THE FINE AS A SENTENCING OPTION IN CANADA

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EXECUTIVE SUMMARY

The fine is the most frequently employed sanction in the criminal courts of modern, western, industrialized societies. In Canada, over 90% of convictions of summary offences and up to one-third of convictions of indictable offences result in the imposition of fines. Many nations rely even more heavily upon the fine, and for a greater range of offences, than does Canada. The Canadian Criminal Code does not permit an offence, punishable by five years or more of imprisonment, to be sanctioned by a fine alone. However, such offences may generally be dealt with by the imposition of a suspended sentence or probation, which many would regard as being essentially non-punitive in nature. It is suggested that the Criminal Code is illogical in its denial of the option to impose a fine alone in relation to such offences.

Recommendation 1: that the Criminal Code be amended so that offences, punishable by five years or more imprisonment, may be sanctioned by the imposition of a fine alone.

Despite the frequency, with which fines are imposed, very little is known about the types of offences for which it is employed, the amounts of fines ordered, and the characteristics of offenders sentenced to pay fines. This situation has arisen as a consequence of the absence in Canada of a central data collection system and has been exacerbated by the fact that data collected in one province

cannot be readily integrated with data from another. Furthermore, even within an individual province (such, as for example, British Columbia), data may be collected by two or more government systems, which are incompatible with one another.

Recommendation 2: that the method of data collection, and the type of data collected, be standardized across Canada so that intra and inter-provincial comparisons may be drawn and a national profile of sentencing patterns determined.

Recommendation 3: that all sentences be recorded in conjunction with details concerning both the offence and the individual offender (for example, the charge, the amount of the fine, the offender's sex, age, race, criminal record, and employment status) so that comprehensive research may be conducted into the use and efficacy of criminal sanctions.

With the exception of young offenders and offenders who are ordered to pay their fines forthwith, the Criminal Code does not require that, prior to pronouncing the amount of the fine to be imposed, the Court inquire into the financial means of the offender. As a financial penalty, the fine is made available to the courts as an alternative to incarceration. However, at the time of imposing a fine, most Canadian judges (unlike their counterparts in England, for example) automatically order a period of incarceration to be served in default of fine payment. By pursuing this practice without undertaking a means inquiry, Canadian courts are, in reality, imposing a sentence of imprisonment upon those offenders, who are genuinely unable to pay their fines.

Conversely, if a means inquiry is not conducted, it is possible that trial judges may be unwittingly sentencing financially advantaged offenders to pay fines that have little or no impact.

> **Recommendation 4: that the Criminal Code be amended so that, in every case in which a fine is to be imposed, the court be required to conduct an adequate inquiry into the means of the offender. Such an inquiry could be conducted through viva voce evidence or by affidavit or the accused could bring into court a completed budget statement (such as is frequently employed in matrimonial cases) and swear to the truth of its contents before the sentencing judge.**

Unlike many nations, Canada gives almost no guidance to judges regarding the minimum or maximum amounts of fines to be imposed. When confronted with the task of sentencing an offender, the court, after hearing the particulars of the offence and hearing from the accused or his lawyer, proceeds to pronounce the amount of the fine to be paid. This is known as the global fining approach. Under this approach, there is no set formula for calculating the amount of the fine. However, it appears that the determination of the actual amount to be paid is based upon judicial practice and experience in relation to the seriousness of the offence.

Since the fine is a financial sanction, two offenders who are convicted of exactly the same offence and are ordered to pay identical fines, may nevertheless suffer the consequences of this sentence in vastly different ways, depending on their individual financial circumstances. Many

nations have attempted to combat this form of sentencing disparity by employing a day-fine system. The total amount of the fine to be imposed is calculated as the product of two factors; namely, the number of day-fine units (which is a measure of the gravity of the offence) and the value of an individual day-fine unit (which represents a certain percentage of the offender's disposable income). Therefore, the fine to be paid is commensurate with both the gravity of the offence and the individual offender's means. While the amount of the fine may differ, the rich and the poor suffer in approximately equal measure.

Recommendation 5: that the present system of "global fining" be replaced with a day-fine system modeled on that currently in place in Sweden.

Recommendation 6: that, to this end, an in-depth study be conducted in order to identify the necessary changes that would need to be made in the Criminal Code as well as in judicial and administrative practice and to identify the means by which the transition to a day-fine system could be facilitated in Canada.

Within the Swedish day-fine system, prosecutors play a critical role in sentencing summary offenders. The offender and the prosecutor reach an agreement (within set guidelines) as to an appropriate sentence. This agreement has the same legal effect as if the sentence had been imposed by the Court. The offender retains his right to be sentenced by a judge, if he so desires. This practice has proven itself to be an invaluable time-saving device for the courts.

Recommendation 7: that a pilot project be conducted, in several court catchment areas, in order to assess the feasibility of, and judicial and public response to, the possibility of Crown Counsel becoming actively involved in the sentencing process.

In calculating the impact of a fine upon an offender, the length of time which he is given to pay the fine is a factor that is of equal importance to the amount of the fine. Since judges are concerned lest impecunious offenders be sentenced to pay a fine that is beyond their means to pay in a timely manner, it is common practice to ask the offender how long he requires to pay the fine. This approach tends to place control of the sentence in the hands of the offender. It is contended that the time given to pay the fine should be the considered outcome of the sentencing judge's knowledge of the offender's income and the seriousness of the offence.

Recommendation 8: that as much judicial consideration be given to the length of time the offender is granted to pay his fine as is given to the issue of the size of the fine to be imposed.

Recommendation 9: that, in every case that a fine is imposed, the sentencing judge advise the offender that, if his circumstances change or he finds himself unable to pay his fine on time, he may apply to the Court for an extension of time in which to pay the fine.

The Criminal Code permits the Court to direct that a fine be paid at such time and on such terms as the Court may fix. Many English courts require that the fine be paid in

installments. This procedure forces the offender to budget for payment of his fine and permits early detection of potential defaulters. It appears that Canadian courts rarely order a fine to be paid in this manner.

Recommendation 10: that the judiciary consider the possibility of ordering that fines be paid in installments on a schedule determined by the sentencing judge.

Recommendation 11: that the offender's payments be monitored and, if default occurs, that he be brought back before the Court as soon as possible for a show cause hearing to determine if his circumstances have changed since sentencing or whether he is deliberately failing to comply with the sentence of the Court.

As the Criminal Code now stands, an offender, who has been ordered to pay a fine or serve time in default, may choose imprisonment as his preferred option. He may do this by signifying to the Court, in writing, that he has elected not to pay his fine and would rather be committed to prison or he may simply not pay his fine and wait to be arrested. It is submitted that it should not lie with the offender to elect a sentence (viz. imprisonment) that the Court initially deemed inappropriate. All sentencing decisions should remain within the sole jurisdiction of the Court.

Recommendation 12: that section 646.(9) be deleted from the Criminal Code.

Once default occurs in relation to a fine, the Court's reaction varies from jurisdiction to jurisdiction in Canada.

Recommendation 13: that administrative and court procedures be standardized in relation to fine default and that, prior to the occurrence of the default, every accused be notified that; (i) the payment period is about to expire; (ii) he may apply to the Court for an extension of time within which to pay his fine, and (iii) the consequences of non-payment.

The major criticism levied against the fine is that impecunious offenders, who are unable as opposed to unwilling to pay their fines, are being imprisoned for fine default. Very little research has been conducted in relation to fine default; however, from the results that have been made available, it seems that some genuinely indigent offenders are being imprisoned along with the recalcitrant.

Recommendation 14: that the system of data collection be improved so that a comprehensive study can be conducted in relation to : (i) the extent of fine default; (ii) why individuals default on their fines; (iii) the cost to the state of fine default; and (iv) the costs and effects of fine collection procedures.

At the time of imposing a fine, the courts of many countries do not sentence the offender to a period of incarceration in the event of default. Should the offender default, he is brought before the Court for a show cause hearing. In these jurisdictions, a greater degree of emphasis is placed upon collecting the fine through civil procedures (such as garnishing wages and seizing goods). Imprisonment is viewed as only a last resort.

Recommendation 15: that imprisonment for fine default not be automatically ordered at the time of sentencing an offender to a fine.

Recommendation 16: that consideration be given to abandoning imprisonment as a primary method of fine collection and that more emphasis be placed upon civil procedures with imprisonment to be used only as a method of last resort.

Recommendation 17: that, upon default, the offender be summoned to Court for a show cause hearing. If he is adjudged to have wilfully refused to pay his fine in full at the expiration of the payment period, he should be considered to be in contempt of court. Upon conviction, the fine should be satisfied through civil proceedings.

Recommendation 18: that, if imprisonment for fine default is to be retained in its present form, the Criminal Code be amended so that in every case the offender will be brought before the Court, prior to committal to prison, for a show cause hearing to determine whether he is incapable of paying the fine (in which case, the sentence can be adjusted) or is merely unwilling to pay his fine.

The research clearly shows that there is a wide disparity in the lengths of prison sentences that offenders are serving in default of payment of fines of the same amount. Some offenders are serving their fines at the rate of $3 per day, while others are serving them at the rate of $70 per day.

Recommendation 19: that, if imprisonment for fine default is to be retained, the length of sentence be commensurate with the size of the fine imposed. To this end, a formula (such as that employed in the day-fine system) should be devised so as to reduce the current problem of sentencing disparity in the per diem rates at which offenders are serving their sentences.

Recent amendments to the Criminal Code now provide a legislative basis for the use of fine option programs.

Several provinces already have well-established fine option programs, which enable offenders who are unable to pay their fines the option of working off their fines in designated community projects. These programs have produced a dramatic saving to the taxpayer and offer a viable alternative to imprisonment for fine default.

Recommendation 20: that all provinces and territories introduce a fine option program as soon as practicable and that, at sentencing, all offenders ordered to pay a fine be advised of the existence of such programs and the application procedure for participating in them.

INTRODUCTION

During the course of the last two centuries, the evolution of the disciplines of criminology and penology has engineered profound changes in the criminal justice system. Not the least of these changes has taken place in the area of sentencing practices. Once a verdict of guilty has been reached, trial judges have been faced with an increasing array of sentences to consider, all of which have their peculiar advantages and disadvantages which must be weighed along with the circumstances of the offender and the particulars of the offence, before sentence can be passed. In light of the veritable smorgasbord of sentencing alternatives and the increasing amount of information that is available to contemporary trial judges in Canada, there

can be little doubt that sentencing has assumed the dimensions of a remarkably complex and sophisticated task.

The one sanction which has consistently remained a staple weapon in the sentencing Court's arsenal is the fine. The earliest written prescription for fine use can be found in Hammurabi's Code (circa 2130 - 2087 B.C.) although fines may well have been in use long before this period. Originally, the fine was devised as a method of avoiding the destructive practice of blood feuds. The offender paid a fine to his victim or the victim's family as a form of compensation for the harm that he had inflicted. Today, the state has superseded the victim in the criminal courts and it is to the state treasury that fines must be paid. Indeed, victims must now pursue the wrong-doer in a civil action if they wish to recover monies directly from the perpetrator.

FREQUENCY OF FINE USE

Throughout the history of the criminal justice system, the fine has always been a commonly used sanction; however, it has probably never been used so frequently (and for such a wide variety of offences) as it has in the modern courts of western industrial nations.

(a) Canada

Across Canada (excluding Quebec and Alberta) sentencing judges in 1973 imposed fines in 34.3% of cases involving convictions for indictable offences while the equivalent

figure for summary offences was 92.7%[1] From more recent information, it appears that Canadian judges are still relying heavily on the fine as an appropriate sanction. A study published by the federal Department of Justice, in 1983, refers to data from British Columbia(collected in 1978), Winnipeg(1981) and Quebec(1978) reveals that when summary and indictable offences are combined, a fine was the sole disposition ordered in relation to 40% to 55% of convictions[2]. The authors of the study indicate that this relatively high degree of fine use reflects the large number of alcohol-related driving offences among summary convictions[3]. The federal study also examined the incidence of fine use in relation to conviction of indictable offences. Here, the figures indicate that the fine was much less likely to be the sole punishment imposed. Utilizing 1979 data from Saskatchewan, Ontario, and the Atlantic provinces, it was discovered that the fine was imposed in from 6% to 18% of convictions. However, the study emphasizes that these figures may be potentially misleading since they only refer to cases in which the fine was the **ONLY** disposition imposed; since the fine may be imposed in

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[1] Curt T. Griffiths, John F. Klein, and Simon Verdun-Jones, Criminal Justice in Canada: An Introductory Text, (Vancouver: Butterworths and Co., Western Canada, 1980) pp.172-173.

[2] Department of Justice, Sentencing Practices and Trends in Canada: A Summary of Statistical Information, (November, 1983) pp.11-12.

[3] ibid, p. 16.

conjunction with other dispositions, the actual number of fines imposed might be much higher than the above figures suggest.

The federal study indicates that the fine is most likely to be imposed in relation to conviction of any of the alcohol-related driving offences; indeed, between 77% and 95% of such cases resulted in the imposition of a fine in the three jurisdictions, for which data combining summary and indictable offences were available. The authors point out that the fine is also the most likely disposition, in many jurisdictions, for such offences as possession of a prohibited weapon and other weapon-related crimes, certain assaults (particularly assaulting a peace officer and resisting or obstructing arrest) and (in two of their court samples) mischief and wilful damage. As noted earlier, since the Criminal Code provides that a fine may not be imposed as the only disposition in relation to offences carrying a maximum penalty of more than five years' imprisonment, the authors of the study note that there are a number of offences for which a fine can never be the most serious disposition imposed; for example, robbery and extortion, wounding, break and enter, possession of a firearm for an illegal purpose, fraud where the value of the subject-matter of the offence exceeds $1,000, possession of stolen goods

valued at more than $1,000, theft over $1,000 and theft of a credit card[4]

(b) Other Jurisdictions

The use of financial sanctions is no less widespread in other jurisdictions. Indeed, some countries use fines more frequently than does Canada and, in certain instances, for more serious offences. It has been estimated that, in the United States, fines constitute 75% of all sentences for criminal offences[5]. In England, approximately 95% of offenders found guilty of non-indictable offences, during 1977, were ordered to pay a fine[6]. Even in the Crown Courts, where the most serious offences are heard, judges imposed fines in 15% of convictions[7]. Dutch judges impose fines with no conditions attached in approximately 93% of their cases[8]. As a result of amendments legislated by the West German Federal Parliament in 1969, the fine is the primary sanction for offences punishable by less than six months

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[4] Where this offence is tried on indictment.

[5] Sol Rubin, The Law of Criminal Correction, 2d ed., (St. Paul, Minn.: West Publishing Co., 1973) p.272.

[6] James A. Carter and George F. Cole, "The Use of Fines in England: Could the Idea Work Here?", Judicature, Vol.63, No.4, (October, 1979), p.143.

[7] Ibid.

[8] Calvert R. Dodge, A World Without Prisons: Alternative to Incarceration Throughout the World, (Lexington: Lexington Books, 1979), p.143.

imprisonment[9]. Indeed, in 1979, 82% of all convictions in West Germany resulted in fines. Many of these offences had traditionally been dealt with by incarcerative sentences. For example, 66% of crimes against the person now result in fines. Where the attack against the victim has been particularly serious, high fines may still be imposed although most judges prefer to order imprisonment in such circumstances.

Why has the fine endured when other penalties have become obsolete or fallen into relative disuse? There are clearly compelling reasons for the longevity of the fine. By far the majority of offenders before the Courts have been convicted of non-violent offences. In modern times, a sentence of imprisonment may well be considered to be too harsh for such offenders. Furthermore, there has been a declining degree of confidence in the efficacy of custodial sentences either as a method of deterrence or as an appropriate form of punishment. The fine offers a mid-range sentence between the severity of a custodial sentence and the less punitive dispositions of probation or a suspended sentence. While a fine may well have a significant impact on an offender's family, it does not deprive the family of his company of his role as breadwinner.

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[9] Gary M. Friedman, "The West German Day-Fine System: A Possibility for the United States?", The University of Chicago Law Review, Vol.50, No.1, 1983, pp.281.

From the Court's perspective, the fine is a relatively expedient sanction to administer. Unlike probation or community service orders, the administration of the fine requires relatively few supervisory personnel and, therefore, is inexpensive from the point of view of the taxpayer. Furthermore, it provides the Court with an unique opportunity to calculate a penalty by simultaneously taking into account the amount of financial damage done by the offender, the severity of his offence, and the individual circumstances of the offender. Since the Criminal Code provides relatively few minimum or maximum fines, the sentencing judge is given a wide degree of discretion in calculating the amount of the penalty to impose. In addition, unlike any other sanction, the penalty to be inflicted is totally within the control of the sentencing judge. Should the offender's circumstances change following conviction, the sentencing judge may adjust the fine and the time to pay it accordingly. Furthermore, should the conviction be overturned on an appeal, the fine is the most easily remissible sanction since it can simply be paid back and the offender returned to his pre-sentencing financial position[10].

The popularity of the fine may also be a consequence of the growing multitude of statutory and regulatory offences. The average Canadian is governed by thousands of federal and

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[10] Ibid., pp.291-294.

provincial statutes as well as municipal by-laws. For many of these quasi-criminal offences, the fine is deemed to be the most appropriate sanction. Since the Crown is not required to prove mens rea in relation to most of these offences[11], the services of probation officers are unnecessary and the harshness of imprisonment unwarranted. For these many thousands of offences, the fine is a quick and inexpensive sentencing solution.

CRIMINAL CODE PROVISIONS

Of course, the fine could not be so frequently resorted to if the Criminal Code did not provide for such a broad range of situations in which it may legitimately be used as a sanction. The Canadian Criminal Code, R.S.C. 1970 C-34 permits the imposition of a fine upon conviction for the overwhelming majority of offences. Furthermore, a fine may be ordered in conjunction with any other disposition that may be imposed by the Court. Summary convictions may be punishable by a maximum of six months imprisonment and/or a fine of up to $2000[12]. Unless a minimum prison term is specified, all indictable offences punishable by less than five years imprisonment may be disposed of by fine alone[13]. Offences punishable by more than five years or more

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[11] See R. v. City of Sault Ste. Marie (1978), 40 C.C.C. (2d) 353 (S.C.C.).

[12] See s. 722 of the Code. The maximum fine is $25,000 where the convicted party is a corporation (s.647).

[13] See s. 646 (1) of the Code.

imprisonment may also result in a fine but only if the fine is used in conjunction with another sanction[14]. Should a sentencing judge feel that, in the particular circumstances of such an offence, the most appropriate disposition would be a fine, the limitations on the use of the fine may be essentially sidestepped by ordering, for example, one day in jail and then imposing a fine as the major penalty.

> **Recommendation 1: that the Criminal Code be amended so that offences, punishable by five years or more imprisonment, may be sanctioned by the imposition of a fine alone.**

LACK OF RESEARCH INTO THE USE AND EFFECTIVENESS OF THE FINE

In light of the major role which the fine plays in modern sentencing practice, one would expect an abundance of empirical research concerning its use and effect. In fact, very little attention has been devoted to the fine either in Canada or in other jurisdictions. Indeed, as one researcher has commented:

> "Few theorists on the problem of punishment have paid sufficient attention to the fine and there is little scientific or statistical knowledge about its effect either on the individual or on society as a whole. Yet the fine is issued in practice more than any other treatment by Magistrates, so that we have here practice perpetually out running theory."[15]

The Saskatchewan Law Reform Commission described some of the difficulties inherent in researching the fine.

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[14] See s. 646 (2) of the Code.

[15] Ralph Davidson, "The Promiscuous Fine", Criminal Law Quarterly, Vol.8, 1965, p.74.

> To begin with, there has been no evaluative research into the fine's effectiveness as a penalty when compared with other sanctions such as imprisonment in lowering conviction rates. Also, no data exists on the types of offenders who are fined or the frequency and uniformity with which the fine is imposed by the different Magistrates' Courts in Saskatchewan. Furthermore, the differential rates of reconviction between offenders who have received large fines and those offenders who receive small fines is unknown. Therefore, we do not know whether the deterrent effect of the fine has any relation to any amount of the fine imposed by the Courts.[16]

It is almost certain that evaluative research would be performed if only the necessary data were available to investigators. This paucity of information is most pronounced in Canada. In the past, researchers relied heavily on information gathered by Statistics Canada. Over the last 15 years that programme was gradually phased out and has now been discontinued. The new Canadian Centre for Justice Statistics is just initiating new programmes in collecting sentencing data. However, researchers require recent, continuous, and comprehensive data, such information is missing to Canadians. The last year for which any nation-wide court statistics were gathered was 1970. Thus, Canada's sentencing data base is already almost 16 years behind the times. To complicate matters even further, the new information which is becoming available through the Canadian Centre for Justice Statistics makes it apparent that

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[16] Law Reform Commission of Saskatchewan, Provincial Offences: Tentative Recommendations for Reform (Saskatchewan: Law Reform Commission of Saskatchewan, April, 1977).

statistics from one Province often cannot be compared with those gathered from another. For example, Saskatchewan, Ontario, and the Atlantic Provinces gather data and divide offences between those which are proceeded with by indictment and those which are proceeded against summarily. British Columbia, Quebec, and the Court catchment area of Winnipeg, on the other hand, combine their data for indictable and summary cases. For these jurisdictions, the data can not be separated. As a result of such differences in provincial data-collecting systems, it is not possible to undertake a comprehensive sentencing study of the relative use of any particular disposition across Canada.

Indeed, an in-depth investigation into the use of a sanction can not even be performed within the boundaries of one Province. As was noted in the Department of Justice's Paper, **Sentencing:**

> "Some Provinces centrally collect information on sentences given for specific offences, but the information is not available in a machine readable form, so that it would take considerable time and money to generate much information beyond the overall volume of criminal cases being sentenced in a given year."[17]

The overall volume of sentencing patterns reveals almost no information which would assist in developing sentencing guidelines or recommendations. Most researchers lack the time and money to generate enough information upon which to base a reliable study. This dearth of information

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[17] Department of Justice, op.cit.

could be easily rectified at the source if only a little more time were spent on data input when reading offenders' files.

Many Provinces, such as British Columbia, lack a central data-collection system and instead, use two different systems; namely, those of B.C. Corrections and B.C. Court Services. Unfortunately, these systems are not compatible with one another since one system follows the case and the other follows the offender. Therefore, it is not possible in British Columbia for a researcher to follow the sentencing process from the initial charge right through to the ultimate disposition.

Even discerning the frequency with which a sanction is used throughout Canada is difficult. Many Provincial data systems, such as the B.C. Court Services' system, have programmed their computers to select the most serious sentence or other disposition and to record it for the particular count in relation to which it was imposed. The other Counts are not recorded. Therefore, only the most serious penalty is recorded, and other convictions for lesser offences or offences resulting in less serious dispositions are lost. For example, since a custodial sentence is considered to be more severe than a fine, should a judge order imprisonment of one day and a fine of $20,000.00, then the computer will only report the disposition of imprisonment. As a result, the numbers of

convictions for various offences committed throughout the Province are not accurately reported and neither does the information gained accurately portray sentencing patterns. Yet other crucial information is also unavailable. Current data systems can not provide information concerning the amounts of fines, nor the size of the fine in relation to offence types and offender characteristics such as age, sex, race, employment status or the number of previous convictions. Such information is crucial if an adequate study of the use and efficacy of the fine is to be performed.

Recommendation 2: that the method of data collection, and the type of data collected, be standardized across Canada so that intra and inter-provincial comparisons may be drawn and a national profile of sentencing patterns determined.

Recommendation 3: that all sentences be recorded in conjunction with details concerning both the offence and the individual offender (for example, the charge, the amount of the fine, the offender's sex, age, race, criminal record, and employment status) so that comprehensive research may be conducted into the use and efficacy of criminal sanctions.

THE FINE IN BRITISH COLUMBIA

The following information was gathered from British Columbia's Court Services' Data Bank[18]. B.C. Court Services inputs information from disposition reports. Their definition of a case is "each accused per information"

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[18] Teresa R. Mitchell-Banks, The Fine: An Enigma, M.A. Thesis, Department of Criminology, Simon Fraser University, Burnaby, British Columbia, 1983.

regardless of the number of counts. If a number of counts are disposed of by various sanctions, the computer will only select the most serious sentence and report it for that count. The other counts are not recorded. Annual disposition reports were analyzed, from the years 1976 to 1982, in order to ascertain sentencing trends over a seven year period both by the type of disposition imposed and by a specific offence category.

Frequency of Fine Use

In British Columbia, when all offences are considered together, the fine is by far the most frequently imposed sanction. In 1982, 603,171 cases resulted in convictions. For 56.05% of these, a fine was the most serious penalty imposed. Just over half (52.4%) of the convictions related to driving offences. When driving offences were deleted from the sample, a fine was still imposed in 50.35% of the cases.

Types of Offences

In an attempt to determine which types of offences could be expected to be resolved by way of a fine, the 20 offence types, given in the disposition reports, were divided into six major offence categories: offences against the person, property offences, statutory and by-law infractions, driving offences, drug offences, and "other". In reviewing the data, it became apparent that sentencing

patterns for this seven year period remained relatively constant and, therefore, the data could be aggregated.

Crimes against the person are usually considered amongst the most serious offences. This category includes assaults, homicides, offensive weapons charges, robbery, and sexual offences. Even in relation to these offences, British Columbia judges imposed a fine as the most severe disposition in as much as 35.96% of all cases. The next most commonly used dispositions were probation or suspended sentences (25.17%) and jail (23.63%). It is probably safe to assume that the most serious assaults resulted in terms of imprisonment. The precise basis upon which judges discriminate between the imposition of a fine and probation or a suspended sentence is unknown. Similarly, the severity of the sanctions imposed (i.e., the number of months' probation or the size of the fine) is also not determinable. What is apparent, however, is that even in cases of violent crime the fine is still used extensively. This is evidenced by the fact that almost 42% of assaults, 34% of offensive weapon charges and 24% of sexual offences resulted in a fine.

TABLE 1

BREAKDOWN OF SENTENCES FOR "PROPERTY OFFENCES" IMPOSED BY B.C. COURTS IN 1982[19]

Offence	Dischg.	Probation/ Susp.Sent.	Fine	Jail	Penit.	N
B & E	.64	31.61	6.91	58.77	.51	2,360
Possess. Stl.prop.	.63	24.89	22.57	44.99	.31	1,567
Theft	12.38	30.33	34.96	21.73	.06	9,774
Fraud	6.48	27.77	22.98	41.58	.26	2,715

The next category of offences examined was that of "property" offences. This category included break and enter, possession of stolen property, theft, and fraud. As can be seen in Table 1, the only offence within this category for which the fine was most prevalently imposed was that of theft. Overall, the most frequently imposed sanction was that of probation or a suspended sentence. This may well be a statistical anomaly as a result of the computer's priority ranking system for sentences in order of severity, and also as a result of the length of incarceration permissible under the Criminal Code and its concomitant restrictions on the imposition of fines. For example, the offence of break and enter is punishable by up to life imprisonment and, therefore, may not be sanctioned by way of a fine alone. However, a judge may impose a sentence of probation for this offence without any additional sanction. This may well explain why 31.6% of break and enters resulted in probation

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[19] Ibid, p.160.

or a suspended sentence whereas the computer only recorded approximately 7% of such offences resulting in fines. It is unknown how many break and entering offences resulted in sentences of both imprisonment and a fine together.

When considering convictions under Federal and Provincial Statutes and Municipal By-laws, the fine was by far the most frequently used disposition, being employed in slightly over 91% of all convictions. As previously mentioned, this is probably a result of the judges viewing these relatively minor offences as being mala prohibita rather than mala in se. Persons who commit infractions of such statutes and by-laws are not generally considered to be a risk to the community and, therefore, supervision or incapacitation is deemed unnecessary. Many of these offences involved defendants trying to take a "short cut" in order to save themselves some money. A financial penalty under these circumstances is peculiarly appropriate as it deprives the offender of his profit[20].

Over half the cases being sentenced by British Columbia judges involve driving offences. For the purposes of analysis, the category "driving offences" comprised two sub-categories:

1. Motor vehicle offences which include criminal negligence, dangerous driving and impaired driving charges, and

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[20] See Clayton C. Ruby, Sentencing (2d.edition) (Toronto: Butterworths, 1980), p.257.

2. Provincial motor vehicle offences which are created by statute.

When driving offences are considered together, the fine was the most prevalent sanction being imposed in as many as 72.5% of cases. However, over the seven year period from 1976 to 1982, the use of the fine has dropped from 81.7% to 61.35%. The decline in the use of fines has been most noticeable in provincial motor vehicle offences, although sentencing patterns for Criminal Code driving offences have also been somewhat unstable. Unfortunately, the data available does not permit the use of dispositions to be correlated with specific Criminal Code sections or provincial statutes and, therefore, it is not possible to identify the source of the fluctuation.

The next major offence category studied was that of "drugs" which included all sections of the Narcotic Control Act R.S.C. 1970, c. N-1 and the Food and Drugs Act R.S.C. 1970, c.F-27. Yet again, the fine was the most frequently imposed penalty (63.84%), followed by discharges (13.35%) and jail (11.88%). However, some offences, particularly those under the Narcotic Control Act, either have minimum sentences of imprisonment or are punishable by in excess of five years' imprisonment and, therefore, can not be sanctioned by way of a fine alone. Since many drug offences, such as importing and trafficking, are profit-motivated, a fine in conjunction with a prison sentence may be a peculiarly appropriate disposition in order to deprive the

offender of his ill-gotten gains. Very heavy fines may well serve to deter profit-seekers and, for organized drug-traffickers could well destroy their capital base.

The last major offence category, "other," included all remaining sections of the Criminal Code. The fine was again the most frequently used sanction being imposed in 38.68% of such cases. The next most frequently used sanction was jail, being employed in 30.72% of such offences.

In summary, with the exception of property offences, the fine was the most commonly imposed penalty in British Columbia for all offence types. Indeed, the fine is used in more than one-half of all cases sentenced by British Columbia judges over the years 1976 to 1982. There is nothing to suggest that this pattern has changed to the present date.

Offender Characteristics

While one can glean a rough idea of what types of offences most commonly result in a fine, what sort of offender is most likely to be fined? Since most Canadian data sources include neither demographic variables nor the amounts of fines imposed and for what offences, this question can not be answered for Canada. Two major English studies, however, demonstrate that the use of the fine is roughly correlated to the number of previous convictions

that an offender brings with him to the sentencing process.[21]

In Paul Softley's study of the sentences of 3,240 adult offenders convicted of burglary, theft, obtaining property by deception, criminal damage, wounding, or assault occasioning actual bodily harm, it was found that offenders without any prior convictions were fined at a rate of 75.2% and those with one or two previous convictions were fined at a rate of 73%.[22] For this group, the principal alternatives to a fine were absolute or conditional discharges. Custodial sentences were relatively rare. However, for offenders with three or more previous convictions, the numbers of fines dropped dramatically to 47.5%. For this group, the principal alternative to a fine was imprisonment or a suspended sentence (27.5%).

In a study, conducted by Phillpott and Lancucki, of 5,000 offenders convicted of violence against the person, sexual offences, burglary, robbery, theft and handling stolen goods, fraud, forgery, malicious damage and motoring offences, it was again found that the rate of fining dropped

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[21] Ibid., pp.160.

[22] Paul Softley, Home Office Research Study No. 46: Fines in Magistrate's Court (London: Her Majesty's Stationery Office, 1978), p.2.

as the number of prior convictions increased.[23] Those offenders, with no prior criminal record, were fined at a rate of 65%, those with one previous conviction at 52%, two to four prior convictions at 41%, and those offenders with five or more prior convictions at approximately 25%. Again, the proportion of suspended or immediate custodial sentences rose steadily as the number of convictions increased. The most significant increase occurred in relation to custodial offences. Offenders with no prior convictions received custodial sentences in 3% of the cases; those with a single prior conviction were sentenced to imprisonment in 12% of the cases; those with two to four previous convictions in 26% of the cases; and those with 5 or more prior convictions were imprisoned at the rate of 47%.

In studies undertaken by Tarling[24] and by Philpott and Lancucki[25], the age of the adult offender did not seem to make any difference to the frequency of fine use. In Tarling's study, the offenders ranged in age from twenty-one years to forty years of age and older. On average, fines were ordered for 61.3% of offenders with no significant variation amongst age groups.

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[23] G.J.O. Phillpotts and L.B. Lancucki, Home Office Research Study No. 53: Previous Convictions, Sentence and Reconviction: A Statistical Study of a Sample of 5,000 Offenders Convicted in January, 1971 (London: Her Majesty's Stationery Office, 1979), pp.8-9.

[24] Roger Tarling, Home Office Research Study #56: Sentencing Practice in Magistrates Courts (London: Her Majesty's Stationery Office, 1979), pp.14-15.

[25] Op.cit. p.10

Seriousness of the Offence

Paul Softley's study appears to be the only work, to date, which has attempted to relate the gravity of the offence to the incidence of fine use. Softley hypothesized that the seriousness of the offence would reflect, more clearly than the number of prior convictions, that fines were employed more often for offences in the "intermediate range" where some sort of sentence less severe than a custodial sentence was deemed to be appropriate. The offences of theft, burglary, obtaining property by deception and criminal damage were analyzed according to the value of the property involved. Analysis showed that the decision to sentence an offender to a fine rather than another form of disposition was unrelated to the value of the property involved. Regardless of the value of the property, the fine was used at an almost steady rate of 65.8%. Offences in which property, worth only 5 Pounds sterling or less was involved, were fined 66.7% of the time, and offences in excess of 50 Pounds sterling, the frequency of fine use dropped by a mere 2%. Other dispositions, however, were influenced by the value of the property involved. As the value of the goods increased, the rate of absolute or conditional discharges declined and the use of custodial sentences increased. Softley suggests that the prevalent use of fines for both minor and serious property offences is attributable to the ease with which the severity of the fine

may be adapted to the gravity of the offence and the circumstance of the offender.

Offenders' Financial Circumstances

Strictly speaking, in sentencing an offender, the judge's selection of one disposition in preference to any other should be primarily based on traditional sentencing principles, such as the protection of the community, the offender's chances of rehabilitation, and specific and general deterrence. However, at least in cases where the defendant is represented, any counsel of reasonable competence will give the sentencing judge a profile of the accused so that the judge may consider the personal circumstances of the offender before him and thus have more information upon which to base his decision.

One question, that a judge will invariably wish to know, is whether or not the accused is employed. It is certainly arguable in law that the type and gravity of the offence committed should be the dominant factors in deciding whether or not a financial penalty is appropriate under the circumstances. However, the decision to impose a financial penalty without ascertaining the financial circumstances of the accused may well result in significant injustice. A sentencing judge may initially consider a fine to be the most suitable sentence; however, if the offender is unemployed he will probably be living either on unemployment insurance or welfare. Jobson and Atkins have noted that:

> ...eligibility for welfare in British Columbia today may in itself be evidence of

> inability to pay. Welfare rates in British Columbia are below the poverty levels set by Statistics Canada. A single person on welfare receives $375.00, and it is widely reported in the press and it is a matter of common experience that many individuals and families on welfare find it necessary to supplement their food supplies by having recourse to the Food Banks.[26]

Thus, a judge presented with a welfare recipient may well find himself with a defendant who is virtually without means and effectively incapable of paying a fine. It is submitted that, while in theory the decision as to the type of sentence to be imposed is to be taken independently of any knowledge of the defendant's means, such a practice may well turn out to be impractical. Atkins and Jobson suggest, however, that if a judge has declared that he is going to impose a fine and then discovers that the defendant is without means to pay it, he may change the sentence to one of community service (even though he may feel that this is inappropriate and that the fine is the sentence of choice) provided that the sentence of a fine has not yet been endorsed on the information and signed by the judge. Once the sentence has been endorsed on the information, the judge is "functus" and unable to change the sentence.

Whether or not Canadian judges really do consider the offender's means, prior to selecting the form of sentence to be imposed, is unknown. However, Softley's studies, undertaken in England, showed that the decision to impose a

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[26] "Keith B. Jobson and Andrew Atkins "Imprisonment in Default: Unequal Justice", Unpublished paper, Faculty of Law, University of Victoria, April, 1985. pp.37-38.

financial sanction was influenced by the offender's status, "presumably because the amounts which some offenders could afford to pay would be derisory and bring the administration of justice into disrepute."[27] Nearly one-half of the unemployed subjects in Softley's study were fined compared with three quarters of those who were employed. For unemployed offenders, a significantly greater use was made of absolute or conditional discharges (17.7% compared with 9.7% for employed offenders) and custodial sentences (15.4% compared with 8.8% of employed offenders). Thus, while unemployed offenders were less frequently fined, they were more frequently discharged or imprisoned. Whether the increased reliance on incarceration was directly related to the offender's means was not investigated.

Once a sentencing judge has decided that a fine is to be imposed, the sentence itself actually comprises three parts, each of which requires equal consideration; the amount of the fine; the time which the offender will be given to pay it; and the length of time to which he will be sentenced to imprisonment should the fine not be paid in full within the period specified. As will be discussed later in this paper, a sentence of imprisonment for fine default ordered simultaneously with the fine is not mandatory. However, most judges automatically sentence an offender to time in default and, therefore, since this is the current

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[27] Softley, op.cit. p.5

practice, these issues will be addressed in the above noted order.

CALCULATING THE AMOUNT OF THE FINE

(a) Canada

With the exception of summary offences and some driving offences, the Criminal Code gives no guidance to judges concerning the minimum or maximum amounts of fines to be ordered[28]. Judges are given almost unfettered discretion in calculating the amount of the fine to suit the means of the offender, the severity of the offence, and the circumstances of the offender. This system may have its advantages; however, it leaves the Canadian sentencing judge "at sea" in calculating the precise amount of the fine to be imposed. In some parts of the country, manuals are apparently available to judges which suggest specific amounts of fines for particular offences. It is also probably true, that as a matter of practice, judges in a particular area gauge the amounts of the fines which they impose by adverting to those imposed by their colleagues for similar offences. However, as judges do not usually sit in each other's courtrooms, any "standards" must stem mainly from informal discussion and the reading of precedent-setting cases. Since individual sentencing cases cannot be appealed to the Supreme Court of Canada, case law precedents have not developed for the whole

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[28] R.E. Salhany notes that it is always presumed that the "amount imposed will be reasonable in relation to the offence committed". See Canadian Criminal Procedure, 4th Edition (Toronto: Canada Law Book, 1984), at p. 405.

of Canada.[29] Therefore, there are certainly no nationally set guidelines for the use of the fine in Canada.

No comprehensive research has been conducted to determine the extent of disparity in the use of fines. In a small study, conducted 20 years ago in Nova Scotia, Jobson performed a survey of six magistrates' courts.[30] Sentences in relation to the following offences were analyzed: common assault (indictable); common assault (summary conviction); assault causing bodily harm (indictable) and obstructing a police officer (indictable). It was predicted that higher penalties would be exerted in the case of indictable offences. However, these predictions were not supported by the data. Thus, for cases of common assault proceeded with summarily, the maximum fine imposed was $150.00; whereas in cases of common assault proceeded with by way of indictment, the maximum fine handed down was only $100.00. This same paradox occurred when the amounts of minimum fines were examined. The lowest fine awarded in assaults proceeded with by way of indictment was $2.00; whereas for those assaults proceeded with by way of summary conviction, the smallest fine imposed was $10.00.

Considerable variation was found between the five judges' sentencing patterns. For example, in cases of common assault, the maximum fine imposed by Magistrate A was eight

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29 Griffiths, et al., op.cit. p.171.

30 K.B. Jobson, "Fines", McGill Law Journal, Vol. 16, 1970, p.640.

times the amount imposed by Magistrate C and the minimum fine imposed by Magistrate A was fifteen times that imposed by Magistrate E.[31] However, when one considers the wide variation in the amount of harm caused by criminal assaults and the wide variations in the criminal records and the means of the offenders, such diversity in sentencing practices should not necessarily be taken as proof of unjustifiable sentencing disparity. Thorough investigations using demographic variables, and taking into account the severity of the offence, prior criminal convictions, and the means of the offender would have to be undertaken before any such conclusion could be reached. However, even such a small scale study as that conducted by Jobson, does raise the question of whether a tariff is truly in existence even within the same sentencing areas.

MEANS' INQUIRIES

Except in those cases where a judge orders a fine to be imposed forthwith, the Criminal Code does not require a sentencing judge to hold an inquiry into the offender's means before pronouncing the amount of the fine to be imposed.[32] In order that justice may be seen to be done, it is essential that, prior to imposing a fine, the judge familiarize himself with the means of the offender. Otherwise, a fine may be imposed which is beyond the offender's means and, by ordering a financial penalty to be

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[31] Ibid. p.641

[32] Sec.646 (5)(a), Canadian Criminal Code.

imposed the judge is in reality sentencing the offender to a period of incarceration. Such an occurrence completely thwarts the purpose of a fine. Judicial ignorance of the particular circumstances of the offender, prior to the pronouncement of the amount of the fine, leads to inequality in sentencing and, thereby, the failure of the fine as a non-incarcerative penalty because

> Unlike other sanctions such as incarceration or probation, which involve time and personal freedom constraints, the fine is unique in that it is a financial penalty and, as incomes are individualized, the impact of the sentence on offenders is less easy to generalize. To illustrate, in cases of custodial sentences, the loss of liberty alone is essentially the same for all offenders. The effects of incarceration on their families, careers etc. may be widely diverse, but their physical ability to serve the sanction is not affected. In cases of financial penalties, however, unless some regard is paid to the individual circumstances of the offender, a sentence may be passed which is actually impossible for him or her to fulfill. Thus, whether the financial circumstances of the offender have been taken into account in fixing the amount of the fine, becomes an essential question in any discussion of fine use.[33]

The importance of determining the offender's capacity to pay a fine, prior to determining a set amount to be paid, was stressed in the case of **R. v. Raspar** (1978)[34] The defendant was convicted of a betting offence and was sentenced to three months' imprisonment, a fine of $25,000.00, or 12 months in jail, in default of payment. Speaking for the Ontario Court of Appeal, Martin J.A. stated that "in our view, the trial judge erred in principle in

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[33] Mitchell-Banks, op.cit., p.69.

[34] 1 C.R.(3d) 45.

imposing a fine of $25,000.00 without making any investigation to assure himself that a fine of that magnitude could be paid by the appellant."[35] This principle is applicable regardless of the size of the fine to be imposed. This is not to say that a judge is bound to impose a fine which is within the immediate capacity of the defendant to pay. It is appropriate to consider the defendant's future financial status in calculating the amount of the fine which he is capable of paying.

A sentencing judge, faced with either an indigent offender or an extremely wealthy one, may find himself in a painful dilemma. In the English case of **R. v. Reeves** (1972)[36] the defendant was sentenced to nine months in jail for obtaining property by deception. The trial judge refused to order a fine as the prisoner was indigent. The judge stated "You are in no position to pay a financial penalty. If you were a man of means, I should make a heavy fine on you, but it is no good doing that in your present position."[37] The Court of Appeal held that the trial judge's position was completely wrong in its logic and, while the learned justices considered a jail sentence appropriate to the type of offence committed, the sentence was reduced to a suspended sentence because of the defendant's "possible

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[35] Ibid, s.-46.

[36] 56 Cr.App.R.366.

[37] Sir Rupert Cross, The English Sentencing System, 2d ed.(London: Butterworths, 1975), p.23.

sense of grievance arising from the impression that he had been sent to prison solely because of his lack of means."

In the case of a wealthy offender, a judge might find himself in the position of wishing to use a financial penalty but knowing that the standard fine currently used would be almost ineffectual for the offender before him. In Canada, the correct approach for dealing with such a situation is unclear. In England, however, the Court of Appeal has held that the poverty of the offender may either mitigate the size of the fine to be imposed or result in a longer time within which to pay it. However, English judges have felt that the fine should not generally be increased beyond the average penalty merely because the offender is wealthy. In other words, the wealthy offender's fine should not be inflated since "equality of treatment requires equality of fine regardless of means."[38] It is submitted, therefore, that in law a sentence of a financial penalty should be imposed regardless of the offender's means, whenever in the judge's discretion, it is the most appropriate penalty in all the circumstances.

However, equality of treatment involves equality of the pains of punishment. In order to achieve true equality in sentencing, the amount of the fine must be correlated to the resources of the offender. In this manner, two offenders, who are convicted of a similarly serious offence and are both fined, will suffer the penalty equally even though

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[38] Ibid, p.208.

their financial circumstances are widely different. This will result in a wide variation in the actual amount of the fine to be imposed but a distinct similarity in the degree of punishment suffered. This is the critical principle underlying the goal of equality in sentencing. Significantly,such an approach was endorsed by the Advisory COuncil in its report, entitled Non-Custodial and Semi-Custodial Penalties.

In general, however, we recommend that fines should be assessed according to the offender's ability to pay and that it is not enough to give effect to this principle solely by way of mitigation. In our view, it should be the case that penalties for similar offences should, as far as possible, be designed to have an equal impact on offenders, and that the well-to-do should pay more than the less affluent. The fine will be equitable only if it is assessed in this manner and thereby constitutes something more than payment for a licence to commit a particular offence.[39] This is the principle on which the day-fine system is based.

> **Recommendation 4: that the Criminal Code be amended so that, in every case in which a fine is to be imposed, the court be required to conduct an adequate inquiry into the means of the offender. Such an inquiry could be conducted through viva voce evidence or by affidavit or the accused could bring into court a completed budget statement (such as is frequently employed in matrimonial cases) and swear to the truth of its contents before the sentencing judge.**

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[39] Non-Custodial and Semi-Custodial Penalties: Report of the Advisory Council on the Penal System, (London: Her Majesty's Stationery Office, 1970), p.7.

THE DAY-FINE SYSTEM

The day-fine system is by no means a novel concept. It was first introduced in Finland during 1921. Sweden followed in 1931, Cuba in 1938 and Denmark in 1939. The day-fine is also used in Peru, and it has been in place in Brazil since 1969, Cost Rica since 1971 and Bolivia since 1972. West Germany and Austria adopted the use of the day-fine system in 1975.[40] The individual practice may vary from country to country but the underlying principle remains the same.

One of the most famous day-fine systems is that embraced by Sweden. The total amount of the fine to be imposed is calculated as the product of two factors; the number of day-fine units and the value of the day-fine unit. The intent of this formula is that two offenders, who have been convicted of similar offences, will suffer the same impact from a fine even though their financial circumstances may be widely different.

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[40] For more information on the day-fine system, see Antonio Beristain, "Penal and administrative fines in relation to prison sentences", International Criminal Justice Review, #302, (November, 1976): p.258; "Fines and Fining: An Evaluation", 101 Pennsylvania Law Review, pp.1013-1030; Fiori Rinaldi, Imprisonment for non payment of fines, Penology Monograph #2, 2d ed. (Canberra: Australian National University, 1976); Hans Jorg Albrecht and Elma H. Johnson, "Fines and Justice Administration: The Experience of the Federal Republic of Germany", International Journal of Comparative and Applied Criminal Justice, Vol. 4, No. 1 (Spring, 1980): pp.3-14; Gary M. Freidman, "The West German Day Fine System: A Possibility for the United States?" The University of Chicago Law Review, Vol. 50, p.281; M. Lopez-Rey, "Present and Future of Non-Institutional Treatments", International Journal of Criminology and Penology, Vol. 1, 1973, pp.301-317.

The number of day-fine units is a reflection of the gravity of the offence and the culpability of the offender. In determining the number of day-fine units to be imposed, the sentencing judge takes into account the same factors that concern Canadian judges; viz. the method by which the offence was carried out, the damage or harm caused, mitigating and aggravating circumstances, deterrence and so on. At least in theory, all offenders in similar circumstances and committing a similar offence would receive a similar number of day-fine units.

The number of day-fine units available to a Swedish judge varies from 1 to 120, thereby accommodating the sentencing of both petty and serious offences. Should an offender be sentenced concurrently to fines for several offences, the aggregate number of day-fines must not exceed 180 days. For some offences, both the minimum and maximum day-fine units and the total value of the fine imposed are regulated by statute.

Just as in Canada, through experience and practice, Swedish judges have developed predictable ranges of sentences (in terms of day-fine units) for common offences.[41] For example, traffic offences usually result in 10 to 15 day-fine units and the less serious forms of impaired driving in 40 to 100 units. In an effort to achieve greater equality in sentencing, the chief public prosecutor

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[41] Hans Thornstedt, "The Day Fine System in Sweden", Criminal Law Review, 1975, pp.307-312.

issues circulars which are reproduced in the commentary to the Penal Code and are used by all criminal lawyers.

It is the value of the day-fine unit which serves as the "leveler" in terms of achieving an equivalent impact upon offenders of various means. The per diem amount of the day-fine is calculated as the thousandth part of the offender's income during the year (after the deduction of essential expenses to maintain himself and his family). The annual income of the offender is calculated on the basis of his financial position at the time of sentencing and is roughly the total amount which the offender has received during the course of the year in the form of wages, interest, pensions, and annuities, etc. The value of the offender's property also influences the per diem rate. However, the courts will consider whether the property is easily liquidated or whether it is "tied up" capital. Invested capital does not usually increase the amount of the day-fine nor do owner-occupied homes, unless they are exceptionally valuable. Any cash savings the offender has are taken into account and do influence the per diem rate. Obligations to support one's children or other dependants, on the other hand, operate to reduce the per diem rate. In addition, the offender may bring before the court other financial liabilities he may have, such as interest due on loans, hire-purchase commitments, unpaid taxes, unpaid fines from earlier sentences or civil damages for which he is

responsible.[42] This investigation is the equivalent of the Canadian judiciary's much more informal means inquiry and, it is submitted, renders a much more accurate picture of the offender's financial status.

In addition to reducing sentencing disparity, in terms of the actual discomfort imposed, the day-fine system has several other advantages. The formula the courts use forces accountability both on the court and the offender. The reasoning, by means of which the total amount of the fine was arrived at, is abundantly clear; indeed, the value of the fine was manifestly not "pulled out of thin air". Thus, the offender understands via the number of day-fine units the measure of the court's disapproval of his offence. Similarly, it is apparent to him because of his participation in assessing his financial position exactly why the fine will cost him what it will. Should the sentence be appealed, the Appellate Court similarly understands the basis upon which the sentence was derived; therefore, it can more accurately assess its fairness.

Public prosecutors play a major sentencing role in Sweden. Seventy-five percent of the fines imposed are achieved by way of a type of "consent" agreement between the public prosecutor and the defendant. The prosecutor may propose a fine determined by him and should the offender accept, it has the same legal effect as a sentence by the court. The prosecutor is limited to the number of day-fines

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[42] Ibid, p.310.

that he may impose. A serious offence may result in no more than 50 day-fines and concurrent offences in no more than 60. The system, which has been in operation since 1948, encompasses all offences with carry fines as the maximum penalty as well as lesser offences such as petty larceny, which are punishable by a fine or a short prison term.[43] While retaining the offender's right to be sentenced by a judge, the jurisdiction given to public prosecutors has relieved the court's burden in relation to the sentencing of a large proportion of relatively minor to moderately serious offences.

For some offences, Sweden has also retained the use of the global fine, whereby the prosecutor or the court sets the fine at a particular sum of money. However, the global fine is only used for petty offences, such as small traffic offences or drunkenness or disorderly behaviour, and the fines imposed are relatively small varying between 10 to 500 kronen.[44] Thornstedt points out that the relationship between the two systems of fining may raise some difficulties, since wealthy offenders ordered to pay day-fines may be sentenced to pay an amount which may be too great in relation to the seriousness of the offence. If the offence is very minor, the law permits the amount of the day-fine to be abated. This is an exception to the general rule that the gravity of the offence should influence the

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[43] Ibid, p.307.

[44] Ibid.

number of day-fines and not the value of the day-fine unit. Since most trivial offences are nearly always punished by way of a global fine, the frequency of day-fine abatements is apparently very low.[45]

West Germany now uses a very similar system of fining to that employed in Sweden. Since reforms introduced in 1969, the West German Federal Parliament has mandated that the fine be the primary sanction for crimes formerly punishable by a prison term of 6 months or less. The second criminal law reform statute changed the method of calculating the fine amount to one modeled on the "Scandinavian Day Fine" system.[46] Legislation directs the courts to impose prison sentences of less than 6 months "only when special circumstances, present in the act or in the personality of the offender, make the imposition of the sentence indispensable for making an impression on the offender or defending the legal order".[47] Freedman reports that, in 1968 (the year before the new law was introduced), the total number of prison sentences of less than 6 months was 113,273; however, by 1979, the number of non-suspended sentences declined to 10,609. That year, fines constituted approximately 82%, non-suspended short-term sentences about 2%, and suspended short-term sentences about 8% of all

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[45] Ibid, p.311.

[46] Freedman, op.cit., p.281.

[47] Quoted in Freedman, op.cit., pp.285-286.

sentences imposed in West Germany.[48] The imposition of a day-fine system has thus had a dramatic impact on the prison population of West Germany.

Default and the Day-Fine System

In addition to changing its method of assessing the amount of the fine, West Germany has also revised its method of calculating the time to be served in prison, should the offender default on the fine. West German offenders can be ordered to pay their fines in an immediate lump sum, or by installment payments, or (just as in Canada) they are given a set time to pay at the expiration of which the fine must be paid in full. If the offender does not remit his fine in compliance with the court's order, the West German penal code provides that he shall serve one day in prison for each day of unpaid day-fine units. Just as the financial impact of the fine is designed to punish offenders equally, so is the consequence of non-payment. As shall be seen later in this paper, disparity in prison terms being served by Canadian fine defaulters is a most serious problem. It is suggested that the imposition of a system similar to that in West Germany would go a long way towards alleviating such injustice.

While non-payment of fines in West Germany may result in serving a prison sentence, that this will be so is not left to the preference of the offender. In Canada, if an

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[48] Freedman, op.cit., p.292.

offender does not wish to pay the fine and would rather go to prison, he simply elects not to pay and his committal will be automatic at the expiration of the time granted by the court. In West Germany, however, the code does not give the offender the prerogative to serve his sentence in prison instead of satisfying the fine. The fine is the primary sanction and the enforcement agency is authorized to garnish wages and attach property in order to collect the court's prescribed fine. Only when all these devices fail may the enforcement agency convert the sanction to a prison sentence[49]

In addition to reducing the number of short-term prison sentences, the new law appears to have had a favourable impact on fine collection. A study undertaken by the Max Planck Institute shows that nearly 50% of all day-fines are paid immediately, slightly more than 30% are paid following the provisions of an installment or delayed payment schedule.[50] Attachment of property is ordered in approximately 11% of all cases and is successful in one out of five. The threat of imprisonment by the enforcement agency produces full payment of the fine in an additional 11% of the cases. Only 4% of all fines imposed result in offenders serving time in prison for default of payment.[51]

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[49] Freedman, op.cit., p.290-291.

[50] Cited in Freedman, op.cit., p.296.

[51] Freedman, op.cit., p.297.

Access to Financial Information

The equity of imposing a financial penalty, under any system, depends on the accuracy of the information regarding the offender's means which is available to the sentencing court. In Sweden, access to information concerning people's financial status is readily available. Information concerning the offender's means is obtained by the police as part of their investigation of the offence and, at sentencing, the offender is asked for further information and verification of the police report. In addition, information from the tax authorities regarding the amounts of individual citizens' taxable income and the amounts of income tax and wealth tax he must pay are a matter of public record. Thus, the sentencing court has ready access to verifiable information regarding the offender's financial means.

Access to information, however, is a problem for West German courts. West German offenders cannot be compelled to provide the court with financial information and, therefore, the courts must rely on the defendant's voluntary disclosure and the public prosecutor's report informing the court of his occupation, education and residence. Should the offender fail to disclose adequate information, the court is permitted to estimate his personal and economic circumstances.[52] This situation is clearly problematic,

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[52] Freedman, op.cit., p.289.

since it makes it difficult for the court to set an accurate fine. It is submitted, however, that this situation is no different than that faced by Canadian courts. Should Canada consider instituting a day-fine system, care should be taken to avoid such problems with disclosure. It may be necessary to legislate a system similar to that established under Sec. 60 of the Family Relations Act, R.S.B.C. 1979 which compels someone under the threat of a penalty to disclose their full financial circumstances.

In summary, the day-fine system has much to commend it, both in terms of its ideological stance and its practice. It is designed to tailor the punishment to the offender and his crime in such a way that two defendants , convicted of the same offence, will suffer the impact of the court's punishment equally regardless of their financial means. This is not to say that a day-fine system is a panacea. It will not reduce sentencing disparity completely because two judges faced with equivalent offenders may still impose differing numbers of day-fine units. However, the circulation of manuals and sentencing memoranda, in conjunction with a determinate range of day-fine units and coupled with judicial experience, may well contribute in a most significant manner towards the ultimate reduction of sentencing disparity.

Furthermore, the day-fine system provides a degree of clarity and consensus to the sentencing process, which has heretofore been missing in Canada. Indeed it might well be

contended that, under this system, justice is not only done, but it is clearly seen to be done. The use of global fines in conjunction with day-fines further relieves the potential problem of wealthy offenders being fined exorbitant amounts for trivial offences. Under the Swedish system, the role of the public prosecutor in sentencing further serves to relieve clogging of the criminal courts. It is reasonable to assume that many summary offences do not require the expertise of judges for sentencing purposes. Experienced prosecutors are most capable of sentencing within the context of summary offences. The day-fine system has the further advantage of achieving both a high collection rate of fines imposed and, of even greater importance, it provides a logical system for determining the number of days' imprisonment to be served in default of payment. As shall be seen later in this paper, the correlation between the amount of the fine and the length of the time to be served in prison for default is totally lacking in Canada.

Introduction of the Day-Fine System to Canada

The Scandinavian day-fine system should be investigated with a view to its possible implementation in Canada. To date, no published study has been undertaken in order to determine the nature of the changes, that would be required in the Canadian Criminal Code and in court administration, or the system's likely impact upon sentencing practice. The Code would have to be amended to permit the use of day-fines in addition to global fines, to delineate how the fine is to

be calculated and for what offences, to give the courts the right to demand (under penalty) full disclosure of the defendant's financial status, and to permit the sentencing of the defaulting offender to a number of days in prison commensurate with the number of unpaid day-fine units.

As previously mentioned, there are a number of countries that have been making use of a day-fine system for 50 to 60 years; therefore, there is a wealth of models to follow in both the practice and the implementation of such a system. Drawing on the experiences of such nations would greatly ease Canada's transition into a day fine-system, thereby causing a minimum of upheaval during the process of implementation.

An important issue that needs to be considered is whether the day-fine system should be imported "wholesale" or whether it should be introduced on a selective basis only. The degree to which a day-fine system is adopted will inevitably dictate the degree to which changes will need to be made to current sentencing law and practice. If sentencing were to continue to be performed exclusively by the courts, the implementation of a day-fine system would require less adaptation than if prosecutors were to become involved in the sentencing process. The option of involving crown counsel in sentencing practice would need to be examined through the prism of a cost-benefit analysis. The introduction of a special prosecutor's office, specifically for this purpose, might well result in significant savings

in terms of both court time and court staff. It may also result in a situation in which the courts would be relieved of the necessity of dealing with the overwhelming burden of petty cases that currently afflicts them; they would then be in a position to achieve a significant reduction in the delay between arrest and trial for those offenders, who would continue to be dealt with by the courts rather than crown counsel[53].

If it were considered appropriate to introduce the "consent agreement" option for summary conviction offences in Canada, it is clear that Crown counsel would require a considerable degree of prior training if the system is to be effective. It is suggested that, prior to the full implementation of such a system, it would be advisable to establish pilot projects in a limited number of court catchment areas. These projects would involve a limited number of experienced counsel who would be equipped with sentencing guidelines. The resulting "consent agreements", reached between crown counsel and the offender, could then be approved by a sentencing court. Should the judiciary determine that the pilot projects are effective, in terms of both justice and time-saving, then a more solid basis for the legislative implementation of this facet of the day-fine system would be established.

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53 For a discussion of how the German "penal order" procedure, in which the prosecutor plays a major role, might be adapted to the Canadian context, see Peter H. Solomon Jr., Criminal Justice Policy, From Research to Reform, (Toronto, Butterworths, 1983) pp. 79-94.

Recommendation 5: that the present system of "global fining" be replaced with a day-fine system modeled on that currently in place in Sweden.

Recommendation 6: that, to this end, an in-depth study be conducted in order to identify the necessary changes that would need to be made in the Criminal Code as well as in judicial and administrative practice and to identify the means by which the transition to a day-fine system could be facilitated in Canda.

Recommendation 7: that a pilot project be conducted, in several court catchment areas, in order to assess the feasibility of, and judicial and public response to, the possibility of Crown Counsel becoming actively involved in the sentencing process.

TIME TO PAY

Once a sentencing judge has determined the appropriate amount of the fine, the next matter for consideration is the length of time that the offender will be given to pay it. Again, the Canadian Criminal Code offers little concrete assistance other than Section 646, subsections (4), (5), and (6). The Code provides that:

> 646.(4) Subject to the provisions of this section, where an accused is convicted of an offence and is fined, the court that convicts the accused may direct that the fine
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> a) be paid forthwith, or
>
> b) be paid at such time and on such terms as the court may fix.
>
> 646.(5) Where a court imposes a fine, the court shall not, at the time the sentence is imposed, direct that the fine be paid forthwith unless
>
> a) the court is satisfied that the convicted person is possessed of sufficient means to enable him to pay the fine forthwith,

> b) upon being asked by the court whether he desires time for payment, or for discharging the fine in accordance with section 646.1, where a program has been established for that purpose, the convicted person does not request such time, or[54]
>
> c) for any other special reason, the court deems it expedient that no time should be allowed.
>
> 646.(6) The court, in considering whether time should be allowed for payment and, if so, for what period, shall consider any representation made by the accused but any time allowed shall be not less than 14 clear days from the date sentence is imposed.

The usual practice appears to be that the judge pronounces the amount of the fine and then asks the accused how long he needs to pay it. This approach demonstrates an understandable degree of concern on the part of the judiciary that offenders not wind up in prison simply as a consequence of a lack of means to pay their fines on time. However, this practice is most troublesome in terms of basic sentencing principles because it affords the offender the opportunity to take control of his sentence and mitigate its effects upon him. By way of illustration, suppose that a sentence of $500 has been imposed and that the offender is asked how long he requires to pay it. If he has his wits about him, he will calculate the longest period to which the judge will agree (i.e., six months) and the judge looks at his calendar and gives the offender a date six months hence.

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[54] Section 646.1 establishes the authority of the courts to offer the offender the alternative of participating in a provincial fine option program.

Any calculating offender is most likely to ask the judge for as much time as possible since a longer payment period generally eases the sting of the penalty and permits him to pay it in a manner that will cause him a minimal degree of inconvenience.

It is arguable that sentencing should be within the total control of the trial judge. It is suggested that the appropriate approach requires that a thorough inquiry be conducted into the offender's means (in particular, to determine the amount of his disposable income per month). Upon this basis, it should be possible to calculate a reasonable time in which to pay the fine. The amount of time that the offender is given to pay the fine should be the decision of the court. It is certainly arguable that the amount of time that the offender is given to pay the fine is as important a variable in the severity of the sentence, as is the amount of the fine. At the time of sentencing, the trial judge should advise the offender that if, through changing circumstances or for some other reason, he finds himself unable to make timely payment of the full fine, then he should return to court, prior to the expiration of the original period set for payment, and request an extension. When the offender reappears before the court, this then allows the sentencing judge to inquire into the nature of the efforts the offender has made to pay his fine and the state of his financial circumstances. The sentencing judge can then decide, at that time, whether an extension of time

is reasonable or whether the offender is just trying to mitigate the effects of the punishment. This practice permits the court to retain control of both the sentence and its impact on the offender. It also guards against the injustice of an impecunious defendant being imprisoned for non-payment of a fine.

Recommendation 8: that as much judicial consideration be given to the length of time the offender is granted to pay his fine as is given to the issue of the size of the fine to be imposed

Recommendation 9: that, in every case that a fine is imposed, the sentencing judge advise the offender that, if his circumstancees change or he finds himself unable to pay his fine on time, he may apply to the Court for an extension of time in which to pay the fine.

Sec. 646.(4)(b) of the Canadian Criminal Code permits the court to direct that the fine be paid at such time and on such terms as the court may fix. Presumably, this would permit the court to direct that the fine be paid in installments over a set period of time; however, the language of the section is unclear. While it is not uncommon for judges in England or for those judges, who employ the day-fine system, to sentence a fine to be paid in installments, the practice in Canada is to assess a fine and set a fixed time in which to pay it. The offender can pay bit-by-bit or in one lump sum, as he pleases, just so long as the fine is paid in full by the expiration of the set period.

The notion of paying fines by installments should be examined more closely. The use of installments may well

result in an enhanced system of fine collection and a situation in which fewer offenders find themselves in jail for fine default. This may be especially true for those offenders who have difficulty budgeting their money and controlling their financial affairs. Installments also serve as a monthly reminder to the offender of his wrong-doing and prevent him from postponing the impact of his sentence. Most significantly, if payments are monitored and it becomes apparent that the offender is not meeting his obligations, it serves as an early warning that something has gone wrong. The offender can then be brought back before the court at an early stage and his financial circumstances re-assessed. Should it become apparent that his situation has changed, e.g. he has lost his job or his income has been reduced, the court can then re-adjust the sentence accordingly. This can be accomplished, for example, by reducing the monthly payments and extending the time within which to pay. If it is obvious that the offender will not be able to pay for reasons of ill health, etc. the sentence can be abated. It is important that offenders be made to realize that they have a primary obligation to pay their fine; however, it is equally if not more important for the court to ensure that offenders, who are not trying to evade their sentence but who are in fact incapable of serving it, are not sent to prison as a result of their incapacity to pay. These people are not in contempt of court and, if a sentence of incarceration was originally rejected as inappropriate at

the time of the original sentencing, then it is even more unsuitable at a later date when the offender has acted in good faith.

Recommendation 10: that the judiciary consider the possibility of ordering that fines be paid in installments on a schedule determined by the sentencing judge.

Recommendation 11: that the offender's payments be monitored and, if default occurs, that he be brought back before the Court as soon as possible for a show cause hearing to determine if his circumstances have changed since sentencing or whether he is deliberately failing to comply with the sentence of the Court.

Those persons who are adjudged to be deliberately refusing to pay their fines are in theory in contempt of court. However, section 646.(9), permits the accused to signify in writing to the court that he prefers to be committed to prison immediately rather than await the expiration of the time allowed him to pay. Furthermore, at the time of imposing a fine, Canadian judges routinely include in their sentence a period of incarceration to be served in default. If the fine is not paid on time, a warrant of committal is automatically issued and the offender is arrested and taken into custody without any further inquiry into his means. Thus, the offender can elect not to pay his fine and to wait out the pay period and serve his time in prison instead.

The only exception to this situation is for those offenders who are sixteen to twenty-one years of age. For these young people, section 646.(10) requires that, prior to

issuing a warrant of committal for fine default, the court must obtain and consider a report concerning the offender's conduct and means to pay. This is usually the result of a half-hour interview with a probation officer. However, it may well be the case that not all judges are aware of this provision of the Code. In a recent paper by Jobson and Atkins, 5 of the 20 persons in the sample serving time for fine default were under twenty-two years of age.[55] It appears that a report was not conducted in all of these cases.

As the Code now stands, non-compliance with the sentence of the court, even though the offender has the means to pay the sentence, does not constitute contempt of court. Furthermore, it may be contended that, by imprisoning people without inquiring further into their financial status, society risks sending indigenous offenders to what is, in effect, a form of debtor's prisons. It is recommended that in every case, prior to incarceration, the offender should be brought before the court. At that time, a thorough means inquiry should be conducted. If the court determines that the offender is capable of paying the fine, but willfully refuses to do so, then the fine should still stand and he should be charged with contempt.

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[55] Keith B. Jobson and Andrew Atkins, "Imprisonment in default: Unequal justice", unpublished paper, Faculty of Law, University of Victoria, April, 1985. A version of this paper was published after completion of this report; "Imprisonment in Default and Fundamental Justice", Criminal Law Quarterly, Vol.28(2), 1986, pp.251-271.

This position is directly in accord with that taken by the Court in **R. v. Yamelst** (1975)[56] and **Curley v. The Queen** (1969)[57]. In Yamelst, Toy J. pointed out that the Crown had several remedies available to it for the collection of unpaid fines and that the pursuit of such alternatives was preferable to routine imprisonment for simple default. In Curley, Justice Brossard incorporated into his judgment the opinion of the Minister of Justice at that time who had made it clear that it was the wish of Parliament that imprisonment for fine default should be resorted to only in cases of wilful refusal to pay the fine:

> The objective of these amendments is to eliminate, so far as our criminal law is concerned, to the greatest extent possible any remnant of imprisonment for debt. We hope that the result of the amendment will be that imprisonment for a failure to pay a fine will only occur where there has been contempt of court, that is a failure by the convicted person to pay a fine ordered by the court even though he has the means to pay it.[58]

If the spirit of these judgments is to be followed, an offender, who defaults on his fine as a consequence of wilful refusal to pay, should face contempt of court charges and the Crown should proceed to collect the fine through the various civil remedies available to it.

It is strongly recommended that section 646(9) be deleted from the Code. If a court finds that a particular

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[56] 22 C.C.C. (2d) 502.

[57] 7 C.R.N.S. 108 (Que.C.A.).

[58] Ibid, p. 111.

financial penalty is warranted, then it should not lie with the offender to decide that he would prefer a different type of sentence. It is recommended that section 646.(9) should be replaced with a section requiring that in every case, prior to committal for fine default, the offender be brought back before the court for a show cause hearing and his financial circumstances be re-assessed. Every precaution must be taken to ensure that impecunious offenders, who are doing their best to pay their fines, should not be imprisoned for fine default. It is this aspect of the fine (and, in particular, the chance of imprisoning indigenous offenders), that has resulted in the most criticism.

Recommendation 12: that section 646.(9) be deleted from the Criminal Code.

FINE DEFAULT

When the period in which the offender has been ordered to pay his fine expires and the fine has not been paid in full, it is usual (with the exception of fines imposed for infractions of provincial statutes)[59] that a warrant is issued for the offender's arrest and committal to prison. While this is generally automatic, it is not immediate. Offenders are usually given a "grace period" in which to pay their fines and thus avoid imprisonment.

The courts' reaction to fine default, at least, in British Columbia, is not standardized. According to Jobson

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[59] See, for example, the B.C. Summary Convictions Act (1960) s.57 amended 1974, R.S.B.C. c. 73 .

and Atkins, courts in the lower mainland (where almost one half of the province's population resides) differ from that of the rest of the province, which is apparently typified by the City of Victoria.[60] In Victoria, when a fine is defaulted upon, a double-registered letter is sent to the defendant's last known address advising him that his fine is overdue and warning him that, should he not make payment, a warrant of committal will ensue. The offender is also notified that he may apply by letter for an extension of time within which to pay his fine. These letters are then forwarded to the sentencing judge by the registry for review. An offender is allowed to request two such extensions by letter; on the third occasion, however, he must appear before the court. According to the authors, mailed-in requests for extensions are routinely granted. Should the defendant be refused an extension, he may formally apply in person before the court for more time in which to pay his fine. Should the offender not respond to the letter advising him that his payments are overdue, a warrant of committal is issued. At this time, another letter is sent to the offender explaining that a warrant of committal has been issued and again advising him of his right to apply for an extension. The warrant can be withdrawn and pulled off the police computer (CPIC) if such an extension is granted. Provided the offender makes some payment on his fine, on a monthly basis, a warrant for his

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[60] Atkins and Jobson, op.cit. p.22-24.

arrest and committal to prison will not be issued even if the payment period has expired.

Jobson and Atkins studied the situation of 20 offenders imprisoned for fine default. Within the sample group, only one third recalled having received a notice of default. Even so, all but one of the offenders were aware that they were in default of their fines. Some of the offenders interviewed did not receive a notice of default because they deliberately changed their place of residence in order to avoid receiving the notice.

The practice in Vancouver is somewhat different. After sentence, the accused is required to report to the Court Registry and the clerk, at that time, advises him of his right to seek extensions either by letter or in person. All extensions must be cleared by the court (by the sentencing judge unless that is impossible). If a request for an extension is refused, the rejection will not be made on the basis of a letter application alone. The individual is required to appear in person before the application can be rejected.[61]

The Vancouver offender is advised by the court clerk prior to his default that time in which to pay his fine is running out. Once the period has expired, the offender is given a seven-day grace period before a warrant is issued for his arrest. Once the warrant is issued, no further applications by letter for extensions will be considered and

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[61] Ibid, p.24.

the offender is not advised that he may apply in person for further extensions. While the Vancouver offender is advised prior to his default that time is running out, unlike the Victoria offender, he is only sent one notice. In addition, in Vancouver, the fine must be paid in full if a warrant is to be avoided.[62]

> **Recommendation 13: that administrative and court procedures be standardized in relation to fine default and that, prior to the occurrence of the default, every accused be notified that; (i) the payment period is about to expire; (ii) he may apply to the Court for an extension of time within which to pay his fine, and (iii) the consequences of non-payment.**

Even after his committal to prison for fine default, the offender still has two methods by means of which he may potentially escape serving his prison sentence. He may make an application before the court for an extension of time in which to pay or he may pay his fine in full and thus obtain his release. In B.C., during 1983-1984, 1,610 offenders were committed to provincial prisons for fine default. Of these, 225 (14%) suddenly produced the money to pay their fines in full, once they found themselves to be prison inmates.[63] It is not known at what period during their incarceration these inmates realized that they did indeed have the resources to pay their fines. Similarly, it is not known whether or not these monies were borrowed. Since one's income and financial resources tend to deteriorate the longer one is

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62 Ibid, p.24.

63 Ibid, p.25.

incarcerated, for this group, there is a strong argument to be made that these defaults were due to wilful refusal (rather than incapacity) to pay the fine .

Even if an offender can not pay his fine in full, but can only make part-payment, his prison sentence is pro-rated accordingly. For those defaulters serving time in prison, B.C. Corrections' policy allows a reduction of one-third of the sentence for good behaviour.

Any fine that results in default is, in essence, a failure, regardless of its cause. Since the fine is a financial penalty, it should be possible to examine its effectiveness from an administrative point of view by conducting a cost-benefit analysis. To date, this is not possible because there is no comprehensive information available concerning the total amount of fines ordered to be paid, the amounts which are actually paid, and the real costs of fine enforcement (including imprisonment) and fine collection.

This is a problem which should be rectified by entering into the courts' computerized data systems full details of the court's sentence, i.e., the amount of the fine, the length of the time to pay, the time to be served in default, and the offence for which the sentence was ordered. Furthermore, it is essential that these variables be retrievable in a convenient form. If this information were to be coupled with basic demographic data concerning the offender (including his criminal record) and in such a

manner that he could be traced right through any subsequent appearances, it would provide an invaluable source of empirical data.

While it is not possible to obtain a precise picture of the amount of income a province gains from fines compared with the cost of enforcing them, it would appear (from scraps of information pieced together) that fining criminals provides a lucrative source of income to the state's treasury. Every other sanction (aside from absolute and conditional discharges and suspended sentences) costs the state money; however, in the case of fines, the offender (in most instances) more than pays his own way.

In British Columbia, as of March, 1983, 10,768 fines were outstanding (although not overdue); these totaled $3,448,312.00.[64] An additional 6,554 fines were overdue and these constituted a further debt to the state of $974,011.00.[65] A further 6,556 fines had been defaulted on and the warrant of committal issued.[66] These fines were worth a further $2,068,835.00. In total, 23,978 fines worth $6,491,158.00 were outstanding or were in the process of being paid as of March, 1983. Since these figures do not include those fines which were ordered to be paid forthwith,

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[64] This information was obtained from a document, available from B.C. Court Services, dated March 21 - 31, 1983 and referred to as "Receivables for Court Registry, Sheriffs and Court Recorders: Provincial Summary".

[65] Ibid.

[66] Ibid.

the total revenue owed to the province through the use of fines cannot be calculated.

In 1974, British Columbia amended its Summary Conviction Act so that default on a fine imposed for an infraction of a provincial statute would no longer result in imprisonment for fine default; instead, enforcement could only be accomplished by means of civil procedures. Delisle reports that, within one year of the proclamation of the amendment, the number of persons imprisoned for fine default in relation to provincial statutes declined by 74.3%.[67] Unfortunately, the author gave no indication of the number of persons so affected. However, he does assert that approximately 12% of these statutory offenders do not complete payment of their fines within the time frames specified by the courts. Put this situation in a more positive light, it also means that, in the vast majority of these cases (88%), the fines are paid on schedule without any enforcement action being taken. Since statutory offences constitute the majority of fines imposed, this track record of success is not insignificant.

In the case of statutory offenders who default on their fines, the offender is supposed to be contacted by telephone and, should payment not be forthcoming, a demand letter is then sent. Approximately 3 weeks later, outstanding defaulters are personally contacted to ascertain whether

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[67] Delisle, "Fines, their imposition and enforcement", working paper of the Criminal Law Division, Ministry of the Attorney General, November, 1977, p.3.

they are able to pay their fines and if so to make arrangements to do so. Those offenders, who are found to be capable of paying their fines but are judged to be wilfully refusing to do so, may be sued for payment in Small Claims Court. In some cases, where the individual is unable to pay his fines due to illness, etc. the fine may be remitted.

No information is currently available regarding either the effectiveness of the current civil enforcement procedures in obtaining payment or the length of time it takes people to pay their fine under this system. The number of people who escape the net of enforcement, and the amount of money lost to the province is also unknown. Similarly, no information is recorded concerning the number of fines paid and the total amount of money which is remitted through this enforcement procedure .

In the case of criminal clients (unlike statutory offenders) , a sentence of incarceration for fine default is permissible. In fact, for some offenders, such a threat may be considered to be a necessary evil. Some offenders may have to be shown the prison gates before they realize that the corrections system is serious. A report by B.C. Corrections suggests that, at least on Vancouver Island, the majority of people (90 - 95% in Nanaimo and Campbell River) pay their fines in full when presented with a warrant for committal: "(s)uch persons come up with the money either right away, or within about two hours, if allowed to make a

few phone calls".[68] These individuals thereby managed to avoid prison entirely. As previously discussed, of 1610 offenders admitted to B.C. prisons for fine default, during 1983 , 225 paid their fines in full and thus obtained their release.

What then can be said about the offender who is committed to prison for fine default and serves his full sentence? Very little is actually known about why people default on their fines. This is surprising when one considers the concern that imprisonment for fine default has engendered. The major concern is that impecunious offenders are being sent to prison because they are unable to pay their fines. This may occur because the amount of the fine imposed at sentencing is beyond the defendant's capacity to pay or because, since the time that the sentence has been imposed, the offender's circumstances have changed leaving him unable to pay his fine and he has either not asked for an extension of time or his request has been rejected.

In terms of the huge number of fines imposed, the proportion of persons who find themselves serving time in default is relatively small. From B.C. court data, it is apparent that, from 1981 to 1982, 27,946 offenders received a fine as their most serious penalty. From B.C. Corrections data, it appears that 1579 offenders served time for fine default. While it is true that the two data systems are not

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[68] Ministry of the Attorney General, "Fine in default program: Vancouver Island Regional Correctional Centre, August, 1, 1977 - January 16, 1978." p.20.

directly comparable, it would appear that approximately 5.6% of fines imposed result in imprisonment for default. However, while the proportion of fines imposed results in a relatively small number of incarcerations, during 1983, fine defaulters in British Columbia constituted 14% of provincial prison populations. For some other provinces, the proportion is much greater. In Ontario, during 1983, fine defaulters constituted 32% of the prison population and, in Quebec, the proportion was as high as 48%.[69] When one considers the average cost of imprisoning an offender for one day is approximately $65.00, the expense to a province of fine default is not inconsiderable.

Owing to the limitations of B.C. Corrections' data, it is not possible to piece together a profile of a typical fine defaulter;instead, it is only possible to describe imprisoned defaulters on the basis of one variable at a time. For example, while one can determine how many offenders are of a particular age, it is not possible to ascertain the offences for which they were charged, their race or the length of custody. Since one cannot ascertain the amount of the fines imposed, the offender's employment status or financial means, it is not possible on the basis of this information to determine whether the Bench's use of the fine was initially appropriate or whether imprisonment for default is an equitable method of dealing with

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69 Sentencing Practices and Trends in Canada: A Summary of Statistical Information, Department of Justice, Ottawa, 1983.

defaulters or is, in reality, operating as a debtor's prison for the poor.

Using B.C. Corrections' data, the following information can be ascertained. By far the majority of persons serving time for fine default are under the age of forty. In fact, 22.59% of these offenders are under the age of 22, 37% are between the ages of 22 and 29, and a further 22% are 30 to 39 years of age. Only 6.7% of fine defaulters are aged 50 or above. It is notable that over one-fifth of fine default admissions were in relation to offenders under the age of 22. Since section 646 of the Canadian Criminal Code requires that, prior to imprisonment, a report must be prepared for the court by a probation officer concerning the ability of such youthful offenders to pay their fines, it is more than likely that at least in the case of these offenders, fine default was not a result of financial inability to pay but rather unwillingness or irresponsibility on their part.[70]

If the default population is divided into native and non-native groupings over the last nine years, an average of 20% have been native offenders. As nothing is known of the proportion of native offenders fined or their personal circumstances, no reasonable speculation can be made regarding the appropriateness of either fine use or

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[70] Mitchell-Banks, op.cit., p.181.

incarceration for default in relation to this particular group of offenders.[71]

Only 3% of the default admissions concerned women. Again, since no information is available concerning the number of females as compared to the number of males who are fined, it is not possible to explain the apparently low rate of admissions for defaulting women. It would be interesting to know more about the financial circumstances of these women.

Were these women single at the time they were fined? Were they working? Were they supporting children and other dependants? It may be the case that many of the women subjected to fines were married and that their fines were paid by their husbands or through the use of family funds.

When the data are analyzed by offence category, it is revealed that by far the largest group of fine defaulters were fined for motor vehicle-related offences (55%).[72] Drinking and driving offenders constitute an average of 46% of the fine default population. The drinking driver is thus a serious drain on the province's courts and correctional systems.

In British Columbia, during the last decade, judicial sentencing patterns, in relation to the length of time to be served in default, has undergone a change. For the period 1974 to 1975/1976, approximately 64% of offenders were

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[71] Ibid., p.182.

[72] Ibid., p. 82.

sentenced to between 22 and 30 days in custody and 30% were sentenced to sentences of 40 to 60 days. Therefore, over 93% of fine defaulters received one of these two ranges of sentences. An additional 5% of offenders received sentences of from 91 to 180 days. This suggests that most judges were thinking in terms of months rather than in terms of weeks or days. This may suggest, and almost reflect, sentencing practice as the courts were sentencing by essentially choosing one of three options rather than by fine-tuning the number of days to be served in relation to the dollar amount of the fine. The year 1977/1978 brought about a dramatic change in sentencing patterns, which has remained constant to the present day. It appears that judges are now calculating the default sentence in terms of weeks. There is no apparent explanation for this change in sentencing practice.[73] It is apparent, however, that, overall, sentences for fine default have become much shorter. During the years 1977 to 1983, 17% of offenders were serving between 1 and 7 days in prison, 33% were serving between 8 and 14 days, 16% between 15 and 21 days and another 21% between 22 and 30 days. Almost 85% of those persons admitted for fine default were serving periods of less than 30 days. This is not to say that some persons are not serving considerably longer sentences. Indeed, an additional 12% of people are serving between 31 and 180 days.

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[73] Ibid., pp. 184-186.

For those offenders serving time in prison for default, the length of their sentence in relation to the size of the fine is of obvious importance. As previously discussed, owing to the lack of information available, it is not possible to ascertain definitively whether there is sentencing disparity in relation to the size of fines imposed when one considers the circumstances of both the offence and the offender. However, data gathered by the Ministry of the Attorney General of British Columbia conclusively demonstrates that there is a wide disparity in sentencing if one examines the amount of time in default to be served in relation to the size of the fine imposed.[74]

The B.C. Ministry of the Attorney General conducted a study of the number of days in default to be served in relation to the dollar amount of the fine imposed for those offenders who were convicted of impaired driving and driving over .08 and who were admitted to the Vancouver Island Regional Correctional Centre for fine default, from Aug. 1, 1977 to January 16, 1978. The data revealed a wide divergence in the per diem rate for which people were serving out their fines. For the group convicted of impaired driving, the average per diem rate was $22.90. However, some offenders were serving off their fines at a rate of less than $4.00 per day while some offenders were serving their's at a rate of $50.00 per day. Even where the amount of the

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[74] Ministry of the Attorney General "Fine in default profile: Vancouver Island Regional Correctional Centre, August 1, 1977 to January 16, 1978".

fine was exactly the same, the length of default sentence imposed was markedly different in certain cases. For example, two offenders from Victoria were both fined $500.00. One offender, who had three previous admissions to VIRCC were serving his fine at $35.71 per day, over a period of 14 days, while another offender with no previous admissions was sentenced to 30 days in default (or $16.67 per diem). This pattern of sentencing disparity was repeated in the category of driving over .08 offences.

For the driving over .08 group, the average per diem rate was $26.41. The per diem rate, however, ranged from a low of $3.26 per day to $71.43 per day. One Matsqui offender, with a $600.00 fine, was sentenced to 184 days in prison for default, while a Courtenay offender with a $550.00 fine was sentenced to 14 days. Regardless of the defendant's histories, it is difficult to justify a $50.00 difference in the amount of the two fines resulting in a difference of 170 days in prison for default. The Matsqui offender was serving his fine at $3.26 per diem, while the Courtenay defendant was serving his at more than 12 times that rate. Similarly, 2 other Courtenay offenders, who both had two previous admissions to VIRCC, were each fined $500.00. One was sentenced to only 7 days in default ($71.43 per day) while the other was sentenced to 61 days ($8.20 per day). If the amount of the fine imposed is adjudged to be appropriate with regard to the gravity of the offence and the means of the offender, then surely the length of time to

be served in default should be relative to the amount of the fine imposed. While the financial means of offenders may differ widely, their physical capacity to serve time in prison for default is the same. In this respect, one may discern yet another advantage of the day-fine system. Under the day-fine system, a fine-defaulter is ordered to serve one day in prison for every day-fine unit ordered. Therefore, under the day-fine system, the amount of time to be served in default of payment is directly commensurate with the gravity of the fine imposed. In British Columbia, and quite possibly in the rest of Canada, no such correlation can be found within the present system of fining. It is apparent that in relation to the per diem rate at which fine defaulters are serving out their sentences, the disparity in sentencing is of such proportions that some offenders are suffering grave injustice. Even should there not be disparity in the setting of default periods, it is difficult to justify the loss of any person's liberty for one day as being worth as little as $3.00. Surely, this is a per diem rate that is far too modest. Such an injustice is compounded further if the offender defaulted on his fine simply because he was impecunious.

The major criticism levied against sentencing offenders to time in prison for default of their fines is that we are in essence recreating debtors' prisons and imprisoning the poor. In light of the moral seriousness of such an allegation one would expect a quantity of research into the

financial circumstances of person's imprisoned for fine default. Yet again, there is an appalling lack of any comprehensive work into this issue. While many authors are willing to hurl such accusations against the use of fines, very few have done any empirical research at all into the matter. What work has been done has often used very small sample groups or has done very little actual empirical research. There is enough material available however, to generate genuine concern. Because it is patently unfair to imprison a man for fine default who is incapable of paying the fine it is critical to that investigators research be conducted in this area.

In a study performed by Professor Jobson of one metropolitan court in Canada (which unfortunately he does not name or describe), 92% of those persons fined paid their fines within the times specified by the court.[75] Of the 8% who defaulted, approximately 25% were never located, 69% paid when the police arrived to arrest them, and 6% went to prison. Apparently most of the fines were in the $50.00 range. Again, this study would suggest that, while some people may indeed have gone to jail when they were incapable of paying their fines, almost 70% found the means to do so when faced with a warrant for committal.

In a survey conducted in Alberta, by Professor John Hagan, information was gathered in relation to 1000 offenders admitted to 5 prisons over a one month period.

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[75] Keith B. Jobson, "Fines", op.cit., pp. 664-665.

Hagan reports that nearly two thirds of the native offenders were incarcerated for fine default whereas only one third of white offenders were similarly admitted.[76] According to Hagan, a "...further analysis revealed that no significant consideration was given to the disadvantaged economic circumstances of native persons in selecting the fines imposed". In addition, the author notes that "(t)his situation suggests an unfortunate parallel between our modern correctional system and the debtors prisons of the past".[77] Unfortunately, the author does not offer the reader information regarding the size of the fines imposed, the frequency or degree of rigour of means inquiries conducted, the number of requests for further time to pay and the court's response, or the per diem sentence for fine default. Therefore, while Professor Hagan may indeed be correct, the accuracy of his analysis cannot be assessed.

The Law Reform Commission of Canada[78] in its working paper, Restitutions and Fines, cites a study which estimates that 40% of people imprisoned for default made partial payment either before incarceration or while in custody. The Commission has suggested that these people were willing but unable to pay their fines and, therefore, the Commission asserts that the fine is a discriminatory sanction. However,

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[76] John Hagan, "Locking up the Indians: A case for law reform", Canadian Forum, 55, Feb/76, p.17.

[77] Ibid., p.16.

[78] Law Reform Commission of Canada Working Papers 5 & 6 (Ottawa: Information Canada, 1974) p.32.

the Commission does not offer sufficient background information regarding this study to assess whether or not this hypothesis is accurate.

In a study conducted by Jobson and Atkins in 1985,[79] interviews were conducted with a sample of 20 males incarcerated in British Columbia prisons solely due to default on their fines. Of these 20, only 3 were employed at the time of their incarceration; 12 were on welfare, 3 were living on unemployment insurance and 2 were being supported by their families and, therefore, presumably had almost no personal income. These facts alone are cause for alarm. Perhaps of greater significance is the finding that, for one third of these offenders, their employment situation had changed dramatically since the time of their sentencing. At sentencing, 10 of the 20 had been fully employed. At the time of their committal, only 3 had jobs. The authors further note that "what is most interesting about this data is that only one out of the 20 persons in default apparently appeared before a judge immediately prior to committal in default."[80]

Thirteen of these men claimed that they had defaulted on their fines because they lacked the financial resources to pay them. None of these persons were employed (2 were collecting unemployment insurance and the other 11 were on welfare) and, therefore, their reasons for non-payment

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79 Op.cit.

80 Ibid.p.6.

seemed credible. For these men, the argument that society is imprisoning the poor has some weight.

Seven of the 13 inmates said, however, that they did have the resources with which to pay their fines. One of these men, however, had no apparent assets and was on welfare and, therefore, the researchers found it difficult to believe that he would have been able to pay his $200.00 fine. One man was unemployed and decided to turn himself in rather than take out a loan for the balance of his fine. Yet another, who was also unemployed and on welfare, decided to turn himself in because he wanted to get it over with. Three of the remaining offenders were found clearly to have had the means to pay their fine. One elected to serve his holidays in jail rather than pay a $500.00 fine. These people had clearly wilfully refused to pay the fine and elected to serve time in prison instead.

While Jobson and Atkins study used a very small sample group, it is clear that at least some members were indigenous at the time they were committed to prison and this finding underlines yet again the need for show cause hearings prior to committing fine defaulters to prison. It should be noted, however, that at least one third of the sample group may have had, or definitely did have, the means to pay the fine and, therefore, could be deemed to have wilfully refused to comply with the sentence of the court.

In England, Wilkins, Morgan and Bowles, and Latham have all reported that the proportion of people fined who

actually find themselves in prison as a consequence of default, is only 9 per 1000.[81] Latham argues that, in most cases, such people were unwilling, rather than unable, to pay their fines. He reports that, in one Manchester court during the last quarter of 1971, 243 defaulters were committed forthwith and "everyone of them paid the amount due either immediately or within a very short time of arriving at the prison. The means inquiry courts were all held on a Friday and by the following Monday none of those committed to prison were still there."[82] However, it is noteworthy that in England a sentence for imprisonment for fine default is not handed down simultaneously with the sentence of the fine. The offender is brought back before the court for a means inquiry before being committed to prison for default.

On the other hand, not all British researchers agree with the opinions expressed above. Dell states that many of those who do wind up in prison for default are without the means to pay their fines.[83] According to Dell, during 1966, 1 in 7 fine defaulters in Birmingham prisons reportedly had no income at all, when they committed the offence for which

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[81] "Fine Enforcement in Birmingham", Justice of the Peace, July 14, 1979, p.386; William D. Bosland, "Fines - Every sentence must carry conviction", The Law Society Gazette, Sept. 28, 1977, p.804; Cecil Latham, "Enforcement of Fines", Criminal Law Review, 1973, p.552.

[82] Latham, op.cit.,p.558.

[83] Suzanne Dell, "Fines", New Society, June 6, 1974, p.578-579.

they were fined. Dell argues that, if fine defaulters were capable of paying their fines, they would do so upon finding themselves committed to prison. Of 10,000 offenders in prison for fine default in 1972, 6,000 served over half their sentences and 3,800 served almost their full time.

In the United States, Hickey and Rubin estimate that between 40 and 60% of offenders, committed to American county jails, are there for fine default.[84] These authors further argue that "...the jails are filled with impoverished defenders unable to pay fines..."[85] Thus, while they maintain that vast numbers of indigent people are committed for fine default and are unable to pay their fines, unfortunately, no empirical research was offered to support this allegation.

Until such time as comprehensive studies are conducted in relation to fine defaulters, criticisms levied against the fine and imprisonment for default seem unanswerable. It seems that society may be imprisoning both those who wilfully refuse to comply with the sentence of the court and those who are incapable of complying with the sentence of the court. These are two entirely different groups of individuals. While it may not be morally wrong to imprison someone for default, if he wilfully refuses to pay, it is

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[84] William L. Hickey and Saul Rubin, "Suspended sentences and fines", Crime and Delinquency Literature, Vol.3 (3), September, 1971, pp.427-428.

[85] Ibid.

surely unconscionable to imprison those who are incapable of compliance.

Recommendation 14: that the system of data collection be improved so that a comprehensive study can be conducted in relation to : (i) the extent of fine default; (ii) why individuals default on their fines; (iii) the cost to the state of fine default; and (iv) the costs and effects of fine collection procedures.

Recommendation 15: that imprisonment for fine default not be automatically ordered at the time of sentencing an offender to a fine.

Recommendation 16: that consideration be given to abandoning imprisonment as a primary method of fine collection and that more emphasis be placed upon civil procedures with imprisonment to be used only as a method of last resort.

Recommendation 17: that, upon default, the offender be summoned to Court for a show cause hearing. If he is adjudged to have wilfully refused to pay his fine in full at the expiration of the payment period, he should be considered to be in contempt of court. Upon conviction, the fine should be satisfied through civil proceedings.

Recommendation 18: that, if imprisonment for fine default is to be retained in its present form, the Criminal Code be amended so that in every case the offender will be brought before the Court, prior to committal to prison, for a show cause hearing to determine whether he is incapable of paying the fine (in which case, the sentence can be adjusted) or is merely unwilling to pay his fine.

Recommendation 19: that, if imprisonment for fine default is to be retained, the length of sentence be commensurate with the size of the fine imposed. To this end, a formula (such as that employed in the day-fine system) should be devised so as to reduce the current problems of sentencing disparity in the per diem rates at which offenders are serving their sentences.

Fine Option Programs

Concern for those offenders, who are imprisoned for fine default, has generated the creation of "fine option"

programs in New Brunswick, Quebec, Saskatchewan, and Alberta. Regardless of their location, these programs are essentially the same in their approach. Immediately after a sentence of a fine is imposed, the offender is advised that, should he find himself unable to pay his fine within the time specified by the court, he may apply to the fine option program (although he must do so before he defaults). If an applicant has been accepted into the program, he is given work service to perform and he works off his fine at a given hourly rate.

Many of the fine option programs appear to be quite successful both in terms of their completion rates and from a cost saving perspective.[86] In Alberta, 218 of 236 applicants successfully completed the fine option program within a seven month period. It is estimated that 3,045 days of incarceration were thus avoided at a saving to the tax payer of $83,700.00. (calculated at only $28.00 per day per individual kept in prison). Furthermore, the community gained the benefit of 4,609 hours of unpaid community service[87].

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[86] H.J. Webber, "It is a fine option: The fine option program at the post incarcerative level", Crime et/and Justice, 15, (3), November, 1977, p.236.

[87] Alberta Department of the Solicitor General, Fine Option Programme, (Printed under the Authority of the Dept. of Social Services, 1976).

The Saskatchewan program reports similar successes.[88] In the fiscal year 1977-78, approximately 4,909 offenders performed more than $400,000.00 worth of community volunteer services. 75,795 days of incarceration were avoided at a saving of over $2,000,000.

Fine option programs provide a viable alternative to incarceration for fine default. Most significantly, they provide a safeguard against incarcerating indigenous offenders by allowing them to work off their fines. Incarceration removes the offender from his family and exposes him to the prison system and the influence of other offenders; all of which is done at great cost to the tax-payer who receives absolutely no benefit from it. While fine option programs do cost money to administer they still represent a saving to the tax-payer. These programs allow the offender to maintain his employment (if he has a job), stay with his family, and put something worthwhile back into the community.

The **Criminal Law Amendment Act, 1985, c.19** amended the Criminal Code so as to provide, inter alia, a legislative basis for the use of fine option programs by Canadian courts. Section 646.1 of the Code now provides that

> (1) An offender, other than a corporation, against whom a fine is imposed in respect of an offence may, whether or not the offender is serving a term of imprisonment imposed in default of payment of the fine, discharge the fine in whole or in part by earning credits for work performed during a

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[88] National Task Force on the Administration of Justice, Correction Services in Canada, 1977-1978, p. 105-106.

> period not greater than two years in a program established for that purpose by the Lieutenant Governor in Council
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> (a) of the province in which the fine was imposed; or
>
> (b) of the province in which the offender resides, where an appropriate agreement is in effect between the government of that province and the government of the province in which the fine was imposed.
>
> (2) A program referred to in subsection (1) shall determine the rate at which credits are earned and may provide for the manner of crediting any amounts earned against the fine and any other matters necessary for or incidental to carrying out the program.
>
> (3) Credits earned for work performed as provided by subsection (1) shall, for the purposes of this Act, be deemed to be payment in respect of a fine.
>
> (4) Where, by virtue of section 651, the proceeds of a fine belong to Her Majesty in right of Canada, an offender may discharge the fine in whole or in part in a fine option program of a province pursuant to subsection (1), where an appropriate agreement is in effect between the government of the province and the Government of Canada.

It is strongly recommended that all provinces and territories introduce a fine option program, if they have not already done so. It is also to be hoped that, now that the fine option program has been established on a firm legislative basis, Canadian judges will take full advantage of the welcome opportunities that it affords in terms of preventing the unnecessary imprisonment of indigent offenders and establishing a sentencing option that offers offenders a meaningful chance to contribute to their community.

Recommendation 20: that all provinces and territories introduce a fine option program as soon as practicable and that, at sentencing, all offenders ordered to pay a fine be advised of the existence of such programs and the application procedure for participating in them.

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