A Report on Community Service Treatment and Work Programs in British Columbia

by

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Introduction

"There is a need to correct the relationship between the offender and the offended, and that can best be accomplished in the context of the community or social milieu in which the relationship is broken."

Alex MacDonald[1]

In 1973, the Attorney General's Department outlined a Five Year Plan to reform the Provincial Criminal Justice System. The overriding philosophy of this plan as it relates to Corrections is to make "every possible attempt . . . to prevent persons from entering the criminal justice system, to divert persons whose basic problem is medical-social, such as the addict, out of this system, and *to establish non-custodial penalties and programs as alternatives to sentences of Incarceration in total institutions*".[2]

It is felt that "custodial penalties have failed to provide a deterrence to the degree often assumed"; that they are "basically nonproductive as agents of positive change in behaviour", that "the cost of keeping people in custody is not rationally defensible except in those cases only which pose an immediate threat to public safety"; that institutions (as "schools of crime") "may in fact lessen the protection of the public by causing incarcerated persons to become more instead of less prone to victimize the public".

In establishing non-custodial penalties and programs, the contention is that "service to the offender . . . can best be delivered at the community level".[3] The idea is that we can better serve many an offender by attempting to integrate him in the community, rather than further alienating him by custodial treatment in isolated and self-contained institutions. The objectives of *sanction* (penalty), *deterrence*, and *rehabilitation* can be combined with the idea of *restitution* to the social community if the offender is required to perform a useful social task in the community as a penalty for his "damage" or "wrong" to that community. The community service work experience is seen as an educational experience for the offender, in that if the task is appropriately chosen it can function positively in teaching the offender a specific skill (such as carpentry, trail blazing, gardening, etc.) as well as in helping him to grow socially more positive by working with constructive community members, and/or other "offenders" in a spirit of sharing and comradeship by completing works for the common community good. The sense of accomplishment gained from such completed work is said to be a great benefit to the offender who, typically, is suffering from low self esteem. At the same time, community service work is seen as a

penalty and deterrent in that it deprives the offender of freedom and leisure and is generally unpaid. The community of course gains not only from the fruits of the labour (it is important that the work assigned be needed and useful, not "make-work"), but also from presumably reduced recidivism rates and from the comparatively lower cost of community versus custodial treatment.

British Columbia's present Correctional Philosophy is entirely compatible with that set out in the Law Reform Commission's working paper *"The Principles of Sentencing and Dispositions"* and with their later papers on *Restitution and Compensation* and *Diversion.*

The B.C. Department of Corrections plans to implement a system of community service work programs throughout the province. But in some areas, particularly outside the large urban centres, experiments have already been made along those lines. This report falls into three parts:

(1) The present organization and administration of Corrections in the province, including plans for the future;

(2) Reports on the actual use of community service treatment, with the comments of judges and probation officers;

(3) An analysis of some of the problems encountered with practical suggestions for solving them.

Part I

Administration Under the Department of Corrections

The first step towards instituting community service work as a sentencing alternative was taken in 1972-73 by a sub-committee of the British Columbia Corrections Association.

A "Sentencing Alternative Committee" was set up, consisting of four Vancouver Provincial Court Judges, representatives of the B.C. Federation of Labour, a Personnel Manager and representatives of United Community Services, the B.C. Employers' Council, the Regional Senior Probation Officer, Justice Research, and the B.C Civil Rights movement.

It recommended that the Probation Service initiate pilot projects in co-operation with a few selected judges, United Community Services, and the British Federation of Labour. Using S. 633(2)(*h*) of the Criminal Code, they would organize penalties for a limited number of offenders based on unremunerated community service work.

The recommendation was approved in May 1973 by the then Director of Corrections, but shortly thereafter the Department of Corrections was re-organized and the Sentencing Alternative Committee was disbanded.

The Corrections Branch gained a new Deputy Minister, and three new executive divisions: Community Corrections, Institutions, and Special Programs. Administration was then decentralized, with probation officers scattered throughout the regions of the province.

A new philosophy seems to have emerged from the Department, based on the use of "educative, humanistic" models rather than authority-oriented and highly disciplined models of behaviour influence.

The development of work service programs is one of five major innovations planned by the Department. The others are: a five-year phasing out of Regional Correctional Centres (large prisons) to be replaced by small regional centres with a maximum of twenty beds and "no locked doors," and custody centres with up to forty beds; diversion programs; new programs for juveniles; personal and social development practices in correc-

tional treatment. The five are interrelated, and the Community Corrections Division hopes to work closely with the Department of Human Resources, particularly in administering services to children and probationers. Community Resource Boards are also being set up within the regions in order to develop and co-ordinate community social services and integrate new treatment programs as smoothly as possible.

Three different types of work service are envisioned:

(1) involvement of probationers in existing community projects, such as service club projects, where the probationer works together with volunteer citizen workers in the hope that constructive attitudes and good organizational habits will rub off;

(2) arranged work projects of a public nature—in the parks, in conservation, etc—for probationers only under the Department's supervision. Participants should either volunteer or be paid, to avoid any connotation of forced labour. The emphasis is on restitutive service to the community as fulfilling the offender's debt to society, and on teaching him new skills, good work habits and possibly new socially constructive attitudes;

(3) special social service programs for offenders who already possess specific skills, such as teaching these skills to underprivileged groups.

Part II

Informal Use of Community Service Treatment in B.C.

(a) Background Information on Areas Covered

The population of British Columbia is concentrated mainly in the large urban centres of the Lower Mainland and Victoria. Apart from small farming communities in the southern interior and small timber settlements in the north there are few "rural" people in the province. Native Indians, comprising about five percent of the total population of the province[4], present special problems which will be discussed below. See Appendix.

An analysis of persons charged under the Criminal Code and other statutes[5], shows that the spread of offences parallels the population distribution: the Lower Mainland and Victoria areas, with over one half of the province's population, produced over one half of the persons charged, while Prince George, the next largest urban centre, had the next highest crime rate.

This study is based on the three large centres, with additional information supplied by probation officers who had worked in the smaller northern communities of Dawson Creek, Fort St. John, Campbell River and Courtenay.

(b) Instances of Ad Hoc Community Service Treatment and Work Programs

These are examples drawn from a four-month ethnographic search and from information in the interviews.

Those judges and probation officers who initiated CS/W (community service or work) treatment did so in carefully screened cases constituting typically much less than five percent of the local caseload. Some of the Vancouver judges used it "once in a blue moon," while others relied on it heavily.

With one exception, the users advocated administrative and staffing changes to make possible extension of the use of CS/W treatment for up to twenty percent of their caseload.

CS/W treatment was used most often as a condition of probation (with or without specific court order) or as part of the "letter of arrangement" with juveniles at the pre-court stage.[6] Most of the examples refer to juveniles, but there are a few instances of CS/W treatment with adults. The less frequent use with adults apparently stems from the fact that adults are not referred to probation officers in a diversionary sense at the pre-court stage, and that there is a tradition of a certain cynicism regarding the rehabilitative potential in a person "by the time he has reached the adult stage," coupled with a reliance on institutional and camp programs for adults.

CS/W examples cover a variety of unpaid (and occasionally paid) work done: (1) for the general benefit of the community as in clearing beaches and parks and blazing trails; or; (2) for the specific benefit of the victim, such as in an individual repairing the damage he did to a private home in Breaking and Entering or; (3) for the specific benefit of needy groups or individuals, such as in gardening and house repair for old age pensioners and working for the handicapped or; (4) "educational" work in various public institutions, such as fire halls, police stations, hospital emergency wards, schools, etc. Tasks were chosen to meet any one of the above four, or combinations of them.

Tasks were sometimes chosen to "fit the crime" as in pumping up tires as a sanction for slashing them; sometimes to fit the offender's assumed educational-personal-growth needs, as in some of the wilderness programs; and sometimes out of community need, as in examples where offenders are fitted into existing community service club projects. Tasks were not chosen or administered in a strictly hard-work-at-any-tough-job-that-comes-up punitive sense. Some examples refer to individual work on a given task (for example, repairing property damage); some to groups of co-offenders (e.g., kids who wrecked a car at a service station and as a sanction jointly repaired it); some to organized work projects: (i) for probationers only (not usually co-offenders) (ii) for probationers and wards (of Human Resources), (iii) for probationers and ordinary citizens of all ages, (iv) for probationers and their "non-delinquent" peers, as in school-oriented work projects and camp work programs.

The degree of supervision varied from minimal observation (for example, dropping the offender off at the job site and then picking him up later) to twenty-four hour vigilance, as in wilderness work projects.

Involvement of the community varied from providing tasks and donations of funds and equipment for the tasks, to help in doing the work itself, to volunteer supervision of tasks.

(c) Reactions of judges

The five judges interviewed were all strongly in favour of using CS/W as an alternative in sentencing, but some raised practical difficulties in applying it.

A judge of the Nanaimo Family Court has used CS/W since 1965 in at least 25 percent of his cases, almost exclusively for juveniles. Working in a small, closely-knit community where the judge himself takes a leading role in service projects, he finds great support from the citizens and consequently the treatment is successful.

In the Vancouver area the caseload is heavier, and judges say they do not have time to dream up innovative penalties. They have a strong traditional framework of institutions, camps and trained personnel to fall back on. Yet the four judges interviewed had all experimented with CS/W in selected cases and were favourably impressed with the results. They said work would have to be done in educating the public and community groups and in training special supervisors for such projects.

Where they have used it, the judges pick sentences that either compensate the victims in some way or contribute to the general good of the community. In Nanaimo, judges have assigned offenders to work in the police station, clean up parks, give instruction in impaired driving and civic affairs. In some cases he has made them pay for damage caused or imposed a curfew. He has not used CS/W more frequently for adults because he feels it is too late, but tries to use probation and restitution more than imprisonment.

A judge of the Vancouver Provincial Court recalled only two instances of CS/W in the past ten years. An offender convicted of armed robbery was ordered to work in homes for the elderly who had no other assistance, enroll in an education program, and cease his association with the co-accused. The rehabilitation was reported as highly successful. In the case of a school boy trafficking in hashish, a fine was imposed which the boy had to pay out of his own earnings and he was under two years of "custody" or curfew at home. He also responded well.

The chief judge of the Vancouver Provincial Court feels that all judges would be in favour of an alternative sentencing system, provided that they were proved viable on the basis of pilot projects which ensure that supervision and the public safety would be adequately provided for. He thinks new legislation would be required, together with a massive public education program. The system would be most effective at the pre-court level with first offenders, he feels. A district judge added that union support is the key to gaining support from other organizations in the urban community.

A judge of the West Vancouver Family Court has also assigned police station and parks work to juveniles. He received some complaints from the community about "slave labour," and reports that one victim, refused to let the boys who damaged a golf course work on cleaning it up. He also feels that the use of volunteer staff for supervision would be unsatisfactory.

(d) Reactions of Probation Officers

From interviews conducted across the province it appeared that CS/W treatment was more popular outside of the heavy population centres. From Prince George, Courtenay, Duncan, Dawson Creek and Nanaimo came enthusiastic reports of how the community helped in various projects and how the recidivism rate had gone down. From Victoria and the Vancouver area there was a measure of scepticism and warning about the need for trained staff and careful screening of offenders. It appears that the programs are well suited for small homogeneous communities where the local citizens can be recruited to work with offenders. In the larger cities this kind of contact is impossible, and the goal of the treatment can become lost in the existing institutions and bureaucracy.

Some problems common to all areas were the lack of trained personnel to co-ordinate and supervise CS/W programs, the reluctance of victims to allow offenders to make amends, and the difficulty of finding suitable work for older offenders. The three projects outlined in the next section are examples of self-contained and successful CS/W treatment. Each region provided other examples of individual cases where the punishment was in some way made to fit the crime, and where the probation officers felt that the offenders had really learned an important lesson.

In Nanaimo, boys who were caught vandalizing a mechanic's car at a service station were required to work there, repairing the car and learning the trade. When the work order ended the garage asked to hire the boys as regular employees.

In Victoria a group of delinquent boys and their non-delinquent friends were put to work on a film of their local Drop-in-Centre. The finished project was shown on a commercial television, giving the boys a real sense of achievement.

In Prince George some boys broke into an old folks' home. They were required to repair the damage and perform house repairs. After this the elderly people called the boys back in whenever they needed help around the place, and the boys are reported as being well-behaved.

In the smaller communities the probation officers showed a very imaginative use of resources. They persuaded citizens to act as volunteer supervisors, which they said had an important preventive effect on young people. They also sought aid from local P.T.A.'s, school boards, Army installations, forestry agencies, the police, service clubs, and provincial officials from Human Resources, Mental Health and other departments.

They reported that young people got a sense of self-worth and usefulness from working on specific goals and improving their own community. Very often the presence of concerned, friendly older citizens helped prevent them from "acting out" hostility and feelings of neglect.

But in order to implement CS/W treatment for more than five to twenty percent of the caseload would require larger staffs, they said.

A regional director of probation said that community service treatment is higher on his list of priorities than straight work orders. He set up a logging camp for probationers in 1959, and also began a logging school as a year-long apprenticeship training program. He worked together with a union, Workmen's Compensation Board, B.C. Forest Service, Loggers and Truckers' Association, and the Deputy Minister of Education. Measured by recidivism rates, this project was very successful. Mr. Richardson says there is a "hard core" of juveniles—around ten percent—who should not be involved in community centre programs but could benefit by wilderness work. One such is a rigorous sailing, mountaineering or hiking survival program operating from a weekend and summer camp project for probationers.

A chief probation officer in Vancouver reported that three interrelated community-oriented programs have been set up by Probation and the Education Department at U.B.C. They provide academic tutoring, recreational and practical activities, and instruction for parents who wish to help their children and iron out family problems.

The staff works according to community needs rather than keep officer hours, and he feels that probation officers should be available around the clock.

A Vancouver Probation Officer is more pessimistic about such a scheme. He says it is virtually impossible to recruit citizen participation and is not convinced that CS/W projects do any more for young offenders than "the usual probationary treatment." He points out the difficulty of forcing youngsters to comply with CS/W orders, since a charge of breach of probation will only result in another probation order: "Kids who know the score will just split."

A probation officer in Coquitlam reported that victims of offences would rather claim from the insurance than have delinquents cleaning up their property. He has set up an experimental program based on a lodge on Burke mountain, where emphasis is on outdoor work and reparation to the community. It links up with programs in the community as part of the on-going project and as after-care.

(e) Three typical projects

(1) *North Vancouver Alternative School and Work Project*

This was a 1972 summer work project designed to encourage the development of greater social awareness, basic education skills, and a positive change in attitude in teenage boys experiencing difficulty in school. It was partly a work project and included some probationers. It consisted of a morning program with academic orientation and an afternoon work project building a log cabin based on theories from the morning sessions. The program was staffed by two teachers plus other workers from Mental Health and the Neighbourhood house. The Human Resources Department, Neighbourhood House, School Board and probation officers were all involved in the project from the planning stage.

(2) *Powell River Work Project*

Six problem probationers and wards were required to assist B.C. Forest personnel in clearing and preparing a new campsite. They were paid a training allowance of $125 a month and worked six hours a day. All the boys had low academic records and complained of having nothing to do

in summer. It was hoped that they would gain some experience and training, a belief in education and some insulation against negative attitudes arising from frustrations in early employment—as well as an appreciation of B.C.'s natural resources and the beauty of the Coast. By the end of the project it was felt that most of the boys had acquired a strong sense of achievement, motivation to return to school, and release from delinquent patterns.

(3) *Joss Mountain Work Project, Vernon*

A physically and emotionally demanding survival program designed to develop co-operation, comradeship, group cohesiveness, interdependence and a sense of responsibility, concern and self-worth for delinquents. Thirty-seven boys from various B.C. interior areas were divided into four groups working ten days each. They blazed a six-mile trail through the wilderness, camping along the way. The program was conceived by a probation officer who raised the money from various companies, clubs and individuals. The B.C. Forest Service supplied equipment, guidance, staff and general help, while many citizens contributed as well. Although two boys ran off, the others acquired team skills and a great deal of satisfaction from the completed trail, which is now used by the public and school training sessions.

(f) Recent developments

PILOT PROJECTS: COMMUNITY WORK SERVICE ORDERS

As anticipated in the Five Year Plan of the Corrections Branch quoted at the beginning of this report, a pilot project on community work service orders is now in operation. This program is seen as a community alternative to traditional treatment of offenders. The basic idea is that by doing something for someone else the offender makes restitution to the community which hopefully is rehabilitating for himself. Although the use of community work service orders is conceived and used as a definite sanction, the programs are considered to be "community" programs rather than "correctional" programs.

The project is based in each of the six Community Corrections Regions covering the province of B.C.: (1) Vancouver Region, (2) Southern Region, (3) Fraser Region, (4) Interior Region, (5) Vancouver Island Region, and (6) Northern Region. In each region the program is directed by senior probation personnel.

The Program is for both juvenile and adult probationers and is enforced after conviction as a condition of probation (C.C.C. Sec. 444) written directly into the order—or, in the case of some juveniles, it is enforced as part of diversionary probation (entirely outside of the court process) and is written into the letter of arrangement. It was decided at a policy meeting held by Community Corrections officials in November of 1974 that Community Service Work Orders for adult diversionary probation (as with juveniles, outside of the court process) would be used only on an ad hoc basis, and that the "letter of arrangement" would not purport to be legally binding.

It was agreed at the policy level that there would not be any restriction on who the client might be, except that he or she would be a person who has committed an offence, agrees to enter the program, and is placed on the program either by a judge or by a probation officer. Because prior agreement of clients is required probation officials expect very few problems of non-compliance and hence minimal use of the Breech of Probation order.

After conviction, the offender is assigned to the program (but not to a specific task) by a judge on the basis of a court report or pre-sentence report from the probation officer. The probation officer assigns the specific task, which, it is stipulated, must involve well-prepared, meaningful work (rather than "make-work"). The offenders assignment will consist of either (1) a community work service project *only*, or (2) an ordinary probation with a special community service work project as an additional condition. (*Note:* Use of Community Service Orders in the Definite/Indeterminate sentence was considered inappropriate at this time.)

The amount of work to be completed was set as a maximum of one hundred hours of community work service which must be completed in an eight week period. Extent of damage and other restitutional aspects are taken into account in estimating the amount of work assigned in individual cases. Since the 1972 Order-in-Council allows coverage for unpaid work only, the client is not paid for this work.

Nine "Community Service Supervisors" have been hired—one for each of the six Community Corrections Regions, except for the Northern district which has two (one for the Prince Rupert area and one for the Prince George area), and the Vancouver Island region which has three (one in

Courtenay, one in Nanaimo, and one in Victoria). Persons hired as Community Service Supervisors were recruited in the communities involved (on a fee for service basis—not as part of the Corrections staff). They are people who have been involved in community work in the past and who have a "good reputation" in the community.

The Community Service Supervisor works under the direction of the Probation Officer. He is in all respects accountable to the probation officer and will be required to submit a daily log sheet. The responsibilities of the Community Service Supervisor include: (1) In instances where the assigned community service work is under the auspices of a service club—making the necessary contacts with service clubs and other organizations in the community, and checking with these organizations to ensure that probationers assigned to their programs are carrying out their responsibilities. (2) In cases where the offender's assigned community service work involves direct restitution to the victim, the community service supervisor will directly supervise the offender at work, or act as liaison if the victim is supervising the work. (The probation officer will have decided which alternative for supervision is most suitable during his pre-sentence or pre-trial investigation). (3) In instances where the assigned community service work involves neither a service club or other community organization, nor the victim, but rather a specific community work service program, the community service supervisor makes the necessary arrangements and does the actual supervision.

Care is taken so that the community service supervisor does not "spread himself too thin" in terms either of area covered or of workload, so that the position is used for high quality rather than quantity or spread of work. High priority is placed on the project and probation officers have been directed to reduce their lower priority activities so that they have adequate time to properly and fully direct the community service supervisor.

Regarding possible conflicts with union interests, liaison between Community Corrections Head Office leaders has resulted in the usual stipulations—that the appropriate unions should be consulted at the planning stage, and that community service work projects should involve work not normally done by a union member. In working at the local level with unions, probation offices can use the assistance of the Regional Justice Councils.

Most of the equipment for the community service work projects is recruited from the community. General funding for the programs is by the Department of the Attorney General, and, for the 1974-75 year, was in the neighbourhood of $46,000. The expectation is that the programs will

continue on an on-going basis and if the program proves viable consideration may be given to expanding it at a later date.

Public Relations for the program is the responsibility of the local probation officer. Apparently some local newspapers have given the program favourable coverage stressing the valuable community restitution aspects. One probation officer involved in the program suggests that there appears to be some immediate public acceptance of community service work orders on the principle that "you pay for what you do"—compared to ordinary probation, which was viewed as "getting off". There seems to be general acceptance and enthusiasm for the idea of community service work programs in the Corrections community at large. There have been requests for community service supervisors from some probation communities not involved in the project. In this connection it is estimated that informal use of community service work orders has generally increased in the province in the past year—one small community in the interior of B.C. reporting that in an unusual month, twenty-six persons were involved as clients in community service work projects.

COMMUNITY DIVERSION CENTRE

The establishment of a Community Diversion Centre in Victoria (508 Alpha Street) is another recent development. This centre is staffed by eight people (two directors who maintain liaison with the justice community and with public organizations, one person for research and evaluation, two court workers, a community liaison officer, a business manager, and a receptionist) and funding was by the Department of the Attorney General. It was to Institute adult diversion programs.

Considered as possible candidates for diversion are: (1) persons who have been convicted and are deemed not likely to receive either (a) probation, or (b) a long prison sentence; and (2) persons referred by the police at the pre-charge stage, and persons referred by managers or security officers of stores in connection with shoplifting problems. The program is seen basically as an alternative to a short sentence or a fine. All willing referrals are accepted, at least for initial assessment, regardless of the nature of the charge or of the arrest record. Initial screening will determine suitability for a community program and willingness to participate. Referrals to the diversion centre, then, will be made at the discretion of local probation officers, Diversion Centre workers, prosecutors, lawyers, judges, and, possibly in the future, Saanich police, and store security officers in the Greater Victoria area.

The Diversion Centre employs three workers who make referrals: two work in the provincial courts and one works with remands (awaiting trial or sentence) at Vancouver Island Regional Correction Centre. The worker will contact for possible referral persons that they judge to be suitable.

Persons who have been referred to the Centre go through a two to three week assessment program which includes a daily two-hour orientation session in a home setting with workers on a one-to-one basis or in a group. During the assessment process the client has contact with staff members, a trained counsellor, selected citizens who act as community sponsors, and at least one ex-client (i.e., a person who has already been through the diversion process). This orientation session ". . . makes clear to the client what a diversion program might involve. His continued participation at any stage is voluntary and he can return to the justice system at will. If a client decides to participate, a 'Dialogue Period' follows where he is required to be acquainted with the programs available and reach definite decisions about his immediate future. The result of this is a contract between client and program directors, agreeable to his probation officer, setting out responsibilities and program requirements. A contract might include, for example, a commitment to carry out *volunteer work for community groups,* to receive alcoholism or other counselling and *to make restitution for his offence.*"

The community sponsor continues with the client for six months to a year—assisting the client in carrying out the terms of his contract (such as job-hunting, re-locating domestic base, change in lifestyle, budgeting for restitution, completing training program, completing community work, etc), and maintains liaison with the Community Diversion Centre. He is also of assistance in tapping community resources for counselling, recreation, and personnel budgeting.

The client's contract can be part of the pre-sentence report, but need not be. It is considered essential that the contract set out a "realistic" program servicing what the client sees on the basis of his orienting experience as his immediate and long term needs. The client's performance is evaluated twice a week, and . . . "if any of those concerned considers that the contract is not being fulfilled, all will meet to renegotiate the terms. If, for any serious reason, negotiation cannot resolve the difficulty, the client can be returned to the justice system."

So far three persons have completed the Diversion Centre's process, spending an average of fourteen days in it, and have received probation in place of a prison sentence. Three more are presently in process. Eighteen other clients have been through initial screening. Twenty persons awaiting trial or sentence at Vancouver Island Regional Correctional Centre have been interviewed.

The Community Diversion Centre hopes to become a central body in Victoria for providing diversion information to the court, and for setting up the framework for an offender's choice of an effective program.

SOUTH EAST VANCOUVER PROJECT

A project now in the initial planning stages and to be jointly sponsored and managed by the British Columbia Police Commission, the Department of Human Resources (Resource Boards), Department of the Attorney General (Adult and Juvenile Corrections, Justice Councils), and the Department of Social planning has amoung its aims to work out Community Alternatives for persons in contact with the police. The main objective of the project is to examine the optimum organization of the police and other social services in a community-oriented setting, with a view to identifying problems, developing efficient means of coordination and delivery of appropriate supportive services and resources in preventing and treating problems. The project is conceived as a two year pilot program beginning in a selected area of South East Vancouver on April 1st, 1975. Clients would be referred to the program through the police, social welfare agencies, crisis centres, Mental Patients' Association, and through programs involving street workers, court workers and others. Clients may also refer themselves on a walk-in basis.

CITY CENTRE YOUTH RESOURCES

The City Centre Youth Resources division of the Vancouver Resources Board operates in the downtown core of Vancouver and works on programs designed to remove the impetus for crime by providing counselling and assistance to young people in maintaining themselves legally and in using available community resources and support systems, and by repatriating young persons from environments considered harmful (subcultures involved in trafficking in drugs, panhandling, theft, family abuse, prostitution, etc.). Part of their program involves diversion in the sense of informal community alternatives to arrest in dealing with offences.

Part III

Conclusion: Issues and Problems

(a) Subjects

The British Columbia experience indicates that community service may offer a more suitable sanction than probation or fines for at least one type of offender—the ten to twenty per cent deemed "safe risks" because they are involved for the first or second time in minor offences and have been screened as non-dangerous. Since it is easier to implement at the pre-court level, it has been applied mainly to juveniles. It is possible that a similar system could be worked out for adults, with police bypassing the criminal charge and referring an offender directly to probation.

In British Columbia however, safe-risk adults were assigned CS/W only after conviction, as a condition of probation. A reason frequently given for not using it more with adults has been that judges do not know what specific tasks are or will be available in the community. However, the solution is for judges to assign a given number of hours of work—in Courtenay it is sixteen or twenty-four—and for Probation to indicate what needs to be done.

For those "not-so-safe risks," the twenty-five percent of first offenders and fifty percent of second offenders now jailed for short terms on conviction of theft, break and enter, having stolen goods in possession, fraud, false pretences and damage to property, the carefully-supervised, educative, and difficult-but-rewarding work programs for groups of offenders only (or, in special cases, offenders and "citizens") may offer a solution—as in the instance of the Joss Mountain trail blazing program for "hard-core" juveniles. This type of program is well-planned in advance, tightly organized to do an important and worthwhile task for the community; but normally isolated from the community (for security and/or educative reasons); however there are also programs operating in the midst of the community, and possible with community involvement. The work is done under conditions where the individual is taught useful work skills, and is forced to rely on and support his fellows so that both individual and cooperative group strengths are learned. It is considered important that the task be such that the offender sees the task completed and feels a sense of satisfaction from the fruits of his labour—and possibly, later along with the rest of the community, enjoys its use—as in making camp sites, blazing trails, etc.

It is apparent that in British Columbia the climate of opinion among judges and probation officers is definitely favourable to more extensive use of CS/W treatment, provided it is properly implemented. The Chief Judge of the Provincial Court claims that all judges would be in favour of CS/W if proved viable on the basis of reliable pilot projects. A common complaint of district judges throughout the province was of the lack of community alternatives in sentencing. It is obvious that such a program would be welcomed by Provincial Court judges.

(b) Workload

With probation officers the common complaint is overwork (heavy case load). It is apparent that the probation service is the main resource that would be relied on for (1) liaison with Human Resources and with the community in setting up tasks; (2) screening offenders for CS/W program suitability; (3) matching up tasks with offenders; (4) supervising the "not-so-safe" risks; (5) dealing with "breaches" and various other difficulties; and (6) generally administering the program. A large-scale increase in the use of CS/W would necessitate staffing increases and organizational changes in the probation service. Most probation officials were of the opinion that needs would best be met by having a number of probation officers specialize solely in CS/W programs. Some suggested an increase in the use of "para-professionals" either directly in CS/W programs, or in court duties to free probation officers for CS/W duties—however, the latter is seen as a less desirable alternative, since it is considered more effective for individual probation officers to build up special skills in CS/W work, and for each to see his own cases right through from referral to "release". It should be noted that CS/W programs could have the preventative effect of bolstering the community and hence reducing the case load. Answers to questions such as this would have to be based on careful pilot studies.

(c) Public Opinion

While court and probation officials are thought to be generally receptive, we can anticipate problems with the general public; for example, with sectors who would complain that CS/W programs as "coddling" offenders and endangering the community, and with sectors who might be up in arms about "chain gang", "forced labour" and "slavery" connotations of work projects. No particular problems were experienced with the consideration of confidentiality or in relations with the public when offenders worked right in the community, separately, or alongside citizen volunteers. (One judge however went to the extreme of having probationers clean up parks

very early in the morning before the rise of the general citizenry!) Probation officers claimed that probationers either were already well known to the community as offenders, or went unnoticed during CS/W projects because they were mixed in with the ordinary workers. There was no problem of non-offender community service volunteers not accepting offenders in their midst. The atmosphere was apparently always friendly and cooperative. However, volunteer community workers in small towns represent a very small proportion of the public-at-large. Even among college students one notices a strong section of hard-line opinion against "better" treatment of offenders. On a recent tour of Lower Mainland Regional Correctional Centre (the largest provincial prison) many of my students were appalled and deeply upset at the condition of prisoners; while, at the same time, a small minority in their midst were quite outraged that the prisoners had "so many privileges". "It's like the YMCA," said one! These opinions are strongly held, and hard to shake—even in the educational environment of a small seminar. A massive public education program backed by extensive coverage of pilot projects working with citizen involvement is recommended. Like any new program affecting what the public considers as its safety and property, CS/W will have to be introduced very carefully and very gradually.

(d) Unions

The problem of union consent and backing, while in some instances has proved to be a major stumbling block, is, as others have found, not an insurmountable obstacle. The key to success with unions appears to have been: (1) including them at the planning stage; (2) using the influence and pressure of other power groups in the community (e.g., the mayor, business heads, school board, etc.—also included in the planning stage); (3) creating projects that do not threaten the union sphere of interest; that is, jobs that would not normally be done by union members; (4) making offenders members of the union concerned (simply by having offenders pay dues); (5) starting with a union concerned with public works and using consent of this union as a precedent to persuade other unions. Coverage for injury on the job was a problem that, before the July 1972 Order-in-Council which extended Workman's Compensation to probationers, was handled in one instance by a rider on general municipal insurance, in another by medical plans, and in many others by "just taking chances".

(e) Administration

There is some conflict of opinion regarding the legislative requirements of implementing CS/W treatment. New legislation would help the program by bringing it to the attention of judges, lawyers, and community agencies. It remains to be worked out on the basis of legal and practical imperatives if such programs are to be operated as conditions of probation and/or alternatives to probation, and what is to be done in the case of non-compliance or breach (surely not, in the first instance, imprisonment or a fine, but more work, less desirable tasks, etc.).

Another question is perhaps that of the voluntariness of offender participation in CS/W projects. Many have suggested that they "get the best results" when the offender is agreeable or has actually volunteered to participate; however, more research would be needed to corroborate this contention. One might consider giving an offender choice between equally beneficial work experiences (as in the Dawson Creek example of tour promotion, or bridge painting, or parks clean-up) and thus inject a note of voluntariness; or a choice between a work project and the court process (as in effect done with juveniles at the pre-court level); or a choice between a fine and a work project—rather than the present fine-or-jail system.

It would seem that a small or medium-sized stable community such as Nanaimo, Courtenay or Dawson Creek with an active, public-spirited citizenry and well-coordinated back-up resources (active service clubs, volunteer crisis and drop-in organizations, recreational facilities or possibilities, good school and alternative-school resources, etc.,) is the ideal setting for CS/W treatment. Some pilot projects then should perhaps be tried in the larger urban centres, and in isolated rural communities, in order to explore special problems and difficulties.

Appendix

Using Community Service in Indian Communities

Indian communities will also present special problems and, possibly, special solutions. Each person that I talked to in this regard: the Indian Courtworkers, the Native Programs Advisor for Corrections, a Native worker involved with Allied Tribes (an Indian organization to help inmates), the Duncan probation officer who works with the Indian Police force on the local reserve, anthropologists at the University of British Columbia specializing in the Indians of British Columbia, emphasized that Indians must be allowed to seek their own solutions in their own communities—and not have outside programs forced on them.

Unfortunately, the pressing needs of most Indian Communities are far more basic than the level of needs of the larger society considered so far in this paper. Conditions in Indian communities vary, but most common are the communities such as many in the B.C. Interior reserves, that suffered severe dislocation at the time of contact with the white man and who have never recovered economically, socially, or psychically. Having been deprived of an independent economic base, they are trapped in the "welfare syndrome" with very low community morale, drinking parents and neglected children, bad health, inadequate housing, and no community facilities. In such communities, the problems of implementing CS/W programs would be immense—due to culture conflict and very poor economic and social conditions. Most of the correctional problems in such communities are related to what are generally called "crime without victims"—alcohol and drug abuse.

Some urban reserves, such as those of some Capilano and Squamish bands may have a fairly strong economic base (if only temporarily) due to the high value of their property, but are subject to heavy social and moral problems arising from the surrounding urban milieu. Some of these bands have been successful in their own recreational programs, especially with therapeutic tribal dancing. The Indian Courtworkers and the Union of British Columbia Chiefs stress the need for basic education on the reserves—initiated and run by the natives themselves: programs on criminal justice, alcohol and drug abuse, and so on. Their motto:

Indian communities that are economically self sufficient with a high degree of moral and social solidarity are rare. An example is the Nishka community, a small fishing settlement on an isolated northern coastal reserve. They have a prosperous and independent economy. They have a strong policing system of their own, and have re-created some of the older tribal methods of social control. Such communities have no need of outside "help", or outside "justice". Indian communities that are less well-off are perhaps in greater need of the satisfactions that come from initiating, planning and executing their own programs:

> *"We should return to the natives the problem of justice in their own communities and make the services of the larger society available to them as resources... On some reserves there may be no idea of what to do with the new responsibilities, since they have been deprived of responsibility for so long. We may therefore need a liaison cooperative resource to get transitional problems worked out. We must give the Indians an opportunity to look at what they might want for themselves."*[7]

According to the Matheson Task Force Report, Native Indians represent approximately 5% of the total population in British Columbia. They comprise however 13% of total admissions to British Columbia Corrections[8] and they constitute 40% of the children given into the custody of Human Resources. It is to be noted that the Indian population is apparently a young population with one half under sixteen years of age and three quarters under thirty-two years of age.[9] They are scattered on 1,600 reserves and belong to 190 different bands representing 10 major ethnic groups and 26 different language groups.[10]

In order to appreciate the problems of Community Service Treatment as it may relate to the Native offender, John Ekstedt, Executive Director of Special Programs, Department of Corrections, felt that we must understand native people in three different categories: (1) The person who is "culturally" Indian, adheres to the traditional Indian values, and does not share or understand white values of "justice". This person probably comes from a highly structured isolated community with a circuit judge and no probation services. Community Service Treatment (along with other white philosophies) are not adequately understood by this person. (2) The native

person who has "one foot in each culture". He tends not to accept white man's justice but tries to use white man's ways to attain Indian or white objectives. He is confused and frustrated in a social and political way, and vulnerable to angry involvement in the white criminal subculture inside and outside of institutions. (3) The native person who is for most intents and purposes, assimilated. Such persons who come to the attention of Corrections have usually been treated nevertheless with more discrimination than their white counterparts.

I include for review excerpts from the Task Force Report indicating some relevant facts about Indians in relation to Corrections.[11]

Indians

Scope of the Problem

The number of Indians admitted to custody for the fiscal year 1971/1972 totalled 1,453 males and 142 females. It is encouraging to note that this total has been decreasing steadily over the last number of years and is now at its lowest point for recent years. However, the need to develop alternatives to a sentence in custody is obvious, when one recognizes that the Indian makes in custody represent 13% of the intake, whereas the Indians as a group represent approximately 4-5% of the total population in British Columbia.

Development of Community Alternatives

In discussion with the Union of B.C. Chiefs, a number of suggestions have been developed which have a good deal of merit in terms of developing alternatives for the court to use in the disposition of Indian offenders.

The Union of B.C. Chiefs has recommended that there be 20 field correctional workers appointed who would cover Indian reserve areas. These field workers would supervise probation and parole cases, develop volunteer supervisors, develop education programs on alcohol and drugs, and liaise with the institutions in which Indians are incarcerated. The Task Force supports this recommendation and further recommends that they be

incorporated as interviewers in the probation service and as they gain the required qualifications be upgraded to the rank of probation officer.

For the urban areas it is recommended that the court worker program be expanded.

One of the obvious problems with the Indian group is the series of offences committed by them in urban areas. From the location of Indian offences throughout the province, it is obvious that the majority occur in the urban and related areas. It is therefore recommended that a program be developed to assist in the integration of the Indians into the urban areas. This would include extension of support for the Indian Friendship Centre and also the Native Information Centre which provides for the counselling of Indians in coping with the problems of urban life. It is also recommended that Manpower provide special attention in terms of developing employment opportunities on a more accessible basis to the Indians not only in urban environment, but also in the regions throughout the province. It has been suggested that government agencies should be encouraged to make specific provision for the hiring of Indians on their staff. Within this context it is recommended that Indians be hired on the staff of the regional correctional facilities recommended in this report and so provide a greater contact and liaison between the centres and the Indian community.

Police

The Task Force was impressed with the efforts of the Royal Canadian Mounted Police to develop an Indian policing program through the use of special constables. We are in agreement with the suggestion of the Union of B.C. Chiefs that this program should be expanded from the present group of 12 to 40 or 50 personnel. It is also recommended that the staff be appointed as special constables within the R.C.M.P. in order to provide a greater career line and status for them within that organization. It is further recommended that the R.C.M.P. be supported in the way of additional manpower to develop the necessary training and supervision program for the special constable force. This program has already been developed in Saskatchewan, and represents an opportunity to involve the entire Indian community in the development of their society.

Prevention

With the development of Indian field correctional workers, there should be some opportunities for development of prevention programs. It

is felt that there is a particular need in the education area for the schools to develop special curriculums and enriched learning opportunities related to the cultural interests of the Indians. It is also recommended that the Indian community be involved in the planning of these special courses.

It is further recommended that the field workers develop Indian volunteers to assist in the supervision of cases on probation and parole. Another recommendation is that these field workers attempt to develop Indian foster homes for the placement of children to the greatest degree possible.

While it is recognized by the Task Force that the Indian communities represent severe problems in some areas of the province, on the other hand there has been substantial progress made in the reduction of the number of Indians coming into custody, and it is felt that this could be continued further through the development of community alternatives. The Task Force in turn, recognizes that the answer to the basic problems of Indian criminality depends to a large extent on the development of solutions to the general, social, and economic problems facing these people.

Native Indian by Court Location

Sunshine Coast/Squamish	30
Lower Mainland	79
Greater Vancouver	249
Vancouver Island	147
Greater Victoria	45
Okanagan/Kootenay	312
Northern B.C.	515
Total	1,377

Comments

1. The major caseload of Native and B.C. Indian admissions came from Northern B.C. (37.4%). The Lower Mainland and Greater Vancouver admitted about the same number (23%) of Indians as the Okanagan/Kootenay area.

2. The Indian offenders comprises 13% of total admissions into Corrections.

3. 31.5% of total admissions from Northern B.C. were Indian.

4. Larger court locations with Native Indians as a high percentage of admissions. Fort St.James (80.9%). Lillooet (71.1%), Burns Lake (68.6%), Smithers (56.8%), Chase (56.2%), Merritt (46.5%), Williams Lake (33.7%), and Prince Rupert (50.4%). Several other places have 20-30% Indian admission e.g. Chilliwack, Duncan, and Quesnel.

5. Obvious clusters of B.C. Indian Reservations occur around the population center of Hazelton, Prince Rupert, Burns Lake, Alexis Creek, Lillooet, Chase, Vernon, Merritt and Chilliwack, Port Hardy, Alert Bay and Nanaimo to Duncan on the Island reflect the same concentrations.

6. The largest number of Indian offenders admitted to corrections institutions is at Oakalla. However, the greatest percentage incarcerated at a larger facility occurred at Prince George where 25% of the inmates were Indian.

7. This offender group made up 11% of total admissions into Corrections Institutions.

Endnotes

1. The Attorney General made this remark in his discussion paper, "Toward a Functional Base for Delineating Federal-Provincial Responsibility in Corrrections", 1973, p. 2.

2. Ibid, pp. 1-2.

3. Ibid, p. 2.

4. According to Department of Indian Affairs and Northern Development, *Indians of British Columbia, an Historical Review*, p. 15, Indians numbered 46,178 as of December 31, 1968. The population count refers to registered or status Indians only. According to a colleague of mine who worked with Mr. Rheaume, the most accurate technique to determine the total number of combined status and non-status Indians is to double the officially registered figure—which makes about 100,000 "cultural-physical" Indians in B.C.

5. M. Matheson, Chairman, *Task Force on Correctional Services and Facilities*, Summary Report, Department of the Attorney-General, February, 1973, pp. 18-22.

6. It is the policy of the Corrections Department, Juvenile Division in Victoria and Vancouver and in some other areas that juveniles apprehended by the police are never directly charged, but referred to the probation service, who in the majority of instances enter into a "letter of arrangement" in which the child (and parents) agree to comply with the directions of the probation officer for a certain specified period of time. This is done under the authority of the Provincial Court Act, Sec. 18, which authorizes the probation officer, with the consent of child and parent to "make suitable arrangments for the child" without formal court procedure. In the case of juveniles coming before the court, Section 20 (1)(*g*) of the Juvenile Delinquent Act authorizes the court to "impose upon the delinquent such further and other considerations as may be deemed advisable". CS/W has been considered within the general intent and philosophy of the act, and is deemed sufficient authority. No problem has been raised to date.

7. An official in the Department of Correction.

8. Matheson, *Task Force Report*, p. 161.

9. B.C. Union of Indian Chiefs, *Proposal for a Legal-Correctional Community Re-Entry Program*, p. 3.

10. Wilson Duff, *The Indian History of British Columbia, Volume I: Impact of the White Man,* The Museum of B.C., pp. 15, 18-37. An excellent reference is *The Economic Impact of the Public Sector Upon the Indians of British Columbia,* a report submitted to the Department of Indian Affairs and Northern Development by D.B. Fields and W.T. Stanbury, University of British Columbia Press, 1973.

11. Matheson, ibid, pp. 160-161.

COMMUNITY SERVICE ORDERS

THE VIEW OF THE COURT

(1) R. v. E.D.J.

(2) R. v. N.S.L.

(3) R. v. W.S.N.

IN THE GENERAL SESSIONS OF THE PEACE

IN AND FOR THE JUDICIAL DISTRICT OF

YORK

HER MAJESTY THE QUEEN

vs.

E. D. J.

Before His Honour JUDGE STORTINI

REASONS FOR SENTENCE

THE COURT: This case has been before us for quite some time. The trial took a few days, and the accused has come up on at least two occasions for sentencing, at which time the Court saw fit to order a pre-sentence report and psychiatric assessment. We now have the benefit of these reports. I have given serious consideration to this case. I am aware of the principles of sentencing; I do not wish to review them in detail. Both counsel have touched on the basic elements of deterrence and rehabilitation.

The background of this case, as I have already stated, is theft of Canada Savings Bonds and stock certificates from the accused's employer. The crime involved is not one of violence; it is serious, but it certainly is not

in the same category as a crime perpetrated by a dangerous offender. I certainly cannot overlook the fact the accused has been in custody in the Don Jail about a year and two months awaiting disposition of this case. It is common knowledge that time served in the Don jail is considered much more difficult than any of Her Majesty's prisons.

In attempting to select a disposition in this case that would be best for society and still deal with the accused on the basis that reflects the basic principles of sentencing, I have had occasion to look at some literature to assist me, in addition to reviewing cases that have dealt with similar types of offences.

I have referred to the report of the Canadian Committee on Corrections, published in 1969, commonly known as the Ouimet Report, and in dealing with sentencing at page 187, the Committee had this to say in discussing penitentiary as a universal response to offences in the community:

> "The penitentiary theory has a fundamental defect in that it rests on the proposition that an offender must be imprisoned in order to provide an opportunity for his reform.
> "There is mounting evidence that treatment in the community may frequently be more effective."

Again, at page 188, the Committee had this to say:

> "The aim of sentencing should be the protection of the community. Contemporary positions on sentencing take into account three possible approaches to this desired result:
>
> "(i) punishment for general or particular deterrence,
> "(ii) segregations, and
> "(iii) rehabilitation.
>
> "In order to determine the degree and extent of control which is appropriate in a particular case, the judge must first decide which is the predominant consideration."

Segregation, of course, would deal primarily with dangerous offences. Of course, it might reflect the age of the crime, the antecedents of the accused and the circumstances surrounding the entire matter; and, of course, rehabilitation involves the accused as a person and the proper test for his rehabilitation, if any.

Again, at page 191 of the Ouimet Report, the Committee has recommended what basically is the Model Penal Code of the American Law Institution, Section 7, which reads as follows:

> "The court shall deal with a person who has been convicted of a crime without imposing sentence of imprisonment unless, having regard to the nature and circumstance of the crime and history, character and condition of the defendant, it is of the opinion that his imprisonment is necessary for the protection of the public because:
>
> > "(a) there is undue risk that during the period of a suspected sentence or probation the defendant will commit another crime; or
> > "(b) the defendant is in need of correctional treatment that can be provided most effectively by his commitment to an institution; or
> > "(c) a lesser sentence will depreciate the seriousness of the defendant's crime."

The Law Reform Commission of Canada has also investigated the whole field of sentencing and dispositions, and in Working Paper 3, under principles of sentencing and dispositions, the Commission had this to say, at page 13:

> "It is suggested that as a rule, the priority should be to impose a non-custodial sentence unless otherwise indicated upon consideration of the following criteria:
>
> > "(1) the gravity of the offence,
> > "(2) the number and recency of previous convictions; and
> > "(3) the risk that the offender will commit another serious crime during his sentence unless he is imprisoned."

Again, at page 29 of that report, the Commission is discussing the involvement of the community in the matter of sentencing and dispositions, and it had this to say, at page 29:

> "Following conviction, the need for a sustained relationship between the community and the offender remains paramount. To reduce the criminalizing and injurious effects of correction and imprisonment; there is need for individuals and organizations to provide an array of visiting services, counselling, therapy, work, recreational or other services."

And in Working Paper 7 of the Law Reform Commission entitled "Diversion," page 11, it was pointed out that the Court ought to never be rigid and inflexible in dealing with dispositions, and it reminds us that:

> "Probation was a direct result of innovation by judges and only later did the practice receive legislative recognition."

On page 12 of Working Paper 7, the Commission had this to say:

> "... the principle of restraint in using criminal processes and sanctions can be exercised by the judge. The Court has a very wide power to impose a sentence other than imprisonment, such as absolute and conditional discharge, restitution, fine and probation. In addition, other community-based sanctions deserve consideration such as *community service* orders."

And again at the bottom of page 12, there is this statement:

> "In Canada there is a high rate of imprisonment compared to other countries. In addition, we usually send persons to prison not because of crimes of violence, but because of convictions for property offences, offences against the public order or other offences not involving violence to the person."

And again on page 13:

> "If imprisonment is restricted to those whose crimes pose a serious risk to the life or limb of others, to those whose crimes are so reprehensible that deprivation of liberty is the only adequate response, or to those who refuse to pay fines or comply with other voluntary sanctions, then we must contemplate sentencing many more men to community-based dispositions."

And at the bottom of page 13:

> "If we are prepared to have an increase in community-based dispositions it becomes important to see whether community resources can handle this change in practice. Specifically, are there programs available in the community for supervising offenders in doing work such as cleaning up waste from public areas, assisting the elderly in clearing snow from sidewalks . . . "

And so on.

The document I have just referred to is dealing with what is known as community service orders as an alternative to the traditional methods

of disposition. They are not new in the criminal justice field; they are now in force in Great Britain by virtue of the new non-custodial measures introduced by the Criminal Justice Act in 1972.

I refer to the article from Prins, Herschell A. entitled "Non-Custodial Measures and the Criminal Justice Act, 1972," to be found at page 2 of the Prison Service Journal of January, 1974; and also the report of the Advisory Council on the Penal System entitled "Non-Custodial & Semi-Custodial Penalties." London, H.M.S.O. 1970, at pages 12 to 21, 51 to 56, 66 to 70. Under the said Act, an adult offender is sentenced to providing community service for a specific number of hours in lieu of incarceration. The order is made following consideration of his social inquiry report as to an offender's suitability, his willingness to carry out a community task and the availability of community work.

If the offender fails to carry out his work commitment he may be returned to court as being in breach of the order and he may then be dealt with in the traditional manner.

Community service by offenders is an alternative to a custodial sentence in those cases where the public interest does not demand that the offender should be imprisoned. It allows the offender to continue to live in the community with his wife and family, supporting them by his normal work. It demonstrates to the offender that society is involved in his delinquency and that he has incurred a debt which can be repaid in some measure by work or service in the community. It attempts to demonstrate that an offender, properly supervised, can contribute to the public good.

The question is, while such disposition is possible by statute in Great Britain, is community service possible under our existing legislation? I would answer yes. I refer to Section 663 of the Criminal Code, paragraph (1):

> "Where an accused is convicted of an offence the court may, having regard to the age and character of the accused, the nature of the offence and the circumstances surrounding its commission,
>
> > "(*a*) in the case of an offence other than one for which a minimum punishment is prescribed by law, suspend the passing of sentence and direct that the accused be released upon the conditions prescribed in a probation order;"

And (*b*) deals with a fine in addition to probation, or a jail term in addition to probation, and (*c*) provides for probation coupled with an intermittent sentence.

Paragraph (2) of Section 663 reads as follows:

"The following conditions shall be deemed to be prescribed in a probation order, namely, that the accused shall keep the peace and be of good behaviour and shall appear before the court when required to do so by the court, and, in addition, the court may prescribe as conditions in a probation order that the accused shall do any one or more of the following things as specified in the order, namely,

"(*a*) report to and be under the supervision of a probation officer or other person designated by the court;"

(*b*) has to do with supporting his dependants; (*c*) has to do with abstaining from addictive substances; (*d*) has to do with abstaining from owning or carrying weapons; (*e*) has to do with making restitution or reparation to the person aggrieved or injured by the commission of the offence; and (*f*) has to do with remaining in the jurisdiction; (*g*) has to do with making reasonable efforts to find and maintain suitable employment, and:

"(*h*) comply with such other reasonable conditions as the court considers desirable for securing the good conduct of the accused and for preventing a repetition by him of the same offence or the commission of other offences."

Section 664 has to do with a probation order coming into force, and sub-section (3) has to do with changes being made in the order and I will read it; Section 664, sub-section (3):

"Where a court has made a probation order, the court may at any time, upon application by the accused or the prosecutor, require the accused to appear before it and, after hearing the accused and the prosecutor,

"(*a*) make any changes in or additions to the conditions prescribed in the order that in the opinion of the court are rendered desirable by a change in the circumstances since the conditions were prescribed,
"(*b*) relieve the accused, either absolutely or upon such terms or for such period as the court deems desirable, of compliance with any condition described in any of paragraphs 663(2) (*a*) to (*h*) that is prescribed in the order, or
"(*c*) decrease the period for which the probation order is to remain in force."

Section 666, sub-section (1), has to do with failure to comply:

"An accused who is bound by a probation order and who wilfully fails or refuses to comply with that order is guilty of an offence punishable on summary conviction."

It is my opinion that community service is feasible in our jurisdiction. It can involve adult males or females who are willing to do community work. These offenders would normally be considered as candidates for probation. The pre-sentence report and medical reports would indicate eligible offenders and any special skills or talent.

The staff and volunteers of a community agency such as the John Howard Society of Metropolitan Toronto can assist in setting up and supervising the particular community service. As a beginning, the community service can be performed for the benefit of community institutions supported in whole or in part by taxes; in other words, the list of institutions provided to Grand Juries for inspections.

At this point I would like to ask the accused, if this Court saw fit to order a community service, would he be willing to undertake such service?

THE ACCUSED: Yes, I would, Your Honour; thank you. Yes, I would.

THE COURT: You would be willing to do volunteer work for one of our local community agencies?

THE ACCUSED: Yes, Your Honour; I would go.

THE COURT: Well, this offender has indicated his willingness to do community service. The John Howard Society of Metropolitan Toronto has indicated to me its willingness to assist the Court in this project.

Normally, volunteers spend an average of four hours per week on community agencies. From the evidence at trial and the pre-sentence and psychiatric reports I have some idea as to the offender's skills and abilities. He has a degree in engineering, and has excellent work experience, and should have no difficulty in maintaining himself and still have time to pay his debt to the community.

The disposition of this Court is, therefore, as follows: one, sentence is suspended; two, the accused is put on probation for two years on the usual terms; that he is to keep the peace and be of good behaviour, and the other statutory conditions; three, he is to do community service for the Elizabeth Fry Society. This volunteer organization works with female offenders. It is a public-supported agency, and it is on the Grand Jury inspection list. They have a residence in Toronto which requires some volunteer labour

well within the competency of this accused, such as, for example, installing an air-conditioning unit, assemble furniture, install wall mirrors, exterior painting and so forth.

Four, the community service will comprise at least three hundred hours; five, the community service is to be performed under the supervision of the John Howard Society of Metropolitan Toronto; and the accused is to report to a staff member or volunteer selected by the executive secretary of the said agency at such times as directed by such supervisor. Six, interim probation reports and a final report on the community service is to be submitted to the Court by the John Howard Society of Metropolitan Toronto; seven, the John Howard Society of Metropolitan Toronto is at liberty to recommend changes, relief of conditions or degrees of periods as set out in Section 664, sub-section (3), of the Criminal Code. This should provide an additional incentive to the accused. I have already referred to the section dealing with failure to comply.

I understand a volunteer from the John Howard Society is in court and will be able to provide the necessary details to the accused and the necessary arrangements for his involvement in the community service as outlined above.

The accused will, of course, sign the usual probation order; that is the disposition of this case.

IN THE PROVINCIAL COURT (CRIMINAL DIVISION)
CITY OF BELLEVILLE—COUNTY OF HASTINGS

HER MAJESTY THE QUEEN

vs.

N. S. L.

Before His Honour Judge J. L. CLENDENNING

HIS HONOUR:

Mr. L., this Court has taken what can only be regarded as a rather unusual step, and I suggest you be seated and listen to my comments.

At times everyone to some degree engages in introspection, establishing goals for themselves and evaluating how best to achieve those goals. This is true not only of the individual, but of institutions, of which our judicial system is but one and an institution of which this Court is one small part.

The individual through introspection attempts to set objectives or goals for themselves. Such is not the case with our legal system. Society itself has determined the objective in the establishment of our whole legal system, that objective being, relating it to the criminal process, the protection of society.

Society has also dictated the process to achieve the determined objective, namely investigation, apprehension, arrest and trial of alleged offenders, and, if convicted, the imposition of sanctions, i.e. sentence. It goes

without saying the Court is concerned only with the last two steps in that process, and the last, the sentencing process, being the most difficult of all.

The sentencing function of the Court has objectives of its own, namely the reformation or rehabilitation of an accused, and deterrence, deterrence not only to the individual before the Court but deterrence also to others who might consider engaging in the type of activity being considered. In attempting to achieve those objectives, the sentencing Court must consider the individual accused as well as other factors. The Court is guided by such factors as the maximum penalty established by Parliament for that offence—and I might add, in the circumstances here the maximum is two years in custody—the principles which it elicits from the decisions of the Court of Appeal dealing with similar fact situations, and if one subscribes to the conclusions in a publication of the University of Toronto Press, "Sentencing as a Human Process", relies indirectly on the psychological makeup of the individual Judge.

Of recent date this Court has engaged in some introspection, introspection engendered by what it regards as increasing incidence of minor thefts from storekeepers in the community, colloquially referred to as shoplifting. As indicative of the magnitude of the problem, a recent Court docket contained no less than fifteen such charges out of a total of 138, greater than ten percent of all charges before the Court. Of these 15, eleven charges originated with one complainant, the rest from various other merchants.

Because of what appeared to be a substantial increase in offences of this nature, the Court became concerned with whether the sentencing process was achieving the desired objectives of reformation, rehabilitation, and deterrence. This concern engendered not only introspection, but meetings with the Crown Attorney, members of the Provincial Probation Service, and staff members of one merchant, in order that the Court might better appreciate the problem. In addition, the Court subjected not only the individual accused but the members of the general public in attendance when a sentence was imposed, to careful observation, to derive their reaction to the imposition of any particular sentence.

On the basis of the enunciated factors, this Court concluded:

1. Shoplifting is on a decided increase. From 1973 to 1974 the value of goods recovered by the one merchant surveyed increased 43%, and the number of apprehensions in Belleville virtually doubled. Part of this increase could be attributed to increased surveillance, but not all. Some is related to an actual increase.

2. It is estimated of those involved in this type of offence, only one in ten is apprehended.

3. The loss engendered by this type of activity, and the cost, is reflected in increased prices and borne by all consumers.

4. The type of merchandising, namely self-serve stores, dictated to a great degree by economic factors, contribute to the increasing incidence of this type of offence.

5. Offenders are not confined to any particular area of our society, but drawn from all areas, social and economic.

6. Only infrequently are the goods stolen such that they could be classified as necessities of life, and the average value of goods involved in one store in 1974, per offence, was $9.25. From these last two items it seems only reasonable to conclude that no particular reason can be ascribed for involvement in this type of activity, but in my view can only be regarded as virtually some type of unexplainable social phenomenon.

7. Detection, apprehension, Court appearance, and disposition are achieving the results of reformation, rehabilitation, and deterrence as deterrence relates to the individual. This conclusion is based on the fact that virtually all those accused appearing before the Court have no previous criminal record, and in all other respects would be regarded as an upstanding citizen. I might add this conclusion appears in keeping with the principles enunciated by the various decisions of the Ontario Court of Appeal, and also with the views expressed by the Law Reform Commission of Canada in their Working Paper Number 3.

8. As a practical matter this Court is precluded from ordering a pre-sentence report in each and every case of petty theft. To do so, I am informed, would place such an onerous workload on the Probation Services that by virtue of the time factor would have an affect on those pre-sentence reports prepared for more serious offences. This of course, to some extent, precludes the tailoring of the sentence to the individual accused before the Court, because of lack of information.

9. Absolute discharges, by some accused, are viewed as tantamount to an acquittal. Given this fact it would seem only in the most unusual circumstances should the Court have recourse to this type of disposition.

10. The principles enunciated by the Ontario Court of Appeal, and I might add with these I agree, would appear to preclude periods of incarceration for first offenders for offences of this nature, unless unusual circumstances exist.

11. The recording of a conviction and the imposition of a fine, in many situations, particularly in relation to those accused on the lower rung of the economic ladder, would effect a hardship out of all proportion to the offence, and in some cases, for non-payment of the fine, involve incarceration. Conversely, to record a conviction and impose a fine on those with financial ability to pay would appear to detract from uniformity of sentence.

Taking all these factors into consideration, the following sentence is imposed. You have been found guilty, Mr. L. No conviction has been recorded.

You will be conditionally discharged upon complying with the following terms of a Probation Order which will be in effect for a period of twelve months.

Firstly, you will keep the peace and be of good behaviour.

Secondly, you will report monthly or as may be required by a Probation Officer.

Thirdly, you will remain within the jurisdiction of the Court, and notify the Court or your Probation Officer of any change in your employment, address, or occupation.

Fourthly, you will not enter nor be found in the business premises commonly referred to as M.F.M. I might add, to explain this term so that you understand it, Mr. L., a term which previously this Court has been including in Probation Orders for offences of this nature in any event, in the meeting conducted the staff of the store indicated their agreement and approval of this procedure. I also understand consideration was given to the possibility of proceedings under the Petty Trespass Act in situations where it was not a term of the Probation Order.

The foregoing terms, in my view, plus the subjection to the Court process, is sufficient to satisfy the principles of reformation, rehabilitation, and deterrence as it relates to you as an individual. To some extent they are also an attempt to tailor the sentence to the individual accused before the Court, notwithstanding in many instances the lack of a pre-sentence report for the reasons previously enunciated and is the case in relation to you.

I am sure if for some reason some particular problem exists, of which the Court at this point is not apprised, it will manifest itself to your Proba-

tion Officer during the reporting requirement and could be the basis for an application to vary the Order to meet the individual circumstances.

In addition, the terms of the Order will act as an individual deterrent inasmuch as further participation in offences of this nature could constitute a breach of the Order, bringing into operation Sections 664 and 666 of the Criminal Code, to which I shall later refer.

If I am correct, most of the principles of sentencing have, with these terms, been satisfied, with one exception, namely general deterrence to others who might engage in offences of this nature.

As indicated earlier, in my view, fines and/or incarceration are not the answer; however, to have no general deterrence incorporated in the sentence, given the increasing incidence of this type of offence, renders the complete sentence meaningless to the public, and to some extent placed the credibility of the whole legal system in issue. It is primarily to this factor this Court has directed its introspection to attempt to incorporate terms both meaningful and relative to the nature of the offence before the Court.

Recognizing the losses and concomitant costs to society, and the reflection of those costs in the form of higher prices; recognizing also the factors enunciated earlier that only one in ten offenders are apprehended; recognizing also the availability of not only our Probation Services but the volunteer program associated therewith, this Court has decided to include one additional term.

The value of the good, Mr. L., as indicated by the Crown Attorney, is $15.75. Reduced to simplistic factors, I take the factor of four which to some extent is a recognition that the apprehension rate may be something less than one in ten; and taking into consideration the minimum wage established in Ontario as $2.25 per hour, the Court arrives at the following.

You will perform such services, in the amount of twenty-eight hours, with such volunteer services in the Belleville area as may be designated by your Probation Officer, such services to be performed within eleven months of this date.

I understand from one of our Probation Officers that one such volunteer service has indicated their willingness to participate in this type of arrangement. How I have arrived at that figure, I will explain it to you, Mr. L., quite simply. I have taken the value of the goods, multiplied it by four, and divided it by $2.25, to arrive at a given number of hours.

This term, in my view, will to some extent satisfy the requirement of general deterrence, and to some extent it will also reimburse society partially for the additional costs borne by them as a result of such activity.

And last, but not least, because of your participation in a program which may contribute to the welfare of those economically deprived, perform a useful service to those who by virtue of their economic status are the most affected by the increased prices occasioned by activities of this nature.

I would point out to you, sir, and I indicated earlier I would refer to Sections 664 and 666 of the Criminal Code. By virtue of the operation of Section 664, if you breach the terms of this Order you may be brought back before this Court, a conviction registered, and sentenced for this offence.

In addition, under Section 666 a breach of any of the terms constitute an offence in itself, for which if convicted you could be eligible to up to six months in custody.

Are you prepared to sign an Order of that nature, Mr. L.?

MR. L.:

Yes.

HIS HONOUR:

Be seated in the body of the Court. After the Order is prepared and executed, you will be free to go.

IN THE PROVINCIAL COURT (CRIMINAL DIVISION)
VILLAGE OF BANCROFT, COUNTY OF HASTINGS

HER MAJESTY THE QUEEN

vs.

W. S. N.

Before His Honour Judge J. L. CLENDENNING

SENTENCE

HIS HONOUR:

The accused was convicted on August 28th last of theft of a truck and contents of a value exceeding two hundred dollars, an offence which carries with it a maximum possible penalty of up to ten years in custody.

On that date, during the course of his submissions, Crown counsel tendered in evidence the criminal record of the accused, a record admitted by counsel for the accused, which is Exhibit 1 before this Court on sentence. After hearing submissions by counsel, the matter was adjourned to to-day's date, a pre-sentence report ordered, and the accused remanded in custody. The pre-sentence report will be Exhibit No. 2 on sentence.

Exhibit No. 1, the criminal record of the accused, was in effect the primary submission by the Crown and is worthy of analysis. It discloses since May 14, 1943, in an approximate thirty one year period, the convictions of the accused for forty three separate criminal offences, for which

he was sentenced to a total of almost thirty years in custodial institutions of various types. To reduce it to average, the accused during the past thirty one years has committed forty three offences, or almost one and one half per year, and was sentenced to an average of almost one year per year during that period. In addition, the accused was sentenced to a training school at the age of twelve, where he resided until he was fifteen. As the pre-sentence report indicates, the accused has spent more than two-fifths of his lifetime within the confines of some type of custodial institution.

I think on the basis of this information it is fair to say the accused has become what sociologists and psychologists refer to as "institutionalized". By that is meant, without the physical restrictions of a custodial institution and the application of formalized rules regulating virtually every aspect of his existence, the accused is, or has become, incapable of operating effectively outside of those confines. I gather that shocks you slightly, Mr. N.?

The sentencing function of the Court is the most difficult it has to perform. In imposing a sentence the basic principles or objectives of sentencing must always be borne in mind; namely, the protection of society; deterrence, to not only the accused, but to others who would engage in this type of activity; and lastly, the reformation and rehabilitation of the accused himself. The input, or information upon which the Court relies are such items as submissions by counsel, criminal records, and, as the case here, pre-sentence reports. In addition, this Court did ascertain from the Ministry of Social and Family Services that an application has been made by the accused for a permanent type disability pension due to his inability to engage in manual labour as a result of back problems. The Welfare Department of Hastings County indicated he is a recipient of fifty nine dollars every second week; and thirdly, certain information was received from the Penitentiary service, information to which I shall shortly refer.

On any analysis of the above material I think the following is a reasonably accurate summary. Society is only being protected to any extent during those periods when the physical limitations of a custodial environment have precluded the accused from engaging in further offences. The same can be said of deterrence as far as the accused is concerned. It is apparent periods of incarceration have not in any way deterred him from further criminal activities, and it is difficult, if not impossible, to assess what, if any, effect these sentences have acted to deter others. And lastly, it is obvious the reformation or rehabilitation of the accused has not been effected.

Before this Court stands a fifty year old man, unskilled, the equivalent of a Grade VI education, no roots in any community, on the lower end of

what anyone must regard the social economic scale, and by virtue of poor health, capable of performing only the most menial tasks. It is given these details, the Court must attempt to make a judicial application of the principles of protection of society, deterrence, reformation and rehabilitation.

It is interesting to note the principle "protection of society" and the obvious question that arises: "From what is society to be protected?" The answer of course is obvious—it is to be protected from an individual who by his past record has a propensity to deprive members of society of their property, virtually all of the past offences being in the nature of theft. This of course can, to a great degree, be equated with monetary loss to the various individuals within the society who have been subjected to the criminal activities of the accused over the years.

It would be interesting if one could make a comparison between the actual monetary loss incurred by individuals—and I might add that is one of the reasons I requested Mr. B.'s (the victim) presence this morning—within our society as a result of the criminal activities of the accused, and the monetary loss to society in general as a result of the periods of incarceration of the accused over the past thirty-eight years. Some indication of the magnitude of the problem can of course be achieved by considering the actual effect in the instant case of a period of incarceration.

At the present time, as I recall, the actual cost per inmate per year of incarceration in a Federal institution is now approximately Thirteen Thousand, Four Hundred Dollars per year. Given the population of Bancroft of roughtly 2,500—and I am not sure whether that figure is accurate and you gentlemen can correct me if I am wrong—this means that for each and every year the accused is incarcerated, it will *cost,* and I emphasize the word "cost", every man, woman, and child approximately Five Dollars, and I am referring of course to the population of Bancroft. To put it bluntly, society has a vested interest in assuring you are deterred from further criminal activities, and that your reformation and rehabilitation within that society is achieved.

Recognizing several factors, such as the failure of periods of incarceration to achieve the objectives of sentencing, the degree to which you have become institutionalized as a result of such incarceration, and recognizing the factor of the practical matter of cost of incarceration and the concomitant vested interest of society, this Court has decided to adopt an entirely different approach. To put it bluntly, it is this Court's intention to substitute the Village of Bancroft for the physical confines of a prison; the members of society your custodial officers; and the terms of a Probation Order the formalized rules of the institution. I might add, the manner in which these rules are drafted, by virtue of the regularized conduct they will impose upon

you, will make it extremely easy to determine whether compliance with those rules is being adhered to. In effect, Bancroft, becomes your penitentiary, the citizenry your custodial officers, and your Probation Order the formalized rules to which you shall adhere. In effect you are being subjected to further institutionalization, albeit within the community; a community which I might add, if success is achieved, has effected a considerable monetary saving, as well as having contributed to your rehabilitation.

To achieve these objectives, the following sentence will be imposed. Sentence will be *suspended,* and I would point out, Mr. N., I emphasize the word "suspended", it will have profound affect on your performance, which I will enunciate later. And you will be placed on probation for a period of three years, and during that period will be bound by the following terms of a probation order:

(1) you will keep the peace and be of good behaviour. If you commit a further offence you will have breached the terms of the order and the effect of breaching the terms of this order, sir, will be perfectly apparent later.

(2) you will report to a probation officer on October 1, next, and bi-weekly thereafter at such time and places as he may designate in writing, or as he may require;

(3) you will remain within the confines of the Village of Bancroft;

If you step outside the limits, with one exception, you will have breached the terms of this order,

and with one exception will not leave that area without the written approval of your probation officer;

(4) You will notify the Court, or your probation officer, of any change of address within the municipality of Bancroft;

(5) you will abstain from the consumption of alcohol absolutely, with one exception, to which I shall later refer;

I might add the exception is one of the benefits you have by staying outside of a penal institution. I well realize that on occasion there is illicit liquor for sale within a penitentiary, but we will let you have the odd drink.

(6) you will remain within the jurisdiction of the Court.

Broadly speaking, the above conditions establish the physical limitations to which you shall be subjected; the following prescribe in detail the formalized and regularized conduct to which you shall adhere.

Mondays to Fridays inclusive—do you know what the word "inclusive" means, Mr. N.?

MR. N.:

Yes I do, Your Honour.

HIS HONOUR:

Monday to Friday inclusive means Monday, Tuesday, Wednesday, Thursday, and Friday.

(7) Mondays to Fridays inclusive, of each and every week, you shall comply with the following:

(a) 7:00 a.m., you will get out of bed;

(b) 8:00 a.m., you will report at the Bancroft Ontario Provincial Police Detachment;

(c) 9:00 a.m., you will arrive at W.'s Hardware, Bridge Street;

Do you know where that is?

MR. N.:

Yes Your Honour.

HIS HONOUR:

(d) 9:00 a.m. to 12:00 noon, you will commence walking—

and I am sure after having spent twenty years in a penitentiary and custodial institutions, you will appreciate the miles you have walked within those confines? It's a habit of inmates.

> you will commence walking from the last-mentioned point, namely W.'s Hardware, east along the south side of Bridge Street, thence north on Hastings Street to Snow Street on the east side; then the reverse direction to the point of commencement on the opposite side of the street. As you will walk, you will pick up any refuse that may have accumulated since the previous day.

And I trust this will be in co-operation with the Bancroft Department of Public Works.

If the reasons for this last clause are not apparent, I think it would be advantageous to enunciate them. Broadly speaking, it coincides with the exercise program to which you would be subjected to in a penal institution; it regularizes your conduct during the morning hours; it recognizes your physical limitations to engage in manual work; it provides you ample time to perform the tasks prescribed, and flexibility to the extent that the regularization of your conduct, and hopefully consequent familiarization with other members of society, may motivate them to request, and you to perform, minor services gratuitously for them. Such familiarity may in part be an answer to the loneliness indicated in the pre-sentence report. And last, but certainly not least, you will be providing a worthwhile service to the community. I might add, I had occasion to drive over that route this morning, and inspect it quite thoroughly, and I am sure you will find ample things to occupy your time for that three-hour period.

This Court is not unmindful of the menial, and what may be regarded by some as demeaning, tasks which have been prescribed. Unfortunately, this Court is restricted, from a practical point of view, of those areas where gratuitous labour can be directed. Hopefully, with community awareness of what this Court is attempting to achieve, suggestions and acceptance will be forthcoming, and this Court will certainly entertain proposals for changes in this term, directing your efforts to other forms of employment. I might add that the Probation Officer for this area, very graciously attended here this morning, and I suggest you co-operate with him to a great extent.

(e) 12:30 p.m., you will attend at your residence;

(f) 12:30 p.m. to 1:30 p.m., lunch at your residence;

And remember one thing, I ascertained from the Penitentiary Services this is practically identical with what you would be doing within the confines.

(g) 1:30 p.m. to 2:00 p.m., free time at your residence;

Unfortunately, since preparing this I was apprised of the fact this morning which has posed some problems. The next two clauses dealt with terms which I cannot impose. However, I will read them so that you will appreciate and understand their intent.

(h) 2:00 p.m. to 2:30 p.m., you would walk to the library;

(i) 2:30 p.m. to 4:00 p.m. you would attend at the library;

and I am going to advise you why that term was imposed. This term hopefully achieves two things; one, it regularizes your conduct; secondly, it recognizes the degree of your formal education. Hopefully, subjection to what can only be regarded as an academic atmosphere may engender some self-motivation on your part to either further your education, or to develop skills whereby you would be better prepared to cope with an extremely complex society.

Because of the fact the library is not open each and every afternoon, I am not going to include in that probation order at this time a term dealing with the hours of 2:00 p.m. to 4:00 p.m., but I am going to make it a term of the probation order that two weeks from today you re-attend at this Court and this Court will entertain submissions from you, or counsel acting on your behalf as well as suggestions from the Probation Officer or any other member of the community as to how you can perform some type of service during that period in order that your conduct may be regularized so that everyone will know exactly where you are going to be during that period.

I might add that this Court would entertain proposals to vary this term should it be the case that attendance at a different institution might achieve either of the above objectives, yet not detract from the broad principles of "institutionalization" or "regularization" of conduct.

(j) 4:30 p.m., once more report to the Bancroft Detachment of the Ontario Provincial Police;

(k) 4:30 to 5:30 p.m., free time in the community;

and in the community means the Village of Bancroft, to perform such duties as shopping, etc.;

(l) 5:30 p.m. to 6:00 p.m., return home;

(m) 6:00 p.m. to 11:00 p.m., at your residence;

(n) 11:00 p.m., bedtime.

That means no late movies, Mr. N. You can't get them in a pentitentiary, you don't get them in Bancroft.

(o) 11:00 p.m. to 7:45 a.m. the following day, in your residence.

(8) Saturday. Saturday is a different day than Monday to Friday:

(a) 9:00 a.m., report to Bancroft Detachment Ontario Provincial Police;

(b) 9:00 a.m. to 12:00 noon, you will phone the victim and if he is available, you will perform, and I appreciate his assistance in this regard, you will perform whatever menial tasks he may have available at his residence or at such other place as he may direct;

He was the person who was inconvenienced as a result of your activities and that is why I had him here.

(c) 12:00 noon to 1:00 p.m., lunch at your residence;

(d) 1:00 p.m. to 3:00 p.m., you will remain within your residence;

(e) 3:00 p.m. to 5:00 p.m., shopping in Bancroft, if necessary.

Now, as indicated earlier, Mr. N., you are prohibited from consuming alcohol absolutely, however there is one exception. That exception is that you may purchase and consume six bottles of beer, such purchase to be made between the hours of 3:00 and 5:00 p.m. on Saturday afternoon, and forthwith thereafter taken directly to your residence. That means there is no liquor.

No other purchase shall be made by you, nor on your behalf, nor with that exception will you enter nor be found in any premises where liquor is sold or dispensed. That means a bootlegger, Mr. N. Do you understand that, sir?

(f) 5:00 p.m., report to Bancroft Detachment Ontario Provincial Police;

(g) 5:00 p.m. to 11:00 p.m., dinner, and attendance at your residence.

During these hours you may attend any social function or theatre within Bancroft, however before so doing on any Saturday evening, you will advise the Ontario Provincial Police, Bancroft Detachment, of the place where you can be located and the time of your proposed attendance.

One of the reasons for that is that movies in Kingston Penitentiary are conducted on Saturdays and Sundays, as perhaps you are well aware, and that is why I restrict this to Saturday because I don't know whether there are Sunday movies in Bancroft.

(h) 11:00 p.m., bedtime.

(9) *Sunday:*

(a) To 10:00 a.m., at your residence;

(b) 10:30 a.m., report Bancroft Detachment Ontario Provincial Police;

(c) 11:00 a.m.—

What church do you attend, Mr. N.?

MR. N:

Well I haven't been going to church around here, Your Honour.

HIS HONOUR:

You are going to attend church. Do you have any preference?

MR. N.:

United Church, Your Honour.

HIS HONOUR:

United Church? Well, I seriously entertained the possibility of you attending a Protestant church on Sunday and a Catholic church the next Sunday, but I will restrict it to the United Church, if that is the one you wish to attend, sir.

You will attend the United Church at 11:00 a.m.

The intention of this requirement is to once more regularize your conduct in the community. Do you see the pattern, Mr. N.? At every given moment of the day someone can tell exactly where you are supposed to be, exactly the same way as a custodial officer in the Kingston Penitentiary. Hopefully it may engender discourse and involvement in community affairs which will assist in your rehabilitation.

(d) 1:00 p.m. to 2:00 p.m., lunch at your residence;

(e) 2:00 p.m. to 5:00 p.m., during this period you may, if you so desire, attend at your mother's residence;

This of course is the only situation in which you are permitted to depart from the Village of Bancroft. As a pre-condition to attendance at your

mother's residence, you are to advise the Ontario Provincial Police at the morning reporting time of your intention so to attend. That means when you attend at the Provincial Police at 10:30 on Sunday morning and you intend that afternoon to go to your mother's residence, you will advise that office of that intention, sir.

(f) 5:00 p.m., report to Bancroft Detachment Ontario Provincial Police;

(g) 5:30 p.m., at your residence from then until the Monday schedule commences.

It is to be hoped the vested interest of the community in assuring the success of this sentence may engender presentation of suggestions which, if viable, could be contained within variations to the probation order. I am thinking perhaps of tasks which you could perform which would be more stimulating to yourself, as well as being more advantageous from a community point of view. In addition, the requirements of church and library attendance could of course be varied if other more viable and acceptable alternatives were presented.

I well recognize that for this sentence to achieve any degree of success, it requires the co-operation of not only yourself, but the Court, your Probation Officers, police officers, and last, but certainly not least, the community itself. If your rehabilitation can be effected, I am sure all persons concerned will be extremely gratified, to say the least, by being in a position to say they contributed in some small way to the recapture of a member of our society who has finally reached the stage of being branded a "burnt-out recidivist".

Mr. N., I did not write it out, but I can tell you this Court is not naive. It may appear to be at first glance, but I would point out to you, sir, by virtue of the operation of Section 664 the onus is on you to comply with the terms of this order. Sentence has been suspended. If you breach any of the terms of this order you can be brought back before this Court and sentenced for this offence. I imposed a three-year probation order, because I was entertaining a three-year period of incarceration in a penitentiary. The choice is yours as to whether this is effective.

I am also not naive to the extent that I realize the routine to which I have subjected you is going to pose problems within the community. It is something with which you are going to have to cope with until the community's appreciation of what is occurring takes place, and that is going to be a transitional period.

I trust, Mr. Counsel, my comments are perfectly apparent. If this order is not followed, the alternative is a period of incarceration, and within the limits of a ten year maximum penalty, it will probably involve a penitentiary term, the cost to the community being, of course, thirteen thousand four hundred dollars per year.

WORKING PAPERS

Note: this first working paper is in blue pages in the original work published.

Restitution and Compensation

Table of Contents

Foreword

In Working Paper No. 3, The Principles of Sentencing and Dispositions, the Commission has laid out a framework for further, more specific studies. This volume contains Working Paper No. 5, Restitution and Compensation, and Working Paper No. 6, Fines.

Restitution and compensation have been chosen for early consideration because they represent means of directing more attention to the victim of crime, stressing the responsibility of the offender and the state to make up for the harm done to the greatest possible extent. Punitive sanctions have been far too long the overriding focus of the criminal process even though these sanctions have been given rehabilitative purposes. For that matter, rehabilitation too has been directed mainly to the offender and not to the victim and very little has been done to reconcile the victim to society and its laws.

Only during the last decade have compensation schemes been developed for a small number of offences. And restitution has been available only to a limited extent, whether through the criminal process or civil action. The present working paper has as its primary aim to make restitution—the responsibility of the offender to the victim to make good the harm done—a basic principle in criminal law, and to supplement it by a scheme for compensation—assistance by the state where the offender is not detected or where he is unable to assume responsibility for restitution.

The role of fines would shift accordingly. Apart from situations where they are imposed for crimes that have no specific victim, such as offences against public order, a fine would represent the penalty for an offence, over and above restitution. In addition, to ensure a more equitable application of fines, we recommend a system of day-fines based on income rather than fixed amounts. Finally, following the principle that imprisonment should only be used when that form of punishment is absolutely necessary, we are opposed to the automatic alternative of days in jail to fines.

Further working papers in the area of sentencing and dispositions will deal with subjects such as diversion, imprisonment and release. Background studies for these working papers dealing with the subjects in greater detail and from various perspectives will be made available

through Information Canada. The working papers should lead to a comprehensive policy of sentencing and dispositions. We therefore strongly urge the public to give us its criticisms and suggestions.

Restitution

Introduction

Doesn't it seem to be a rejection of common sense that a convicted offender is rarely made to pay for the damage he has done? Isn't it surprising that the victim generally gets nothing for his loss? Restitution—making the offender pay or work to restore the damage—or, where this is not possible, compensation—payment from public funds to the victim for his loss—would seem to be a natural thing for sentencing policy and practice. Yet, under present law they are, more frequently than not, ignored.

In Anglo-Saxon times restitution was seen as the natural and accepted mode of settling disputes. Today the criminal law of Canada gives little recognition to restitution or its place in sentencing theory. Some other countries, however, do accept the notion of reparation as a primary consideration in sentencing. In some jurisdictions the criminal law provides for a broadened concept of restitution, including apologies for the wrong done or the notion of paying back through work.

Not only are such legislative statements in accord with common sense, but with social practices as well. How frequently do business firms settle thefts by employees privately, extracting in many cases a promise to pay the money back? How frequently do police, for example, using proper discretion, suggest to the offender and victim that rather than proceed with charges they should work out a suitable compromise involving restitution?

Not only are these practices in accord with common sense, they are also just. If justice is to be done, the violation of the individual victim's personal and property rights ought to be redressed. The sanction in criminal cases becomes justifiable on account of the offender's violation of someone else's rights—rights that are publicly supported through the criminal law. Under present sentencing policy, however, it is not the damage to the victim's rights and interest that are recognized at the time of sentencing, but society's interests. Thus, in the interests of public protection, the offender's fine is payable to the Crown, or his

liberty is forfeited to the state. As his losses tend to be swept aside by state interests in the criminal trial, the victim is left unsatisfied.

To some extent the victim's losses are recovered through various types of social insurance legislation. If the crime resulted in loss of employment, benefits may be available under the unemployment insurance law. Other welfare measures may also mitigate losses. Thus, medical and hospital bills will be paid for under the public health insurance schemes. More recently various provincial statutes provide for some compensation to victims of crime although property losses are excluded. In addition, the victim may sue the offender for damages, providing his identity and whereabouts are known. This civil remedy, however, is expensive, often illusory, and little used. There is, therefore, a practical need to consider restitution as a sanction.

Not only is restitution a natural and just response to crime, it is also a rational sanction. This can best be perceived by examining the nature of crime.

In seeking to understand crime and to develop responses to it, it may be helpful to view it not as a pathology or an evil to be suppressed at all costs but as an inevitable aspect of social living. In civil law the inevitability of social conflict has long been recognized. Thus, many social conflicts classed as torts or breaches of contract are understood to be normal features of social life, frequently serving the social purpose of clarifying different value positions. In criminal law, too, the wrongful conduct can be seen as an aspect of conflicting values as, for example, in some drug offences and in abortion. Through conflicts over value positions society has the opportunity of reaffirming its view of what conduct is so injurious that it ought to be dealt with by penal sanctions. Should the emphasis in sentencing policy, then, be on the suppression of crime through severe sanctions or should it be on making clear what values are at stake in the conflict and affirming in a tolerant but firm way those values that have the support of the community? Should sentencing policy emphasize the rejection of the offender as a parasite on the body politic, or should we, on finding the offender responsible for having committed an offence take into account what the social sciences and common experience teach us about human behaviour and impose a sanction that encourages reconciliation and redress?

Doubtless there are offences in respect of which reconciliation is useless and where the most rational sanction may be prolonged imprisonment. For the great majority of offences, however, restitution would

appear to be appropriate. Restitution involves acceptance of the offender as a responsible person with the capacity to undertake constructive and socially approved acts. It challenges the offender to see the conflict in values between himself, the victim, and society. In particular, restitution invites the offender to see his conduct in terms of the damage it has done to the victim's rights and expectations. It contemplates that the offender has the capacity to accept his full or partial responsibility for the alleged offence and that he will in many cases be willing to discharge that responsibility by making amends.

As pointed out in the working paper on The Principles of Sentencing and Dispositions, the concern in sentencing should be to choose a just sentence. We suggest that in many cases restitution as a sanction would satisfy the demands of justice: in other cases supplementary sanctions may be necessary. Furthermore, to the extent that they may be operative, deterrence and rehabilitation would find scope within the sentence supported by a reasoned explanation. Thus, the offender's restitution payments, for example, or his work done in lieu of such payments would become his correction, for we believe the most valuable form of correction is self-correction.

It is not only on *a priori* grounds, such as those just discussed, that restitution should be given greater prominence in sentencing and dispositions. On quite practical grounds restitution offers greater satisfactions and benefits to all concerned. Under restitution the victim, first of all, is no longer used largely as a means of protecting society's collective values. Rather his claim to satisfaction as well as society's is recognized in restitution and compensation. An important part of this recognition is the victim's psychological need that notice be taken of the wrong done.

Recognition of the victim's needs underlines at the same time the larger social interest inherent in the individual victim's loss. Thus, social values are reaffirmed through restitution to victim. Society gains from restitution in other ways as well. To the extent that restitution works towards self-correction, and prevents or at least discourages the offender's committal to a life of crime, the community enjoys a measure of protection, security and savings. Depriving offenders of the fruits of their crimes or ensuring that offenders assist in compensating victims for their losses should assist in discouraging criminal activity. Finally, to the extent that restitution encourages society to perceive crime in a more realistic way, as a form of social interaction, it should lead to more productive responses not only by Parliament, the courts, police,

and correctional officials but also by ordinary citizens and potential victims.

The offender, too, benefits in a practical way from a sentencing policy that emphasizes restitution. He is treated as a responsible human being; his dignity, personality and capacity to engage in constructive social activity are recognized and encouraged. Rather than being further isolated from social and economic intercourse he is invited to a reconciliation with the community. While he is not permitted to escape responsibility for his crime his positive ties with family, friends and the community are encouraged, as are opportunities for him to do useful work.

In this way restitution acknowledges the limitations of a sentencing policy designed to "correct" or "rehabilitate" offenders and yet attempts to avoid the futility of strictly punitive sanctions. In coming to the point of view that restitution be a central consideration in sentencing and dispositions, the Commission has drawn upon the social sciences and philosophy as well as history.

The Meaning of Restitution

For the purposes of this working paper, "Restitution" is a sanction permitting a payment of money or any thing done by the offender for the purpose of making good the damage to the victim. Since the purpose is to restore, as far as possible, the financial, physical or psychological loss, restitution could take many forms including an apology, monetary payment, or a work order.

Restitution refers to the contribution made by an offender towards the satisfaction of his victim. It moves from the offender to the victim and is personal. "Compensation", on the other hand, is impersonal and refers to a contribution or payment by the state to the victim. The proposed reform would supplement restitution, where necessary, with compensation.

Historical Roots

In Anglo-Saxon England there was no criminal law as we know it. Disputes were dealt with by a process greatly resembling our civil law. When an individual felt that he had suffered damage because of another's wrongful conduct he was permitted either to settle the matter by agreement or to proceed before a tribunal. Restitution was the order of the day and other sanctions, including imprisonment, were rarely used.

As the common law developed, criminal law became a distinct branch of law. Numerous antisocial acts were seen to be "offences against the state" or "crimes" rather than personal wrongs or torts. This tendency to characterize some wrongs as "crimes" was encouraged by the practice under which the lands and property of convicted persons were forfeited to the king or feudal lord; fines, as well, became payable to feudal lords and not to the victim. The natural practice of compensating the victim or his relatives was discouraged by making it an offence to conceal the commission of a felony or convert the crime into a source of profit. In time, fines and property that would have gone in satisfaction of the victim's claims were diverted to the state. Compounding an offence (that is, accepting an economic benefit in satisfaction of the wrong done without the consent of the court or in a manner that is contrary to the public interest) still remains a crime under the Canadian Criminal Code and discourages private settlement or restitution.

It would now seem that historical developments, however well intentioned, effectively removed the victim from sentencing policy and obscured the view that crime was social conflict.

Current Canadian Law

Today in Canada restitution can be made a condition of a probation order. In addition, in minor offences of damage to property the court may order the accused to pay "compensation" not exceeding $50.00. This sanction can only be imposed as an additional penalty; it cannot stand by itself. There are also the little-used provisions in the Code whereby at the time of sentence the victim or "a person aggrieved" may ask the judge to have the accused pay to him an amount by way of satisfaction and compensation for loss or damage to property suffered as a result of the offender's crime. Still other provisions in the Code relate to restoration of stolen property purchased by third parties or held by the court or the police for the purposes of the trial.

There is nothing in the Criminal Code to suggest that restitution should be seen as a sanction in its own right and nothing to tie restitution to a theory of sentencing or criminal law. The isolated provisions related to restoration of property and compensation for property loss appear to be historical carry-overs from English legislation that were grudgingly grafted onto the penal law in order to save victims the expense of a civil suit to regain stolen property or secure compensation. The civil nature of these provisions is shown by the fact that they

come into operation for the most part, "on application" of the victim. With one exception the judge does not have power to impose them on his own initiative, as he does with fines. In practice these provisions are used infrequently and even when they are, it is often a large company that appears as the victim to ask for compensation. More frequently losses by companies tend to be dealt with under insurance law, a mode of settlement that many lawyers and businessmen prefer to applications in the criminal courts.

Somewhat more widely used are the restitution provisions under a probation order. In a survey of records covering over 4,294 convicted appearances from 1967 to 1972,* however, restitution was recorded only for 6 convictions, that is, in approximately .1% of the sentences. It is possible, however, that the records do not completely reflect how often restitution is used. For one thing restitution is sometimes used unofficially on adjournment before sentence. If restitution is made during the adjournment the prosecution and the judge will necessarily take it into account at the hearing on sentence. At the same time, the extent to which fines are used and paid is referred to later in this paper.

Although there is little empirical evidence of how frequently restitution is used, there are indications that restitution appears to be working out well where it is imposed. At the same time there can be no doubt that some probation officers dislike the added burden of collecting restitution payments. To what extent the office of the court clerk or administrator could assist the probation officer in this regard remains to be explored. It should also be noted that there may be some coolness towards restitution among the judiciary. This may be owing in part to a reluctance to get involved in assessing the amount of the claims. In part, too, restitution has suffered in the criminal courts because it was seen, unfortunately, as an unwanted child of the civil process: a debt collection technique that had no place in the criminal courts. Counsel for the victim and the prosecution have also, usually, all but forgotten the need to press for restitution in sentencing.

Rather than rest content with the present fragmented state of the criminal law with its various references to restitution, restoration and compensation, surely it is more rational and just to make restitution central to sentencing theory and practice and to supplement it with a compensation scheme for victims of crime.

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* This survey, to be released by the Commission, is referred to as the "September Study" and involved an analysis of the records of all persons who appeared in court for the first time in September, 1969.

The "Combined Trial"

In some countries the claim for restitution is not deferred to an administrative compensation board, nor is the victim left to pursue his remedy by suing the offender in the civil courts. Instead, a claim for damages is presented during the criminal proceedings.

Depending on the jurisdiction, the procedure obliges the prosecution to put forward the victim's claim for damages or leaves the initiative with the victim to present the claim himself; in effect it allows for a combined trial of both criminal and civil liability. In some systems there are, however, practical disadvantages to this procedure. In theory, the prosecution is supposed to inform the victim that charges are being laid, but in practice the prosecution frequently fails to give such notice. The result is that the victim is effectively prevented from making a timely claim for damages during the criminal proceedings. A further weakness of the combined trial in some jurisdictions is the power of the judge to refuse to determine the issue of damages if he thinks it would not be suitable or would delay the trial. Differences in the concept of causation and in the rules of evidence in civil and criminal proceedings are sometimes given as reasons why judges are unwilling to hear claims for damages in the criminal trial.

Other critics question the desirability of giving the plaintiff in a civil action a central place in the investigation and conduct of the trial. Any potential bias, however, could be avoided by putting off consideration of the civil claim until after the verdict in the criminal trial. However, there is no need to complicate the criminal trial with civil issues. After the matter of guilt has been decided, it should be feasible to consider restitution and even compensation under the more relaxed rules of procedure at the sentencing stage. Moreover, in Canada, combining the civil and criminal trial would raise serious constitutional issues; civil law is generally under the jurisdiction of the provinces, while criminal law is a federal matter.

For various reasons, therefore, we do not favour the combined trial as a device in considering restitution in criminal law.

Will it Work?

Administration Too Burdensome

In most cases the procedure during sentencing is not, and presumably should not be, strictly adversarial as at trial. Notwithstanding the merits of cross-examination and the rules of evidence in clarifying legal issues and determining facts, it is necessary at the sentencing stage

to make a broader inquiry than the strict rules would permit into such matters as the history of the offence and the circumstances of the offender. This is not to say that the sentencing process should not be open, fair, and accountable. It does mean that a judge should be able to have access to a wide range of material relating to the circumstances of the offence, including the amount of loss suffered on the criminal injury.

One objection to restitution is that criminal courts are not able to deal with the complicated questions involved in assessing the amount of the damage. The force of this argument must be weighed against the fact that almost all judges are trained and experienced lawyers. In addition county court and supreme court judges hear both civil and criminal cases and are familiar with the assessment of damage or loss. According to our information, judges in England and Wales are not experiencing any great problems in administering the new sentencing provisions relating to reparation. Also crime compensation boards make assessments of loss regularly without undue trouble.

Where assessment of the amount of the loss is complicated or time-consuming, the judge could order that restitution be made, with the exact amount and terms of payment to be assessed by the court clerk or administrator. A similar suggestion has been made with respect to calculation of the amount of the day-fine in the Commission's Working Paper on Fines. Alternatively, assessment of the amount of restitution could be made by the existing compensation boards. It should not be forgotten, however, that restitution is a sentencing matter and assessment should remain within the control of the court.

Assuming that restitution is moved from the background to centre stage in sentencing and dispositions, zeal in recovering restitution payments should not wipe out the reality that some offenders may have difficulty in making payments unless they are given time to do so. Indeed, the offender's ability to pay should be given attention at several different stages. This type of consideration, as in fines, could perhaps best be handled through the court clerk or administrator. A more detailed discussion of enforcement procedures may be found in the Commission's Working Paper on Fines.

Do They Have the Money?

At this point it would be naive not to acknowledge the chief argument against the implementation of restitution as a major consideration in sentencing and dispositions. In colloquial terms the argument is: "It won't work because all criminals are poor and, even if some of them have money, you'll never be able to make them pay".

An examination of the education and means of Canadian offenders indicates that, while many are below or near the poverty line, it is wrong to suggest that all offenders are without means to pay any monetary sanction. Experience with fines, which are currently imposed without a means test in many cases, shows that a great many offenders can pay. A study of fines imposed on female-offenders in Toronto during a four month period in 1970 showed that the fines were paid in full in 79 percent of the cases. This is consistent with an analysis of fines collected in New Brunswick, Halifax, and Vancouver where the data shows that fines imposed are paid in approximately 83 percent of the cases. In addition, the Toronto study on fines showed that 44 percent of the fines were in amounts of $25.00 or less while another 24 percent ranged from $30.00 to $75.00. An analysis of sanctions imposed in property offences as revealed in statistics released by Statistics Canada shows that fines are imposed in approximately 31 percent of indictable offences. If fines are being paid, it is likely that restitution is within the capacity of the offender to pay.

The nature of offences and the amounts of losses involved are factors that will affect the restitution order. Statistically, the most frequent Criminal Code offences in Canada apart from motor vehicle offences are assault and theft. Precise statistics on the damage or amounts of money involved are not available but from an analysis of Toronto police records it appears that in cases of theft, break and enter, possession of stolen goods, robbery, and fraud, the average value of stolen goods as estimated in police reports was less than $25.00 in 27 percent of the cases. In another 36 percent the value of the goods was between $26.00 and $100.00. If this data has general application it would indicate that in many cases a restitution order need not be unduly large and could be within the ability to pay of a great number of offenders notwithstanding their relative poverty. Losses in cases of personal injury may be somewhat larger. Studies in 1966 in Ontario and in 1973 in Vancouver indicated that the amount of the loss to victims, including both personal injury and property loss, on the average, approximated $300.00 some of which was covered by insurance or other measures. However, in Ontario through 1969-71, the average award by the Criminal Injuries Compensation Board was $1,900.00. This may not be representative of all offences against the person as it is estimated that less than 3 percent of those eligible for compensation actually apply. As indicated earlier, where restitution is made a term of a probation order, payment and collection appear to be working well.

Can They Work?

If the offender does not have the money to make good a restitution order, he should be given an opportunity to do work either for the victim, some other person, or some agency. In some cases the work could be service in lieu of payment, while in others the offender could be paid the going wage and make restitution payments out of his wage. In this way, in so far as possible, the losses brought about by the offender would be restored in part by his own work and effort and not simply passed on to the victim's family, private charity, or public welfare.

Admittedly, this sort of thing is already being done in isolated cases. What is needed is to give restitution—including not only money payments but work, or restitution in kind—first consideration whenever possible.

Frequently, however, the courts do not have the kind of support services needed to make work or service orders feasible. This and other aspects of the problem will be developed in the Commission's forthcoming paper on Community Service Orders.

It is not only at the court level, however, that restitution should be considered. Presumably, it would be an important consideration in pre-trial settlement procedures under a diversion scheme, and could also be a factor in determining release procedures during a term of imprisonment. If a prisoner is gainfully employed at a reasonable wage, he should be given the opportunity to budget part of his income for restitution payments. Yet under present conditions, no more than 20 percent of prisoners in federal institutions are engaged in working at industrial-type jobs. Moreover, until the recent announcement to pay the minimum wage to those who work at industrial jobs, wages paid in federal institutions ranged from a mere $3.00 to $4.00 a week. Until imprisonment is recognized as a deprivation of liberty, and not necessarily a deprivation of the opportunity to work at a reasonable wage, restitution at the institutional level will remain impossible.

The Role of Other Sanctions

Under the Commission's proposal, restitution would become a central consideration in sentencing and dispositions. The term "central consideration" is used to indicate that restitution would merit foremost, but not exclusive, consideration. What is anticipated is a range of sanctions ranging from relatively light to severe, with restitution receiving consideration in most offences.

In many cases, especially those not requiring deprivation of liberty, restitution may be the main sanction. Yet it would hardly be just were the offender merely required to pay back what he had taken. It is fitting that he would be required to pay back more than he took. Consequently, in many cases, a fine would be an appropriate additional sanction in recognition of the harm done to society and the costs involved in upholding values and protecting individual rights.

In addition, it is anticipated that fines would continue to play an important role as a sanction in their own right in cases such as impaired driving where the injury is not to a specific victim but to the public.

Moreover, in cases where restitution is to be the main sanction, it may be useful to impose probation as an additional penalty for offenders requiring community supervision.

Among the goals of the proposal to give increased attention to restitution is a reduction in the use of unnecessary imprisonment. As noted in the Commission's forthcoming working papers on Diversion and Imprisonment, in non-violent offences against property short terms of imprisonment may not always be necessary if restitution and work orders are available.

Compensation

Restitution by offenders cannot deal with all cases in which there is a need to pay back the loss suffered by victims of crime. In some instances an offender may not be able or willing to pay restitution, or, having agreed to pay, may for various reasons be unable to pay all or part of the amount required. In another type of case the offender will not be known or proceedings may not be undertaken because of lack of evidence. Accordingly, there is a need to consider a scheme of compensation from the state to supplement restitution from the offender.

Justification

Compensation for victims of crime can be a valuable tool in supporting the purposes of the criminal law. As suggested in the Commission's working paper, The General Principles of Sentencing and Dispositions, the Commission is of the view that one of the purposes of the criminal law is to protect core values. At the basis of any society is a shared trust, an implicit understanding that certain values will be respected. Some of these values are thought to be so important that they are protected through various provisions of the criminal law. A violation of those values in some cases may not only be an injury to individual rights, but an injury as well to the feeling of trust in society generally. Thus, the law ought not only to show a concern for the victim's injury but also take concrete measures to restore the harm done to public trust and confidence. Public confidence and trust might also be reinforced by prompt police action or dispositions that demonstrate a serious concern for the wrong done. This concern, however, is directed against the offender. Compensation, on the other hand, is directed towards the victim and should not be lost sight of as another meaningful and visible demonstration of societal concern that criminal wrongs be righted.

Before considering whether compensation for criminal injuries should be through the criminal law, social insurance or some other system, it will be helpful to review other arguments sometimes put forward as justifying compensation to victims of crime.

It is stated from time to time that the state, in taxing the citizen to maintain police forces, has reduced the citizen's capacity to protect himself. The actions of the state in its taxing and policing functions, are, undoubtedly, a desirable trade-off against the situation where men would build their own fortresses or turn to the law of the jungle, but part of the trade-off, it is said, should include reasonable compensation for some criminal injuries.

Some schemes for compensation to victims of crime are based purely and simply on sympathy and offer no "right" to compensation. To care about victims of crime and to offer compensation out of sympathy is understandable, but since caring and sympathy can be swayed by largely personal factors it may be desirable to relate this sympathy to some objective basis that would reduce the risk of favouritism. In some jurisdictions this objective basis is found by requiring proof of "need". While it is difficult to reconcile "need" and the welfare approach with the demands of justice in sentencing, the notion of concern for the individual is worth preserving.

Among the foregoing, arguments are sometimes put that the state, in undertaking to provide security to all members of society, is under a duty to provide compensation when that security fails. It has been pointed out, however, that the state does not really hold out a promise to protect everyone from all criminal injuries. At most it simply attempts to keep the peace and keep crime to a minimum. These attempts by the state do not give rise to legal promises nor legal rights or duties. At most the state may be under a moral obligation to provide compensation to victims of crime.

Another argument favouring state compensation is based on the proposition that since society generates conditions favourable to crime such as inadequate education and housing or inadequate health services, unequal economic opportunities, or marketing and tax structures that invite avoidance or abuse, society must take the responsibility for compensating those who are injured by crime. An analogy could be made to Workmen's Compensation. In the interests of economic growth society encourages men to work in the presence of risk to life and limb yet compensates those who are injured in doing so. In effect this approach is really one of distributing the losses and is a recognition of a social liability for this kind of injury or loss. Greater security generally comes about by sharing the cost of the losses rather than letting them rest where they fall. In Workmen's Compensation the losses are borne by the industry and not by the injured worker or society generally. The logical consequence of this approach to injuries leads to public insurance schemes under which major losses are covered

whether they arise as a result of industrial accident, for example, automobile crash, or crime. The recent New Zealand Accident Compensation Act and the current British Royal Commission on compensation for personal injury are illustrations of this approach.

In a society that places a high value on openness and freedom from pervading police control the argument for social liability for criminal injuries is understandable. However, as will be pointed out shortly, there are good reasons why such a liability should not be discharged through a public insurance scheme, but be closely associated with the criminal justice system.

Delivery Systems

What is the best instrument for achieving the two principal aims of a compensation scheme: namely, to sustain public confidence and trust that core values will be supported and to demonstrate a concern for individual rights and well being? Is it adequate to leave the victim of criminal injuries to his civil law remedy of suing for damages or to private insurance? Not only is a private remedy in tort useless where the offender is not known or cannot be found, it is generally illusory and unprofitable even where the offender is sued. Private insurance also is inadequate not only because it probably leaves out more people than it covers, but also because it does not meet the real problem. At issue is the need for a social response demonstrating concern for the individual well being of the victim and a collective and visible affirmation that certain core values remain important.

Can public insurance schemes serve these objectives? To a certain extent the victim's needs can be met by a variety of social insurance laws including Unemployment Insurance, Workmen's Compensation, Canada Pension Plan, public medical and hospital insurance schemes, or welfare. No doubt the general framework of social insurance, private insurance and tort law are useful parts of an approach that can alleviate the losses of victims of crime. At the same time these measures by themselves are not entirely satisfactory and their benefits are limited. Moreover, it should not be overlooked that, to the extent that the victim does qualify under one or other of these social insurance schemes, he reduces the amount to which he might be entitled in subsequent crises. Even a comprehensive public insurance scheme, such as the one enacted in New Zealand and that under consideration in England, is not an appropriate means of giving compensation to victims of crime.

To place in one scheme compensation for all losses whether arising from sickness, industrial accident, unemployment, or motor vehicle

accident—to offer compensation for all such injuries without distinction —may well be undesirable. Do we want to place criminal injuries on the same plane as industrial accidents? To compensate victims of crimes and victims of automobile accidents out of the same insurance scheme may tend to blur the distinction between crime, negligence and accident. To be sure, while the victim of crime receives compensation from insurance officials, the offender may be apprehended or face threatened apprehension and conviction at the hands of the police and courts. Does it raise confusion about the purposes of the criminal law to treat the criminal event, on the one hand, on the same basis as an industrial accident and, on the other hand, threaten punishment of the offender on the basis of his individual responsibility? Compensation to victims of crime can be used to further the purposes of the criminal law and ought not to be lost in social insurance programs aimed at sharing the losses arising from the social and economic policies of society as a whole. That being so, the structures and mechanisms for delivery of compensation to victims of crimes should be related to the criminal law and its processes.

Accordingly, it becomes important that compensation to victims of criminal injuries be connected to the Departments of Justice or Attorneys-General and visibly be seen as an instrument in support of the administration of justice. From this point of view the isolation of the existing compensation to victims of crime legislation can be appreciated. To begin with the legislation exists in only eight of the ten provinces, and is not obviously tied to criminal processes. In some provinces the legislation is administered by the Department of Labour rather than the Department of Justice or the Department of the Attorney-General. In most provinces the schemes are administered by administrative boards, and judging by the number of applications for compensation, are relatively unknown to victims. If the purposes of criminal law are to be well served, the compensation boards must be brought visibly to the forefront of the administration of justice and linked to the courts in determining compensation.

Moreover, if the educative function of the criminal law and its concern for individual well-being are to be best served, compensation should be timely. If the monetary payment is to serve as a demonstrable affirmation of the importance of the individual and social values violated by the crime, compensation should be made promptly to restore the faith, confidence and trust that core values be respected. This would have important psychological value for the victim: a timely monetary payment in compensation of loss can substantially reduce the anxiety arising from the injury.

Scope

If compensation is to have a correctional component should it be restricted only to crimes of violence as is generally the case under existing provincial schemes for compensation to victims of crimes? Should victims be compensated for property loss? Are offences against property the type of criminal event in which it is desirable not only to see that the victim is compensated but that compensation be through the medium of the criminal law and at state expense? Are commercial frauds the kinds of injuries that the criminal law should be most concerned about, or should they be excluded for compensation on the ground that these are injuries foreseeably arising out of an enterprise entered into with a view to making a profit? Finally, should the range of victims be extended to include businesses or other corporate persons?

First of all, there can be little disagreement with the view that compensation to victims should cover personal injuries resulting from crimes of violence. Whether compensation should be extended to cover property loss is more difficult. Logically, it can be said that property loss should be covered, since such compensation would support core values, strengthen social bonds, reduce the victim's anxiety and affirm individual rights. On a practical level, however, the cost of compensating property losses would be substantial and funds available for compensation are limited. Since it is justifiable to draw a distinction between laws protecting individual dignity and well being and those protecting property or commercial interests, there can be no doubt that the former should have priority in receiving compensation.

What are the estimates of the cost of extending compensation for loss of property? Property crimes are among the most numerous of all criminal offences. In 1971 in Canada over 800,000 such offences were reported to the police, almost 300,000 of which were theft under $50.00. Considering that over fifty per cent of these latter cases involved losses of less than $25.00 and in other property offences over fifty per cent involved losses of less than $200.00, it is estimated that the loss from property offences, not including auto theft, would be approximately $96,000,000 a year. Over one-half this amount can probably be attributed to losses by corporate victims, and another ten per cent could be paid by offenders actually apprehended and able to make restitution. Thus, apart from losses to corporations and cases where the offender himself can make restitution, compensation claims by individual victims for property loss would still approximate the substantial amount of $40,000,000 annually.

Other disadvantages to extending compensation to property losses can be anticipated. Such a coverage would probably greatly increase the reported crime rate. It is commonly assumed that many property offences are not reported to the police. According to one estimate, for every crime of this type that is reported, another two go unreported. One reason given for such non-reporting is that victims feel it will do no good. Police, they feel, will not be able to apprehend the offender nor recover the goods. Were reporting to be followed by an opportunity to claim compensation, it is likely that reported crimes would greatly increase in number. This may be a disadvantage particularly in a society that wants to encourage individuals to handle minor conflicts on their own.

Furthermore, it is said, extending compensation to crimes involving property loss would encourage numerous fraudulent claims. One way to combat these, would be to rely on police investigation or setting up a claims bureau similar to those operated by the insurance industry This in turn would result in an increased drain on the tax dollar.

Finally, it is said, property today no longer has the high value it had a hundred years ago. In the "throw-away" consumer oriented society of plastic, foam and nylon, many consumer items are looked upon as readily replaceable and, indeed, are made for early obsolescence. Under these circumstances, it is said to be only reasonable to exclude property loss from victim compensation schemes.

For these reasons the Commission is opposed, at this time, to extending compensation to victims of crimes for property losses in general. The distinction between values promoting individual dignity and well-being as opposed to property interests seems sound.

Still, there are some crimes against property that, in our view, should be considered in much the same light as crimes against the person. Crimes, such as for example, breaking and entering into the home result in injuries to feelings, dignity and personal security as much as crimes against the person. The same can be said of theft from the person. In such cases tangible expression of concern by the state would tend to enhance trust and cohesiveness in society. We are, therefore, of the view that compensation should extend to victims of such crimes. However, theft of property not under an individual's personal control or possession, while still a matter of concern, does not involve an invasion of a person's dignity and personal well-being in the same way. Monetary loss or an invasion of rights of ownership through theft or fraud relate more to protection of economic interests. This seems to be the type of losses for which insurance can adequately protect the victim.

If property losses generally are to be excluded as an item of compensation in criminal injuries there is little to be gained by asking whether corporate or institutional victims should be compensated. Compensating corporations in relation to crimes of personal violence is not an issue: the corporate body does not bleed as ordinary mortals do. In any event, losses from crimes against corporate bodies can be, and are generally adequately covered by insurance or through increased charges and services borne by society generally.

Financing

Financing compensation raises other considerations. Restitution, of course, would be paid by the offender to the extent that he was able. Should the offender's resources be such as to make it unrealistic to order full restitution, the victim should be entitled to compensation to cover the outstanding loss. Similarly, when the offender is unable to pay, or is not located and brought to justice, the victim's claims for compensation should be met by the state.

So far as possible money for compensation should be derived from fines or forfeitures imposed in the criminal courts. That is to say, those who commit criminal offences should be the initial source of funds to compensate victims. Even though fines may be expected to give way to restitution in many cases, fines will still be an important sanction. This will be so particularly in crimes against public order where there may be no individual victim. Funds from fines or forfeitures or subrogation could be reserved in a special compensation fund, a *caisse d'amendes* or a reparation chest. Such a fund would serve as a highly visible reminder that in crime, it is not only the damage to society that must be paid back but the injury to individual victims. Only if the fund is not sufficient to pay adequate compensation should it be supplemented from the federal or provincial treasuries.

Conclusion

The foregoing has set forth a position respecting restitution and compensation that would give increased recognition to the victim in the criminal process and encourage a broad look at the criminal event in arriving at a disposition.

It recognizes the contribution the criminal law can make through sentencing and dispositions to preserving that mutuality or shared trust that is the basis of much of civilized society. If the lawless wilfully break the rules that protect core values they ought to be held accountable and provided with the opportunity to restore the harm done to the victim and to the social fabric. When the offender is not available or cannot pay back the harm done, the victim ought not to be left on his own nor should the attack on shared values be left unattended. Rather, through compensation from the state the importance of the individual can be reaffirmed and a concern to uphold common values be visibly demonstrated.

Under existing law much can be done to extend the practice of imposing restitution as a condition of a probation order or of conditional discharge. But more can be done by legislative change to facilitate the position taken in this working paper that restitution be made a central consideration in sentencing and dispositions. Specific recommendations for legislation will be made in the Commission's final report to the Minister and Parliament. More substantial changes in law and practice, particularly at the provincial level, may be needed if compensation and compensation boards are to be visibly linked to the administration of justice. There may also be a need to reconsider the existing administrative structures supporting the court and its services. In this respect the Commission's working paper on Fines and Their Enforcement is also relevant.

Fines

Note: This second working file is an extract of 19 pages in the original work published

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Introduction

The authority to deprive an individual of his liberty may be the most awesome power people have given to the state. To maintain him in this condition and, further, to attempt to re-form him into a more "productive" participant in our society is a costly undertaking and its effectiveness remains in doubt.

For these reasons we recommended in working paper No. 3 that imprisonment be used with greater restraint. We suggested that some offenders should be diverted out of the formal criminal trial into forums more appropriate for arbitration and conciliation. We argued that restitution to the victim, community service, and probation are much more humane, at least equally effective in preventing recidivism, and far cheaper ways of dealing with many offenders whose minimal involvement in criminal activity or lack of dangerousness to the community does not necessitate incarceration.

It is these underlying principles that bring us to consider the fine as a sentencing alternative. Fines are certainly less awesome than imprisonment; they have not been shown to be any less effective a deterrent than any other disposition; they are clearly the least expensive measure possible.

The Commission has already indicated a preference for restitution where an individual victim is harmed. Even in those cases, however, fines may be a supplementary or alternative sanction. In other cases where the harm is not to an individual but to society generally, there may be good reason to impose a fine. In some respects this type of sanction may be looked at as paying back to the whole community.

If, both as a natural outcome of a decrease in the use of imprisonment and as a result of a positive preference for the imposition of the fine in certain cases, perhaps as an alternative to restitutions, the use of the fine in sentencing can be expected to increase, it is necessary to look at the present problems in both the imposition and enforcement of fines, and attempt to correct their shortcomings. Even if the use of the fine does not increase, we find some serious problems with the fine as it presently exists and have some positive recommendations for its improvement.

Principles in the Imposition of Fines

Which Offences?

The fine being a humane and economical form of criminal sanction, it would seem to be a sound policy for the judge to be able to impose fines for any offence for which a mandatory sanction is not specified. He would then be further enabled to exercise his discretion, directed perhaps by sentencing guidelines, according to the individual offender, his record, and the particular circumstances of the offence.

Present Criminal Code provisions preclude the judge from imposing a fine for any indictable offence punishable by more than five years imprisonment, except in conjunction with a term of imprisonment or possibly probation. This prohibition affects approximately two-thirds of all Criminal Code offences. In order to circumvent this restriction, some judges have adopted the practice of sentencing the offender to one day in prison in addition to the "real" sentence deemed appropriate in the case, the fine.

To make the law correspond with current attitudes and practices and to discourage the use of imprisonment where a fine might be as appropriate, by broadening the sentencing alternatives available to the judge, **the Commission recommends that judges be given the discretion to impose a fine as the sanction for any Criminal Code offence, except those for which a mandatory sanction is specified, and that, in order to effect this recommendation, present Criminal Code restrictions on the use of the fine be removed.**

Alternative Jail Sentences

When a judge imposes a fine as the appropriate sanction, he has presumably determined that imprisonment is an inappropriate penalty or unnecessary for the protection of society. Yet present practice sets up the fine, not to stand in its own right as the sentence of the court, but rather to be accompanied by an alternative sentence of imprisonment if the fine is not paid. "X dollars or Y days" is the typical pronouncement of a sentence that would seem to involve an inherent contradiction. It is as if the court were saying, "While we find imprisonment inappropriate in your case, you may choose to be imprisoned if you do not want

to accept the sentence we have deemed appropriate. Furthermore, whether you choose imprisonment or not, although we find imprisonment unsuitable, you will be imprisoned if you do not, for whatever reason, pay the penalty we have imposed".

The effect of the fine or days in default sentence is that approximately 50% of admissions to provincial and local correctional institutions in certain parts of Canada in recent years have been for default in payment of fines. A considerable amount of money is therefore being spent to imprison offenders who were not meant to be imprisoned in the first place. It is recognized that most of these people are imprisoned for non-payment of fines resulting from violations of provincial statutes, primarily liquor offences. However, studies indicate sufficient use of imprisonment as an alternative to a fine in Criminal Code offences for such practice to warrant concern at a federal level as well. While some of those being imprisoned are people who choose to spend a short term in jail although they could afford to pay their fines, many seem to be people who simply cannot afford the fine owing to financial circumstances, or who are unable to organize their incomes so that they could manage to pay. In one study 40% of people imprisoned for not paying fines made partial payment either before or while in custody. This figure demonstrates a willingness but inability on the part of these people, to pay the full amount of the fine which also may have been the case for some of those imprisoned who made no payment at all. Furthermore, several studies indicate that the types of offences for which persons are imprisoned for non-payment of fines are typically "poor people's" offences, such as vagrancy and drunkenness. In other words, the alternative jail term seems to fall discriminatorily on the poor offender. The discriminatory effect of the alternative jail term has been found in several provinces to weigh most heavily on the relatively poorer Indian population. In 1970-71 in Saskatchewan correctional centres 48.2% of admissions were for non-payment of fines. However 57.4% of native admissions were for default of fines as compared to 34.7% of non-native admissions.

Besides the discriminatory effect and cost of the days in default sentence, we believe that the whole system of criminal justice becomes suspect when the fine is seen not as a sanction but as a means of purchasing liberty.

Commissions and law reform bodies both in Canada and elsewhere have recommended **that judges be prohibited from imposing a fine and simultaneously imposing a sentence of imprisonment to be served in the event that the fine is not paid.** We adhere to this recommendation.

It has been said that where a convicted person lacks the means to pay even the smallest of fines, a short term of imprisonment is justified. We firmly reject this use of imprisonment as being a punishment for being poor and believe that by giving the individual the opportunity, for instance, to do work, that is, by a work order, justice will be far better served. Although enforcement of fines will be considered at a later stage in this paper, we would like to note that we adopt the two basic principles enunciated in the New Zealand Fines Enforcement Committee's Report, and recommend:

(1) **That, as the court in imposing a fine must have considered this to be the appropriate penalty for the offence, every effort should be made to collect the fine before resorting to imprisonment or other forms of detention.**

(2) **The final sanction of imprisonment should not be resorted to unless:**

   (a) **all other methods of enforcement have been unsuccessfully attempted or were unavailable or inappropriate, and**

   (b) **the defendant has the means or ability to pay.**

In advocating removal of the immediate threat of imprisonment, we have considered its possible effect on payment of fines. Although it is probable that the likelihood of imprisonment has some effect on securing payment, no significant increase in failure to pay has been noted, at least in New Zealand or England where imprisonment has been relegated to a last resort enforcement measure.

Day-Fines

In previous papers we have expressed the belief that a major concern of a just sentencing policy must be reasonably uniform sentences for similar offences and offenders, whether this concern be expressed in legal terms of due process and equality before the law, or by moral criteria of fairness and humanity. But with regard to pecuniary sanctions, equality of punishment is not achieved by uniformity in the dollar amount of fines. Clearly a fine of, say, $100 would affect a poor man's life far more severely than a rich man's. We feel that the principle of equality would be far better served by a scheme that recognizes the financial circumstances of each individual offender. The financial hardship society imposes on its law-breakers through the imposition of fines is unjustifiable when it bears more heavily on its poorer members. This financial fact of the differential effect of similar fines on different offenders distinguishes the fine from other sanctions and calls for a different scheme for achieving desired

uniformity. A method that has been employed successfully in several countries is the day-fine.

Under a day-fine system the fine would be determined by the amount earned by the offender. The sentencing judge would not concern himself with the dollar amount of the fine. Having satisfied himself that the offender can pay at least a modest fine, he would, without further regard for his financial circumstances, determine the severity of the sanction in terms of a number of day-fines. Translating the sentence into dollars would become an administrative matter rather than a judicial one. In Sweden, one day-fine is equivalent to 1/1,000 of the yearly gross income of the offender. Sentenced to twenty day-fines, the person with a gross income of $5,000 would be required to pay $100, while another person with a gross income of $50,000 would pay $1,000. (Computation of the amount of the day-fine as well as the office whose responsibility it would be are dealt with further in Part Two of this paper). Thus, on being fined, the offender would be required to go immediately to the office of the court clerk, where an inquiry into his means would be held, the amount of the fine arrived at, and arrangements for payment made.

It is recognized that there may be initial difficulties in the administration of day-fines, but it is believed that the compensating benefit of greater equality in sanctions for rich and poor alike justifies its implementation. However, small fines in sums of up to $25, which cause little hardship for anyone notwithstanding his financial circumstances, need not be subject to the administrative process of determining means and the value of the day-fine. This exception to the day-fine scheme would encompass a large number of those fines presently imposed. In Toronto provincial courts from January to April 1971, 44% of the women fined were fined in amounts of $25 or less, and over half of these fines were for Criminal Code offences.

We recommend, therefore, that all fines over $25 be judicially expressed in terms of day-fines, and that the court clerk or court administrator conduct a means inquiry to determine the dollar value of the fine, immediately upon pronouncement of the sentence. We would suggest, however, that before the day-fine system is fully adopted, a pilot project be undertaken, in which day-fines are tested for one Criminal Code offence, that of impaired driving, for example, an offence for which fines are relatively high and which encompasses offenders with a wide variety of incomes.

La caisse d'amendes: A Reparation Chest

In our working paper on Restitution and Compensation, we recommended that a highly visible fund be set up from which some

victims of criminal activities would receive financial compensation for their losses. While we will not here delve into the underlying philosophy of this "compensation pot", we repeat our proposal that all revenues from fines collected as criminal sanctions flow into such a fund. If it is considered desirable to reinstate the victim in his historic position of importance in the criminal process, the conclusion follows that revenue from fines should go not to the state as is presently the case, but to the victims of criminal offences. In this way, criminal offences, the monetary penalties imposed for them, and the victims' losses would properly be seen as being interrelated.

An Administrative Scheme of Enforcement

Introduction

Although the Criminal Code presently places the responsibility for enforcement of fines on the sentencing judge, usually much of the initiative is taken by the clerk of the court, with the assistance of local police. The judge generally has neither the time nor the resources to oversee the payment of fines which, after all, is an administrative matter; similarly the police, charged with the responsibility of finding offenders in default and arresting them, do not have the time to give this task a great deal of attention. Furthermore, complications arise when the offender lives or moves beyond the geographical jurisdiction of the police and court.

To illustrate the difficulties of this shared responsibility in the enforcement of fines, let us look at what happened to the 830 fines imposed for Criminal Code offences by provincial judges in one Canadian city in 1971. Although 199 fines were not paid in the time allotted, only 158 warrants were issued before the end of the year. Although 158 warrants were issued, only 81 were executed (73 of which resulted in payment, 8 resulted in jail terms for non-payment). So, several months after time to pay had expired, 118 of the original 830 offenders continued to avoid payment. Where offenders are negligent in making prompt payment or wilfully avoid making payment, the costs of administration are needlessly increased. The desirability of passing part of these additional costs on to the offender in certain cases should not be overlooked.

By centralizing all aspects of enforcement of fines in one administrative agency with adequate manpower and facilities to execute these functions, and to keep accurate, accessible and up-to-date records possibly through computerization, much of the inefficiency and resultant inequities of the present system could be removed. Furthermore, judges and police would not be burdened by these responsibilities. We recommend, therefore, that the office of the court clerk or administrator be expanded in order that it take over these functions. A strengthened court administration would also be responsible for the collection and enforcement of restitution payments, as suggested in our working paper on Restitution and Compensation.

Procedures for Payment of Fines

Means Inquiry

The Criminal Code does not always require the court to consider the means of the accused before determining the amount of the fine. Only if the judge orders the fine to be paid immediately should he be satisfied that the accused is able to do so (and this provision may be nullified as will be seen in the following section). Even later when the offender is faced with jail for failure to pay, no inquiry into the offender's ability to pay need be held except where the offender is under 21. Even in such a case, the Code does not specify the depth to which the inquiry must go.

A means inquiry is an integral part of a day-fine system. We suggest that, as with enforcement, determination of means would best be handled by a branch of the court clerk's office with adequate time and resources allotted for the specific task. After asking the offender some basic questions about employment, number of dependants, extent of debts and assets, the court administrator would compute the amount of the day-fine by an estimation of 1,000th of the offender's gross income in the past year, with rules for reductions for dependants, large debts, and high incomes (because of progressive taxation) as well as for increases for offenders with large amounts of capital. Specific rules for this computation might best be developed through the proposed pilot project.*

Time to Pay

The first decision now made by the judge with regard to enforcement is whether the offender should pay immediately. As argued above, the administrative arm of the court would be better equipped to make this determination through its inquiries and could relieve the judge of the task. While at present the judge cannot order immediate payment unless

(a) the court is satisfied that the person convicted is able to pay forthwith, or

(b) upon being asked the accused person states that he does not require time to pay,

these provisions are undermined by another provision which permits the judge to order immediate payment if for any special reason he deems it expedient.

We suggest that everyone with immediately available means be required by the court clerk or court administrator to pay forthwith.

* We have included as an appendix a summary of the day-fine system as it operates in Sweden.

However, no special reason such as likelihood of absconding or history of non-payment should supersede the fact that an individual cannot pay immediately. Surely it is absurd for someone to be considered in default of payment of his fine as soon as it is imposed, if he does not have the money with him but for some special reason is required to pay immediately. It would be preferable for the judge to choose an alternative sanction such as a work order or probation where he has reason to believe that payment of a fine would be unlikely or too burdensome to enforce.

Where time to pay is granted, it must at present be a minimum of fourteen days. In practice, many payments are made shortly after the deadline. (In one study 44.6 percent of offenders paid after the deadline but before a warrant was issued). Do these statistics suggest that extending the usual two week time to pay period to a minimum of three or four weeks might result in a somewhat lower default rate? Or do they equally suggest a tendency for people to pay at the last possible moment whatever the allowed time may be? We are not convinced that the two week period need be increased. What is more important is that each case be considered individually and carefully and that the court clerk or administrator in consultation with the offender, set a time that appears to be both feasible for the offender and no later than necessary.

Instalments

In our present-day economy, instalment payment is the normal and often the only feasible means of payment for many people. Having adopted the principle that every effort be made to collect the fine before resort to imprisonment, we must be willing to accommodate this practical reality by acceptance of the need for instalment payment of fines. If accurate records are kept, instalment payment can be an efficient means of decreasing the likelihood that the offender will be unable to meet the time set for payment. As with the time to pay, the decision about the desirability, times and amounts of instalment payments should be made by the court clerk or administrator after consultation with the offender. In this connection it may also be desirable to consider the availability of debt counselling services, possibly through cooperation with another agency, to assist the offender in organizing his finances so that he would be able to manage payments.

Extension of Time to Pay

The offender should be made aware that if he has unforeseen difficulties in meeting payment, he has the right to apply to the clerk of the court for extension of time to pay.

Procedures in the Event of Non-Payment

It has been suggested above that the judge and the police be relieved of their responsibilities in enforcing payment of fines and that collection be concentrated in the office of the court clerk or administrator. Such an office should have the facilities and the time to discharge a specific duty of arranging and enforcing quick but feasible terms of payment. It has also been suggested that day-fines be introduced, that provisions for payment by instalments and extension of time to pay be made and that the availability of counselling facilities be considered. All of this should have the effect of keeping the amount of the fine more in line with the ability of the offender to pay and make the terms of payment more realistic. Through these improvements it is expected that the number of persons who do not pay in the allotted time will be decreased.

Yet the question remains—what do we do with the person who fails to pay his fine on time? To meet this question we have discussed a number of possible steps. The procedures which follow should have to be invoked for only a small percentage of fined offenders. We must keep in mind the principle that imprisonment ought only be resorted to after all other methods of enforcement have been unsuccessfully attempted or were unavailable or inappropriate, and the offender has the means or ability to pay. These procedures, then, are meant to ensure that those offenders who do not pay their fines do not get away, but also that they do not end up in prison unless all other methods of enforcement have been exhausted and wilfully continue to refuse payment.

The first step to be taken when an offender has not met the time set for payment and has not requested an extension, would be the calling of a means inquiry. For those who had been sentenced in day-fines it would mean a second and more detailed examination of their means. At this inquiry the offender would be given the opportunity to show cause for his non-payment of the fine. The onus would be on him to produce evidence of his financial position that might suggest a miscalculation at the first means inquiry or a deterioration of means since that time. Through such an inquiry the clerk could make a preliminary determination whether or not the non-payment was deliberate or negligent.

In order to get the defaulting offender to this means inquiry, the court clerk's office would mail a warning, explaining that the deadline had passed and that the offender must pay immediately or be summonsed to attend at the court clerk's office for examination

and disclosure of means. If payment were not then made, a person from the court clerk's office would serve the summons, in person. The experience in several jurisdictions has been that many tardy offenders pay on receipt of the warning or the summons. Finally, if the offender ignores the summons to appear, the court administrator's office would request that a warrant be issued by the court, which the staff of the court clerk would execute, forcing the offender's appearance at the means inquiry.

Depending upon the results of the means inquiry, some offenders might decide to pay at that time. Other offenders, upon showing a change in their financial circumstances, might ask for a re-adjustment of the dollar value of the day-fine, an extension of time to pay, or an alteration in the terms of instalment payments. However, if it were found that the offender's circumstances had changed so drastically since the sentence was imposed that no payment was possible, the court administrator should have the power to apply to the judge to change the sentence.

On such an application the judge should have the power to do one of several things. One possibility would involve a total forgiveness or removal of any sanction. One factor leading to such a determination might be the gravity of the misfortune that caused the deterioration of means. While at present the power to forgive a sanction (remission) is exercised by the Governor-General in Council through the National Parole Board, it is suggested that justice would in this connection be better served if such power were placed in the local judge.

The judge should also have the power to re-sentence the offender and to order, for example, that an offender lacking the means to pay work off the amount of his fine through community service. (The concept of work orders will be treated in a forthcoming working paper). While community service orders are viewed as a preferred alternative, it is recognized that such a scheme would not be practicable at all times in every community. Therefore, the offender might also be re-sentenced to a term of probation. Similarily, probation might be considered as a re-sentencing alternative for the offender who cannot pay and refuses to cooperate in a work order.

Finally, intentional defiance of a work order or a probation order would constitute a new offence punishable on summary conviction, as is presently the law for violations of probation orders (Criminal Code of Canada, s. 666). If tried and convicted of this offence, the offender would be subject to possible imprisonment as one of the regular sentencing alternatives for summary conviction offences.

Where the office of the court clerk found through its means inquiry that the offender had the means to pay his fine but deliberately refused to do so, or where the offender neglected to provide evidence to prove his inability to pay, that office would also apply to the judge for re-sentence or conversion of the sanction. It is suggested that the judge in those cases have the power to make collection of the fine coercive, no longer dependent on the cooperation of the offender who has demonstrated his unwillingness to cooperate. This may be done through an order that sums of money belonging to the accused including wages be placed under garnishee and attached at a specified rate until such time as the entire amount of the unpaid fine has been collected. Employers should not be allowed to use such garnishment as a basis, in whole or in part, for the discharge of an employee or for any other disciplinary action against an employee. Another possible order of the court which may be considered is the seizure and sale of goods belonging to the recalcitrant defaulter. However, this method may be considered too problematic to be practicable.

Where these methods of forced collection of fines owed are found to be unavailable or inappropriate, the court should have the power to re-sentence the offender with means who intentionally refuses payment to a term of imprisonment.

Appendix

The Swedish Day-Fine System*

What it is and how it operates

1. The day-fine was brought into force in Sweden in 1932 in order that monetary penalties for criminal offences should affect the rich and the poor more equitably, and we understand that it is now completely accepted there by both the public and the judiciary. Somewhat similar systems are, we understand, in force in Denmark and Finland. The principle of the system as applied in Sweden is simple enough. The fine is calculated by multiplying together a number (from 1 to 120, or from 1 to 180 in the case of multiple offences) reflecting the gravity of the offence, and a sum of money (varying from 2 kr. to 500 kr.) known as the day-fine, which is assessed according to the offender's ability to pay. The two factors, the seriousness of the offence and the offender's means, are determined quite independently of each other, and both the number of day-fines and the amount of each are announced in court. The information about the offender's means is obtained by the police before the trial, and is usually confirmed with him in court. In general, the day-fine is estimated at 1/1000th of his annual gross income (less expenses directly related to his employment); and there is provision for the reduction of the day-fine according to his liabilities, and for its increase if he has capital exceeding a specific amount. The system does not apply to minor offences, which are punishable by fines up to a maximum of 500 kr; these offences are excluded because to calculate the day-fine in the very large number of cases concerned would involve a heavy administrative burden and because the payment by the well-to-do of a very large fine for a petty offence is thought to be out of place.

Scope of the application of the system

2. Under the day-fine system the fine imposed is arrived at by multiplying a number (from 1 to 120, or 180 for multiple offences), reflecting the gravity of the offence (which may be affected by any

* Home Office, Report of the Advisory Council on the Penal System, *Non-Custodial and Semi-Custodial Penalties*, 1970, p. 7, 8, 74-76.

previous convictions for similar offences), by a sum of money (varying from 2 kr. to 500 kr. and called a day fine) assessed according to the offender's ability to pay. Both the number of day fines and the amount of each day fine are announced by a judge in passing sentence. Fines for all offences under the penal code are imposed in the form of day fines, except where a maximum sum of 500 kr. is specified (monetary fines) or where there is a special basis of computation (standardised fines). (Monetary fines are available for drunkenness, disorderly conduct, minor traffic offences and regulatory offences; standardised fines are primarily applied in the use of income tax evasion.) Certain statutes other than the penal code also provide for specific offences to be punished by day-fines, and in a few cases a minimum number of day fines is prescribed. In the more serious motoring offences, such as dangerous driving, careless driving, etc., day-fines up to the maximum of 120 may be added when a conditional sentence (suspended judgment) is passed or probation ordered; damages may also be ordered where the issues are clear but this is rarely done. (Compensation and costs are ordered independently from the day-fine). It is understood, however, that in motoring cases insurance companies take account of the number of day-fines ordered by the courts, which is taken to reflect the degree of culpability of the offender.

3. The imposition of day-fines is not exclusively the prerogative of the court. If the penalty prescribed for an offence is only a fine the public prosecutor may issue an "order of summary fine" (Strafforelaggande) instead of instituting proceedings. His discretion is limited to a maximum of 50 days fines, or 60 days fines in the case of multiple offences. If the accused agrees to pay the fine the order is deemed to be a final judgment delivered by the court; if he does not the prosecutor will institute proceedings. There appears to be no special limit on the amount of the day-fine ordered in cases disposed of by the public prosecutor.

4. The table at the end of this appendix* gives some indication of the pattern of sentencing in the Swedish courts and of the extent of the use of the fine. In their present form the Swedish statistics do not distinguish between fines which are assessed on a day-fine basis and those which are not, and it is therefore difficult to assess the extent of use of the day-fine. One unofficial estimate by the Swedish authorities is, however, that of fines imposed by courts and prosecutors in the period 1965-67, 20-25% were assessed as a day fine basis; in the case of fines imposed by courts only, probably 45-65% were assessed on a day-fine basis.

* Not included herein.

Assessment of the offender's means

5. The assessment of the offender's capacity to pay is very much a rough and ready business; it involves no great volume of work and presents no real problem. The courts are apparently much less fussy now in their assessment of the offender's means than they were when the system was brought into operation in the early 1930's. Information about the offender's means is obtained by the police as part of their investigation of an offence and is not infrequently obtained from the offender by telephone[1]. Where the offender is present at the hearing, which he usually, but not always, is, the judge will check with the defendant whether the information given in the police report is accurate. In theory, the case may be adjourned for further enquiries if it is evident that the offender is untruthful, but this apparently is seldom done. The giving of false information concerning means is not an offence, and the offender risks no penalty by giving untrue information, either in the form or orally to the court. It is perhaps relevant that information about income is public property in Sweden; an annual register of the income of most wage earners is published and there is a national system of graduated pensions, a feature of which is that each person has an insurance card showing his tax grade which the court may ask to see. It is also possible to confirm income with the tax authorities, and the defendant knows that his statement of income can be checked. The form commonly used for less serious offences is a short version, which includes details of gross income, tax assessment, capital, debts, marital status, wife's income and number of dependent children; there is also a fuller type of form which fulfils in addition the function of a social enquiry report. The simple form, requiring only a few entries, is usually endorsed by a rubber stamp on the papers. Inaccuracies in the information supplied in the form seem to be not uncommon but, where necessary, these are cleared up by direct inquiry from the defendant in court. It appears in fact that the system could be operated even without the use of the form. The public prosecutor does not ask for any particular fine to be imposed and it is left entirely to the judge to decide upon the number of day-fines and the amount of each.

Computation of the amount of the day-fine

6. In general, the day fine is estimated as 1,000th of the offender's annual gross income (less expenses directly related to his employ-

[1] There is no system of bail in Sweden. The offender is brought before the court and a decision taken whether or not to release him pending trial. As long as five days could elapse before such release is ordered.

ment). If the offender is married and his wife has no income of her own, a reduction of 1/5th is made, and a further reduction of 2 kr. is made for each child. There are rules governing the reduction of the amount of the day-fine when the income is high (because of progressive taxation) and for its increase when the offender has capital of 30,000 kr. or more. There are also rules for computing the amount of the day-fine in the case of married women with no income of their own and for offenders with large debts; for those without means the day-fine, normally set at a minimum of 5 kr., is usually reduced to 3 kr., but can be reduced to 2 kr.

Enforcement

7. The collection of the fine is the responsibility of the enforcement authority and no money may be paid into the court. The enforcement authority is also responsible for the enforcement of unpaid fixed penalties, unpaid fines imposed by the public prosecutor, maintenance, taxes and civil debts. A register of fines is sent to the enforcement authority and in theory enforcement action commences after eight days if payment is not made. The offender may arrange with the enforcement office to pay the fine by monthly instalments over a period of one year or, exceptionally, two years, and the authority is entitled to grant a respite of four months or, in special circumstances, eight months before collecting the fine. If no satisfactory arrangements are made action is taken to attach the defaulter's earnings; if this expedient is not available and threatening him with imprisonment proves unsuccessful, the next step is to distrain on his property. As a last resort the case may be referred to the public prosecutor; if this action is not taken within three years of the imposition of the fine recovery is no longer possible. The public prosecutor may write off outstanding sums up to 50 kr. or 5 day-fines (100 kr or 10 day-fines in respect of multiple offences); these fines cannot be converted into imprisonment unless the offender has been refractory or manifestly neglectful in fulfilling his duty to pay, or unless the conversion is deemed to be needed as a means of inducing him to amend his ways. The court may convert the outstanding sum to imprisonment of up to 90 days' duration, and the usual tariff is one day's imprisonment for each day fine unpaid. (Once actually admitted to prison the offender may not secure release by payment of the outstanding sum.) Alternatively, the court may refer the case back to the enforcement authority with a view to further extension of the period of payment, or it may impose a conditional sentence. It is understood that of 29,000 cases dealt with by the enforcement office in 1967 4,000

were referred back to the public prosecutor. Only a hundred or two cases a year are in practice converted to imprisonment. The maintenance of children has first claim on any monies received, and taxes, fines and civil debts follow in that order. An interesting feature of the system is that fines imposed in one of the Nordic countries may be enforced in any other, subject to the proviso that the defaulter may be imprisoned only in his country of origin.

Features of particular interest

8. The following aspects of the system deserve comment:

(i) It is claimed that the introduction of the day-fine led to a striking (50%) reduction in the number of fine defaulters imprisoned; and it is to be assumed, therefore, that the system has operated to correct the imposition in some cases of unrealistically high fines. The system is, however, primarily designed to ensure that an even justice is done.

(ii) A wide discretion is conferred upon the executive authority. The public prosecutor can impose fines of up to 500 × 50 kr. and has discretion to "write off" unrecovered day-fines of up to 5 in number. (Driving licences can be withdrawn by the licensing authority for traffic offences, and it is understood that this power is automatically invoked where fines in excess of 30-40 kr. are imposed.)

(iii) There is thought to be nothing objectionable to a very prolonged period of enforcement. One Swedish official explained to members of the Sub-Committee that the objective was not to punish, but to deter by bringing home to the offender that the commission of further offences would prove costly.

(iv) In practice, offenders may be fined fairly stiff amounts (up to 500 kr.) without the use of the day fine system. There is some anomaly in this, because such fines for lesser offences could be higher than fines imposed under the day fine system for more serious offences on those with limited means.

(v) The wide discretion in matching the penalty to the offence is said not to result in practice in any marked disparity between one court and another in the assessment of the gravity of the offence.

(vi) The day-fine system is completely accepted both by the public and the judiciary. After many years of its operation the procedure is well established, and there is no question of

reverting to the old system of prescribing minima and maxima for specific offences.

(vii) The penal code provides that fines may be used as a collective punishment for several crimes, with a corresponding increase in such cases of the normal maximum or 120 day-fines to 180 day-fines, and an increase of a maximum fine directly imposed from 500 to 1,000 kr.