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Use of Conditional Sentence Orders in British Columbia 2010-2020

Research Report 2022-1

Yvon Dandurand[1]

Abstract

The lack of detailed sentencing data continues to be a problem in Canada. This problem is underscored when parliamentarians are considering amendments to the *Criminal Code* that will affect sentencing practices. Bill C-5, *An Act to amend the Criminal Code and the Controlled Drugs and Substances Act,* includes proposed amendments that would, among other things, repeal certain mandatory minimum penalties and remove some existing restrictions to the use of conditional sentences. This report examines the impact in British Columbia of the restrictions imposed in 2012 on the use of conditional sentences by the *Safe Streets and Communities Act*. It also examines whether the restrictions have had a differential impact on the sentencing of indigenous offenders in that province. The data reveal a sudden and persistent reduction in the use of CSOs in British Columbia, starting in fiscal year 2014-15, with the coming into full effect of the restrictions. The data also reveal that, whereas there was a substantial difference in BC sentencing data between the percentages of indigenous and non-indigenous offenders who received a CSO before 2013-2014, that difference became much less pronounced after the restrictions were imposed. The impact of the new restrictions on the proportion of cases where a CSO was imposed seems to have been relatively less pronounced for indigenous offenders than for non indigenous offenders, thus reducing the difference observed between the two groups prior to the legislative amendments. Nevertheless, indigenous offenders continued to receive a CSO proportionally less often than non-indigenous offenders and to be proportionally more likely to receive a sentence of incarceration. Given the limited availability of sentencing data, it is nearly impossible to understand the full range of factors that may have influenced sentencing decisions for these two groups of offenders. Nonetheless, the data did not support the claim that indigenous offenders were disproportionately affected by the restrictions on the use of CSOs introduced in 2012.

[1] Professor Emeritus, School of Criminology and Criminal Justice, University of the Fraser Valley, and Fellow and Senior Associate, International Centre for Criminal Law Reform and Criminal Justice Policy. The author wishes to thank Dr. Zina Lee and Dr. Darryl Plecas for their kind assistance with this study.

1. Introduction

Although it has other merits, the main goal of conditional sentencing is to reduce the system's reliance upon incarceration by providing courts with an alternative sentencing mechanism.[2] When first enacted, in 1996[3], s. 742.1 of the *Criminal Code* provided that a conditional sentence order (CSO) could be imposed where three conditions were met: the offence did not carry a mandatory minimum sentence; the sentence imposed was less than two years; and serving the sentence in the community would not pose a danger to the community. A conditional sentence could be combined with other sentences. As part of the same reform initiative, Parliament also enacted s. 718.2(e) which instructs sentencing judges to consider all available sanctions other than imprisonment for "all offenders, with particular attention to the circumstances of aboriginal offenders."

In 1997, Parliament added an additional precondition to s. 742.1 of the Code: namely, that the court must be satisfied that imposing a CSO "would be consistent with the fundamental purpose and principles of sentencing."

In 2007, s. 742.1 was further amended by restricting the availability of CSOs for "serious personal injury offences", terrorism offences and/or organized crime offences for which the maximum term of imprisonment is ten years or more, and which were prosecuted by indictment.[4]

In 2012, the *Safe Streets and Communities Act,* S.C. 2012, c. 1, s. 34, in addition to introducing mandatory minimum sentences, made conditional sentences unavailable for offenders convicted of certain offence categories. It eliminated the reference in s. 742.1 to "serious personal injury offences" (enacted in 2007), and restricted the availability of conditional sentences:

- for all offences with a maximum sentence of 14 years or life where the Crown proceeds by way of indictment [s. 742.1(c)];
- all offences prosecuted by indictment with a maximum sentence of imprisonment of 10 years or more that involved "bodily harm", the import/export, trafficking of drugs; and/or the use of weapons [s. 742.1(e)]; and
- for the following offences if prosecuted by indictment: prison breach; motor vehicle theft; criminal harassment; sexual assault; kidnapping; forcible confinement; trafficking in persons; abduction; theft over $5,000; breaking and entering no dwelling us; arson for fraudulent purpose [s. 742.1(f)].

Following the 2012 amendments, CSOs remain available for all hybrid offences where the Crown proceeds summarily (provided the offence is not subject to a mandatory minimum sentence). Thus, CSOs remain available for most offences.

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[2] Several other countries have also enacted similar legislation to address the issue of overincarceration. See: Armstrong, Sarah, McIvor, Gill, Fergus McNeil, & Paul McGuiness (2013). *International Evidence Review of Conditional (Suspended) Sentences.* Report No. 01/213, The Scottish Centre for Crime & Justice Research.
[3] S.C. 1995, c. 22, *An Act to amend the Criminal Code (Sentencing) and other Acts in consequence thereof*, proclaimed into force on September 3, 1996.

[4] *An Act to Amend the Criminal Code (Conditional Sentence of Imprisonment), SC 2007, c 12*.

In 2015, the Truth and Reconciliation Commission called "upon the federal government to amend the *Criminal Code* to allow trial judges, upon giving reasons, to depart from mandatory minimum sentences and restrictions on the use of conditional sentences."[5]

In 2020, in *R. v. Sharma*, 2020 ONCA 478, the Ontario Court of Appeal declared that ss. 742.1(c) and 742.1(e)(ii) of the *Criminal Code* unjustifiably infringed ss. 7 and 15 of the *Charter* and were, therefore, of no force or effect.[6] Ms. Sharma, a young indigenous woman who had pleaded guilty to importing a significant quantity of cocaine and received a sentence of 17 months' incarceration, had asked the Court of Appeal to strike down s. 742.1(c), and a similar provision in s. 742.1(e)(ii), on the basis that they contravene two sections of the *Charter*: s. 15 of the *Charter* because the effect of these provisions is to discriminate against Aboriginal offenders on the basis of race, and s. 7 of the *Charter* because they are arbitrary and overbroad in relation to their purpose.

Writing for the majority, Feldman J. A. explained that the conditional sentence is a central tool given to sentencing judges to apply the Gladue factors and therefore that the restrictions to the availability of 742.1 deprived the court of an important means to redress systemic discrimination against Aboriginal people when considering an appropriate sanction:

> "*Criminal Code* amendments that make the criminal law more stringent or that increase a maximum sentence for an offence would not have the same effect. Sections 742.1(c) and 742.1(e)(ii) undermine the purpose of the Gladue framework, exacerbating and perpetuating the discriminatory disadvantage of Aboriginal offenders in the sentencing process".[7]

In December 2021, the Government reintroduced a Bill to amend the *Criminal Code* and *Controlled Drugs and Substances Act* that would repeal certain mandatory minimum penalties, remove some existing restrictions to the use of conditional sentences and establish diversion measures for simple drug possession offences.[8]

One may expect some of the discussions surrounding the proposed amendments to focus on the impact of the restrictions imposed on the use of CSOs on charging and sentencing practices, on female offenders and indigenous offenders, on the application of Gladue principles, and more broadly, on public safety. Unfortunately, the empirical data that should inform these discussions is still very limited.

The present analysis purports to answer two of these issues, at least as they relate to the situation in British Columbia:

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[5] Truth and Reconciliation Commission of Canada (2015). *Calls to Action*, Action No. 32. https://www2.gov.bc.ca/assets/gov/british-columbians-our-governments/indigenous-people/aboriginal-peoples-documents/calls_to_action_english2.pdf

[6] *R. v. Sharma*, 2018 ONSC 1141, para 186. See also: R. v. Sharma, 2020 ONCA 478.

[7] Feldman, J. A., in *R. v. Sharma*, 2020 ONCA 478, para. 130.

[8] Bill C-5, *An Act to amend the Criminal Code and the Controlled Drugs and Substances Act*, 1st Session, Forty-fourth Parliament, 2021.

- Do the B.C. courts and Corrections data support the conclusion that restrictions upon CSOs enacted by Parliament in March 2012 have had a significant impact upon the total number and/or percentage of CSOs imposed upon all categories of offenders?

- Is there evidence of significant differences between the number and/or percentage of CSOs imposed upon indigenous as compared to non-indigenous offenders during the time frame of the analysis?

2. Measuring the Use of CSOs

Numerous competing explanations exist for any observed change in rates of imprisonment, whether as a result of the implementation of a sentencing alternative such as the CSOs or any other factor. Because the CSOs were intended to be used for offenders who would otherwise be sentenced to a term of imprisonment, success in the implementation of CSOs has sometimes been defined as a measurable reduction in the prison population or in prison admissions, without a change in other community-based sanctions. However, the question of whether the conditional sentence was successful in reducing imprisonment in Canada is very hard to answer.[9] The difficulty resides in trying to rule out alternative explanations for any observed changes in the rate of incarceration, including the impact of other contemporaneous initiatives designed to reduce incarceration, whether for all sentenced offenders or for a particular group such as indigenous offenders.

Reid proposed a new metric for analyzing patterns in the utilization of CSOs, i.e. the Conditional Sentence Utilization Percentage (CSU%).[10] The CSU% metric consists of calculating the number of CSOs divided by the total number of prison admissions and CSOs, added together based on the assumption that a CSO is a form of prison sentence and should be counted as such. Reid argues that it is important to assess its use relative to total imprisonment (defined as including sentences of imprisonment served in the community).

The CSU% metric is based on a distinction Reid makes between community-based imprisonment sentences and other community-based sentences in order to emphasize his view that a CSO is actually a custodial sentence (or a form of custody discharged in the community). To emphasize his point, Reid uses the terms "Conditional Sentence of Imprisonment" (CSIs) as opposed to CSOs which is the terminology more typically used in the relevant literature. The metric when first proposed by Reid was new because previous analyses had treated a CSO as a community-based sentence, in the same broad category as suspended sentences and probation, but with different and more exacting conditions attached to it.

[9] Webster, Cheryl Marie & Anthony N. Doob. 2019. "Missed Opportunities: A Postmortem on Canada's Experience with the Conditional Sentence". *Law and Contemporary Problems*, 82(1): 163-197.

[10] Reid, Andrew A. (2017), "The Differential utilization of conditional sentences among Aboriginal offenders in Canada", *Canadian Criminal Law Review*, 22(2): 133-157.

In addition to the conceptual difficulty involved in defining a CSO as a sentence of imprisonment, as opposed to a community-based sentence, there are a few other issues which may affect the validity of the CSU metric. One of them is the assumption that judges who do not sentence an offender to a CSO do not make use of other available community-based alternatives. The metric does not capture changes in the use of other community-based options at sentencing.[11]

Reid's article is based on data from the Adult Correctional Services Survey (ACS Survey) on correctional admissions to either custodial and community-based programs across the 13 provincial/territorial jurisdictions in Canada. Correctional data are a very imperfect source of data for analyzing sentencing patterns. However, in the absence of better sentencing data in this country, researchers sometimes use correctional admission data to identify potential changes in sentencing patterns. Reid's article refers to some of the limitations of the ACS Survey data, in particular, its limited data coverage as well as provincial variations in reporting. It also refers to the fact that the analysis that it reports had to exclude several cases where the Aboriginal identity of the individual offender was unknown. However, some of the other limitations of using correctional admission data instead of court data to analyze sentencing patterns are not explicitly addressed in the article.

For a discussion of these well-known limitations, one may consult the discussion presented by Cheryl Marie Webster and Anthony Doob[12]. These limitations include the fact that the method for aggregating admissions in the ACS Survey presents quite a few challenges. For example, in the ACS Survey, an admission refers to all processed entries into the correctional system. Admissions are recorded each time a person begins any type of custodial or community supervision, as a measure of the case-flow in correctional agencies over time. The same person can be included several times in the admission counts where the individual moves from one type of sanction to another (e.g., multiple admissions to custody in a year, an admission to a CSO followed by an admission to custody after a breach of conditions, etc.). Custody admissions include intermittent sentences so there is no way to tease out changes to these distinct forms of custody over time. Custody admissions are also affected by the fact that, at the time of sentencing, offenders may have received credit for time served while on remand.

3. Method

We reviewed data obtained from BC Court Services Branch and BC Corrections. Our analysis relies on three sets of data: (1) a dataset extracted from JUSTIN, the integrated computerized justice case management system and database maintained by the province of British Columbia to support the administration of criminal justice cases from initial police submissions to Crown assessments and through the court process; and, (2) two datasets extracted from CORNET, the BC corrections case management system, used for the administration of offender sentences and supervising offenders according to the terms set by the courts.

[11] Reid, Andrew & Roberts, Julian V. 2019. "Revisiting the Conditional Sentence of Imprisonment After 20 years: Is Community Custody Now an Endangered Species?". *Canadian Criminal Law Review*, 24(1): 1-37, p. 13.

[12] Webster & Doob. 2019. "Missed Opportunities", supra note 8.

The JUSTIN data was extracted by Court Services staff on October 21, 2020. The data file includes annual data on the total sentences ordered, as well as conditional and suspended sentences ordered by BC courts during the ten-year period between fiscal years 2010/11 and 2019/20. The data are broken down by "ethnicity", itself defined as a nominal variable with three categories: "indigenous", "non indigenous", and "unknown". Indigenous identification for the offender is based on what is reported in JUSTIN. Much of that information comes directly from police agencies when they submit Reports to Crown Counsel electronically, and relies on self-reporting by the accused person. Self-identification as a method is not perfectly reliable because it does not fully ensure that all indigenous defendants are identified, but is nevertheless acceptable as a realistic and reasonably accurate way of identifying indigenous individuals for the purposes of case management and statistical analysis.

In JUSTIN, sentences are recorded per accused per file per count, but in the data we obtainedthat , each file/accused is counted only once. The year is based on the most recent sentence date for the file/accused in JUSTIN. The data we analyzed were extracted from JUSTIN based on the following rules:

- A file/accused is included in the conditional sentence count if there was a conditional sentence ordered at any point on the file.
- A file/accused is included in the suspended sentence count if there was a suspended sentence ordered at any point on the file.
- Conditional sentences that are suspended are not included in the conditional sentence count, but are included in the suspended sentence count.

The JUSTIN Court Module is used for preparing documents and tracking cases through the court system, including court decisions. In my opinion, the information it contains is reliable and the way statistical data were reportedly extracted from that system was adequate for the purpose of the present analysis.

CORNET includes information about adult and youth offenders including offences committed, personal information, movements, court documents, sentence calculations, risk needs assessments, security classifications and victim information in cases where the offender is supervised by BC Corrections. The data extracted from CORNET were based on court documents relating to the sentence ordered in each individual adult offender case supervised by BC Corrections. They included yearly data on overall number of sentences ordered by BC courts and supervised by BC corrections (including warrant of committal, conditional sentence, parole order, probation order, recognizance peace bond) in cases involving adult offenders, the total number of conditional sentence orders, and the number of warrants of committal for fiscal years 2007/08 to 2019/20 in

cases involving adult offenders.[13] Similar data were provided in separate tables for indigenous and non-indigenous offenders.

CORNET information on the indigenous status of sentenced offenders, like JUSTIN data, is based on the offenders' self-identification. Unlike JUSTIN, however, CORNET is not a direct source of sentencing data because it is limited to cases supervised by BC Corrections and is meant to measure the flow of offenders through the correctional system and not the court decisions.

Both the CORNET and the JUSTIN data we obtained should be considered as estimates at the point in time at which the data were extracted and, as a result of ongoing data entry and maintenance, the data provided are subject to change slightly if extracted from the system at a future date.

The datasets respectively cover periods of 10 years in the case of JUSTIN data (2010/11 - 2019/20) and 13 years for CORNET data (2007/08 – 2019/2020). In both cases, the data cover a period of six years during which the full impact of the 2012 legislative amendments could be observed (2014/15 to 2019/20). That period is sufficiently long for an impact to be observed. In fact, when measuring the direct impact of a legislative amendment on sentencing, the longer the period included in the analysis the greater likelihood there is that factors other than the amendment itself have influenced the observed sentencing patterns.

The datasets from JUSTIN and CORNET do not contain identical figures because they are derived from two related but different administrative processes, sentencing decisions as opposed to correctional admissions. Correctional data is obviously a more indirect indicator of sentencing decisions.

4. Impact in British Columbia of the Restrictions on the Use of CSOs enacted by Parliament in March 2012

The restrictions upon the use of CSOs enacted by Parliament on March 13, 2012 are associated with a significant reduction on the total number of CSOs imposed on all offenders by the courts in BC and on the percentage of cases where a CSO was ordered.

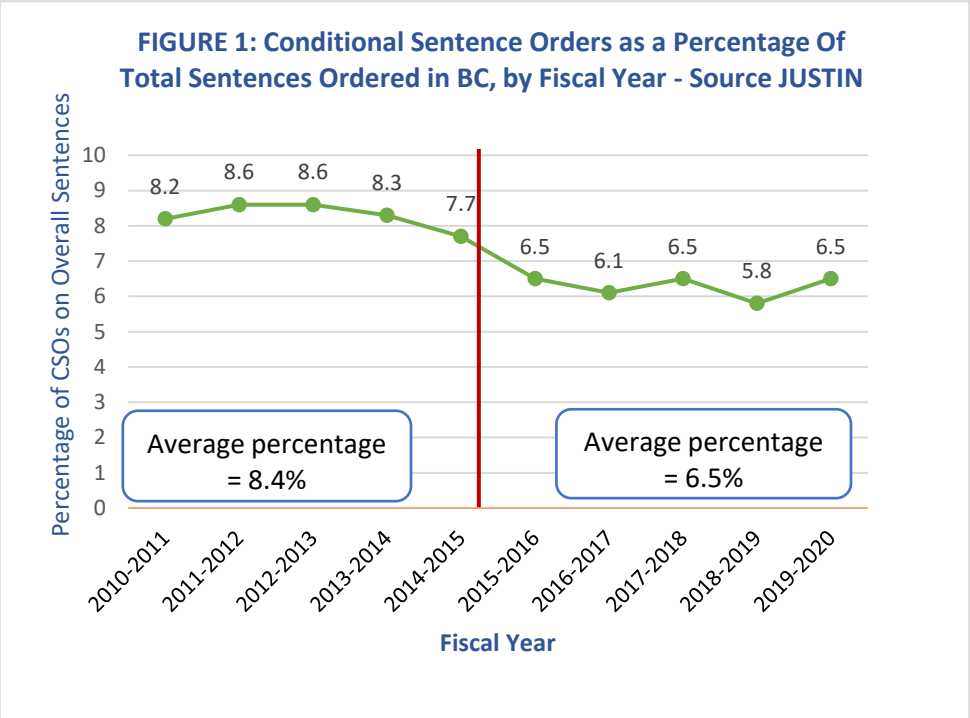
Table 1, based on JUSTIN data, clearly shows the effect of the new restrictions on the use of CSOs in British Columbia. Given that the restrictions introduced by s. 34 of the *Safe Streets and Communities Act* did not come into force until November 20, 2012 and that the new restrictions could not apply retroactively to sentencing, we are assuming that the impact of these restrictions was minimal during the remainder of fiscal year 2012-13 and progressively started to be reflected in sentencing decisions during fiscal year 2013-14. Therefore, our analysis used the end of fiscal year 2013-14 as the cutoff point and fiscal year 2014-15 as the first year where the full impact of the new restrictions could be observed. This cutoff point is indicated by a dividing red line in the tables and figures presented below.

[13] The definition used by BC Corrections is "individual charged as an adult offender".

In previous studies on the utilization of CSOs as compared to other sentencing options, researchers have used various measures of change in correctional caseload expressed as percentages. These included percentage of CSOs as compared to the total number of sanctions supervised by correctional agencies, or the total number of incarcerations, or total number of probation admissions being supervised. The present analysis relies primarily on court-based sentencing data, as opposed to correctional caseload data. It also relies on the most valid measure of change in the use of CSOs, that is the year-to-year comparison between the percentage of all sentences ordered which included a conditional sentence order. To make the observed trend more visible, we have also calculated and compared the average percentage of CSOs for the years preceding the legislative amendments to the average percentage of CSOs for the years following these amendments.

TABLE 1: Number of Conditional Sentence Orders on File and Percentage which are Conditional Sentence Orders. BC – 2010-2011 to 2019-2020 – JUSTIN Data

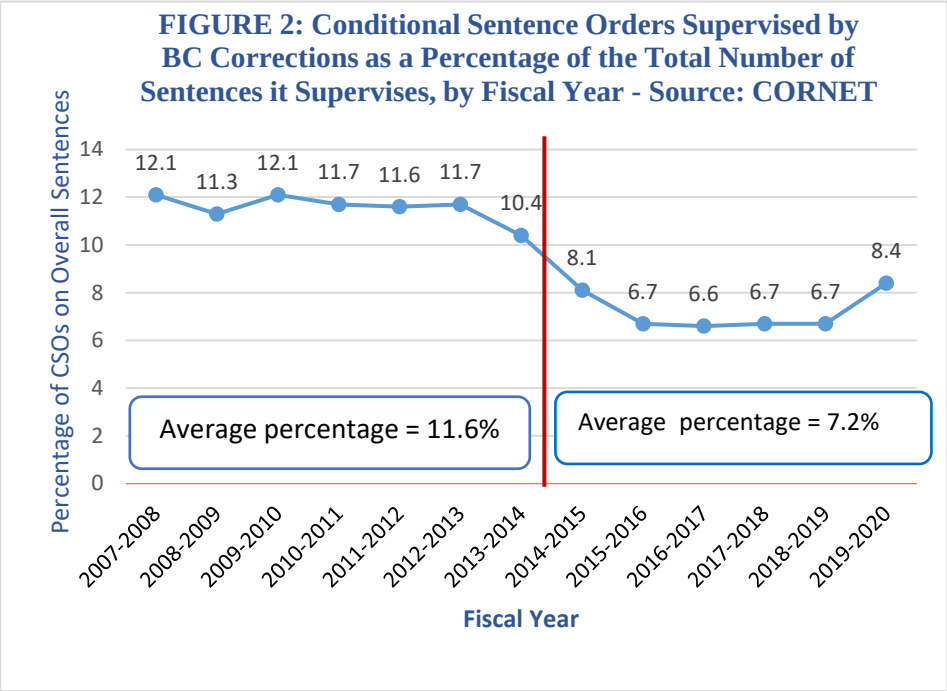
Fiscal Year	Total Sentences on Concluded Files	Conditional Sentence Orders on Concluded Files	Percentage of Conditional Sentence Orders	Average Percentage Before and After Restrictions
FY 2010-11	51,254	4,183	8.2%	8.4%
FY 2011-12	47,566	4,073	8.6%	
FY 2012-13	45,377	3,917	8.6%	
FY 2013-14	43,480	3,591	8.3%	
FY 2014-15	42,323	3,238	7.7%	6.5%
FY 2015-16	43,869	2,845	6.5%	
FY 2016-7	45,469	2,777	6.1%	
FY 2017-18	44,281	2,862	6.5%	
FY 2018-19	40,745	2,364	5.8%	
FY 2019-20	38,203	2,496	6.5%	



Using the end of fiscal year 2013-14 as the cutoff point for the period prior to the new restrictions, we note that the percentage of CSOs imposed as compared to the total number of sentences ordered during fiscal years 2010-11 to 2013-14 was very stable, fluctuating barely between 8.2 to 8.6 percent of the total number of concluded sentencing files. There is however a clearly noticeable reduction in the use of CSOs starting in fiscal year 2014-15 (see Figure 1). The average percentage of CSOs imposed was 8.4% for the four year period preceding the introduction of the restrictions, as compared to 6.5% for the six years after the restrictions came fully into effect.[14] This represents a substantial reduction of 23% between the two time periods in the proportion of sentencing cases where a CSO was imposed.

The same analysis performed on the CORNET dataset (Figure2) shows a similarly abrupt reduction in the percentage of CSOs supervised by BC Corrections as compared to the total number of sentences under its supervision. The average percentage of CSOs imposed was 11.6% for the seven year period preceding the introduction of the restrictions, as compared to 7.2% for the six years after the restrictions came into effect. This represents a reduction of more than a third (38%) in the proportion of sentencing documents recorded by BC Corrections for CSOs under its supervision.

[14] I have made the calculations using 2012-13 as the cutoff point for the "before the amendments" period and they led to near-identical conclusions.



In our view, it is logical to attribute that sudden and persistent reduction in the use of CSOs in Britsh Columbia, starting in fiscal year 2014-15, with the coming into full effect of the restrictions imposed by the *Safe Streets and Communities Act*. Other changes in the criminal justice system and in sentencing practices have undoubtedly occurred over the last several years, including the introduction of Indigenous Courts and the greater availability of Gladue reports at the time of sentencing. Nevertheless, we cannot think of a competing hypothesis that would explain the coincidence between the coming into effect of the new restrictions and the significant drop in the use of CSOs observed in this province at that specific point in time.

After CSOs were introduced in Canada some researchers have attempted to determine, although without much success, whether a "net widening" effect could have occurred as a result of the new sentencing option. In other words, they were interested in whether an increase in the use of CSOs had reduced the proportion of offenders who received a conditional supervision sentence such as a suspended sentence or conditional discharge.[15] Given that the effect new restrictions on the use of CSOs was to proportionally reduce the use of that sentencing option, one may ask whether the opposite of a net widening effect may have taken place after the restrictions. To verify this, we considered whether the proportion of suspended sentences ordered in BC had increased after the restrictions on the use of CSOs were imposed. It appeared that, on the contrary, the relative

[15] For example, Laprairie, Carol and Chris Koegl. 2000. *The Use of Conditional Sentences: An Overview of Early Trends.* Ottawa: Department of Justice Canada; Dawn North (2001). 'The Catch 22 of Conditional Sentencing, *Criminal Law Quarterly*, 44, 342. See also: Reid, Andrew & Julian V. Roberts. 2019. "Revisiting the Conditional Sentence of Imprisonment After 20 years: Is Community Custody Now an Endangered Species?". *Canadian Criminal Law Review*, 24(1): 1-37.

frequency with which suspended sentences were ordered also decreased during the period following the legislative amendments (see Figure 6).

5. Differences between the frequency with which CSOs are imposed upon indigenous offenders as compared to non-indigenous offenders

Indigenous people are drastically over-represented in the Canadian criminal justice system. Official inquiries[16], government statistics[17], and empirical research[18] have documented the fact that indigenous individuals account for a much higher proportion of Canada's inmate population than would be expected by looking only at their relative proportion in the general population. Systemic factors are in part responsible for that situation. For example, breaches of conditions attached to community-based sentences and the management of these situations may partly explain the higher incarceration rates for indigenous offenders.[19] Administration of justice offences among indigenous offenders (i.e., failure to appear in court, breach of bail or probation conditions) are partly responsible for the over-representation of indigenous offenders in prison. However, the reasons for the observed overrepresentation are complex and, to some extent, are related to the indigenous offenders' unique circumstances, marginalization, and alienation from the justice system.

Generally speaking, suspected disparities or discrimination in sentencing are hard to document or explain because so many factors are usually at play. In our justice system sentences are meant to be individualized, taking into account individual factors and circumstances, while considering the seriousness of the offence and the degree of responsibility of the offender. Courts must consider a variety of aggravating and mitigating factors concerning the offender, the offence, and the surrounding circumstances. Therefore, as noted by Andrew Welsh and James Ogloff, it is "extremely difficult to empirically untangle the extent to which extra-legal factors, such as race, affect sentencing decisions".[20] They add, "a great deal of work needs to be done before we understand the nature of over-representation".[21] Unfortunately much of that work remains to be done.

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[16] Truth and Reconciliation Commission of Canada. 2015. *Honouring the Truth, Reconciling the Future: Final Report of the Truth and Reconciliation Commission of Canada*. Ottawa: Truth and Reconciliation Commission of Canada. Also: *BC First Nations Justice Strategy*, Corrections and the BC First Nations Justice Strategy - BC First Nations Justice Council (bcfnjc.com)

[17] E.g., Department of Justice. 2017. *Spotlight on Gladue: Challenges, Experiences, and Possibilities in Canada's Criminal Justice System.* Ottawa: Research and Statistics Division, Department of Justice Canada. https://www.justice.gc.ca/eng/rp-pr/jr/gladue/gladue.pdf

[18] E.g., Roberts, Julian V. & Andrew Reid. 2017. Aboriginal Incarceration in Canada since 1978: Every Picture Tells the Same Story. *Canadian Journal of Criminology & Criminal Justice*, 59(3): 313-345.

[19] Lehalle, Sandra, Landreville, Pierre, & Mathieu Charest. 2009. « L'Emprisonnement avec sursis au Québec: Impact de l'arrêt Proulx ». *Canadian Journal of Criminology & Criminal Justice*, 51(3): 277-302.

[20] Welsh, Andrew & James R. P. Ogloff. 2008. Progressive Reforms or Maintaining the Status Quo? An Empirical Evaluation of the Judicial Consideration of Aboriginal Status in Sentencing Decisions, *Canadian Journal of Criminology and Criminal Justice*, 50(4): 491-517, p. 494.

[21] Idem, p. 512.

The limited sentencing research conducted to date seems to indicate that indigenous status does not in itself predict the likelihood of receiving a custodial or non-custodial disposition relative to both the aggravating and mitigating factors cited by judges, and the sentencing objectives applied in each case. In other words, sentencing outcomes are more directly influenced by prior criminal history, lower socio-economic status, and offence seriousness than by indigenous status.[22] However, lower socio-economic status is itself linked to poverty, lack of education, and the lack of employment opportunities for indigenous people. The legacy of suppression of their culture has had a profoundly negative impact on indigenous communities, families, and individuals through the generations.

Based on the national ACS Survey data, Reid concluded that between 2000-2001 and 2007-2008 conditional sentences were used more liberally with indigenous offenders than they were with non-indigenous offenders, but that the trend was reversed following that period and up to 2014-2015 when non-indigenous offenders received more community-based custody sentences than did indigenous offenders.[23] Reid's article does not address the question of the impact of the 2012 *Criminal Code* amendments on the use of CSOs.

Table 2 displays 10 years of data extracted from JUSTIN, for both indigenous and non-indigenous accused, on the conditional sentence orders imposed by BC courts as a percentage of the total sentences ordered on concluded files. It also displays the average percentage of CSOs ordered for the periods before and after the new restrictions were implemented.

As mentioned earlier, there was a substantial drop in the percentage of cases in which a CSO was ordered after the restrictions were introduced. That drop in percentages after the restrictions were imposed was greater for non-indigenous offenders (i.e., 2.1% less than in the previous period) than for indigenous offenders (i.e., 1.1% less than in the previous period). These decreases in the percentage of CSOs represent a 24% drop for non-indigenous accused as compared to 16% for indigenous accused in the proportion of individuals who received a conditional sentence order after the restriction were introduced. The impact of the new restrictions on the proportion of cases where a CSO was imposed seems to have been relatively less pronounced for indigenous offenders than for non indigenous offenders, thus reducing the difference observed between the two groups prior to the legislative amendments.

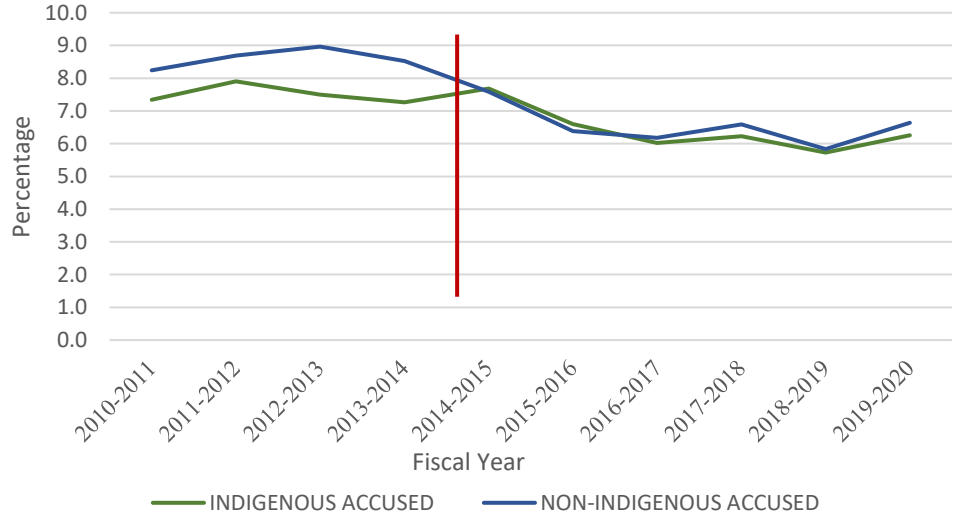
[22] Idem, p. 495.

[23] Andrew A. Reid. 2017 "The Differential utilization of conditional sentences among Aboriginal offenders in Canada", p. 141.

TABLE 2: Conditional Sentence Orders as a Percentage of Total Sentences Ordered on Concluded Files - Indigenous vs Non-indigenous Accused; BC - FY 2010-11 to 2019-2020 – JUSTIN Data				
Fiscal year	Indigenous accused	Average percentage for time period	Non-indigenous accused	Average percentage for the time period
2010-2011	7.3	7.5%	8.2	8.6%
2011-2012	7.9		8.7	
2012-2013	7.5		9.0	
2013-2014	7.3		8.5	
2014-2015	7.7	6.4%	7.6	6.5%
2015-2016	6.6		6.4	
2016-2017	6.0		6.2	
2017-2018	6.2		6.6	
2018-2019	5.7		5.8	
2019-2020	6.3		6.6	

Before the restrictions were introduced, non-indigenous accused were apparently more likely than indigenous offenders to receive a conditional sentence order. It is quite clear from the JUSTIN data that, before the end of fiscal year 2013-2014, non-indigenous accused were somehow more likely than indigenous accused to receive a CSO. However, since the restrictions fully came into effect there is no substantive difference left between the two groups in their respective likelihood of receiving a CSO (see: Figure 3). This, in our view, is a particularly important conclusion to be drawn from the available sentencing (JUSTIN) data.

FIGURE 3: Conditional Sentence Orders as a Percentage of Total Sentences Ordered on Concluded Files - Indigenous vs Non-indigenous Accused; BC - FY 2010/11 to 2019-2220 - JUSTIN Data



As can be seen in Figure 4, the CORNET data present a very similar picture of the reduction changes in the use of CSOs for both indigenous and non-indigenous offenders following the coming fully into force of the new restrictions.

FIGURE 4: CSOs as a Percentage of Total Sentences Served - Indigenous vs Non-indigenous Accused; BC - FY 2007-08 to 2019-20; CORNET Data

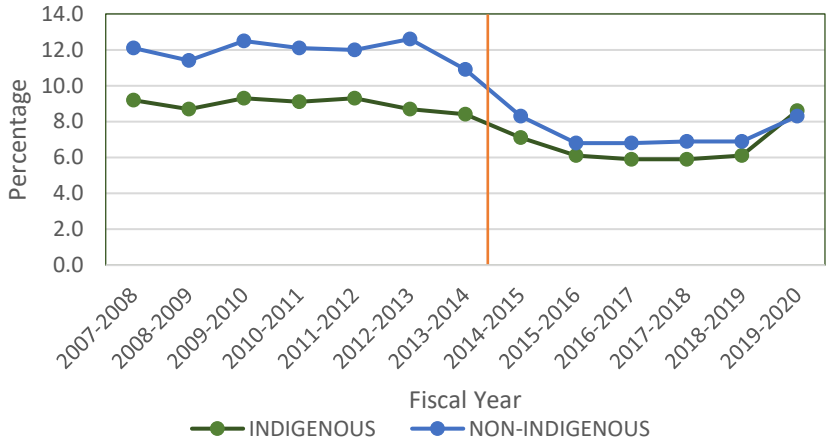
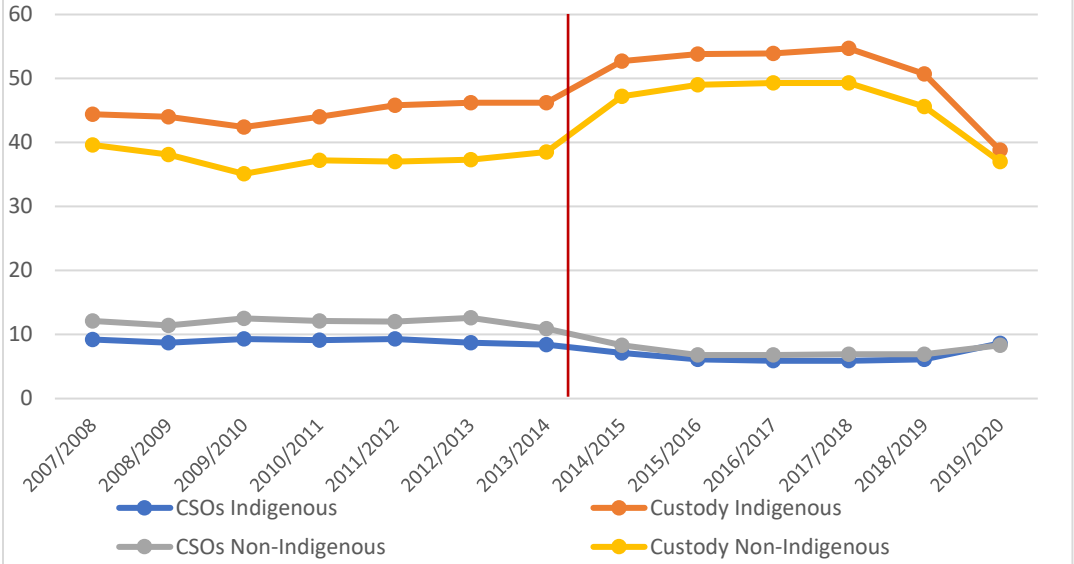


FIGURE 5: CSOs and Warrants of Commital as a Percentage of Total Sentences Served - Indigenous vs Non-indigenous Offenders; BC - FY 2007/2008 to 2019/2020; CORNET Data



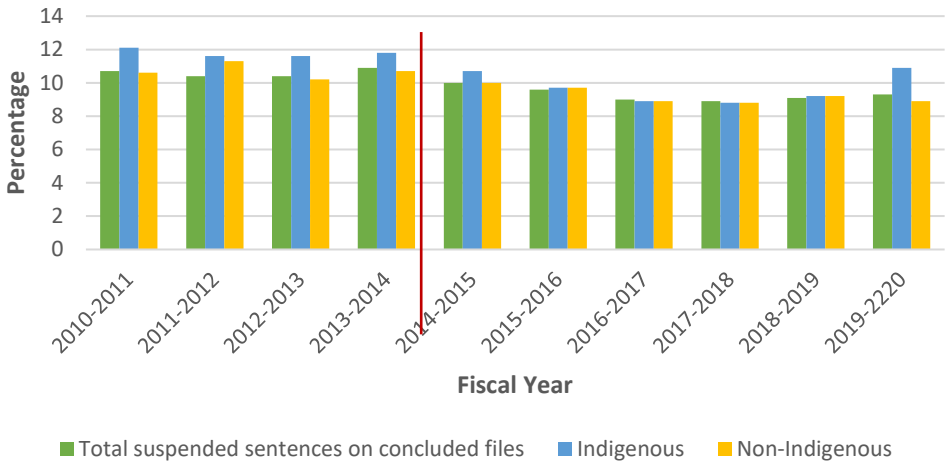
Many observers had predicted that the restrictions on conditional sentences, together with the introduction of mandatory minimum sentences, would exacerbate the ongoing crisis of Indigenous

overincarceration.[24] As shown in Figure 5, the substantial reduction observed after 2013-2014 in the percentages of CSOs ordered by the courts was accompanied, as expected, by a substantial increase in the percentages of sentences of incarceration (warrants of committal) ordered by the courts for both indigenous and non-indigenous offenders.

As an alternative to imposing a conditional sentence, when no minimum punishment is prescribed by law, a court may suspend sentence and impose a probation order (s. 731 of the *Criminal Code*). There are some legal differences between a CSO and a suspended sentence, but the two measures allow a court to order a community-based sanction as opposed to a period of incarceration.[25] For this reason, we reviewed the data on suspended sentences ordered by BC courts during the same period.

Figure 6 presents the suspended sentences ordered in BC as a percentage of the total sentences ordered in BC over a ten-year period. That data support three conclusions: (1) the number of suspended sentences ordered by BC courts has also decreased slightly over the last several years; (2) there is not a substantial difference in the percentages of suspended sentences orders for indigenous and non-indigenous offenders; and, (3) there is no sign that judges may have systematically resorted to ordering suspended sentences instead of CSOs after the restrictions to the use of CSOs were introduced by law.

FIGURE 6: Suspended Sentences as a Percentage of Total Sentences Ordered on Concluded Files - Indigenous vs Non-indigenous Accused; BC - FY 2010-11 to 2019-2020



[24] Newell, Ryan. 2013. "Making Matters Worse: The Safe Streets and Communities Act and the Ongoing Crisis of Indigenous Over-Incarceration". *Osgoode Hall Law Journal*, 51(1): 199-249.

[25] Tweney, summarizing the general principles on conditional sentences articulated by the Supreme Court in R. v. Proulx, explains that " a conditional sentence should be more punitive than a suspended sentence with probation. To achieve this objective, conditional sentences should generally include punitive conditions that restrict the offender's liberty. Conditions such as curfew and house arrest should be the norm, not the exception". Tweney, Gregory J.. 2000. *Supreme Court of Canada Speaks on Conditional Sentences.* Ottawa: Department of Justice.

6. Explaining the differences between the rates of CSOs imposed on indigenous and non-indigenous offenders.

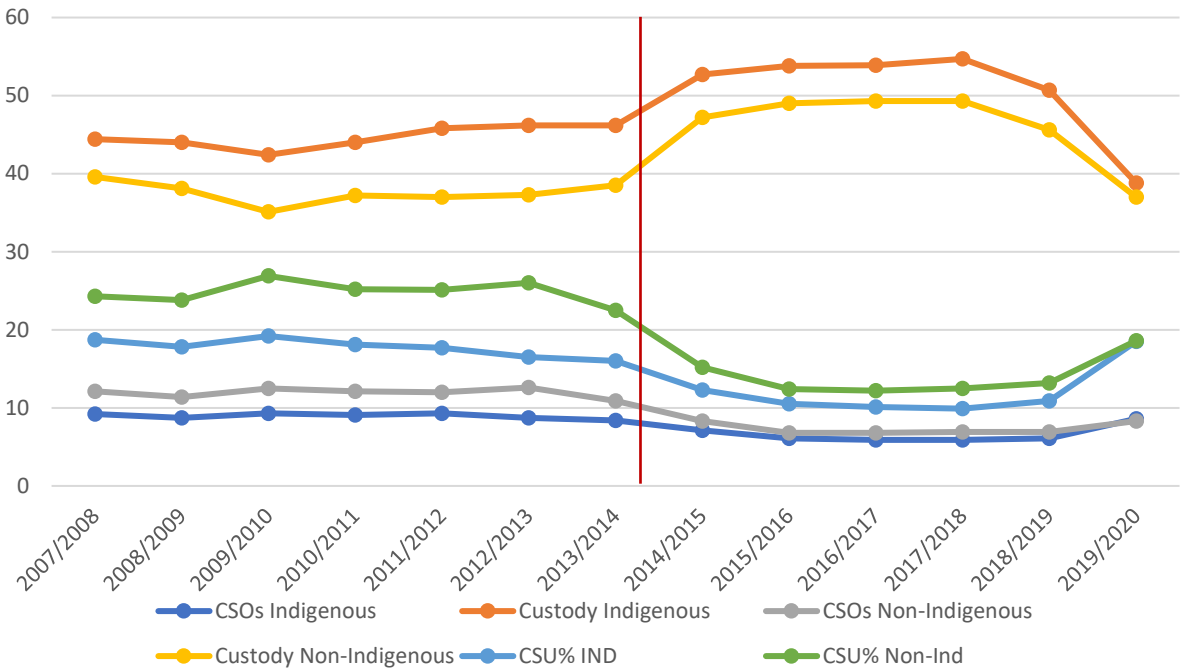
As already mentioned, whereas there was a substantial difference in BC sentencing data between the percentages of indigenous and non-indigenous offenders who received a CSO before 2013-2014, that difference became much less pronounced after the restrictions were imposed. Nevertheless, indigenous offenders continued to receive a CSO proportionally less often than non-indigenous offenders and to be proportionally more likely to receive a sentence of incarceration. This may be the result of differences between the two groups in terms of the offences for which they were charged, the impact of mandatory sentences, or any of a number of other factors. However, without more detailed sentencing data, one can only speculate about the reasons for the observed variance between the two groups of offenders. Given the limited availability of sentencing data, it is nearly impossible to understand the full range of factors that may have influenced sentencing decisions for these two groups of offenders.

We should also add that one should not automatically assume that, in cases where the new restrictions applied and notwithstanding the impact of mandatory minimum sentences, judges have necessarily imposed a sentence of incarceration.[26] Judges have other options and there are too many factors at play in determining sentencing outcomes, including prosecutorial discretion in cases potentially involving mandatory minimum sentences, for anyone to jump to such conclusions. In the absence of detailed sentencing data, it is most difficult to empirically delineate the impact of any of these factors.

We were able to use the CORNET data to apply the metrics suggested by Reid. We calculated the CSU percentages for both indigenous and non-indigenous adult offenders in BC for the period between fiscal years 2007-2008 and 2019-2020. Figure 7 shows how, after the new restrictions on the use of CSOs came into full effect, the CSU percentages for indigenous and non-indigenous offenders followed the same trend as the percentages of CSOs for these two groups and how the two groups seem to have been similarly affected by the change. The CSU percentages do not support the suggestion that, in British Columbia, indigenous offenders were disproportionately affected by the restrictions imposed in 2012 in the use of CSOs.

[26] See: Dandurand, Y. (2016). *Exemptions from Mandatory Minimum Penalties: Recent Developments in Selected Countries.* Vancouver: International Centre for Criminal Law Reform.

FIGURE 7: CSOs and Warrants of Commital as Percentages of Total Sentences Ordered, CSU Percentages - Indigenous vs Non-indigenous Accused; BC - FY 2007/2008 to 2019/2020; CORNET Data



7. Conclusion

We should note that there are substantial variations in sentencing practices across the country, including differences in the use of CSOs. The introduction in 2012 of restrictions in the use of CSOs may have had a different impact in various provinces. More analysis like the one presented here would help understand these various patterns.

Finally, there are many questions which the present analysis could not answer, including the differential use of CSOs for men and women, the rate of successful completion of sentence for different types of offenders serving a CSO, the recidivism rates for offenders sentenced to CSOs as compared to that rate for offenders serving a prison sentence, as well as the impact of the use of CSOs on public safety. Moreover, the conclusions we have reached here about the impact on indigenous offenders of the restrictions imposed on the use of CSOs are far from definitive. Better data and a more granular analysis are required to better understand the cumulative impact of various reforms over the years, from the adoption of Gladue principles, to the imposition of mandatory minimum penalties, and the restrictions on the use of CSOs.

Finally, given the very consequential amendments that are contemplated in Bill C-5, one should expect that an effort will be made to collect and disseminate data to measure the impact of these

changes, and find out whether the amendments are producing their intended effect, including on the sentencing of indigenous offenders and their overincarceration.

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