers put in a total of 109,555 hours, supplementing the time of 275 full-time staff and 169 part-time staff.

At the national level, CAEFS focuses on law and policy reform initiatives, informed by its membership and those women with the lived experiences of criminalization and imprisonment. The interactions of CAEFS with women serving federal terms of imprisonment have led us to take note of numerous instances of abuse of rights by the Correctional Service of Canada (CSC). In conjunction with the Native Women's Association of Canada (NWAC), CAEFS has combined these personal accounts with the findings of other equality seeking women's groups in Canada to serve as the basis for these submissions.

Background

In 1996, with the proclamation of Bill C-41, conditional sentences and principles of sentencing were introduced to the *Criminal Code of Canada*.¹ Parliament created conditional sentences for the express purposes of:

- 1) reducing reliance upon incarceration by providing an alternative sentencing mechanism to the courts for sentences of up to two years less a day (provincial jurisdiction) and where there is no minimum sentence designated;² and
- 2) furthering restorative sentencing processes that encourage those who have caused harm to acknowledge this fact and to make reparation provided the safety of the

¹ Sections 742 and 718 respectively.

² Currently there are 42 such 'offences'.

community would not be jeopardized and that the sentence would be consistent with the fundamental principles of sentencing set out in sections 718 to 718.2.³

The importance and relevance of these objectives persist, as Canada continues to rely on the use of imprisonment.⁴ Moreover, women are the fastest growing prison population in Canada,⁵ with Aboriginal and other racialized women, as well as those with disabling mental health issues, most significantly over-represented in our prisons.⁶ Nevertheless, most imprisoned women do not pose a risk to public safety and they could and should be sentenced to community-based dispositions rather than to terms of incarceration.⁷

Bill C-9 proposes to amend section 742.1 of the *Criminal Code* so that an individual convicted of an indictable offence for which the maximum sentence is a term of imprisonment of ten years or more would no longer be eligible for a conditional sentence. Although proponents of the Bill argue that it is aimed at eliminating the use of conditional sentences for violent crimes, in fact, it does not differentiate in terms of violent and non-violent crimes.⁸ Furthermore, as the Department of Justice has pointed out, people convicted of property crimes account for 39% of those given conditional sentences, while administration of justice convictions account for 11% and driving related offences for 4% of conditional sentences.⁹

Approximately 20 percent of those sentenced to conditional sentences of imprisonment are women. Given the reality that women tend to be convicted for less serious ‘crimes’

³ MacKay, Robin. *Conditional Sentences*. Ottawa: Library of Parliament, Parliamentary Information and Research Service, December 21, 2005, p. 1.

⁴ International Centre for Prison Studies (2006) “World Prison Brief.” London: King’s College, University of London. Available online at www.prisonstudies.org

⁵ In addition, the United Nations Human Rights Committee recently expressed serious reservations regarding Canada’s treatment of women prisoners [United Nations Human Rights Commission, *Concluding Observations of the UNHRC in Relation to the Report Submitted by Canada under Article 40 of the ICCPR*. Geneva: UNHRC, 2005].

⁶ Canadian Human Rights Commission. *Protecting their Rights: A Systemic Review of Human Rights in Correctional Services for Federally Sentenced Women*. Ottawa, 2003; Office of Correctional Investigator. *Correctional Investigator’s Response to the Canadian Human Rights Commission’s Consultation Paper for the Special Report on the Situation of Federally Sentenced Women January 2004* (online). Available: http://www.oci-bec.gc.ca/reports/OCIResponse_CHRC_e.asp. [June 2005].

⁷ These range from the reports of the Canadian Sentencing Commission, to the Task Force on Federally Sentenced Women, the Arbour Commission, the Auditor General of Canada, the Public Accounts Committee and the Canadian Human Rights Commission.

⁸ MacKay, Robin. *Legislative Summary – Bill C-9: An Act to Amend the Criminal Code (Conditional Sentence of Imprisonment)*. Ottawa: Library of Parliament, Parliamentary Information and Research Service, Law and Government Division, 2006. Examples of *Criminal Code* offences that would now be exempt from a conditional sentence disposition include: theft over \$5,000 (s.322-332); theft or forgery of credit card (s.342); robbery (s. 343); possession of property over \$5,000 obtained by crime (s. 354); obtaining a credit card by false pretence (s. 363(1)); forgery, (s.366. s); bodily harm caused by criminal negligence (s. 221); manslaughter (s. 234); assault causing bodily harm or with weapon (s. 267); aggravated assault (s. 268); forcible confinement (s. 279(2)); abduction of person under 14 (s.281); death caused by criminal negligence (s. 220(b)).

⁹ Department of Justice. *Conditional Sentencing Series – Fact Sheet #1: What is a Conditional Sentence?* Accessed on line on August 19, 2006 at http://www.justice.gc.ca/en/ps/rs/rep/qa/cs_1.html

to start with, that they have a much lower risk of recidivism,¹⁰ and thus generally pose a very low risk to public safety, they should actually be experiencing more conditional sentences and far less criminalization and imprisonment. Furthermore, those who are being convicted and sentenced should be receiving the least restrictive sanction available.¹¹

Issues Raised by Bill C-9

1. *Contravention of Sentencing Principles*

a) Least Restrictive Measures

The sentencing principles enacted when conditional sentences were introduced in 1996¹² reinforces the premise that the use of imprisonment as a sanction should be regarded as extraordinary and should consequently only be employed as a measure of last resort. For the reasons stated above and below, Bill C-9 will contradict this basic principle.

Canadians would be far better served if Parliament withdrew or defeated Bill C-9 and refocused resources on the development of the social service and mental health infrastructure needed to ensure appropriate community-based supervision and support of conditional sentences. Sentencing data reveals that the dismantling of our social safety net has not only led to the increased marginalization, victimization and criminalization of our most vulnerable populations, but has also contributed to the amplified use of imprisonment for the most marginalized.¹³

Accordingly, rather than risk increased net widening by further restricting the ability of judges to exercise their discretion to apply conditional sentences, Parliament could focus on the development of resources that would be more conducive to the increased use of conditional sentences for criminalized individuals who do not pose a risk to public safety, but who might otherwise be imprisoned. The social/human and economic cost of maintaining the current trajectory of increased reliance on imprisonment means we are

¹⁰ Reed, Micheline and Julian V. Roberts (1999) "Adult Correctional Services in Canada, 1997-98." *Juristat: Canadian Centre for Justice Statistics*, 19 (4).

¹¹ MacKay, Robin. *Legislative Summary – Bill C-9: An Act to Amend the Criminal Code (Conditional Sentence of Imprisonment)*. Ottawa: Library of Parliament, Parliamentary Information and Research Service, Law and Government Division, 2006. p. 3.

¹² The history of the conditional sentence in the context of broader Canadian sentencing reforms is well documented by Allan Manson in the following publications: Manson, A. "Conditional Sentences: Courts of Appeal Debate the Principles" (1998), 15 C.R. (5th) 176, at 182–185.; Manson, A. "The Reform of Sentencing in Canada" in D. Stuart, R. Delisle & A. Manson, eds., *Towards a Clear and Just Criminal Law: A Criminal Reports Forum* (Toronto: Carswell, 1999) at 461–467.

¹³ *Ibid.*: Also, by 1998-1999, for instance, 35 percent of adults found guilty of a criminal offence received a term of incarceration, which represented a 2 percent increase of the rate of imprisonment prior to the introduction of conditional sentences, according to Thomas, Jennifer. "Adult Correctional Services in Canada, 1998/99." *Juristat: Canadian Centre for Crime Statistics*, 20 (3), 2006.

mainly reliant on the most costly and least effective means of addressing social and criminal justice issues.

b) Denunciation, Proportionality and Deterrence

Proponents of Bill C-9 suggest that it will send a clear message of denunciation and therefore deter harmful behaviour, and that it will allow courts to sentence individuals in ways that are proportional to the harm caused by their actions. Unfortunately, what may be judged as adequately denunciatory is likely to change from person to person, depending upon her or his subjective experiences and perspectives.¹⁴ Accordingly, attempts to interpret and assess degrees of denunciation must be considered cautiously and with due consideration of other principles of sentencing outlined in the *Criminal Code*.

General deterrence¹⁵ is identified as a primary objective of Bill C-9. However, although the Supreme Court of Canada held in *R. v. Proulx*¹⁶ that a conditional sentence simultaneously serves several functions, including that of being designed to be a punitive sanction capable of achieving the objectives of denunciation and deterrence, as set out in subsections 718(a) and (b) of the *Criminal Code of Canada*, deterrence is by and large recognized as empirically unproven as an effective principle of sentencing.¹⁷

c) Rehabilitation, Reparation and Restoration

Bill C-9 appears to actually contravene the sentencing principles laid out in ss. 718 (d), (e) and (f) of the *Criminal Code*. These provisions support rehabilitation, as well as reparations to victims and communities as legitimate goals of sentencing.¹⁸

The principles of restorative justice and specific alternative approaches for Aboriginal women are promoted and/or endorsed by the decision of the Supreme Court of Canada in *R. v. Gladue*¹⁹.

Even for serious crimes such as impaired driving causing death, research shows that conditional sentences should continue to be an option. They write:

[B]ased on our review there is therefore no indication that conditional sentences are being issued indiscriminately, often, or without reason. To

¹⁴ Paciocco, David M. and Julian V. Roberts, *Sentencing in Cases of Impaired Driving Causing Bodily Harm or Impaired Driving Causing Death, With a Particular Emphasis on Conditional Sentencing*. Ottawa: Canada Safety Council, 2005..

¹⁵ The belief that the existence and threat of penalties dissuades others from engaging in behaviour that might trigger the penalty.

¹⁶ [2000], 1 S.C.R. 61.

¹⁷ Doob, Anthony and Webster, Cheryl. "Sentence Severity and Crime: Accepting the Null Hypothesis," in M. Tonry (Ed.) *Crime and Justice: A Review of Research*. Chicago: University of Chicago Press, 2003.

¹⁸ Roach, Kent. "Changing Punishment at the Turn of the Century: Restorative Justice on the Rise." *Canadian Journal of Criminology*, (2000) 42 (3): 249-280.

¹⁹ [1999], 1 S. C. R. 688.

the contrary, the conditional sentence is used because there are cases in which the imposition of this sanction can be justified according to the statutory purpose and principles of sentencing.²⁰

2. *Interference with Judicial Discretion*

In *R. v. Proulx*, the Supreme Court also rejected the argument that those who are convicted of certain offences should be precluded from receiving a conditional sentence as a sanction. The Court held that such discretion should remain in the hands of the judiciary. Bill C-9 proposes severe and significant restrictions be placed upon judges in terms of their ability to impose conditional sentences.

In 1971, Chief Justice McKinnon of the Nova Scotia Court of Appeal perhaps best expressed the importance of judicial discretion in sentencing matters when he asserted:

It would be a grave mistake... to follow rigid rules for determining the type and length of sentence... There is not only the offence committed, but the method and manner of committing; the presence or absence of remorse, the age and circumstances of the offender [*sic*], and many other related factors. For these reasons, it may appear that lesser sentences are given for more serious offences and vice-versa, but a court must consider each individual case on its merits, even if the different factors involved are not apparent to those who know only of the offence charged and the penalty imposed.²¹

Bill C-9 would prevent judges from maintaining the requisite flexibility to make sentencing decisions based on the uniqueness of each case even for serious crimes. Indeed, based upon their research, Paciocco and Roberts conclude that:

[B]ased on our review there is therefore no indication that conditional sentences are being issued indiscriminately, often, or without reason. To the contrary, the conditional sentence is used because there are cases in which the imposition of this sanction can be justified according to the statutory purpose and principles of sentencing.²²

3. *Increased Human and Fiscal Costs of Imprisonment*

It is projected that, if enacted, Bill C-9 would eliminate the possibility of receiving a conditional sentence for 5500 men and women per annum.²³ Currently, 35% of all sentences involve incarceration and imprisonment devours 82% of correctional

²⁰ Ibid, 2.

²¹ Cited in Paciocco and Roberts, 2005, page 19.

²² Ibid, 2.

²³ MacKay, 2006.

spending.²⁴ In contrast, 14% of corrections budgets are devoted to community-based supervision.²⁵ At even the most conservative estimates of \$50,000 to \$150,867²⁶ or \$250,000+ per year,²⁷ Canadian taxpayers would need to pay an additional 275 million – 1.3 billion dollars each year to jail these individuals. Comparatively, Canadians pay \$1,792 per year to supervise an individual in the community.²⁸

Currently, 81% of all prison admissions are for less than six months, so the costs of administering these sentences are borne by the respective provincial or territorial jurisdiction in which sentences are served.²⁹ Furthermore, these costs are compounded each year by the additional strain on mental health, child welfare and other social services that burgeoning prison populations occasion. As a number of provinces have already noted, the vast majority of the increased costs associated with the implementation of the restrictions on conditional sentences outlined in Bill C-9 will burden provincial and territorial coffers.

Moreover, a criminal justice system based on frequent and brief sentences served, usually by the most socially disadvantaged is counterproductive for all of society.³⁰ Simply put, society bears the cost, but receives no benefit and the criminalized are further stigmatized with no substantive change in terms of the pre-existing conditions which contributed to their criminalization and imprisonment in the first place. If, instead, the focus was on the enhancement of community-based sanctions, the costs associated with administering such sentences would be much lower and the individuals serving sentences in the community could seek or maintain employment, care for children and other family members, pay taxes, and maintain the human and social connections crucial to community integration.

In the United States, the last two decades have seen the implementation of similar criminal justice law reform initiatives. There, the cost of fighting crime (police, courts, and prison) has risen by 350 percent since 1982. Americans now spend about \$40 billion per year on incarceration; and, in the states of California and New York, more resources are now allocated to imprisoning people than are expended on education³¹ or health

²⁴ Quigley, Tim, “Has the Role of Judges in Sentencing Changed... Or Should It?” *Canadian Criminal Law Review*, (2000) 5: 317-338.

²⁵ Ibid.

²⁶ Correctional Service of Canada (2005) *Basic Facts about the Correctional Service of Canada*. Ottawa: Public Works and Government Services of Canada.

²⁷ The cost of imprisoning adults in Canada generally ranges from \$50,000-\$250,000 per year, depending upon the gender (the Correctional Service of Canada estimates the cost of imprisoning women at between \$150,000-\$250,000 per annum, depending upon the security level and location of the imprisoned woman), security level, treatment needs, and provincial/federal differences.

²⁸ MacKay, 2006.

²⁹ Quigley, 2000.

³⁰ Roberts, Julian V. and Simon Verdun-Jones, “Directing Traffic at the Crossroads of Criminal Justice and Mental Health: Conditional Sentencing after the Judgment in Knoblauch.” *Alberta Law Review*, (2002) 39: 788-809.

³¹ Mauer, Marc. *Comparative International Rates of Incarceration: An Examination of Causes and Trends*. Washington, DC: The Sentencing Project, 2003.

services.³² In Canada too, one of the long-term consequences of Bill C-9 will be the need for massively increased budgets to build more prisons, and the inevitable corresponding further destruction of our faltering social services.

According to the Justice Minister of Saskatchewan, the Bill C-9 move away from sentencing according to the ‘least restrictive measures’ and restrictions in terms of who is eligible for conditional sentences, will also further jeopardize the ability of provinces to address the disproportionate numbers of Aboriginal people in the criminal justice system.³³ Bill C-9 would also be problematic for the territory of Nunavut where, in 2005, judges imposed 203 conditional sentences compared to 189 terms of incarceration for men and women.³⁴

In this context, it is also important to point out that the dimishment of community resources has already impacted conditional sentences. In their survey of 461 criminal trial judges, Julian Roberts and his colleagues found that 31 percent ‘rarely’ or ‘never’ were able to find community resources when considering a conditional sentence.³⁵ Similarly, 40 percent of judges maintained that the number of available treatment programs (such as substance abuse and mental health counselling) was ‘rarely’ or ‘never’ sufficient. Roberts, Doob, and Marinos also found that four out of five judges (80.2 percent) would increase their use of conditional sentences if there were more resources available in the community.³⁶ Nothing in Bill C-9 addresses this need. In fact the proposed legislation will further compound the problem of inadequate community resources.

4. Context of Women’s Criminalization

As we discussed above, most criminalized women are regarded as low risks to public safety. Especially considering the circumstances that precipitate the criminalization of most people, particularly women and Aboriginal peoples, it would be far more fiscally responsible for the government to allocate taxpayers’ money to shoring up our social, health and educational services than to jailing more and more people. The impact of our deteriorating social and health services, coupled with a greater reliance on incarceration, has resulted in the increased criminalization of women and girls as a result of poverty, racism, lack of education and/or access to reasonable employment and child care, as well as their experiences with physical or sexual violence and/or substance abuse.

In terms of violent crime, the context in which women are charged is important in order to appreciate the low-risk they pose to society. In most cases, violence perpetrated by women is reactive or defensive in nature (i.e. occurring in response to violence directed at her and/or her child(ren)).

³² Human Rights Watch. *Ill-Equipped: U.S. Prisons and Offenders with Mental Health Illness*. Washington, DC, 2003. Retrieved May 4, 2004, from http://hrw.org/reports/2003/usa1003/3.htm#_Toc51489445

³³ MacKay, 2006.

³⁴ *Ibid.*

³⁵ Roberts, Julian V., Doob, Anthony N. and Marinos, Voula. *Judicial Attitudes to Conditional Terms of Imprisonment: Results of a National Survey*. Ottawa: Department of Justice Canada, 2000.

³⁶ *Ibid.*

Racialized men and women, especially Aboriginal and African Canadian women have historically been over-represented in the criminal justice system.³⁷ Although Aboriginal people represent roughly 2-3% of the adult population in Canada, they account for 11% of admissions to federal prisons in 1991-92, 15% in 1996-97, and 17% in 1997-98.³⁸ The overrepresentation is even more pronounced across provincial jurisdictions. For example, 72% of the prison population in Saskatchewan and 61% in Manitoba are Aboriginal persons and they are also more likely to receive a custodial disposition (17%) than a conditional sentence (12%).³⁹

The situation for Aboriginal women is even worse. For instance, in 2000 Aboriginal women made up 2.8% of the population of women in Canada, yet comprised of 23% of the federal prison population. In 2004, the Canadian Human Rights Commission reported that Aboriginal women were 29% of the federal prison population⁴⁰ and this figure is now estimated by the Correctional Service of Canada as 32%. This is an astronomical increase, when one considers that a decade earlier, Aboriginal women comprised 15% of the federal prison population.⁴¹ The over-representation of Aboriginal women is even more pronounced among prisoners classified as maximum security where, in the federal system, depending upon the timing of the snap shot, 40-60% of Aboriginal women have the highest classification designation.⁴²

³⁷ Report of the Royal Commission on Aboriginal Peoples. *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada*. Ottawa, 1996.; Commission on Systemic Racism in the Ontario Criminal Justice System. *Interim Report of the Commission on Systemic Racism in the Ontario Criminal Justice System. Racism Behind Bars: The Treatment of Black and Other Racial Minority Prisoners in Ontario Prisons*. Toronto: Queen's Printer for Ontario, 1994.; Commission on Systemic Racism in the Ontario Criminal Justice System. *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System*. Toronto: Queen's Printer for Ontario, 1995.; Satzewich, Vic. (ed). *Racism & Social Inequality in Canada: Concepts, Controversies & Strategies of Resistance*. Toronto: Thompson Educational Publishing Inc., 1998.; United Nations Human Rights Commission. *Concluding Observations of the UNHRC in Relation to the Report Submitted by Canada under Article 40 of the International Covenant on Civil and Political Rights*. Geneva: UNHRC, 2005.; Urban Alliance on Race Relations. *Race and the Canadian Justice System: An Annotated Bibliography*. Toronto: Urban Alliance on Race Relations, 1995.

³⁸ Reed and Roberts, 1999.

³⁹ Ibid.

⁴⁰ Canadian Human Rights Commission. *Protecting their Rights: A Systemic Review of Human Rights in Correctional Services for Federally Sentenced Women*. Ottawa, 2003.

⁴¹ Monture-Angus, Patricia. *The Lived Experience of Discrimination: Aboriginal Women who are Federally Sentenced*. 2002. Available on line at:
<http://www.elizabethfry.ca/submissn/aborigin/aborigin.pdf>.

⁴² Canadian Association of Elizabeth Fry Societies (CAEFS). *Position of the Canadian Association of Elizabeth Fry Societies (CAEFS) Regarding the Classification and Carceral Placement of Women Classified as Maximum Security Prisoners*. Ottawa: Canadian Association of Elizabeth Fry Societies, 1998. Available on line at: <http://www.elizabethfry.ca/maxe.htm>.; Canadian Human Rights Commission. *Protecting their Rights: A Systemic Review of Human Rights in Correctional Services for Federally Sentenced Women*. Ottawa, 2003.; United Nations Human Rights Commission. *Concluding Observations of the UNHRC in Relation to the Report Submitted by Canada under Article 40 of the International Covenant on Civil and Political Rights*. Geneva: UNHRC, 2005.

For Aboriginal women in particular, systemic racism and colonialism has had a wide-ranging and devastating impact from both the child welfare and the criminal justice systems. As the Department of Justice has pointed out,⁴³ and as Patricia Monture reminds us: “over-representation is the result of systemic factors and not evidence of intrinsic Aboriginal criminality, [so] the systemic factors which lead to over-representation must be the source of our amelioration efforts. Keeping Aboriginal women out of prisons, therefore, must be the first priority.”⁴⁴

Concluding Observations

1. *Lack of Empirical Evidence*

In terms of deterrence and rehabilitation, Canadian studies do not support the law reform direction introduced by Bill C-9, and no empirical research has suggested that restrictions to conditional sentences will result in safer communities, lower crime rates or act as a deterrent to crime. In fact, there is a growing understanding that prison does not achieve the sentencing goals of rehabilitation or deterrence.⁴⁵ Furthermore, research reveals that rehabilitation programs are far more effective when offered in the community, rather than in prison.⁴⁶

In terms of community safety, denunciation and deterrence, again, the research does not support the notion that there is a correlation between severity of sentencing practices and reductions in crime rates.⁴⁷ Supporters of Bill C-9 have pointed to the United States where research has shown that violent crime has been reduced in many large-scale cities.⁴⁸ However, violent crime has been reduced everywhere because of an aging population in North America;⁴⁹ as such, lower levels of crime are not attributable to the draconian trend of mass incarceration in the United States. In any event, relying on American data to support Bill C-9 is a hollow argument in light of the fact that even though the United States incarcerates at a rate 6-7 times more than Canada, its crime rate is five times that of Canada.⁵⁰

⁴³ Department of Justice Canada. *Background: Conditional Sentencing Reform Bill*. Ottawa: Department of Justice Canada, 2005.

⁴⁴ Monture-Angus, 2002.

⁴⁵ Roberts and Roach, 2005.

⁴⁶ Doob and Webster, 2003.

⁴⁷ Von Hirsch, A., Bottoms, A., Burney, E., and Wikstrom, P-O. *Criminal Deterrence and Sentence Severity*. Oxford: Hart Publishing, 1999.; Kury, H., Ferdinand, T, and Obergfell-Fuchs, J. “Does Severe Punishment Mean Less Criminality?” *International Criminal Justice Review*, (2003) 13: 110-148.; Doob and Webster, 2003.

⁴⁸ MacKay, 2006.

⁴⁹ Carrington, Peter J. “Population Aging and Crime in Canada, 2000-2041.” *Canadian Journal of Criminology*, (2001) 43 (3), 331-356.

⁵⁰ MacKay, 2006.

2. *Lack of Knowledge*

Canadians generally favour the continued use of conditional sentences, including in cases involving violence.⁵¹ Although some high profile and unusual cases have caused some conditional sentences to come under public scrutiny, media accounts of such exceptional cases rarely adequately describe the context of such sentencing decisions;⁵² nor do they adequately explain that such exceptional cases are not representative of the vast majority of circumstances in which conditional sentences imposed.⁵³ As Allan Manson has pointed out, even in cases involving the taking of a life, although “[a] non-custodial sanction may be unlikely and even rare but it cannot be excluded from consideration out of hand. There have been cases where the history between the parties, the context of the killing and post-offence rehabilitative efforts combine to suggest a basis for sympathy that negates the usual demand for a retributive response.”⁵⁴

The general public is provided with very little information about the sentencing process in Canada. In general, surveys gauging public opinion on sentencing show that most people underestimate the severity of sentences that are actually imposed on individuals.⁵⁵ Additionally, most Canadians do not understand the difference between a conditional sentence and probation.⁵⁶ Moreover, in one study of victims, researchers found that most were unaware of alternatives to prison or the costs of incarceration. They also reported that even though victims initially indicated that they would choose a prison sentence, most changed their opinion and favoured community-based sanctions after they were informed about the range and nature of sentences available.⁵⁷

Accordingly, in light of the foregoing and especially given the importance of a full and fair examination of each person’s case, we believe sentencing courts are best suited to identifying the contexts in which conditional sentences are appropriate.

⁵¹ For instance, two surveys – one conducted across Canada and the other in Ontario – described a hypothetical case and then asked respondents if they thought the person should go to prison or receive a conditional sentence. The case involved a male who was convicted of assault causing bodily harm because, in the process of a bar fight, he broke the nose of another patron. In both surveys, over three-quarters opted for the conditional sentence instead of a prison term. Department of Justice Canada, 2005, *Conditional Sentencing Series*.

⁵² *R. v. Millar* (1994), 31 C.R.(4th) 315 (Ont.Gen.Div.); *R. v. Getkate*, [1998] O.J. No. 6329 (Ont. Gen. Div.); *R. v. Gladue*, [1999] 1 S.C.R. 688.; *R. v. Turcotte* (2000), 144 C.C.C.(3d) 139 (Ont.C.A.). Manson, A. “The Conditional Sentence: A Canadian Approach to Sentencing Reform or, Doing the Time-Warp, Again.” In Department of Justice. *The Changing Face of Conditional Sentencing: Symposium Proceedings*. Ottawa: Department of Justice Canada, 2001, pp. 9-23.

⁵³ For example, in an Angus Reid survey conducted in 1999, less than half the sample gave a correct definition of a conditional sentence (from a list of three options). Department of Justice Canada *Conditional Sentencing Series – Fact Sheet #2: Conditional Sentencing and the Views of the Community*. Ottawa: Department of Justice Canada, 2005.

⁵⁴ Manson, A. “The Conditional Sentence: A Canadian Approach to Sentencing Reform or, Doing the Time-Warp, Again.” In Department of Justice. *The Changing Face of Conditional Sentencing: Symposium Proceedings*. Ottawa: Department of Justice Canada, 2001, p. 12.

⁵⁵ *Ibid.*

⁵⁶ Roberts and Roach, 2005.

⁵⁷ Joel Henderson and Thomas Gitchoff; Cited in Roberts and Roach, 2005.

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