



## Legislative Summary

### ***Bill C-16:***

### ***Ending House Arrest for Property and Other Serious Crimes by Serious and Violent Offenders Act***

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**Robin MacKay**

Legal and Legislative Affairs Division  
Parliamentary Information and Research Service

## **Legislative Summary of Bill C-16**

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Any substantive changes in this Legislative Summary that have been made since the preceding issue are indicated in **bold print**.

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# LEGISLATIVE SUMMARY OF BILL C-16: ENDING HOUSE ARREST FOR PROPERTY AND OTHER SERIOUS CRIMES BY SERIOUS AND VIOLENT OFFENDERS ACT

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Bill C-16, An Act to amend the Criminal Code (short title: Ending House Arrest for Property and Other Serious Crimes by Serious and Violent Offenders Act) was given first reading in the House of Commons on 22 April 2010. The bill amends section 742.1 of the *Criminal Code*,<sup>1</sup> which deals with conditional sentencing, to eliminate the reference to serious personal injury offences. It also restricts the availability of conditional sentences for all offences for which the maximum term of imprisonment is 14 years or life and for specified offences, prosecuted by way of indictment, for which the maximum term of imprisonment is 10 years.

## 1 BACKGROUND

### 1.1 GENERAL

Conditional sentencing, introduced in September 1996, allows for sentences of imprisonment to be served in the community, rather than in a correctional facility.<sup>2</sup> It is a midway point between incarceration and sanctions such as probation or fines. The conditional sentence was not introduced in isolation, but as part of a renewal of the sentencing provisions in the *Criminal Code*. These provisions included the fundamental purpose and principles of sentencing. The fundamental principle of sentencing is that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.<sup>3</sup> The renewed sentencing provisions set out further sentencing principles, including a list of aggravating and mitigating circumstances that should guide sentences imposed.<sup>4</sup>

The primary goal of conditional sentencing is to reduce the reliance upon incarceration by providing the courts with an alternative sentencing mechanism. In addition, the conditional sentence provides an opportunity to further incorporate restorative justice concepts into the sentencing process by encouraging those who have caused harm to acknowledge this fact and to make reparation.

At the time of their introduction, conditional sentences were generally seen as an appropriate mechanism to divert minor offences and offenders away from the prison system. Overuse of incarceration was recognized by many as problematic, while restorative justice concepts were seen as beneficial. In practice, however, conditional sentences are sometimes viewed in a negative light when used in cases of very serious crime.<sup>5</sup>

Concern has been expressed that some offenders are receiving conditional sentences of imprisonment for crimes of serious violence, sexual assault and related offences,

driving offences involving death or serious bodily harm, and theft committed in the context of a breach of trust. While it may be beneficial to allow persons who are not dangerous to the community, who would otherwise be incarcerated, and who have not committed a serious or violent crime, to serve their sentence in the community, certain commentators have argued that sometimes the very nature of the offence and the offender require incarceration. It has been suggested that a refusal to incarcerate a serious offender can bring the entire conditional sentencing regime, and hence the criminal justice system, into disrepute. In other words, it is not the existence of conditional sentences that is problematic, but rather their use in cases that appear to justify incarceration.

## 1.2 THE LEGISLATIVE BASIS FOR CONDITIONAL SENTENCING

The provisions governing conditional sentences are set out in sections 742 to 742.7 of the *Criminal Code*. Several criteria must be met before the sentencing judge may impose a conditional sentence:

1. The offence for which the person has been convicted must not be a serious personal injury offence. A “serious personal injury offence” is defined in section 752 of the *Criminal Code* as:
  - (a) an indictable offence, other than high treason, treason, first degree murder or second degree murder, involving
    - (i) the use or attempted use of violence against another person, or
    - (ii) conduct endangering or likely to endanger the life or safety of another person or inflicting or likely to inflict severe psychological damage on another person,
 and for which the offender may be sentenced to imprisonment for ten years or more, or
  - (b) an offence or attempt to commit an offence mentioned in section 271 (sexual assault), 272 (sexual assault with a weapon, threats to a third party or causing bodily harm) or 273 (aggravated sexual assault);
2. The offence for which the person has been convicted must not be a terrorism offence.
3. The offence for which the person has been convicted must not be a criminal organization offence prosecuted by way of indictment for which the maximum term of imprisonment is 10 years or more.
4. The offence for which the person has been convicted must not be punishable by a minimum term of imprisonment.
5. The sentencing judge must have determined that the offence should be subject to a term of imprisonment of less than two years.

6. The sentencing judge must be satisfied that serving the sentence in the community would not endanger the safety of the community.
7. The sentencing judge must be satisfied that the conditional sentence would be consistent with the fundamental purpose and principles of sentencing set out in sections 718 to 718.2 of the *Criminal Code*.

Insofar as the final criterion is concerned, among the objectives of sentencing are:

- the denunciation of unlawful conduct;
- the deterrence of the offender and others from committing offences;
- the separation of the offender from the community when necessary;
- the rehabilitation of the offender;
- the provision of reparation to victims or the community; and
- the promotion of a sense of responsibility in the offender, and acknowledgement of the harm done to victims and to the community.

As mentioned above, the fundamental principle underlying sentencing is proportionality – the sentence imposed by the court must be proportionate to the gravity of the offence and the degree of responsibility of the offender. Among the other sentencing principles are that aggravating and mitigating factors be taken into account, that there be similarity of sentences for similar offences, that the totality of consecutive sentences should not be unduly long or harsh, and that the least restrictive sanction short of incarceration should be resorted to whenever possible.

In addition to meeting the criteria set out above, conditional sentences involve a number of compulsory conditions, as set out in section 742.3 of the *Criminal Code*. These conditions compel the offender to:

- keep the peace and be of good behaviour;
- appear before the court when required to do so;
- report to a supervisor as required;
- remain within the jurisdiction of the court, unless written permission to go outside that jurisdiction is obtained from the court or the supervisor; and
- notify the court or the supervisor in advance of any change of name or address, and promptly notify the court or the supervisor of any change of employment or occupation.

Furthermore, optional conditions are designed to respond to the circumstances of the individual offender. Such conditions may include an order that the offender abstain from the consumption of alcohol or drugs, abstain from owning, possessing or carrying a weapon, perform up to 240 hours of community service, attend a treatment program approved by the province, or any other reasonable condition that the court considers desirable for securing the good conduct of the offender and for preventing the

offender's repetition of the same offence or commission of another offence. The court must ensure that the offender is given a copy of this order and an explanation of the procedure for changing the optional conditions and the consequences of breaching the conditions.

Section 742.6 of the *Criminal Code* sets out the procedure to be followed when one or more of the conditions of a conditional sentence is breached. According to that section, the allegation of the breach may be based upon documentary evidence. The allegation must be supported by a written report of the offender's supervisor including, where possible, signed witness statements. The offender must be given a copy of this report. If the court is satisfied that a breach of a condition has been proved on a balance of probabilities, the burden is then on the offender to show a reasonable excuse. Where the breach is made out, the court may: take no action; change the optional conditions; suspend the conditional sentence for a period of time and require the offender to serve a portion of the sentence in custody and then resume the conditional sentence with or without changes to the optional conditions; or terminate the conditional sentence and require the offender to serve the balance of the sentence in custody.

### 1.3 SUSPENDED SENTENCES AND PROBATION ORDERS

As an alternative to imposing a conditional sentence, a court may suspend sentence and impose a probation order. Section 731 of the *Criminal Code* indicates that, where a person is convicted of an offence, a court may, having regard to the age and character of the offender, the nature of the offence, and the circumstances surrounding its commission, suspend the passing of sentence and direct that the offender be released on the conditions prescribed in a probation order. This possibility is open to the court only if no minimum punishment is prescribed by law.

The court has the power to revoke a suspended sentence where the offender is convicted of an offence while on probation. The court also has the option of directing the offender to comply with the conditions prescribed in a probation order, in addition to fining or sentencing the offender to imprisonment for a term not exceeding two years. The term of imprisonment may be a conditional one, in which case the probation order comes into force at the expiration of the conditional sentence. A court may also make a probation order where it discharges (either absolutely or conditionally) an accused under subsection 730(1). The maximum period of probation is three years.<sup>6</sup>

As with conditional sentences, there are mandatory and optional conditions for a probation order. Section 732.1 of the *Criminal Code* states that the mandatory conditions are that the offender keep the peace and be of good behaviour, appear before the court when required, notify the court or the probation officer in advance of any change of name or address, and promptly notify the court or the probation officer of any change of employment or occupation.

The optional conditions available to the court include a requirement that the offender: report to a probation officer as required; abstain from alcohol or drugs; abstain from owning, possessing or carrying a weapon; participate actively in a

treatment program, if the offender agrees; and comply with such other reasonable conditions as the court considers desirable for protecting society and for facilitating the offender's successful reintegration into the community. As is the case with conditional sentences, the court is required to furnish the offender with a copy of the probation order, an explanation of the consequences for breaching the order, and an explanation of the procedure for applying to vary the optional conditions.

Section 733.1 of the *Criminal Code* sets out the consequences of an offender failing to comply with the terms of a probation order, without reasonable excuse. Such a failure is either an indictable offence and makes the offender liable to imprisonment for a term not exceeding two years, or is a summary conviction offence and makes the offender liable to imprisonment for a term not exceeding 18 months or to a fine not exceeding \$2,000, or both.

#### 1.4 COMPARISON OF CONDITIONAL SENTENCES, SUSPENDED SENTENCES AND PROBATION ORDERS

The provisions set out above demonstrate some important differences between conditional sentences, suspended sentences, and probation orders. Firstly, unlike the suspended sentence under section 731(1)(a), a conditional sentence is actually a sentence of imprisonment. This sentence, however, is served in the community, rather than in a correctional facility.

Secondly, under section 742.3(2)(e) the court may order the offender to attend a treatment program as part of a conditional sentence. There is no statutory requirement for the offender's consent as there is under section 732.1(3)(g) for probation orders.

Thirdly, the wording of the residual clause in section 732.1(3)(h) dealing with optional conditions in probation orders states that one of those conditions' goals is to facilitate the offender's successful reintegration into the community. This is unlike the residual clause in section 742.3(2)(f) dealing with conditions of conditional sentences, which does not focus principally on the rehabilitation and reintegration of the offender and therefore authorizes the imposition of punitive conditions such as house arrest or strict curfews. This difference again emphasizes that conditional sentences are considered to be more punitive than probation orders.

Finally, the punishment for breaching the conditions of a conditional sentence range from the court taking no action to the offender being required to serve the remainder of his or her sentence in custody. By contrast, breach of a probation order is made its own offence, with imprisonment a possible punishment. The differing consequences for breach of a condition relate to the fact that breaches of conditional sentence orders need be proved only on a balance of probabilities while breaches of probation orders, since they constitute a new offence, must be proved beyond a reasonable doubt.

## 1.5 CONDITIONAL SENTENCING CASE LAW

The criticism directed at sentencing practices in Canada tends to focus on the nature of the offence. It is also important, however, to consider how the courts weigh the aggravating and mitigating factors relevant to the offender, and the circumstances surrounding the offence, in crafting an appropriate sentence. As noted above, the sentencing provisions of the *Criminal Code* place an emphasis on a “least restrictive measures” approach, directing the courts to use incarceration only where community sentencing alternatives are not adequate. Collectively, these principles allow for flexibility in the exercise of judicial discretion. Over time, the courts of appeal and the Supreme Court of Canada have attempted to provide more detailed guidance as to how the various principles should be applied to categories of offences and offenders. It should be noted that most of the cases discussed below were decided prior to recent amendments to the conditional sentencing regime that broadened the number of offences for which a conditional sentence is not available.

### 1.5.1 *R. v. PROULX*

The most important case to consider conditional sentencing is the decision of the Supreme Court in *R. v. Proulx*.<sup>7</sup> Here, the Court examined the issue of conditional sentences in a case that concerned a charge of dangerous driving causing death and bodily harm. Prior to this decision, judges had little guidance on when it was appropriate to impose a conditional sentence, outside of the criteria set out in the *Criminal Code*. The Supreme Court made it clear that a number of changes needed to be made to the way in which the sanction was used. But the judgment also consists of a strong endorsement of conditional sentencing. The Supreme Court set out a number of principles, which may be summarized as follows:

1. Unlike probation, which is primarily a rehabilitative sentencing tool, a conditional sentence is intended to address both punitive and rehabilitative objectives. Accordingly, conditional sentences should generally include punitive conditions that restrict the offender’s liberty. Therefore, conditions such as house arrest or strict curfews should be the norm, not the exception.
2. There is a two-stage process involved in determining whether to impose a conditional sentence. At the first stage, the sentencing judge merely considers whether to exclude the two possibilities of a penitentiary term (incarceration for two years or more) or a probationary order as inappropriate, taking into consideration the fundamental purpose and principles of sentencing. At the second stage, 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.
3. “Safety of the community,” which is one of the criteria to be considered by a sentencing judge, refers only to the threat posed by a specific offender and not to a broader risk of undermining respect for the law. It includes consideration of the risk of any criminal activity, including property offences. In considering the danger to the community, the judge must consider the risk of the offender reoffending

and the gravity of the damage that could ensue. The risk should be assessed in light of the conditions that could be attached to the sentence. Thus, the danger that the offender might pose may be reduced to an acceptable level through the imposition of appropriate conditions.

4. A conditional sentence is available for all offences in which the statutory prerequisites are satisfied. There is no presumption that conditional sentences are inappropriate for specific offences. Nevertheless, the gravity of the offence is clearly relevant to determining whether a conditional sentence is appropriate in the circumstances.
5. There is also no presumption in favour of a conditional sentence if the prerequisites have been satisfied. Serious consideration, however, should be given to the imposition of a conditional sentence in all cases where these statutory prerequisites are satisfied.
6. A conditional sentence can provide a significant amount of denunciation, particularly when onerous conditions are imposed and the term of the sentence is longer than would have been imposed as a jail sentence. Generally, the more serious the offence, the longer and more onerous the conditional sentence should be.
7. A conditional sentence can also provide significant deterrence if sufficient punitive conditions are imposed, and judges should be wary of placing much weight on deterrence when choosing between a conditional sentence and incarceration.
8. When the objectives of rehabilitation, reparation and promotion of a sense of responsibility may realistically be achieved, a conditional sentence will likely be the appropriate sanction, subject to considerations of denunciation and deterrence.
9. While aggravating circumstances relating to the offence or the offender increase the need for denunciation and deterrence, a conditional sentence may be imposed even if such factors are present.
10. Neither party has the onus of establishing that the offender should or should not receive a conditional sentence. However, the offender will usually be best situated to convince the judge that such a sentence is appropriate. It will be in the offender's interest to make submissions and provide information establishing that a conditional sentence is appropriate.
11. The deference due to trial judges in imposing sentence generally applies to the decision whether or not to impose a conditional sentence. Although an appellate court might entertain a different opinion as to what objectives should be pursued and the best way to do so, that difference will generally not constitute an error of law justifying intervention.
12. Conditional sentencing was enacted both to reduce reliance on incarceration as a sanction and to increase the principles of restorative justice in sentencing.

The key result of the *Proulx* decision, therefore, is that there is no presumption against the use of a conditional sentence if the crime does not have a mandatory period of incarceration.

### 1.5.2 *R. v. WELLS*

Another key decision of the Supreme Court concerned the role conditional sentencing should play in relation to Aboriginal offenders. The case of *R. v. Wells*<sup>8</sup> involved a sentence of 20 months' imprisonment imposed on an Aboriginal man convicted of sexual assault. In upholding this sentence as appropriate in the circumstances, the Supreme Court found that the proper approach for considering a conditional sentence for an Aboriginal offender involves the following sequential considerations:

1. a preliminary consideration and exclusion of both a suspended sentence with probation and a penitentiary term of imprisonment as fit sentences;
2. assessment of the seriousness of the particular offence with regard to its gravity, which necessarily includes the harm done and the offender's degree of responsibility;
3. judicial notice of the "systemic or background factors that have contributed to the difficulties faced by aboriginal people in both the criminal justice system and throughout society at large"; and
4. an inquiry into the unique circumstances of the offender, including any evidence of community initiatives to use restorative justice principles in addressing particular social problems.

While no offence is presumptively excluded from the possibility of a conditional sentence, as a practical matter, and notwithstanding s. 718.2(e), particularly violent and serious offences will result in imprisonment for Aboriginal offenders as often as for non-Aboriginal offenders. Although counsel and pre-sentence reports will be the primary source of information regarding the offender's circumstances, there is a positive duty on the sentencing judge to be fully informed.<sup>9</sup> In this case, the sentencing judge did properly inform himself. The application of subsection 718.2(e) of the *Criminal Code* does not mean that Aboriginal offenders must always be sentenced in a manner that gives greatest weight to the principles of restorative justice and less weight to goals such as deterrence, denunciation, and separation. The offence in this case was a serious one, so the principles of denunciation and deterrence led to the imposition of a term of imprisonment.

### 1.5.3 OTHER RELEVANT CASES

Other cases have helped provide guidance to judges on whether it is appropriate to impose a conditional sentence rather than a term of incarceration. The case of *R. v. Knoblauch*<sup>10</sup> determined that mentally ill offenders are not excluded from access to conditional sentences. The requirement that the offender spend the period of the conditional sentence in a secure psychiatric treatment unit reduced the risk to the community to a point that it was no greater than the risk that the accused would reoffend while incarcerated in a penal institution.

In the case of *R. v. Fice*,<sup>11</sup> the Supreme Court ruled that a woman who attacked her mother with a baseball bat and strangled her with a telephone cord should have been sent to prison rather than allowed to serve her sentence in the community. In addition, the Court held that, when a sentencing judge considers the gravity of the offence and the moral blameworthiness of the offender and concludes that a sentence in the penitentiary range is warranted and that a conditional sentence is therefore unavailable, time spent in pre-sentence custody ought not to disturb this conclusion.

The case of *R. v. F.(G.C.)*<sup>12</sup> shows how the courts of appeal in Canada have developed guidelines for the use of conditional sentencing by the lower courts. The Ontario Court of Appeal pointed out that it had repeatedly indicated that a conditional sentence should rarely be imposed in cases involving the sexual assault of children, particularly where the accused was in a position of trust. Moreover, cases that involve multiple sexual activities over an extended period of time and escalating in obtrusiveness generally warrant a severe sentence.

The case of *R. v. Coffin*<sup>13</sup> furnishes an example of a court of appeal emphasizing different aspects of the sentencing principles in order to impose a sentence of imprisonment in place of a conditional sentence. The offender in this case had pleaded guilty to 15 charges of defrauding the Government of Canada. The appeal court found that the trial judge had not placed sufficient emphasis upon the facts that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender,<sup>14</sup> an important objective of sentencing is that of denunciation and deterrence,<sup>15</sup> and a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances.<sup>16</sup> Generally, a term of imprisonment was the sentence in Canada for large, planned frauds that took place over extended periods of time.

## 1.6 CONDITIONAL SENTENCING DATA

Statistics Canada reports that conditional sentences still represent a small proportion of all sentences. While the tendency in recent years has been to use conditional sentences more frequently, there was a decline in their use in 2006 and 2007. In 2002–2003, conditional sentences accounted for 8.3% of the adult correctional population.<sup>17</sup> In 2008, this figure had increased slightly to 8.6%.<sup>18</sup> In 2008, of the 119,965 adult offenders being supervised in the community, the vast majority (82%) were on probation, 11% were on conditional sentences and 7% were on parole or statutory release.<sup>19</sup>

Canada's incarceration rate in 2008–2009 rose by 1% from the previous year, the fourth consecutive annual increase. The gain was driven largely by the growing number of adults being held in remand in provincial/territorial jails while awaiting trial or sentencing. Recent increases in the incarceration rate follow a period of relatively steady decline from 1996–1997 to 2004–2005. On any given day in 2008–2009, an average of 37,234 adults and 1,898 youths aged 12 to 17 years were in custody in Canada, for a total of 39,132 inmates – a rate of 117 people in custody for every 100,000 population. Canada's incarceration rate tends to be higher

than those of most Western European countries, yet lower than that of the United States. For example, in 2008, Sweden had a rate of 74 people in custody per 100,000 population. By contrast, the rate in the United States for adults alone was 760. (The United States excludes youths from its rate.)<sup>20</sup> Statistics Canada has indicated that the implementation of the conditional sentence in 1996 provided the courts with a community-based alternative to imprisonment, and had a direct impact on the decline in the number of sentenced prison admissions.<sup>21</sup>

The imposition of conditional sentences should not only reduce the rate of incarceration, it should also reduce expenditures on the correctional system. This is due to the fact that the average annual inmate cost for persons in provincial/territorial custody (including remand and other temporary detention) in 2005–2006 was \$52,195, and the average annual expenditure related to housing a federal inmate was \$94,900<sup>22</sup> while the average annual cost of supervising an offender in the community (including conditional sentences, probation, bail supervision, fine option, and conditional release) in 2006–2007 was \$2,398.05.<sup>23</sup> Unfortunately, no recent national statistics are publicly available on the proportion of orders breached or the nature of the judicial response to breaches. An earlier survey found that the successful completion rate of conditional sentence orders fell from 78% in 1997–1998 to 63% in 2000–2001. This failure rate was largely attributed to breaches of the increasing number of conditions placed upon offenders, rather than allegations of fresh offending.<sup>24</sup>

A study of the trial courts in Ontario and Manitoba reveals an increase in the proportion of offenders being committed to custody and a corresponding decline in the proportion of offenders being permitted to continue serving their sentences in the community, following an unjustified breach of conditions. In 1997–1998, for example, 65% of offenders in Manitoba found to have breached their orders without reasonable excuse were subsequently committed to custody for some period of time; in 2000–2001, this proportion rose to 74%. In Ontario, the proportion rose from 42% to 50% over the same period. These data – the most recent breach statistics currently available – demonstrate a more rigorous judicial response to the breach of a conditional sentence order following the judgment of the Supreme Court in the *Proulx* case.<sup>25</sup>

Due to the relatively recent introduction of conditional sentencing, few academic studies of its impact upon the criminal justice system have been completed. Furthermore, there is a dearth of sentencing statistics in Canada, with even the Adult Criminal Court Survey of Statistics Canada lacking important data. A 2004 study found that conditional sentencing has had a significant impact on the rates of admission to custody, which have declined by 13% since its introduction.<sup>26</sup> This represents a reduction of approximately 55,000 offenders who otherwise would have been admitted to custody. There has also been evidence of net-widening, however; between September 1996 (when conditional sentencing was introduced) and the end of March 2001, approximately 5,000 offenders who prior to 1996 would have received a non-custodial sanction were sentenced to a conditional sentence, which is a form of custody.<sup>27</sup>

Another Statistics Canada study found that adult offenders who spent their sentence under supervision in the community were far less likely to become reinvolved with correctional authorities within 12 months of their release than those who were in a correctional institution.<sup>28</sup> The study found that in four provinces, 11% of people who were under community supervision became reinvolved with correctional authorities within 12 months of their release in 2003–2004. Among those in custody only, 30% were reinvolved – more than double the proportion of those under community supervision. The study did not, however, examine the relationship between prior criminal history and offender outcomes. Criminal history is often cited as a risk factor for repeated involvement in the criminal justice system. Furthermore, the fact that an offender received a custodial sentence may indicate that a higher level of risk is associated with such a person than with an offender being supervised in the community.

Considerable variation in incarceration rates has been found between provinces. In some jurisdictions, net-widening was quite significant; in others, the opposite occurred.<sup>29</sup> In several provinces, the reduction in the number of admissions to custody exceeds by a considerable margin the number of conditional sentences imposed. Thus, there has been a general shift towards the greater use of alternatives to imprisonment, possibly as a result of the statutory reforms introduced in 1996.<sup>30</sup> One of these changes was the codification of the principle of restraint with respect to the use of imprisonment.

In a study that concentrated upon the victims of crime and their attitudes towards conditional sentencing, the benefits of conditional sentencing are said to be that:

- most rehabilitation programs can be more effectively implemented when the offender is in the community rather than in custody;
- prison is no more effective a deterrent than more severe intermediate punishments, such as enhanced probation or home confinement;
- keeping offenders in custody is significantly more expensive than supervising them in the community;
- the public has become more supportive of community-based sentencing, except for serious crimes of violence;
- widespread interest in restorative justice has sparked interest in community-based sanctions. Restorative justice initiatives seek to promote the interests of the victim at all stages of the criminal justice process, but particularly at the sentencing stage; and
- the virtues of community-based sanctions include the saving of valuable correctional resources and the ability of the offender to continue or seek employment and maintain ties with his or her family.<sup>31</sup>

The study concluded that, while it was clear that there was an acceptance amongst victims of the *concept* of community-based sentencing, the acceptance does not extend to its use in the most serious crimes of violence.<sup>32</sup> The seriousness of such offences appeared to warrant a custodial term, in the eyes of victims. Research on conditional sentencing suggests that only a small percentage of conditional sentences

are imposed for the most serious crimes of violence. The authors of this study conclude that greater attention to the interests of victims in crafting conditional sentences could advance the restorative purposes of sentencing by providing reparation, acknowledgment of harm, and protection to crime victims. It could also help offenders understand the harms caused by their crimes and enhance the credibility of the conditional sentence as a meaningful alternative to imprisonment.

## 2 DESCRIPTION AND ANALYSIS

Bill C-16 consists of three clauses. Not all of the clauses are discussed in this Legislative Summary.

### 2.1 REPLACEMENT OF SECTION 742.1 OF THE *CRIMINAL CODE* (CLAUSE 2)

The replacement to section 742.1 of the *Criminal Code* eliminates the reference to serious personal injury offences, placing greater emphasis upon the maximum term of imprisonment applicable to *Criminal Code* offences. In addition to the existing provisions on minimum terms of imprisonment, lack of danger to the community, and terrorism and criminal organization offences, the new section further provides the following:

- A person convicted of an offence prosecuted by way of indictment for which the maximum term of imprisonment is 14 years or life is not eligible for a conditional sentence.
- A conditional sentence will not be available for certain offences, prosecuted by way of indictment, for which the maximum term of imprisonment is 10 years. These offences are those that: result in bodily harm; involve the import, export, trafficking or production of drugs; or involve the use of a weapon.
- Conditional sentences will not be permissible for the following offences, when prosecuted by way of indictment:
  - Prison breach (section 144)
  - Luring a child (section 172.1)
  - Criminal harassment (section 264)
  - Sexual assault (section 271)
  - Kidnapping, forcible confinement (paragraph 279(2))<sup>33</sup>
  - Trafficking in persons – material benefit (section 279.02)
  - Abduction by parent or guardian of person under the age of 14 years (section 283)
  - Theft over \$5,000 (paragraph 334(a))
  - Breaking and entering a place other than a dwelling-house (paragraph 348(1)(e))
  - Being unlawfully in a dwelling-house (section 349)
  - Arson for fraudulent purpose (section 435)<sup>34</sup>

The Offence Grid in the 2010 edition of *Martin's Annual Criminal Code* indicates that there are 75 separate offences with a maximum sentence of 14 years or life imprisonment. These are the offences that are addressed by new paragraph 742.1(c). Of these 75 offences, 36 are already ineligible for a conditional sentence. This is largely due to the fact that these offences have a mandatory minimum punishment attached to them or, in the case of an offence such as sexual assault, the offence fits within the definition of "serious personal injury offence" in section 752 of the *Criminal Code*. This would seem to leave 39 offences affected by this provision of Bill C-16; these are listed in the appendix to this Legislative Summary. These 39 offences cover a wide range, from conspiracy to commit murder to possession of counterfeit money. The 14-year threshold, therefore, does not distinguish between violent and non-violent offences or between personal and property offences.

Bill C-16 removes the "serious personal injury offence" aspect of section 742.1 from the conditional sentencing regime. It is this section that has ensured that a conditional sentence is not available upon conviction for sexual assault. This is, presumably, why the offence of sexual assault is included in new paragraph 742.1(f) of the *Criminal Code*, since the maximum penalty for this offence is 10 years' imprisonment and it would otherwise be amenable to a conditional sentence. This may also explain why the offence of criminal harassment is in the list of offences in proposed paragraph 742.1(f). The definition of "serious personal injury offence" includes conduct "inflicting or likely to inflict severe psychological damage on another person." The category of psychological damage is replaced in new subsection 742.1(e) with "bodily harm." Yet, criminal harassment may inflict psychological damage only and so it would be amenable to a conditional sentence, unless it were included in the special list of offences in proposed paragraph 742.1(f). The offence of uttering threats in section 264.1 of the *Criminal Code*, however, may also inflict severe psychological damage and yet a conditional sentence may still be imposed, even if Bill C-16 is adopted into law.

### 3 COMMENTARY

Vigorous debate has surrounded Bill C-16, its predecessor Bill C-42, and a similar predecessor bill, C-9, which was given Royal Assent on 31 May 2007, concerning the use of conditional sentences and their place in the sentencing scheme. This section of the Legislative Summary attempts to present the points of view on these matters as they have been expressed, with particular emphasis on media reports.

An editorial has acknowledged that restricting the use of conditional sentences will mean a greater burden for provincial jails, but asserts that this is a good thing, at least in cases of serious violence. It cites a particular case of an offence that involved planned and repeated harm to the victim where a conditional sentence of 18 months' duration was initially imposed. The Ontario Court of Appeal then ruled that the crime merited a penitentiary sentence. The editorial stated that house arrest rests on the faulty premise that a person's home can be a jail. In the end, the editorial concludes, house arrest trivializes serious offences.<sup>35</sup>

Another editorial has stated that the government is right to take away sentencing discretion from judges who cannot be trusted to use it wisely. Lawmakers are left with no choice but to remove such discretion.<sup>36</sup> The individual case cited (a scalding of a young person) was resolved at sentencing by a joint recommendation, and the editorial's author thought that the judge had brought the administration of justice into disrepute by accepting a conditional sentence. In the author's view, this was a case that called for a loud denunciation of the convicted person's conduct as well as a sentence that sent a message of specific and general deterrence. A conditional sentence in this case contributed significantly to the erosion of public confidence in the justice system.<sup>37</sup>

An earlier editorial stated that judges who give conditional sentences to those convicted of serious crimes such as manslaughter or impaired driving causing death are wrong. The author argued that it is unconscionable for people convicted of those types of serious crimes not to do jail time.<sup>38</sup> The editorial went on to say that while judges need some discretion to find the right sentence for the right situation, the option of house arrest for serious, violent crimes should be out of the question. It asserted that this is why legislation is needed to put a sentencing floor on these crimes and that governments need to start sending the message to the courts that the failed experiment of light sentencing for violent crimes is over.

These opinions appear to reflect the prevailing public attitude. A recent Angus Reid poll found that a majority of Canadians supported ending conditional sentences for crimes that are not personal injury crimes.<sup>39</sup> These opinions are also shared by Winnipeg Police Association president Mike Sutherland, who said "Police in the trenches need to know that their government is prepared to hear them and take necessary measures to keep our streets and all Canadians safe."<sup>40</sup>

Joseph Di Luca, vice-president of the Criminal Lawyers' Association, was less positive about Bill C-42, noting that conditional sentences "were a recognition by Parliament that the collateral consequences of imprisonment – in taxpayer dollars, increased exposure of first offenders to career criminals, and the low rehabilitative success of the penitentiaries – were too high."<sup>41</sup>

The executive director of the John Howard Society of Saskatchewan, Mike Dunphy, has said that conditional sentences are often longer than jail terms and that when prisoners are released sooner on parole, they roam the community under less stringent conditions than if they were under house arrest. He has asserted that earlier release is an issue for the community if inmates have not had access to rehabilitation services or sufficient time to benefit from them, and he has said that offenders also have a better chance if they are reintegrated into society by living at home under tough conditions, rather than languishing in jail under the influence of criminals.<sup>42</sup>

Another potential problem with eliminating conditional sentencing for certain offences is that it will create a need for more space in provincial jails. Elizabeth Elliott, a criminologist at Simon Fraser University, has stated that British Columbia jails are overcrowded and another one needs to be built. The cost of this is borne by the provinces. She calls for more community-based prevention programs aimed at

reducing poverty, child neglect and other root causes of crime. She argues that there is a rational and logical use for incarceration but that it is being used to “mindlessly punish.”<sup>43</sup>

In 2006, the president of the Canada Safety Council wrote in response to the argument that long prison sentences are a more effective deterrent than house arrest.<sup>44</sup> He said that if this were so, offenders who go to jail should be less likely to reoffend when released than those given conditional sentences, yet the two groups tend to reoffend at about the same rates. He continued that there is even evidence that long prison sentences without other remedial programs may actually increase the chances of reoffending after release, and he said that if an offender can be rehabilitated, conditional sentencing makes sense from a safety standpoint as it offers the potential to establish an environment for positive behaviour change.

The same commentator, now past president of the Canada Safety Council, has written that conditional sentences hold far more potential for rehabilitation and restorative justice than do terms of imprisonment. He has said that while incarceration protects the public from the offender during the time served, a conditional sentence will be far more likely to prevent the offender from continuing to endanger the public after serving the sentence.<sup>45</sup>

Howard Sapers, the Correctional Investigator, has written that program shortages are so severe they have become a threat to public safety: “[T]oo many offenders spend their time in prison without getting the corrective programs they need. ... The result is ongoing violence and despair on the inside and increased risk of individuals reoffending once released.”<sup>46</sup>

Some of those opposed to Bill C-42 said that a “one-size-fits-all” approach to sentencing is neither just nor sensible. They added that an offender on a conditional sentence is no more likely to reoffend than someone who has served his or her time in jail.<sup>47</sup> They said that, on the contrary, studies have found that offenders who serve their sentences without prison have a much better chance of rehabilitation and reintegration into society. Furthermore, according to these commentators, conditional sentences are cost-effective. The cost of imprisoning one person for one year has been estimated by a recent commentator at more than \$70,000. At that rate, every 15 people given a conditional sentence instead of a year in jail save Canadian taxpayers more than \$1 million.<sup>48</sup>

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## NOTES

1. *Criminal Code*, R.S.C. 1985, c. C-46.
2. Conditional sentences were introduced by Bill C-41, now S.C. 1995, c. 22, proclaimed in force on 3 September 1996, amending the *Criminal Code*. Amendments to the conditional sentencing regime were made by Bill C-51, An Act to amend the Criminal Code, the Controlled Drugs and Substances Act and the Corrections and Conditional Release Act, S.C. 1999, c. 5. The relevant part (clauses 39–42) came into force on 1 July 1999. Further amendments to the conditional sentencing regime were made by Bill C-9, An Act to amend the Criminal Code (Conditional Sentence of Imprisonment), S.C. 2007, c. 12. This bill came into force on 1 December 2007.

3. *Criminal Code*, s. 718.1.
4. This Legislative Summary is based, in part, on Robin MacKay, [Conditional Sentences](#), Publication no. 05-44E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 21 December 2005.
5. Alberta Justice and Attorney General, [The Conditional Sentence of Imprisonment: The Need for Amendment](#), 17 June 2003.
6. *Criminal Code*, s. 732.2(2)(b).
7. *R. v. Proulx*, [2000] 1 S.C.R. 61.
8. *R. v. Wells*, [2000] 1 S.C.R. 207.
9. Allan Manson, *The Law of Sentencing*, Irwin Law, Toronto, 2001, pp. 274–75.
10. *R. v. Knoblauch*, [2000] 2 S.C.R. 780.
11. *R. v. Fice*, [2005] 1 S.C.R. 742.
12. *R. v. F.(G.C.)*, (2004), 71 O.R. (3d) 771 (C.A.).
13. *R. v. Coffin*, (2006), 210 C.C.C. (3d) 227 (Q.C.A.).
14. *Criminal Code*, s. 718.1.
15. *Criminal Code*, s. 718(a) and 718(b).
16. *Criminal Code*, s. 718.2(b).
17. Karen Beattie, "[Adult Correctional Services in Canada, 2003/04](#)," *Juristat*, Vol. 25, No. 8, 16 December 2005, Text Table 1.
18. Statistics Canada, "[Adult correctional services, average counts of offenders in provincial, territorial and federal programs](#)," 21 December 2009.
19. *Ibid.*
20. Statistics Canada, "[Adult and youth correctional services: Key indicators](#)," *The Daily*, 8 December 2009.
21. Statistics Canada, "[Adult correctional services](#)," *The Daily*, 16 December 2005.
22. Laura Landry and Maire Sinha, "[Adult Correctional Services in Canada, 2005/2006](#)," *Juristat*, Vol. 28, No. 6, 6 June 2008, p. 7. The federal average inmate expenditures include expenditures associated with the operations of the institution, including salaries. The average inmate expenditures for provincial/territorial corrections, on the other hand, reflect only operating expenditures associated with custodial services and exclude spending associated with operating the institution, such as salaries. The difference in inmate costs may also result from the higher levels of security required in the federal system as well as the higher costs of incarceration associated with federally sentenced female offenders. In addition, there may be an increased number of treatment programs available to offenders serving longer sentences associated with federal custody.
23. Canadian Centre for Justice Statistics, *Adult Correctional Services in Canada Survey*, "Adult corrections operational expenditures, community supervision services, 2002/2003 to 2006/2007," prepared for the Library of Parliament, 8 July 2009.
24. Julian V. Roberts, "The Evolution of Conditional Sentencing: An Empirical Analysis," *Criminal Reports*, 6<sup>th</sup> Series, Vol. 3, 2002, pp. 267–83 (Table 7).
25. David M. Paciocco and Julian Roberts, *Sentencing in Cases of Impaired Driving Causing Bodily Harm or Impaired Driving Causing Death*, Canada Safety Council, Ottawa, 25 February 2005.

26. Julian V. Roberts and Thomas Gabor, "The Impact of Conditional Sentencing: Decarceration and Widening of the Net," *Canadian Criminal Law Review*, Vol. 8, 2004, pp. 33–49.
27. Ibid.
28. Statistics Canada, "[Outcomes of probation and conditional sentence supervision](#)," *The Daily*, 15 December 2006.
29. Roberts and Gabor (2004).
30. Roberts (2002).
31. Julian V. Roberts and Kent Roach, "Conditional Sentencing and the Perspectives of Crime Victims: A Socio-Legal Analysis," *Queen's Law Journal*, Vol. 30, 2005, pp. 560–600.
32. Ibid., p. 599.
33. It would seem that the offence of kidnapping in subsection 279(1) of the *Criminal Code* would be captured by other aspects of Bill C-16, as there is either a mandatory minimum punishment or a maximum punishment of imprisonment for life. Subsection 279(2), however, sets out the offence of kidnapping by means of forcible confinement, for which the maximum punishment is imprisonment for 10 years.
34. Should Bill S-9, An Act to amend the Criminal Code (auto theft and trafficking in property obtained by crime), and Bill C-16 both come into force, the new offence of "Motor vehicle theft (section 333.1)" will be added to the list of offences for which a conditional sentence will not be available, when prosecuted by way of indictment.
35. "Conditional sentences: A house is not a jail," Editorial, *The Globe and Mail* [Toronto], 26 April 2010, p. A12.
36. Tom Brodbeck, "Punish the guilty: Hound your MPs to pass Bill C-42 to ensure criminals face justice," *The Winnipeg Sun*, 21 June 2009, p. 5.
37. Tom Brodbeck, "Perverse sentencing for burning child," *The Edmonton Sun*, 19 June 2009, p. 15.
38. "Crime Bills Good Start," Editorial, *The Edmonton Sun*, 8 May 2006, p. 10.
39. David Karp, "Federal anti-crime initiatives meet with favour in B.C., poll suggests; In general, B.C. voters were more supportive of the tough-on-crime legislation than the Canadian average," *The Vancouver Sun*, 26 June 2009, p. A8.
40. Canadian Press, "Tougher stand on conditional sentences: Tory bill focuses on serious crimes," *The Winnipeg Sun*, 14 June 2009, p. 8.
41. Kirk Makin, "Criminal Code: Tories to propose law ending conditional sentences for serious crimes," *The Globe and Mail* [Toronto], 15 June 2009, p. A4.
42. Janet French, "Quennell pans crime measures: Ottawa not in synch with consensus reached by provincial ministers," *The Star Phoenix* [Saskatoon], 5 May 2006, p. A3.
43. Canadian Press, "Opposition vows to gut Tory house arrest bill," 15 June 2009.
44. Emile Therien, "Courts Need Conditional Sentencing," *The Ottawa Citizen*, 8 May 2006, p. A9.
45. Emile Therien, "Canada's increasingly flawed criminal justice system," Letter to the Editor, *The Hill Times*, 22 June 2009, p. 9.
46. Howard Sapers, quoted in "[Are prisons ready for extra inmates?](#)" *The Edmonton Journal*, 30 October 2007.
47. Edward L. Greenspan, "Unconditionally a bad idea," *The Kingston Whig-Standard*, 23 June 2009, p. 5.
48. Ibid.



APPENDIX – BILL C-16’S PROPOSED ADDITIONS  
TO THE LIST OF *CRIMINAL CODE* OFFENCES FOR WHICH  
A CONDITIONAL SENTENCE IS NOT AVAILABLE

Part of proposed paragraph 742.1(c) adds 39 offences in the *Criminal Code* to the list of offences for which a conditional sentence is not available. These offences, listed below, are those for which the maximum term of imprisonment is 14 years or life imprisonment and for which a conditional sentence is currently available.<sup>1</sup>

Offence	Section of the <i>Criminal Code</i>	Maximum Sentence
Forge passport or use forged passport	57(1)	14 years
Hijacking	76	Life
Endanger aircraft	77	Life
Take weapon or explosive on board	78	14 years
Breach of duty of care, explosives, causing death	80(a)	Life
Breach of duty of care, explosives, causing harm	80(b)	14 years
Explosives, intent to cause death or harm	81(1) (a & b)	Life
Explosives, placing or making	81(1) (c & d)	14 years
Explosives, for benefit of a criminal organization	82(2)	14 years
Bribery of judicial officers	119	14 years
Bribery of officers	120	14 years
Perjury	131, 132	14 years
Contradictory evidence with intent to mislead	136	14 years
Fabricating evidence	137	14 years
Incest	155	14 years
Accessory after fact, murder	240	Life
Overcoming resistance to commission of offence	246	Life
Dangerous operation of vehicle, etc., causing death	249(4)	14 years
Fail to stop at scene of accident knowing person is dead; or reckless whether death results	252(1.3)	Life
Criminal breach of trust	336	14 years
Public servant, refuse to deliver property	337	14 years
Stop mail with intent	345	Life
Break and enter with intent, committing indictable offence re: dwelling house	348	Life

Offence	Section of the <i>Criminal Code</i>	Maximum Sentence
Draw document without authority	374	14 years
Obtaining, etc., based on forged document	375	14 years
Fraud over \$5,000 or re: testament instrument	380(1)(a)	14 years
Intimidation of justice system participant or journalist	423.1	14 years
Wilful mischief endangering life	430(2)	Life
Arson, disregard for human life	433	Life
Arson, damage to property of others	434	14 years
Arson, damage to own property, threat to safety of others	434.1	14 years
Make counterfeit money	449	14 years
Possession, etc., of counterfeit money	450	14 years
Uttering, etc., of counterfeit money	452	14 years
Attempts and accessories, indictable, punishment by life	463(a)	14 years
Conspiracy, murder	465(1)(a)	Life
Conspiracy to commit other indictable offences	465(1)(c)	Life
Commission of offence for criminal organization	467.12	14 years
Instructing offence for criminal organization	467.13	Life

## NOTES

1. This information is taken from the Offence Grid of *Martin's Annual Criminal Code, 2010*, (Emond Montgomery Publications Limited, Toronto, 2009), and so may not be a comprehensive list. For example, the offence of piracy under section 74 of the *Criminal Code* is not listed in the Offence Grid but would be affected by Bill C-16, as the maximum punishment for this offence is life imprisonment. The Provincial Judges' Association of British Columbia developed the Offence Grid for their Judges' Handbook.