



CONDITIONAL SENTENCING

(A Practitioner's Guide)

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Background:

A Conditional Sentence Order (CSO) is a form of sentence authorized by the *Criminal Code* for certain criminal offences. See: ss.742 to 742.7. Conditional sentencing was first introduced in 1996 to provide the courts with an alternate form of “imprisonment” – a form of imprisonment that does not require incarceration. Through the imposition of conditions, a CSO places restraints on an offender’s liberty without completely separating the offender from society. There seems little doubt that Parliament’s goal in authorizing this form of sentence was to provide courts with an alternative to incarceration for certain offences – offences that would have otherwise attracted a jail sentence (but not so serious as to attract a penitentiary sentence).

In imposing a CSO, an offender is sentenced to a term of imprisonment but in circumstances where the sentencing judge has determined that the offender can safely serve his/her sentence in the community rather than behind bars. A fulsome review of the circumstances where conditional sentencing is appropriate is beyond the scope of this paper. Sufficient to say, the *Criminal Code* requires the offence to be serious enough to attract a jail sentence, but, notwithstanding the seriousness of the offence, a finding that a particular offender can serve his/her sentence in the community without endangering the safety of that community. Obviously, many offences do not fit within this rather narrow range of offences. For example, a CSO is not appropriate for offences where any form of probation is the appropriate disposition. The sentencing judge must be satisfied the sentence would, but for the availability of a CSO, have involved incarceration. At the other end of the spectrum, a CSO is not appropriate for offences requiring a penitentiary sentence or where the need for denunciation and deterrence are so pressing that incarceration is the only way to express society’s condemnation of the offender’s conduct or to deter similar conduct in the future. See: *R v Bethke* [2013 SKCA 135 \(CanLII\)](#) | *R v Bethke* | [CanLII](#), at para. 40.

What is a Conditional Sentence Order?

Properly constructed, a CSO is intended to achieve both punitive and restorative goals simultaneously. See: *R v Proulx* [2000 SCC 5 \(CanLII\) | R. v. Proulx | CanLII](#). See also: *R v Nezcroche* [2021 SKPC 27 \(CanLII\) | R v Nezcroche | CanLII](#) at para 19. Punitive goals are achieved through provisions such as house arrest, curfew conditions, and sobriety clauses. In a CSO, these provisions are intended to restrain the offender's liberty - not for reasons of rehabilitation (although that may be a secondary effect) but rather to denounce and deter unlawful conduct. Unlike a probation order, house arrest, curfew conditions, and sobriety clauses are the norm; not the exception. Rehabilitative conditions, such as treatment and counselling, are also common. Once imposed, a CSO bears many similarities to a probation order. An offender is supervised by and reports to a probation officer (aka a "supervisor") and is bound by the conditions imposed by the sentencing judge.

Of interest to this paper, the judge's determination that an offender can safely serve his/her sentence in the community is reviewable upon the occurrence of a breach. It is at this point – upon the occurrence of a breach - that the differences between a probation order and a CSO become apparent. By way of additional background, recent reports (data from April 2020 to March 2021) indicate that, on any given day, probation officers in Saskatchewan are supervising approximately 1,100 adults that have been placed on a conditional sentence. On average, approximately 94 CSO breaches are submitted per month.

First Major Difference between Probation and a Conditional Sentence Order – Bail:

An offender who is alleged to have breached a conditional sentence is entitled to seek bail (judicial interim release) pending a hearing of the alleged breach. See: s. 742.6(2). However, in the case of a breach of a CSO, the provision of s. 515(6) of the *Criminal Code* govern the offender's release pending a hearing. This is the reverse onus provision. As a result, the offender must show cause why he/she should be released pending a hearing of the allegation. Pragmatically, a breach of a CSO bears many similarities to a parole violation. An allegation of a breach must be supported by a written report of the offender's supervisor. See: s. 742.6(4). A justice of the peace does not have jurisdiction to deal with judicial interim release of a person apprehended for an alleged breach of a CSO. See: *R v Gessleman*, [2005 ABQB 628 \(CanLII\) | R. v. Gessleman | CanLII](#) at para 19. Finally, unlike a breach of a probation order, the tertiary ground for detention is a significant consideration in the case of an alleged breach of a CSO. An offender's ability to safely serve his/her sentence in the community is closely tied to compliance with the conditions imposed by the sentencing judge.

A number of factors can weigh on the question of bail, including the nature, timing and circumstances of the breach, changes in the plan for community supervision, whether more than one breach has occurred, and the existence of extenuating circumstances or a reasonable excuse. The allegation of new criminal charges is an aggravating factor. New charges trigger concerns

under both the secondary and tertiary grounds. Some would argue that judicial interim release pending hearing of an alleged breach of a CSO ought to be the exception; not the rule. Nonetheless, release is an available option. However, the onus is on the offender to demonstrate the ability to be safely released back into the community.

Another Major Difference – Breach Proceedings:

The procedure for hearing and determining whether a breach of a conditional sentence order has occurred is set forth in s. 742.6 of the *Criminal Code*. While not required, it is preferable that the allegations of a breach of a CSO be heard and determined by the judge or justice that imposed the CSO.

A breach of a CSO is not a criminal offence and a breach proceeding is not a criminal prosecution. See: *R v Whitty* [1999 CanLII 18919 \(NL CA\) | R. v. Whitty | CanLII](#) at para 41 and 48. See also: *R v Proulx* at para 27. A finding of a breach of a CSO does not change the nature of the original sentence - only the location and/or the conditions upon which that sentence is served. See: *Whitty* at para 45. While the accused's liberty is at stake, he/she can only serve the remainder of his/her sentence and no imprisonment beyond the end date of the CSO can be imposed by the court regardless of the number or nature of the condition breached. See: *R v Casey* [2000 CanLII 5626 \(ON CA\) | R. v. Casey | CanLII](#) at para 13.

In a breach proceeding, the Crown is required to prove the elements of the breach – the existence of a condition, the breach of that condition by the offender, and the offender's subjective *mens rea* – that the offender knowingly or willfully failed to comply. See: *R v Donald*, [2020 SKPC 44 \(CanLII\) | R v Donald | CanLII](#) at para 35. However, Parliament created a simpler and more expedited mechanism for dealing with breaches – a mechanism distinctly different from other criminal proceedings. In *R v McIvor*, [2008 SCC 11 \(CanLII\) | R. v. McIvor | CanLII](#) at para 18, the court identified four very distinct ways that a breach proceeding is different than other criminal proceedings:

1. By allowing allegations of a breach of a CSO to be proven by documentary evidence, including any reports prepared by the offender's supervisor. See: s. 742.6(5). The Crown is not bound by the common law rules of evidence, including the hearsay exception rule. In other words, *viva voce* evidence is not required, and hearsay is permissible.
2. By lowering the ultimate standard of proof for a breach to a balance of probabilities. See: s. 742.6(9). Because the Crown need only prove the elements of the breach on the balance of probabilities, the approach to proof set forth by the court in *R v W. (D.)*, [1991 CanLII 93 \(SCC\) | R. v. W.\(D.\) | CanLII](#), has no application in the context of a breach of a CSO. See: *R v Kitson* [2003 CanLII 33635 \(MB PC\) | R. v. Kitson | CanLII](#) at para 14. See also: *R v Obodzinski* [2019 QCCQ 458 \(CanLII\) | R. c. Obodzinski | CanLII](#) at para 56.
3. By requiring leave of the court for an offender to cross-examine the supervisor or any other person who has provided the court with documentary evidence. See: s. 742.6(8). As a result, the offender's common law right to require witnesses to attend

court and to be subject to cross-examination is restricted by the presiding judge's discretion.

4. By placing a persuasive burden on an offender to prove that he/she had a reasonable excuse for non-compliance. See: s.742.6(9). This reverse onus provision has been found to be *Charter* compliant. See: *Casey*.

The Court's Options in the Event of a Breach of a CSO:

The presiding judge has several options in the event a breach has been sustained (following either an admission by the offender or by a determination following a hearing). These include:

- **Take no action:** Such a disposition is appropriate when:
 - the presiding judge is satisfied that the period of time the accused was held in custody pending a hearing/resolution of the matter has been sufficient to satisfy the applicable sentencing objectives, including denouncing the offender's non-compliance; and
 - the judge is satisfied that the offender can safely serve the balance of the sentence in the community notwithstanding the occurrence of a breach.
- **Suspend the CSO for a period of time:** Doing so, requires the offender to serve time in custody - 2/3 thirds of the time the CSO is suspended as the offender (the offender is entitled to earned remission when a CSO is suspended calculated in accordance with the provisions of the *Prisons and Reformatories Act*). Such a disposition is appropriate where:
 - the presiding judge determines that an additional period of custody is required to satisfy the applicable sentencing objectives, including denouncing the offender's non-compliance; and
 - the judge is satisfied that, after serving the additional period of incarceration, the offender will be able to safely serve the balance of his/her sentence in the community.
- **Terminate the CSO:** Such a disposition requires the offender to serve 2/3 thirds of the remaining time on the CSO (the offender is also entitled to earned remission when a CSO is terminated). Such a disposition is appropriate where:
 - the principles of sentencing require the offender to serve the remainder of his/her CSO in custody; or
 - the presiding judge no longer has confidence that the offender can safely serve his/her sentence in the community.
- **Amend the Conditions:**

The Supreme Court of Canada in *Proulx* stated that, where a conditional sentence is breached without reasonable excuse, there should be rebuttable presumption that the offender serve the remaining portion of the sentence in jail. While this presumption is rebuttable, the constant threat of incarceration is meant to ensure the offender complies with the conditions of his/her CSO. This presumption is also meant to foster public support for conditional sentencing.

Practical Consideration in the Event of an Alleged Breach:

1. **Reports from Supervisors:** An allegation of a breach of a CSO must be supported by a written report of the offender's supervisor. These reports provide the court with information on how the offender has performed in the community while serving his/her conditional sentence, together with a description of any alleged breaches. The supervisor's report also provides an indication of how many more days the offender has left to serve on his/her sentence and a recommendation regarding disposition in the event the breaches are upheld. See: s. 742.6(4).

2. **Days Owing:** Two important points: The number of days left owing by the offender on his/her CSO is only accurate as of the date of the report. Furthermore, the number of days owing is prior to any credit being granted for the period of time while the CSO has been in suspension. Once the breaches have been determined (by admission, withdrawal, or hearing), the number of days owing by the offender will be automatically adjusted by correction staff for the credits earned while the CSO was suspended. NOTE: In most cases, there will be some credits earned and the number of days reduced. In some cases, the reduction can be significant.

3. **Suspension of a Conditional Sentence Order:** Although a subtle distinction, CSOs do not automatically go into suspension because a breach has occurred. Rather, an action by the Crown is required to cause the CSO to go into suspension. For example, a CSO will go into suspension if:

A warrant for arrest is issued for an alleged breach of the offender's CSO. See: s. 742.6(3)(a).

The offender is arrest without a warrant for an alleged breach of his/her CSO. See: s. 742.6(3)(b).

A summons is issued commanding the offender to appear in court on a charge that he/she has breached his/her CSO. See: s. 742.6(3)(c).

The offender is sentenced to custody on unrelated matters. See: s. 742.7.

Once suspended, the offender's CSO remains in suspension until such time as a determination is made as to whether or not a breach occurred (by withdrawal, admission or determination by the court). See: s. 742.6(10).

4. **Calculation of Appropriate Credits:** Any credits earned by the offender during the period of suspension are not calculated until after the court deals with the breaches (following their

admission, withdrawal, or a hearing). If the offender has incurred multiple breaches, the appropriate credits will be applied to the CSO by correction staff in the chronological order of the breaches.

5. **Calculation of CSO Credits if a Breach is Upheld:** If a breach of a CSO is admitted or found by the court, the suspension is upheld. In that case, the offender will be credited for any time spent on remand as a result of that breach but not for any time the offender was in the community on a release order pending disposition of the breach. Furthermore, the number of days owing by the offender is automatically reduced by any time spent on remand and the presiding judge does not need to make any order for the credit to apply. See: s. 742.6(15). NOTE: If the breach is upheld, credit for remand time is calculated on a one-to-one basis. NOTE: The offender will also receive credit for any time spent in police custody, as well as at any remand facility, toward the outstanding days left to serve on his/her CSO.

6. **Calculation of CSO Credit if Breach is not Upheld:** If a breach of CSO is withdrawn or dismissed by the court, the suspension has **not** been upheld. In which case, the offender will automatically be granted credit for any time spent on remand as a result of that breach and any time spent in the community on a release order pending disposition of that breach. NOTE: If the breach is not sustained (ie. withdrawn), the offender is granted enhanced credit for any remand time (1.5 to 1) and ordinary credit for any time spent in the community on a release order for that alleged breach. NOTE: A breach that has been withdrawn by the Crown has not been sustained!

7. **Calculation of Sentence End Date:** The end date for a CSO cannot be calculated until all outstanding breaches have been determined. The number of days owing on the CSO is automatically recalculated after the outstanding breaches are determined. If the offender has incurred multiple breaches, the appropriate credits will be applied to the CSO in the chronological order of the breach. NOTE: The credits are applied in the chronological order of the breaches not in the order they are determined by the court. NOTE: The court cannot impose a second sentence for a breach and cannot increase the length of the sentence that was originally imposed. See: *Casey* at para 13.

8. **Suspension or Termination:** If the court suspends the CSO, the Offender is automatically given credit for any time spent on remand and no order is required from the court. When a CSO is suspended or terminated, the offender is also entitled to earned remission under the *Prisons and Reformatories Act*, RSC 1985, c. P-20. As a result, the offender will only serve 2/3 of the time the CSO is suspended or 2/3 of the time remaining on the CSO if it is terminated. For example, if an offender owes 60 days on his/her CSO and has spent 3 days in custody prior to being released into the community and, if his/her CSO is suspended for a period of 30 days, the offender will serve 20 days in custody. However, his/her CSO will be reduced by 33 days (30 + 3), leaving 27 days left to serve in the community on the CSO. If, however, that same CSO was terminated, the offender would be credited for the time spent on remand (3 days) and will serve 38 days in custody (2/3 of 57 days) and the CSO will expire upon release from custody.

9. **Multiple Breaches:** If an offender has multiple breaches, credits are applied to a CSO in the chronological order of the breaches not in the order they are determined by the court. Furthermore, a withdrawal of a breach by the Crown means the suspension was not upheld and the offender will receive credit for any time they spent on remand as a result of that breach and any time spent in the community pending hearing of that breach until the point in time when the subsequent breach occurred.

Conclusion:

Conditional sentencing is a useful alternative to incarceration for certain offenders. While the provisions of the *Criminal Code* governing the imposition of a CSO are relatively straight forward, complications can arise in the event a breach is alleged to have occurred. It is helpful for both prosecutors and defense counsel to familiarize themselves with the provision of the *Criminal Code* – because, while the provisions appear simple – sometimes, their practical application is not! The most common errors I have observed in dealing with conditional sentencing are:

1. **Erroneously seeking to place an offender on a CSO in circumstances where incarceration is not warranted:** This sometimes occurs when an offender has performed poorly while on probation (by failing to report, by failing to engage in programming, and/or by incurring new charges) and counsel believes that the “Sword of Damocles” effect of a CSO will motivate change in the offender’s conduct. However, unless incarceration is appropriate (from a sentencing perspective) in the event of a breach, a CSO is not the proper sentencing option. Over-use of conditional sentencing can lead to more incarceration or longer periods of incarceration for some individuals.

2. **Repeatedly releasing an offender pending hearings when repeated breaches are alleged:** If a breach of a CSO is alleged to have occurred, the offender will be arrested. That person has the right to seek judicial interim release pending a hearing or resolution of that alleged breach. However, multiple releases of an offender when repeated breaches are occurring appears inconsistent with Parliament’s intent. Prompt consequences were intended to foster public acceptance of conditional sentencing as a safe alternative to incarceration. See: [R v Lutz 1997 CanLII 3514 \(BC CA\) | R. v. Lutz | CanLII](#) at para 10. Furthermore, the prolonged suspension of a CSO, creates the potential for error #3.

3. **Making erroneous assumptions regarding the number of days the offender has left owing on his/her CSO:** The offender’s supervisor will prepare a report and that report will identify the number of days the offender has left owing on his/her CSO. However, that information is only correct as of the date of the first suspension and prior to the calculation of credits earned by the offender since the CSO went into suspension. Credits are not applied by sentence management until after a determination has been made with respect to each of the breaches that are alleged to have occurred since the offender’s CSO went into suspension. Many factors influence the calculation of earned credits, including how long the offender was on

remand while the CSO was suspended, how long the offender was in the community pending a hearing on the alleged breaches, and the ultimate disposition of each of the alleged breaches.

Note:

Judge Schiefner is a judge of the Provincial Court in Prince Albert, Saskatchewan. The comments in this paper are solely those of Judge Schiefner and do not necessarily represent the views of the Court or any other judge of that Court. [Saskatchewan Courts | Saskatchewan Provincial Court, Court of Queen's Bench & Court of Appeal \(sasklawcourts.ca\)](http://sasklawcourts.ca)