



# OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

## GUIDELINE FOR FEDERAL PROSECUTORS

September 24, 2012

### **COMING INTO FORCE OF THE *SAFE STREETS AND COMMUNITIES ACT*<sup>1</sup> (Amendments to s. 742.1 of the *Criminal Code* (Conditional Sentences))**

#### **Purpose**

[1] The purpose of this guideline is to advise federal prosecutors of key changes to conditional sentences under s. 742.1 of the *Criminal Code*, as a result of the coming into force on **November 20, 2012**, of certain sections of the *Safe Streets and Communities Act* (“the Act”). The effect of the amendments is to restrict the availability of conditional sentences. These amendments apply only to offences committed after the coming into force of the amendments, which are contained in Part 2 of the Act.

[2] Under the amendments, conditional sentences remain unavailable if the offence is punishable by a minimum term of imprisonment,<sup>2</sup> or if the offence is a terrorism offence or a criminal organization offence prosecuted by way of indictment for which the maximum term of imprisonment is 10 years or more.

---

<sup>1</sup> <http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=5465759>

<sup>2</sup> Existing MMPs in the *Criminal Code* can be found in the Offence Grid, which appears at the back of the Code, before the Index. It is also important to read this guideline in conjunction with other PPSC Guidelines concerning the Act, which concern new or increased mandatory minimum penalties in relation to certain *Criminal Code* offences and particular drug offences committed in certain circumstances.

[3] Prior to the Act, conditional sentences were not available in relation to serious personal injury offences as defined in s. 752 of the *Criminal Code*. Under the new legislation, conditional sentences are not available in respect of the following offences:

- All offences prosecuted by way of indictment for which the maximum term of imprisonment is 14 years or life;<sup>3</sup>
- Offences prosecuted by indictment for which the maximum term of imprisonment is 10 years, that:
  - (i) resulted in bodily harm;
  - (ii) involved the import, export, trafficking or production of drugs, or
  - (iii) involved the use of a weapon.

In addition, a list of eleven offences, when prosecuted by indictment, are expressly excluded from eligibility for conditional sentences. This list includes prison breach (s. 144), criminal harassment (s. 264), sexual assault (s. 271), kidnapping (s. 279), trafficking in persons-material benefit (s. 279.02), abduction of person under 14 (s. 281), and the following property offences:

- motor vehicle theft (s. 333.1);
- theft over 5,000 (s. 334(a));
- breaking and entering a place other than a dwelling house (s. 348(1)(e));
- being unlawfully in a dwelling-house (s. 349); and
- arson for fraudulent purpose (s. 435).

[4] Thus, fewer offences will be eligible for conditional sentences as a result of these changes. As far as CDSA offences are concerned, conditional sentences will remain available for s. 4 offences. However, conditional sentences will no longer be available for any other Schedule I or Schedule II drug offence, except for s. 5 offences of trafficking or possession for the purpose of trafficking in three kilograms or less of a Schedule II drug (marihuana and cannabis resin). This is because of related amendments to the *Controlled Drugs and Substances Act* (CDSA) that include an increase in the maximum penalty for marihuana production from seven to 14 years and the introduction of mandatory minimum penalties for certain CDSA offences committed in certain circumstances in relation to Schedule I and II drugs.<sup>4</sup>

### **Impact on Prosecutions**

[5] These amendments mandate no change in the general Crown approach and rationale regarding Crown elections, plea resolution and sentencing discussions. That said, Crown counsel must follow the guidelines described below that relate to the exercise of discretion.

---

<sup>3</sup> The list of offences in the *Criminal Code* that fall in these categories can be found in the Offence Grid, located in the *Criminal Code*, as explained in note 2. See also the attached Annexes A and B for examples of offences in other federal acts that fall into these categories.

<sup>4</sup> See the Guideline regarding new or increased MMPs for certain sexual offences involving children and young persons and see the Guideline regarding new MMPs for particular drug offences committed in certain circumstances.

[6] Regarding the Crown election to proceed summarily or by indictment, Crown counsel should not elect to proceed summarily simply so that a conditional sentence would remain available to the accused.<sup>5</sup>

[7] Likewise, concerning plea resolution and sentencing discussions, in keeping with the will of Parliament, it will generally be inappropriate to either agree to a plea to a lesser offence, or stay or withdraw a charge, where the evidence supports the original charge, so that the accused will remain eligible for a conditional sentence. For example, if the accused is charged with an offence that is punishable by an MMP, or that is an indictable offence punishable by 14 years or life, Crown counsel should not generally agree to a plea to a lesser offence so that a conditional sentence will be available to the accused.

#### *Stay, Withdrawal or Accepting Plea to a Lesser Offence*

[8] If Crown counsel wishes to stay or withdraw a charge, or take a plea to a lesser offence, so that a conditional sentence will remain available to the accused, the prior consent of the Chief Federal Prosecutor (CFP) or his/her delegate is required. Counsel must provide the CFP with a written memorandum setting out the basis for the stay, withdrawal or plea and explaining why the proposed course of action is in the public interest. For example, there may be situations where the lack of availability of a conditional sentence would likely result in an unduly harsh consequence under the circumstances of a particular case, such as where the unavailability of a conditional sentence would result in young children being left with no caretaker. In such situations, Crown counsel might exercise discretion to reach a resolution that would permit a conditional sentence. However, if the reason for the stay or withdrawal is due to the threshold for prosecution (a reasonable prospect of conviction) not being met, the above-mentioned consent is not required.

#### *Obtaining Prior Consent not Feasible*

[9] Where it is not feasible for Crown counsel to obtain the CFP's consent beforehand, Crown counsel may stay, withdraw, or agree to a plea to a lesser offence, which would enable the accused to remain eligible for a conditional sentence. In such circumstances, Crown counsel must provide to the CFP, as soon as practicable after doing so, a written memorandum demonstrating how the proposed course of action was in the public interest and why it was not feasible to seek consent beforehand.<sup>6</sup> Crown counsel must also ensure that the memorandum is placed on the file.

[10] During sentencing submissions, it will also be important for Crown counsel to remind the judiciary that the principles of sentencing for adults in the *Criminal Code* have not changed.

---

<sup>5</sup> The PPSC policy regarding Crown elections in relation to dual procedure offences is explained in Chapter 19 of the Deskbook.

<sup>6</sup> Such circumstances must be understood as exceptional. Crown counsel are expected to make every effort to contact the CFP or his/her delegate in person, by email or by telephone, when necessary, to seek consent in all circumstances. Crown counsel may only stay, withdraw a charge, or agree to a plea to a lesser offence, which would result in a conditional sentence being available to the accused where it otherwise would not be, if reasonable attempts were made to contact the CFP or his or her delegate and where obtaining an adjournment of the case in order to seek the consent would not be feasible and might otherwise jeopardize the prosecution.

Judges must continue to sentence in accordance with the sentencing principles and the jurisprudence, to the extent that the jurisprudence has established the applicable sentencing principles, sentence range, and overall sentence fitness in certain types of cases. Crown counsel can reasonably argue that Parliament has not altered the sentencing principles but merely restricted sentencing options in relation to certain kinds of offences. For example, probation will not be appropriate as a result of these amendments in situations where it was not appropriate before.

[11] Finally, Crown counsel should never hesitate to consult senior PPSC colleagues and managers when engaged in resolution discussions and the preparation of sentencing submissions. Crown counsel should also remain mindful of their obligation to consult managers in appropriate circumstances as outlined in the Deskbook and in relevant Guidelines.

### **Conclusion**

[12] It will generally be inappropriate for Crown counsel to take a plea to a lesser offence, or stay or withdraw a charge, when it is done with the intent of ensuring that a conditional sentence remains available to the accused, where the evidence supports the original charge. In exceptional circumstances deviating may be acceptable and must be done in accordance with the present guideline.

**Annex A:** Non-*Criminal Code* Offences Punishable by a Maximum Sentence of 14 Years Imprisonment

**Annex B:** Non-*Criminal Code* Offences Punishable by a Maximum Sentence of Life Imprisonment