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A Comparative Empirical Analysis of Sentencing Trends in Canada:

1983-1984 and 1999-2000

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**Submitted to the Department of Criminology, University of Ottawa, in partial
fulfillment of the requirements for a degree of Master of Arts**

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Abstract

This thesis provides a comparative analysis of sentencing patterns in two time periods separated by seventeen years. Research of this type has not been attempted previously, due to the limited availability of historical sentencing data. Using statistics obtained from the Royal Canadian Mounted Police's Fingerprint System from 1983-1984 and the Canadian Centre for Justice Statistics' Adult Criminal Court Survey for 1999-2000, this study examines whether recommendations made by various federal inquiries into sentencing have affected judicial decision-making at the trial court level. At the core of this discussion is an examination of those initiatives aimed at reducing the use of imprisonment as a sanction.

Comparisons reveal that sentencing patterns in 1983-1984 differed significantly from those present in 1999-2000. In some cases, it appears as though the changes were in accordance with recommendations of the federal inquiries whereas in others, the patterns that were discovered seemed to indicate that judges ignored or even defied the directives given. With regard to the promotion of community sanctions, there was an overwhelming increase in the use of probation. In contrast, the findings with respect to the use of imprisonment were more ambiguous; while the overall decrease in the rate of incarceration had been a stated objective, the manner in which this reduction was achieved appears to contradict the recommendations of the inquiries. Essentially, this study shows that, despite the wealth of time and research devoted to the reform of the sentencing process in this country, the impact of these efforts on judicial practices has been minimal.

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Chapter One

INTRODUCTION

Considered by many to be the apex of the criminal justice system, sentencing is a complex process that has been the subject of much discussion and which has generated much controversy. Throughout the past three decades, politicians, lawmakers, academics and the public have been engaged in the debate surrounding sentencing practices. During this time, several Parliamentary Committees and Royal Commissions have suggested ways to reform this process. The central recommendation made by these federal bodies was the immediate enactment of a coherent policy that would guide judges in the determination of a sentence. It was not until recently however, with the proclamation of Bill C-41 in 1996, that the statutory framework of sentencing in Canada was significantly amended. This legislation included several measures, one of the most important of which appears to have been the codification of a purpose and principles of sentencing (see Daubney and Parry, 1999; Roberts and Cole, 1999, for discussion).

Throughout this era of sentencing reform, one practice consistently identified by the Commissions of Inquiry as a serious problem was Canada's over-reliance¹ on incarceration. In light of this observation, the adoption of several measures aimed at reducing the use of this sanction were recommended. By specifying the circumstances under which a term of imprisonment could be imposed, it was expected that the use of incarceration would be greatly reduced. As a result of these recommendations, the sentencing reforms of 1996 introduced into legislation a number of changes to the

¹ The belief that Canada imprisons more people than is necessary is well established in Canadian criminal justice literature. See Doob (1997) for discussion.

Criminal Code that were intended to promote the use of penalties other than imprisonment.

Current Research Project

As there is very little knowledge regarding the impact of such recent policy statements and Commissions of Inquiry on sentencing practices, this thesis will provide a framework through which these initiatives can begin to be assessed. The critical question of whether Commissions of Inquiry have influenced sentencing patterns at the trial court level will be addressed. This will be accomplished by comparing sentencing data from 1983-1984 to similar data from 1999-2000. Specifically, the focus of this analysis will be on those aspects of reform amenable to empirical evaluation, namely changes in the use of the primary sentencing options. Given the efforts of the Commissions of Inquiry to reduce the use of imprisonment, as well as the wealth of information available on this subject in both time periods, a significant part of this study will be dedicated to an evaluation of this particular sanction.

Importance of Research

This project is innovative as it is the first time these particular data from the 1980s have been compared with current statistics on sentencing. In fact, it is the first time historical comparisons of this nature have ever been made. Accordingly, as most analyses of sentencing trends involve comparisons between different offences or across jurisdictions, comparing data from different time periods addresses a gap in the literature. The availability of systematic data on sentencing also serves a number of other purposes.

First, in addition providing judges with the opportunity to assess their own sentencing practices against that of their peers, it would allow them to gain a historical perspective on the sentencing patterns of their predecessors. Second, as the public generally acquires information about sentencing through simplistic, often sensationalized, media accounts, increased access to reliable information will better inform public opinion about the nature and severity of the sentencing process (Roberts, 1999b: 157). Further, since public opinion plays an important role in the development of criminal justice policy (Roberts and Stalans, 1997), a knowledgeable public can also aid the implementation of more effective legislation. Finally, in evaluating the use of imprisonment in two time periods, changes in the punitiveness of the Canadian criminal justice system can be explored.

Overview of Thesis

An introduction to this study has been provided in **Chapter One**. After outlining the history of sentencing reform in **Chapter Two**, the remainder of this thesis will consist of an empirical analysis of sentencing patterns in Canada. This analysis will focus on a comparison of sentencing data collected in 1983-1984 with similar data from 1999-2000. An examination of these data presents an opportunity to explore variations in sentencing and, in particular, the use of incarceration over time. In **Chapter Three**, the methodological approach to this study will be provided. The sentencing patterns that emerge from a comparison of the data from the two time periods will then be presented in **Chapter Four**. Possible explanations for these findings will be discussed at this time. In **Chapter Five**, a summary overview of major findings of this study will be provided along with the limitations of this project and some suggested directions for future

research. Lastly, potential policy implications of this study will be discussed in **Chapter Six**.

Chapter Two

RECENT HISTORY OF LEGISLATIVE DEVELOPMENTS

Overview

This chapter will summarize the history of sentencing reform in Canada, tracing the earliest stages of this process to the various Parliamentary Committees and Royal Commissions mandated to investigate sentencing practices in this country. As the recommendations regarding the use of imprisonment are pivotal to this study, these will be discussed in greater detail. Taking this historical context into consideration, a comprehensive evaluation of the 1996 reforms will then be provided. Finally, numerous Supreme Court decisions will be examined in order to determine the manner in which the courts have interpreted these reforms.

Historical Review of Sentencing Reform in Canada

A. The Canadian Committee on Corrections (1965-1969)

Chaired by Justice Roger Ouimet, this Committee was tasked with studying "... the broad field of corrections, in the widest sense, from the initial investigation of an offence through to the final discharge of a prisoner from imprisonment or parole..." (1969: 1). In its report entitled *Toward Unity: Criminal Justice and Corrections*, the Committee devoted one chapter to an examination of sentencing, identifying the protection of society as the primary aim of this process. The Committee stated that the best way to achieve this goal was by rehabilitating offenders, preferably through the imposition of non-custodial sanctions. However, the Committee noted that, "...the way

in which sentencing provisions are set out in the Criminal Code has inclined the courts to take a particular attitude as to their duty to impose sentences of imprisonment” (1969: 191). In order to combat this belief, the Committee argued that a wider range of non-custodial dispositions needed to be made available. For example, the Committee recommended the creation of the absolute discharge for first-time offenders charged with minor offences. They also called for the increased availability of probation and fines in lieu of imprisonment.

In terms of when to impose a sentence of imprisonment, the Committee proposed amending the *Criminal Code* to include a statement similar to the following, found in the official draft of the 1962 Model Penal Code of the American Law Institute:

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

Essentially, this statement would have restricted the use of imprisonment to the following categories of offenders: those who would likely re-offend if permitted to remain in the community, those in need of rehabilitative services that only a prison could provide² or those who had committed a crime that was serious enough to warrant a term of

² In terms of using prison to rehabilitate offenders, as it has subsequently been demonstrated, the efficacy of correctional treatment is questionable, as is a judge's determination of this need. For an analysis of this position, see Veneziano (1986).

incarceration. By specifying the circumstances under which the public must be protected, this statement would have provided judges with unequivocal direction as to the use of imprisonment. In addition, by also recommending that judges provide written reasons whenever a term of imprisonment is imposed, the Committee removed the presumption of incarceration in the sentencing of offenders (1969: 212).

The adoption of the statement proposed by members of the Committee, along with their commitment to the increased use of non-custodial sanctions, would have provided the impetus for actual change in the sentencing of offenders. Further, calling for the repeal of mandatory minimum sentences, except those for murder, as well as the elimination of imprisonment for the inability to pay a fine, would certainly have contributed to an overall decrease in the use of custody. Considering the fact that the Ouimet Committee report appears to have been the first articulation of this type of reform, it is not surprising that most of the Committee's recommendations with reference to sentencing were not adopted. Nonetheless, the Committee's work laid much of the foundation for subsequent research in this area.

B. Federal Government Proposals (1969-1984)

Following the Report of the Canadian Committee on Corrections, a series of reviews of the criminal law and sentencing practices in Canada was undertaken. The Law Reform Commission of Canada (LRCC) completed the first of these, submitting their report on dispositions and sentencing to Parliament in 1976. The LRCC concluded that the entire criminal justice system should be used only when other mechanisms fail. This was therefore the first articulation of the policy of restraint with respect to the

criminal law. As such, the LRCC proposed that a number of restrictions be placed on the use of custody, namely that imprisonment be used only if less severe sanctions were deemed inappropriate. While this was the first major report to Parliament dealing specifically with sentencing, it did not provide a comprehensive set of recommendations and no legislative changes were contemplated (Canadian Sentencing Commission, 1987: 53).

In 1981, the federal Department of Justice and the Ministry of the Solicitor General launched the Criminal Law Review. As part of this process, the federal government articulated its policy with respect to criminal law by way of a document entitled *The Criminal Law in Canadian Society* (1982). Approximately one year later, an accompanying document entitled *Sentencing* (1983) revealed the government's policy with respect to the sentencing process. Drawing heavily on the work of the Canadian Committee on Corrections and the Law Reform Commission of Canada, the government declared its intention to incorporate a statement of the purposes and principles underlying sentencing into law as well as its willingness to prioritize non-carceral sentences. Ultimately, these statements would become part of Bill C-19. Introduced in 1984, this Bill consisted of an amalgam of *Criminal Code* amendments. Although it died on the order paper, the aspects of Bill C-19 that dealt with sentencing were referred to the Canadian Sentencing Commission (hereafter CSC), a Royal Commission of Inquiry established in the same year.

C. The Canadian Sentencing Commission (1984-1987)

Mandated to investigate all aspects of sentencing in Canada, it took the CSC three years to develop its comprehensive sentencing reform package. The Commission's final report entitled *Sentencing Reform: A Canadian Approach* identified a number of serious problems with the sentencing process, including Canada's over-reliance on incarceration. In fact, the CSC noted that "...although we regularly impose this most onerous and expensive sanction, it accomplishes very little apart from separating offenders from society for a period of time" (1987: xxiii). In light of this observation, the CSC endeavored to be as explicit as possible in its recommendations with respect to the use of incarceration (1987: 17).

The justification for the imposition of any legal sanction was to be found within the CSC's Declaration of the Purpose and Principles of Sentencing. The CSC decided that the fundamental purpose of sentencing would be "...to preserve the authority of, and promote respect for the law through the imposition of just sanctions" (1987: 153). To assist judges in the pursuit of this goal, the CSC provided the following statement of principles:

- (a) The paramount principle governing the determination of a sentence is that the sentence be proportionate to the gravity of the offence and the degree of responsibility of the offender for the offence.
- (b) Second, the emphasis being on the accountability of the offender rather than punishment, a sentence should be the least onerous sanction appropriate in the circumstances and the maximum penalty prescribed for an offence should be imposed for only the most serious cases.
- (c) Subject to paragraphs (a) and (b) the court in determining the sentence to be imposed shall consider the following:
 - (i) any relevant aggravating and mitigating circumstances;

- (ii) a sentence should be consistent with sentences imposed on other offenders for similar offences committed in similar circumstances;
 - (iii) the nature and combined duration of the sentence and any other sentence imposed on the offender should not be excessive;
 - (iv) a term of imprisonment should not be imposed, or its duration determined, solely for the purpose of rehabilitation;
 - (v) a term of imprisonment should be imposed only:
 - aa) to protect the public from crimes of violence
 - bb) where any other sanction would not sufficiently reflect the gravity of the offence or the repetitive nature of the criminal conduct of an offender, or adequately protect the public or the integrity of the administration of justice,
 - cc) to penalize an offender for willful non-compliance with the terms of any other sentence that has been imposed on the offender where no other sanction appears adequate to compel compliance.
- (d) In applying the principles contained in paragraph (a), (b), and (c), the court may give consideration to any one or more of the following:
- (i) denouncing blameworthy behaviour;
 - (ii) deterring the offender and other persons committing offences;
 - (iii) separating offenders from society, where necessary;
 - (iv) providing for redress for the harm done to individual victims or to the community;
 - (v) promoting a sense of responsibility on the part of offenders and providing for opportunities to assist in their rehabilitation as productive and law-abiding members of society.

Underlying the CSC's entire approach were the principles of proportionality and restraint, as contained in paragraphs (a) and (b) respectively. As a fundamental principle of the just deserts philosophy (von Hirsch, 1976: 1993), proportionality requires that the penalty imposed be proportionate to the seriousness of the crime committed and, to a lesser degree the culpability of the offender. The principle of restraint calls for the imposition of the least onerous sanction that still achieves the overall goal of the sentence. Although not explicit in their intended effect, the way in which these principles are interpreted has important repercussions for the use of imprisonment. For instance, critics have suggested that criminal justice policies based on the just deserts approach led to an increase in prison populations in the United States and therefore should not have been the guiding principle of sentencing reform in Canada (Grygier, 1988; Gabor, 1990). However, in response to these critics, von Hirsch (1990; 1993) argued that coupling proportionality with the principle of restraint was actually indicative of the CSC's intent to reduce the use of imprisonment. This is because, once penalties were structured according to the gravity of the offence, incarceration would then be reserved for only the most serious of crimes.

More precise direction regarding the use of imprisonment was provided in paragraph (c), sub-sections (iv) and (v). In specifying the circumstances under which a term of imprisonment should be imposed, the CSC practically duplicated the statement provided by the Canadian Committee on Corrections. The only notable exceptions were that a term of imprisonment should not be imposed solely for the purpose of rehabilitation and that an offender should be incarcerated only when no other sanction appears sufficient to compel compliance. While the Committee's statement is

commendable in its simplicity, the CSC's decision to include this direction among so many other considerations may obscure its potential effectiveness in terms of changing sentencing practices. In fact, a common criticism of the CSC's approach to reform is that, while the declaration may have been the most comprehensive to date, it would have failed to provide judges with clear guidance (Roberts and von Hirsch, 1992: 335).

While it is unlikely that the Declaration alone would have resulted in a reduction in the use of imprisonment, the CSC provided concrete sentencing guidelines to assist trial judges in the determination of the nature and quantum of a sentence. Under this scheme, all *Criminal Code* offences were assigned to one of four categories of presumptive dispositions reflecting the seriousness of the offence and, by inference, the likelihood of imprisonment (Roberts, 1997a: 245). Although it was expected that judges would impose the recommended disposition, they could depart from this scheme, and in some cases increase the sentence imposed by up to fifty percent higher than the stated maximum penalty, as long as written reasons were provided for this exceptional sentence.

According to this guideline scheme, certain offences were presumed to be punished by way of a community sanction. This view is consistent with the CSC's pursuit of the principles of proportionality and restraint as it was recognized that certain, less serious offences were not deserving of imprisonment. As many individuals convicted of such offences had typically been sentenced to a term of incarceration, this scheme would undoubtedly have been effective in reducing the use of custody (Doob, 1990: 426). At the same time, the promotion of community sanctions as legitimate penalties would have helped to validate them as sentences in their own right.

Overall, the CSC made a concerted effort to address the issue of the overuse of imprisonment through the Declaration of Purpose and Principles of Sentencing and the accompanying presumptive sentencing guidelines. Further, they reiterated the Canadian Committee on Corrections' recommendations to eliminate imprisonment for fine default and repeal mandatory minimum sentences, except those for murder and treason. Ultimately, the federal government rejected the CSC's reform package for several reasons. To begin with, most judges did not want any form of sentencing guidelines (Daubney and Parry, 1999: 36). Curiously, the CSC appeared aware of this, noting that there existed "...the mistaken belief that any guidelines which are developed by a source other than the Courts of Appeal are mandatory in nature and take away the discretion of the sentencing judge" (1987: 271). However, they had hoped that this misconception could have been overcome through the education of criminal justice professionals, including and especially judges.

Second, the provinces heavily scrutinized the proposed changes, in particular those measures attempting to reduce the use of incarceration as a sanction. According to Roberts and von Hirsch, reforms that would have "...reduced sentences of imprisonment would probably have the effect of decreasing federal populations at the expense of provincial admissions" (1992: 325). Although the federal government is responsible for enacting legislation, without the cooperation and financial support of the provinces, reforms such as the CSC's are unlikely to be implemented.

Finally, a number of the CSC's other recommendations, such as the abolition of parole and the reforms to the maximum penalty structure, also attracted criticism. With so much opposition to their reform package, it is perhaps not surprising that the CSC's

recommendations were not enacted into legislation. Instead, their report became an integral part of a subsequent Parliamentary Standing Committee's review of sentencing, conditional release and related aspects of the correctional system.

D. The Standing Committee on Justice and Solicitor General (1987-1988)

Chaired by Member of Parliament David Daubney, this Committee published its report entitled *Taking Responsibility* in the fall of 1988. As part of its mandate, the Daubney Committee consulted extensively within the criminal justice field, as well as with members of the public. In so doing, they sought reforms that would specifically address Canadians' concerns with the criminal justice system. Like the reports that had come before it, the Daubney Report identified the overuse of incarceration as a significant problem associated with the sentencing process in Canada. The Committee also noted that Canadians generally supported the allocation of resources for developing alternative sanctions (1988: 9). Taking these views into consideration, the Daubney Committee developed an approach to sentencing reform that attempted to reduce the use of imprisonment by increasing the availability and effectiveness of alternative measures. The framework for this approach was similar to the one provided by the Canadian Sentencing Commission, and consisted primarily of an articulation of the purpose and principles of sentencing and a voluntary sentencing guideline system.

The Daubney Committee identified the maintenance of a just, peaceful and safe society as the fundamental purpose of sentencing. This purpose was to be achieved by holding offenders accountable for their actions through the imposition of sanctions which:

- (a) require, or encourage when it is not possible to require, offenders to acknowledge the harm they have done to victims and the community, and to take responsibility for the consequences of their behaviour;
- (b) take account of the steps offenders have taken, or propose to take, to make reparations to the victim and/or the community for the harm done and to otherwise demonstrate acceptance of responsibility;
- (c) facilitate victim-offender reconciliation where victims so request, or are willing to participate in such programs;
- (d) if necessary, provide offenders with opportunities which are likely to facilitate their habilitation or rehabilitation as productive and law-abiding members of society; and
- (e) if necessary, denounce the behaviour and/or incapacitate the offender.

Throughout these paragraphs, the Committee suggests a variety of ways in which offenders are to take responsibility for their behaviour (Mohr, 1990: 533). Incapacitation, which is mentioned only as the last way of achieving this goal, is almost exclusively achieved through imprisonment. Listing it as a final consideration may imply that custody is to be used only as a last resort. Further, upon closer examination of paragraphs (a) through (d), it does not appear that imprisonment is deemed essential to the promotion of offender accountability.

In addition to the detailed instructions on achieving the purpose of sentencing, the Daubney Committee also recommended that the following principles be codified:

- (a) The sentence should be proportionate to the gravity of the offence and the degree of responsibility of the offender; further, it should be consistent with the sentences imposed on other offenders for similar offences in similar circumstances (including, but not limited to, aggravating and mitigating circumstances, relevant criminal record and impact on the victim);
- (b) The maximum penalty should be imposed only in the most serious cases;
- (c) The nature and duration of the sentence in combination with any other sentence imposed should not be excessive;

- (d) A term of imprisonment should not be imposed without canvassing the appropriateness of alternatives to incarceration through victim-offender reconciliation programs or alternative sentence planning;
- (e) A term of imprisonment should not be imposed, nor its duration determined, solely for the purpose of rehabilitation;
- (f) A term of imprisonment should be imposed where it is required:
 - (i) to protect the public from crimes of violence, or
 - (ii) where any other sanction would not sufficiently reflect the gravity of the offence or the repetitive nature of the criminal conduct of an offender, or adequately protect the public or the integrity of the administration of justice; and
- (g) A term of imprisonment may be imposed to penalize an offender for wilful non-compliance with the terms of any other sentence that has been imposed on the offender where no other sanction or enforcement mechanism appears to compel compliance.

The Daubney Committee appears to have essentially reproduced the Canadian Sentencing Commission's statement, with some notable modifications. Paragraph (d) would have legislated that all appropriate alternatives to incarceration be considered before handing down a sentence. During the course of its inquiry, the Daubney Committee investigated the viability of a wide range of alternatives to imprisonment, including home confinement, victim-offender mediation and enhanced probation services. In evaluating existing community programs, the Committee was able to recommend effective alternatives to imprisonment.

In conjunction with the direction that judges seek alternatives, paragraphs (e), (f) and (g) also put restrictions on the use of imprisonment. On the whole, however, the Daubney Committee's statement suffers from the same problems as the CSC's Declaration of the Purposes and Principles of Sentencing. The statement is too complicated and does not provide judges with clear guidance on how a sentence is to be

determined. While the CSC addressed these problems by providing presumptive sentencing guidelines, the Daubney Report recommended no such mechanism. Although it endorsed the CSC's guideline scheme, the Daubney Committee chose to make the guidelines purely advisory in nature (1988: 65). While this would have addressed some of the criticism directed at the CSC, it has been noted that advisory guidelines have very little effect on sentencing practices (Roberts, 1990a: 552; Tonry, 1996).

Although the Committee's attempts to address public concerns with sentencing reform were commendable, it essentially produced what has been described as "...a somewhat watered down, occasionally toughened up, and sometimes contradictory set of proposals" (Doob, 1997a: 171). For instance, as the Committee had also advocated for the introduction of a new mandatory minimum sentence, their commitment to reducing imprisonment was somewhat questionable. In the end, the Daubney Committee's report was overshadowed by the 1988 federal election, and, consequently, fell by the wayside (Roberts, 1990b: 382; Doob, 1997a: 171). Nevertheless, elements of the Committee's suggestions for reform were subsequently to emerge in the federal government's proposals. It is to these that we now turn.

E. Federal Government Proposals (1988-1994): The Road to Bill C-41

In late 1990, the federal government released the discussion paper *Sentencing: Directions for Reform* that consisted of an amalgam of past proposals, including a modified statement of the purpose and principles of sentencing. This document proposed that a permanent commission on sentencing and parole be established in order to provide sentencing guidelines. In this paper, the government also declared its intention to

continue examining the efficacy of expanding the range of available community sanctions in order to reduce the use of incarceration (Canada, 1990: 17). That same year, Minister of Justice Kim Campbell stated that her department was committed to introducing legislation that would address concerns with the sentencing process that had been raised over the previous two decades (Campbell, 1990: 387). These positions were later reflected in Bill C-90, tabled in 1992 that, with the calling of a federal election in 1993, had died on the Order Paper. In 1994, after the Liberals replaced the Conservatives as the ruling political party, Bill C-90 was resurrected in the form of Bill C-41 (Brodeur, 1999: 333).

F. Bill C-41 (1994-1996)

Introduced in 1994, Bill C-41, entitled “An Act to amend the Criminal Code (sentencing) and other Acts in consequence thereof,” represented the first major reform of sentencing practices in Canada in many decades. As federal Minister of Justice, Allan Rock promised that this bill would, through a number of the proposed changes, finally address the overuse of imprisonment as a sanction (House of Commons Debates, 1994). One of the measures introduced that was purported to have such an effect was the introduction of the conditional sentence of imprisonment. Created to allow offenders convicted of non-serious offences to serve a sentence of up to two years less a day in the community, this disposition was intended as a true alternative to imprisonment (Gemmell, 1999: 64; Roberts and Healy, 2001).

Another way in which this reform attended to this issue was by limiting the circumstances in which a term of imprisonment could be imposed for the inability to pay

a fine (Manson, 1999: 478). Adopting a measure that had often been recommended in the past, judges are now required to consider an offender's ability to pay a fine before imposing one. While these were significant changes, the introduction of a Statement of the Purpose and Principles of Sentencing represented the first time judges were given legislative guidance with respect to the determination of sentences (Doob, 1997b: 241).

Bearing a strong resemblance to the previously recommended statements, Bill C-41 set out the following in Section 718 of the Criminal Code:

The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful society by imposing just sanctions that have one or more of the following objectives:

- (a) to denounce unlawful conduct;
- (b) to deter the offender and other persons from committing offences;
- (c) to separate offenders from society, where necessary;
- (d) to assist in rehabilitating offenders;
- (e) to provide reparations for harm done to victims or to the community; and
- (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.

Most of the objectives contained within this statement represent the traditional goals of sentencing. Paragraphs (e) and (f), however, explicitly acknowledge the victims of crime, thereby placing an emphasis on the objectives of restorative justice. The inclusion of such notions not only attempts to accommodate the rights of victims, but also provides judges with an alternative sentencing paradigm. Judge Bayda (1997), the Chief Justice of Saskatchewan, has stated that, as restorative justice is typically not associated with the use of imprisonment, these objectives now allow judges to justify the use of non-

custodial sentences. On the one hand, the inclusion of these restorative objectives among a number of traditional goals seems to provide the impetus for reducing the use of incarceration. However, because the statement also allows judges to pursue any number of the enumerated goals, it actually "...offers little guidance and, accordingly, may have little impact on sentencing practices at the trial court level" (Roberts, 1997a: 246).

Following the statement of purpose are a number of principles, contained in Sections 718.1 and 718.2 that must also be considered when imposing a sentence:

718.1 Fundamental principle – a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

718.2 Other sentencing principles – a court that imposes a sentence shall also take into consideration the following principles:

- (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,
 - (i) evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation or any other similar factor,
 - (ii) evidence that the offender, in committing the offence, abused the offender's spouse or child, or
 - (iii) evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim, or
 - (iv) evidence that the offence was committed for the benefit of, at the direction of or in association with a criminal organization

shall be deemed to be aggravating circumstances;

- (b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;
- (c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;
- (d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and
- (e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

Paragraph (d), representing the codification of the principle of restraint, and paragraph (e), which stresses the use of alternatives to custody, signify Parliament's attempts to reduce the use of imprisonment. While both principles were present in previous statements of purpose, the explicit mention of aboriginal offenders in paragraph (e) represents a formal recognition of the overrepresentation of native peoples in the Canadian correctional system.

In reviewing these principles, it becomes evident that the government's commitment to reduce incarceration is perhaps not as strong as its rhetoric would suggest. To begin with, the language used in paragraphs (d) and (e) is somewhat weak. For example, instead of stating that an offender *must* not be deprived of their liberty, or that alternatives *must* be considered for all offenders, the more permissive *should* is used. By allowing room for interpretation, the specific intention of these principles may be circumvented (see Roberts and von Hirsch, 1995).

Absent from these principles is a paragraph listing the circumstances under which it is appropriate to impose a sentence of incarceration. This absence is notable, as similar statements had consistently been recommended since the Canadian Committee on Corrections released its Report in 1969. While this in itself does not pose a significant

problem, the fact that the 1996 reform also omits any form of sentencing guidelines makes the clarity of the statement of purpose and principles all the more important. In fact, it has been suggested that, in the absence of such guidance, "...the statement of purpose becomes critical: it becomes the sole vehicle to effect reform of current practice" (Roberts and von Hirsch, 1992: 351). Finally, in the same year that Bill C-41 was introduced, the government amended the *Criminal Code* to create new mandatory minimum sentences for ten offences if these crimes were committed with a firearm. If the government were so intent on reducing imprisonment, why then would they introduce sentences that necessitate the use of custody?

Despite their weaknesses, the 1996 sentencing reform represents the first time legislation has suggested that prison should not be the normal expected sentence for all offenders (Doob, 1997b: 242). However, due to the ambiguity of the aforementioned provisions, the courts' interpretation of the reforms is of utmost importance. Essentially, the decisions rendered by the courts will determine whether or not Parliament's attempts to reduce the use of incarceration will be successful. At this point, a review certain key judgments from the Supreme Court of Canada is provided.

G. Supreme Court Judgments

The first Supreme Court interpretation of Bill C-41 came in 1999 with *R. v. Gladue*. In this case, the Supreme Court was asked to interpret the principles governing the application of Section 718.2 (e) with respect to the consideration of alternatives for aboriginal offenders. In handing down their decision, the Court made a number of important clarifications of this Section. To begin with, they recognized that this Section

was Parliament's attempt to address the overuse of incarceration for all offenders, and, in particular, the overrepresentation of aboriginal offenders in Canadian prisons (paragraph 50). Further, the Supreme Court held that this emphasis on aboriginal offenders was appropriate, as there are unique background and systemic factors affecting native peoples that must be taken into consideration when determining a sentence. Lastly, they suggest that the existing overemphasis on incarceration may be due to the inaccurate perception of restorative justice as a more lenient response to crime. In order to make sentences more meaningful for all offenders, particularly aboriginals, the Supreme Court acknowledged the importance and validity of pursuing principles of restorative justice.

However, at paragraph 79, the Court qualifies this conclusion with the statement that

generally, the more violent and serious the offence, the more likely it is as a practical reality that the terms of imprisonment for aboriginals and non-aboriginals will be close to each other or the same, even taking into account their different concepts of sentencing.

This would seem to suggest that the Supreme Court is of the opinion that, as the seriousness of an offence increases, the applicability of the goals of restorative justice decrease. This position is later reiterated by the Court in *R v. Wells* (2000). In this case, the Supreme Court ruled that, for serious offences, the principles of restorative justice should not be given consideration above the traditional principles of denunciation, deterrence and separation. Therefore, while the *Gladue* decision appears initially to have been a clear validation of Parliament's attempt to reduce the use of incarceration, particularly for aboriginals, Campbell (2000) notes that the Supreme Court's reluctance to fully embrace restorative measures may have nullified the potential effectiveness of

Section 718.2 (e). (Although it is important to the sentencing process, the significance of Section 718.2 (e) will not be discussed further in this thesis.)

In *R v. Proulx* (2000), the Supreme Court was given the opportunity to provide guidance regarding the construction and imposition of a conditional sentence of imprisonment. The Court acknowledged that this newly created disposition was intended by Parliament to be a meaningful alternative to imprisonment and, therefore, consistent with Bill C-41's goal of reducing the use of custody (paragraph 21). As Parliament has specified that the imposition of a conditional sentence must be consistent with the purposes of sentencing, the Supreme Court attempted to determine the circumstances under which a conditional sentence was appropriate. In paragraphs 104-112, it is suggested that conditional sentences are generally better suited for achieving the goals of rehabilitation and restorative justice. As such, the Court maintained that, if a judge were to pursue the goals of denunciation and/or deterrence, these would better be accomplished by continuing to impose sentences of incarceration.

In making this determination, the Supreme Court failed to position the conditional sentence as a true alternative to incarceration. While the Court did suggest that conditional sentences could achieve the goals of denunciation and deterrence, they might have to be made longer in order to carry the punitive impact of a term of imprisonment. However, as the Supreme Court also stated that offenders should be imprisoned for the balance of their sentence upon violation of the terms of their conditional sentence order, concerns have been raised over the possibility that conditional sentences may actually increase the rate of incarceration (Roach and Rudin, 2000: 369). This is based on the

notion that, if the conditions are made more onerous, there is a greater likelihood that offenders will violate them, and be committed to custody.

In enacting Bill C-41, Parliament effectively allowed the courts to determine the extent to which these reforms would contribute to the reduction in the use of imprisonment. While mindful of the need to reduce rates of incarceration, the Supreme Court seems hesitant to generate real change in this area. This appears to be a result of the court's insistence that the goals of denunciation and deterrence can only effectively be achieved through the use of incarceration. Furthermore, in recent decisions³, the Court has gone as far as using these particular goals to justify the existence of mandatory minimum sentences of imprisonment. Therefore, although the Supreme Court has been presented on numerous occasions with the opportunity of providing clear guidance on reducing the use of custody, it has thus far failed to do so.

Summary

The sentencing process in Canada has been the focus of considerable criticism, inquiry and reform over the past thirty years. At the centre of this discussion has been the recognition that the high rate of incarceration in this country is unacceptable. One approach consistently recommended to alleviate this problem has been to provide judges with direction as to the use of this sanction. While the guidance initially suggested by the Canadian Committee on Corrections was clear and concise, subsequent versions have provided less definitive direction, the least of which was given in the form of Bill C-41. Unfortunately, as the 1996 reform failed to enact more substantial changes, it appears as

³ See *R. v. Morrissey* (2000) and *R. v. Latimer* (2001).

though the debate on how to reduce Canada's incarceration rate has simply moved to the courts. With the availability of such a substantial and well-publicized body of research, the hope is that the knowledge garnered during this reform process transcends the ambiguity of the 1996 legislation. A summary of the recommendations made by the various federal inquiries into sentencing is provided in Table 1.

Table 1: Summary of the Recommendations of the Federal Inquiries into Sentencing, 1969-2000

Federal Inquiry	Recommendations
The Canadian Committee on Corrections (1965-1969)	• The protection of society is to be the guiding principle of the sentencing process. • In order to promote the use of alternatives to prison, a wider range of non-custodial dispositions should be made available. • There should be greater use of fines. Imprisonment for fine default should be limited. • Prison should be reserved for recidivists, those in need of rehabilitation or those who pose a risk to the community.
The Canadian Sentencing Commission (1984-1987)	• The overriding purpose of sentencing is the promotion of respect for the law through the imposition of just sanctions. • The imposition of any sentence should take into consideration the principles of proportionality and restraint. • The increased use of community sanctions should be promoted through the use of presumptive dispositions. • A term of imprisonment should only be imposed to protect the public from crimes of violence, to penalize an offender for not complying with a court ordered sanction, or where no other sanction would sufficiently reflect the seriousness of the crime.

The Standing Committee on Justice and the Solicitor General (1987-1988)

- The purpose of sentencing is to maintain a just, peaceful and safe society.
- The availability and effectiveness of alternative sanctions should be increased.
- A term of imprisonment should only be imposed when all alternatives to incarceration have been considered, to protect the public from crimes of violence, where no other sanction would sufficiently reflect the seriousness of the crime or to compel compliance from an offender.

Bill C-41, enacted 1996

- The fundamental purpose of sentencing is to contribute to the maintenance of society through the imposition of just sanctions.
 - Sentencing is to be guided by the principle of proportionality.
 - Imprisonment is to be used with restraint and all alternatives to incarceration should be considered before sentencing an offender to prison.
 - There must be consideration for an offender's ability to pay a fine before imposing this sanction.
 - The Criminal Code will be amended to allow for the creation of a conditional sentence of imprisonment.
-

Chapter Three

METHODOLOGY

Overview

The general objective of this study is to provide a historical comparison of sentencing patterns in two time periods separated by fifteen years. In order to perform this task, sentencing data⁴ from 1983-1984 will be compared with data obtained from the Adult Criminal Court Survey for 1999-2000. These particular sources have been chosen as they contain the most comprehensive sentencing statistics available in Canada. In fact, apart from the 1983-1984 database, systematic information pertaining to sentencing practices was not available between 1973-1993. Nevertheless, due to the length of time separating the periods being compared, this study is limited in terms of the depth of analysis that can be performed and as such will be primarily descriptive.

Key Concepts

Before proceeding to an account of the databases, the precise meaning of a variety of terms that are of particular importance within the context of this study will be provided.

- a. **Disposition** – A disposition can be any one of a number of sentencing options available in Canada. Principally, these include fines, probation, or imprisonment. For a further discussion of sentencing options in Canada, see Edgar (1999).
- b. **Fine** – A fine involves the payment of money to the appropriate authorities within a specified period of time. Providing that the offence is not subject to a minimum

⁴ These data were gathered to enable the Canadian Sentencing Commission to fulfill their mandate.

penalty or a term of imprisonment of greater than five years, a fine may be imposed for most offences contained within the Criminal Code.

- c. **Imprisonment** – A term of imprisonment is characterized by the separation of an offender from society and is currently the most severe disposition available in Canada. Those sentenced to prison for less than two years are sent to a provincial correctional institution whereas those sentenced for periods greater than two years serve their sentence in a federal penitentiary.
- d. **Incarceration Rate** – For this study, the incarceration rate refers to the proportion of sentences for a particular offence or offence sub-category that involved incarceration and not the number of people in prison expressed as a proportion of the total general population.
- e. **Offence Category** – An offence category contains a number of offence sub-categories consisting of one or more Criminal Code offences. All Criminal Code offences included in this study are grouped into one of the following five “offence categories” developed by the Canadian Centre for Justice Statistics: *Crimes against the person*, *Crimes against property*, *Other Criminal Code offences*, *Traffic offences* and *Drug-related offences*. For a complete listing of the offences contained within these categories, see Appendix A.
- f. **Perceptions of Offence Seriousness** – The perceived seriousness of an offence is measured by examining the incarceration rates for different offences.
- g. **Principle of Restraint** – Articulated in section 718.2(d) of the Criminal Code, this principle requires the imposition of the least restrictive sanction appropriate under the circumstances of the offence.

- h. **Probation** – A term of probation is served in the community and involves a number of mandatory and optional conditions that are imposed for a maximum of three years.
- i. **Proportionality** – As the fundamental principle of sentencing in Canada (Section 718.1 of the Criminal Code), proportionality requires that the sanction imposed be directly related to the blameworthiness of the offender and the seriousness of the crime committed.
- j. **Sentencing** – Sentencing is the judicial determination of a legal sanction to be imposed on a person found guilty of an offence (Canadian Sentencing Commission, 1987: 153).
- k. **Sentence Severity** – The severity of a sentence can be determined by looking at the type and quantum of the punishment imposed. It is expected that as the seriousness of an offence increases, so will the severity of the sanction.
- l. **Suspended Sentence** - So long as there is no minimum penalty for the offence, a judge can suspend the passing of a sentence and direct an offender to comply with the conditions of a probation order. If the individual violates their term of probation, the suspension can be revoked and replaced by any sentence that could have originally been imposed. For the purposes of this study, suspended sentences and probation orders will be combined into one category.

The FPS-CPIC Database

The first of the two databases included in this analysis was derived from the Royal Canadian Mounted Police's criminal history records contained within the

Fingerprint System that is maintained by the Canadian Police Information Centre (hereafter the FPS-CPIC Database). Used by the Canadian Sentencing Commission, this database provided the foundation for the Commission's statistical examination of sentencing practices in Canada in the mid-1980's (Canadian Sentencing Commission, 1987: 466).

The database is only available in eight hard copy tables, each containing information on different sentences imposed for all criminal convictions processed in 1983-1984. Encompassing approximately 90 percent of the adult criminal caseload for that period, statistics are available on the number and types of disposition imposed for nearly every offence contained in the Criminal Code. Specifically, the FPS-CPIC reports those dispositions involving fines, probation, suspended sentences and imprisonment. The tables that provide the most detail are those that pertain exclusively to the use of incarceration as a sanction. These present a breakdown of the number and average length of the sentences of imprisonment that were imposed. Additional statistics on sentence lengths, such as the median, mode and percentile distribution, are also available from the FPS-CPIC database.

Limitations of the FPS-CPIC Database

Although it contains the only comprehensive statistics on sentencing available from the 1980s, there are significant limitations to this database. First, when the data were compiled, offences where there were fewer than 100 dispositions imposed within a one-year period were omitted. As a result, information on certain infrequent offences is not available for the purpose of comparison. For example, despite the seriousness of the

offence, the number of sentences for the charge of child abduction is not known. Similarly, due to their relatively low frequency, certain non-custodial sanctions were also excluded⁵. Furthermore, all statistics were rounded to the nearest unit meaning that a number of dispositions were overlooked by the analysis. Together, these factors may have resulted in a slight underestimation of the total number of sentences for this period.

Another limitation is that the data presented were not broken down by specific jurisdiction (province or territory). Instead, the dispositions imposed are presented only in terms of their national totals. As such, comparisons between the provinces and territories are not possible and the extent of inter-jurisdictional variation within this period remains undetermined. For example, without knowing the rates of incarceration for the different provinces and territories, the issue of sentencing disparity cannot be evaluated.

Finally, and perhaps the most serious limitation to this dataset is that individual case characteristics, such as the presence of a victim impact statement or the plea entered by the accused, are not included. As a result, it is impossible to determine the impact of such aggravating or mitigating factors on the resulting dispositions. For example, although it has been shown that the prior criminal record of an offender is "... strongly predictive of sentence severity" (Roberts, 1997: 341), as this particular information is not available, the extent to which an offender's criminal history has influenced the sentencing decision is not known. In the absence of this type of information, other considerations, such as the role of proportionality or the perceptions of offence seriousness, also become difficult to explore.

⁵ Although available in 1983-1984, the use of sentencing options such as the absolute or conditional discharge, community service, compensation or restitution orders is not known.

The Adult Criminal Court Survey

The second database employed by this analysis is the 1999-2000 Adult Criminal Court Survey (ACCS), collected by the Centre for Criminal Justice Statistics. Containing the most systematic sentencing data currently available, the ACCS provides a national database of statistical information on the processing of cases through the adult criminal court system. The ACCS is divided into two components: Case Characteristics and Caseload. The Case Characteristics component collects comprehensive data on the completed charges, appearances and cases for federal statute offences. The Caseload component, on the other hand, collects aggregate data on all charges, appearances and cases for federal and provincial statutes and municipal by-laws. Currently, the majority of provincial and territorial adult criminal courts in the following nine jurisdictions report to the ACCS: Newfoundland, Prince Edward Island, Nova Scotia, Quebec, Ontario, Alberta, Saskatchewan, the Yukon and the Northwest Territories. Together, these account for approximately 80 percent of the national adult criminal court caseload.

Limitations of the Adult Criminal Court Survey

There are also a number of limitations in using the data contained within the ACCS. To begin, as with the FPS-CPIC database, there is no case specific information. Without this information it is impossible to determine the impact of offender characteristics on the outcome of a charge. A second limitation is that the sentences included are drawn almost exclusively from the lower courts and therefore do not contain the majority of decisions rendered by the Superior Courts. Although very small in numbers, the cases transferred to these courts tend to be those that are more serious and

hence are more likely to receive a sentence of imprisonment. Given that sentences handed down by the Superior Courts tend to be longer than those imposed by the Provincial Courts, there is some concern that sentence severity, at least as reported by the ACCS, is somewhat underestimated (Roberts and Birkenmayer, 1997: 463).

Comparing the Databases

The sentencing trends presented throughout this analysis are based on a comparison of the total number of dispositions imposed in each period. This is because these are the only statistics available from the 1983-1984 dataset. While this is not necessarily a limitation, there are certain factors to be aware of when using the disposition as a unit of analysis. First, when sentencing an offender, judges frequently impose more than one sanction per charge. As a result, the number of dispositions imposed does not necessarily represent the actual number of individuals being sentenced for an offence. Second, when an individual is convicted of multiple charges, the sentence they receive is not automatically broken down in terms of the offences committed. It is therefore impossible to know to a certainty the impact of the different charges on the sentence rendered (Roberts 1999b: 139). For these reasons, the databases record all of the dispositions given for each convicted charge. Unfortunately, this results in an inflation of the number of sentences reported in comparison with the actual number of sentences being served. While it is important to be aware of these concerns, the use of the disposition as a unit of measure nonetheless allows for an accurate examination of sentencing patterns in the two time periods.

Another issue that arises from a comparison of the FPS-CPIC and ACCS databases is that the number and complexity of the statistical manipulations that can be performed is restricted to the figures presented in the 1983-1984 dataset. All calculations made with the ACCS will therefore have to be tailored to those contained within the FPS-CPIC database. For instance, comparing the mean or average sentence imposed for different offences will not be possible. While the statistics produced will not be as advanced as desired, they are however sufficient to conduct a meaningful analysis.

A final limitation to this comparison is that only three sanctions can accurately be assessed: fines, probation and prison. The explanation for this is twofold. First, there are a number of sentencing options that were not available in 1983-1984 that are currently counted by the ACCS⁶. Second, as mentioned earlier, the FPS-CPIC neglected to record any of the other kinds of dispositions being imposed during this period. In 1999-2000, these 'other' sanctions accounted for approximately 17 percent of all dispositions. By omitting them, and therefore reducing the total number of sentences included in the analysis, the proportionate use of prison, probation and fines becomes somewhat overstated for this period. However, given that the 1983-1984 data also exclude information on the use of these other sanctions, this omission is necessary to make the databases comparable.

⁶ The ACCS collects data on the following sentencing options: absolute and conditional discharges, restitution orders, suspended sentences, forfeitures, community service orders, suspension of driver's license, firearm restrictions, conditional sentences of imprisonment and all other court ordered sanctions.

Selection of Years for Comparison

In order for the findings from a historical comparison to be considered valid, it is important to ensure that neither period is anomalous in terms of the subject matter. In the context of this study, the topic for consideration is that of sentencing patterns. Since 1983-1984 was the only year during the 1980s in which comprehensive sentencing statistics were gathered, determining whether or not this period is representative of the sentencing patterns for this decade is not possible. As such, 1983-1984 becomes the de facto standard for comparison. The 1999-2000 period on the other hand, was chosen for two reasons. First, the data from this time period represent the most recent sentencing statistics available, thereby maximizing the scope of this study. Second, as the trends in sentencing for the past five years have been relatively stable, the year 1999-2000 may be considered as representative of this period and therefore is suitable for comparison.

Summary

Throughout this chapter, the parameters of this study have been defined by establishing the points of comparison between the two databases. As the information gathered by the ACCS was far more detailed than the FPS-CPIC statistics, the 1999-2000 data had to be tailored to the 1983-1984 figures. While this ultimately reduced the scope of this study, it was necessary in order to accomplish a comparison that was meaningful and accurate. A summary comparison of the FPS-CPIC and the ACCS databases is provided in Table 2.

Table 2: Comparison of the FPS-CPIC and the ACCS Databases

FPS-CPIC 1983-1984	ACCS 1999-2000
• Only dispositions imposed in adult criminal court are recorded • Sentences imposed in single-charge cases are not differentiated from those imposed in multiple-charge cases • Ninety percent of the adult criminal caseload is included • Data presented are not broken down by province or territory • Data are divided into eight hard-copy tables • Data are available for all <u>Criminal Code</u> offences • Case specific data are not provided • Information on the use of prison, probation/suspended sentence and the fine is provided	• All charges, cases and convictions in adult criminal court are recorded • Sentencing information on both single- and multiple-charge cases is provided • Eighty percent of the adult criminal caseload is included • Data pertaining to specific jurisdictions are available • Data are presented in a multitude of tables • Data are available for all <u>Criminal Code</u> and Federal Statute offences • Case specific data are not provided • Information pertaining to the use of all available sanctions is provided

Chapter Four

RESULTS

Overview

This chapter is divided into three sections, each of which explores a number of critical issues arising from a historical evaluation of sentencing data. In the first part, general sentencing patterns in adult criminal court will be compared. This is necessary in order to determine whether or not there have been significant changes in the sentencing environment between the two time periods. Next, the distribution of sanctions will be presented. Comparing the use of the primary sentencing options establishes a context for the analysis of the use of imprisonment. The remainder of this chapter will be devoted to an examination of this sanction. Specifically, the following questions will be addressed:

1. Has the overall use of prison increased, decreased or stayed the same?
2. What types of offences were most likely to be sentenced to prison in the two time periods?
3. Has there been a change in the ranking of offences with relation to their perceived seriousness?
4. In terms of the rate of custody, has the principle of proportionality in sentencing been followed?
5. What is the length of time that different offences are being sentenced to prison?

In light of the scope and complexity of the topics explored, a summary of the major findings will be provided at the end of each section.

1. Sentencing Patterns in Adult Criminal Court

In 1983-1984 there were 692,139 dispositions handed down by Canadian adult criminal courts in comparison to the 452,480 dispositions imposed in 1999-2000 (see Table 3). This represents a decrease of 35 percent over a seventeen-year period. A significant portion of this reduction can be attributed to a decline in the volume of crime reported to the police. According to the Uniform Crime Reporting Survey⁷, between 1983 and 1999 the crime rate dropped from 9,853 to 8,570 incidents per 100,000 population, a decrease of 13 percent⁸. As would be expected, the number of adults charged for their involvement in criminal incidents also decreased during this timeframe. In 1983, there were 460,552 adults charged compared to the 426,063 adults charged in 1999, a drop of 8 percent.

Changes in the crime rate and the number of individuals charged however are not sufficient to account for the much greater decrease in the number sentences imposed over this period, suggesting that there may have been other factors that were also responsible for this difference. For instance, sentencing data were gathered from fewer jurisdictions in 1999-2000. Additionally, sentences involving sanctions other than prison, probation and the fine are omitted in both periods. Although information on the use of other sanctions is not available for 1983-1984, as there were fewer sentencing options available during this time, it is likely that they represented fewer than the 17 percent of sentences they composed in 1999-2000. These factors suggest that the total number of sentences

⁷ Since the Uniform Crime Reporting Survey collects data according to the calendar rather than the fiscal year, the years 1983 and 1999 are used as they respectively contain the majority of the fiscal years 1983-1984 and 1999-2000.

⁸ These numbers represent the revised crime rates for both years and include all Criminal Code, Federal Statute, Criminal Code Traffic, and Drug offences.

for 1999-2000 is underestimated, making the overall decrease in sentences imposed less significant than initially calculated, albeit by an undefined amount.

Table 3 – Sentences in Adult Criminal Court, Selected Provinces and Territories, 1983-1984 and 1999-2000

Offence Category	Number of Sentences Imposed		Percentage of Total Sentences	
	1983-1984	1999-2000	1983-1984	1999-2000
Crimes against the person	50,688	72,542	7.3	16.0
Crimes against property	334,407	143,275	48.3	31.7
Other Criminal Code	112,568	155,716	16.3	34.4
Traffic offences	144,902	62,168	20.9	13.7
Drug-related offences	49,574	18,779	7.2	4.2
Total	692,139	452,480	100.0	100.0

Sentencing Trends in the Major Offence Categories

Table 3 shows the distribution of sentences across the different offence categories for the periods under examination. Each of these categories will now be explored in order to highlight some offence specific trends that emerge from this comparison.

Crimes against the person

While *Crimes against the person* accounted for only a small amount (7 %) of sentenced offences in 1983-1984, in 1999-2000 this proportion had more than doubled, totaling 16 percent of all dispositions imposed. This increase reflects a similar rise in the rate of violent crime, which grew from 7 percent of all crimes committed in 1983-1984 to 11 percent in 1999-2000 (Uniform Crime Reporting Survey Database, 2000). Much of

this growth can be attributed to a proliferation in the number of common assaults reported to the police. In fact, between 1983 and 1999, the rate of common assault charges more than tripled (Uniform Crime Reporting Survey Database, 2000). This rise has been associated with the introduction of legislation in 1983, which increased the circumstances under which law enforcement could lay a charge for a minor assault (Kingsley, 1993: 6). For example, police officers called to the scene of a domestic dispute were henceforth able to lay charges against an aggressor where there were “reasonable and probable grounds” to believe that an assault had occurred. Accordingly, the number of convictions (and sentences) for this crime increased substantially: accounting for 35 percent of sentences for *Crimes against the person* in 1983-1984, common assaults comprised more than half (57 %) of sentences imposed in this category in 1999-2000.

Crimes against property

Representing nearly half (48 %) of all dispositions imposed in 1983-1984, *Crimes against property* constituted the single largest category of sentenced offences. In 1999-2000, this category dropped to the second largest, composing 32 percent of sentences for that period. Correspondingly, the rate of property crime fell 24 percent between 1983 and 1999 (Uniform Crime Reporting Survey Database, 2000). Substantial decreases in sentences for the crimes of theft and break and enter are largely responsible for the overall reduction in the proportion of sentences given for *Crimes against property*. Down from 65 percent of sentences in 1983-1984, these two offences accounted for 48 percent of this category in 1999-2000. In 1999, the rates of break and enter were the lowest they had been in 25 years (Kowalski, 2000: 2).

Other Criminal Code offences

Amounting to 16 percent of sentencing decisions in 1983-1984 and 34 percent in 1999-2000, *Other Criminal Code* offences evinced the greatest increase, becoming the largest category of sentenced offences in 1999-2000. The crimes included within this category are varied, ranging from minor public order and administration of justice offences to serious weapons infractions. The overall growth in this category, however, can be attributed almost entirely to a considerable increase in the proportion of sentences imposed in the sub-category of “unspecified Criminal Code” offences. While making up less than a third (26 %) of sentences for *Other Criminal Code* offences in 1983-1984, these crimes accounted for almost half (46 %) in 1999-2000. These findings should be cautiously interpreted as this sub-category groups together a number of obscure and uncommon crimes. The failure of the 1983-1984 database to record offences where there were fewer than one hundred dispositions may therefore be particularly evident.

Traffic offences

As the category with the second largest proportion of sentences in 1983-1984, *Traffic* offences were represented in 21 percent of sentencing decisions. By 1999-2000, however, only 14 percent of sentenced offences were for traffic violations. This decrease can in large part be explained by a continuous decline in impaired driving since 1983. In fact, the incidence of these offences decreased by 58 percent between 1983 and 1999 (Uniform Crime Reporting Survey Database, 2000). Several variables contributed to this decrease, namely the increased efforts of law enforcement agencies in apprehending

impaired drivers as well as changes in societal attitudes towards both alcohol consumption and drinking and driving (Sauve, 1998).

Drug-related offences

The smallest category of sentenced offences in both time periods, *Drug-related* offences comprised 4 percent of all dispositions in 1999-2000, slightly fewer than the 7 percent imposed in 1983-1984. Despite this overall decrease, drug trafficking offences made up well over one-third (36 %) of sentences in this category in 1999-2000, 32 percent more than they had in 1983-1984. Law enforcement agencies also witnessed a 35 percent increase in trafficking violations over this period (Uniform Crime Reporting Survey Database, 2000). The rise in trafficking offences seems to have been the result of shifting police efforts towards combating the supply of illicit substances as opposed to targeting the consumers of these substances (Trembley, 1999: 3).

Comparison of the Most Frequent Offences

A small number of offences contained within the above mentioned categories accounted for the overwhelming majority of sentences imposed during the periods under examination (see Figures 1 and 2). In fact, ten offences or offence sub-categories made up 87 percent of sentences in 1983-1984 and 85 percent in 1999-2000. The majority of these were of a non-violent nature, with common and major assault being the only exceptions. This finding challenges the common public perception that the most serious crimes of violence account for a significant proportion of the courts caseload (Doob and Roberts, 1983: 13; Roberts, 1994).

Figure 1 - Ten Most Frequent Offences and Offence Sub-Categories, 1983-1984

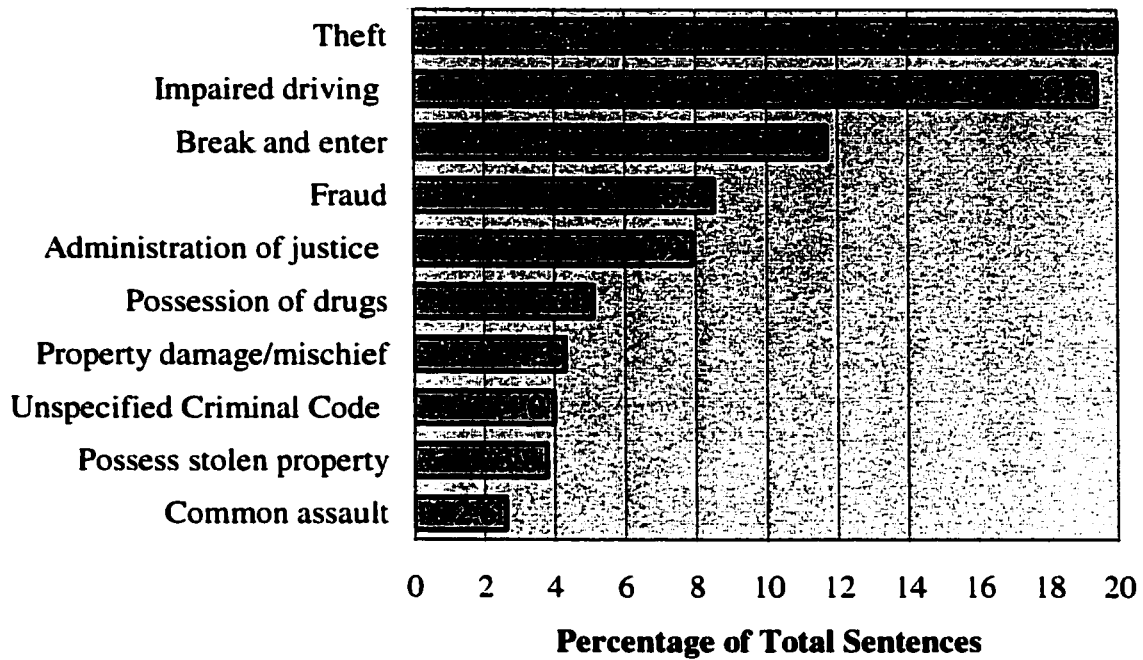
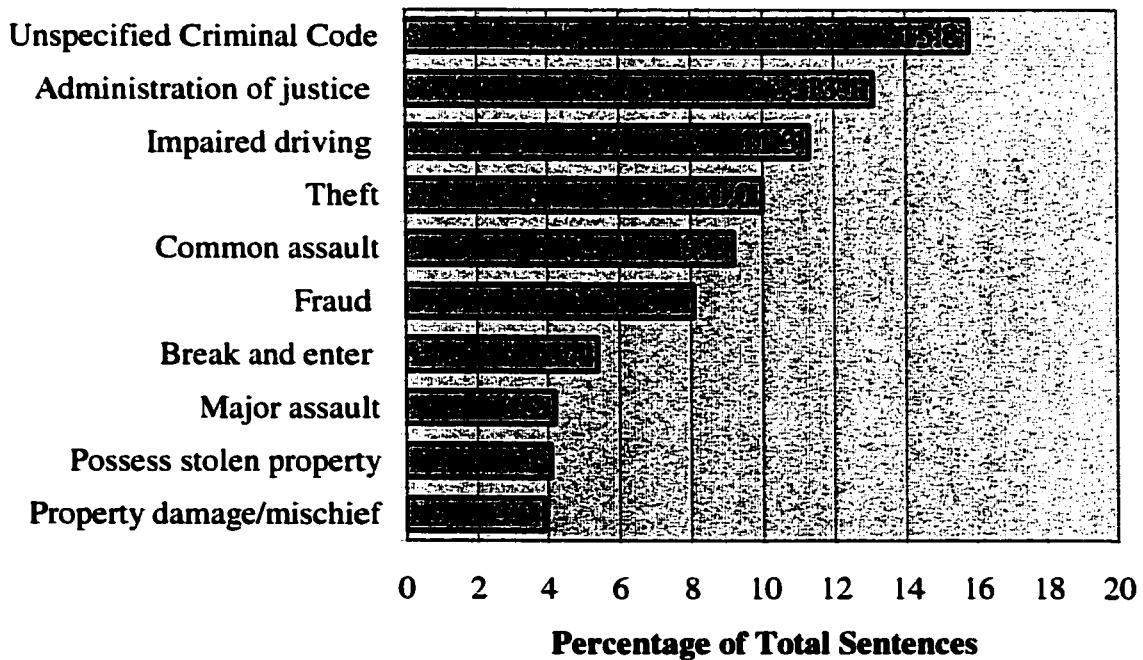


Figure 2 - Ten Most Frequent Offences and Offence Sub-Categories, 1999-2000



As Figures 1 and 2 illustrate, nine of the ten most frequently sentenced offences and offence sub-categories were the same in 1999-2000 as they were in 1983-1984. Listed in Table 4, these same nine offences were involved in approximately 80% of sentencing decisions handed down by judges during the periods under examination. Many of these offences also represent the least serious crimes within their respective categories. For example, while an assault is not a trivial offence, it is considered to be the least serious crime involving violence. This finding indicates that the same less serious offences consumed an overwhelming amount of the courts' resources in both 1983-1984 and 1999-2000, suggesting that diversion from the formal court system needs to be improved.

Table 4 – Offences and Offences Sub-Categories Generating the Most Sentencing Decisions in 1983-1984 and 1999-2000

Rank	1983-1984	1999-2000
1	Theft	Unspecified <u>Criminal Code</u>
2	Impaired driving	Administration of justice
3	Break and enter	Impaired driving
4	Fraud	Theft
5	Administration of justice	Common assault
6	Drug possession*	Fraud
7	Property damage/mischief	Break and enter
8	Unspecified <u>Criminal Code</u>	Major assault*
9	Possess stolen property	Possess stolen property
10	Common assault	Property damage/mischief

*Denotes those offences not present in the top ten in both time periods.

Despite the fact that the offences and offence categories accounting for the most sentences remained virtually unchanged between 1983-1984 and 1999-2000, their rank order varied considerably. For example, whereas theft had been the single most frequently sentenced offence in 1983-1984, composing 20 percent of sentences, by 1999-2000, it had dropped to fourth, representing only 10 percent of the sentences imposed. Replacing theft as the category accounting for the most dispositions was that of “unspecified Criminal Code” offences. Accounting for 16 percent of dispositions in 1999-2000, this category had more than tripled in size since 1983-1984. Given that most offences and offence sub-categories exhibit clear sentencing patterns in terms of the dispositions imposed, a shifting in the number of sentences handed down for a particular category has a corresponding effect on the sanctions imposed.

Summary

The most significant transformation in the sentencing environment between 1983-1984 and 1999-2000 was the substantial reduction in the volume of offences being sentenced by the courts. In addition, there were considerable shifts in the distribution of sentences imposed in the different offence categories. Nevertheless, when comparing the frequency with which all the different offences were being sentenced, the rank orders for the two years were very similar⁹. However, as there was a significant amount of variation in those offences that accounted for the majority of sentences, the sentencing patterns that emerge from this comparison are considerably different in 1983-1984 than

⁹ A strong positive correlation ($\rho = 0.91$) between the rank orders was found. It was determined that this relationship was significant beyond the .001 level ($t = 10.4$, $df = 22$).

they were in 1999-2000. Summary highlights of the major findings from this section are provided in Box 1.

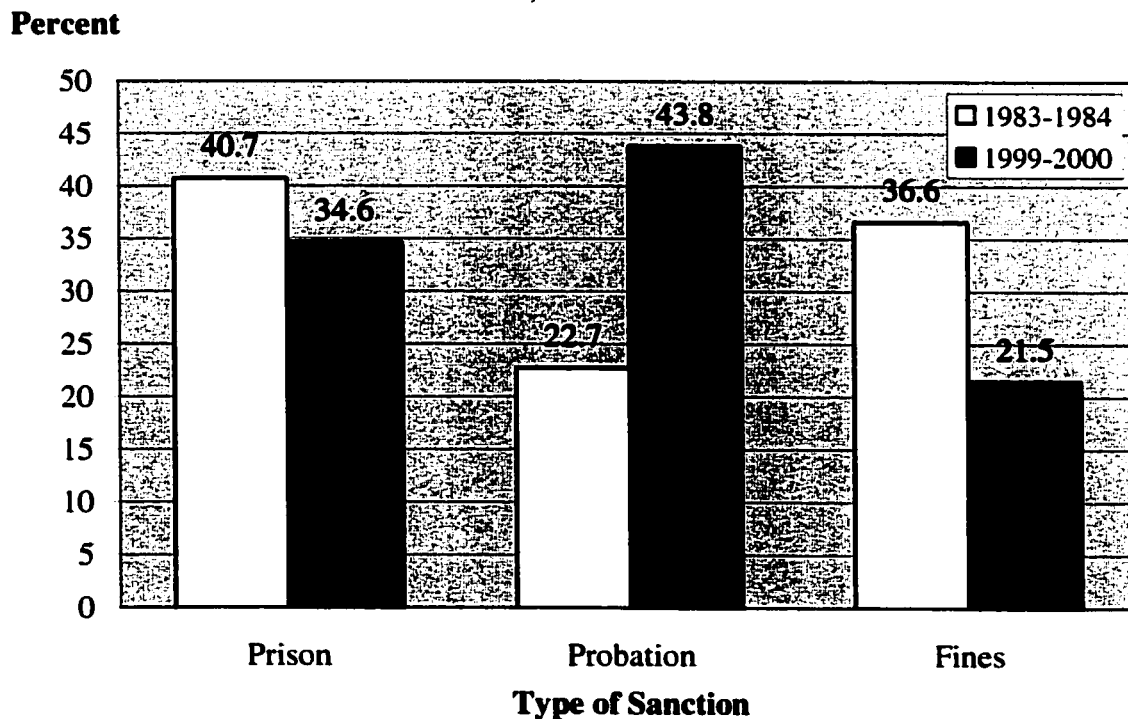
Box 1
Sentencing Patterns, 1983-1984 and 1999-2000

- There was a 35 percent reduction in the total number of sentences imposed
- The substantial growth in the proportion of sentences for *Crimes against the person* can be attributed to a rise in common assaults
- The decrease in sentences for *Crimes against property* coincides with a drop in the rate of property crime
- The proportion of sentences for *Other Criminal Code* offences increased substantially, making it the category receiving the most sentencing decisions in 1999-2000
- The significant decline in the category of *Traffic* offences can be linked to the continual reduction in impaired driving convictions since 1983
- As the category with the fewest sentencing decisions in both time periods, *Drug-related* offences experienced a considerable decrease
- Ten of the less serious offences accounted for the majority of dispositions in both time periods

2. Distribution of Sanctions

The primary sanctions (i.e. those which, taken together, account for the vast majority of all dispositions) imposed by the courts in 1983-1984 and 1999-2000 were imprisonment, probation¹⁰ and the fine. The proportion of dispositions involving these three sanctions is presented in Figure 3. As shown, the distribution of sanctions varied considerably over this period. Most notably, a shifting away from the use of imprisonment and fines appears to be the result of a substantial increase in the use of probation in 1999-2000. Changes in the use of these sanctions will now be discussed.

Figure 3 - Distribution of Sanctions, Selected Provinces and Territories, 1983-1984 and 1999-2000



¹⁰ As mentioned in the methodology, this category is composed of both probation orders and suspended sentences. However, as suspended sentences always involve a period of probation, this category is referred to simply as 'probation'.

Fines

There was a considerable decrease in the use of this sanction between 1983-1984 and 1999-2000. As the principal sanction least likely to be imposed in 1999-2000, fines accounted for 22 percent of dispositions compared to 37 percent in 1983-1984. The use of fines in the different offence categories is presented in Table 5. Despite a decreased use of this sanction in every category, fines remained the most frequently imposed disposition for both *Traffic* and *Drug-related* offences. In both time periods, impaired driving offences alone were responsible for more than one third of all fines imposed by the courts (41% in 1983-1984 and 36% in 1999-2000). Not surprisingly, *Crimes against the person* were the least likely to receive a fine in 1999-2000, with only 10 percent of violent offences given this disposition. The same however cannot be said for the earlier period. In 1983-1984, the category of *Crimes against property* was, by a small margin, the least likely to receive a monetary punishment.

Table 5 – Use of Fines by Offence Category, 1983-1984 and 1999-2000

Offence Category	1983-1984 (%)	1999-2000 (%)	Difference (%)
Crimes against the person	21.2	9.8	- 11.4
Crimes against property	19.8	12.1	- 7.7
Other Criminal Code	30.8	17.8	-13.0
Traffic offences	77.3	60.4	- 16.9
Drug-related offences	57.7	40.7	- 17.0
Total	36.5	21.5	- 15.0

One explanation for the decreased use of this sanction relates to the issue of fine default. In an attempt to address this problem, the 1996 reform directed judges to consider an offender's ability to pay a fine before imposing one¹¹. Given this criterion, judges in the latter period may have found that many offenders were simply not eligible for a fine. Accordingly, they were faced with finding alternate sentences for these particular offenders. In light of the marked increase in the use of probation, it is possible that the judiciary came to favour this more onerous sanction for offenders who were incapable of providing financial reparations.

Probation

The use of probation nearly doubled over the period under examination, rising from 23 percent of dispositions in 1983-1984 to 44 percent in 1999-2000. As the most commonly imposed punishment for this period, there was an increase in probation orders in every offence category (see Table 6). In 1983-1984, the use of probation was highest for *Crimes against property* (34%), although it was never the most frequently imposed sanction in any of the categories. Probation use for property crimes increased substantially over the period in question, accounting for 52 percent of sanctions imposed in this category in 1999-2000.

Surprisingly, *Crimes against the person* attracted an even greater use of this sanction, with 61 percent of dispositions involving probation. The fact that violent crimes were more likely than property offences to receive a term of probation can be

¹¹ As amended by the sentencing reform bill of 1996, s. 734(2) of the Criminal Code now states that a judge must not order a fine unless satisfied that the offender is able to pay the fee or work it off in a fine option program.

attributed to the growth in common assaults. Composing more than half of the sentences (57%) in the category of *Crimes against the person*, 67 percent of common assaults received a period of probation as a sanction in 1999-2000. In both periods, probation was used least frequently for *Traffic* offences.

Table 6 – Use of Probation by Offence Category, 1983-1984 and 1999-2000

Offence Category	1983-1984 (%)	1999-2000 (%)	Difference (%)
Crimes against the person	24.1	61.0	+ 36.9
Crimes against property	34.0	52.0	+ 18.0
Other Criminal Code	15.7	41.1	+ 25.4
Traffic offences	4.5	16.6	+ 12.1
Drug-related offences	12.0	28.6	+ 16.6
Total	22.5	43.8	+ 21.3

One possible reason for the rise in probation orders imposed over this period is that, with the sentencing reforms of 1996, aspects of this sanction were significantly amended. These legislative changes were intended to bolster judicial confidence in the use of probation as they removed inconsistencies in the application of this sanction (Department of Justice, 1996). The trend towards the increased use of this sanction however, appears to have preceded these reforms. Following a notable increase in the early 1990s, the number of individuals serving probation orders grew gradually throughout the remainder of the decade (Lonmo, 2001). Therefore, it appears as though the observed rise in the use of probation is part of a long-term trend, one that may be indicative of a shift in judicial attitudes towards the use of this sanction.

Imprisonment

Imprisonment was the most stable sanction in terms of usage over the periods being compared, experiencing only a moderate decrease. As the most frequently imposed sanction in 1983-1984, prison terms composed 41 percent of sentences. By 1999-2000, prison accounted for only 35 percent of dispositions. In fact, only the category of *Traffic* offences experienced a significant increase in the use of prison over this period (see Table 7). Nearly one quarter (23%) of sentences in this category resulted in a prison term in 1999-2000, whereas in 1983-1984 slightly fewer than 18 percent of sentences for *Traffic* offences involved prison. This rise can be attributed to a 50 percent increase in the rate of incarceration¹² for Criminal Code traffic violations. Regardless of this, the category of *Traffic* offences was the least likely to receive a prison sentence in both time periods, suggesting that judges regard these crimes as the least serious forms of infractions.

In 1983-1984, prison was used more than any other sanction in the categories of *Crimes against the person*, *Crimes against property* and *Other Criminal Code* offences. Prison use was highest for violent offences, with over half (54%) of sentences in this category receiving this sanction. However, in 1999-2000, the use of prison for *Crimes against the person* dropped to 29 percent, making it the category with the second smallest use of this sanction. Given that crimes of violence are generally regarded as the most serious offences, the fact that the categories of *Crimes against property*, *Other Criminal Code* and *Drug-related* offences have a higher use of imprisonment would seem to contradict studies suggesting that the seriousness of the offence should be the most important factor in determining the type of sentence imposed (Hamilton and Rytina,

¹² Readers are reminded that, in the context of this study, the “rate of incarceration” refers to the proportion of sentences for a particular offence or offence sub-category that involve a term of incarceration.

1980). Further, even when common assault, an offence that carries a relatively low rate of incarceration, is removed from the category of *Crimes against the person*, *Other Criminal Code* offences are still sentenced to prison more frequently. The fact that this particular category had the greatest use of imprisonment in 1999-2000 may be explained by a 65 percent increase in sentences for offences against the administration of justice. Although not particularly serious, these offences do carry a high rate of imprisonment, indicating that judges are less tolerant of those offenders whose acts challenge the authority of the courts (Roberts and Grimes, 2000:11).

Table 7 – Use of Prison by Offence Category, 1983-1984 and 1999-2000

Offence Category	1983-1984 (%)	1999-2000 (%)	Difference (%)
Crimes against the person	54.2	29.1	- 25.1
Crimes against property	45.8	35.9	- 9.9
Other Criminal Code	52.4	41.1	- 11.3
Traffic offences	17.9	23.0	+ 5.1
Drug-related offences	30.3	30.7	+ 0.4
Total	40.6	34.6	- 6.0

Reducing Canada's reliance on incarceration has long been a stated objective of the federal government (Roberts and von Hirsch, 1995: 229). In 1996, restrictions were placed on the use of this sanction with legislation requiring that prison be used with restraint and that all alternatives be considered before imposing a term of imprisonment. Since the overall proportion of prison sentences declined between 1983-1984 and 1999-2000, it is possible that these reforms may have had their intended effect. However,

given that this decrease was only moderate and that prison use actually increased in some of the offence categories, the explanation for the reduction in incarceration is more complex than initially depicted. This topic will be explored at length in the following section.

Summary

Between 1983-1984 and 1999-2000, the distribution of sanctions changed significantly. To begin, there was a marked decrease in the use of fines across all offence categories. Probation, on the other hand, rose substantially, becoming the most frequently imposed sanction. Finally, the proportion of sentences involving prison fluctuated greatly; while increases were noted in some categories, the overall use of this sanction declined moderately. An overview of the major changes in the distribution of the primary sanctions is presented in Box 2.

Box 2
Distribution of Sanctions, 1983-1984 and 1999-2000

- In 1983-1984, prison was the most frequently imposed sanction (used in 41 percent of sentences), followed by fines (37%) and probation (23%)
- The distribution of sanctions was quite different in 1999-2000, with probation being the most common sanction (accounting for 44 percent of sentences), followed by prison (36%) and fines (22%)
- There was a decrease in the proportion of **fines** imposed in every offence category; a fine was most commonly imposed for *Traffic* offences in both periods
- There were significant increases in the use of **probation** in every offence category; probation orders were most commonly imposed for *Crimes against property* in 1983-1984 and *Crimes against the person* in 1999-2000
- The proportion of **prison** sentences decreased in most categories, with the notable exception of *Traffic* offences; prison was used most frequently in *Crimes against the person* in 1983-1984 and *Other Criminal Code* offences in 1999-2000

3. Issues in Imprisonment

In this section, factors pertaining specifically to changes in imprisonment will be assessed. To begin, the modest decrease in the rate of incarceration will be examined more closely with the aim of identifying offence specific differences in the use of this sanction in the two time periods. Secondly, adherence to the principle of proportionality will be determined so as to establish whether or not its enactment into legislation in 1996 has had an effect on the imposition of custodial sanctions. Lastly, as the overall reduction in the use of imprisonment would be rendered meaningless if the average length of prison sentences had increased proportionately over this period, variations in sentence length will be evaluated.

Offence Specific Trends in the Use of Imprisonment

While the majority of offences and offence sub-categories experienced a moderate decrease in their use of prison, there were some offences where the drop in this sanction was more substantial. Table 8 presents the offences and offence sub-categories that experienced a reduction in their use of imprisonment of at least 20 percent. Surprisingly, the majority of these are more serious crimes involving violence. While the incarceration rates for these offences remained relatively high, decreases of this magnitude imply that the courts were treating offenders convicted of crimes such as attempted murder and sexual assault significantly more leniently in 1999-2000 than they were in 1983-1984. Because many of these are low-frequency offences, however, their rates of incarceration are more likely to fluctuate.

Table 8 – Offences and Offence Sub-Categories with at least a 20% Decrease in the Rate of Incarceration

Offence Group	Rate of Incarceration		Difference (%)
	1983-1984	1999-2000	
Kidnapping	85.8	56.5	- 29.3
Robbery	91.9	65.5	- 26.4
Trafficking	75.5	50.6	- 24.9
Sexual assault	64.4	41.2	- 23.2
Attempted murder	87.0	64.8	- 22.2
Fraud	53.3	33.1	- 20.2

Conversely, there were also a handful of offences and offence sub-categories where the incarceration rates increased (see Table 9). While certainly not trivial, these offences tended to be of a less serious nature¹³. For example, the rate of incarceration for the sub-category of public order offences, which includes crimes such as trespassing or causing a disturbance, rose from 26 to 32 percent. In light of attempts to reduce the use of imprisonment, this finding is particularly disappointing, given that it has been suggested that community sanctions would be particularly well suited to these types of crimes (Roberts and Birkenmayer, 1997: 472).

¹³ There are offences involving death and/or bodily harm in the sub-categories of Criminal Code traffic and impaired driving, however as neither are very common, their impact on sentencing patterns for these categories is minimal.

Table 9 – Offences and Offence Sub-Categories with an Increase in the Rate of Incarceration

Offence Group	Rate of Incarceration		Difference (%)
	1983-1984	1999-2000	
Criminal Code traffic	30.9	46.4	+ 15.5
Morals – sexual	13.9	24.9	+ 11.0
Drug possession	12.6	18.7	+ 6.1
Public order offences	26.3	32.0	+ 5.7
Impaired driving	16.9	18.0	+ 1.1
Theft	34.0	34.5	+ 0.5

As this study has shown, judges in 1999-2000 were, in general, less likely to impose a sentence of imprisonment than in 1983-1984. A closer examination of this finding reveals that they were even less likely to use incarceration for some of the most serious offences while simultaneously increasing their use of imprisonment for some less serious crimes. However, despite these shifts, the rank order of offences and offence sub-categories in terms of their rate of imprisonment were almost identical¹⁴. This suggests that in both time periods, judicial perceptions of offence seriousness remained virtually unchanged. Therefore, while the rate of incarceration for certain offences and offence sub-categories has fluctuated over time, in relation to other crimes, the severity with which these offences are treated has not changed significantly.

¹⁴ There is a strong positive correlation ($\rho = 0.92$) between the rankings of offences in terms of their rate of incarceration in the two time periods. This relationship was found to be significant beyond the .001 level ($t = 10.7$, $df = 22$).

Influence of Proportionality in Sentencing

Having found that the ranking of offences according to their rates of imprisonment has not changed considerably between 1983-1984 and 1999-2000, it is important to determine whether or not the treatment of these crimes over this period reflects the influence of the principle of proportionality. As a fundamental (and codified) principle of sentencing, proportionality requires that the severity of the punishment imposed be in proportion to the gravity of the offence committed as well as the extent of the actor's culpability (von Hirsch, 1993: 6). Since imprisonment is the most severe sanction available in Canada, it therefore follows that prison should be reserved for the most serious crimes. The offences and offence sub-categories with the highest rates of incarceration in 1983-1984 and 1999-2000 are shown in Figures 4 and 5, respectively. In both periods, the top five positions were occupied by the same offences. In accordance with the principle of proportionality, these consisted primarily of violent crimes. As would be expected, the category of homicide and related was most likely to be sentenced to prison.

Figure 4 - Offences and Offence Sub-Categories with the Highest Incarceration Rates, 1983-1984

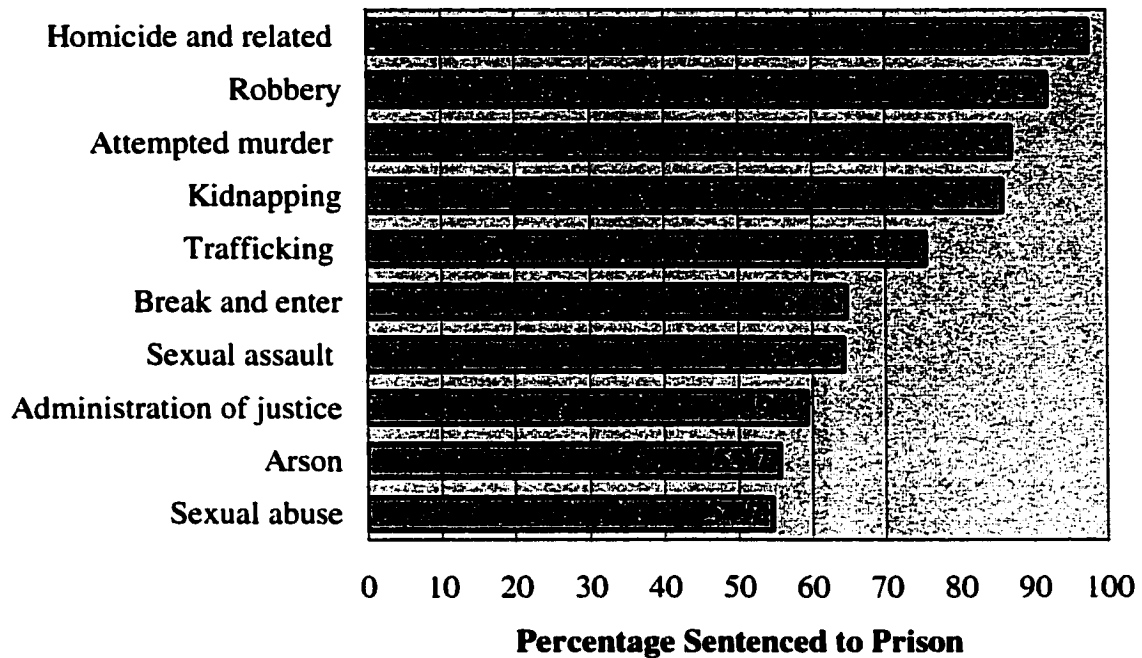
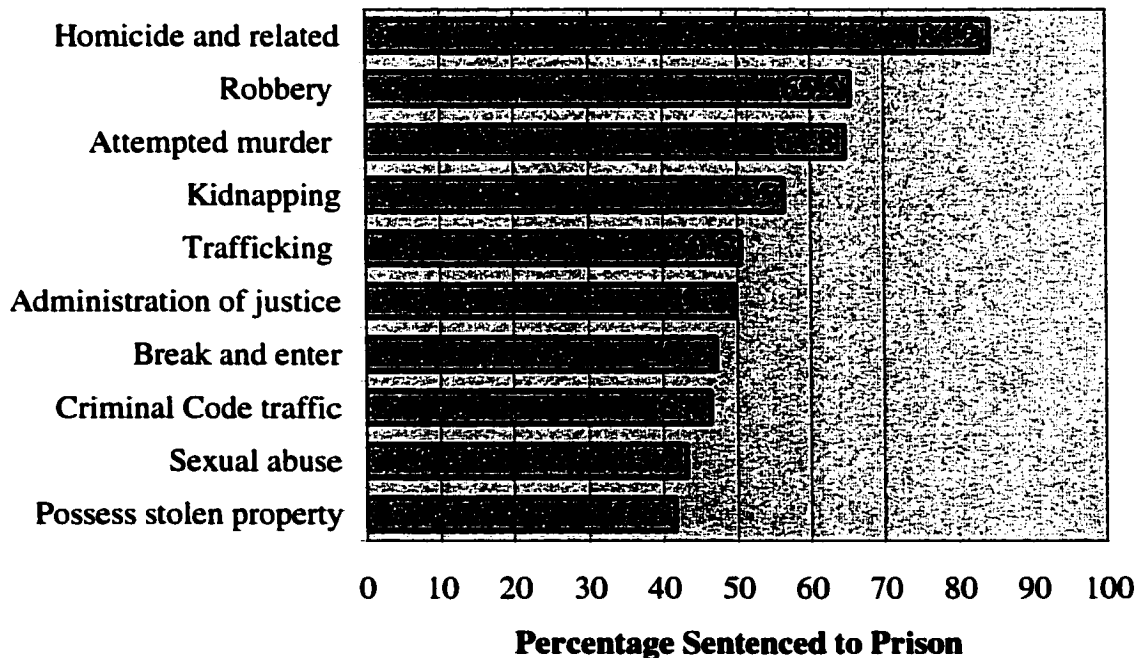


Figure 5 - Offences and Offence Sub-Categories with the Highest Incarceration Rates, 1999-2000

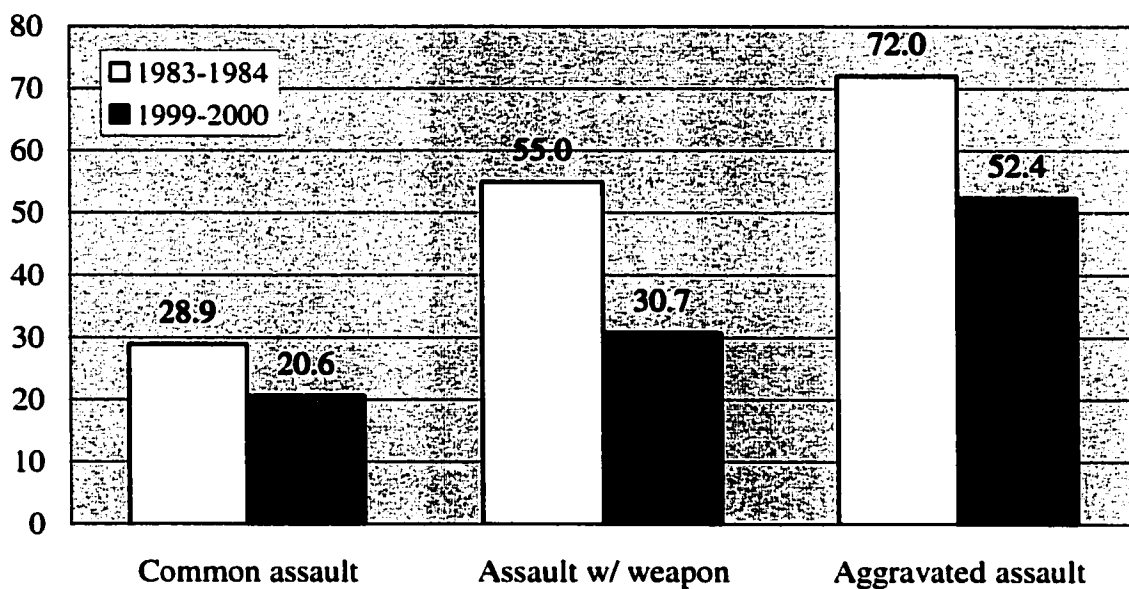


Upon cursory examination, the ranking of the remaining offences and offence sub-categories seems to contradict the principle of proportionality. For instance, the fact that in both periods break and enter was more likely than sexual abuse and sexual assault to be sentenced to a term of imprisonment would appear to be a violation of this principle. There are however, other explanations for this apparent anomaly. According to Roberts and Birkenmayer, property offenders tend to have extensive criminal records and are thus more likely to be viewed by judges as 'career criminals' (1997: 469). This, along with the fact that the crimes committed by these individuals generally require a certain degree of premeditation, contributes to a higher rate of incarceration for these types of offenders. Similarly, administration of justice offences, which are often related to case processing matters such as failure to comply with a court order, also ranked higher than some other more serious crimes. Given that these types of offences tend to impede the proper functioning of the criminal justice system, judges may feel that, in order to induce compliance from these offenders, imprisonment may be the only viable option. Therefore, while proportionality may be the fundamental consideration at sentencing, its application is constrained by a number of aggravating and mitigating factors also important in the determination of a sentence.

Another way of testing whether proportionality is present in the Canadian sentencing system is to examine offences with a tiered penalty structure. In Canada, both assault and sexual assault are classified in this manner. Based upon the threat or actual level of harm inflicted, the three levels of physical assault as established by the Criminal Code are: common assault (level I), assault with a weapon or causing bodily harm (level II) and aggravated assault (level III). As shown in Figure 6, common assault had the

lowest incarceration rate in both periods, after which the use of imprisonment increased by at least 30 percent in each subsequent level of assault. This pattern is consistent with the application of the principle of proportionality as the more serious offences were more likely to receive the most severe penalty.

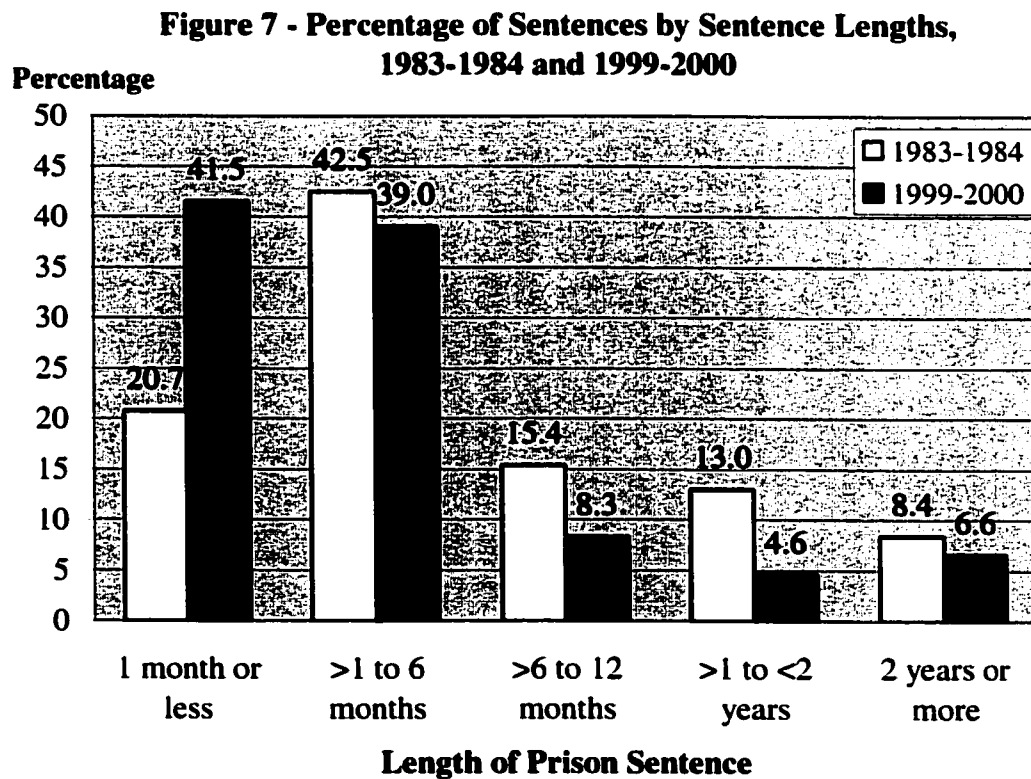
Figure 6 - Incarceration Rates for the Different Levels of Assault, 1983-1984 and 1999-2000



The examination of the ranking of offences and offence sub-categories in terms of their rates of imprisonment has shown that the influence of proportionality in the sentencing of offenders was evident in both 1983-1984 and 1999-2000. This finding indicates that the introduction of this principle into legislation in 1996 appears simply to have been a codification of practice. Accordingly, the formal declaration of this principle has had little impact on the use of imprisonment in Canada.

Sentence Length¹⁵

A breakdown of prison sentence lengths is provided in Figure 7. In both periods, most prison sentences were relatively short. Nearly two-thirds of all custodial sentences imposed in 1983-1984 and more than three quarters in 1999-2000 were for a duration of six months or less. Prison terms between one and six months were most frequently imposed in 1983-1984, whereas in 1999-2000, the percentage of prison sentences for the shortest period of time had more than doubled, making sentences of one month or less the most common. The use of sentences exceeding six months in length decreased, albeit minimally for prison terms exceeding two years.



¹⁵ There were 1,771 sentences from 1983-1984 and 5,314 sentences from 1999-2000 that were excluded from this study, as the length of the imposed prison sentences was not known.

Among the different offence categories, the distribution of sentence lengths varied greatly (see Table 10). In 1983-1984, sentences of six months or less were most likely to be imposed in the category of *Traffic* offences where 92 percent of sentences were for this length of time. The fact that this category overwhelmingly consisted of impaired driving violations, an offence which carries a minimum term of imprisonment of no less than fourteen days for offenders convicted of a second infraction, and no less than ninety days for those guilty of subsequent violations, explains the overwhelming use of sentences of this length. In contrast, in 1999-2000, this duration of prison sentence was most frequently imposed in *Other Criminal Code* offences, where 92 percent of sentences were for this length of time. Within this category, crimes against the administration of justice were most likely to receive a sentence of six months or less. Although this sub-category contains some of the least serious Criminal Code infractions, many of these offenders, who could have been eligible for community sanctions, were instead temporarily incarcerated. Thus, while the disproportionate use of brief prison sentences for *Traffic* offences is the result of a legislated mandatory minimum sentence, the increased use of short sentences in the category of *Other Criminal Code* offences may be indicative of a shift towards a more punitive treatment of these offenders by judges.

Table 10 – Length of Prison Sentences by Offence Category, 1983-1984 and 1999-2000

Offence Category	Length of Prison Sentence					
	1 month or less (%)	>1 to 6 months (%)	>6 to 12 months (%)	>1 to <2 years (%)	2 years or more (%)	
	83/84	99/00	83/84	99/00	83/84	99/00
Crimes against the person	13.0	28.0	31.6	40.4	12.4	9.7
					16.1	7.1
Crimes against property	14.3	28.2	41.8	41.7	19.9	13.2
Other Criminal Code	28.1	56.3	48.0	35.2	9.4	4.6
Traffic offences	48.0	45.7	44.3	45.0	6.2	5.3
Drug-related offences	24.8	37.8	44.9	34.9	13.7	7.8
					9.9	4.8
					26.9	14.8
					7.6	9.3
					1.8	2.0
					0.1	1.8
					6.8	14.8

On the other end of the spectrum, in both 1983-1984 and 1999-2000, *Crimes against the person* had the highest use of prison sentences of greater than six months in length. This finding is expected considering the violent nature of these offences and that crimes such as murder command a minimum term of imprisonment of greater than two years. However, what is surprising is that, in 1999-2000, the proportion of sentences exceeding six months in length was nearly cut in half for violent offenders, while those convicted of *Crimes against property, Traffic and Drug-related* offences were only slightly less likely to receive a sentence of this length. Most astonishing is the fact that drug offenders were almost as likely as violent offenders to receive a sentence of greater than two years in length. One possible reason for the increased use of federal sentences for *Drug-related* offences is that, with the introduction of the Controlled Drugs and Substances Act in 1997, the penalty structure for offences contained within this category was significantly amended.

With sentences heavily weighted towards the use of the shortest terms of imprisonment in 1999-2000, one conclusion is that the courts have become more lenient in their treatment of offenders. As offenders in 1999-2000 were less likely to spend a significant amount of time in a correctional institution than those imprisoned in 1983-1984, this assumption would seem reasonable. However, the justification behind the use of very short prison sentences could also be considered quite punitive. Simply stated, some judges may feel that a brief term of imprisonment is necessary in order to adequately penalize an individual for their criminal behaviour (Doob, Marinos and Varma, 1995: 139). Given that the only objective served by these sentences is the temporary incapacitation of the offender, the greater use of these short sentences may

imply that judges are increasingly using prison in situations where a community sanction would be more appropriate. Considering that the average cost of incarcerating an offender ranges from \$128 to \$183 a day (Canadian Centre for Justice Statistics, 2001:13), these short prison sentences also represent a tremendous economic cost.

Summary

This detailed comparison of the use of imprisonment in the two time periods has revealed far more than a modest six percent decrease. Despite substantial fluctuations in the rates of incarceration for a number of crimes, a meaningful shift in judicial perceptions of offence seriousness was not observed. Further, even though the principle of proportionality did not enter into legislation until 1996, judges appear to have followed this tenet in both periods. Lastly, in terms of the length of prison sentences imposed, there was an overwhelming growth in the proportionate use of sentences of one month or less. A summary overview of major findings with respect to the use of imprisonment is provided in Box 3.

Box 3
Use of Imprisonment, 1983-1984 and 1999-2000

- Substantial decreases in imprisonment were observed for some of the most serious, violent offences
- There was an increased use of incarceration for a few less serious offences
- Despite apparent inconsistencies in the ranking of offences, the principle of proportionality was present in both time periods
- In both periods, most custodial sanctions were relatively short with the majority of sentences being for one to six months in 1983-1984 and for less than one month in 1999-2000
- Short prison sentences were most frequently imposed in the category of *Traffic* offences in 1983-1984 and *Other Criminal Code* offences in 1999-2000
- In 1983-1984 and 1999-2000, *Crimes against the person* were most likely to receive a longer sentence of imprisonment; in 1999-2000, violent offences were only slightly more likely than drug offences to be serving a prison sentence of greater than 2 years.

Chapter Five

DISCUSSION

Overview

This chapter begins with a summary of the main findings of this study, the significance of which will be examined in light of the recommendations of past Commissions of Inquiry. The limitations of this project will then be presented along with suggested directions for future research.

Summary of Empirical Findings

- The number of offences sentenced by the courts decreased by 35 percent between 1983-1984 and 1999-2000.
- A small number of less serious crimes accounted for the overwhelming majority of sentencing decisions in both periods. In fact, the same nine offences composed 80 percent of the courts caseload in 1983-1984 and 1999-2000.
- The significant rise in the use of probation as a sanction was the result of a moderate decrease in the rate of imprisonment coupled with a more substantial decline in the use of fines.
- The sentencing process has become more lenient with respect to a number of serious offences (i.e. attempted murder, sexual assault) while its treatment of certain minor offences (i.e. theft, drug possession) has become more severe.
- Despite changes in the use of imprisonment for a number of offences, judicial perceptions of offence seriousness do not appear to have changed significantly between 1983-1984 and 1999-2000.

- With regard to the use of incarceration as a sanction, the principle of proportionality was evident in both time periods.
- While the overall use of imprisonment has been stable, there has been a trend towards the increased use of shorter prison sentences.

Conceptualization of Sentencing Reform

After completing its examination of Canada's penal system, the Canadian Committee on Corrections concluded that sentencing needed to proceed in a new direction. Essentially, this brief but important policy statement involved shifting the focus of sentencing away from the presumption of imprisonment and towards the use of a wider range of non-custodial dispositions (Canadian Committee on Corrections, 1969: 191). This change in approach provided the basis for the sentencing reform movement, and would be built upon by subsequent Commissions of Inquiry over the next quarter century, culminating in the statutory sentencing reforms proclaimed in 1996 (Bill C-41).

While the Canadian Committee on Corrections can be credited with establishing the ultimate objective of sentencing reform, the Canadian Sentencing Commission and the Standing Committee on Justice and Solicitor General are responsible for articulating the manner in which this change could be achieved. Taken together, the proposals advanced by these bodies formed the basis of a structured approach to sentencing in which community sanctions became the preferred method of punishment. Ultimately, however, the reforms enacted in 1996 represented an emasculated articulation of the sentencing vision put forth by the Commissions of Inquiry. Nevertheless, the research and public discussion that led to these reforms attracted unprecedented public and professional attention to the sentencing process and its problems. Therefore, the current

research sought to evaluate the effects of the sentencing reform process on judicial practice by examining sentencing data that span the past seventeen years. In particular, the impact of calls for increasing the use of community sanctions at the expense of prison has been explored.

The Sentencing Environment, 1983-1984 to 1999-2000

This study found that between 1983-1984 and 1999-2000, sentencing patterns in Canada underwent momentous change. Along with an overall reduction in the number of convicted offences before the courts, the types of offences being sentenced most frequently varied considerably. Predictably, explanations for many of these findings were linked to changes in the crime rate. For instance, the notable increase in the proportion of sentences imposed in the category of *Crimes against the person* reflected a similar rise in the violent crime rate. The manner in which these offences were being sentenced also changed dramatically. Whether or not these changes were in accordance with the recommendations of the Commissions of Inquiry will now be discussed.

The Increased Use of Community Sanctions

Although the term “community sanctions” refers to a breadth of alternatives to imprisonment, this study was limited to an examination of the primary alternatives, specifically fines and probation. In terms of the fine, every Commission of Inquiry has recommended their increased use, observing that this sanction is easy and inexpensive to administer, creates revenue and causes only minimal disruption to an offender’s life (Canadian Sentencing Commission, 1987: 377). At the same time, there was also the

realization that the effectiveness of fines was being impaired by the high incidence of imprisonment for fine default (Canadian Committee on Corrections, 1969: 198). In order to address this concern, the 1996 reform legislated that the imposition of a fine be limited to those offenders who have the means to pay. Consequently, the direction provided to judges may have been mixed; while the overall use of fines was supposed to have risen, fewer fines could safely be imposed if the issue of default was to be addressed.

The current study indicates that, contrary to the recommendations calling for the increased use of fines, the proportion of sentences involving this sanction has actually decreased, from 37 to 22 percent between 1983-1984 and 1999-2000. However, the rate of fine default also declined substantially: in 1983-1984, 37 percent of prison admissions were for failure to pay a fine (Canadian Centre for Justice Statistics, 1985: 85) whereas by 1999-2000, the number of individuals sent to prison for non-payment of a fine had dropped to 19 percent (Lonmo, 2001: 6). Although the problem of fine default was not remedied by these reforms, it does appear that this issue has taken precedence over the recommendation to increase the use of fines.

The direction given by the various Commissions and Committees with respect to probation was less explicit than that which was provided for fines. In general, as probation was the most common and well-established form of community-based sanction, the federal inquiries supported its increased use but felt that administrative improvements were desperately needed (The Standing Committee on Justice and Solicitor General, 1988: 103). As with many alternatives to imprisonment, additional resources were required in order to provide adequate supervision for those serving sentences in the community. Likewise, 63 percent of judges surveyed by the Canadian

Sentencing Commission felt that the quality of supervision of community sanctions affected their willingness to impose such sanctions¹⁶(1987: 363). Despite the recognition of this problem, the number of non-custodial staff employed in adult corrections was approximately the same in 1997-1998¹⁷ (Besserer and Tufts, 1999) as it was in 1983-1984 (Canadian Centre for Justice Statistics, 1985: 73).

This study shows that there was a doubling in the proportion of sentences involving probation between 1983-1984 and 1999-2000. This finding is somewhat surprising, given that the problems associated with probation do not seem to have been resolved. The increased use of this sanction may actually be indicative of an attempt by judges to use more community sanctions rather than a specific endorsement of probation. Because probation has historically been the most frequently used alternative to prison, it is possible that judges simply increased their use of the community sanction with which they were most familiar. Unfortunately, in the absence of statistics on the use of other alternative measures in 1983-1984, this hypothesis is difficult to evaluate.

In summary, it would appear as though judges have, at least to some extent, altered their practices to comply with the recommendations regarding the use of community sanctions. With probation being the most widely imposed disposition, a community sanction is now the presumed punishment for a large majority of offences. In fact, probation is the most frequently imposed sanction in the categories of both *Crimes against the person* and *Crimes against property*. Another indication that the sentencing

¹⁶ A similar finding now emerges with respect to the newest alternative to imprisonment – the conditional sentence. See Roberts, Marinos and Doob (2000).

¹⁷ This represents the most recent period for which this statistic is available. It is not expected that the employment levels would have increased substantially by 1999-2000.

reform movement has been effective is that, despite an overall decrease in the use of fines, the rate of imprisonment for fine default has been cut in half. Overall, community sanctions appear to have been positively affected by efforts aimed at promoting them as legitimate alternatives to incarceration.

The Decreased Use of Imprisonment

At the height of the Parliamentary investigations into sentencing, Canada had a prison population rate¹⁸ of 108 per 100,000 inhabitants (Correctional Service of Canada, 1986). At the time, it was believed that the rate of incarceration in this country was simply not sustainable (Canadian Sentencing Commission, 1987: 233). In fact, fears were raised over the possibility that imprisonment not only failed to rehabilitate offenders, but that individuals released from prison were a greater threat to society than before they were incarcerated (The Standing Committee on Justice and Solicitor General, 1988: 75). In light of these concerns, the federal inquiries all proposed that the use of imprisonment be restricted. Essentially, it was recommended that prison be reserved for certain types of offenders, a directive which would have been tantamount to applying the principle of restraint to the sentencing of all offenders.

This study has demonstrated that the proportion of sentences involving incarceration decreased from 41 to 35 percent in the period between 1983-1984 and 1999-2000. This decline, although moderate, is essentially commensurate with the recommendations regarding the use of imprisonment, as a less onerous sanction was

¹⁸ This rate refers to the number of people in prison expressed as a proportion of the total population and is not to be confused with the incarceration rate that was used elsewhere in the study to represent the proportion of sentences involving a term of imprisonment.

deemed appropriate in a greater proportion of offences. Interestingly, the largest decrease in the use of incarceration was observed for the category of *Crimes against the person*. In fact, the rate of imprisonment for offences contained within this category dropped an average of 19 percent. This suggests that judges were increasingly exercising restraint for some of the most serious offences. This finding is particularly surprising given that the Commissions and Committees consistently stated that the use of prison for offenders convicted of crimes of violence was justifiable and often necessary for the protection of the public.

Had this degree of restraint been shown towards all offences, this change in practice would not seem inappropriate. However, not only was this not the case, this study also found that the use of incarceration for some less serious offences actually rose. While the expected effect of this principle would be an overall reduction in the use of incarceration, its impact should have been particularly evident for low-seriousness offences where a wider variety of sentencing options may be deemed appropriate (Doob, 1990: 425). Further, the increased use of shorter prison sentences across all offence categories implies that judges were using imprisonment where a community sanction might have been more appropriate. These findings would seem to indicate that the principle of restraint has been applied inconsistently and, as a result, has not had its intended effect.

The very fact that the use of imprisonment decreased between 1983-1984 and 1999-2000 is a laudable achievement. However, according to the most recent statistics, Canada still incarcerates 105 per 100,000 in the general population (Walmsley, 2002), a rate that, by some standards, would be deemed as simply unacceptable. Even so, when

compared to other similarly situated countries, Canada's use of imprisonment remains moderate (see Table 11). For example, the United States, which has seen its use of incarceration triple over the past seventeen years, imprisons its citizens at a rate seven times greater than Canada (United States Bureau of Justice Statistics, 2000).

Table 11 – International Prison Population Rates*, 2002

Country	Prison Population Rate**
United States	700
New Zealand	145
United Kingdom	125
Australia	110
Canada	105
Germany	95
Netherlands	85
France	80
Sweden	65
Finland	50

*Due to methodological issues related to the use of this index, these rates represent approximations.

**Rate given per 100,000 of the national population

Regardless of Canada's international standing with respect to prison use, had the recommendations of the Commissions of Inquiry been followed more closely, the reduction in the use of imprisonment would certainly have been more pronounced. Instead, over a third of sentences for offences such as possession of stolen property and fraud still involve a period of incarceration. If judges had more diligently followed the principle of restraint and the presumption of community sanctions for low-seriousness offences, the use of prison for such crimes would have been greatly reduced. Thus, while it is clear from this study that judicial attitudes towards the use of imprisonment

underwent a change during the sentencing reform process, there is still a reliance on the use of this sanction in Canada.

The Role of Judicial Attitudes

While this study has focused on determining the impact of the reform process on the sentencing of offenders, the role of judicial attitudes cannot be overlooked. In 1971, John Hogarth published his landmark study entitled “*Sentencing as a Human Process*.” The results of Hogarth’s research demonstrated that knowing the judicial attitudes and penal philosophies of a sentencing judge could better predict the sentence imposed than examining the legal facts of the case. For example, a judge who believes that a sentence should perform a deterrent function will favour imposing a term of incarceration. Hogarth recommended that, in order to affect changes in the sentencing of offenders in Canada, judges should be provided with specific legislative guidance (1971: 386).

When Parliament reformed sentencing in 1996, they resisted implementing changes that would significantly alter the manner in which sentences were rendered in this country. Apart from incorporating the purpose and principles of sentencing into law, the reforms offered little guidance to judges in terms of choosing an appropriate sentence. Instead, it was felt that once the purposes and principles were legislated, the manner in which sentences were determined could, and should, be left up to an independent judiciary (Roberts and von Hirsch, 1999: 49). As a result, it would appear as though sentencing in Canada has very much remained “a human process”. Therefore, while it is impossible to determine the extent to which judicial beliefs continue to be a factor in the sentencing of offenders, given that the 1996 reforms did little to limit judicial discretion,

it would seem likely that the sentencing patterns presented throughout this study have been influenced by the attitudes and perceptions of the judiciary.

Limitations of Study

The current research was primarily limited in terms of the data that were available for comparison. Based on RCMP criminal records information, the 1983-1984 dataset provides a rare and informative glimpse into the sentencing of offenders in the early stages of the reform process. Alternately, the 1999-2000 data were assembled as part of an ongoing research initiative that began in 1996 within the Canadian Centre for Justice Statistics. Not only were these databases created by two separate organizations and for different purposes, but the methodologies used to compile this information also differed. Although these distinctions made the databases difficult to compare, precautions were taken to ensure the soundness of this examination. Further, where possible, this comparison was augmented with information from additional sources.

The length of time separating the datasets also placed a significant limitation on this study. For example, over the past seventeen years, there have been a number of legislative changes to the Criminal Code. As such, definitions of a limited number of offences have been altered so that an equivalent offence no longer exists. In other instances, the penalty structures associated with certain offences have changed. For example, in 1995, ten new mandatory minimum sentences were introduced for offenders convicted of violent crimes committed with a firearm. In either case, differences of this sort did not permit a reliable comparison of the sentencing trends specific to these offences.

Other significant social and legal developments that occurred over this period may have also affected the sentencing patterns presented. For example, the Charter of Rights and Freedoms, which came into force in 1984, fundamentally altered the structure of the Canadian legal system and influenced both the application and interpretation of the law throughout the period under examination. Similarly, the rise of the victims' rights movement over the past two decades, which led to the recognition of the role of the victim in the sentencing process, may also have had an effect on the sentencing patterns. Despite the importance of these changes, these matters could not be considered further given the scope of this project.

Future Research Priorities

The limitations of this study underline the need for future evaluations of sentencing in Canada. Given that the sentencing reform movement was centered upon the promotion of a wide range of alternatives to imprisonment, it is unfortunate that the current research was limited to an examination of only two such measures: probation and fines. With a greater number of sentencing options becoming available over this period, their impact on the distribution of sanctions should be examined. Further, as community sanctions were intended to be true alternatives to incarceration, it becomes important to assess the manner in which these dispositions are being used. The possibility that these sanctions could have unintentionally become "net-wideners," thereby effectively increasing the number of individuals under the control of the criminal justice system, was one of the concerns raised by the Canadian Sentencing Commission (1987: 367). A

future study, which takes into account the full range of sentencing alternatives, would certainly be able to address the validity of this apprehension.

One alternative sanction that would be particularly interesting to examine is the conditional sentence of imprisonment. Introduced in 1996, the conditional sentence was part of an overall attempt to reduce the use of imprisonment in Canada (Roberts, 1997c: 322). Unfortunately, the current research could not examine the impact of this sanction, as data pertaining to its use are presently limited¹⁹. As more detailed statistics become available, the manner in which the conditional sentence is being used should be assessed in order to determine whether or not it is having its intended effect. For example, it would be important to establish if the implementation of the conditional sentence is responsible for the reduction in imprisonment that was noted by this study.

A number of recommendations brought forth by the Commissions of Inquiry that were omitted from this particular analysis could also be the subject of future evaluation. For instance, one of the objectives set out by the Commissions of Inquiry had been to address variability in sentencing. As this was to have been accomplished through a purpose and principles of sentencing, it would be important to determine whether or not the enactment of such a statement has been effective in addressing this problem. Another issue identified by the Committees and Commissions was the gross overrepresentation of Aboriginals within the correctional population. Studying whether or not this formal recognition had any effect on the rates of incarceration for these offenders is essential.

¹⁹ At this time, detailed statistics on the conditional sentence of imprisonment are only available for four jurisdictions (see Belanger, 2001).

In order to effectively explore the research topics outlined above, the gathering and reporting of Canadian sentencing statistics must be improved. To begin, considering that the Canadian Sentencing Commission conducted the only national survey of judges in 1985²⁰, research concerning the opinions of the judiciary should be updated. In addition, replicating Hogarth's 1971 study on judicial attitudes might also prove a useful tool for assessing the effects of the 1996 reforms. Further, information on sentencing practices should be expanded to include a wider range of sentencing related variables (Roberts, 1999a: 231). Moreover, additional long-term studies should be conducted so as to eliminate the possibility of short-term fluctuations being responsible for variations in sentencing patterns. Finally, statistics in this area should continue to be produced annually. Once better sentencing statistics have been developed, further evaluations of sentencing reforms can be conducted.

²⁰ See Department of Justice (1988).

Chapter Six

CONCLUSION

For the past thirty years, those mandated to reform the sentencing process have struggled to implement policy that would effectively alter sentencing practices in this country. The enactment of Bill C-41 in 1996 represented the culmination of these efforts. While providing the judiciary with the opportunity to move away from the use of incarceration as a sanction, as the Honourable Judge Vancise of the Saskatchewan Court of Appeal notes, Bill C-41 did not force judges to challenge the status quo (1997: 390). Perhaps not surprisingly, then, this study has shown that the reform process has not been entirely successful in changing judicial practice, especially with respect to the use of imprisonment.

It would therefore seem that in order to achieve substantial change in the sentencing of offenders, the direction provided to judges must be improved. One possibility would be to adopt a sentencing guideline system such as the one proposed by the Canadian Sentencing Commission. Under these guidelines, every Criminal Code offence would be assigned a recommended or “presumptive” disposition. However, if a judge disagreed with the presumed sentence, they could impose an alternative sanction, so long as written reasons were provided. While this type of guidance would ensure that sentencing practices would change, when the Canadian Sentencing Commission first recommended this approach, it was widely perceived as unnecessary and undesirable in the Canadian context (Roberts and von Hirsch, 1992: 339). Thus, as a significant effort

would be required in order to overcome such opposition, the successful implementation of this type of reform may prove difficult.

A less controversial remedy involves replacing the current statutory statement of the purpose and principles with one that provides more definitive direction on the sentencing of offenders. Any new statement that would be adopted must be written in a language that is both clear and unequivocal. For example, if one of the goals is to reduce the use of imprisonment as a sanction, then legislation should explicitly state the circumstances under which the use of this sanction would be deemed appropriate. Such a statement would provide judges with a precise indication of Parliament's position on the use of this sanction. Furthermore, in order for it to be an effective guide to judges, a new statement should endeavour to be as uncomplicated as possible²¹. If such changes were made, a legislative statement of the purposes and principles of sentencing could constitute an effective vehicle for reform.

An alternative to legislative guidance would involve developing and instituting training programs for members of the judiciary. Taking into consideration that judicial attitudes are part of the sentencing equation (Hogarth, 1971), this approach would look to change sentencing patterns by providing judges with better training in the area of sentencing. In order to accomplish this goal, a brief training period could become a requisite for newly appointed magistrates, while more experienced judges could be required to attend annual refresher courses on a variety of sentencing-related subjects. Throughout this training, members of the judiciary could be kept abreast of the findings of current sentencing related research. For example, judges could be educated on the

²¹ See Roberts and von Hirsch (1995) for an example of an alternate formulation of the statute of the purpose and principles of sentencing.

efficacy of different sentencing options. There is evidence that this approach can be a useful component of sentencing reform. For instance, the substantial decline in Finland's prison population rate over the past several decades has, in part, been attributed to judges being educated on the disadvantages of imprisonment (Lappi-Seppala, 1998). While the effects of judicial training on sentencing patterns may not be immediately apparent, instituting these types of programs does represent a viable way to influence judicial decision-making.

As the problems that led to the development of Bill C-41 have not been solved by its enactment into legislation, it is likely that the issue of sentencing reform in Canada will have to be revisited in the near future. Given that decades of recommendations were essentially ignored in the development of the 1996 sentencing reforms²², perhaps it is time to return to the research. As this chapter has shown, sentencing reform in Canada does not necessarily require a complete overhaul of the system in order to effectively alter sentencing practices. It is hoped that when Parliament decides to reopen this issue for debate, the mistakes of the past will not be repeated and the vast body of research surrounding this issue will not be discarded for a second time.

²² This point underscores the observation that Canadian criminal justice policy seems to develop largely independent of research. For further discussion of this issue, see Roberts, 1999a.

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Appendix A – Offence Category Definitions**Crimes Against the Person**

Homicide and Related	first degree murder, second degree murder, manslaughter, infanticide
Attempted Murder	attempted murder
Robbery	robbery with firearms, with other offensive weapons, other robbery
Kidnapping	kidnapping, forcible confinement, hostage taking
Sexual Assault	aggravated sexual assault, sexual assault with a weapon, causing bodily harm, threats to a third party
Sexual Abuse	sexual interference, invitation to sexual touching, sexual exploitation, incest, bestiality
Major Assault	aggravated assault (level 3), assault with a weapon or causing bodily harm (level 2), discharging firearm with intent, unlawfully causing bodily harm, assault against peace/police officer
Common Assault	assault level 1

Crimes Against Property

Break and Enter	business premises, residence, other break and enter
Arson	arson
Fraud	cheques, credit cards, counterfeiting, other fraud
Possess Stolen Property	have stolen goods
Theft	theft of motor vehicles, theft over, theft under, theft from motor vehicles, shoplifting, theft unspecified, other theft
Property Damage/Mischief	mischief to property less than/more than \$1,000, mischief with data

Other Criminal Code

Weapons	Explosives, pointing a firearm, use of a firearm in committing offence, careless use/storage/handling of a firearm, possession of prohibited weapons, restricted weapons, other offensive weapons
Administration of Justice	bail violations, fail to appear or comply with a summons/appearance notice/promise to appear, breach of recognizance, unlawfully at large, escape custody, breach of probation
Public Order Offences	causing a disturbance, obstruct a peace officer, trespass at night,
Morals – Sexual	keeping a bawdy house, procuring, other prostitution related offences, indecent acts, public morals
Morals – Gaming	keeping a betting house, gaming house, other gaming and betting offences
Unspecified Criminal Code	all other <u>Criminal Code</u> offences including perjury, possession of burglary instruments, obstruction of justice, criminal negligence causing death
Traffic Offences	
Criminal Code Traffic	dangerous operation of motor vehicles, vessels, aircraft, dangerous operation causing death/bodily harm, fail to stop at the scene of an accident, operation while disqualified
Impaired Driving	impaired driving, impaired driving causing death/bodily harm, impaired >.08, fail to provide sample
Drug Related Offences	
Trafficking	trafficking/importing drugs, heroin, cocaine, cannabis, restricted drugs, other drugs
Possession	possession of drugs, heroin, cocaine, cannabis, restricted drugs, other drugs