



**Community-Based Sentencing:  
Perspectives of Crime Victims  
An Exploratory Study**



# Community-Based Sentencing: Perspectives of Crime Victims An Exploratory Study

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Research and  
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*The views expressed herein are solely those of the authors and do not necessarily reflect those of the Department of Justice Canada.*





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## Highlights

- This report describes findings from a preliminary examination of community-based sanctions from the perspective of the crime victim. Interviews were conducted in Ottawa and Toronto with victims in personal injury cases in which a community sanction had been imposed (usually a conditional sentence of imprisonment (CSI)).
- The interviews took place in Ottawa and Toronto and were facilitated by personnel from the Victim/ Witness Assistance Program (VWAP).
- The victims who participated in this study were not uniformly opposed to the concept of community-based sentencing or conditional sentencing. Several individuals felt that a conditional sentence could be effective if it was tough enough and if it was adequately enforced. There was perception shared by several that the sentence should be used for less serious cases.
- Many victims found the criminal process, including the sentencing phase, to be confusing.
- Several individuals brought copies of the conditional sentence order to the interviews. Reviewing these orders, it was easy to see why the victims were baffled about the nature and conditions of the order. Several orders were missing critical pieces of information.
- Most crime victims were satisfied with their contact with Crown counsel in their case, as well as Victim/Witness Assistance Program personnel. With respect to the Crown, most victims reported having had the opportunity to provide input into the conditions that might be recommended to the sentencing court.
- Several victims remarked upon the laxity of the curfew restriction imposed on the offender in their case.
- A review of reported judicial decisions on conditional sentences suggests no uniform approach to incorporating victim interests in such sentences and infrequent conditions relating to the acknowledgment and reparation of harm done to the victims.
- The report concludes with a discussion of suggestions regarding victims and community sentencing in personal injury cases.





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# Executive Summary

## Purpose of Report

This project was designed to explore crime victims' perceptions and experiences with respect to community-based sentencing. The report describes findings from a preliminary examination of community-based sanctions from the perspective of the crime victim. It contains a review of relevant sociological research involving crime victims, as well as a review of relevant caselaw.

## Methodology

Interviews were conducted with victims in personal injury cases in which a community sanction had been imposed (usually a conditional sentence of imprisonment (CSI)). In order to supplement this information, interviews were also conducted with Crown counsel. The interviews took place in Ottawa and Toronto and were facilitated by personnel from the Victim/Witness Assistance Program (VWAP). All victims had been involved in cases in which a community sanction, usually a conditional sentence of imprisonment, had been imposed. The crimes represented a wide range of offences, including sexual assault and assault causing bodily harm. In the most serious cases the victims had sustained very serious, irreversible injuries. Discussions focused on a number of issues relating to victims' perceptions and experiences with respect to sentencing.

## Key Findings

The victims who participated in this study were not uniformly opposed to the concept of community-based sentencing or conditional sentencing. Several individuals felt that a conditional sentence could be effective if it was tough enough and if it was adequately enforced. Throughout our conversations with crime victims, it was clear that there was an acceptance of the *concept* of community based sentencing. However, it was equally apparent that for this group of individuals, this acceptance does not extend to include the most serious crimes of violence. For these crimes, the seriousness of the offence appeared to warrant a custodial term in the eyes of the victims.

Not surprisingly, many victims found the criminal process, including the sentencing phase, to be confusing. In terms of information about the sanction imposed, almost all the victims had received a copy of the probation or conditional sentence order, almost always by mail. Only two had received a copy of the reasons for sentence, but the victims were unanimous in their desire to have both documents. However, although most participants had received the court order, almost all found it confusing. Several individuals brought copies of the conditional sentence order to the interviews. Reviewing these orders, it was easy to see why the victims were baffled about the nature and conditions of the order. Several orders were missing critical pieces of information. With the exception of two individuals, all the victims reported being satisfied with their contact with Crown counsel. The Crown counsel to whom we spoke confirmed that whenever possible,

they consulted the victim with respect to conditions that might be suggested to the court in sentencing submissions. All the victims to whom we spoke were positive about the support that they had received from VWAP personnel. Most had contact with the same individual, and clearly had confidence in the information and support that they had received.

Several victims remarked upon the laxity of the curfew restriction imposed on the offender in their case. For example, in one case the offender had a 9pm to 6am curfew, which the victim perceived as being not appreciably different from the life of the average citizen, and therefore not a “punishment condition”. Perhaps the most troubling “house arrest” condition emerging from the study was one in which the offender was restricted to his house or his cottage for certain hours. According to the victim, the offender had spent most of the time at his cottage entertaining friends, and that this had coloured her perception of the sentence. Non-compliance with conditions, or the perception that the offender had failed to comply with conditions clearly disturbed a number of victims.

A review of reported judicial decisions on conditional sentence demonstrated no consistent trends in considering victim interests. Some decisions include conditions that there be no contact with the victim. Some found victim support for a community sentence to be a factor that helped justified the sentence while others concluded that such support did not accord with a concern for the victim’s continued safety. Very few reported cases contained conditions that provided acknowledgment of and reparation for the harm done to the victim; a few cases did require apologies to be made to the victim and some kind of reparation either to the victim or to organizations that provided services for similarly situated victims.

## **Future Directions**

The report concludes with a number of suggestions with respect to the interests of crime victims in personal injury cases resulting in the imposition of a conditional sentence or other community-based sentence. It is important that victims be provided with more information about:

- the nature of the sanction in general (e.g., the nature and purpose of a conditional sentence or a term of probation);
- the court’s reasons for imposing the specific community-based sanction. This should include the important sentencing factors considered by the judge.
- the specific conditions imposed on their offender;
- the consequences for the offender if he breaches a condition of the order;
- any violations of the order resulting in a breach hearing, whether these violations pertain to the victim or not;
- the final outcome of the order (i.e., whether the offender successfully completed the order, or having violated a condition, was committed to custody).



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Greater attention should be paid to crafting conditions that acknowledge and provide reparation for harms done to victims. In cases where fines are appropriate, consideration should be given to whether financial compensation to the victim will better serve the restorative objectives of sentencing.

## Conclusion

Research on conditional sentencing suggests that only a small percentage of conditional sentences are imposed for serious crimes of violence. Nevertheless, when such a sentence is imposed in these cases, the consequence is often to increase the suffering of the crime victim, whatever the benefits for the offender. Some of this suffering could be addressed by conditions that the offender not have contact with the victim, but these conditions must be explained to the victim and enforced.





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# 1.0 Introduction

## 1.1 Community-Based Sanctions

Over the past decade, most western nations have experienced an expansion of community-based alternatives to imprisonment. In conjunction with statutory directions to judges to sentence with restraint regarding the use of custody (see below), this has resulted in an increased judicial reliance on non-custodial sentencing options. A number of factors explain this increased interest and legislative activity. First, there has been a growing awareness of the limitations of imprisonment, in terms of rehabilitation as well as deterrence. Correctional experts generally agree that most rehabilitation programs can be more effectively implemented when the offender is in the community rather than custody.

With respect to deterrence, it is becoming increasingly clear that prison is no more effective a general or specific deterrent than the more severe intermediate punishments (e.g., Doob and Webster, 2004). Second, keeping an offender in custody is significantly more expensive than supervising him or her in the community. Third, public opinion research has demonstrated that in recent years, the public has become more supportive of community-based sentencing, except when applied to serious crimes of violence (see Roberts, 2002; Roberts and Stalans, 2004).

Finally, the widespread interest in restorative justice – both here in Canada (see Roach, 1999; von Hirsch, Roberts, Bottoms, Roach and Schiff, 2003) and in other jurisdictions such as England and Wales and New Zealand -- has also revitalized interest in community-based sanctions. Restorative justice promotes the use of victim compensation, and service to the community. Restorative justice responses to crime generally encourage the offender to accept responsibility, express remorse for the offence, and apologise to the victim. Research has found that many crime victims state that they appreciate these steps on the part of the offender.

The statutory amendments to the *Criminal Code* introduced in 1996 place considerable emphasis on punishing offenders in the community rather than prison (see Daubney and Parry, 1999). Bill C-41 codified the principle of restraint in sentencing. According to section 718.2(d): “an offender should not be deprived of liberty, if less restrictive alternatives may be appropriate in the circumstances”; 718.2(e) further states that: “all available sanctions *other than imprisonment* that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders” (emphasis added).

Finally, restorative purposes were added in 1996 to the traditional purposes of sentencing. Section 718(e) provides that one of the objectives of a sentence is “to provide reparations for harm done to victims or to the community” and section 718(f) provides that another objective is “to promote a sense of responsibility to offenders, and acknowledgment of the harm done to victims and to the community.” Comparable provisions exist at the youth court level in the *Youth Criminal Justice Act* (see Bala, 2003; Roach, 2003).

The virtues of community sanctions<sup>1</sup> have thus become increasingly apparent in recent years. When offenders are punished in the community, the state saves valuable correctional resources, the offender is able to continue (or seek) employment, and maintain ties with his or her family. Offenders have much to gain from serving their sentences in the community. Whatever the benefits for offenders, however, victim interests must not be overlooked. From the victim perspective, community penalties have the advantage of increasing the likelihood that the offender will be able to work and pay compensation, in the event that this is ordered by the court. In appropriate circumstances, a community sanction might also facilitate restorative objectives of acknowledgment and reparation of the harm done to the victim. At the same time, some victims, and victim rights' advocates, have expressed concern that the offender's presence in the community – particularly if he lives in the same neighbourhood – may cause additional suffering for the victim. This concern is only partially addressed by including as a condition of the community sanction that the offender is not to have contact with the victim.

If the offender has been convicted of a personal injury offence, particularly one of the more serious crimes, the victim may be apprehensive of further offending. In addition, some victim rights organizations have expressed the view that the imposition of a community sanction, even a community term of imprisonment, may depreciate the seriousness of the offence. Some victims may link the severity of the sentence to the harm inflicted; if the harm is considerable, and if a community sentence is perceived to be lenient or not properly enforced, community sentencing may exacerbate the suffering of crime victims. Whether crime victims feel this way is an issue that was explored in this research.

Research to date on community-based sentencing, and in particular the conditional sentence of imprisonment, has not explored the reactions of crime victims. It is a regrettable omission, in light of the importance of the victim in the sentencing process. We know very little about the reaction of a crime victim when the offender is ordered to discharge his sentence in the community.

The principal vehicle by which victims may provide input to the court at sentencing is the Victim Impact Statement (VIS). Victims in Canada have the right to make and deliver orally a statement describing the effect of the crime upon their lives. Courts are obliged to consider this statement when imposing sentence. Most of the research on victims and community sentencing has addressed the role and impact of the victim impact statement (see Roberts, 2003). The VIS is the vehicle by which victim interests at sentencing can be put before the court. For this reason, this study also explored the extent to which victims had submitted a victim impact statement.

## **1.2 The Conditional Sentence of Imprisonment**

One of the elements of the Sentencing Reform legislation of 1996 was the creation of a new community based sanction, the conditional sentence of imprisonment. As will be seen, this form of custody in the community carries important consequences for victims. The ambit of the sanction is broad: if the other statutory criteria are met, a court may impose a conditional

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<sup>1</sup> Throughout this report “community sanctions” refers to conditional sentences and terms of probation, which are the sanctions of principal interest in this research.



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sentence of up to two years less a day. Since approximately 96% of custodial terms are under two years in length (Roberts, 2004), the conditional sentence can be, and has been imposed for very serious personal injury offences. The proportion of the most serious offences resulting in a conditional sentence is relatively small;<sup>2</sup> nevertheless, the impact on the victim cannot be ignored.

Although this research project explored victim reactions to community sentences in general, much of the discussion focused on the conditional sentence of imprisonment. The reason for this is clear: this sanction can be imposed only on offenders that the court has deemed must be sent to prison,<sup>3</sup> in other words, offenders for whom no non-custodial sanction is appropriate. These are the more serious cases of offending. There is an obvious relationship between the seriousness of the offence and nature of victims' reactions. Victims are unlikely to have a negative reaction to the imposition of a term of probation, since it is likely to be imposed in a crime of relatively low seriousness. However, if an offender has committed a crime the seriousness of which requires the imposition of a term of imprisonment, and that individual is permitted to remain in the community, some (but by no means all) victims may find this outcome troubling. Victim reaction to conditional sentences may also play a significant role in how both those in the criminal justice system and the community at large accept conditional sentences as the most visible form of community sanction.

### **1.2.1 Community Custody vs. Prison**

If an offender is sentenced to custody, victims know that for a specified period of time (subject to parole or statutory release), the offender will be in detention. Custody is a sanction with which members of the public and victims are quite familiar. Moreover, a sentence of custody carries conditions common to all prisoners (serving their sentences at the same security level). The critical variable of a sentence of imprisonment is the *length* of sentence. In contrast, a conditional sentence is far more flexible, and cannot easily be fixed on a scale of sentence severity. All conditional sentence offenders must abide by a limited number of statutory conditions. All of these conditions relate to the offender and none to the victim.<sup>4</sup> However, in addition, judges devise and impose conditions to reflect the specific needs of individual offenders, as they may emerge from sentencing submissions or from the Pre-Sentence Report (PSR). Optional conditions may also relate to victim interests if they are also reasonable and necessary "for securing the good conduct of the offender and for preventing a repetition by the offender of the same offence or the commission of other offences."<sup>5</sup> In an important respect, these conditions define the nature and severity of the sanction.

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<sup>2</sup> For example, in 2001/02, 8% of convictions for assault causing bodily harm resulted in a conditional sentence (Department of Justice Canada, 2003).

<sup>3</sup> *Criminal Code* s. 742.1.

<sup>4</sup> *Criminal Code* s.742.3(1).

<sup>5</sup> *Criminal Code* s.742.3(f).

### 1.3 Importance of Promoting Victim Understanding and Acceptance of Sanction

A number of conditional sentence judgments have referred to the importance of the views of the public with respect to the conditional sentencing regime.<sup>6</sup> As well empirical research has explored public knowledge of, and attitudes towards the conditional sentence (e.g., Marinos and Doob, 1998; Sanders and Roberts, 2004). This concern with community reaction to non-custodial sanctions is understandable. If the general public does not understand, or accept, the conditional sentence of imprisonment, judges will lose confidence in the disposition. If this happens, the sanction will eventually fall into desuetude.<sup>7</sup> However, crime victims represent an even more important constituency than members of the public. If victims are opposed to conditional sentencing, either because they have not been given sufficient information about the sanction, or for some other reason, this also creates a problem for the sentencing process. Or, put another way, if victims support the conditional sentencing regime, this will provide the sanction with some degree of legitimacy in the community.

In several respects, victim input is also important to the sanction. This is clear from *R. v. Proulx* ([2000] 1 S.C.R. 61), wherein the Supreme Court noted that the 1996 sentencing reforms were designed not only to decrease the use of imprisonment but also to expand the use of restorative justice principles in sentencing. The Court explained at para 18:

Restorative justice is concerned with the restoration of the parties that are affected by the commission of an offence. Crime generally affects at least three parties: the victim, the community and the offender. A restorative justice approach seeks to remedy the adverse effects of crime in a manner that addresses the needs of all parties involved. This is accomplished, in part, through the rehabilitation of the offender, reparations to the victims and to the community, and the promotion of a sense of responsibility in the offender and acknowledgment of the harm done to victims and to the community.

The Supreme Court of Canada has been more enthusiastic than courts in other countries about developing a “jurisprudence of restorative justice”. It has identified “restorative justice both as a penal philosophy that focused on the needs of offenders, victims and the community affected by the crime and as a penal technique that involved community sanctions and was tied to restraint regarding the use of imprisonment.” (Roberts and Roach, 2003 at 246-7)

The Court in *R. v. Proulx* also stated that “In determining whether restorative objectives can be satisfied in a particular case, [and hence whether a conditional sentence is imposed] the judge should consider the offender’s prospects of rehabilitation, including whether the offender has proposed a particular plan of rehabilitation; the availability of appropriate community service and treatment programs; whether the offender has acknowledged his or her wrongdoing and

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<sup>6</sup> For example, in the unanimous judgment in *R. v. Proulx* [2000] 1 S.C.R. 61, the Supreme Court noted that: “trial judges are closer to their community and know better what would be acceptable to their community.” (at para 131; emphasis added).

<sup>7</sup> This was the case with the suspended term of imprisonment in England and Wales (see discussion in Roberts, 2004).



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expresses remorse; *as well as the victim's wishes as revealed by the victim impact statement*" (at para 113; emphasis added).

There is another element of the *Proulx* judgment that pertains to the interests of the victim. The Court noted that: "In my view the use of community service orders should be encouraged... By increasing the use of community service orders, offenders will be seen by members of the public as paying back their debt to society. This will assist in contributing to public respect for the law" (para 112). Once again the judgment is sensitive to the nature of public reaction: if members of the public see the sentence as having an important impact on the life of the offender, they are more likely to accept the sanction as a substitute for a term of institutional imprisonment.<sup>8</sup> The corollary of this proposition is that if the public believes the offender's life has not been changed by the sentence, support for the conditional sentence will decline. Victim input is important here too. If victims feel that the offender's life has been seriously constrained, they will be more likely to accept the sanction as an adequate substitute for a custodial sentence served in a correctional facility. On the other hand, if offenders are seen to be violating their conditions, or if the court order appears to have had little impact on the life of the offender, victims will have a negative view of the sanction. For this reason, victims' perceptions regarding the administration of a conditional sentence were one of the issues explored in this research.

### **1.3.1 Nature of the Input**

The crime victim may have specific security needs that can be addressed by the conditions imposed. For example, victims may feel threatened if the offender visits their workplace or walks past their residence. In the research workshops on the role of the victim conducted for the Policy Centre for Victim Issues by Young and Roberts (2001), victims' advocates expressed concern over the adequacy of supervision of offenders serving sentences in the community. In addition, reparation is a key component of community sentencing, and the victim is best placed to provide input regarding this issue. These issues were therefore explored in this study.

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<sup>8</sup> For an empirical demonstration of this proposition, see Sanders and Roberts (2000). Public support for conditional sentencing increased significantly when members of the public were provided with information about the specific conditions attached to the order.





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## 2.0 Methodology

### 2.1 Sources of Information

The goal of the present research therefore was to explore the experiences and perceptions of crime victims in cases in which a community based sentence had been imposed. This generally means either a conditional sentence of imprisonment or a probation order. We addressed a limited number of research questions, by means of in-depth interviews with individual or small group discussions. The questions pertained to victims' experiences and perceptions regarding community sentencing. Specifically, we were interested in their perceptions of:

- the concept of community sentencing;
- the sentence imposed on the offender in their case;
- the extent to which they had input into the sentence;
- the nature of conditions imposed;
- the adequacy of supervision of offenders serving sentences in the community;
- the nature of the official response to breach of conditions.

We were also interested in the level of information that they had acquired about the sentencing process, and the role of the victim. Most members of the public subscribe to a number of myths about the criminal process. For example, many people believe that the Crown "represents" the victim, in the same way that defence counsel represent accused persons (Roberts, 2002). Since victims enter the criminal justice system with the same level of knowledge of the justice system as members of the public, they may well hold the same misperceptions. Unless these misperceptions are dispelled, victims may well react negatively to the experience of appearing as a complainant/ witness.<sup>9</sup> In addition, research on victims in other jurisdictions has shown that victims sometimes have unrealistic expectations of the sentencing court, and when these expectations are unfulfilled, evaluations of the justice system (and of judges) become more negative.

In writing this report we have drawn upon the following sources of information:

- focus groups composed of crime victims in Ottawa;
- interviews with crime victims who were unable or unwilling to participate in group discussions in Ottawa and Toronto;
- interviews with Crown counsel with particular experience dealing with crime victims;
- interviews with victims' advocates;
- a review of the social science literature upon this issue;<sup>10</sup>

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<sup>9</sup> VWAP personnel and Crown counsel can (and do) play an important role in educating crime victims about their role in the sentencing process, and preparing victims for the sentencing decision.

<sup>10</sup> The search was conducted by the Centre of Criminology Library at the University of Toronto, with additional research undertaken by a research associate at the University of Ottawa.

- a review of the relevant and reported caselaw since the key judgment from the Supreme Court pertaining to conditional sentencing (*R. v. Proulx*).

The research aimed to explore victims' reactions to community sentences, but as will be seen, other issues arose during the discussions. The limited resources and time scale of the study precluded a quantitative analysis based upon a representative sample of victims. Instead, we pursued the research questions with a small number of victims. By drawing upon different sources of participants we hoped to assemble a diverse sample of crime victims. During the course of the discussions/ interviews, we sought reactions that were common to a number of individuals. Clearly, we cannot generalize the findings from this group of victims to all crime victims, all victims in which a community sanction was imposed or even all victims in violent offences resulting in a community sentence. Nevertheless, we have confidence that we have learned lessons about victims' reactions to the issue that apply to more than simply the individuals interviewed for this study.

## 2.2 Victim Focus Groups/ Interviews

All the victims in this research were female victims of a personal injury offence. Eighty percent of the participants were involved in a case resulting in the imposition of a conditional sentence of imprisonment; in the remaining cases a term of probation had been imposed. The crimes represented a wide range of offending, including sexual assault *simpliciter*, and assault causing bodily harm. In the most serious cases the victims had sustained very serious, irreversible injuries. In order to protect their privacy, crime victims were contacted initially by VWAP personnel,<sup>11</sup> and asked if they would be willing to participate in the study. If they responded affirmatively, they were sent a letter containing a complete description of the study's scope and aims. Victims were subsequently contacted by one of the researchers, and a mutually convenient time was arranged for the two group discussions. In Ottawa, the sessions were attended by the principal researcher, a rapporteur, and a representative from the Victim/Witness Assistance Program. We thus constructed a purposive sample of victims that was clearly diverse with respect to the nature and seriousness of the offences.

In Toronto, victims were interviewed individually with a representative from the Victim/Witness Assistance Program present. All victims<sup>12</sup> were informed of their right to see a copy of the research report once it was available, and were encouraged to contact VWAP, the researchers or the Research Division of the Department of Justice Canada if they had any further questions about the study. Consistent with standard ethical guidelines, participants were guaranteed anonymity, and had the right to withdraw from the study at any point. Participants were informed in the letter, and reminded in the discussions or interviews, that the research project was not in any way related to the judicial proceedings in which they had been involved. As

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<sup>11</sup> We also attempted to contact victims through other means, namely through non-governmental agencies, but were unable to generate any additional participants.

<sup>12</sup> In all, 14 victims participated; 6 in one of two groups and eight by means of individual interviews. We encountered considerable difficulty in generating participants, and explored a number of possible sources of participants. Not surprisingly, most violent crime victims have little interest in reliving the traumatic events associated with their victimization, including the criminal proceedings in which they were involved.



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noted, a number of victims were unable to attend the group session; the principal researcher interviewed these participants individually.

### **2.3 Interviews with Crown Counsel and Victims' Advocates**

In addition to the discussions and interviews with crime victims, interviews were conducted with a small number of Crown Counsel and Victims Advocates.<sup>13</sup> Prosecutors play a critical role in the sentencing process, and act as a bridge between the court and the crime victim, without losing sight of their role to act on behalf of the state. The interviews were conducted in person or by telephone, with the same conditions of anonymity adopted for the interviews with crime victims. The intention was not to create a representative sample of prosecutors, but rather to explore the experience and opinions of certain individuals with particular experience relating to crime victims.<sup>14</sup>

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<sup>13</sup> In light of the extremely heavy caseload of Crown counsel, the researchers express their appreciation to the five individuals who took the time to participate in this study.

<sup>14</sup> For example, one Crown had participated in numerous conferences addressing the interests of the victim, while another had extensive experience handling sexual assault prosecutions.





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### 3.0 Victims and Community Sanctions: Findings from Previous Research

Although there has been a great deal of research into the place of the victim in the criminal process in Canada (e.g., Roach, 1999; Young, 2001), as well as specific victim-related initiatives such as Victim Impact Statements (e.g., Meredith, 2001; Roberts, 2003), very little research has explored victims' general reactions to community-based penalties. It is an important oversight, in light of the increased interest restorative justice (see Roach, 2000; Roberts and Roach, 2003). Restorative initiatives seek to promote the interests of the victim at all stages of the justice process, but particularly at the stage of sentencing. Recent decisions from the Supreme Court of Canada have also stressed the importance of both community-based sentencing and the importance of the victim (Roach, 2000).

The few studies on victim responses to community sanctions are quite old, and of rather limited relevance today. For example, Hudson and Galaway's (1980) volume contains chapters exploring victim perspectives on restitution, but these contributions were written during a period in which Victim Impact Statements had yet to be introduced, and when the expansion of community-based sentencing had yet to take place.<sup>15</sup> The only study that directly explored victims' reactions to community sentencing is an exploratory study conducted 25 years ago and reported by Henderson and Gitchoff (1983). The researchers conducted interviews with a small number of victims.<sup>16</sup>

Henderson and Gitchoff report that victims knew little about alternatives to incarceration: "It was apparent that the victims were unaware of the costs of incarceration, were unaware of community service as a sentencing option, and seldom considered restitution as a part of sentencing because they were uninformed of its availability" (1983, p. 49). Of course, much has changed in 25 years, and it is likely that victims today are provided with more information about the range of penalties available.<sup>17</sup> These researchers also found that victims initially voiced a desire that the offender be committed to prison, but that their views changed after having been provided with information about the alternative sanctions available to a court. Henderson and Gitchoff concluded that: "we found that victims were quite willing to move away from a position of retribution if given viable alternatives" (p. 49). More recent scholarship supports this finding. For example, Erez (1994) concluded that: "The "retributive" element in some victims' preferences for certain sentencing outcomes may result from lack of knowledge about alternative dispositions" (p. 21).

The limited Canadian research in this area suggests that victims are often dissatisfied with sentencing outcomes, but once again it is unclear whether this reflects unrealistic expectations about sentencing outcomes. This finding emerges from the landmark research conducted by John Hagan a generation ago. Hagan (1983) found that almost two thirds of crime victims

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<sup>15</sup> Victim impact statements were introduced in Canada in 1988.

<sup>16</sup> The research report does not state the exact number of victims interviewed.

<sup>17</sup> In addition this study took place in another jurisdiction (the United States).

perceived the dispositions imposed in their case to be too lenient. It must be recalled however, that this study was also conducted before the introduction of victim impact statements. The introduction of this reform may have attenuated victim dissatisfaction; research has demonstrated that victims are more positive about the outcome of the hearing if they have had some input into the process (see Young, 2001).

There are two principal sources of information about victims' reactions to community sentencing: in-depth studies of victims who have passed through the criminal process, and large-scale victimization studies (e.g., Hough and Moxon, 1985; Hough and Roberts, 1998; Tufts, 2000; Tufts and Roberts, 2002). In studies of "official" victims (i.e., those in the system), interviews are usually conducted with victims after the sentencing hearing. In the victimization studies, respondents are asked about the penalties that they believe would be appropriate. These studies include the responses of victims who have not participated in the criminal justice system, often because they did not report the incident to the police.

If victims are dissatisfied with the severity of sentences imposed, differences should emerge between their sentencing preferences and those of the general public. The general finding from a series of studies in several countries (including Canada) is that victims' sentencing preferences do not differ significantly from those obtained from non-victims (e.g., Hough and Moxon, 1985; Brillon, 1988; Hough and Roberts, 1998; van Dijk and Steinmetz, 1988). For example, Sprott and Doob (1997) draw upon the 1993 General Social Survey in Canada and found that "victims of violence were not more punitive than were victims of property crimes or non-victims" (p. 285).

The most recent exploration of this issue drew upon the General Social Survey (GSS) in Canada. Tufts (2000) compared the sentencing preferences of victims and non-victims. She found no differences between the reactions of victims and non-victims with respect to the sentencing of first offenders<sup>18</sup>. In fact, when asked to evaluate the criminal courts, victims and non-victims respond in a similar fashion, as can be seen in the following Table 1.

<b>TABLE 1: PERCEPTIONS OF THE CRIMINAL COURTS IN CANADA: PERCENTAGE OF RESPONDENTS RATING THE CRIMINAL COURTS AT DOING A GOOD JOB</b>			
	Victims of Violent Crime	Victims of non-violent crime	Non-Victims
Ensuring a fair trial for the accused	40%	41%	40%
Determining whether the accused is guilty	21%	20%	21%
Helping the victim	15%	13%	16%
Providing justice quickly	11%	10%	14%

Source: Adapted from Tufts (2000).

<sup>18</sup> Differences did emerge when both categories of respondent were asked to sentence repeat offenders, with victims responding more punitively.



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These findings are important because they suggest that as a group, victims are not likely to be more opposed or receptive to community sentences than members of the public. Moreover, victims' sentencing preferences are generally close to the sentences imposed by courts. The principal difference between victims and the general public in terms of sentencing appears to concern reparation: not surprisingly, crime victims assign more importance to reparation.

When crime victims are asked to select an appropriate sentence for the offender in their case, they often choose community-based sanctions. A typical example of such a study was reported by Lutz, Fahrney, Crew and Moriarty (1998), who analysed responses to a state-wide survey of several categories crime victims in Iowa.<sup>19</sup> When asked to identify an appropriate disposition, victims of all kinds of crimes advocated treatment for their offender. Of all assault victims, only one-quarter favoured incarcerating the offender. The percentage of sexual assault victims favouring the incarceration of the offender was higher; however, 40% of these victims still endorsed a community-based sentence rather than custody (Lutz et al. (1998)). Lutz et al. concluded that: "The comparatively large percentage of respondents selecting alternative sentences to prison....suggests Iowans want more from their criminal justice system than only incarceration of offenders" (1998, p. 53).

### 3.1 Perceptions of Severity

Although few studies have addressed the issue, the argument is often advanced that if victims perceive the sentence imposed as being too lenient (in light of the seriousness of the offence), they be dissatisfied with the sentencing process. This may promote their suffering and result in alienation from the justice system. There is in fact empirical support for this proposition from a careful study of crime victims' reactions to the criminal process. Tontodonato and Erez (1994) explored the effects of the justice system on the distress levels of crime victims. These researchers explored the impact of a number of variables on distress levels, including the nature of the offence, demographic variables such as sex and age, and victims' perceptions of the severity of the sentence eventually imposed.

Tontodonato and Erez (1994) found that victims' perceptions of the adequacy of the sentence exercised an important influence over their reactions to victimization. The researchers concluded that: "Sentence leniency, or what is perceived as a light sentence colors the way the victim recalls his or her reaction to the victimization and further contributes to feelings of distress associated with the experience. A sentence of sufficient severity, on the other hand, may give the victim the feeling that 'justice has been done'" (p. 50).

Of course, whether a given disposition is "sufficient" is a subjective judgment; the same sentence will be judged differently by different victims. However, to a degree reactions to sentencing will be determined by expectations; if victims expect most offenders to be imprisoned, and for durations in excess of a year, they may feel that a 44-day term of custody is too lenient. If victims are aware that most sentences imposed in Canada do not involve custody, and that the median sentence of custody is 44 days,<sup>20</sup> they may evaluate the same 30-day sentence in a

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<sup>19</sup> The categories were: property crimes; assault; sexual assault; threats.

<sup>20</sup> See Reed and Roberts (1999). In 2001/02, four out of five custodial sentences were under 3 months (see Carriere, 2003); the median sentence was not published).

different light. For this reason alone it is vital that crime victims hold realistic expectations of the sentencing process.

### **3.2 Summary**

The following points emerge from the literature:

- very little systematic research has explored the reactions of victims to community sanctions, despite the growing use of these dispositions, and the increased attention paid to victims in the criminal process;
- surveys of the general public and crime victims reveal that both have little systematic knowledge of the sentencing process;
- the more severe community sanctions (particularly those that replace terms of custody such as the conditional sentence) are likely to create the most difficulty for crime victims as they are imposed in the more serious cases;
- there is some evidence that if victims are given information about community sanctions, they are more supportive of the concept of punishing offenders in the community;



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## 4.0 Conditional Sentence and Victim Interests: Recent Caselaw

Reported caselaw since *R. v. Proulx* ([2000] 1 S.C.R. 61) was reviewed with particular attention to judicial discussion of victim interests, interpretation of the restorative principles of sentencing in providing acknowledgement and reparation to victims and the community for the harm caused by crime and conditions in conditional sentences that may address the concerns and interests of victims.

*R. v. R.A.R.* ((2000) 140 C.C.C.(3d) 523) was a companion case to the landmark case of *R. v. Proulx* discussed above. It involved an offender who was convicted of sexual assault and two counts of assault against a young woman who worked on his farm. The trial judge sentenced the accused to one year in prison with \$12,000 in fines. The Manitoba Court of Appeal imposed a nine-month conditional sentence with conditions of house arrest, community service and rehabilitative programs. The court was influenced by the fact that the accused had subsequent to his conviction paid \$10,000 to the complainant pursuant to a settlement of a human rights complaint.

In a divided decision, the Supreme Court would have restored the sentence of imprisonment given the emphasis placed on denunciation and deterrence of sexual assault. Justice L'Heureux-Dube stated the following for the majority:

“Although the Court of Appeal made no finding that the respondent showed voluntary signs of remorse or acknowledged responsibility for his acts, it did note that since the imposition of the original sentence, he had made a payment of \$10,000 to the complainant pursuant to a settlement of the complainant’s proceedings before the Manitoba Human Rights Commission relating to the same incidents. This weighed in favour of restorative objectives and therefore of a conditional sentence...In my view, however, this factor was not so important as to outweigh the need for a one-year sentence of incarceration in order to provide sufficient denunciation and deterrence, as found by the trial judge” (at para 30).

Although this case reveals judicial reservations about the ability of conditional sentences to fulfill the penal goals of deterrence and denunciation, it also recognizes that reparation and perhaps other victim oriented actions and conditions could fulfill the restorative objectives of sentencing in ss.718(e) and (f). These provisions added to the *Criminal Code* in 1996 direct judges to impose just sanctions that “provide reparations for harm done to victims” and “to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and the community.” *R.A.R.* also suggests that the restorative and reparative objectives of sentencing should not necessarily be restricted to restitution of easily calculable pecuniary damages.

In *R. v. Bratzer* ((2001) 160 C.C.C. (3d) 272), the Nova Scotia Court of Appeal rejected an appeal of a conditional sentence for armed robbery at three gas stations. The accused had been willing to meet with the victims but “as might be expected, the victims did not want to participate. Mr. Bratzer wrote and provided to the court an lengthy letter of apology to each of the three victims.” (para 31). The Court of Appeal considered the victim impact statement, but relied on the caution in *R v. Sweeney* about their use. The conditional sentence of two years less a day was described as based on “strict conditions” including house arrest, but did not relate specifically to the interests of the victims.

This case suggests that in some cases, victims will not be interested in meeting the offender even if the offender is willing to apologize and attempt to make amends for the offence. The case demonstrates judicial respect for the wishes of the victim and may suggest that some victims of serious crimes may not be interested in attending restorative meetings with offenders. At the same time, it is not known whether adequate resources were expended in this case or exist in general to lay the groundwork for potentially restorative meetings between victims and offenders. It is increasingly recognized that restorative justice does not just spontaneously happen and that resource-intensive groundwork is necessary to prepare offenders, victims and the community before they can engage in potentially restorative meetings.

As discussed above, some of the most difficult issues with community sanctions arise when they are used in cases of serious violence. Because only a subset of conditional sentence judgments are reported and or appealed, serious cases are likely over-represented in the reported jurisprudence concerning conditional sentences. Nevertheless, this provides a good vehicle for discussing some of the most difficult issues concerning community sanctions and their effects on victims.

Conditional sentences have been considered in a number of cases involving sexual violence. In *R. v. C.R. P.* ((2001) O.J. No. 1595), a 15-month conditional sentence was ordered with respect to an Aboriginal offender who had sexually assaulted his niece on four occasions when she was between 8 and 14 years of age. The victim impact statement indicated that the victim was “affected by shame, guilt and anger”. The trial judge stated:

“Reparation to the victim and promoting responsibility on the part of the accused would be assisted by an apology and admission of wrong doing by C.R.P., even if ordered by the court. The accused shall, with the assistance of his conditional sentence supervisor, write a letter of apology to J.W. admitting his wrong, and apologizing for the harm done to her. The letter may be sent to the Crown Attorney’s Office at Sault Ste Marie, who shall pass it along to J.W.” (at para 15).

Other conditions included participation in rehabilitation programs for child abusers, 100 hours of community service, house arrest and non-association with the victim or any unsupervised child less than 14 years of age. This case raises the question of whether a letter of apology would serve a meaningful purpose in acknowledging harm done to the victim. It also raises the issue of whether a court ordered letter of apology would represent a genuine and sincere gesture of remorse. More study is required about how victims of crime perceive apologies for crime.



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In *R. v. Longboat* ((2003) O.J. No. 598), two Aboriginal offenders who had sexually assaulted a sleeping woman were both sentenced to conditional sentences of two years less a day. A victim impact statement had indicated that “the victim is very unhappy, scared to go out. She has headaches. She speaks about feeling unsafe and the negative effect this has had on her relationship and her life.” (para 6). The judge expressed concern that some statements made by the offenders’ families indicated that: “they have not recognized the guilt of the accused or accepted that guilt, they do not have empathy for the victim. The victim must be recognized. Here a sleeping woman is assaulted sexually by not one, but two men acting together, an abhorrent act, which cannot be forgotten. An act that will obviously have long-term serious effects on her life as borne out by the sad tone of the witness statement.” (para 14). The judge imposed a condition that the offender was not to be within 50 metres of the victim including her home, school, or place of work. This order applied for the duration of the conditional sentence and for two additional years of probation. Another condition required each of the offenders to pay \$1,000 within a year to an Aboriginal woman’s shelter on the Six Nations Reserve. (para 71).

This case is an example of the common use of no contact conditions as a means of recognizing victim interests. As suggested above, the effectiveness of such conditions in responding to fears and anxieties that victims may have needs to be studied. This case also involves the payment of money as a means of making amends. Unlike in *R. A.R.*, the payment was not made directly to the victim but rather to an organization that provides services to other victims of male violence.

A number of reported conditional sentence cases involved spousal violence. In *R. v. M.S.R.* ((2002) B.C.J. No. 845), the British Columbia Court of Appeal set aside a sentence of three years imprisonment for aggravated assault by an Aboriginal man against his estranged wife. It imposed a 21 month conditional sentence followed by 2 years of probation with optional conditions of abstaining from alcohol, attending anger-management, engaging in cultural ceremonies, assisting the community in a family violence forum, performing 240 hours of community service and observing a curfew.

Prowse J.A. stressed new evidence that the accused had overcome his alcohol problem and that the community expressed a willingness to assist in the community sentence. She added: “I also place weight on the fact that the victim of this offence has stated that she no longer feels threatened by his presence in the community. These are matters which were unknown to the sentencing judge.” (para 29). At sentencing, the offender had apparently blamed the victim for his actions that included a stabbing (para 27). *M.S.R.* demonstrates a concern about the views of both the community and the victim in deciding whether a community sentence is appropriate in cases of spousal violence. It also raises the issue of whether a victim would feel comfortable objecting to a community sanction that was supported by the community.

In *R. v. MacDonald* ((2003) 173 C.C.C. (3d) 235), the Nova Scotia Court of Appeal overturned a conditional sentence of 2 years less a day with alcoholism treatment condition for aggravated assault against a spouse. The victim had requested leniency and a non-custodial sentence for the offender, noting that she intended to continue to live with him. The Court of Appeal imposed a sentence of 22 months imprisonment followed by three years’ probation. It stressed the need for denunciation and deterrence, but also expressed concerns about the safety of the victim. Bateman

J.A. stated: “It is counter-intuitive to permit a violent offender to continue to cohabit with the victim, even though the victim is a willing participant. That would surely undermine confidence in the administration of justice.” (para 41). The Court of Appeal also concluded that the offender’s “expression of remorse rings hollow in the case of this second assault upon the same victim.” (para 50). This case shows an unwillingness to follow the wishes of the victim in a spousal violence case, but also a concern about the victim’s safety.

In *R. v. Nensi* ((2001) O.J. No. 5655 (Ont. Ct. J.)), a conditional sentence was rejected in a case of spousal assault, assault causing bodily harm, threatening death and assault with a weapon. The judge held that: “a community sentence would endanger the safety of the victim and potential other partners and thereby the safety of the community.” (para 45). The six months imprisonment would be followed by two years of probation with victim-related conditions of no contact with the complainant (who had divorced the accused) or her family, as well as counselling. In a case of criminal harassment of a former spouse, another judge found that a conditional sentence was not appropriate given the continued danger to the spouse. He also noted that such a sentence would fail to serve the penal purposes of s.718(f) of promoting a sense of responsibility in the offender or acknowledging the harm that was done to the victim and the community. The sentence imposed was a five-month term of imprisonment followed by three years probation with a non-contact order unless it involved communication on the phone about the children of the marriage and a \$200 contribution to a Transition House (*R. v. Simms* ((2002) N.J. No.3 (Prov. Ct.))). Once again, the reparation was directed not towards the actual victim, but towards an organization that provided services to similar victims. It was also a more nominal sum than the \$10, 000 that was paid to the victim in *R.A.R.* or the \$1000 that was ordered paid to the woman’s shelter in *Longboat*.

These cases of spousal violence demonstrate rejection of conditional sentences in cases of spousal violence and the use of no-contact conditions in subsequent periods of probation as a means of recognizing the interests of the victim at sentencing. The last case also demonstrates the use of nominal contributions to organizations that provide services for victims as a means of advancing the restorative and reparative purposes of sentencing.

Conditional sentences are also considered in reported cases concerning dangerous and/or impaired driving causing death and/or bodily harm. In *R. v. Duchominsky* ((2003) 171 C.C.C. (3d) 526), the Manitoba Court of Appeal substituted a conditional sentence, with no victim specific conditions, for a sentence of 2 years less a day imprisonment on two counts of dangerous driving causing death and three of dangerous driving causing bodily harm. In another recent case, an Alberta provincial court judge ordered a two-year less a day conditional sentence for a teacher convicted of dangerous driving causing death. There was evidence of considerable remorse on behalf of the offender and the trial judge devised extensive and creative conditions.



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None, however, related to the interests of the victims' family. The trial judge did, however, preface his extensive reasons for sentence by stating that no sentence:

"can adequately reflect the loss of Kristen's life, or your own loss from her death. It may seem to you that what I will say may be vastly disproportionate to the tragedy of her death. That does not in my mind diminish what I have heard said about Kristen or the impact of her death. I cannot begin to imagine the extent of your sorrow nor the devastation resulting from her needless death. Any attempt to relate the sentence I am about to impose to that loss, risks insulting your loss. There is and can be no meaningful relationship – whatever sentence anyone might impose." (*R. v. Iftody* ((2003) A.J. No. 100 (Prov. Ct.), para 2).

These cases suggest that at times judges conclude that conditions cannot offer a meaningful form of acknowledgment or reparation to families for the death of victims.

In *R. v. Sandreswaren* ((2001) O.J. No.3933), a conditional sentence was held to be inappropriate in a case of a drunken driver convicted of criminal negligence causing death. The judge ordered a sentence of two years imprisonment in part to allow the offender to participate in community programs warning of the dangers of drinking and driving. The judge, Cole J., regarded a 240-hour term of community sentence as a fair equivalent to an additional year of imprisonment:

"From all that I know about the accused, I am entirely prepared to accept that he truly wishes to make amends for the inestimable wrong he has caused. It seems to me that the current state of the dialogue around restorative justice in Canada -- at least when we talk about adult offenders -- places substantial emphasis on the offender's duty or obligation to provide reparations to the community" (para 63).

This case shows judicial willingness to craft probation conditions that advance the interest of acknowledging harm to the community, as opposed to the individual victim. As in the above cases, the focus on acknowledgement of harm to the community (as opposed to the victim) seems to be based on an implicit recognition that conditions cannot adequately recognize or repair the harm to families who have lost loved ones as a result of crime. It may also recognize a perhaps accurate perception that the family of the victim might not want contact with the offender.

Although many reported decisions on conditional sentencing relate to offences involving violence or serious harms, some relate to property crimes. In *R. v. MacAdam* ((2003) 171 C.C.C. (3d) 449), the Prince Edward Island Court of Appeal entered a conditional sentence in a fraud case with no conditions of reparation. It overturned a sentence of imprisonment and a probation order that required the offender to make restitution to the victims (who had been sold used cars with rolled back odometers). The majority of the Court of Appeal emphasized problems relating to the quantification of the damages to the victim and the danger that the offender could be charged with breach of probation if he could not make restitution.

A dissenting judge in *MacAdam* would have deferred to the trial judge who had emphasized the accused's lack of remorse and his failure to indicate that he did not have the means to make restitution to the victims. The concern about an offender being found in breach of a community sanction such as a conditional sentence or probation because they are financially unable to make reparation is a legitimate concern, but one that could be addressed by variation of conditions or by recognizing that a lack of necessary funds may be a reasonable excuse for failure to comply with reparative conditions (Manson, 2001).

In *R v. Watkinson* ((2001) 153 C.C.C. (3d) 561), the Alberta Court of Appeal also overturned a sentence of imprisonment in a fraud case and entered a conditional sentence. It indicated that the restorative objectives of sentencing could be satisfied by conditions requiring community service and addiction counselling. In both of these fraud cases, conditional sentences did not provide reparation to the victims of the fraud. We will address reforms that may encourage judges to order reparation for victims more often in a subsequent part of this report.

## 4.1 Summary

Reported cases since *R. v. Proulx* demonstrate a range of approaches to victim interests and conditional sentences. Starting with dicta from the Supreme Court of Canada in *R.A.R.*, there is some willingness to recognize that money paid to victims or organizations that provide services for victims may serve reparative purposes. At the same time, the reported cases involving property crimes do not demonstrate conditional sentences being used to achieve financial reparation. There are concerns that conditional sentences are not designed in a manner to encourage the compensation of crime victims. (Roach, 1999b) Some of the cases show a willingness to encourage attempts at non-financial acknowledgment of harm through conditions such as letters of apology, but others demonstrate respect for the decisions of victims that they do not want to meet with offenders.

In cases of spousal violence, appellate courts have taken different approaches, with some accepting conditional sentences in part because victims have not opposed them, while others have concluded that concerns about the safety of the victim should prevail over the wishes of the victim that the offender should serve his sentence in the community. In cases where victims have suffered the loss of loved ones, judges tend to focus on reparation and acknowledgment of harm to the community on the assumption that conditions are not up to the task of serving these purposes in relation to the victims.



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## 5.0 Reactions of Crime Victims

Each crime victim is an individual with unique experiences and opinions. As one experienced Crown noted, victims' reactions are dependent upon a range of factors, including the seriousness of the offence, the duration of the judicial proceedings, the treatment the individual received from legal and para-legal professionals and many other factors. The challenge to the researcher is therefore to uncover issues that are common to a number of people. Several such concerns emerged during the course of the interviews and focus group discussions. We begin with the question of victims' general reactions to community sentencing, and then turn to the critical question of level of knowledge about the sentence imposed.

The victims who participated in this study were not uniformly opposed to the concept of community-based sentencing or conditional sentencing. Not surprisingly, the level of awareness of the sanction varied considerably across victims. Several individuals felt that a conditional sentence could be effective *if it was tough enough and if it was adequately enforced*. However, there was a perception shared by several victims that the sentence should be used for less serious cases. One victim expressed it in the following way: "It should be given to teenagers. It's like being grounded." Two victims in Ottawa indicated that they were satisfied with the imposition of a conditional sentence in their case because it was the offender's first offence and they felt the embarrassment caused by the conviction was itself a significant punishment. Another victim agreed that a conditional sentence was appropriate because they felt the offender needed help, and because they didn't feel imprisonment would benefit the offender or the community. This is an example of victims supporting restorative principles.

Similarly, the victims in cases in which a suspended sentence had been imposed did not react negatively to the idea that the offender was not in prison, although they did have concerns about possible violations of conditions. One of the probation case victims described the sentence as one that she "thought was fair". However, she too expressed a desire for information about the offender's whereabouts (see below). Two victims expressed the view that the offender's presence in the community had created a kind of home confinement for them; they were apprehensive about encountering the offender in their neighbourhood.

### 5.1 Level of Knowledge

Despite the efforts of Crown counsel and VWAP personnel, the complexities of the justice system represented a challenge for the victims. Not surprisingly, many victims found the criminal process, including the sentencing phase, to be confusing. One individual brought us a copy of a memoir that she had written about the experience wherein she wrote: "I was so confused by it all.....how people can change their minds, enter different pleas [at the] last minute, it is a tough world trying to understand the judicial system". Another individual described the criminal process as akin to "entering a whole new world", and yet another said "it was all totally new to me". One victim said that even now [at the time of the interview] "I don't know what I can and cannot ask". Several victims said that they felt "out of the loop", and did not know whether or when someone would get back to them in response to their queries.

In terms of information about the sanction imposed, most of the victims had received a copy of the probation or conditional sentence order, almost always by mail. Only two had received a copy of the reasons for sentence, but the victims were unanimous in their desire to have both documents. However, although most participants had received the court order, almost all found it confusing; their knowledge of the conditions imposed, and the likely consequence for the offender in the event that the conditions were violated, came from contact with VWAP personnel (or the Crown) rather than the document itself. One individual was unclear whether the offender had been sentenced to a conditional sentence of imprisonment or a term of probation.

Another victim who was generally satisfied with the sentence imposed (a suspended sentence accompanied by a term of probation) nevertheless acknowledged that she was “not totally clear” about the length of the order. (This individual had not received a copy of the order in the mail, but indicated in the interview that she would have liked to have had a copy.) Of those victims who had received a copy of the order, several stated that they would have liked to have had the order “interpreted” by a legal professional, or a VWAP representative, particularly the victim-related conditions such as no-contact restrictions. Another victim described the conditional sentence order that she had been sent in the mail as “full of legal jargon”. One victim noted that she had received a copy of the offender’s probation order in the mail but she “hadn’t understood a word” of it.

Although they had not been asked to do so, several individuals brought copies of the conditional sentence order to the interviews.<sup>21</sup> Reviewing these orders, it was easy to see why the victims were baffled about the nature and conditions of the order. Several orders were missing critical pieces of information. One order pertaining to a conditional sentence case was actually a probation order, on which a conditional sentence had been written, with no indication of the duration of the conditional sentence. The individual victim in this case had heard that the offender was “covered for five years”, but had no deeper understanding than this. In reality, it appears that the offender had been sentenced to two years less one day of conditional imprisonment, to be followed by three years probation. These are the maximum periods of time available to the courts for these sanctions, and this fact should have been made clear to the victim. The documentation provided to the victims in many cases appears to have been totally inadequate.

The conditional sentence order form was not conceived to provide a layperson with general information about the sanction; it is a legal document created for other purposes. Accordingly, it is of little use as a means of informing crime victims about the sentence imposed on the offender in their case. It is critical that victims have a sound grasp of the nature of the court order. Ideally, in light of the language used on the conditional sentence/ probation orders, the contents should be explained in person by either a VWAP individual or a legal professional.

It is important to provide personal injury victims with information about the conditional sentence of imprisonment as the paradoxical nature of the sanction (a term of custody served at home) can give rise to misunderstandings. For example, in one case the offender had been detained in custody pre-trial. The court had ultimately sentenced him to a conditional sentence of

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<sup>21</sup> This alone attests to the significance that crime victims attach to the conditions of the sentence when the offender discharges that sentence in the community.



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imprisonment. From the victim's perspective, he had been imprisoned (while presumed innocent), and then released to return home having been found guilty.<sup>22</sup> Conviction had resulted in liberty, albeit of a restricted nature. Criminal justice professionals well understand these apparent paradoxes, but they need to be explained to crime victims and members of the community.

In another case, the offender had been on bail, under conditions pre-trial, and in the opinion of the victim had violated some of these conditions. At sentencing he received a conditional sentence with conditions that seemed no different to the victim to the conditions on bail. She stated that: "In our case, we believe justice has not been done. A non-custodial sentence was issued [with] probation [i.e., bail] conditions similar to which I know he broke prior to being convicted, prior to the trial, so what encouragement did I have that he would abide by them now?". Another victim confronted with a similar scenario described it in the following terms, "The judge just gave him what he had already been given". Several victims indicated they did not see/understand the difference between probation and a conditional sentence.

Almost all the victims expressed a desire for more information of one kind or another, whether relating to the sentence imposed, its administration, or the offender. They would have liked to have received information regarding whether the offender was following the conditions, improving, participating in programs, when the sentence ends etc. A copy of the judge's reasons for the sentence imposed – why jail was not imposed, the length of conditional sentence, and the nature of the conditions attached to the order.

Several victims were confused about the sentencing factors given weight by the court. One individual had been the victim of a serious crime in Toronto involving two co-accused. One had no criminal record and the other was a recidivist, yet the court imposed the same sentence on both offenders. She did not understand how this was possible in light of their different profiles.

## **5.2 Victim Participation in Sentencing: Attending the Sentencing Hearing**

Although almost all the participants had completed a VIS, most victims had not attended the sentencing hearing, and none had made an oral presentation of the statement. Only a few seemed aware that they had the right to make an oral presentation. One participant indicated that she did not submit a VIS because she was fearful of retaliation if the offender did not receive prison time. Several failed to attend the hearing out of apprehension that they would encounter the offender "in the elevator, or the parking lot", in the words of one victim. They expressed feelings of insecurity about attending the hearing, but made it clear that had they felt more comfortable, would have been present. Instead, they had asked family members to attend.

Two victims in one case had wanted to attend the sentencing hearing, but when they attended, the hearing was postponed to a later date. They were not informed about this second date, but in any event it was postponed a third time. On this occasion, understandably they declined to attend. These postponements (and the fact that they had not been informed of the second date)

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<sup>22</sup> In such cases offenders receive credit for time served pre-trial; it was not clear that the significance of this (or the "two for one rule" of credit) had been brought to the attention of the crime victims.

had been most troubling to the victims. Their experience was further marred by an apparent inability of the system to convey their Victim Impact Statements to court. They had completed two VIS, and clearly wanted these statements to be conveyed to the judge. However, even though they sent the statements to the court by courier, for some reason they were never provided to the Crown, and therefore never became part of the hearing. This was a major source of disappointment for these individuals.

### **5.3 Victim Input into the Conditions Imposed and Contact with the Crown**

The conditions imposed on offenders serving conditional sentence orders or probation orders are critical from many perspectives, but particularly the interests of the victim. Accordingly, we explored the extent to which these victims had been able to make “submissions” to the Crown regarding the conditions that might form part of the prosecution’s submissions at sentencing.

We had anticipated, based on findings from earlier research, that victims would express some disappointment about the extent and possibly also the nature of their contact with the Crown. However, with the exception of two individuals, all the victims reported being satisfied with their contact with Crown counsel. Most (but by their comments, not all) victims had received and completed a Victim Input Form. This form is provided by VWAP to the Crown counsel with carriage of the case. It contains information on whether the victim would like to submit a VIS, whether there are security concerns, and whether the victim seeks no contact conditions.

Crown counsel have few occasions, and very little time, to provide crime victims with information about the sentencing process, and to prepare them for the sentence that is likely to be imposed. Nevertheless, the interviews with Crown counsel made it clear that they make every effort to explain their position with respect to sentencing and solicit (where appropriate) the victim’s input with respect to the conditions that may be sought in the event that a community sentence is imposed. The most frequently requested restriction was that the offender be required to stay away from the victim’s residence or workplace. Being included in the discussion regarding conditions made the victims feel that they were being listened to and their input taken into consideration. Crown counsel added that they advised the victim that ultimately the determination of which conditions to impose lay within the discretion of the court, not the Crown. The Crowns also attempted, where possible, to explain why the court imposed a particular sentence.

The exceptional cases involved a victim who, as a result of a lengthy proceeding, had had contact with several Crown counsel, and another individual who reported that she had had a negative experience at the sentencing hearing. She stated that on the request of counsel for the offender, the Crown had suggested that she not attend the hearing, and the sentence imposed was in duration at least, far from what she had been led to expect from the Crown prior to the hearing.



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## 5.4 Contact with Victim/Witness Assistance Program

All the victims to whom we spoke were positive about the support that they had received from VWAP personnel.<sup>23</sup> Most had contact with the same individual, and clearly had confidence in the information and support that they had received. However, several expressed disappointment that contact had ended once the sentencing hearing had taken place. These individuals would have liked some kind of “follow-up”. Victims appeared to be aware that resource limitations upon the Victim/Witness Assistance Program prevented this from happening.

## 5.5 Victim Reactions to Specific Conditions

As noted earlier in this report, the conditions attached to a conditional sentence order define the order. A CSI can be relatively lenient, or it can be oppressively onerous, depending upon the number and intrusiveness of the non-statutory conditions attached. (See Appendix A for a list of the compulsory conditions applicable to all offenders serving conditional sentence). In *Proulx*, the Supreme Court made it clear that a tight curfew or house arrest should be a standard condition of all conditional sentence orders.<sup>24</sup> Several victims remarked upon the laxity of the curfew restriction imposed on the offender in their case. For example, in one case the offender had a nine pm to six am curfew, which the victim perceived as being not appreciably different from the life of the average citizen, and therefore not a “punishment condition”.<sup>25</sup>

### *Cottage Arrest?*

Perhaps the most troubling “house arrest” condition emerging from the study was one in which the offender was restricted to his house or his cottage for certain hours.<sup>26</sup> According to the victim, the offender had spent most of the time at his cottage entertaining friends, and that this had coloured her perception of the sentence. Being allowed to spend time at a recreational home is unlikely to strike many people as the equivalent of a term of custody spent in an institution. None of participants felt that a conditional sentence was equal to jail time.

One condition in particular attracted comment from several victims. Participants felt the no alcohol condition was “a joke” because offenders were not tested and as such it was not enforced, or even enforceable. Several individuals made comments such as “he can still watch tv” when discussing the conditional sentence. However, it is important to point out that the victims did not seem to be advocating stricter conditions or surveillance merely to punish the offender. Often these statements were accompanied by the opinion that “only this way will he follow treatment”. In some cases the desire for stricter conditions was related to the nature and

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<sup>23</sup> Since they were referred to us by VWAP personnel, all the participants had had contact with victim services. However, victims’ advocates made it clear that some victims are, for some reason or other, not contacted by VWAP. We were unable to contact any victims in this category, but it is clearly cause for concern if victims of serious personal injury crimes are not contacted.

<sup>24</sup> “Conditions such as house arrest or strict curfews should be the norm, not the exception” – at para 36.

<sup>25</sup> The conditions imposed do not have to be punitive or treatment oriented; some conditions will be imposed to encourage the offender to lead a more conventional, i.e., law-abiding lifestyle. The goal of the conditions is “securing the good conduct of the offender and preventing a repetition by the offender of the same offence or the commission of other offences” (s. 742.3(2)).

<sup>26</sup> The researchers were able to verify this condition as the victim brought the CSI form to the interview.

seriousness of the offence: two victims stated that they felt tougher conditions and more rigorous enforcement/ surveillance was necessary, but primarily for offenders convicted of sexual offences.

Several of the participants perceived that the offender who victimized them was laughing at/not taking seriously the conditional sentence; this perception was related to the conditions imposed and these victims' expectations that these conditions could be violated with relative impunity. Conditions that are lax or unenforceable can only bring the administration of justice into disrepute. One condition that was cited by victims and victims' advocates was a prohibition against the use of the internet. This had been imposed in a case of a sex offender. There was considerable skepticism regarding the ability of the system to enforce such a condition. Most members of the public are unlikely to hear about these conditions; crime victims however, pay keen attention when the offender is sentenced to a community-based sanction.

Non-compliance with conditions, or the perception that the offender had failed to comply with conditions clearly disturbed a number of victims. One woman who had been badly injured during a brutal assault had heard from a relative of the offender that he had failed to attend court-ordered treatment for anger management. She said, "that's what really blew me away; he's just laughing...". As with many other statements by the crime victims, this was not mere punitiveness; the individual believed that only if the offender received treatment for his anger would he refrain from further offending.

## **5.6 Sources of Dissatisfaction with the Sentencing**

### **Length of Time to Resolve Case**

Participants indicated that they were frustrated by how slowly the system worked and the lack of information they received. One described the time from charge to sentencing hearing as "unacceptable, timewise". The duration of the order came as a surprise to many victims. There seemed to be an expectation that if the offender were serving a community sentence, he would be under supervision for a much longer period than was in fact the case.

### **Absence of Electronic Monitoring**

Several crime victims in Toronto (but not Ottawa) expressed surprise that the offender had not been subject to electronic monitoring. These victims had suffered very serious injuries. It was clear that they would have been far more comfortable with the imposition of a conditional sentence if the offender had been subject to electronic monitoring.

### **Supervision of Offenders in the Community**

The enforcement of community sanctions has long been a concern of victims. Research conducted with crime victims for the Department of Justice a generation ago found the same result. The study's report notes that: "on closer analysis of expressed dissatisfaction with the courts, it is more often dissatisfaction not with the sentence per se, but with the perceived lack of enforcement" (Department of Justice Canada, 1984). All but two of the victims in conditional



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sentence cases expressed some degree of apprehension about the supervision of the offender in the community.

Most participants did not feel confident that the conditional sentence was being enforced and were unsure of what, if anything, would happen if the offender breached the conditions.<sup>27</sup> Only two participants believed that a breach would result in jail time, others were not informed of consequences and one felt that no consequences would ensue for the offender. The perception that conditions were not being enforced made victims feel angry and raised personal security concerns.

Several victims had encountered or seen the offender in their case during the course of their daily life. In most cases this came about because the offender lived in the area, rather than because he had violated a condition not to approach the victim's residence. However, two victims affirmed that the offender had violated one or more of his conditions. One of these individuals had reported what she believed to be a violation to the police. She had been told that "it would be taken care of", but had not heard any more from the police or any other criminal justice professional.<sup>28</sup> She was unaware of the nature of any action being taken against the offender, or even whether any action had been taken at all. Understandably, these victims were upset at these alleged violations and the perceived lack of response. We also heard from victims living in small communities, in which breaches of orders will be apparent to many people.

### Nature and Timing of the Plea

In all the cases in which the offender had pleaded guilty, this plea was entered at the last opportunity before trial. Victims resented this late plea, although they were aware of the fact that it had saved them from having to testify.<sup>29</sup> All common law jurisdictions accord some mitigation at sentencing to offenders who plead guilty. However, the timing of the plea is critical. An early plea should earn the offender a significant reduction in the severity of the sentence imposed. A last-minute plea should carry far less weight as a mitigating circumstance.

A number of victims found an early plea to be of considerable benefit to them. In one case the offender had entered an early plea, and accompanied this by an expression of remorse. This had had a dramatic impact on the victim's attitude to the offender; she stated the following: "I have a lot of compassion for him".

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<sup>27</sup> If an offender is alleged to have breached a condition of the order, a breach hearing will be held. If the court finds on a balance of probabilities, that the order has been violated without justification, the court may simply warn the offender, amend the conditions of the order or commit the offender to custody for the balance of time on the order (or some period thereof). The direction from the Supreme Court in *R. v. Proulx* was clear: offenders who violate their orders should be committed to custody, and for the duration of time remaining on the order.

<sup>28</sup> We cannot know whether the police, having investigated the matter, concluded that the allegation was unfounded. Whatever the outcome of their investigation, the victims should have been contacted with regard to the resolution of the matter.

<sup>29</sup> Some victims took the opposite view, and expressed frustration because the guilty plea had prevented them from being able to testify.

## **Compensation**

In several cases, victims had sustained serious (and in one case, permanent) injuries and incurred expenses, yet there appears to have been little discussion of compensation. On the advice of counsel, these individuals had initiated civil proceedings against the offenders. (The civil suits were in progress when we interviewed the victims.) Several meetings between counsel had already taken place and it was clear that the civil suits were stressful for victims. In addition, to a significant degree, these victims had initiated the civil suit as a way of compensating for the criminal sanction that had been imposed. In one case, by the victim's report, the offender was very wealthy and would have had little problem paying compensation.



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## 6.0 Future Directions and Research Priorities

### Information

It is clear that the criminal justice professionals who have contact with victims clearly make an effort to provide information about the likely sentencing outcome; nevertheless, victims clearly need to be given more and better information about the sentence imposed. Moreover, this information should be communicated in a manner that is comprehensible to laypersons. Some of this information is general in nature, applying to all conditional sentences or probation orders; other material would apply to the specific sentence that was imposed.

Simply mailing victims an incomprehensible CSI order, particularly one with critical information missing, is in our view inappropriate, particularly for serious crimes of violence. In an ideal world, victims would receive information about a range of issues, including the following:

- the nature of the sanction in general (e.g., the nature and purpose of a conditional sentence or a term of probation);
- the court's reasons for imposing the specific community-based sanction. This should include the important sentencing factors considered by the judge. For example, if an early plea of guilty and the absence of a criminal record played an important role in the determination of sentence, this should be communicated to the victim. There is a statutory obligation upon judges to provide reasons for the sentences that they impose.<sup>30</sup> It is critical that these reasons be communicated to the crime victim when a community sanction is imposed in a personal injury offence. Otherwise, victims may infer unprincipled leniency in sentencing, in the same way that members of the public often criticize judges without knowing the reasons why a particular sanction was imposed. In an ideal world, judges would prepare written reasons for sentence or victims would be provided with some record of the judge's reasons for sentence.
- the specific conditions imposed on their offender;
- the consequences for the offender if he breaches a condition of the order;
- any violations of the order resulting in a breach hearing, whether these violations pertain to the victim or not. In the words of one individual, she felt it important to be "kept up to speed", but in her view this had not occurred in her case.
- the final outcome of the order (i.e., whether the offender successfully completed the order, or having violated a condition, was committed to custody).

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<sup>30</sup> S. 726.2.

Talking to the victims made it clear that they had received information about the sentence from numerous sources: police officers, VWAP personnel, the Crown, and in two cases, the offender's conditional sentence supervisor. It was equally clear that these individuals often had different and occasionally conflicting views of the sentence imposed. We feel that information about the factors considered at sentence can most reliably come from the Crown, and it would accordingly be better if this were the victim's single source of information about the sentence imposed.

### **Information about the Reasons for Sentence**

Under present arrangements, it may be difficult for a victim who does not attend the sentencing hearing to know of the reasons provided by the judge for the sentence. These reasons may be communicated to the victim by the Crown or VWAP personnel. Some mechanism is needed to ensure that the victim is provided with an account of the judge's reasons for sentence.

In the event that the victim is present in court at sentencing, the Crown should ensure that they understand the sanction imposed. As noted earlier, it seems clear that Crown counsel make every effort to explain the sentence to victims. However, if the victim is not present, they should be given the opportunity to discuss the sentence with the Crown at some later date, if only by telephone. We feel that this "debriefing" should be conducted by a legal professional, and preferably the one who has had carriage of the case. We realize that the suggestion is at present somewhat impractical, in light of the caseload for which most Crown counsel are responsible. A second best solution may be to provide the victim with the judge's reasons for sentence, if they are available, or to have the sentence explained by VWAP personnel who attended at court.

### **Judicial Communication**

One of the statutory pre-requisites for the imposition of a conditional sentence is that the court must be satisfied that "serving the sentence in the community would not endanger the safety of the community".<sup>31</sup> But judges need to do more than simply assure *themselves* that this criterion has been met; they should also make an effort to communicate their confidence in this regard to the individual most affected by the crime, namely the crime victim.

Research upon crime victims and members of the judiciary has revealed two important findings of relevance to the present discussion. First, crime victims state that they appreciate some judicial recognition of the harm inflicted. This recognition may be expressed in remarks at sentencing in the event that the victim is in attendance, or possibly acknowledgement in reasons of the harm as documented in the Victim Impact Statement. Second, judges appear to be aware of this; fully 70% of judges responding to a survey in 2001 stated that they cited the VIS in their reasons for sentence, or addressed the victim directly in oral reasons (Roberts and Edgar, 2002). In the present context, we see an important opportunity for communication between the court and the victim. Judges can play a key role in explaining the imposition of a community-based sanction to the crime victim. This is relatively straightforward if the victim is present at the sentencing hearing. Unfortunately, for a variety of reasons, most victims do not attend the hearing. If the victim is absent, perhaps it is possible to conceive of a mechanism by which the

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<sup>31</sup> S. 742.1.



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court's reasons are taken down and communicated to the victim, without the necessity of ordering a transcript from the court reporter service.

### **Information about Breaches and Outcome of the Community Sanction**

Under present arrangements, it is difficult to see how the breach information can be conveyed to the victim. Unless the victim has reported an alleged breach, the incident may not come to the attention of the VWAP personnel. Some mechanism is needed to ensure that this information is conveyed to VWAP.

Some commentators may argue that victims have no right to information about the administration of the sentence, and that constitutes a violation of the offender's privacy rights. After all, victims are not informed if, having been committed to custody, the offender violates institutional rules, or commits an offence against another prisoner or a correctional officer. In this latter example however, the victim knows that the offender is within the care of the prison authorities. An offender sentenced to a community-based sanction is supervised by correctional authorities, but remains within the "jurisdiction" of the community. Under these circumstances, we see an enhanced role for the community, and this role carries a responsibility to communicate information about the offender's progress.

There is also a more positive, potentially restorative element to this proposal. For example, knowing that the offender has completed mandatory treatment and served his term of custody in the community may well be of considerable benefit to victims. In a similar fashion, knowing of a successful order will also help to dispel cynicism surrounding offender rehabilitation. One victim who had obviously thought a great deal about the issues, recommended that an informal "outcome hearing" could be held, at which the victim could receive information about the way that the sentence had ended. After hearing this suggestion, we asked the remaining participants whether they thought this would be of benefit to them, and they all responded affirmatively.

### **Web-based information**

Many crime victims seek information from other sources. For example one individual whom we interviewed had turned to the internet, where she found a wealth of information about conditional sentencing. The Department of Justice website contains a fact sheet on conditional sentencing; we recommend that it be expanded and a greater attempt be made to inform victims and members of the public of its existence. As well, this fact sheet could be provided to VWAP personnel for distribution to all victims in cases in which a conditional sentence had been imposed.

### **Victim Input into the Conditions of a Community-Based Sentence**

Most of the victims to whom we spoke had had the opportunity to provide input to the Crown as he or she contemplated submissions on sentence. In some locations victim input is achieved by means of a form completed by the VWAP personnel after speaking with the victim. However it is accomplished, it is essential that this input be solicited. Victims of personal injury offences often have security concerns that can be addressed by the imposition of specific constraints upon

the offender's freedom of action. Victims may also provide the judge with information that is important in realizing the restorative purpose of sentencing, namely the acknowledgement and reparation of harm done to the victim and the community.

Victims should be informed however, that the determination of the sentence and any conditions imposed on the offender lies entirely within the discretion of the sentencing court. In this way, they will be better prepared in the event that a condition suggested by the victim and transmitted by the Crown in submissions, is not imposed by the judge. It is very important that victims do not have unrealistic expectations about the nature of the sentence that will be imposed.

Courts should consider carefully the nature of the restrictions imposed. A standard restriction prevents the offender from approaching within 500 metres of the victim's residence. However, if the offender freely circulates within the streets around the victim, this may also arouse apprehension. One victim said that: "the scary thing is that he lives a block away" and added that she was "terrified that he would come back". Perhaps it is worth considering the interests of the victim to a greater degree in constructing these restrictions. Victims also need to be informed of the procedures to be used in case the offender breaches the condition, the possibility of a variance in the conditions, and the consequences should an offender be found in breach of a condition.

## **Related Security Concerns**

Most community based orders carry restrictions on the offender's liberty in a way that relates to the victim. As noted in the previous section, the most frequent such restriction is to avoid approaching within 500 metres of the victim's residence. Most victims were still to some degree apprehensive of the offender. Even if they were not afraid of re-victimization they expressed a desire not to encounter him on the street. Several wanted to know where the offender lived, and, in the words of one victim "whether I am going to bump into him at the mall". Once again the imposition of a community sentence creates a particular concern for the crime victim.

One victim had been told that she would receive monthly verification calls to establish that the offender was in fact complying with victim-related conditions. After three months she had received only one such call, and acknowledged that she would have liked the reassurance of regular contact. Such verification is likely to stretch the capacities of VWAP personnel, or whoever is charged with such a task; however, we feel it is a useful, relatively low-cost service that should be encouraged.

## **The Need to Encourage Greater Use of Reparative Conditions**

The caselaw and the interviews conducted for this study suggest that judges are often unwilling to order reparation for the victim, a conclusion sustained by comments from the crown counsel. Judges prefer not to undertake a damages "hearing", and elect to leave the issue to the possibility of a civil action. Both our interviews and review of reported cases suggest that reparative conditions are not frequently attached to community sanctions.



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In some property crime cases such as *R. v. MacAdam*, courts seemed quite reluctant to order that the offender pay financial compensation. Concerns were expressed that offenders might be held to have breached community sanctions if they were financially unable to pay reparation. This is a legitimate concern (Manson, 2001; Roach, 2003), but one that could be addressed by sensitive administration of the community sanction, including the ability to obtain variances of conditions and a generous interpretation about what constitutes a reasonable excuse for breach of a condition.

More fundamentally, not all offenders will be financially able to make reparation to the victim and thought should be given to blending state and private funds to allow meaningful reparation to victims. (Roach, 2000; Roberts and Roach, 2003; Roach, 2003)

At the same time, more reparative conditions could be attached to community sanctions than at present. Fines are still extensively used as a sanction even though judges are now directed to pay attention to the offender's ability to pay the fines. A victim's claim to reparation should be at least as compelling as the state's claim to benefit from either fines or victim surcharges placed on fines. Reparation can serve as a tangible form of acknowledgement by the offender of responsibility for the offence and harm caused to the victim.

Some of the victims interviewed for this study have had to pursue subsequent litigation before the civil courts in an attempt to receive an award of compensation. This accords with a recent trend of victims, especially in sexual assault cases, making increasing use of civil litigation after the criminal case has been completed (Feldthusen, 1993; Roach, 1999). In our view, this is unfortunate because of the expense, time and trauma that will be imposed by the need to engage in subsequent litigation. Victims are vulnerable to re-victimization in the civil litigation process.

The need for civil litigation is especially unfortunate given the explicit recognition of reparation to victims as a legitimate objective of sentencing. There is no priority of sentencing objectives and in the absence of such a priority, reparation should be considered as important as other more traditional sentencing objectives such as denunciation, deterrence, incapacitation and rehabilitation. There is a danger that the reparative purposes of sentence will be a false promise to victims unless supported by on-the-ground reparation as part of the sentencing process. (Roach, 2000; Roberts and Roach, 2003)

Judges need to be encouraged to make greater use of reparative conditions in community sanctions. As discussed above, concerns about unfair breaches when offenders are not financially able to engage in reparation can be addressed by inquiries into the offender's ability to pay, variances of reparative conditions to allow more time for payment and generous interpretation of what constitutes a reasonable excuse.

Judges may also not have abandoned the caution that surrounded the administration of the restitution provisions of the *Criminal Code*. The focus on restitution under the *Criminal Code* has been on "readily ascertainable" pecuniary damages based on "the replacement value" of property and "actual and reasonable expenses".<sup>32</sup> There is also a sense that the criminal process

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<sup>32</sup> *Criminal Code* s.738. See also *R. v. Zelensky* [1978] 2 S.C.R. 940; *R. v. Siemens* (1999) 136 C.C.C.(3d) 353 (Man.C.A.); *R. v. Devgan* (1999) 136 C.C.C.(3d) 238 (Ont.C.A.) leave denied 142 C.C.C.(3d) vi (S.C.C.).

should not be used as a replacement for civil litigation. (Manson, 2001) It is arguable whether there is a need to re-think restitution in light of the profound significance of the 1996 sentencing reforms.<sup>33</sup> A fundamental feature of those reforms was the recognition of reparation to victims as an objective of sentencing. The concept of reparation to victims in s.718(f) of the *Criminal Code*, as interpreted by the Supreme Court in *R.A.R.* is broader and more flexible than the notion of financial restitution of readily ascertainable losses in s.738 of the *Code*. Reparation does not have to be based on readily ascertainable financial damage and can include symbolic payments to victims and organizations that provide services to victims. These payments can be tailored to reflect both the harms suffered by victims and the means of the offender.

Thought should be given to legislative reforms to encourage the use of reparative conditions. At present, such provisions would be crafted under the general provisions for optional conditions which refer to “such other reasonable conditions as the court considers desirable...for securing the good conduct of the offender and for preventing a repetition by the offender of the same offence or the commission of other offences.”<sup>34</sup> Nothing in this basket clause encourages reparative conditions. Moreover the ability of provinces to enact regulations to preclude “the inclusion of provisions on enforcement of restitution orders as an optional condition of a probation order or of a conditional sentence order” is recognized under s.738(2) of the *Criminal Code*. Perhaps the ability to impose reasonable reparative conditions should be specifically mentioned in the *Criminal Code* and the broader nature of reparation as opposed to restitution made clearer (Roach, 2000, 2003). In any event, careful follow-up is necessary to determine whether the recognition of reparation to victims as a purpose of sentencing has not become a false promise to victims. The limited data in this study suggest that reparative conditions are not frequently used in community sanctions and that victims have been forced to seek reparation through the expensive (and difficult) process of civil litigation.

## “After-Care” from Victim Witness Assistance Personnel

The victims were uniformly positive regarding their contact with the Victim Witness Assistance Program. However, a number of individuals expressed a desire to have some follow-up contact once sentence has been imposed. At present, absent exceptional circumstances, contact between VWAP and the victim ends with the sentencing of the offender. The reason for this is obvious; the Victim/ Witness Assistance Program simply does not have the resources to extend their valuable services beyond this point. However, we feel that this follow-up is important, even if it means simply making a phone call to see whether the victim has any needs that may be addressed by VWAP personnel. The victims suggested that this follow-up from victims’ services take place 1-2 weeks after sentencing to answer questions and direct to resources. In making this suggestion, we are well aware that the resources of the Victim witness assistance program are very limited. If this idea is pursued, the program would have to receive additional funding, otherwise it may be impossible to “deliver” upon the promise of additional support, and this would make matters worse for victims.

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<sup>33</sup> This process may have begun given the Supreme Court’s recognition in *R. v. Fitzgibbon* [1990] 1 S.C.R. 1005 of the value of “compensation” orders to victims and in rehabilitating offenders and re-integrating them into society.

<sup>34</sup> *Criminal Code* s.742.3(2)(f)



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## Research Priorities

We see several research priorities in need of attention, several relating to the limitations of the present study.

First, although there was little evidence of compensation/ reparation in the cases brought to our attention, the sample size prevents us from generalizing to community-based sanctions.

Accordingly, it would be useful to conduct research into the issue using a larger and more representative sample. This could be accomplished by means of a victim survey, or an analysis of court documents in cases involving community based sanctions.

Second, many of the victims interviewed for this study had concerns about the compliance rates of offenders serving conditional sentences of imprisonment. This question is clearly of general interest. Little is in fact known about the success rates of conditional sentence orders. The limited research on this question suggests that most orders are in fact completed successfully, but a more comprehensive study needs to be conducted, if only in a single jurisdiction. In Ontario, for example, statistics are compiled by the Ministry of Public Safety and Security that are capable of answering key questions in the area of conditional sentencing such as, “how many offenders serving conditional sentences breach their orders?” These statistics have not been compiled or published simply because of limitations on research resources.





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## 7.0 Conclusion

Throughout our conversations with crime victims, it was clear that there was an acceptance of the concept of community based sentencing. However, it was equally apparent that for this group of individuals, this acceptance does not extend to include the most serious crimes of violence. For these crimes, the seriousness of the offence appeared to warrant a custodial term in the eyes of the victims.<sup>35</sup> It must be recalled that the participants in this study are not representative of all crime victims; our participants had been the victims of the more serious crimes of violence, often involving sexual aggression. Research on conditional sentencing suggests that only a small percentage of conditional sentences are imposed for serious crimes of violence. Nevertheless, when such a sentence is imposed in these cases, the consequence is often to increase the suffering of the crime victim, whatever the benefits for the offender.

We have not taken the position in this report that a conditional sentence should never be imposed in a case involving violence. This determination remains in the discretion of the sentencing judge – a point made by the Supreme Court when it rejected the position that certain offences should be excluded from the conditional sentence regime. However, it is clear from interviews with crime victims and professionals who have contact with victims, that when a conditional sentence is imposed in such cases, the interests and needs of the victim need to be given greater consideration from the court, and from the justice system in general. At the very least, careful attention must be given to the victim's security concerns by appropriately crafted no contact conditions.

At the same time, we believe that the system could in many cases do a better job of making real the emphasis given in the 1996 sentencing reforms to the restorative sentencing purposes of providing acknowledgment and reparation of the harms suffered by victims. This requires not only much more information and after care for crime victims, but also more attention to how conditions in community sanctions can serve the legitimate interests of victims in reparation and acknowledgment of harm.

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<sup>35</sup> Although the victims did not use the word “denunciation”, this would appear to be the sentencing goal that they saw as being frustrated by the imposition of a conditional sentence. This position is consistent with the judgment in *R. v. Proulx*, wherein the Supreme Court noted that: “Where objectives such as denunciation and deterrence are particularly pressing, incarceration will be the preferred sanction.”; at para 127.





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## Appendix A

**742.3.1 Compulsory Conditions of conditional sentence order-** The court shall prescribe, as conditions of a conditional sentence order, that the offender do all of the following:

- (a) keep the peace and be of good behaviour;
- (b) appear before the court when required to do so by the court;
- (c) report to a supervisor
  - (i) within two working days, or such longer period as the court directs, after the making of the conditional sentence order, and
  - (ii) thereafter, when required by the supervisor and in the manner directed by the supervisor;
- (d) remain within the jurisdiction of the court unless written permission to go outside that jurisdiction is obtained from the court or the supervisor; and
- (e) 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.