ENFORCEMENT OF PROBATION IN BRITISH COLUMBIA

by

John Norman Aasen

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Name: John Norman Aasen

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Examining Committee:

Duncan Chappell
Chairperson,
Professor, Criminology

Senior Supervisor
Associate Professor, Criminology

Theodore (Ted) S. Palys
Assistant Professor, Criminology

Ross Collver
Judge, Provincial Court of British Columbia

Date Approved: April 16, 1985

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Enforcement of Probation in British Columbia

Author: _____
(signature)

John Norman Aasen
(name)

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(date)

ABSTRACT

Enforcement of probation is a generic term describing the processes through which consequences are provided for those offenders who fail to comply with probation order conditions or are involved in offences while subject to a probation order. Those processes are: a breach of probation charge, revocation of the suspended passing of sentence, and modification of probation conditions.

The Canadian literature, dealing with probation generally, assumes enforcement as a fact and often assumes the validity of the international comparison of enforcement related issues.

The focus of the historical analysis of the thesis is upon Criminal Code amendments, made in 1968 and 1969, which dramatically altered probation legislation. For instance, the offence of breach of probation was created and that, in turn, necessitated a charge and proof beyond a reasonable doubt. The amendments appear to have been given minimal scrutiny through the parliamentary process. Some of these amendments made probation in Canada different from what it is in the United States and England.

The offence of breach of probation is discussed in relation to legal and administrative problems. It is posited that the crux of the difficulties lies with proving, in most cases, that an accused person wilfully failed to comply with a probation condition by omission.

Problems with revocation of the suspended passing of sentence and modifications are set out with regard to: the nature of the legislation; the restrictiveness of some case law; and certain administrative difficulties.

The research involves the results from: questionnaires submitted to criminal justice personnel; interviews with probation officers; examination of official data; and sampling of court documents.

The questionnaire responses clearly indicate there is a great deal of dissatisfaction with the present level of enforcement. The remainder of the research supports this impression; there is a low conviction rate for the offence of breach of probation and revocations of suspended sentences and conditional discharges are very rare.

This thesis concludes with the proposition that Criminal Code amendments are required. It is submitted that the process of enforcing probation orders in Canada should be similar to that of the United States and England. There is also a recommendation for further research and for ongoing evaluation of enforcement practices.

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Aileen Sams made completion of this project a reality and deserves special mention for her efforts.

DEDICATION

To

Judy, Jennifer, and Mae

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I. INTRODUCTION

The general hypothesis on which this study is based is that British Columbia and Canada are in need of a Criminal Code amendment regarding probation. The present law is inadequate in terms of providing appropriate consequences for, and accountability of, offenders with respect to compliance with probation orders, particularly when the law is put into practice.

The purpose of the study will be presented in this chapter. As a basis for proceeding with understanding, to other chapters, the remainder of this chapter will contain the following:

- the terms will be defined;
- an overview of the problems regarding probation enforcement will be presented;
- the detrimental affects of a lack of enforcement will be discussed; and
- there will be a general description of the research.

The last section will discuss the other chapters in terms of their content.

Purpose of the Study

The study was a result of a longstanding interest in probation as it exists in British Columbia. The writer has had several years practical experience as a probation officer. From that experience, it was noticed that few, if any, probationers were returned to court to be sentenced with respect to "suspended sentences" and relatively few probationers were charged and convicted of the offence of breach of probation. In addition, the charges which proceeded to the trial stage rarely seemed to result in convictions. The writer began to question why this was the case and if his experience was unique. Therefore, the purpose of the study will be an attempt to answer the following general questions:

- are there problems with enforcement of probation?
- is the law a significant factor in contributing to the problems?
- how did the present probation law (Criminal Code sections) evolve?
- do others in the criminal justice system perceive enforcement of probation to be problematic?
- what can be done about the problems if they do exist and what alternatives might be available?

Definitions

Any study of probation requires definition of the terms. There seems to be considerable confusion and misinterpretation of the terms relating to probation. For example, the terms probation and parole are often confused; "perhaps the majority of laymen, and a surprisingly large number of lawyers and other practitioners in criminal justice, are unclear about the differences between probation and parole and use the terms interchangeably" (Killinger, Kerper, and Cromwell, 1976, p.5). Only the basic concepts will be defined here. Those concepts and others will be further defined and elaborated upon throughout the text.

A. Probation

Definitions of probation are many and varied. An American text states:

> Probation is a method of the criminal justice system in which a delinquent or criminal offender, adjudicated or found guilty of a crime upon a finding, verdict or plea of guilty, is released by the court without commitment to an institution or prison, subject to conditions imposed by the court and to the supervision of a probation service (Solomon, 1976, p.143).

The foregoing definition is important as it distinguishes between probation and parole. It clearly indicates that a probationer is released without commitment to an institution or prison. Parole is early release from prison subject to

supervision in the community. The definition is, however, inadequate for the present Canadian context as one can be placed on a period of probation following a prison sentence (Canadian Criminal Code S.663.(1)(b)).

Probation is defined in the Ouimet Report (1969):

> As a disposition of the court whereby an offender is released to the community on a tentative basis, subject to specified conditions, under the supervision of a probation officer (or someone serving as a probation officer) and liable to recall by the court for alternative disposition if he does not abide by the conditions of his probation (p. 293).

The Ouimet (1969) definition is Canadian but it is not much closer to the present reality of probation in Canada than is the American definition. The Ouimet Report predated the 1968/69 Criminal Code amendments regarding probation. That is the reason the definition no longer applies. It will, however, be a major attempt of this thesis to support a state of affairs which would make the Ouimet definition appropriate. In addition, certain recommendations of the committee will be supported in this thesis. Those recommendations are presented in the following two chapters.

For the purposes of this study, probation will be defined as a disposition of the court whereby an offender is subject to specified conditions, with or without the supervision of a probation officer, and liable to the separate offence of breach of probation if there is a failure to comply with probation conditions, and revocation, in certain instances, of the suspended passing of sentence or conditional discharge in the

event there is an offence committed while on probation.

The above noted definition requires explanation. It states an offender is subject to specified conditions. There are two requirements or conditions which are deemed to be in every probation order: that the accused shall keep the peace and be of good behaviour and shall appear before the court when required to do so by the court (Criminal Code, S.663 (2)). Those are the only two conditions which are required of any probation order. All other conditions are at the discretion of the court.

The probation conditions which may be optionally imposed by the court are:

a. Report to and be under the supervision of a probation officer or other person designated by the court;

b. provide for the support of his spouse or any other dependents whom he is liable to support;

c. abstain from the consumption of alcohol either absolutely or on such terms as the court may specify;

d. abstain from owning, possessing or carrying a weapon;

e. make restitution or reparation to any person aggrieved or injured by the commission of the offence for the actual loss or damage sustained by that person as a result thereof;

f. remain within the jurisdiction of the court and notify the court or the probation officer or other person designated under paragraph (a) of any change in his address or employment or occupation;

g. make reasonable efforts to find and maintain suitable employment; and

h. comply with such other reasonable conditions as the court considers desirable for securing the good conduct of the accused and for preventing a repetition by him of the same offence or the commission of other offences (Canadian Criminal Code S.663 (2)).

Condition (h) is very general and allows for the use of any condition provided it meets the criteria of securing the good conduct of the accused or preventing his repetition of the offence or other offences. The condition requiring reporting to a probation officer or other person may, or may not, be imposed and, therefore, probation may be with, or without, supervision.

The term suspended sentence is a misnomer when used in the Canadian context. It is the passing of sentence which is suspended and not the sentence per se (S.663. (1) (a)). That is, imposition of sentence is not made and immediately suspended as is the case, for example, in most United States jurisdictions. In this study, there will be a distinction made between the suspended execution of sentence and the suspended passing of sentence.

The definition of probation indicates that revocation of the suspended passing of sentence or conditional discharge may occur in certain circumstances. The reason for that qualification is that there are five means by which a

person may be placed on probation.

1) Conditional Discharge

Section 662.1 (1) of the Criminal Code states:

> Where an accused, other than a corporation, pleads guilty to or is found guilty of an offence...if it considers it to be in the best interests of the accused and not contrary to the public interest, instead of convicting the accused, by order direct that the accused be discharged absolutely or upon the conditions prescribed in a probation order.

It is important to note the words "instead of convicting the accused"; a person who receives a conditional discharge does not have a criminal record. A person cannot receive a conditional discharge for an offence with a minimum punishment or one which may be punishable by imprisonment for 14 years or more (Criminal Code S.662.1(1)).

2) The Suspended Passing of Sentence

Suspension of the passing of sentence may occur for any offence "other than one for which a minimum punishment is prescribed by law" and the accused can be "released upon the conditions prescribed in a probation order" (Criminal Code S.663(1)(a)).

(3 and 4) Fine and Probation or gaol and probation

An accused can be placed on probation in addition to a fine or a period of incarceration (Criminal Code S.663(1)(b)). In these instances, the passing of sentence is not suspended for the period of probation. Therefore, the revocation provisions of the Criminal Code do not apply. The probation period cannot follow a period of imprisonment

greater than two years (Criminal Code S.663(1)(b)). The maximum period of probation is three years (Criminal CodeS.664 (2)(b)). Therefore, the absolute maximum length of state intervention, when probation is involved, is five years. Of course, it must be remembered that a gaol sentence will involve remission and the period of state intervention will be less than five years maximum in reality. Apparently, a period of probation cannot follow a sentence of imprisonment and a fine (Criminal Code S.663(1)(b)).[1]

5) An intermittent gaol sentence and probation

The last means of placing an accused on probation is through the use of an intermittent sentence of incarceration. This type of disposition usually involves ordering the offender to serve a gaol sentence on weekends. The purpose of this type of disposition is often to facilitate maintenance of an offender's employment during the week while providing punishment in the form of incarceration. An intermittent sentence cannot exceed 90 days (Criminal Code S.663 (1) (c)). During the time the person is not serving the gaol sentence he is subject to a probation order (Criminal Code S.663 (1) (c)). However, it would appear the probation order cannot go beyond the last part of the gaol sentence served.[2]

It is worth noting an intermittent sentence is not what it appears to be at first sight. One who is unfamiliar with the criminal justice system might think an offender who is

sentenced to the maximum 90 day intermittent sentence would be required to serve 45 weekends. That is simply not the case. Remission is calculated for an intermittent sentence in the same manner as it is for any other type of incarceratory sentence. Therefore, 30 days would be remitted to the offender provided there is no inappropriate behaviour within the institution. Further, if the offender was ordered to begin his sentence at, say, 5 p.m. on Friday evenings and ordered released at 9 p.m. on Sunday evenings (in order to facilitate the offender's attendance at his place of employment), the offender would be credited with three days served per weekend. That is the case, notwithstanding the fact that some 51 hours were served rather than 72. Therefore, the maximum intermittent sentence, in this type of situation, would mean the offender would serve 20 weekends. The probation period would be reduced proportionately as well; it would be slightly less than five months instead of slightly less than 11 months.

B. Revocation

Revocation will be defined as the imposition of sentence, in the instance of the suspension of the passing of sentence or conditional discharge, as a result of a conviction subsequent to the making of the respective probation order. With respect to the suspension of the passing of sentence, Section 664 (4) (d)

of the Criminal Code states, "Where the probation order was made under paragraph 663 (1) (a), [the court may] revoke the order and impose any sentence that could have been imposed if the passing of sentence had not been suspended". With respect to a conditional discharge, the court may, "revoke the discharge, convict the accused of the offence to which the discharge relates and impose any sentence that could have been imposed if the accused had been convicted at the time he was discharged" (Criminal Code S.662.1 (4)).

C. Breach

Breach of probation will be defined simply as a wilfull failure or refusal to comply with conditions set out in a probation order or a conviction for an offence subsequent to the making of a probation order and while the offender is bound by the probation order. Formally, a breach could be seen as a charge or conviction pursuant to section 666 of the Criminal Code: "an accused who is bound by a probation order and who wilfully fails or refuses to comply with that order is guilty of an offence punishable on summary convicton". However, a probation officer or other peace officer may have reasonable and probable grounds to believe a wilfull failure or refusal occurred without the matter resulting in a charge pursuant to section 666; the peace officer may be using discretion or decide there is insufficient evidence to process a charge.

A decision to not process a charge, for evidentiary reasons, is not considered to be discretionary because there is very limited, if any, choice involved. That is, to process a charge for which there is insufficient evidence would be futile except for, perhaps, the administrative nuisance it may create for all those involved. It is submitted that the commonly accepted perception of peace officer discretion involves the free choice of the peace officer to not process a charge for humanitarian reasons, when the peace officer is of the opinion the charge will likely result in conviction. Therefore, a decision to not process a charge because of a lack of evidence does not truly involve discretion; it involves a "Hobson's choice".

The Crown prosecutor may also use discretion or decide there is insufficient evidence to proceed with a charge pursuant to section 666 of the Criminal Code. There is reason to believe the latter situation is not at all uncommon. Those matters which do not result in a charge will also be referred to as a breach from time to time in this thesis. A great deal of discussion will focus on those matters which do not result in charges and/or conviction due to problems of legal technicality.

D. Modifications

Probation modifications will be defined as alterations, additions, or deletions of probation conditions and/or the

period of probation. An application to the court for modification of probation conditions or reduction in the probation period can be made by the accused or the prosecutor (Criminal Code S.664(3)(a),(b), and (c)). These alterations can only be made when, "in the opinion of the court (the modifications) are rendered desirable by a change in the circumstances since the conditions were prescribed" (Criminal Code S.664(3)(a)).

Section 664(4)(e) of the Criminal Code provides for changes or additions to probation conditions or the extension of a period of probation upon application by a prosecutor. The section applies only when there has been a subsequent conviction inclusive of a conviction for breach of probation.

It is interesting to note there is no formal provision, in the modification sections of the Criminal Code, for the involvement of a probation officer. In practice, probation officers are often consulted by the court before a modification is made and the probation officer most often initiates action by requesting a prosecutor to make the application. Nevertheless, there is a clear possibility for an order to be modified considerably without the input of the supervising probation officer who might be more aware than anyone else of the changed circumstances of an accused.

E. Enforcement

Enforcement will be defined as a charge of breach of probation, revocation of the suspended passing of sentence or conditional discharge, and the modification of a probation order resulting in a consequence, for the offender who wilfully fails or refuses to comply with an order or is convicted of a subsequent offence while subject to a probation order.

The Problems

Administrative difficulties such as the poor wording of probation orders or lack of communication within the criminal justice system contribute to the overall difficulties with enforcement of probation orders. Those areas will be discussed in this thesis. However, it is submitted the major problem area relates to the Canadian Criminal Code sections regarding probation. The problem is the inability to apply those sections, in a meaningful and practical manner, to the day to day realities of probation supervision. In fact, it is possible for a probationer, subject to very common probation conditions and regardless of his original offence, to completely ignore all the conditions of his probation order with impunity.

In the case of a person being charged with wilfully refusing or failing to comply with a probation order, the problems usually arise out of Crown counsel having to prove an

accused's omission, vis-a-vis an "act", beyond a reasonable doubt. That is, the prosecutor must deal with section 666 of the Criminal Code as if it were an offence like any other substantive offence in the Criminal Code. A further difficulty arises in the relative ease of defending such a charge.

There will be detailed examples and discussion offered later in this thesis regarding 'proof' problems. A typical example will illustrate the point for present purposes. A person may have a probation order which states that he must report to and be under the supervision of a probation officer or other person designated by the court (Criminal Code S.663(2)(a)). If the person simply does not report to anyone, the question becomes: how does the prosecutor prove the person did not report to a probation officer? Perhaps the only way of doing so would be to have all the probation officers in the Province of British Columbia give evidence regarding that person's failure to report to one of them. The economic cost of so doing, to prove a summary conviction matter, would be ridiculously high. The foregoing example raises another question: is a Crown prosecutor's most rational option to stay the proceedings or refuse to proceed with the charge?

Defending a charge of failing to report in a situation like the one described is extremely simple. Notwithstanding an accused's implicit and explicit obligation to relate the truth to the court in a trial situation, it might be expected that a person who failed to report entirely might simply state that she

was unable to report because of a physical ailment. Since that person did not report to anyone, it would be very unlikely that a Crown prosecutor would be able to rebut that evidence. Hence, the person will not be convicted of wilfully failing to report. The accused or her defence counsel might also argue that since there has been no evidence to show the person did not report to a probation officer there is also no evidence regarding the wilfull failure to report; the accused was given no instruction as to where and when to report.

Revocation of the suspended passing of sentence or conditional discharge is problematic in terms of the attitudes of prosecutors, legalities, and practical application. A Crown prosecutor might believe that revocation amounts to "double jeopardy". The suspended passing of sentence must be operative in order for it to be revoked and it may expire before the offender is convicted of a subsequent offence, notwithstanding the fact that the offence was committed while the order was in effect. Another problem is that the probation officer may simply not be aware of the subsequent charge or conviction and, therefore, will not initiate a revocation procedure. It must be remembered that revocation does not provide enforcement of probation orders which were made in addition to a fine or a period of incarceration as there is no suspension of the passing of sentence or conditional discharge in those instances.

Detrimental Effects

An inability to enforce probation orders may have severe consequences. It may be expected that probation, as a valid disposition of the court, may not be seen as such by the offender, practitioners in the criminal justice system, and the public. This may, in turn, result in higher rates of incarceration. Higher rates of incarceration would involve considerable monetary and social cost. It seems necessary that justice must be done and must appear to be done by both the offender and the offended. An inability to enforce probation orders may undermine the principles of sentencing used by Canadian courts. Present concern with victims may be meaningless if work service and restitution cannot be enforced.

A draft report of a policy statement by the Canadian Association for the Prevention of Crime (1982) outlines the advantages of probation very well and implicitly indicates what may be lost in the event probation falls into disrepute:

> Probation was originally introduced as an alternative to imprisonment. Probation was seen as having the following advantages over imprisonment:
> 1) The offender is supported through assistance, guidance, and supervision provided by the probation officer and appropriate community agencies.
> 2) The above support is provided where it will have the most practical effect: in the community where the offender must learn to live.
> 3) The offender is able to maintain the positive elements of his life, such as continuing his employment or education and fulfilling such social obligations as maintaining his family.
> 4) The offender may be able to make amends to the victim of his crime, thus reducing the loss suffered by the victim and giving the offender the feeling that he has

discharged his debt and can start over again with a clear slate.
5) The fact that he has been given a second chance rather than being dealt with harshly may encourage the offender to respond by staying within the law.
6) Probation avoids the dangers inherent in a prison sentence: a greater stigma and resulting social and employment difficulties; the risk of identification with the criminal world on the part of the offender; establishing acquaintances that are a bad influence; and the greater break with the community and the positive aspects of life there.
7) Probation costs much less than imprisonment (p.2).

The Research

If the law respecting probation enforcement was problematic, we would expect to find low levels of findings of guilt when there were "not guilty" pleas. However, one cannot necessarily draw an inference that low levels of conviction are caused by unenforceable law. There are far too many other variables which may be factors. For example, an alternative hypothesis is that certain low conviction levels (in trials) can be attributed to accused persons pleading guilty to obvious offences and only in those cases in which accused persons are most likely innocent will there be trials. In sum, there are validity problems in most social science research and a single measure is not satisfactory in terms of dealing with rational alternative hypotheses.

A multifaceted quantitative and qualitative approach has been taken in this study. First, an anonymous questionnaire was administered to the significant actors dealing with enforcement of probation in British Columbia; judges, prosecutors, and

probation officers. Second, probation officers in various British Columbia locations were interviewed. Third, court dockets and official data were examined regarding two types of communities, a large and small community, in each of the five corrections regions in the Province, to determine actual conviction rates. Fourth, court files were examined in an attempt to determine the types of probation cases which may be problematic or non-problematic in terms of conviction. Last, probation orders, from the different Provincial locations, were content-analyzed to determine if they differed significantly in their form or wording. It is hoped this multi-measure approach will strengthen both the validity and reliability of the findings.

The Thesis

The guiding philosophies and models of probation are reviewed in the second chapter. There is a review of the Canadian literature regarding probation generally and enforcement of probation specifically. There is a critical review of the Canadian literature and research with respect to two major assumptions which appear to pervade both. These are the assumption of comparability and the assumption of enforcement. There is a comparison with some of the literature of the United States and Great Britain. The last part of the chapter examines the work and recommendations of three major

Royal Commissions: the Archambault Report, the Fauteux Report, and the Ouimet Report.

The history of probation, particularly in Canada, is deliniated in Chapter III. Legislative changes are incorporated in that historical review and the recommendations of the Ouimet committee are examined in greater detail. Some of the case law is also discussed in relation to the historical progression of probation. The present law of probation in Canada, the United States, and Great Britain is presented and compared.

The fourth and fifth chapters deal with the day to day problems of enforcement. Specific case examples are offered to illustrate the legal and administrative problems and the difficulties encountered in implementing the law in practice. That is, the impracticality of probation practice, when combined with the legal necessities, is illustrated.

Chapters VI and VII include a detailed description of the research. The research in relation to the legal and practical problems is discussed. The results and interpretation of the research follow a delineation of the methodology for the elements which comprise the entire study.

The last chapter summarizes the study. Recommendations are made with respect to: further research; data collection; and legislative change.

NOTES

1. See, for example, Regina v. Blacquiere (1975), 24 C.C.C.(2d) at 168. The Ontario court of appeal held that the word or in S.663(i)(b) of the Code was deliberate and excluded the use of both a fine and imprisonment in addition to probation. That is, probation can be imposed in addition to a fine or in addition to a gaol sentence but not in addition to both.

2. See Barnett C.R.N.S. vol.38,pp.173 and 174. Judge Barnett notes that in British Columbia, the court of appeal has held that the probation period which must accompany an intermittent sentence must also be within the period of incarceration imposed and cannot extend beyond the last day served. However, he also notes two avenues of 'getting around' the restriction: first, the court may require that the last day be served at the end of the intended probation period; perhaps two years from the date of sentence imposition. Second, the court may impose an intermittent period of longer duration; for example, one weekend per month.
   Two cases which pertain to the restriction are Demedeiros v. The Queen (1979),12 C.C.C. (2d.)113 (B.C.C.A.) and R. v. Thomas (No.2)(1980), 53 C.C.C. (2d.) 285 (B.C.C.A.). A case which did not allow for the restriction and is, therefore, contrary to the findings in British Columbia is R. v. Weber (1980), 52 C.C.C. (2d) 468 (Ont.C.A.)

II. A LITERATURE REVIEW RELEVANT TO ENFORCEMENT OF PROBATION

The Major Models

An examination of enforcement of probation must involve a discussion of the major models and underlying philosophies of probation practice. The necessity arises from the interrelationship of those models with enforcement. It could be argued that an individual or group adopting a treatment philosophy may not, necessarily, be concerned with enforcement of probation. On the other hand, it would seem an organization operating on the basis of a crime control philosophy may be very concerned with enforcement. However, it would appear that at least an element of control is necessary in either situation and the ability to control depends on the ability to enforce.

It is beyond the scope of this study to detail the literature regarding the various probation models. It seems clear, however, that:

> Two conceptual frameworks are identified in the literature, the traditional juridical which uses the free-will model of human behaviour to guide probation practice, and the treatment pathological framework, which assumes a deterministic view of offender behaviour. The literature suggests a current shift back to a reliance upon the traditional juridical framework with an emphasis upon the rule of law, individual responsibility and the 'social contract' type of intervention with offenders. In return for social stability and other social welfare measures that the state and the law provide, the individual as a party to a contractual obligation, fulfills his responsibility by

> behaving in accordance with legal directives. Correctional policies, including probation, emphasize accountability, efficiency, specificity, and systematic procedures, in short, punishment with economy in the 'system era'. The accountability approach is reflected in alternative forms which are now beginning to be the basis for policy development: justice, just desserts, opportunities, and security models (Couse and Matonovich, 1982, p.214).

Most texts dealing exclusively with probation and parole discuss the broad concepts of care and control. Other texts, dealing in part with probation, usually include chapter sections which examine revocation (control) and rehabilitation (care). In sum, most of the probation literature addresses both concepts with explicit or implicit preference for one usually indicated. The literature generally distinguishes between the functions of care and control, based on the respective philosophies of determinism and free will, with control coming to the fore in recent times.

An example of a "caring" philosophy is presented in an article by Sanchez (1982): "Probation Officers Do Make a Difference" (p.77). It also exemplifies what could be seen as the tenacity of the social case work perspective. Sanchez writes:

> Because the probationers indicated that the probation officer was an instrument of change, and because so much literature and attention are pointed at the failure of the 'system' (including probation), my interest was hightened to pursue the notion of 'success' in a more structured way. This article does not examine the failures of probation officers: rather, it examines the successful interaction between officer and client (p.77).

The article emphasizes social casework but does not neglect enforcement entirely. For instance, Sanchez notes a question

should be asked of probationers regarding the performance of probation officers: "did she warn me of what consequences I might expect if I took certain actions" (p.80).

"Probation: Call It Control and Mean It" (Barkdull, 1976, p.3) is an article, which supports, as its title implies, the control ideology. Barkdull argues there is increasing use of incarceration as probation sentences are viewed by the public as "getting off". He suggests that view could be altered if greater supervision and control were exercised. He essentially argues for stronger probation controls to justify greater decarceration. Although control is emphasized, the need for social casework and assistance to the offender is not negated.

An article which exemplifies a melding of the two ideologies is "Advocacy, Brokerage, Community: The A.B.C.'s of Probation and Parole" (Dell 'Apa et al., 1976, p.37). The authors stress the utility of community resource management teams in probation; i.e., the team concept of administering probation services. However, they also recognize both casework and control:

> The C.R.M.T. (Community Resource Management Team) worker views his responsibility to change the community as being at least as important as changing the client. In so doing, a new balance is struck between the traditional role of counselling and controlling the client and community development (p.41).

A recent article in Corrections Magazine discusses the concept and application of intensive probation supervision. This type of probation involves small caseloads and is described as an alternative to prison because it attempts to make probation "a

tough sanction against crime" (Gettinger, 1983, p.7). Gettinger (1983) quotes a long time offender: "Anybody with any natural sense would rather do this than go to prison" (p.8). Intensive supervision involves community work service, restitution, fines, curfews, and volunteers in addition to surveillance. The team concept can be incorporated with one officer concentrating on the role of counsellor and broker and another concentrating on surveillance. Thus, both care and control are utilized in the program.

Singer (1980), unlike most writers, has taken the position that care and control are complementary, notwithstanding the many polemical viewpoints to the contrary. Couse and Matonovich (1982) note:

> The basis of Singer's argument is that the distinction between the two schools of thought is superfluous; that care and control are not opposites but complementary, yielding a single ideology or conceptual approach: the pathological juridical (p.37).

They also note, in reference to other works:

> The central difference is that, whereas a number of writers in the probation literature have claimed the caring role as an adjunct or appendage to the controlling role, Singer's point is that they are the same thing, a unitary entity (p.37).

The debate between care and control proponents will undoubtedly rage on. The debate is largely one focussing on what probation should be or, more accurately, what probation should stress. An author who stands out, in terms of asking what probation is, is Lewis Diana. Diana (1960) reviewed the literature up to 1960 in order to answer that question with

respect to the professional literature. He also did some research with practitioners to determine what probation is in reality.

Diana (1960) used five definitions of probation. Probation as a legal disposition is a view of probation as a second chance with a threat of punishment in the event the offender fails to improve his behaviour. Probation as strictly a measure of leniency and probation as strictly a punitive measure are self-explanatory. Probation as an administrative process:

> Involves executing concrete measures (e.g., imposing a curfew, effecting a school transfer, helping the probationer find employment) in the hope that somehow a behavioural change will be effected. This view of probation differs from that which suggests that it is a form of treatment in that the approach does not involve an attempt to probe the personality of the probationer so as to generate 'insight' and consequent behavioural change. Rather, the probation officer is essentially an officer of the court who is charged with seeing that the order of the court is carried out (Griffiths et al., 1980, p.253).

Diana (1960) found that probation as social casework was poorly defined:

> The point of view which identifies probation with casework treatment is difficult to analyze. It cannot be presented as a consistent or well defined approach and appears, rather, to represent an attitude or state of mind in lieu of a technique or substantive theory. In any event the literature presenting probation as casework treatment generally defines probation as the application of casework principles and techniques in dealing with the offender. But what is casework? (p.44).

In discussing Diana's work, Griffiths et al. (1980) have described probation as social casework in the following manner:

> The basic theme of the approach is that the probationers' anti-social conduct is the product of some underlying emotional disorder which is in need of

> treatment: the treatment is generally borrowed from the disciplines of psychology and psychiatry (p.253).

Diana's review of the literature found the prominent view on probation to be as casework or administration, or a combination of the two. However, Diana (1960) notes:

> These leading approaches overlap considerably so that their differentiation consists almost solely in their respective points of emphasis. Thus, all three would agree that probation is a legal disposition and that probation is not to be thought of as mere leniency or as mere punishment; but in the first instance, it is viewed as basically casework treatment, in the second, administrative supervision; and in the third, both of these. Each, however, contains elements of the other. So in all cases probation is seen as a social as well as a legal process, as a method of supervision and guidance in which all available community resources are used, and as a process which aims at the total adjustment of the offender (p.51).

Twenty experienced probation officers were interviewed by Diana in order to determine what probation is in reality. His findings were:

> Obviously there is no concensus or standardization of opinion concerning probation among these 20 experienced workers, nor have they any clear conception of what casework is. I suspect such a situation is general (p.55).

Regardless of the position taken with respect to the care versus control debate, or the related conceptualization of what probation is, it seems that at least an element of control is necessary, as the literature, generally, suggests. It would be unrealistic to expect a probation service to function without some form of coercion which is implicit in the control function.

Within the context of a hypothetical, non-coercive, probation system, some rhetorical questions can be posed:

1. Would offenders with the most to gain in terms of needing

assistance (care) necessarily be those who would voluntarily attend at a probation office;

2. Would probation be seen as an alternative to incarceration by the public and judiciary;
3. Could reparative sanctions such as work service and restitution be viable; and
4. Would not some form of injustice develop as a result of the inherently coercive nature of the criminal justice system?

The last question requires elaboration. A person awaiting sentence might be inclined, within a voluntary probation system, and perhaps at the suggestion of his counsel, to 'volunteer' for: attendance at counselling sessions, abstinence from alcohol use, victim reparation, etc. The purpose of so 'volunteering' might be to achieve a more lenient sentence from the court, inspite of the fact that formal probation did not exist. Further, perhaps many individuals would feel responsible for their 'voluntary' promises and act on them. However, there would undoubtedly be some, if not many, equally culpable persons, who would ignore their moral obligations in the absence of legal controls. Thus, a fundamental injustice would be created for those who did comply with their voluntary agreement with the court.

The foregoing discussion has raised three major points. First, it is unlikely that the absence of coercion is a possibility within an adversarial criminal justice system. Second, an attempt to implement non-coercive probation, within

an adversarial system, could be unfair to persons who felt coerced or morally responsible. Third, the possibility of sanctions for failure to comply should apply to all offenders, as not to do so would create inequities.

Canadian Literature

The Canadian literature regarding probation is generally laudatory. It usually points to: the economic benefits of probation (National Conference, 1972, p.20), its rehabilitative efficacy (Parizeau and Szabo, 1977, p.46), and its humanitarianism (Outerbridge, 1970, p.197). Of course, probation has had its detractors as well (Boyd, 1978). It is not within the scope of this thesis to detail the debate as to whether or not the praise or the criticism is justified. Rather, it is submitted the praise cannot be justified, at least generally, if probation is not used as an alternative to incarceration in most instances. Alternatively, the criticisms lack strength if probation is used as an alternative to incarceration. For example, if a person placed on probation would not have been incarcerated, the economic benefit of probation is non-existent. If the person would have been incarcerated, for even a fraction of the time he was placed on probation, there would be an economic benefit.

A prominent feature of the Canadian literature regarding probation is its paucity in absolute terms. A more important

feature, with respect to this study, is the almost complete absence of literature and research regarding enforcement of probation. However, there is some literature which is directly and indirectly related to enforcement.

This section of the literature review will first critically examine the Canadian literature in terms of two major assumptions: an assumption of comparability; and an assumption of enforcement. Second, there will be a discussion and critical examination of the literature which directly addresses the issue of enforcement. Third, there will be an examination of Canadian evaluation research. Last, there will be an examination of the Archambault, Fauteux, and Ouimet Committee reports regarding their respective positions relating to probation enforcement.

The Assumption of Comparability

The assumption of comparability refers to the very common tendency of Canadian writers to compare and transpose what has occurred in other countries, particularly the United States, to the Canadian situation.[1] This appears to be an incorrect assumption for two reasons: first, there is a cultural difference which may affect, for instance, the manner in which probation is practiced; and, second, the probation legislation in other countries and specifically in the United States, England, and Australia, is quite different.[2] It is this latter difference which is germane to this thesis and which will be

examined in relation to some recent Canadian literature.

One of the more important differences between the probation legislation of Canada and the United States is the fact that in most U.S. jurisdictions there is no actual offence for failure to comply with a probation order. Rather, when an offender fails to comply with an order, he is returned to court and there is a hearing regarding the failure to comply. In Canada a failure to comply can result in a charge of breach of probation pursuant to Section 666 of the Criminal Code. One might expect, therefore, that American authorities have a lesser degree of difficulty in enforcement proceedings due to a less technical enforcement process. Hence, there may be significant differences in the way judges in Canada and the U.S., perceive probation. Secondly, there may be significant differences in the manner in which probationers in those respective jurisdictions, perceive the ability of authorities to enforce court orders.

The legislative differences will be discussed in greater detail in later chapters. For present purposes, it appears reasonable to assert that legislative differences may be significant in terms of compliance with probation order conditions and those differences are not accounted for by Canadian writers. For example, Parizeau and Szabo (1977) note:

> One measure of the success of probation is whether the probationer completed the probation period without a breach of conditions that would induce the court to terminate his probation (p.145).

They also point out there are several other variables which must be considered in evaluating the success of probation (p.146).

Similarly, other Canadian texts have indicated the methodological problems involved in probation research:

> That the reconviction rate for those on probation is less than those who have been incarcerated probably says more about the efficacy of the selection for probation process than the process of treatment while on probation (Griffiths et al., 1980, p.256).

The above noted writers do not consider the difference in legislation as a possible intervening variable notwithstanding the fact that most of the probation literature in their respective texts and in other Canadian materials refers to American research.

The Assumption of Enforcement

The assumption of enforcement simply refers to the tendency in the literature to assume that Canadian probation law is readily put into practice, efficacious, and non-problematic. This is as equally pervasive in the literature as the assumption of comparability. The assumption of enforcement will be discussed in relation to: social and economic costs, evaluation research, textbooks and journal articles, and the work of the Canadian Law Reform Commission.

A) Social and Economic Costs

In view of the absence of evidence regarding enforcement of

probation in Canada, it seems reasonable to speculate on what the effects of non-enforcement might be. The possibility of unfairness to individuals who had voluntarily complied with probation orders has been discussed previously. A similar situation would arise if enforcement was perceived to be non-existent or negligible as compliance with probation conditions would then be, ostensibly, voluntary. Probation as an alternative sentence may fall into disrepute with the judiciary, practitioners, and the public.

Both the offender and victim may suffer from non-enforcement. For instance, an offender who has found, through experience, that he is able to ignore probation conditions with impunity, might be disposed toward commission of further offences. Victims of crime may also be affected. Victims who have had restitution conditions, in probation orders, made on their behalf may not receive that reparation.

The above noted costs have been alluded to, or explicitly mentioned, previously. They may be of very great importance and yet they seem intangible and not easily subjected to quantitative or qualitative analysis. For that reason, they are again mentioned in this context and a few more examples will be offered. For instance, there is the frustration factor for the judiciary, police, Crown counsel and probation officers. In addition, defence counsel may also have reason to be concerned, as it might become increasingly difficult to convince a

sentencing court of the appropriateness of a disposition involving probation. Defence counsel might also meet with increasing difficulty in arriving at an agreement with Crown counsel regarding sentencing matters. Similarly, members of the public who have been victimized may become more rigid.

The economy of probation vis-a-vis incarceration will not be discussed in detail here. However, it must be reiterated that it would appear probation is much less costly than incarceration, provided it is used as an alternative to incarceration. It is the possible economic costs and some of the concomitant social costs of making an incorrect assumption regarding enforcement which will be examined. A clear example will be used in that regard; the implimentation of the Young Offenders Act.

The Juvenile Delinquents Act has been replaced by the Young Offenders Act which received third reading in the House of Commons on May 17, 1982. It would appear the drafters of that new legislation assumed the probation provisions of the Criminal Code were readily enforceable and put into place similar provisions in the Young Offenders Act. That is, Section 33 of the Young Offenders Act requires a 'review' for a breach of probation condition in which the Crown prosecutor is obliged to prove, beyond a reasonable doubt, the young person wilfully failed to comply with a probation order. For all intents and purposes, the review is a trial similar to that which occurs through a charge pursuant to Section 666 of the Criminal Code.

It is not in dispute that the Juvenile Delinquents Act required revision, or even that the enforcement provisions were possibly subject to abuse. Rather, it is submitted that it was not necessary, or appropriate, to implement enforcement legislation similar to the Criminal Code on an apparent assumption of the ability to enforce. In a recent text, Wilson (1983) praises the Young Offenders Act and criticizes the Juvenile Delinquents Act. Throughout the text, it is apparent Mr. Wilson assumes the Crown's ability to enforce adult probation orders. If that assumption is not correct, it is doubtful the results will be in the best interests of young persons or society.

There are short run and long run economic costs which must be considered in relation to the Young Offenders Act. In terms of short run costs, it could be argued that much of the time and effort devoted to implementation of the legislation may be wasted if the legislation proves to be ineffectual in terms of probation enforcement; for example, planning with respect to those young persons whose dispositions might be reviewed. The respective Provincial governments might assume a number of young persons will be incarcerated after their probation is reviewed, pursuant to Section 33, and build facilities to accommodate those young persons. Long run costs might involve increased court time through trial delays. In any event, it would appear that an assumption of enforceability, based on no evidence, could be very costly.

B) Evaluation Research

Martinson (1977) noted: "It is just possible that some of our treatment programs are working to some extent, but that our research is so bad that it is incapable of telling" (p.27). Notwithstanding methodological problems, it does seem that two measures are commonly used to determine probation effectiveness: compliance with probation conditions during the probation period, and recidivism before or after the probation period. Canadian research not only suffers from methodological problems (Parizeau and Szabo, 1977, p.146), it is also rare (Cockerill, 1975, p.284) and usually old.[3]

The relationship of evaluation research to enforcement is obvious; the level of enforcement will, at least to some extent, determine probation effectiveness in terms of research results. A hypothetical situation may illustrate the relationship. If a number of breach of probation charges, forwarded to Crown counsel, are not proceeded with for technical reasons, then, obviously, the results of an evaluation study, using conviction for non-compliance with probation conditions as a measure of failure, may be exaggerated with the bias being in favour of success.

A confound for a longitudinal recidivism measure would be the effect of legislation which may increase or decrease enforcement and, consequently, offenders' perceptions of the

ability to enforce probation orders. There were significant criminal code amendments in 1969 regarding probation (the alterations are detailed in the next chapter). Those amendments, in turn, altered the manner in which probation was enforced. For example, prior to the amendments, persons were returned to court for sentencing if they failed to comply with probation conditions. Subsequent to the legislation, they would be charged with a separate offence of breach of probation but they could not be returned to court for sentencing purposes unless there was a conviction during the probation period.

Two Canadian studies which have defined probation success in terms of recidivism were published by Cockerill (1975) and the Ontario Probation Officers Association (1967). The Cockerill study used data from June, 1967 to December, 1972. The study considered offences committed during the probation period and an unknown follow-up period. The overall success rate was 61%. The Ontario Probation Officers Association used a three year follow-up period with non-conviction for an indictable offence as the criterion for success. The study claimed a success rate of 68.3%.

Both the Cockerill study, using data from before and after 1969, and the Ontario Probation Officers Association study, using data from prior to 1969, cannot be used to generalize to the present effectiveness of probation because of the significant Criminal Code amendments. Yet, these studies are cited in recent literature with an apparent lack of

consideration for the effect of the legislative change.[4]

The issue here is not whether the data in the aforementioned studies is correct or incorrect. It has to do with the apparent assumption in the literature that the legislative changes had no effect in terms of recidivism or compliance with probation conditions. A second problem, at least in the Cockerill study, appears to be the assumption of the researcher that there was no significant change in enforcement as the study period overlapped the Criminal Code amendments.

A relatively recent study conducted in Ontario (The Adult Probationer in Ontario, 1978) tends to support the position that the legislative amendments of 1969 may be a significant factor. The study indicated a success rate of 70% in terms of recidivism or failure to comply with probation order conditions (p.8-2). However, it is noted in the article, "this figure can only be approximate, since there are no province-wide provisions for informing probation officers about the charges which may be laid against their clients" (p.8-2). In addition to the noted data collection problems, the results of the study may also be problematic in the sense that possible charges of failure to comply may have been rejected by Crown counsel for evidentiary reasons. Therefore, the success rate could be greatly exaggerated. There is some indication of that factor in the study (p.8-1).

C) Textbooks and Journal Articles

One would think enforcement of probation would merit more than passing mention in Canadian textbooks dealing with the criminal justice system and in the general literature dealing with probation. That is not the case, in spite of the importance of enforcement in maintaining the credibility and validity of probation as an alternative to incarceration. Non-incarceratory programs such as community work service are implemented through the vehicle of probation as well. Probation, per se, has less than a chapter devoted to it in most Canadian textbooks. By way of contrast, there are a number of American texts directed solely to the topic of probation and the related field of parole. Those books generally have a chapter or a large section of a chapter which addresses enforcement. An English text is devoted entirely to the topic (Lawson, 1978).

The Canadian texts which mention probation, particularly adult probation, offer very little information regarding enforcement. It would appear there is an assumption of automatic enforcement or an assumption that enforcement is, at least, operating satisfactorily. Enforcement of probation is given a matter-of-fact treatment in Canadian texts, if it is mentioned at all. A recently published introductory text states:

> Clearly probation is a legal disposition which allows offenders to retain most of their freedom while simultaneously placing them under the threat of punishment should they not adhere to the terms of the probation order (Griffiths et al., 1980, p.254).

Other authors have been content to cite the enforcement sections of the present Criminal Code (Sheridan and Konrad, 1976, p.263).

There are a few Canadian journal articles which deal with probation specifically. One of those articles, which clearly assumes the ability to enforce, is "An Examination of Probation" (Boyd, 1977). Boyd takes the position that probation is punitive and blatantly coercive. He recognizes that enforcement is seldom pursued, "The silver lining in this cloud of triple jeopardy can be found in the fact that prosecutors appear to act infrequently on charges under either S.666 or S.664 (4) (d) (p.377)." However, he seems to assume they could easily convict if they so wished.

Boyd's conception of triple jeopardy is that "he [the probationer] can be brought to court if charged with a new offence; he can be brought to court if he fails to comply with the conditions of his probation order (S.666, Criminal Code); he can be brought to court and sentenced on the original offence if he breaches a probation order (S.664 (4) (d))" (p.377). Boyd's argument regarding triple jeopardy is faulty; it is based on a false premise and it seems to indicate a misunderstanding of the Criminal Code.

In developing his argument, Boyd seems to assume that the original suspension of the passing of sentence, or other method of placing the offender on probation, is a sentence in itself and that any subsequent action to ensure the disposition is fulfilled, amounts to additional jeopardy. He does not seem to

accept the fact that the passing of sentence is suspended or that another type of disposition is lessened when a person is placed on probation. In any event, to accept Boyd's premise would mean, by way of analogy, that a person sentenced to imprisonment and who failed to serve that sentence, would be subjected to double jeopardy, at least, in the event the court made an attempt to have him do so. Even if one does accept the position that compliance with probation conditions is punishment, it seems that enforcement of the conditions is not double jeopardy but, rather, an exercise to ensure that the sentence of the court is carried out.

Boyd's description of triple jeopardy is correct in reference to Section 666 of the Criminal Code insofar as a probationer can be charged with an offence under that section for failure to comply with a condition of probation or for commission of another offence while subject to a probation order. However, the two instances are distinct; where is the additional jeopardy? Offenders are expected to comply with probation order conditions and they are expected not to commit further offences while subject to a probation order. In fact, commission of another offence is a failure to comply with the statutory condition of probation to keep the peace and be of good behavior (Criminal Code S.663 (2)). That is, it is merely a separate condition of probation. It is possible, however, to charge a person first with a failure to comply with a condition of probation and, after conviction for same, charge the person a

second time for failure to comply with the condition to keep the peace and be of good behavior. The case law seems to clearly preclude that possibility.[5] In any event, it is hoped that the principles of natural justice would apply.

The Boyd article was discussed at some length to point out that not only is probation generally assumed to be enforced, it can also be interpreted to be excessive if put into practice.

D. The Law Reform Commission

The Law Reform Commission of Canada has, as a singular entity, produced more literature regarding probation in Canada than any other. That literature indicates the authors assume the present enforcement process is operating satisfactorily. Generally, it can be said the Law Reform Commission has recommended and commended probation and similar dispositions as being viable alternatives to incarceration without addressing the possibility of problems in the present process of enforcing probation orders. However, the Commission has recommended certain changes to the Criminal Code which may assist the enforcement process:

> Section 666 should be repealed. Where an accused is bound by one of these orders (good conduct, reporting, residence, performance, community service, restitution, and compensation) the wilfull failure or failure to comply with the order should not amount to an offence unless such breach constitutes an offence under the general law. Proof that the accused has breached the order should be sufficient to give the court jurisdiction to exercise the powers conferred by Section

662.1 (4) and 664 (6), including the power to vary the terms of the order or to substitute a different sentence for the order (Law Reform Commission - a Report on Dispositions of Sentences in the Criminal Process).

It is not known what the Commission intended by "proof" of a breach. If it meant proof beyond a reasonable doubt, the removal of Section 666 will likely not alter the present difficulties with enforcement of probation orders. However, if the level of proof intended was the balance of probabilities, in a hearing situation, implementation of the recommendation would be very positive in terms of enforcing probation orders. The latter situation would be similar to that of most American jurisdictions.

Canadian Enforcement Literature

There is very little Canadian literature regarding enforcement of probation. There are a few journal articles dealing with certain aspects of the process. Otherwise, it would appear the literature is of a local, or at best, a provincial nature. Since this study is related to enforcement in British Columbia, some of the local literature will be examined.

Problems with probation conditions, particularly with respect to inappropriate conditions and unenforceable wording of probation conditions, constitutes the theme of an article by Judge C.C. Barnett of the Provincial Court of British Columbia. Judge Barnett (1977) stated he and Judge Sarich surveyed probation officers throughout the province regarding probation

order conditions. He notes:

> Some definite--and disconcerting--statements can fairly be made concerning the general practices of the courts in specifying the conditions of probation orders:
> (1) The conditions are often hopelessly vague or ambiguous, and could not possibly be the foundation of a successful 'breach of probation' prosecution. This is an almost universal concern of probation officers and their concern applies to conditions which are frequently used by the courts.
> (2) The courts frequently impose conditions which nobody could realistically expect the probationer to obey or the authorities to police and enforce.
> (3) Trial courts not infrequently continue to employ conditions which the appellate courts have frowned upon or to word otherwise proper conditions in ways which the appellate courts have said are improper (p.187).

Barnett's article is an excellent treatise on the wording of probation conditions and the legal difficulties therewith. However, there is no quantitative analysis provided. Additionally, the article is limited in terms of discussing problems with enforcement as it only deals with the wording of probation conditions.

An article entitled "Probation" (Dombeck, 1976) is similar in nature to Barnett's. It also concentrates on the wording of probation orders and is, essentially, a legalistic work. Dombeck (1976) stresses three problem areas with the make up of probation orders. The first concerns "clerical errors", the second illegal or irregular orders, and, the third faulty orders _per se_ (p.412).

The second and third type of problems have been discussed with respect to Barnett's article. It is the first type of problem which requires elaboration. As Dombeck notes, "clerical" errors do occur:

> Instances of these include both boxes (a) and (b) of form 44 being marked, no mention of restitution being required on the probation order while it had been ordered in court, and probation orders which do not have coinciding signatures of the accused with the name indicated in the order (p.412).

Dombeck submits "clerical" errors are not particularly significant in view of the provisions of Section 711 (1) of the Criminal Code (p.412). He notes, "this section clearly indicates that an order, including a probation order, is not to be held invalid due to any irregularity" (p.413).

There are some problems with Dombeck's article. First, it is limited by a lack of quantitative analysis. Second, Dombeck assumes that if probation orders are not considered invalid, due to clerical errors, the problem is resolved. That is not, necessarily, the case. This matter will be discussed in greater detail in Chapter 4 when the practical problems of probation are discussed in relation to legal practice. Third, there is very little discussion of other problems relating to the enforcement sections of the Criminal Code. Finally, in discussing the revocation and breach sections of the Code, Dombeck states, "thus, the court does have a choice between two alternatives if the accused breaches a condition" (p.411). It is submitted that this statement is incorrect. A suspension of the passing of sentence cannot be revoked unless there is a conviction while the offender is on probation. It may also be a fact that the probation period was in addition to another form of punishment (e.g., in addition to a period of incarceration).[6] The court's choice, therefore, could be very limited. Indeed, the court does

not really have a choice at all. It depends upon the procecutor's discretion as to whether a charge will be proceeded with in the instance of a breach and it is up to the prosecutor as to whether or not an application for revocation will be made.

There are legal texts on sentencing which have sections relating to probation; e.g., Ruby, C. Sentencing (2nd ed) (1980) and Nadin-Davis, R.P. Sentencing in Canada(1982). However, they will not be discussed here as they appear to assume enforcement, for the most part, and they are quite similar to the Dombeck article in terms of citation of cases.

Provincial and Local Literature

In "The Adult Probationer in Ontario" (Renner, 1978) there are some indications of problems with enforcement:

> In many cases, it appeared that the probation officers lacked either the evidence or the inclination to lay charges against the probationer when violations occur. For example, of the 170 cases who failed to report to the probation officer, only 73 had charges laid against them by the officer" (p.8-1).

The author does not indicate the extent to which a probationer failed to report (for example, "not at all","missed one appointment", etc.). In any event, the study seems to indicate legal problems are not of great importance: "however, the probationer is usually convicted once the probation officer lays charges against him or her" (p.8-1). The latter finding may be problematic in the sense that plea bargaining is not accounted

for. That is, it might well be that the probationers who are charged with failure to comply were also charged with another offence and pleaded guilty in order to have the other charge(s) stayed or to receive a concurrent sentence.

Another Ontario study indicates the possibility of enforcement problems. Jackson (1982) notes:

> In addition, too many breaches are failing because of failure to identify that person as the one originally placed on the probation order. Some judges feel the Criminal Code should be changed to include a presumption of identity clause, i.e., the evidence is considered sufficient if the accused before the court has the same name as that on the probation order, where there is a lack of evidence to the contrary (p.19).

A recent British Columbia study focuses upon community service orders. However, it comments upon the difficulty of enforcement and the need for enforcement (Sandulak, 1982). The study notes:

> Community service is presently ordered by the courts as a probation condition. Enforcement of conditions has become increasingly complex and technical...as frequently mentioned in this report, the credibility of the program, the credibility of community-based court sanctions, lies in accountabilty of offenders fulfilling court ordered requirements (p.83).

The Sandulak report involved questionnaires being sent to judges, Crown counsel, probation officers, and community service supervisors who were asked if there was a good capacity to enforce failure to complete community service hours. The results were:

> Responses provincially and by function were strongly 'Yes' but fully one quarter responded 'No'. However, in the previous section of the report dealing with enforcement, some comments of respondents related to problems in enforcement for example, 'adult...is hard to do' (p.83).

The report also made a recommendation regarding enforcement problems: "Legislation alteration is required to change the onus of proof from the Crown to the offender in instances of wilfull failure to comply with court orders" (p.84). This is a similar recommendation to that of the Canadian Association for the Prevention of Crime (1982):

> It is recommended that sub-section 664 (6) and 666, both as amended by Bill C-21 (1978) be further amended to place the onus on the probationer to show that he/she had a lawful excuse for failing to abide by the conditions of his/her probation order, similar to the provisions related to recognizance now appearing in section 133 of the Criminal Code (p.7).

Another British Columbia corrections branch report points to various problems with enforcement of probation orders (Bahr, 1981). The problem areas delineated are: Crown prosecutor reluctance to process breaches, lengthy delays, interpretation difficulties with wording of probation order conditions, inaccurate drafting of probation orders as they were stated in court, and lack of common definition and administrative procedures for revocation of probation orders (p.52). With reference to the problems, the report states:

> As a consequence, there is a growing concern among probation officers about the credibility and effectiveness of probation as a measure to be used instead of imprisonment (p.52).

The report goes on to recommend that:

> The Criminal Code be amended so as to put the onus on the offender to prove that he did not commit the breach with which he is charged. With this change, probation would once again be seen as a realistic alternative measure (p.53).

Unfortunately, the report is not supported by the inclusion of a statistical analysis.

Standerwick (1981) addressed problems of enforcement in "A Field Study of Some Theoretical and Administrative Issues Concerning Reparative Sanctions". He examined 932 cases and also conducted interviews with practitioners. Standerwick found enforcement to be problematic:

> Any experienced criminal lawyer is well aware of the many technical difficulties in proving a probation order, e.g., proving the identity of the probationer; proving that the court clerk's wording of the sentence as found on the probation order accurately sets forth what the judge said in court; proving that the judge complied with the provisions of Section 663 (4) (p.28).

Standerwick went further to point out a very important feature of most probation conditions:

> Apart from the purely technical defences, there is often difficulty in proving the substance of an offence. This is because many breaches of probation arise from the failure to perform a required act, rather than the commission of an outlawed act. Even the most basic provision of a probation order, that an offender 'report to a probation officer' is virtually incapable of proof where the onus rests on the Crown to prove failure to comply (p.28).

Standerwick suggests that a possible solution to enforcement problems would be a legislative change. However, he suggests legislation similar to that which existed prior to the Criminal Code Amendments of 1968-69 C.38 S.75. He states:

> The amendments created for the first time in Canada the distinct offence of breach of probation. After the amendments the court's ability to effectively supervise its order was reduced to cases where a subsequent criminal offence, including breach of probation was proven. Prior to the amendments a hearing conducted in accordance with the principles of natural justice was sufficient to enable the court to supervise its order.

> It may be time to examine whether the amendments of 1968-69 C.38 S.75 have in fact created more problems than they were intended to solve (p.29).

Standerwick made other suggestions with respect to increasing the ability to enforce compensation orders which would not involve legislative change. He recommended (p.38) that greater care be taken, by the judiciary, when orders are worded and that probation officers monitor these orders more closely.

A strong concern regarding the status of probation as a disposition was expressed by Standerwick. In essence, he opined (p.29) that probation will fall into disrepute, if orders are frequently unenforceable. His findings would indicate the reason for that concern:

> Of the 19 cases involving breaches of the order to pay full compensation, only two had resulted in a breach of probation charge being laid. In one of these cases the accused was found guilty, had a sentence imposed on the breach of probation conviction, and had the terms of the original probation order extended so that he was still under obligation to pay the compensation. In the other case there had been no success in locating the accused to serve him with the processes of the court (p.27).

At another point he notes:

> However, the fact that almost 40% of those ordered to pay compensation as part of the sentence failed to do so should be a source of concern. It is suggested that a sentence which is not complied with is really no sentence at all (p.38).

Howden (1979) studied enforcement of probation in Edmonton, Alberta. The principal aims of the study were, "To measure the relative frequency with which the various types of [probation] violations result in prosecution" (p.37). and:

> To establish the pattern of judicial disposition of breach charges, since it is a common complaint of probation officers that judges do not regard breaches of

> probation as serious offences, often handing out token punishment or none at all (p.37).

Notwithstanding a considerable number of methodological and data collection problems, Howden concluded that certain technical violations, e.g., failure to report, are more difficult to prosecute than are substantive violations involving new offences (p.11). In addition, he stated:

> The frequency of token sentences in the results represents a varification of the impressions of probation officers and administrators, that many judges do not appear to view violations of probation orders as serious offences (p.14).

Howden did not consider a competing hypothesis that sentences were lenient because the courts did not encounter many cases of breach of probation and did not, therefore, apply the principles of specific or general deterrence in sentencing. In any event, his results were:

> ...of all violators disposed of by the courts, about 28% received no punishment, about 38% received fines averaging $100, with the most common fine being $50, about 10% received more probation, averaging about nine months, and about 24% received some sentence of imprisonment, averaging 60 days with the most common sentence being 30 days, although it is not clear from the data how much of this gaol time is concurrently served or remitted (p.14).

"An Examination of Breach of Probation Charges in Prince George" (Leischner, 1980) is a study of a somewhat restricted nature; it was for a one year period (June, 1979 to June, 1980) and was, as the name implies, for only one location. It is similar to the Howden study in the sense it tends to concentrate on dispositions for breach of probation charges and concludes that sentences were excessively lenient. Leischner (1980) found

the following:

> In addition to the 83 S.O.P's (stay of proceedings) there were 6 absolute discharges, 7 dismissals, 3 withdrawals and 31 one-day gaol sentences. Interestingly, a one-day gaol sentence was never served by the probationer; rather, he is required to sign a release form and he is sent home. It appears then, that 52% of all breaches examined were disposed of in such a manner that the probationer received no actual punishment for breaching his probation (which is classified as a Criminal Code offence). Of the remaining 48% of the 250 breach charges, 14% of the probationers were given fines ranging from $25.00 to $300.00. The most common fines were for $50 and $100 as they accounted for 68.6% of the total fines issued. 12.8% of the probationers were given gaol sentences ranging in length from three days to six months. The most frequent sentences were for 10, 14, and 30 days imprisonment. 12% of the probationers never appeared for sentencing; hence, they still have outstanding warrants for their apprehension (some of these warrants are approaching a year old). 6.4% of the 250 breaches were classified as transfers or new trial dates for which the author was unable to enter any disposition. 2% of the probationers were given conditional discharges or suspended sentences with probation. And finally, .8% of the probationers were granted extended probation terms to enable them to attend the Impaired Drivers' Course (which they still haven't attended). Thus concludes this 'motley throng' of court dispositions for the 250 breach charges which were researched (p.4).

Leischner concentrated his efforts upon dispositions for breach of probation but this was not done to the exclusion of other problem areas. He did provide a cursory overview of other problems as exemplified by his notation of a Crown prosecutor's reasons for stays of proceedings:

> a) The Crown cannot prove the charge. b) There is an improper charge. c) There is a technicality involved. d) There is an unenforceable order. e) The charge is too old. f) The Crown engages in plea bargaining (p.6).

It should be noted, that with the exception of the last item, all of these matters could be included under the term 'legal

difficulties'. For that matter, the plea bargaining is likely not mutually exclusive in the sense that a Crown prosecutor may be more willing to bargain with a technically difficult charge.

Before concluding this section, it seems appropriate to reiterate that there is an obvious paucity of literature regarding probation, in general, and enforcement of probation in particular. The foregoing remark is in reference to Canadian literature in which assumptions are made regarding international transferability of probation concepts and efficient enforcement of probation.

Royal Commissions

There have been three major Royal Commission enquiries regarding corrections in Canada: The Archambault Commission in 1938, The Fauteux Committee in 1956, and the Ouimet Committee in 1969. All of the committee reports made recommendations regarding probation which are pertinent to this study.

The Archambault Commissioners recommended:

> That an adult probation system be adopted throughout Canada modelled upon the system now in force in England (p.230).

The Committee also recommended:

> The appointment of qualified probation officers, the use of presentence reports, and that probation officers be given supervision of persons released on ticket-of-leave (p.231).

In making its recommendations, it would appear the Archambault Committee considered probation to be a reformative enterprise and one with economic benefits:

> The Commissioners are of the opinion that, in addition to the reformative influence it exerts, the establishment of an adult probation system throughout Canada would effect an economic saving to the authorities charged with the responsibility of administering the criminal law in all its phases (p.230).

The foregoing statement also indicates the Commissioners envisioned probation as an alternative to incarceration.

The Archambault Commissioners were of the opinion probation conditions must be adhered to and the disposition of probation should be imbued with the seriousness of any other disposition:

> In adopting a probation system certain cardinal principles should be followed. Probation should never be either lenient or harsh. It should always be definitely disciplinary in purpose. The conditions of probation should be wisely imposed by the court and strict compliance therewith should be demanded...when an offender is released on probation the court does him an injustice if it does not surround the release with all the solemn dignity of a sentence of the court (p.230).

The Fauteux report extolled the virtues of probation in terms of offender reformation (p.13) and economic benefits (p.14). The Committee also perceived it as a viable disposition of the court provided the conditions are complied with:

> Probation is an alternative to imprisonment.... It involves compliance by the offender with specific conditions...it is a form of correctional treatment deliberately chosen by the court because there is reason to believe that this method will protect the interests of society while meeting, at the same time, the needs of the offender (p.13).

The Fauteux Committee made recommendations for certain Criminal Code amendments. It recommended that certain probation conditions be specifically stated in the Criminal Code (p.14). More importantly, in terms of the expansion of probation services, it recommended fewer restrictions on the use of probation:

> It is to be noted that by sub-section (5) of section 638, no power to suspend a sentence exists where the offender has been convicted of an offence related in character within five years prior to the commission of the offence of which he was convicted.... We are of the opinion that in the interests of sound correctional practice, section 638 should be amended by deleting the restrictions above referred to, leaving it to an informed judiciary to exercise its discretion in proper cases (p.12).

Unlike the Archambault Report, the Fauteux Report also recommended conditional and absolute discharges (p.3).

It is noted neither the Archambault or Fauteux reports contained recommendations for a separate Criminal Code offence of breach of probation.

The Ouimet Committee, inter alia, made a number of recommendations regarding Criminal Code amendments. It recommended that restrictions on the eligibility for probation be removed; placement on probation be through a probation order rather than a recognizance; that the conditions of the order be explained to the offender; that the offender receive and endorse a copy of the order, and agree to abide by the conditions; and that the maximum length of probation be three years (p.298).

Three recommendations of the Ouimet report are important to the present study and will be presented in some detail. The

first is:

> The Committee recommends that, upon application of either the probation officer or the probationer to vary the conditions of or terminate the probation order, the court be empowered to approve the variation upon notice to the probation officer or the probationer or to set a date for a hearing to consider the merits of the application and to act as it sees fit. Procedure should be provided for compelling appearance before the court either by summons or warrant (p.301).

Part of the Committee's reasoning for that recommendation was:

> There should be access to the court by either the probation officer or the probationer to request a change in the conditions of the probation order. Such a provision would make it possible to keep the probation order flexible to meet the changing needs of the probationer as changed circumstances arise and as he responds to supervision (p.301).

It should be noted this recommendation was not followed by a corresponding alteration in the Criminal Code. The present Criminal Code allows for application by the offender or the prosecutor (S.664 (3)). The court, per se, may never hear a probation officer's reasons for amending a probation order if a Crown prosecutor decides the application was not worthy of a court appearance.

The second recommendation is:

> That a court be empowered to transfer an order relating to a person on probation to another court of equivalent jurisdiction anywhere in Canada and that the court that has assumed jurisdiction in the case have power to order supervision, to alter or discharge the probation order and to sentence upon breach of the conditions of the probation order in the same manner as the court of original jurisdiction (p.303).

This recommendation was, ostensibly, incorporated in the subsequent legislation. However, its effect was far from what was envisioned by the Committee. The Committee, in reference to

the previous legislation requiring a probationer to be returned to the original sentencing court (former Criminal Code section 638), stated:

> This results in inequity, because a probationer who stays within the jurisdiction of the originating court and subsequently violates his recognizance is liable to punishment, whereas a transferred probationer may escape the consequences of his broken promise to the court for economic reasons (p.303).

The Committee was, of course, referring to the cost of returning a person to the original court. The irony of that last statement will be explained in Chapter IV.

The third recommendation is:

> That the probation officer report to the court when a person under probation is convicted of a subsequent offence or wilfully fails to abide by any other conditions of the probation order and that the court be empowered to compel the appearance of the probationer and to:
> (a) continue the probation order,
> (b) vary the probation order, or
> (c) revoke the probation order and impose a sentence of fine or imprisonment (p.302).

The third recommendation detailed above was not a great departure from the enforcement sections of the Criminal Code existing at that time (see Appendix A). It was, rather, more of an attempt to bring the discretionary powers of the court under one section (p.302). Its simplicity should be noted and compared with the present sections of the Criminal Code (sections 662 through 666 - see Appendix C).

The Ouimet report was similar to the Archambault and Fauteux reports in the sense that it did not recommend a separate substantive offence of breach of probation. Indeed, it

made a specific recommendation against such a charge:

> The Committee is of the opinion that a new offence of breach of probation should not be created but that a breach should be dealt with as part of the original charge. Breach does not automatically call for an end to probation and a sentence. The probation order could be renewed, perhaps with the conditions varied. If a new offence of breach of probation is created, the breach would be heard either by the court that heard the original charge who would find it as convenient to deal with the original charge, or by a court not orginally involved in the case, handicapped by a lack of knowledge of the offender (p.302).

The Committee posited that if a new offence of breach was created, the sentencing court would be handicapped. It would appear the Committee did not consider that the creation of a separate offence of breach may handicap the court to the extent it may not be informed of a breach because Crown counsel would not proceed with a charge due to legally technical reasons.

NOTES

1. Reference is being made to the probation legislation and practice in other countries as compared to Canada.

2. For specific differences, see Chapters III, IV, and V; particularly Chapter III.

3. One of the more recent studies, by Cockerill, was published in 1975, ten years ago.

4. See Griffiths et al., (1980) as an example. This introductory text cites the Cockerill study and makes no mention of the possible effects of the legislative change.

5. See R. v. Kienapple C.R.N.S. vol. 26.

6. If the person was placed on probation in addition to a period of incarceration, the only method of enforcement would be through a charge pursuant to S.666 of the Criminal Code.

III. A HISTORICAL REVIEW AND INTERNATIONAL COMPARISON

Introduction

This chapter includes a brief description of the history of probation. The history of Canadian probation and relevant legislation is described with particular emphasis placed upon the 1968-69 Criminal Code amendments. There is a comparison of Canadian enforcement legislation with that of the United States and England.

History of Probation

It would appear the exact beginning of probation is speculative.[1] Nevertheless, Sheridan and Conrad (1976) note:

> However, it is known that English commonlaw recognized the principal of judicial reprieve, the withholding of sentence during a period of good behaviour, as early as 1340. To what extent and under what circumstances this was used is not known, but it is reasonable to speculate that many English judges found opportunities when a reprieve would be advantageous (p.251).

Probation, more as it is perceived today, began in the 17th Century. In England, Court missionaries were appointed by the Church of England Temperance Society in 1876. The appointments led from magistrates' requests for volunteers to act as suretees for offenders. The volunteers were responsible for reporting back to the respective courts if the offenders did not respect

the conditions imposed by the court (Sheridan and Conrad, 1976).

The beginning of probation in the United States is attributed to John Augustus, a Boston bootmaker.

> In 1841, under the provisions for judicial reprieve derived from English commonlaw, he acted as surety for a man before the court for drunkeness (Sheridan and Conrad, p.243).

Augustus continued his volunteer work with hundreds of bailees. His work led the way for formalized probation in the United States. As a result of his work, the State of Massachusetts made legal provision for unpaid probation workers in 1869:

> This was followed in 1878 by appointment of the first paid probation officer for the City of Boston and in 1880 by the appointment of adult probation officers in every city and town in the State. Adult probation was available in every state by 1956 (Sheridan and Conrad, p.253).

History of Canadian Probation

Sheridan and Conrad (1976) note:

> In Canada adult probation apparently began with judges directing the release of certain offenders on a recognizance rather than imposing sentence. This procedure, though not legal, was generally accepted and in 1889 the Act to Permit the Conditional Release of First Offenders in Certain Cases was passed (p.253).

The Act to Permit the Conditional Release of First Offenders (S.C. 1889 c.44) restricted probation to those youthful first offenders who had not committed an offence punishable by more than two years. The legislation seems to indicate that probation was intended to be in lieu of greater punishment and a measure of leniency:

> [The Court may] instead of sentencing him at once to any punishment, direct that he be released upon his entering into a recognizance, with or without suretees and during such period as the court directs, to appear and receive judgement when called upon, and in the meantime keep the peace and be of good behaviour (Statutes of Canada, 1889, c.44,p.164).

The Act was incorporated in the Canadian Criminal Code of 1892. Incidentally, sub-section 2, of section 971 of the Criminal Code, set out a provision for the offender to pay the costs of prosecution.

There were amendments to the probation legislation in 1892, 1900, 1906, and 1921. The most important amendment, in terms of the expansion of formalized probation services, was made in 1921 as reporting to a probation officer was then included in the legislation:

> The court in suspending sentence may direct that the offender shall...report from time to time as the court may prescribe to any officer that the court may designate (R.S.C. 1927 c.36).

There were further amendments between 1921 and 1969. It can fairly be said that many of the amendments expanded or formalized probation in Canada:

> The history of these developments clearly shows a slow movement from legalism to a fairly successful attempt to incorporate the rehabilitative ideal (Parker, 1976, p.92).

The amendments gradually expanded the type of offences, offenders, and courts which could involve the use of probation. However, probation remained comparatively restricted prior to the 1968-69 Criminal Code amendments. Probation as it existed up to those amendments will be described and the limitations will be discussed. The enforcement aspects will be discussed in detail.

Probation before the 1968-69 Criminal Code Amendments

The probation sections of the Criminal Code immediately prior to the noted amendments were not complex and were comprised of three sections (See Appendix A).[2] The first subsection of section 638 provided the criteria for the type of offender and offence for which probation could be considered. The type of offence could be any other than those requiring a minimum punishment. The offender had to be a first offender. Sub-section 5 of section 638 qualified the latter requirement:

> Where one previous conviction and no more is proved against an accused who is convicted, but the previous conviction took place more than five years before the time of the commission of the offence of which he is convicted, or was for an offence that is not related in character to the offence of which he is convicted, the court may, notwithstanding subsection (1), suspend the passing of sentence and make the direction mentioned in sub-section (1) (Martin's Criminal Code, 1968, p.591).

Sub-section (1) (a) of section 638 required an offender to keep the peace and be of good behaviour for a term fixed by the court. Sub-section (1) (b) required the offender "to appear and to receive sentence when called upon to do so during the period fixed under paragraph (a), upon breach of his recognizance".

Sub-section (2) of 638, provided for probation conditions:

> A court that suspends the passing of sentence may prescribe as conditions of recognizance that
> (a) the accused shall make restitution and reparation to any person aggrieved or injured for the actual loss or damage caused by the commission of the offence, and

(b) the accused shall provide for the support of his wife and any other dependents whom he is liable to support.

The latter part of subsection (2) contained a general clause which permitted imposition of any other appropriate probation conditions. It also provided for the amendment of probation conditions, alteration of the term of probation, and the maximum length of probation:

> ...and the court may impose such further conditions as it considers desirable in the circumstances and may from time to time change the conditions and increase or decrease the period of the recognizance, but no such recognizance shall be kept in force for more than two years (Martin's Criminal Code, 1968, p.591).

Subsection (3) provided for reporting to a probation officer and subsection (4) required the probation officer, or other person designated by the court, to report a breach of the terms of recognizance to the court which made the order.

Section 639 might be named the true enforcement section of the former code. Subsection (1) of that section provided for the issuance of a summons or warrant upon a court or justice "being satisfied by information on oath that the accused has failed to observe a condition of the recognizance" (Martin's Criminal Code, 1968, p.592).

Subsections (2) and (3) of section 639 required that the accused be brought before the court and that the accused be remanded or admitted to bail pending a hearing.

Subsection (4) provided the penalty for breach of probation:

> The court may, upon the appearance of the accused pursuant to this section or subsection (4) of section

638 and upon being satisfied that the accused has failed to observe the condition of his recognizance, sentence him for the offence of which he was convicted (Martin's Criminal Code, 1968, p.593).

Subsection (5) provided for the replacement of the judge or magistrate in the event one was unable to act.

The last section, section 640, simply placed probation within the jurisdiction of the courts dealing with criminal matters:

For the purposes of section 638, and section 639, 'Court' means:
(a) a superior court of criminal jurisdiction,
(b) a court of criminal jurisdiction,
(c) a magistrates court acting as a summary conviction court under part xxiv, or
(d) a court that hears an appeal (Martin's Criminal Code, 1968, p.583).

Limitations of the Pre-1968-69 Amendment Legislation

The foregoing legislation was limited in terms of the use of probation as an alternative to incarceration and was generally criticized by a number of groups: the Canadian Corrections Association, Mr. Justice Ouimet, the Canadian Committee on Penal and Correctional Reform, the Ontario Probation Officers Association, and the Ontario Magistrates Association (Minutes, Standing Committee on Justice and Legal Affairs, 1968). With respect to the need for change, Hogarth (1969) wrote:

The law pertaining to probation needs to be rewritten giving this form of disposition independent legal status and broadening the class of the offence to which it may apply...there are no restrictions on the use of

> probation in the United Kingdom, except for murder, where a mandatory life term must be imposed, restrictions of various kinds exist in several United States of America, and in some European countries, but none appeared to be as severe as those in our laws (p.125).

The Canadian Bar Association also commented. A report of its criminal justice section recommended:

> Presentence reports, transfers of jurisdiction and removal of restrictions to grant probation to only first and second offenders (Canadian Bar Review, 1961, p.189)

The limitations of the legislation existing prior to the 1968-69 Criminal Code amendments are indicated in the recommendations and relevant commentary of the Ouimet Committee. Recommendations of the Ouimet Committee have already been discussed partially in this thesis. However, the Committee's recommendations subsume, for the most part, the recommendations of the other interest groups and require repetition, therefore, in the present context. The Ouimet Committee recommended:

> ... that no provision for the imposition of probation in addition to a period of imprisonment appear in Canadian law.
>
> ...that statutory provision be made for a distinct disposition of the court known as probation.
>
> ...that such restrictions on eligibility for probation contained in the Criminal Code be removed.
>
> ...that the method by which an offender is placed on probation be by probation order and not through employing the recognizance set out in form 28 of the Criminal Code.
>
> ...that before issuing a probation order the judge or magistrate explain the implications and conditions of the order to the offender; that a copy of the probation order signed by the judge or magistrate be served on the offender; and that the offender be asked to endorse the original order to the effect a copy has been served on him, that he understands its terms and conditions, and

that he agrees to abide by them.

(A)Mandatory provisions

That every probation order include, in addition to the name of the court making the order, the following:

...The name of the court within whose territorial jurisdiction the offender resides or will reside;

...The requirement that the offender keep the peace and be of good behaviour;

...The provision for the appearance of the offender, when called upon during the period of the probation order, so that the order may be varied or judgment imposed.

...the provision that the offender be under the supervision of a probation officer appointed or assigned to that territorial jurisdiction or a designated person;

...the provision that the offender be required to report to the probation officer in accordance with instructions given by the court and receive visits at his home by the probation officer.

(B)Discretionary provisions

The discretionary powers available to the court under section 638 (2) be retained

The Committee also recommended:

... that the maximum length of probation be three years.

... that, upon application of either the probation officer or the probationer to vary the conditions or terminate the probation order the court be empowered to approve the variation upon notice to the probation officer or the probationer or to set a date for a hearing to consider the merits of the application and to act as it sees fit. Procedures should be provided for compelling appearance before the court either by summons or warrant.

...that the probation officer report to the court when a person under probation is convicted of a subsequent offence or wilfully fails to abide by any other condition of the probation order and that the court be empowered to compel the appearance of the probationer and to:

(a)continue the probation order,

(b)vary the probation order, or

(c)revoke the probation order and impose a sentence of fine or imprisonment.

...that a court be empowered to transfer an order relating to a person on probation to another court of equivalent jurisdiction anywhere in Canada and that the court that has assumed jurisdiction in the case have power to order supervision, to alter or discharge the probation order and to sentence upon breach of the conditions of the probation order in the same manner as the court of original jurisdiction.

...that a federal probation development act be designed to promote high standards of probation practice throughout Canada (Ouimet Committee, 1969, pp.293-306).

The recommendations of the Ouimet Committee were oriented toward the expansion of probation services. With respect to enforcement, the Committee's recommendations did not seek to alter the previous legislation significantly. Comparison of the eighth and ninth recommendations with the legislation existing prior to the 1968-69 Criminal Code amendments indicates that the processes of probation order amendment and revocation of the suspended passing of sentence would have remained identical, for the most part, in the event the recommendations were followed in subsequent legislation. It must also be restated that the Committee specifically recommended against the creation of a separate offence of breach of probation (Ouimet Committee, p.302).

The Committee's recommendations, regarding the eligibility of accused persons for probation, were followed in legislation. Sheridan and Conrad have noted:

Perhaps the most significant amendment to this section (the probation section) is the removal of any legal restrictions for the suspending of sentence, other than

> where a minimum sentence is prescribed by law...in practice, this means that probation can be considered for the vast majority of offenders who appear for sentencing (p.260).

Most of the Ouimet Committee's recommendations were followed in legislation. However, there were some significant departures from the recommendations. First, provision was made in the new legislation for probation in addition to a fine or imprisonment (section 638 (1) (b) Martin's Criminal Code, 1969). Second, there has been no federal probation development act developed. Last, and most significant for the purposes of this thesis, the separate offence of breach of probation was created by the 1968-69 Criminal Code amendments (section 640A Martin's Criminal Code, 1969) and the provisions for amendment of probation orders were made a good deal more complicated (sections 639 (3) and 639 (4) Martin's Criminal Code, 1969).

With the exception of the additions of a conditional discharge provision and probation in conjunction with an intermittent sentence in 1972, the present legislation is almost identical to the legislation as amended in 1968-69 (see Appendices B and C). Therefore, present day problems can be attributed to the 1968/69 amendments. The practical application of probation and its enforcement will be discussed and detailed in the following two chapters. It will be assumed, for present purposes, the problems exist and are significant.

Before discussing the origin of the present enforcement sections, it is necessary to discuss a basic difficulty arising from the fact certain of the Ouimet Committee's recommendations

were followed in legislation while others were not. The difficulty lies in the fact that the Committee's recommendations were not mutually exclusive in terms of their practical application. For example, the Committee recommended transfer of jurisdiction between provinces (Ouimet Committee, p.303). It would appear the Committee assumed the enforcement process would involve a hearing instead of a trial for breach of probation However, a trial was required after the 1968-69 amendments (p.302). Transfer of evidence and witnesses and the costs of same are much more demanding in the case of a trial situation.

The Origin of the Present Probation Legislation

It has previously been noted that a number of groups supported expanding the use of probation through lessening the restrictions on the granting of probation. Those groups, generally, made recommendations similar to those of the Ouimet Committee regarding presentence reports, transfer of jurisdiction, amendment and enforcement of probation orders, mandatory conditions, and so on (see for example Canadian Corrections Association - Proposals for Development of Probation in Canada, 1967). However, not one document could be found, in the course of research, in which there was a recommendation for a separate offence of breach of probation. In conducting the research for this thesis, a number of avenues were explored in an attempt to ascertain the origin of the idea for a separate

offence of breach of probation. It seemed important to do so in order to discover the rationale for it, particularly in light of the Ouimet Committee's recommendations against it. In addition, there was no historical precedent for it in Canada, England, or the United States.

Interviews were conducted with local criminal justice personnel to determine if they could recall the group or individual who recommended the specific offence of breach of probation; no one could. A member of the Standing Committee for Justice and Legal Affairs at the time the legislation was passed was interviewed. He could not recall the source although he could vaguely remember it originated with the federal bureaucracy dealing with justice matters. Enquiries were made with a member of parliament involved with criminal justice matters. His research assistant subsequently forwarded materials which were of no assistance in the endeavour. An enquiry was made with an acting deputy minister in the department of justice. That person advised:

> Various departments of the Attornies General, in particular the Department of the Attorney General of Nova Scotia, recommended the creation of a penalty provision to enforce the terms of probation orders.[3]

A letter of enquiry was forwarded to the Department of the Attorney General in Nova Scotia and the response indicated the information is no longer available.

It would appear the origin of the separate offence of breach of probation will have to remain somewhat of a mystery. It is interesting to speculate as to why the offence was

created. One plausible reason may be that there was no suspended sentence involved in a probation order following a gaol term in the 'new' legislation. Therefore, to provide a consequence for wilfull breach of a probation order, the offence was created.

Another hypothesis is that the originators intended to provide greater protection to the accused than was previously the case. That is, creation of a trial situation for a breach of probation may protect accused persons from arbitrary and capricious actions by probation officers and other authorities.

A third speculation, which is not exclusive from the previous two, is that the originator may have intended for there to be additional penalty for wilfull failure by way of the stigma of an additional conviction. In any event, the full ramifications of the creation of the separate offence of breach of probation, in terms of enforcement problems, may not have been thoroughly considered.

A former administrator in the British Columbia Corrections Branch was contacted regarding the origin. His recollection was that the third hypothesis of increased penalty was the case and that potential problems with enforcement were not widely considered by corrections personnel. An article by Marks and Tear (1969), written shortly after the 1968-69 amendment, indicates a perception of some of the potential problems (see pages 279 and 280 particularly); however, the article was one of only two of that kind discovered in the literature.

In addition to input from Royal Commissions, interested parties, and legislative draftsmen, passage of a Criminal Code amendment in parliament brings a proposed bill under the scrutiny of the members of Parliament and the Standing Committee on Justice and Legal Affairs.[4] The Committee is composed of elected representatives from all parties in the House.

In view of the noted scrutiny, the question may arise: How did the legislation, if it is problematic, survive the parliamentary process? It is posited the proposed probation legislation might not have received a thorough scrutiny because it comprised only a small part of the legislative changes considered in the 1968-69 Criminal Code amendments. That is, Bill C-150 was an 'Omnibus Bill' which sought enactment of criminal legislation in a number of areas: The Criminal Code, the Penitentiary Act, the Parole Act, and the Prisons and Reformatories Act (Commons Debates, 28th Parliament, 1968-69. MacLeod, 1976, p.116).

The probation segment of the 'Omnibus Bill' was not debated in the House of Commons. Perusal of Hansard indicates the House was initially concerned with passage of the Bill in toto as opposed to segmentally. Members of parliament subsequently debated, at length, sections of the Bill containing what could be termed politically 'hot' items such as amendments regarding abortion, homosexuality, and the use of breathalizer apparatus

(Commons Debates, 28th Parliament, 1968).

The Standing Committee on Justice and Legal Affairs dealt with the probation segment of Bill C-150 in March, 1969 (Standing Committee, 1969, pp.709-720). Incidentally, that was the year of publication of the Ouiment Committee Report. The Committee's recommendations were, however, available prior to the publication date. A motion to table Bill C-150 for second reading and to refer it to Committee was made in the House of Commons by the then Justice Minister, Mr. John Turner.

The debate of the Standing Committee was limited in detail regarding clause 75; the probation segment of Bill C-150. The entire debate regarding the clause, is recorded on a dozen pages of the Minutes of the Standing Committee. The Committee initially discussed the implementation of presentence reports, probation in addition to a gaol term or a fine, and the wording of section 638 (2) (h). The latter section gave magistrates wide discretion to "impose such other reasonable conditions as the court considers desirable for securing the good conduct of the accused and for preventing a repetition by him of the same offence or the commission of other offences".

The Standing Committee debate, regarding those sections which have been most problematic in terms of enforcement, was very limited. The pertinent sections and the relevant debate will be detailed. The first section is 638 (4). A major problem with it has been resolved by recent appeal court decisions. However, the section, the problem, and the relevant Standing

Committee debate will be detailed as support for the theory that the Committee did not foresee the problematic nature of the legislation. Section 638 (4) (now section 663 (4)) states:

> Where the court makes a probation order it shall:
>
> (a) cause the order to be read by or to the accused;
> (b) cause a copy of the order to be given to the accused; and
> (c) inform the accused of the provisions of subsection (4) of section 639 and the provisions of section 640 (a) 1968-69 c.38,s.375.

Mr. Deakon (Standing Committee, p.719) enquired as to how the subsections would be applied. The justice minister indicated subsections (a) and (b) would be done by the probation officer 'outside the court'. Regarding subsection (c) he stated: "Certainly, in (c) the accused must be informed by the magistrate of the general consequences of the order" (p. 720).

Subsection (c) caused difficulties in later years. It was determined, on appeal, in a British Columbia County Court that the sentencing judge must advise the accused directly and that Crown counsel must prove that fact (R. v. Shaver 38 C.C.C. (2d) 545). The ramifications of that decision and of a similar decision (R. v. Palermo, 35 C.C.C. (2d) 371) were that Crown counsel was required to order a transcript of sentence and produce it in court in a breach of probation proceeding. This, in turn, required that the accused be served with a notice of intention regarding production of the transcript, and the notice must be no less than seven days (pursuant to Canada Evidence Act).[5]

It is necessary for the probationer to be informed pursuant to subsection (c) before he can be bound by a probation order (see R. v. Leguilloux 51 C.C.C. (2d) 99). Therefore, it is necessary for a court to be settled on the point that the accused was informed before continuing a trial of breach of probation. It is clear, from the statement of the Justice Minister, Mr.Turner, the intention was for the sentencing magistrate to inform the accused of the penalty provisions of the probation legislation. However, it is doubtful the Minister or Standing Committee members envisioned the introduction of a transcript of sentence and service of a notice of intention in each and every case of breach of probation. There is certainly no mention of same in the Minutes of the Standing Committee.

The foregoing evidentiary problem has been resolved, for the most part, by two decisions. In 1979, the British Columbia Court of Appeal, determined there was a presumption of regularity with respect to the court advising an accused pursuant to subsection (c) (R. v. Leguilloux supra). That is, at a trial for breach of probation it is presumed the original sentencing judge advised the accused unless there is evidence to the contrary. The decision did not negate the requirement of the court to inform, but it did eliminate the necessity of the Crown acquiring transcripts in each and every case. Incidentally, it has been determined by the B.C. Court of Appeal that the sentencing judge must advise the probationer of the provisions of the 'suspended sentence' section (664 (4)), even when the

suspension of the passing of sentence is not involved (see R. v. Bara 58 C.C.C. (2d) 242).

The Supreme Court of Canada finally settled the issue of informing the accused, pursuant to subsection (c), in R. v. Stearner 1982, 13 Sask. R. 359, 64 C.C.C. (2d) 160 (S.C.C.). In that case, it was resolved that the accused could be made aware of the consequences of a breach of probation by someone other than the sentencing judge. That is, someone such as a court clerk may inform the probationer. It is interesting to note, that although it relieves the technicality, the decision does not coincide with the intent of the legislation as stated by Mr. Turner. That is, the Supreme Court of Canada has indicated that the court may delegate informing the accused pursuant to subsection (c).

The Standing Committee did not debate section 639 (now section 664):

> 639 (1) A probation order comes into force
> (a) on the date on which the order is made; or
> (b) when the accused is sentenced to imprisonment under paragraph (b) of subsection (1) of section 638 otherwise than in default of payment of a fine, upon expiration of that sentence.
> (2) Subject to subsection (4),
> (a) where an accused who is bound by a probation order is convicted of an offence, including an offence under section 640A, or is imprisoned under paragraph (b) of subsection (1) of section 638 in default of payment of a fine, the order continues in force except insofar as the sentence renders it impossible for the accused for the time being to comply with the order; and
> (b) no probation order shall continue in force for more than three years from the date on which the order came into force.
> (3) Where a court has made a probation order, the court may at any time, upon application by the accused or the prosecutor, require the accused to appear before it and,

after hearing the accused and the prosecutor,
(a) make any changes in or additions to the conditions prescribed in the order that in the opinion of the court are rendered desirable by a change in the circumstances since the conditions were prescribed,
(b) relieve the accused, either absolutely or upon such terms or for such period as the court deems desirable, of compliance with any condition described in any of paragraphs (a) to (h) of subsection (2) of section 638 that is prescribed in the order, or
(c) decrease the period for which the probation order is to remain in force.

Most of section 639 is related to enforcement (see Appendix B).[6] It deliniates when a probation order comes into force, when and for how long it can be enforced, and how it can be amended. Paragraphs (3) (a), (4) (d), and (4) (e) of section 639 and the equivalent sections in the present legislation are of particular concern in terms of enforcement. Paragraph 639 (3) (a) provided for probation conditions to be changed or added in certain situations and subject to an application being made by the accused or prosecutor. Paragraph 639 (4) (d) provided for revocation and sentencing and paragraph 639 (4) (e) provided for the extension of a probation order and changes or additions to conditions. Paragraphs (d) and (e) both require the commission of a subsequent offence, inclusive of a breach of probation conviction, before they can be implemented. This is certainly a different situation from that described in the previous legislation in which application was made directly to the sentencing judge by the probation officer in the event conditions were not complied with or a subsequent offence was committed. In any event, one would think the Standing Committee would have discussed section 639 in detail because of its

importance in relation to the other probation sections and enforcement of a sentence of the court generally.

The last section dealt with by the Standing Committee was section 640A:

> (1) An accused who is bound by a probation order and who wilfully fails or refuses to comply with that order is guilty of an offence punishable on summary conviction.
>
> (2) An accused who is charged with an offence under subsection (1) may be tried and punished by any court having jurisdiction to try that offence in the place where the offence is alleged to have been committed or in the place where the accused is found, is arrested or is in custody, but where the place where the accused is found, is arrested or is in custody is outside the province in which the offence is alleged to have been committed, no proceedings in respect of that offence shall be instituted in that place without the consent of the Attorney General of such province.

Section 640A did not receive much attention from the Standing Committee. Yet, subsection (1) was the most significant part of the new legislation as it provided for breach of probation to constitute a substantive offence and thereby created the necessity of a trial for a breach of probation charge. Problems related to the section are central to this thesis.

Mr. D. Hogarth, a member of parliament for New Westminster, British Columbia, was, perhaps, the only committee member who perceived the problematic nature of section 640A.[7] He was the only committee member who questioned the application of the section. The entire debate, regarding 640A, noted in the Standing Committee minutes, was:

Mr. Hogarth: "there will be a great deal of difficulty, Mr. Turner, in proving that he (the accused) wilfully failed".

Mr. Turner (Ottawa - Carlton): "Surely, no more difficulty than in any other offence".

Mr. Hogarth: "As a matter of fact I do not know how you can wilfully fail to do anything. You can fail but how can you wilfully fail?"

Mr. Turner (Ottawa - Carlton): "He may have failed by omission. There is wilfull failure or deliberate failure - a deliberate thing as in wilfull cruelty to animals. Not an unkind...."(p.721 Standing Committee, Justice Legal Affairs).

The proposed section was agreed to after the foregoing debate which is marked by its very limited duration. In addition, it would seem that Mr. Turner's analogy of wilfull cruelty to animals is quite flawed. For instance, wilfull cruely to animals may often be an act such as beating a dog, whereas most breaches of probation would likely be omissions such as failing to report to a probation officer. On the other hand, Mr. Turner may have been thinking of an omission such as starving a dog. However, starving a dog has obvious evidentiary differences from failing to report to a probation officer. In the case of starving a dog, a crown prosecutor may have the assistance of physical evidence, perhaps photographs of an emaciated animal. That will not be the case in a failure to report to a probation officer.

Probation in the United States

It is well beyond the scope of this study to detail all of the legislation pertaining to probation, and particularly the enforcement of probation, in the United States. The administration of probation and the pertinent legislation varies from jurisdiction to jurisdiction. There is municipal, county, state, and federal probation in the United States. (Abadinsky, 1982, pp.23-25)[8]

For the purposes of this study, the specific legislation pertaining to federal probation was chosen as it is national in scope and is, in that sense, similar to the Canadian Criminal Code. The legislation of two states, Washington and Oregon, has been studied for comparative purposes. Both federal and state probation officers, located in Seattle Washington, were interviewed regarding application of the respective statutes within their jurisdictions. Appendix D contains the U.S. federal legislation.

Federal probation in the United States is involved with offenders convicted in a U.S. district court for violation of a federal law.[9] For example, the federal probation and parole service may be involved with a person who has been convicted of importing narcotics into the United States. Generally, the offences dealt with by the service are felony matters of a reasonably serious nature.[10] The federal statute does not seem to differ greatly from the relevant legislation in the States of

Washington and Oregon. State probation officers deal with felonies and local (county, city) jurisdictions deal with misdemeanours.[11]

Eligibility for Probation in the United States

Section 3651 of title 18, United States Code, states:

> Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, any court having jurisdiction to try offenses against the United States when satisfied that the ends of justice and the best interests of the public as well as the defendant will be served thereby, may suspend the imposition or execution of sentence and place the defendant on probation for such period and upon such terms and conditions as the court deems best (p.482).

The foregoing section indicates that eligibility for probation does not differ significantly between U.S. federal probation and Canadian probation.[12] However, it would appear that in some American jurisdictions probation is slightly more restrictive. Abadinsky (1982) has noted: "Most states have statutory restrictions on who may be granted probation in felony cases. Crimes such as murder, kidnapping, and rape often preclude a sentence of probation as do second or third felony convictions". Rape does not have a minimum punishment in Canada and, therefore, a rapist is not precluded from receiving a sentence of probation in Canada. There are also no restrictions in Canada with respect to second or third offences.

The U.S. federal statute has a general clause which provides for a number of probation conditions. The clause allows the court to impose "...such terms and conditions as the court deems best" (S.3651, Title 18, U.S. Code, p.482). Specific probation conditions which the court may impose, pursuant to S.3651, relate to: payment of a fine or restitution, support of legal dependants, residence in a residential community treatment centre, payment of the costs of residence at a treatment centre, and participation in a community supervision program for drug addicts. It should be noted, the specific probation conditions delineated in the Canadian Criminal Code do not include attendance at residential programs.

With respect to probation conditions which might be considered illegal in the United States, Killinger et al., (1974) note:

> Although the trial court has broad discretion in imposing the terms and conditions of probation, the powers are not boundless. Conditions imposed must be reasonable and relevant to the offense for which probation is being granted. Accordingly, it has been held that a condition of probation which (1) has no relationship to the crime of which the offender was convicted; (2) relates to conduct which is not of itself criminal; (3) requires or forbids conduct which is not reasonably related to future criminality, does not serve the statutory ends of probation and is invalid (p.72).[13]

The situation in Canada does not appear to be significantly different. There have been cases decided which, in toto, appear to correspond to the foregoing criteria regarding appropriate

conditions.[14]

Length of Probation

The federal statute provides for a maximum term of probation to be five years, inclusive of any extensions to the original period of probation imposed.[15] In Canada, the maximum period of probation is three years.[16]

Types of Probation

The U.S. federal probation statute provides for probation by itself, in addition to a fine, and in addition to a period of imprisonment. In every case a suspended sentence is involved. For example, in the instance of an incarceratory sentence, the court may impose more than six months, require the accused to serve a maximum of six months incarceration, and then suspend the execution of sentence for the balance of sentence.[17] In the case of an offence punishable by both fine and imprisonment, the court may impose a fine, as a condition of probation, and place the offender on probation as to imprisonment.[18] It has already been noted that in Canada certain dispositions of probation do not include a suspended passing of sentence. There is no suspended passing of sentence in addition to a fine or a period of incarceration.[19]

Suspended Sentence

The term suspended sentence in Canada means the suspension of the passing of sentence (the suspension of the imposition of sentence) and not the suspension of the execution of sentence:

> As it is not the sentence itself, but its passing that is suspended a Court in exercising this power should not mention any fixed term of proposed incarceration, for in addition, to do so would place the court in the position of binding itself should the accused be subsequently brought before it for sentence. R. v. Sangster (1973), 21 C.R.N.S. 339 (Que.C.A.) (Martin's Criminal Code, 1978, p.508).

Suspended sentence in the United States can mean both the suspension of the passing of sentence or the suspension of the sentence itself (suspension of the execution of sentence). For instance, the American federal statute provides for both.[20] In the case of the suspension of the execution of sentence, a penalty greater than the original cannot be imposed.[21]

The consequences for the offender in the United States may vary greatly with respect to which type of suspended sentence is imposed. As is the case in Canada, if the passing of sentence is suspended, any sentence which could have been imposed originally can be imposed upon revocation of the suspended sentence. Further, Killinger et al., (1976) note:

> On the distinction (between the suspended imposition of sentence and the suspended execution of sentence) may turn such later issues as to whether or not the offender has been 'convicted'; what civil rights he has forfeited; the term for which he may be committed upon resentence after revocation of the suspension; whether

probation is a part of the prosecution; and whether the probationer on revocation of probation is entitled to counsel under the holding in Mempa v. Rhay or the revocation is governed by the right to counsel rules announced in Morrissey v. Brewer and Gagnon v. Scarpelli (p.18).

Enforcement of Probation

A. Modifications of Probation Orders

Modification of terms and conditions of probation is very flexible in the United States. For example, the federal probation statute simply states:

> The court may revoke or modify any condition of probation, or may change the period of probation" (S.3651, Title 18, U.S. Code, p.482).

Killinger et al., (1976) note:

> Authority to modify the term of probation by decreasing the term and discharging the offender prior to the completion of the term should be placed in the court. The court should likewise have authority to modify the conditions of probation on application of the probationer, the probation officer or upon its own motion. The probationer should have free access to the court for the purpose of clarification or explanation of the probation conditions. This power of modification preserves the flexibility of probation as a correctional tool as it allows for changing conditions and for the gradual increase in the ability of the probationer to handle his own affairs which is one of the major objectives of probation (p.89).

U.S. courts are, of course, under an obligation to act fairly in terms of extending probation or modifying probation conditions. In some states, the statutes provide that a

condition or term must be violated before the probation period or conditions can be modified (Killinger et al., 1976, p.89). In any event, modification is much simpler than in Canada where the prosecutor is involved in making certain applications and the probation officer has no statutory right to make application. Extension of the probation period for no more than one year requires conviction for an offence, inclusive of a breach of probation offence (S.666 of the Criminal Code) during the probation period.[22]

A Canadian probation officer might be motivated, in certain instances, to press a charge of breach of probation in order to have a probation period extended. An instance might be a situation where a cooperative probationer had a valid, but time limited, reason for failing to comply with a condition of probation such as payment of restitution or completion of community work service during the probation period. The only way to obtain a 'legal' extension in such cases is to acquire a conviction for failure to comply.[23]

B. Revocation

Enforcement of probation in the United States is provided through revocation of suspended sentences. Since suspended sentences are provided in cases involving a fine and/or incarceration in addition to probation, there is no need for a distinction to be made between such dispositions. In Canada,

probation in addition to a fine or incarceration does not involve a suspended passing of sentence and, as previously noted, revocation proceedings are not possible in such instances.[24]

Probation may be revoked in the United States for failure to comply with probation conditions, a technical violation, or if a probationer commits a new crime while subject to a probation order. The latter is known as a non-technical or new arrest violation.

The decision to initiate revocation proceedings lies with the probation officer. "considerable discretion is exercised by the probation officer as revocation is considered a serious matter for it may represent a failure of the probation officer as well as the probationer" (Smith et al., 1979, chap.8). In any event, case law has determined that it cannot be arbitrary and capricious.[25]

Sol Rubin (1973) has stated:

> The probation statutes do not require that every discovered violation be brought to the attention of the court. Unless they support effective administration and sound casework; the supervising officer should exercise discretion in this regard (p.238).

The grounds for revocation involving a technical violation are that a probation condition has not been complied with. However, the failure to comply should be substantive. For example, a probationer's failure to attend at one appointment with his probation officer may not be appropriate. DiCerbo (1966) has stated:

> In general, it is my belief that after all possible leads to locate an absconder have been exhausted, the probation officer has valid reason for petitioning the court for a warrant (p.16).

A federal probation officer (U.S.) advised that usual practice is to attend at the residence of the probationer in addition to telephoning and sending a letter before proceeding with a revocation for failure to report.[26] In addition, the usual practice is to discuss the revocation with a supervisor.

The ground for a non-technical or new offence revocation is the commission of a crime while a probationer is subject to a probation order. It is only necessary that the probationer be charged with a new crime; a conviction for the new offence is not necessary.[27] However, revocation is not authorized when a probationer has been acquitted of the new offence.[28]

Serving the offender with notice of revocation is required with respect to United States federal probation and in most states (Killinger et al., 1976, p.189). Notice is required in any case of arrest with or without warrant and if a summons is used. The notice and the summons should include the following:

1. the date, time, and place of the hearing which has been set by the court;
2. a copy of the petition listing the claimed violations and evidence against the probationer;
3. the right to be heard in person and to present witnesses and documentary evidence;
4. the conditional right to confront and to cross-examine adverse witnesses; and

5. the right to request court appointed counsel when the probationer is unable to afford retained counsel and the procedure for him to apply for court-appointed counsel.(Federal Probation Officers Procedures and Operating Manual vol. x p.5-19).

The above noted requirements arose from a decision of the U.S. Supreme Court: Gagnon v. Scarpelli, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed, 2d, 656 (1973).

Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 25 93, 33 L.Ed 2d. 484 (1972) was a case decided by the U.S. Supreme Court regarding minimum due process requirements in parole revocations. That decision was later held to apply to probation revocations. There is a two step process of a preliminary hearing and a revocation hearing as a result of the Morrissey decision. Killinger et al., (1976) state:

> With reference to parole revocations, the court spelled out a two step procedure which included an on-site hearing to determine probable cause and a revocation hearing 'which must lead to a final evaluation of any contested relevant facts in consideration of whether the facts determined warrant revocation' (p.192).

A revocation hearing is scheduled following a plea of not guilty at the preliminary hearing. Abadinsky (1982) has noted:

> The judge may remand the probationer to custody pending the hearing or can release the probationer on bail or on his own recognizance. The probation department will subsequently prepare a full violation of probation report, detailing the charges and providing a summary of the probationer's adjustment to supervision. This report is presented to the judge prior to the revocation hearing. If probable cause is not established at the preliminary hearing the matter is dismissed (p.105).

A probationer can plead guilty at the preliminary hearing. He may also do so at the revocation hearing or he may be found guilty, as previously noted, at the revocation hearing. It must be emphasized that in any case, the court is not bound to impose the sentence which has been suspended. Reprimand or modification are alternatives to such action.

The Gagnon v. Scarpelli decision, supra, concluded that the minimum due process requirements of the Morrissey v. Brewer decision are to be applied to probation. Those due process requirements are required by statute with respect to federal probation. Rule 32.1 of the Federal Rules of Criminal Procedure, Title 18, U.S. Code, states:

> The revocation hearing, unless waived by the probationer, shall be held within a reasonable time in the district of probation jurisdiction. The probationer shall be given,
> (a) written notice of the alleged violation of the probation;
> (b) disclosure of the evidence against him;
> (c) an opportunity to appear and to present evidence in his own behalf;
> (d) the opportunity to question witnesses against him; and
> (e) notice of his right to be represented by counsel (p.83).

Right to counsel in the case of suspended imposition of sentence, was decided by the U.S. Supreme Court in 1967. In Mempa vs. Rhay, 389 U.S. 128, 88 S.Ct. 254, 19 L.Ed 2d. 336 (1967), it was held that counsel was required in such cases. Whether counsel is required in cases involving suspended execution of sentence is not clear; it varies in different states (Killinger et al., 1976, p.190). However, notice of right

to counsel is provided by statute. In addition, a federal probationer has the right to counsel regarding modification of probation. Rule 32.1 (b) of the Federal Rules of Criminal Procedure, Title 18, U.S. Code, states:

> A hearing and assistance of counsel are required before the terms or conditions of probation can be modified, unless the relief granted to the probationer upon his request or the court's own motion is favourable to him (see Appendix D).

The right to counsel is not clear in the American literature in terms of distinguising between the right to have counsel if one is able to afford counsel and the right to have counsel provided, if one is unable to afford counsel. It would appear the literature is largely referring to the latter situation. In any event, the Mempa case was one in which the probationer was indigent. It would seem fair to say that in most cases the right to counsel at one's own expense is provided.

The burden of proof at a revocation hearing is on the state. The burden is on the probation officer to prove that the probationer in fact violated the conditions of his probation. If it is determined that he did, then the court must decide whether or not the probation should be revoked (Federal Probation Officer's Procedures and Operating Manual p.5-21).

It is most important to emphasize that all revocation proceedings in the United States involve hearings and not trials. In describing the nature of a revocation hearing, Killinger et al., (1976) note:

> The requirements of minimum due process in the revocation hearing have not changed the basic character

> of the probation revocation hearing. The court in Morrissey v. Brewer said, 'We begin with the proposition that the revocation of parole is not part of the criminal prosecution and thus the full panoply of rights due a defendant does not apply to parole revocation'. Thus, a hearing on probation revocation is still a hearing, and not a trial. A hearing is not governed by the rules concerning formal criminal trials. It is not necessary that all the technical provisions and criminal procedure be followed in a proceeding for revocation of probation. Hearing on motion for revocation of probation is not required to be formal and may be held in vacation. A proceeding to revoke probation is not a 'trial' as that term is used and contemplated by the Constitution in regard to criminal cases. Result of a probation hearing is not a conviction but a finding upon which trial court may exercise discretion by revoking or continuing probation. The defendant is not entitled to a jury trial on revocation of probation. Proof beyond a reasonable doubt is not required to show violation of the conditions of probation; a clear and satisfactory showing is sufficient (p.194).

The standard of proof in probation revocation proceedings is more specifically stated in the United States v. Francischine, 512 F.2d 827 (5th Cir.), cert. denied, 423 U.S. 931 (1975) (cited in Federal Probation Officer's Procedures and Operating Manual):

> A revocation of probation is an exercise of broad discretionary power by the trial court akin to that utilized in imposing the probated sentence initially. Evidence that would establish guilt beyond a reasonable doubt is not required to support an order revoking probation. Probable evidence rising to the level of substantial evidence is not required to support an order revoking probation. Probable evidence rising to the level of substantial evidence is not even required, absent arbitrary and capricious action in the revocation. All that is required is that the evidence in fact be such as to reasonably satisfy the judge that the conduct of the probationer has not been as good as required by the conditions of probation (vol. x p.5-24).

C. Factors Related to Probation Enforcement in the United States: Tolling and Transfer of Jurisdiction

The Tolling of a probation term means, in effect, that the probation period will not continue to run when there has been a violation of probation. For example, if a probationer has absconded, a probation statute may provide for the probation period to cease running until the probationer has returned and has answered to the court. Killinger et al., (1976) note:

> It is usual for a probation statute to provide that the term of probation is 'tolled' if the defendant is charged with a violation of probation and flees the jurisdiction or cannot be found. The Illinios statute for example, provides that when a petition is filed charging a violation of a condition of probation, the court may order a summons for the offender to appear or order a warrant for his arrest. 'The issuance of such warrant or summons shall toll the sentence of probation or of conditional discharge until the final determination of the charge, and the term of probation or conditional discharge shall not run so long as the offender has not answered the summons or warrant' (Illinios Unified Code of Corrections, 1005-6-5(2)) (p.91).

Jurisdiction is usually not transferred in the United States (Killinger et. al., 1976, p.114). Rather, most states are signatories to a reciprocal agreement called the Interstate Compact. In essence, the compact provides for probation supervision in any signatory state although the originating state maintains prosecutorial jurisdiction. It is up to the sending state to retake the offender and prosecute in the event of a probation violation. However, it would appear jurisdiction can be transferred with respect to U.S. federal probation cases (see Appendix D).

Probation in England

There is little point in describing the English situation in detail as it is much like that of the United States in terms of enforcement procedures. A general description of English probation and the enforcement procedures would, therefore, seem sufficient.

Judge Barnett (1977) has noted:

> At the outset it is important to understand that there are major differences between the relevant statutory law of Canada and other jurisdictions, and thus the texts and decided cases from other jurisdictions must be used with great care (p.169).

He describes the following differences:

1. In England a person convicted of a criminal offence may be placed on probation and the probation order takes the place of any sentence in respect of the conviction on which it is made. In Canada, a probation order cannot stand alone.
2. In England a conditional discharge is to be granted in cases where it is inexpedient to inflict punishment and a probation order is not appropriate. In Canada a conditional discharge must be accompanied by a probation order.
3. In England a suspended sentence is one which has been imposed but is deferred unless the offender commits a further offence within a specified period. In Canada, the term 'suspended sentence' means that the court has suspended the passing of sentence and when this is done the offender must be placed on probation for a specified period: see Regina v. Sangster (1973), 21 C.R.N.S. 339 (Que. C.A.).
4. In England a court cannot make a probation order unless the offender expresses his willingness to comply with the proposed terms of probation. In Canada no such restriction is imposed upon the courts (p.169).

Judge Barnett might have also made the point that community work service, like suspended sentence, is a separate disposition of the court in England. In Canada, community work service must be a condition of probation.

A. Suspended Sentence

"Suspended sentences" in England and the United States have two major similarities. First, sentence is imposed and then deferred in England and that can be the case in the United States. Second, in England the "suspended sentences" stand alone and that can be the case in the United States as well.

The second point also indicates a major distinction between the countries. In most American jurisdictions a probation order accompanies a suspended sentence. Further, a probationer can have a suspended sentence revoked for failing to comply with probation conditions imposed as part of the suspended sentence and probation order process in the United States. Another offence must be committed before a suspended sentence can be revoked in England.

The most significant point to be made with respect to English "suspended sentences" is that revocation must involve a subsequent offence. The situation is very similar in Canada. The only difference is that the Canadian Criminal Code specifically includes a breach of probation charge (S.666) as one which could bring about a revocation of the suspended passing of sentence.

In England, such is not possible because there is no offence of breach of probation.

B. Breach of Probation

A breach of a probation condition is called a breach of requirement in England (Lawson, 1968). Proof of breach of requirement does not necessitate a trial and proof beyond a reasonable doubt. Satisfactory proof is the criterion and there is a hearing instead of a trial. Jarvis, (1980) describes the procedure:

> The alleged breach of requirement must be clearly put to the probationer and he must be asked if he admits it. If he does not admit it, the probation officer must prove it to the satisfaction of the court, giving evidence on oath and being open to cross examination. There is a right of appeal against the court's decision (p.70).

A breach of requirement can be dealt with by lower courts or superior courts in England. That is dependent, of course, on which court made the probation order in the first instance. A breach of requirement made by a Crown court (superior court) is first dealt with in a magistrate's court. The magistrate's court may subsequently commit a probationer to the Crown court for the breach of requirement. In that event, and if the probationer does not admit the alleged breach, it must be proved to the Crown court's satisfaction and the procedure previously described by Jarvis is the same.

After a breach of requirement is proved, the court has a number of options in terms of providing consequence for the breach. The options are, for the most part, identical for both magistrates courts and superior courts. Jarvis (1980) describes the powers of the Crown court:

> If the Crown court is satisfied that the probationer has failed to comply with any requirements of the probation order, it may deal with him for the original offence in any way it could deal with him if he had just been convicted by the court of that offence (P.C.C.A 1973, 56 (6) (c)). It may sentence him, make a fresh probation order, or make an order of absolute or conditional discharge; it may fine him up to 50 (pounds sterling) and permit the probation order to continue (P.C.C.A. 1973, 5 (6) (6) (q)); it will, when the provision is implemented, be able to make a community service order without prejudicing the continuance of the probation order (P.C.C.A. 1973, S.6 (6) (b)); or it may take no action and permit the probation order to continue. If he is sentenced for the original offence, the probation order ceases to have affect (P.C.C.A. 1973, S.5 (2)) (p.73).

The consequences for a conviction of an offence committed during the period of probation are identical to the consequences for a breach of requirement. Jarvis (1980) offers further details in the event of a subsequent conviction:

> A court empowered to deal with the matter may of course do so immediately after the conviction for a fresh offence without the issue of a summons or warrant.
>
> No process can issue until after conviction...the offence must have been committed during the occurrence of the probation order. It does not affect the issue that the conviction was not until after the order had expired. In respect of a summary offence, the process must issue within six months from the date of the conviction for the further offence (p.73).

It has been noted previously in this chapter that probation cannot stand alone in Canada as it does in England and that probation is distinct from the suspension of the execution of

sentence in England. That does not mean that only the suspension of the execution of sentence and not the suspension of the passing of sentence exists in England. Although that is correct in the technical or literal sense, it is not correct in reality. It has been noted that after proof of either breach of requirement or commission of a subsequent offence, English courts may "deal with him (the offender) for the original offence in any way it could deal with him if he had just been convicted by the court of that offence" (Jarvis p.73). This procedure amounts to nothing less than a de facto suspension of the passing of sentence. Therefore, English courts have at their disposal both the suspension of the execution of sentence and a de facto suspension of the imposition of sentence. It is interesting to note the similarity of Jarvis's explanation with the words of the Canadian Criminal Code in S.664 (4) (d):

> Where the probation order was made under paragraph 663 (1) (a), [the court may] revoke the order and impose any sentence that could have been imposed if the passing of sentence had not been suspended.

It is readily apparent the British courts take a stern position with respect to the commission of subsequent offences. Judge Barnett (1977) has commented:

> The court of appeal in that country [England] has stated on a number of occasions that a probationer who commits a further offence during the probation period and is sentenced to imprisonment for that offence should normally be sentenced also for the offence in respect which the probation order was made (p.213).

Jarvis (1980) is specific regarding appropriate adjudications in cases involving subsequent offences:

> If the court is dealing with the original offence and the further offence at the same time, the orginal offence must not be taken into consideration but should be dealt with by separate adjudication (R. v. Webb, (1953) 1 All E.R. 1156.) If a sentence for the original offence is given, it should, generally speaking not be merely a nominal one, since it is most important that an offender should be made to realize that discharge on probation is not a mere formality (R. v. Webb, supra.). A former Lord Chief Justice has given his view that a prison sentence concurrent with that passed for the subsequent offence is normally undesirable since it would encourage offenders to regard probation as a 'let off' and its sanctions ineffective (Lord Parker's address to the Magistrates Association Training Conference, 1967)(p.76).

C. Due Process Safeguards in England

In the United States, proof of breach of probation is to the satisfaction of the court and a hearing is conducted; provided certain procedures are followed. English due process requirements are similar. For example, in the instance of a subsequent conviction, Jarvis (1980) describes the following situation:

> The further conviction must be put to the probationer in the clearest possible terms. He must be told where he was originally convicted and what happened; and then told the date and nature of the further conviction and the adjudication of the court. He must then be asked if he admits those facts...the offender must be told of his right to give evidence and call witnesses. There is a right of appeal...legal aid may be granted to the accused (C.J.A. 1967, SS 73 (2) and 74 (12)) (p.75).

Australian Probation

During the course of this study, an examination was made of

Australian probation literature and relevant statutes regarding probation. For the purpose of brevity, it can be stated that the Australian federal and state probation legislation appears to closely resemble the English situation. That is, a breach of requirement (breach of probation) does not involve a trial and proof beyond a reasonable doubt.

Summary

The following points are considered to be the most important for the purposes of this thesis:

1. Probation was originally intended to be an alternative to incarceration, in certain cases, and as a measure of leniency.
2. The Canadian probation legislation prior to 1969 was less complicated than is now the case. It was quite restrictive in terms of eligibility. It more closely resembled the present English and American legislation in terms of enforcement. That is, a breach of probation did not involve a trial and proof beyond a reasonable doubt.
3. Several groups and agencies recommended alteration of the probation legislation prior to the 1968-69 Criminal Code amendments. It would appear one of the primary purposes common to the groups was to expand the use of probation. None of the prominent groups recommended the creation of a separate offence of breach of probation and the Ouimet

Committee recommended specifically against the creation of such an offence.

4. The exact origin of the separate offence of breach of probation is somewhat of an enigma. Attempts to determine the origin of the idea of the offence have been unsuccessful. It could not have been taken from English or American law.

5. The probation segments of the 1968-69 'Omnibus' Bill were not debated in the House of Commons and they received very limited examination by the Standing Committee on Justice and Legal Affairs. It would appear there were issues of greater political concern contained in the overall bill.

6. Probation in the United States varies from jurisdiction to jurisdiction. However, there are some commonalities:
   a. There is usually not an offence of breach of probation;
   b. Suspended sentence can mean the suspended execution of sentence or the suspended passing of sentence;
   c. Revocation involves a hearing and not a trial;
   d. After satisfactory proof of failure to comply or commission of a subsequent offence, the court has a number of options in terms of disposition and is not bound to impose a sentence of imprisonment.

7. The accused is provided with due process safeguards in the United States. Those safeguards are provided by statute and through formal policy.

8. English probation is very similar to that of the United

States and will not be summarized for that reason. The point must be made that Canadian probation legislation is far different from both English and American law.

NOTES

1. Sheridan and Conrad (1976) stated the exact beginning of probation was unknown: "The manner in which history has been recorded leaves this (the beginning of probation) largely in the realm of speculation...." p.251.

2. The entire 1968 Criminal Code sections pertaining to probation are in Appendix A.

3. Excerpt from correspondence received from D.C. Prefontaine, Acting Assistant Deputy Minister, Policy Planning and Development Branch, Department of Justice, Ottawa. Dated March 3, 1983.

4. For a more detailed explanation of the process, see MacLeod, A.J., Criminal Legislation in Crime and its Treatment in Canada 2nd ed. pps.133-35.

5. Section 28 of the Canada Evidence Act states: (1) No copy of any book or any other document shall be received in evidence, under the authority of sections 23, 24, 25, 26, or 27, upon any trial, unless the party intending to produce the same has before the trial given to the party against whom it is intended to be produced reasonable notice of such intention. (2) The reasonableness of the notice shall be determined by the court, judge, or other person presiding, but the notice shall not in any case be less than seven days.

6. Subsection 639 (4) dealt with revocation and amendment of probation orders subject to a subsequent conviction and subsection 640 dealt with the offence of breach of probation. Subsection (4) of section 639 now corresponds to subsection 664 (4) and section 640 (a) now corresponds to section 666. Appendix C details the present sections and Appendix B details the 1969 sections.

7. Mr. Hogarth is now a county court judge in New Westminster, British Columbia.

8. Also see Probation and Parole in the Criminal Justice System - Killinger, et al. (1976).

9. Mr. Robert Lee, Chief U.S. Probation Officer, Seattle, Washington. Letter dated June 1982.

10. Ibid.

11. Letters from Washington and Oregon State Probation Authorities.

12. Compare with section 663 of the Canadian Criminal Code. (See Appendix C)

13. People v. Dominquez 256 Cal. App. 2 v. 623, 64 Cal. Rptr. 290 (1967) as cited in Killinger et. al., 1976, p.72.

14. See R. v. Caja and Billings 36 C.C.C. (2d) 115 and R. v. Ziatas (1973) C.C.C. (2d) 287 (Ont.C.A)

15. S.3651, Title 18, U.S. Code (1982) p.482. (see Appendix D).

16. S.664(2) (b) Canadian Criminal Code (See Appendix C).

17. S.3651, Title 18, U.S. Code, (1982) p.482 (see Appendix D).

18. Ibid.

19. When a Canadian court suspends the passing of sentence it is not possible to impose a fine. "A $1,000 Court costs ordered to be paid as a term of probation was tantamount to the levying of a fine and as such was illegal as the trial Court had decreed the suspension of the passing of sentence". R. v. Pawlowski (1971), 5 C.C.C. (2d) 87, 16 C.R.N.S. 313 (Man.C.A.) Of course, in the instance of a period of incarceration or a fine in addition to a period of probation, enforcement can be provided only by the implementation of section 666 of the Criminal Code.

20. S.3651, Title 18, U.S. Code (1982). (see Appendix D).

21. Roberts v. United States, 320 U.S. 264, 64 S.Ct. 113, 88 L.Ed.41 1943) as cited in Killinger et al., 1976.

22. See Section 664 of the Criminal Code (See Appendix C).

23. See section 663 of the Canadian Criminal Code (See Appendix C).

24. See section 663 of the Canadian Criminal Code (See Appendix C).

25. In re Solis 274 Cal. App. 2d. 344, 78 Cal. Rptr. 919 (1969) cited in Killinger et al. 1976, p.172.

26. In 1982, the federal probation officer was interviewed by the writer in Seattle, Washington.

27. See People vs. Brooks 67 Ill. App.2d 479,214 N.E. 2d. 498 (1966) cited in Rubin, 1973, and also People vs. Wilkins cited in Killinger et al., 1976, p.187.

28. Gianole v. U.S. 58 F.2d.115 (8th Cir. 1932).

IV. THE OFFENCE OF BREACH OF PROBATION -- SECTION 666

This chapter will deal with the actual problems encountered in enforcing probation orders by way of Section 666 of the Criminal Code. Three types of problems will be described: legal, administrative, and philosophical. However, the trichotomization does not mean the problems are mutually exclusive. They are almost indistinguishable in certain instances. This is particularly the case with both legal and administrative problems. Therefore, all three problematic areas will be presented in conjunction with one another. Case examples and practical situations will be presented, from time to time, to assist in illustration. The extent of the problems will be described in Chapters VI and VII. However, there will be some direct reference to research data in this chapter.

The Reporting Condition

A major problem with enforcement of probation involves the wording of probation orders. In Chapter I, a simple example of failing to report to a probation officer was illustrated with respect to Section 666 of the Criminal Code. The wording used in the example was that of Section 663 (2) (a) of the Code: "Report to and be under the supervision of a probation officer or other person designated by the court". The inadequacies of that wording and more elaborate wording will be detailed here.

It was noted in Chapter I that a major problem with the Criminal Code wording involved the identity of the probationer in the event the probationer simply ignored the probation order and reporting condition entirely. That is, since the probationer is only required to report to a probation officer, which probation officer is the supervising probation officer and which probation officer will be able to give evidence in court that the accused failed to report? Further, if the correct probation officer is in court for a breach of probation trial, how will he or she identify the person who did not report? Before this and other questions can be answered, the process of placing a person on probation and assignment to a probation officer must be explained.

It has been previously noted a person can be placed on probation by any one of five means. In each of those instances, a charge pursuant to Section 666 is applicable. It has also been noted a court clerk must see to it that the offender is advised of the possible consequences of a failure to comply with a condition of probation and for commission of a subsequent offence (The provisions of Section 666 and 664 (4)). That is, the offender must be advised of the possible charge of breach of probation, modification of an order in certain instances, and revocation of the suspended passing of sentence. This applies even if a suspended sentence is not imposed[1]

The sentencing court generally imposes the probation period and conditions and then advises the offender of the above noted

Sections. The court is also required to "cause the order to be read by or to the accused" (S.663 (4)(a)) and "cause a copy of the order to be given to the accused" (S.663 (4)(b)). This is usually accomplished by the court directing the accused to the court clerk's office in order to acquire a copy of the order. In some courts, the judge directs that the accused be accompanied by, or be in the custody of, a deputy sheriff until the provisions of 663(4) are complied with. The offender then leaves the courtroom and attends at the court clerk's office where he waits until the probation order is typed. The court clerk then reads the order to the offender and advises him of the possible consequences pursuant to Sections 664(4) and 666; asks the offender to sign the order, and provides him with a copy of the order. The clerk then advises the offender of the location of the nearest probation office.

The offender will then attend at the nearest probation office. The person the offender first meets may or may not be a probation officer. In larger probation offices, there is often a "duty" probation officer.[2] In smaller probation offices, the new probationer will likely be met by an office stenographer as probation officers are often unavailable.[3] In any event, the person will be asked for personal details such as name, birthdate, address, and telephone number. He will be advised that he will be contacted after the case is assigned to a particular probation officer. In some of the greater Vancouver probation offices, the duty probation officer will assume

responsibility for those cases which arrive on that officer's day of duty. The probationers must also reside within the geographical area supervised by that officer's probation office.

After the case is assigned by a supervisor, the probation officer will usually forward a letter to the probationer indicating an appointment for a certain time and date, or telephone the probationer and indicate same. In the case of a duty probation officer receiving her own cases, she will direct the probationer to return on a particular time and date at the initial meeting. In the case of an offender who does not live in the balliwick of the probation office closest to the court, a probation officer or stenographer will direct the new probationer to a probation office in the area in which the offender lives and give him a time and date on, or before, which he is required to report.

It must be emphasized that the procedures described so far are only the usual ones practiced in larger communities. In many areas of the Province, these procedures are impossible. For example, in a smaller community, a deputy sheriff may not be available to accompany the offender to a court clerk as only one deputy sheriff may be available for the entire court process.

A general understanding of the noted processes is necessary in order to understand the inadequacies of probation order wording. The explanation will begin with the Criminal Code wording: "Report to and be under the supervision of a probation officer".

A Hypothetical Case (See note 6 in Chapter V)

A young man broke into a house and stole a television set which he sold to a friend for $50. The friend was subsequently apprehended with the stolen property and advised the police of the source. The young man, Mr. A, was apprehended and convicted of break and entry on the evidence of his friend as well as other evidence. His counsel was provided by Legal Aid and Mr. A. was suspicious of his counsel's commitment, notwithstanding his able submissions to the court regarding sentence.

Mr. A. had a previous record of breaking and entering. However, his counsel was able to convince the court that his client had recently acquired a job, was remorseful, was prepared to repair the damage caused by the break in, and was, therefore, a suitable candidate for a probationary sentence. The court agreed with Mr. A's counsel and suspended the passing of sentence for one year with, inter alia, a probation condition requiring Mr. A. to report to and be under the supervision of a probation officer.

It will be assumed, in this case, that Mr. A. attended at the court clerk's office to sign and receive a copy of his probation order in the manner previously described.[4] However, while he is waiting for the order to be typed, he begins to brood about: his friend's lack of loyalty, his opinion about his counsel's competence, and his previous preconception of

acquittal. After he received the probation order, in the correct manner, he was directed to, and given the address of, the nearest probation office. He decided, however, that he would not report or comply with any of the conditions of his probation order.

The next step in the scenario is that the probation office to which the offender was directed, was sent a copy of the probation order by the court registry. The case was then assigned to a probation officer. The probation officer sent a letter to Mr. A. directing him to report by a certain time and date. Mr. A. changed his residence as he anticipated attempts to contact him by a probation officer. The probation officer waited for a response from Mr. A. as he did not attend at the time indicated in the letter. The probation officer then looked for Mr. A's name in the telephone directory in order to attend at his last known address. He found there was no listing for Mr. A. and that he did not reside at the address he provided the police at the time of apprehension. At this point, the probation officer submitted a report to Crown counsel indicating the appropriateness of a charge of breach of probation due to Mr. A's failure to report.

Crown counsel's response to the probation officer's request could have been that the charge is not worth proceeding with because it is far too difficult to prove. However, it will be assumed that the charge was approved and an information was duly sworn. Since the probationer had moved, in this instance, a

considerable period of time passed before he was brought to court to answer the charge. An attempt was first made to serve Mr. A. with a summons, and a warrant was subsequently issued as the summons could not be served.

When Mr. A. was brought before the court, he pleaded not guilty and a trial date was set. Crown counsel arranged for the probation officer and other witnesses (perhaps) to attend at the trial to provide evidence of Mr. A's failure to report.

Mr. A. had counsel at the trial. His counsel had a variety of defences and arguments at his disposal. They relate not only to the offence, per se, but also to the procedures previously described. Many of these arguments will be described in detail here.

Identity

The probation officer who initiated the charge has never seen the offender. She was assigned a probation file with a name on it: Mr. A's. If the probation officer is asked to identify the accused in the trial situation, she will simply not be able to do so and the matter will proceed no further. Mr. A. will have been able to ignore his probation order with impunity. In other words, the consequences of his breaking and entering and his failure to comply with the court order amount to nothing.

Crown counsel in some areas of British Columbia, have a method of dealing with a probation officer's failure to identify

the accused. The police officer who arrested the accused with respect to the original offence is called as a witness to identify the offender. Since the original offence is stated in the probation order, the connection between the accused and the person named in the probation order can be made. However, there may be further defence arguments as to whether or not the person named in the order may have the same name as the accused. The policeman might have difficulty in remembering an accused from an arrest that may have occurred several years previously. Hair splitting is not necessary to make the point that proof of identity is somewhat difficult and a second witness is necessary to prove the charge.

In the present example, it was assumed that Mr. A. lived in the area supervised by the probation office to which he was initially directed by the court clerk. Another identity problem arises when the probationer does not live in the area in which he was sentenced. In those instances, a probationer may report to the probation office to which he was initially directed but may not report to the office to which he was referred. Therefore, in a trial situation for a breach of probation, the probation officer who referred the person and the probation officer to whom he was referred may be called upon to identify the accused. More exactly, the second probation officer may be called upon to give evidence that the probationer did not report. This matter will be discussed further with respect to problems of transfer of supervision and jurisdiction. The point

to be made here is that yet another witness may be required and that witness, the second probation officer, may not be able to identify the accused.

Still another witness is required to identify Mr. A., the court clerk. This is necessitated by the statutory requirement that the accused be provided with a copy of the order, read it or have it read to him, and be informed of the provisions of Sections 664 (4) and 666. A person is not bound by a probation order unless the statutory requirements are performed.[5] Obviously, the court clerk who complied with the requirements must be able to identify the accused.[6]

The process of a court clerk identifying an accused, to whom an order was read, was given a copy, and informed of the provisions of Sections 664 (4) and 666 is not as simple as it first appears. That is, the process, per se, may be simple but the act of recalling the individual may not be. Even more so than in the case of a policeman, a court clerk may have very great difficulty in identifying a person from, say, a year previously. One can appreciate this most in the context of a large court registry where there are, perhaps, several probation orders made daily by any one of several court clerks.

In the present case, Mr. A. attended at the court clerk's office under the direction of the court. Let us assume, that a court clerk is able to identify the accused. This does not resolve or mean the end of "identity" problems. A further difficulty lies in the continuity of identification. If Mr. A.

went to the court clerk's office on his own, how does the court clerk know he was the person named in a particular probation order? That is, the person who may be identified may not be the person who was given a particular probationary sentence by a particular court. The person may have been attending at the court clerk's office for some other reason, perhaps to receive a similar probation order, for a similar offence, made by a different court.

It has already been noted that in some courts, the probationer is accompanied by a deputy sheriff or placed in the custody of a deputy sheriff until the statutory provisions have been complied with.[7] This appears to be a solution to the problem of continuity of identity. However, the same practical problems of identity remain: 1. the recollection of a deputy sheriff as to the identity of the particular accused; and 2. the necessity of having another witness at a breach of probation trial.

The salient points to be made with respect to identity are:

1. It is a necessary element to be proven by the Crown in a trial;
2. It may be extremely difficult, in practical terms, due to the nature of probation and the process of being placed on probation and being assigned to a probation officer; and
3. A minimum of two, and perhaps several more, witnesses are required to prove identity.

The wording of reporting conditions is inextricably tied to identification issues. There are other problems with the wording which also require examination. All of the problems will be examined in the context of the example previously provided.

Mr. A's probation order required him to report to and be under the supervision of a probation officer. It has been illustrated how a particular probation officer may be assigned supervision and how the officer may initiate a charge pursuant to Section 666 of the Criminal Code. The question here is: if Mr. A. was required to report to a probation officer, what is proved by evidence given by the probation officer, who was assigned the case, that Mr. A. did not report to her?

The answer to the foregoing question is that very little is proved by such evidence, and it is certainly not sufficient to convict Mr. A. In fact, there is likely not enough evidence to make out a prima facie case of failing to report. The reason is that Mr. A. may have reported to any one of over three hundred probation officers in the Province of British Columbia. Since the probation officer assigned the case cannot identify the offender, perhaps the only way for the Crown to prove the accused did not report to a probation officer, is to have every probation officer in the Province of British Columbia attend at the trial and give evidence that the accused did not report to any one of them. Of course, there is an assumption here that the

Crown would be able to prove, by some other means, that the person charged was the person placed on probation and the one to whom a particular probation order applied. In any event, the implication of the simple Criminal Code wording is that an absurd situation is created in practice; calling all probation officers to provide evidence.

Another issue regarding the Criminal Code wording has to do with the manner of reporting. That is, is the probationer to report in person, by mail, or by telephone? It is likely that parliament did not intend for every probationer to report by telephone. It is obviously necessary to determine the method of reporting in a probation order in order for a failure to report to be proved. For example, if Mr. A. simply forwarded a letter to the probation officer naming himself and indicating his willingness to forward another letter, at his discretion, he has complied with the wording of the order, but not with the spirit or intent of the order. Of course, it may very well be that the sentencing court intended no more than reporting by mail. It would seem that the benefit of the doubt in that regard must be given to the offender. If the court wishes in-person reporting, it should specify same in the probation order.

The Criminal Code wording does not specify the place where the probationer is to report. In the example, Mr. A. was advised, by the court clerk, of the location of the nearest probation office. However, such direction can best be classified as an administrative nicety and is certainly not binding upon

the probationer. The probationer is only bound by the conditions in the probation order. Obviously, unless a particular location is specified in a probation order, a similar situation arises to that of reporting to any probation officer in the Province of British Columbia; the probationer may have reported to any probation office in the Province.

The question of when the probationer is to report to the probation officer is not specified in the Criminal Code wording. Therefore, if Mr. A., for example, decided to report to a probation officer one month prior to the expiration of his order (eleven months after it began) he has, technically, complied with the probation order.

A question related to when the person is to report is the question of how often the probationer must report or the interval of reporting. The Criminal Code wording requires the offender to be under the supervision of a probation officer. The intent of that wording would appear to be regular reporting as required by the probation officer. However, it is submitted that the phrase "be under the supervision" is far too vague for the purpose of proving a probationer did not comply with a probation order. That is, the probationer's interpretation of the phrase could lead to a reasonable doubt by a court. The probationer could easily interpret it to mean the visitation, at his residence, of a probation officer from time to time. It could also be interpreted that the probationer is required to report as directed by the probation officer; but if the probationer

does not report he cannot receive direction. Probation order reporting conditions should, therefore, specify the interval of reporting or, at least, reporting as required by the supervising probation officer.

Judge Barnett (1977) has commented on the wording of reporting conditions generally and on the reporting condition set out in the Criminal Code specifically:

> Probation orders generally contain a reporting condition and the very general concern of the probation officer is that this basic condition is frequently imprecisely worded, a situation which enables uncooperative probationers to evade them and to escape conviction if charges are brought under S.666 of the Code.
>
> The standard probation order form used in British Columbia reproduces S.663 (2) (a) of the Code as condition one, and all too often this appears as the supposed condition of the order which the probationer receives. The wording of 663 (2) (a) is only a framework for the court and it is unfortunate that it appears in print on probation order forms (p.188).[8]

The problems with the wording of S.663 (2) (a) have been delineated. It would appear that more precise wording is necessary. Judge Barnett (1977) has suggested:

> A satisfactory reporting condition should designate: (a) Whether the reporting is to be to a probation officer or to some other specified individual; (b) the manner of reporting (i.e., in person, by mail, by telephone); (c) the place of reporting; (d) the first occasion of reporting and the interval of reporting thereafter (p.188).

Judge Barnett (1977) offers the following as an example of an order which satisfies the model presented:

> Report in person immediately (or immediately upon the expiration of sentence) to the duty probation officer, 7th Floor, 193 East Hastings, Vancouver, and thereafter to a designated probation officer once per calendar month (or more often if required by the probation officer and in such manner as specified by the probation officer) (p.188).

It would appear that if reporting conditions were worded as suggested by Judge Barnett, the evidentiary problems discussed so far, would be resolved. However, this might not be the case. The problems might only be decreased and would most certainly not be eliminated. Further, it is possible the criteria suggested by Judge Barnett will not be met in any event. It is necessary, therefore, to discuss further difficulties with reporting conditions in relation to a charge pursuant to S.666 of the Criminal Code. Most of the discussion will relate to reporting conditions which generally incorporate Judge Barnett's model and some of the discussion will pertain directly to that model.

Judicial Independence

There is some evidence to indicate the courts of British Columbia might be unwilling to adopt any standardized criteria for the wording of reporting conditions. At issue is judicial independence, the concept that a judge should not be subject to influence in making independent decisions. The author attended a meeting of provincial court judges in 1980. Several judges expressed the view that they must remain free to impose probation conditions as they see fit, on an individual basis.

An indication of judicial independence is given by the results of a random sample of probation orders taken in the Fall

of 1982 and in the Spring of 1983. Out of 150 orders in the sample, only two satisfied the criteria suggested by Judge Barnett, notwithstanding the fact his article may have had wide distribution and there have been meetings of judges at which the problems of wording have been discussed. More specifically, very few orders in the sample were worded exactly the same except when the same judges imposed sentence.[9]

The purpose of this section is not to argue against the concept of judicial independence. It is quite clear the courts must be able to impose sentence within the bounds of the statutes and relevant case law. The point is that since Section 663 (a) is a guideline only, the courts are able to vary widely in how they word reporting conditions and the wording, generally, does not satisfy what is necessary from an evidentiary point of view, to prove a charge of failure to report pursuant to S.666. That is, if the wording does not, at least, meet the criteria suggested by Judge Barnett, it may not be much better than the wording of the Criminal Code itself.

Case Example

The following is an actual case of the B.C. Court of Appeal.[10] A woman, who will be referred to as Ms. B., was sentenced in county court to three years incarceration as a result of a conviction for conspiring to traffic in heroin. The sentence was reduced on appeal to incarceration for two years

less one day followed by two years probation. The reporting condition of her probation order stated:

> Report to and be under the supervision of a probation officer or at least once a month or more frequently if required.

The foregoing probation condition satisfies two of Judge Barnett's criterion; it names the person to whom the offender must report, a probation officer, and it indicates the frequency of reporting. Yet, it is apparent that if Ms. B. did not report to a probation officer at all, the Crown prosecutor would be in no better position to prove the matter than he would be in the event the Criminal Code wording was used. For example, the condition does not specify which probation officer or probation office Ms. B. must report to initially. Hence, Ms. B. could have reported to any probation office or probation officer in the Province of British Columbia.

There have been several cases dealt with by the appellant courts regarding certain principles relating to conditions of probation. For instance, conditions must not be for punishment purposes alone.[11] However, it can fairly be said there is very little direction given to the lower courts regarding the specific wording of probation conditions.

The importance of the concept of judicial independence, as it relates to probation conditions, is that it will likely continue to be the case that probation conditions will vary from court to court. The reason is that judicial independence must be maintained and there seems to be very little higher court

direction in terms of the appropriate wording of probation conditions. That is, the legislation and the case law do not give specific direction. The wording of probation conditions, specifically reporting conditions, may, therefore, continue to create enforcement problems.

Another problem may be that the orders are not worded in an enforceable fashion because the judiciary is unaware of the problems with present wording. However, that issue will be discussed later in this chapter in another context and it will also be addressed in the following chapter.

Primae Facie Case and Beyond a Reasonable Doubt

Before discussing further problems, it is necessary to distinguish between the two stages in a trial as they apply to a breach of probation. The Crown prosecutor has two needs: 1) to produce sufficient evidence on each element of the offence to prevent a successful 'no evidence' motion by the defence; and 2) after he has done so, he must prove the allegation beyond a reasonable doubt.[12] It is submitted that in the situations described so far, the initial degree of proof will not be satisfied. For example, if a probation order states: "Report forthwith to a probation officer", the Crown prosecutor will not be able to prove the reporting element of the offence sufficiently if only one probation officer gives evidence of failure to report. In the following examples, both the degrees

of proof can be questioned. They must be kept in mind during the discussion of the cases. To assist in conceptualizing the latter degree of proof, Cross (1974) has cited Lord Goddard:

> Let us leave out of account, if we can, any expression such as 'giving the person the benefit of the doubt'. It was not a question of giving benefit of a doubt; if the jury are left with any degree of doubt whether the prisoner is guilty then the case has not been proved." R. v. Onufrejczyk (1955) 1 Q.B. 388 at P. 391; [1955] 1 All E.R.247, at P.249) (p.95).

Making New Law

The issue of judicial independence raises another problem with enforcement of breach of probation. The problem is that each time a probation condition is made it becomes subject to interpretation in the event there is a trial. The Crown prosecutor must prove every element of the offence and the words of a probation condition create elements of the offence. Thus, the wording of a probation order creates, in a limited sense, 'new' law subject to interpretation by a trial court.

An example, using Ms. B.'s reporting condition, will illustrate. Her probation condition stated: "Report to and be under the supervision of a probation officer or at least once a month or more frequently if required". At a trial for breach of probation, Ms. B.'s defence counsel might argue the 'or', between officer and at, is disjunctive rather than conjunctive. That is, the argument might be that Ms. B. interpreted the 'or' as meaning she had the option of being under the supervision of

a probation officer or reporting at least once a month. Of course, the argument might further extend to her interpretation of being under the supervision of a probation officer as meaning visitation by the probation officer at her place of work or residence.

This example of how Ms. B. could interpret her probation condition might impress some as hair splitting. The fact remains that more than a reasonable doubt may be created in such an instance.

A further issue is that breach of probation appears to be almost unique in this way. A comparison with another offence might further illustrate the point. A common offence is driving with more than 80 ml. of alcohol in the blood. That offence requires the identity of the accused as does breach of probation. However, proof of guilt requires evidence with respect to the proper application of the breathalizer machine and that the readings were over the amount set by statute, i.e., over .08. This is a gross simplification of the process. It is, however, reasonably accurate in terms of the general facts at issue. Breach of probation is unique because the facts at issue are not only the elements contained or implied in the statute, but also the elements created by the wording of a probation order.

Two other troublesome aspects related to the wording of probation reporting conditions must be mentioned. In combination they form what could be called the question of the full message to the probationer. They are: (1) What the judge states as the wording to be placed in a probation order; and (2) What differences there are between what the judge states and what the court clerk transcribes.

Some explanation of the overall problem must be made before discussing the above noted aspects of it. The problem briefly stated, is that which 'counts' in a trial of breach of probation is the actual wording on a probation order and not what the judge said, in entirety, at the sentencing hearing. That is, the judge may have explained a probation condition and the court's expectations with respect to it, but only the wording, as transcribed by a court clerk, in a probation order, will be at issue in a trial.

A case example will assist in the explanation of the two issues. Mr. E. was convicted of fraud as a result of a matter to do with forging cheques. It was his second offence. A presentence report was prepared and a probation officer recommended a period of probation and suggested several probation conditions. The recommended wording of the reporting condition was: "report forthwith in person to J.Jones, a probation officer at 6632 Dome Street, Burnaby, B.C., and

thereafter to a probation officer designated by the supervising probation officer to supervise the performance of this order".

An interesting feature of the reporting condition recommended by the probation officer is that it contains all of the elements recommended by Judge Barnett. Indeed, it goes beyond those elements in terms of specification as it names the probation officer to whom the person should report. However, it must be noted that a presentence report was prepared and the writer of the report knew he would be supervising the offender in the event a period of probation was imposed. In other words, the probation officer named himself when providing the recommended wording of the reporting condition to the court.

At Mr. E's sentencing hearing the judge stated he agreed with the wording recommended by the probation officer. He then went on to paraphrase the wording and to explain the court's expectations to the offender. The judge's wording was: "report forthwith to Mr. Jones and thereafter as directed by him". The wording of the reporting condition in the actual probation order was: "report forthwith to Mr. Jones where and when as directed by your probation officer". The wording in the probation order is far different than the wording recommended in the presentence report. In fact, the wording of the probation order is not the wording used by the judge in paraphrasing the recommended condition.

In the case at hand, the judge did not give specific direction to the clerk of the court and paraphrased the wording

recommended by the probation officer. The argument has been made that judges must be more careful when selecting appropriate wording. Additionally, it is necessary that the judge give specific direction to the clerk of the court regarding the exact wording to be used in the probation order.

Court clerks have a number of duties at a sentencing hearing. It seems clear that when a judge is specific about probation conditions, or spends a great deal of time elaborating upon the reasons for sentencing and the use of conditions, a great deal of confusion may arise as to what is the correct wording. In Mr. E's case it would appear the court clerk reinterpreted the judge's wording to what the clerk decided was a more concise statement.[13]

The crucial point is that the court's expectations with respect to compliance with probation conditions must be conveyed on the probation order. Notwithstanding a full and lengthy explanation of the expectations of the court at the time of sentence, the wording which is important in the event of a trial for breach of probation is that which is stated in the probation order. Differentiation between what the sentencing judge stated in court and the wording of a probation order will be of no assistance to the Crown prosecutor. Furthermore, the differentiation may be of considerable assistance to the defence as misunderstanding and confusion by the accused may be an issue.[14]

Another case example will further illustrate and clarify the point and will indicate some of the possible ramifications of incomplete, ambiguous, or unenforceable wording. Mr. D. was convicted of assaulting his estranged wife. He received a conditional discharge with one year probation. The reporting condition was: "Report to the probation officer within twenty-four hours".

Mr. D. was a very bitter man. His wife had taken up with another man and he felt "the authorities" were on her side. When he reported, he advised the probation officer he understood the judge at the sentencing hearing to have directed regular reporting to a probation officer. However, he also astutely noted that the probation order directed him to report only once: within 24 hours. That is exactly what he did.

The unfortunate outcome of Mr. D's case is that he was subsequently charged with assaulting his estranged wife and the alleged offence was of a much more serious nature. It may have made a difference if Mr. D. had reported regularly. It is quite possible he may have been referred to professional help by the probation officer. He may have developed a relationship with the probation officer which could have been of assistance in terms of dealing with the courts, authority in general, and in developing appropriate communications with his wife.

Before leaving the problem of inappropriately worded orders, the matter of modification in such instances must be addressed. Section 664 (3) of the Criminal Code states:

> Where a court has made a probation order, the court may at any time, upon application by the accused or the prosecutor, require the accused to appear before it and, after hearing the accused and the prosecutor, (a) make any changes in or additions to the conditions prescribed in the order that in the opinion of the court are rendered desirable by a change in the circumstances since the conditions were prescribed.

Some might argue that in a case such as Mr. D's it is a simple matter to initiate a return to court in order to have the condition modified to a more appropriate form pursuant to Section 664(3)(a) of the Criminal Code. However, there are a number of difficulties encountered by probation officers in such actions:

1. Difficulties in convincing prosecutors to make an application;
2. Taking a chance on questioning the judge's original wording;
3. Wastage of time involving a court appearance; and
4. The legal appropriateness of making an application.

These difficulties will be discussed more fully in the following chapter. At this point it is sufficient to note that it is not a simple matter to make an application and have a probation condition amended.

Transfers

Many offenders do not commit offences in the area in which they live, or in the jurisdiction of the sentencing court. For example, a person might commit a breaking and entering in Vancouver, and live in Burnaby. Therefore, the offender will

appear, if apprehended, in a Vancouver court even though he may live in Burnaby, only a few blocks away from the location of the offence.

The person who lives in Burnaby may be placed on probation and be required to report to the probation office nearest the Vancouver courthouse. He will, in turn, be directed by the Vancouver probation office to report to the probation office which supervises the area in which he lives, in this case Burnaby. Similarly, a person may actually live in another province, or another part of Canada. In these cases, supervision may also be transferred to the probation office which has supervisory jurisdiction. A number of problems exist with intra-provincial and inter-provincial transfers.

a) Intra-provincial Transfers

Most of the problems with intra-provincial transfers also apply to inter-provincial transfers. There is specific reference to the latter in the Criminal Code but transfers within province are simply done administratively and there is no specific reference to them in the Criminal Code. Intra-provincial transfers simply require reference of a probationer from one probation office to another. The problems encountered with reporting conditions when there are intra-provincial transfers will be discussed in this Section. A case example will illustrate.

Mr. R. was convicted of break, enter, and theft. He had a lengthy 'juvenile' record but the latest offence was his first as an adult. He was eighteen years of age at the time of the offence. The court suspended the passing of sentence and placed him on probation for eighteen months. One of the probation conditions was "to report forthwith to a probation officer and thereafter as directed by a probation officer".

Mr. R. reported initially to a probation officer in Burnaby. He advised the officer he had the possibility of employment in Penticton, B.C., a considerable distance from the Greater Vancouver area. He provided the officer with an address of residence in Penticton and stated that he must go there immediately or risk losing the employment opportunity. The officer gave the probationer written direction to report to the Penticton probation office on, or before, a certain date (a week later). He also provided the probationer, in writing, with the address and telephone number of that office.[15]

Mr. R. did not report to the Penticton probation office. The referring probation officer telephoned that office to determine if Mr. R. had reported and the response was in the negative. A question arises as to what can be done about it. The answer will be obvious when the problems arising from such a situation are detailed.

The major difficulty concerns the decision as to who should initiate a charge of breach of probation, the referring probation officer or the receiving probation officer? It seems

obvious the referring officer should do so, as he can identify the accused and gave the accused the necessary instructions. However, it must be remembered that officer is in the same position as the judge who originally made the order. The officer does not know the case load of each probation officer and must, therefore, refer to an office. Therefore, in a trial situation, the Crown prosecutor, in order to prove a charge of failure to report to a probation officer, may be in a position of having every person who is employed at the Penticton probation office attend at court in Burnaby to eliminate the possibility of the probationer reporting to any one of them.

In view of the foregoing circumstances, it might appear that it would be economically expedient to have the Burnaby probation officer attend in Penticton court. It must be remembered, however, that other witnesses are necessary to prove a breach of probation charge: the court clerk, possibly a sheriff, and possibly a police officer. These individuals are, of course, at the original court location. In the present case, they will also be required in Penticton. Thus, the situation becomes one of great economic expense.

There is also a social cost and inconvenience to the witnesses which must be considered. Still another factor is the coordination of the witnesses to attend court at a particular time. Many of them may have other court and investigatory responsibilities. Another factor to be considered is the documentation for a breach of probation trial. It is the policy

of court registries in British Columbia to keep the original document at the sentencing court. In the present case, the document (the probation order) would be located at the Burnaby Court registry. Therefore, if the trial is proceeded with in Penticton, a copy would be forwarded to that court registry. The use of a copy at a trial brings about a further difficulty. Section 28 of the Canada Evidence Act requires reasonable notice to the accused regarding the use of the copy and the notice must not be less than seven clear days.

All of the foregoing must be examined with a view to the fact that a breach of probation is only a summary matter. It is quite clear that the net social and economic cost may not justify a breach of probation trial when a transfer of significant distance has been made within the jurisdiction of the province.[16]

b) Inter-provincial Transfers

The Criminal Code Section dealing with inter-provincial transers is Section 665 and it states:

> Where an accused who is bound by a probation order becomes a resident of, or is convicted of an offence including an offence under Section 666 in a territorial division, other than the territorial division where the order was made, the court that made the order may, upon the application of the prosecutor, and, if both such territorial divisions are not in the same province, with the consent of
>
> a. the attorney General of Canada, in the case of proceedings in relation to an offence that were

instituted at the instance of the Government of Canada and conducted by or on behalf of that government, or

b. in any other case, the Attorney General of the province in which the order was made,

transfer the order to a court in that other territorial division that would, having regard to the mode of trial of the accused, have had jurisdiction to make the order in that other territorial division if the accused had been tried and convicted there of the offence in respect of which the order was made, and the order may thereafter be dealt with and enforced by the court to which it is so transferred in all respects as if the court had made the order.

It would appear the present law may have come into being as a result of a perceived need to allow for greater mobility of probationers; to resolve economic difficulties; and to resolve a certain inequity in the previous procedure. The previous legislation did not allow for transfers of jurisdiction between provinces and a breach of a probation condition required a hearing before the original sentencing court.[17]

Transferring a probation order, informally, between provinces encompasses all of the difficulties encountered with intra-provincial transfers. Additional administrative difficulties are encountered with formal transfers of jurisdiction. The appropriate personnel at the sending and receiving probation offices must first agree that formal transfer of jurisdiction is appropriate. The original sentencing judge may agree and indicate so on a document, but first the consent of the Attorney General of the province must be obtained. This is obviously a process

requiring considerable correspondence.[18]

Formal transfer of jurisdiction does not negate the requirements of proof in a trial, it merely adds to the administrative burden of the responsible probation officer. The probation officer must ask himself, why should I waste my time?[19]

The Proposals for Development of Probation in Canada (1967), made by the Canadian Criminology and Corrections Association, before the 1968-69 Criminal Code amendments, shed some light on the possible rationale for the present legislation.[20] Certain aspects of the Association's rationale will present themselves as being ironic. Recommendation 19 and the rationale are:

> Recommendation 19. That a court be empowered to transfer its jurisdiction over a person under a probation order to another court of equivalent jurisdiction anywhere in Canada.
>
> That such a court of equivalent jurisdiction be given the power to supervise, to vary or discharge a probation order, or to sentence upon violation of the order in the same manner as the court of original jurisdiction.
>
> Rationale 19. In our mobile society, requests for transfer of probation supervision are not uncommon, either because the offence was committed away from the jurisdiction within which the offender resides, or because the offender desires to change his place of residence subsequent to conviction for reasons of employment or family. Transfers of supervision are effected by the court recommending the recognizance to allow the probationer to reside in another jurisdiction. Once the transfer has been approved, the documents are sent to the distant probation officer, and supervision continues. However, the offender is still responsible to the originating court, and reports of progress are sent to the probation officer of that court.

> As can be seen, the procedure is somewhat cumbersome. Very real problems may arise if the transferred probationer violates the terms of his recognizance, either through being convicted of a subsequent criminal offence, or as a result of a breach of a special condition of the recognizance. If the court decides that the probationer should appear for judgment, it necessitates the transferred probationer returning to the court of original jurisdiction.
>
> The cost of the return of a violating probationer to the court may be considerable, especially when he has been transferred to another province. The cost may be so great that it, rather than the nature of his subsequent violation, tends to be the criterion upon which breach proceedings are instituted or not.
>
> This results in certain inequity, because a probationer, who stays within the jurisdiction of the originating court and subsequently violates his recognizance, is liable to punishment, whereas a transferred probationer may escape facing the consequences of his broken promise to the court for economic reasons.
>
> It is submitted that this recommendation could be implemented in the following manner: Upon granting written permission for the probationer to transfer, the originating court would forward a memorandum containing the court's impressions of the gravity of the offence to the clerk of the other court which will supervise the probationer. This information would thereby be made available to the supervising court if the probationer subsequently appears to receive sentence.
>
> The procedure outlined in this recommendation might also be made to apply in those cases in which a probationer has absconded to another jurisdiction.
>
> (A similar suggestion made by Conference of Commissioners on Uniformity of Legislation in Canada, 1958-Criminal Law Section and by Conference of Commissioners on Uniformity of Legislation in Canada, 1964 - Criminal Law Section) (pp.11-12).

The Association was clearly concerned with the economic expense of returning the probationer to the original court for sentence and the concomitant inequities for offenders. It must be remembered that such returns to the original sentencing court may have involved receiving sentence for

indictable offences on occasion. It is posited that the situation described by the Association and the Ouimet Committee (p.303) has been exacerbated by the present legislation as more travel, for more people, for a lesser offence in many instances, is involved.

It must further be noted that the Canadian Criminology and Corrections Association and the Ouimet Committee recommended inter-provincial transfers within the context of the non-existance of a breach of probation charge and a formal trial.

It is necessary to state the obvious to emphasize the problems with transfers. It would appear that a probationer need only request a transfer of jurisdiction to a relatively distant probation office and then ignore the requirements of the order in order to evade his probation responsibilities. Even if a probationer did report to a distant office originally and then decided to not comply, it would seem likely that impunity would be the result. That is, it is not likely Crown prosecutors would be prepared to move several witnesses, over great distances, in order to prove a summary conviction matter.

Ideal Wording

It has been argued in this chapter that courts seldom satisfy the criteria for reporting conditions as suggested by

Judge Barnett. It has also been argued that even if they were inclined to do so, practical considerations may negate achieving that objective. For instance, not all probation offices may be able to afford the luxury of having a duty officer available at all times when a probationer may report. Therefore, judges would not be able to be specific enough in wording reporting conditions to ensure that no problems are encountered in terms of having an excessive number of probation officers or witnesses to identify the accused.

It has also been illustrated that notwithstanding specific wording of reporting conditions, there are a number of other considerations which will counteract a successful prosecution of a breach of probation. For example, a court clerk may have failed to identify the accused at trial and, consequently, may not be able to give evidence as to having informed that particular accused of the provisions of Section 644(4) and 666 of the Criminal Code.

The court clerk may fail to identify the accused because of a fault in memory or because the accused did not report in the first instance. In the case of a carefully worded probation order, it is submitted that a court clerk's ability to recall a certain accused will be no better than in the case of a poorly worded probation order. A court clerk may see so many people on a daily basis that identity of a particular accused, for example, nine months hence, is an onerous task indeed. If the accused failed to report entirely to the court clerk, the task

becomes impossible. The point is that problems prevail in spite of carefully worded orders.

Omissions versus Acts

It is submitted that breach of probation will usually involve a failure to do something as opposed to refusing to do something; a probationer will simply not report as opposed to advising someone, perhaps the probation officer, that he refuses to report. Section 666 provides for both instances, the failure being an omission and the refusal being an act.

The fact that a breach of probation is usually an omission or failure to act distinguishes it from most other criminal offences. For instance, theft, break and enter, impaired driving, and possession of narcotics are "acts".

A typical breach of probation charge is failure to report to a probation officer. It is obvious that such a failure involves the absence of observation in the sense that a witness does not actually see a person doing something and other evidence is not readily available. It is the person's failure to do something which constitutes the offence. The fact that one or more persons did not observe an accused's failure to do something does not necessarily eliminate the possibility that the requirement may have been performed elsewhere. Therefore, it is much easier to create a reasonable doubt with respect to a failure to do something than it is with an "act".

Much of this chapter has been spent illustrating the difficulties in eliminating the alternative possibilities with respect to a breach of probation charge for failure to report. It is not necessary to offer further explanation. However, it may be helpful to contrast the situation with an offence involving an "act". A hypothetical case of a possession of stolen property charge will be used as an example.

An offender enters a house by breaking a window and opening an inside latch. He then steals a television set and leaves the residence. At a later date, the offender's house is searched by the police and the television set is found. The set has the owner's social insurance number secreted on the inside. The offender is then charged and brought to trial. At the trial, the offender is linked to that particular set by the police officer who identifies the accused and the television set. There may also be evidence given by the owner of the set regarding his ownership of it and the offender's lack of right to have it in his possession.

It is clear from the example that possession of stolen property involves the observation of facts which are not available in a breach of probation charge. Social insurance numbers and other physical evidence such as a television set are usually not available in a breach of probation trial. Such things as fingerprints are also not available in a breach matter. In any event, the point is that in offences involving "acts", such as possession of stolen property, the elimination

of alternative possibilities is considerably less difficult in most cases.

While breach of probation is different from most other offences because it is usually an omission, there are other offences which involve omissions and breach of probation differs from them, as well, in terms of proof difficulties. It is submitted that with other offences by omission there is often the availability of physical evidence and/or the Criminal Code usually provides for a reduction of the evidentiary burden upon the Crown.

The availability of physical evidence in other omissions is readily apparent, for example, in offences such as wilfull cruelty to animals, failing to provide safeguards around a dangerous area, and neglecting to obtain assistance in child birth. These are Criminal Code offences, usually by omission, for which there would likely be physical evidence available. With respect to the offence of wilfull cruelty to animals, Section 402 (1) (c) of the Criminal Code states, inter alia:

> 402(1)Every one commits an offence who
>
> (c) being the owner or the person having the custody or control of a domestic animal or bird or an animal or bird wild by nature that is in captivity, abandons it in distress or wilfully neglects or fails to provide suitable and adequate food, water, shelter and care for it.

It is obvious that, in most cases, before a charge would be laid under this Section an animal in a poor state of health would be found and someone would observe that condition. It is equally obvious that the owner or the person having custody of the

animal would likely be responsible. In other words, the availability of alternative explanations for the animal's condition is limited.[21]

Alteration of the evidentiary burden with respect to omissions is often provided by what is commonly known as a reverse onus. That is, the burden of proof is upon the accused as opposed to the Crown (Cross, 1974, p.91). However, the burden is not as great as it is for the Crown. The burden is discharged by evidence which satisfies the trier of fact of the probability of what the accused is required to establish. (Cross, 1974, p.89).

An example of a reverse onus Section of the Criminal Code is Section 197. The Section essentially deals with failure to provide the necessities of life to dependents. Sub-Section 2 contains the reverse onus:

> Every one commits an offence who, being under a legal duty within the meaning of subection (1), fails without lawful excuse, the proof of which lies upon him, to perform that duty....

The operative words are: "the proof of which lies upon him". The accused in this instance would be required to provide some form of legitimate excuse for failing to provide necessities. It should also be noted that the Crown would be required to provide evidence of the legal duty and not the neglect that caused the harm set out in the statute. Of course, the offence would likely be initiated by the discovery of, for example, a destitute child. Therefore, there may also be physical evidence of the failure.

Section 133 (3) of the Criminal Code has a reverse onus Section and the offence is closely related to the offence of breach of probation. Section 133 (3) deals with failure to comply with a condition of a recognizance. Prior to the 1968/69 Criminal Code amendments, a person was released on his own recognizance when he was placed on probation. The conditions of a recognizance can be very similar to probation conditions as provided in current legislation. For example, a recognizance condition may require an accused person to report to a bail supervisor on a regular basis.

Section 133 (3) states:

> Every one who, being at large on his undertaking or recognizance given to or entered into before a justice or a judge and being bound to comply with a condition of that undertaking or recognizance directed by a justice or a judge, fails, without lawful excuse, the proof of which lies upon him, to comply with that condition, is guilty of
>
> (a) an indictable offence and is liable to imprisonment for two years, or
>
> (b) an offence pubishable on summary conviction.

The difference between enforcement of Section 133 (3) and Section 666 is best illustrated by the use of a hypothetical case. A reporting condition similar to the wording of Section 663 (2) (a) will be used: "Report to and be under the supervision of a bail supervisor". It has been illustrated how this wording is completely inadequate for a probation order. It will be assumed that the identity of the accused is not an issue although it very well could be for similar reasons to those given for breach of probation.

The accused is directed to report to a certain bail supervision office by the court clerk. The accused does not report. The bail supervisor, after attempting to contact the accused, initiates the charge pursuant to Section 133 (3) of the Criminal Code. The accused must provide a reasonable excuse. The question here is: what is he going to say? Surely, the accused is not going to say he reported to a bail supervisor elsewhere, if that is not the case, and thereby commit perjury. It would seem a perjury charge would be relatively easily proved in such an instance. It has already been illustrated how, in a breach of probation matter, the accused will likely be acquitted because of the mere possibility of reporting to a probation officer elsewhere. The accused will likely say nothing as the onus is upon the Crown to prove the failure to report.

Cross (1974) stated the reason for the existence of a reverse onus in certain instances:

> Up to a point, the policy underlying statutes which place a burden upon the accused is justifiable because, in the absence of such a provision, a number of unmeritorious submissions of no case to answer, on account, for example, of the prosecutor's failure to give evidence of the lack of a lawful excuse, would have to be accepted (p.91).

In other words, an unacceptable number of accused persons would not be convicted because of evidentiary problems. It is submitted that breach of probation exactly fits the description.

A reverse onus in Section 133 (3) is somewhat ironic when compared to Section 666. As was previously stated, being subject to a recognizance can be very similar to being subject to a

probation order. Yet, the former situation involves less of a burden upon the Crown. The irony is that the person who is subject to a recognizance is technically innocent, as he has not gone to trial, whereas a person subject to a probation order has been convicted.

The irony is readily apparent to a probation officer who also acts as a bail supervisor. A person may have reported to the probation officer for some time while subject to a recognizance. The probation officer is likely aware of the relative lack of difficulty in convicting the accused for breaching the recognizance. After the person is convicted and placed on probation, perhaps instead of being incarcerated, the level of difficulty in convicting the accused, for failure to comply with a similar order, is increased dramactically. Further irony is provided by the fact that a breach of recognizance can be an indictable or summary offence whereas breach of probation is strictly a summary matter.

Wilfullness

Section 666 requires that a failure to comply with a probation order be a wilfull failure. At first glance, this would appear to be a logical requirement in accordance with principles of natural justice. The type of situation one might contemplate would be a person's failure to report to a probation officer but not having done so because of some form of

incapacity. For example, the probationer may have been given an appointment to report to a probation officer, by the probation officer, and then failed to attend as he was far away from the probation office seeking employment. However, the person attempted to telephone the probation officer without success. Shortly after the person's failure was noted by the probation officer, a charge was initiated. Therefore, the probationer should not be convicted, as a failure to report was clearly not wilfull or, at least, there was some lack of wilfullness.

The above noted situation may have been the type contemplated by the legislative drafters who created the offence of breach of probation, Section 666. It does not, however, represent reality. The probation officer would likely have made attempts to contact the probationer before initiating the charge and it would be only after the attempts had failed that a charge would be initiated. To this, one might respond that the person's failure to report subsequently would be evidence of the wilfullness of the failure. That is not the case. A charge requires that an information be laid. A specific date would be named in the information, namely the date on which the probationer was directed to report by the probation officer. Therefore, subsequent failure to report, over, perhaps, an extended period of time, would not be wilfull because the person was given no direction to report.

In this example, the date noted in the information would be the date at issue if the offender stated he telephoned the

probation office, but the probation officer was not in, and then went to a distant community to look for work. In this instance, the actus reus may not be present as the probationer did report by telephone. In any event, the extent of his wilfullness may be in question and result in acquittal.

A major factor to note in the example is that a specific date would likely be on the information. A second factor is that the evidence which will be adduced by the Crown pertains to that particular date. A third factor is that the accused might simply give some excuse for missing that particular date and there would be no evidence to the contrary. However, this last point may be of little significance as the Crown is required to demonstrate wilfullness.

How does the Crown prosecutor demonstrate wilfullness in such a case? A series of difficult questions can be asked in that regard: will the Crown have everyone who might have answered the telephone at the probation office give evidence; can anyone of those persons be sure the accused did not telephone; will the Crown be required to have witnesses such as the prospective employer give evidence that there was no pressing need to attend on a particular date? In sum, the concept of wilfullness is a nebulous one, and what is considered sufficient evidence will, therefore, vary from court to court.

A key point illustrated by the example is the narrowness of focus taken when an offence must be proved at trial. That is, the focus is on a specific date as opposed to the totality of

the person's failure. The probationer may not have reported for several months after the initial missed appointment but that fact may not be taken in evidence.

The wording of the reporting condition may be a factor. For instance, the condition may require reporting at least once a month. However, even in that instance a reasonable doubt may be present. If the probation officer was not able to contact the offender directly, how would the offender know when to contact the probation officer? Once again, the offender may simply say he telephoned and the officer was not available or attended at the office and it was closed in the evening or on Sunday, and so on. The order may not have been so specific as to detail reporting on weekdays and during business hours.

Some observers might think the foregoing discussion is simply ridiculous. One might ask why the probation officer did not send the probationer a letter directing him to report at a later date or attend at his residence to advise him. With respect to a letter, how would the Crown prosecutor prove the offender received it? The probation officer may attend at the residence to find the offender has moved or was not home. If the person was home, and attended at subsequent meetings, there would not be a charge laid in the first place. With respect to the offender no longer being at the address, or not being at home, the question must be asked: how much time must a probation officer spend in his attempts to locate the probationer?

Section 666 is a summary conviction matter. Section 721 (2) of the Criminal Code, respecting summary matters, states:

> No proceedings shall be instituted more than six months after the time when the subject-matter of the proceedings arose.

This section can create problems in breach of probation matters. In order to illustrate the nature of the problem, the example from the previous section will be used. The wording of the reporting condition is all important.

It will be assumed that the probation order required the probationer to report to and be under the supervision of a probation officer. A probation order was imposed for a period of nine months. The probationer reported initially but did not report at a specific time two weeks hence. If the probation officer fails in attempts to contact the probationer, he may wish to initiate a charge. However, the condition does not state when the probationer is to report. The probation officer may contact Crown counsel and be advised, or may already know, that there is little likelihood of conviction. If the probationer does not report at all during the remainder of the probation period, that may be evidence of the fact that the order was breached as it would appear that the order required reporting at least once more during the probation period. The probation officer may then wait until the order has expired before attempting to initiate the charge. Of course, the charge cannot

be initiated because of the statutory limitation.

The Relationship of Reporting Conditions to other Reporting Conditions

This chapter has, thus far, dealt only with reporting conditions and problems associated with reporting conditions. There are, of course, a number of conditions which can be imposed by the court (e.g., see section 663 subsections b through h). Section 663 (2) (h) makes "such other reasonable conditions as the court considers desirable for securing the good conduct of the accused and for preventing a repetition by him of the same offence or the commission of other offences" possible. There are, however, a limited number of probation conditions which are used regularly. The more common of these conditions will be discussed in the following sections.

The problems with reporting conditions were discussed in considerable detail because of the importance of the reporting condition, per se, and because of its relationship to other conditions. That is, most other conditions, if imposed in the absence of a reporting condition, are likely to be meaningless.

Some conditions would obviously be meaningless. For example, a condition requiring an offender to do community work service under the direction of the probation officer would be useless unless the order also required reporting to a probation officer. Other conditions would be less obvious in that respect

but would likely be equally meaningless. For instance, a requirement to "make reasonable efforts to find and maintain suitable employment" (S.663 (2) (g)) would be useless in the absence of the reporting condition. The situation would be akin to the question of whether or not a tree falls in the forest if there is no one to see or hear it fall.

Many of the problems discussed in relation to reporting conditions can be applied to other probation conditions. Therefore, it is not necessary to detail each problem as it applies to the other conditions. In the context of other conditions, only major problems, usually germane to that specific condition will be detailed.

Community Work Service

Community work service can be, amongst other things, reparative and punitive. It is not the purpose of this thesis to discuss the philosophical underpinnings of community work service. However, in relation to the concepts of punishment and reparation, it can be fairly said that they are dependent upon adequate enforcement. Punishment imposed and not enforced is no punishment at all. Similarly, reparation not made does nothing for the community, the victim, or the offender.

The Wording of Community Work Service Orders

The wording of community work service orders constantly suffers from the same problems as reporting conditions: ambiguity, imprecision, and vagueness. For instance, a condition which states "Complete one hundred hours of community work service" is unenforceable wording. The questions which may arise and foster reasonable doubt at trial are manifold: What community work service - work found by the offender and completed by the offender on his own? When should the work service be completed - within the period of probation; within one year, who is to say the work was, or was not completed? Was the work service completed satisfactorily?

Probationers are not all aware of the legal technicalities. A probationer having a probation order containing the aforementioned condition may very well complete the community work service or begin it and then decide not to complete it. In the second instance, it is submitted that Crown counsel will likely not proceed with a charge because of the technical difficulties. A probation officer may very well be wasting his or her time in processsing a charge.[22] A community service order should state the time period in which the work service is to be completed and specify that the work is to be done under the direction and to the satisfaction of the probation officer or his designate. An adequately worded order might state: "Complete 50 hours of community work service under the direction and to

the satisfaction of the probation officer, or his designate, not later than one month prior to the expiration of the probation order". This wording, or similar, will suffice even if the order is a reparative sanction in the cause of the victim. That is, the wording does not impose the offender on, perhaps, a reluctant victim.[23]

Identity

As in the case of reporting conditions, an adequately worded condition does not bring an end to enforcement problems with community work service. For instance, identity of the accused can be even more of a problem with such orders than it is with a reporting condition. Before explaining the difficulties, by way of a hypothetical case, a brief description of the process of community work service will be of assistance.

Community service officers have been employed by the British Columbia Corrections Branch directly, or indirectly through contract, in larger British Columbia communities. In smaller communities, a probation officer may arrange a contract between the corrections branch and a member of the community to supervise the community work service. The primary reason for the use of community work service officers is the onerous weight of numbers in larger communities. That is, it would be most difficult for a probation officer to supervise the performance of work service for, say, 20 probationers at any one time. In

addition, community service officers find work for the probationers to do. They arrange with various community agencies to have work performed. For example, the local YMCA may need a lawn mowed, or routine maintenance performed on an ad hoc or regular basis. Another example may be work or simply visitation with elderly persons in a care home. A community service officer associated with a large probation office may have a caseload in the hundreds as he may be supervising the probationers of several probation officers.

In the hypothetical example, it will be assumed the probationer had a community service order requiring the work to be completed to the satisfaction of the probation officer or his designate and the date of completion was specified.

The probationer reported to the probation officer and was directed by the probation officer to do the work service under the supervision of a community work service officer. The community work service officer, in turn, took the offender to a local YMCA and introduced him to the administrator of the facility. An arrangement was made between the offender, the administrator, and the officer for the offender to report regularly and work with employees of the YMCA facility. There are three employees in addition to the administrator. The probationer did not complete the community work service.

One question which could arise at trial would relate to the elimination of the possibility the person may have worked with one of the individuals named. That is, the administrator and the

three employees would be needed in court to give evidence that the probationer did not report to any one of them. If only the administrator gave evidence, the clear possibility would exist that the person reported and worked with the employees. If only one employee attended and gave evidence, the obvious possibility would exist that the probationer worked with the other two and so on.

Some observers may have difficulty in understanding the foregoing. One may ask: why are all the witnesses necessary? The answer to that question, in a word, is hearsay. If, for instance, the administrator attended court and gave evidence that each worker told her that the probationer in question had not done the work, the evidence would not be allowed as it is hearsay.

Some observers might also question the type of work assigned. That is, there may be a suggestion that work which can be constantly monitored by one person, preferably the community service officer, would be best. There are problems with that conception of work service. In such instances, the community work service officer would have to be on a one-to-one supervision basis with the probationer. Every hour worked by the probationer is one hour worked by the officer; a most uneconomical situation. Of course, there is the possibility of group work of a menial nature which can be supervised by one or two persons. This gives rise to the notion of a chain gang. The offender would not be getting the benefit of seeing and helping

others. The point is that community work service should be assigned in a fashion similar to the YMCA situation for practical, economic, and correctional reasons.

The probation officer would be required, in court, to give evidence that he directed the accused to do the work service assigned by the community work service officer. The community work service officer and the administrator would also be required to give evidence regarding the plan of work and the arrangements made. The necessity of the above named persons' evidence relates to the offender's wilfullness in failing to do the work service. For instance, the probationer would have to be directed by the probation officer to do the work service assigned by the community work service officer before he would be convicted of wilfully failing to do the work service.

It is obvious that a number of witnesses would be required in proving a breach of probation charge in a case such as the YMCA situation. In fact, four employees of that organization would have to be called.

The above noted type of situation presents a problem for community work service staff and probation officers. That is, one wonders how many times the employees of a community organization would attend court before it was decided that it is not practical to accept probationers on community work service. The community work service officer and probation officer may be faced with the dilemma of proceeding with a charge at the cost of losing a resource or ignoring a wilfull failure and

maintaining a resource where many other cooperative probationers may complete their community work service.

Victim Reparation through Community Work Service

Victim reparation through community work service involves the concept of an offender doing work for the victim of the offence in order to repair the damage created by the offence. In its simplest form, this might involve something like 50 hours of gardening work for a victim. Perhaps the order was made as a result of reckless driving through the victim's property and garden.

It should now be clear there would be problems in the event the offender failed to do the work service indicated in the example. First, there would have to be evidence that the person wilfully failed to do the work service. The work supervisor would have to provide evidence that sufficient direction was given to the offender for the entire 50 hours. Second, who is to supervise the order? It is simply not economically feasible to have community work service personnel directly supervise individuals over a period of 50 hours. Third, in the event the victim agreed to assign work and supervise same, the victim would then be required to attend court to give evidence as to the work assigned and the failure to complete it.

The example represents the most basic of situations. Yet it would seem likely the victim would be required to give evidence

in court regarding the lack of reparation. The situation would be even more complicated if the victim was employed. First, there may be questions regarding the actus reus. For instance, the defence may contend the victim or community work service officer underestimated the length of time necessary to perform a certain task, and since the victim was at work when the work was to be performed there is no evidence the offender did not work for a specific period of time. The defence may also question the victim about the extent of the damage before the work service commenced. The defence might even point to the possibility of further damage occurring after the offender had completed an assignment. The possibilities are endless unless there is direct observation of the work site and work through time. A second factor would, again, be the requirement of the victim to attend in court in order to give evidence. In this case, the victim would likely be subject to further loss because of taking time off work to attend court. In addition, the victim may be subjected to 'difficult' questioning. For example, the victim may be asked questions regarding his expertise in evaluating damage, time of repair, and quality of work.

Restitution

Restitution as a condition of probation may not appear to be difficult with respect to enforcement. However, as is the case with other probation conditions, there is more to it than

is apparent from a cursory examination of the subject. Identity is, of course, a factor in the prosecution of an accused who failed to pay restitution. However, this section will deal only with the problems which usually arise with restitution orders specifically.

Wilfullness

One of the more prominent difficulties with enforcement of restitution orders involves the concept of wilfullness. The difficulty specifically relates to the offender's ability to pay restitution. That is, if the offender does not have the ability to pay because of unemployment, he has not wilfully failed to pay the restitution.

In R. v. Dashner, 15 C.C.C. (2d) 142, it was held that the sentencing court should establish the offender's ability to pay and that the amount of restitution or reparation ordered is for actual loss or damage incurred by the victim. There is no difficulty with enforcement arising from that particular decision. However, more generally, the decision does indicate an area of concern, the offender's ability to pay. The offender may hold out to the sentencing court, at the time of sentencing, that she is not only able but also willing to pay restitution. The court may make a probation order and a restitution condition accordingly. It is submitted that often when a restitution condition is made there has been a submission by the accused

regarding a willingness to pay restitution.

A problem arises, needless to say, when the offender does not pay resitution. It would seem the Crown must establish the person had the ability to pay throughout the length of the probation order, in order to provide proof of wilfull failure. Proof that the offender held out to the sentencing court an ability to pay is only proof of a possible ability to pay at the time of sentencing. Circumstances may change after sentencing. For instance, the offender may not have acquired a promised job of which the sentencing court was informed. Perhaps an offender who was working at the time of sentencing lost her employment.

If an offender loses employment because of, for example, technological change, it would appear that an inability to pay would be a valid defence, particularly if the offender was unable to acquire new employment. However, what happens in the case of an individual who remained employed and had the ability to pay but failed to pay? In this case, also, the Crown may have a great deal of difficulty establishing an ability to pay. Even if the Crown was able to establish employment and earnings, the accused may simply point out that the earnings were spent on necessities. For instance, the defence may argue that the purchase of an automobile was necessitated by transportion to employment. In short, the accused need only convince the court of the lack of necessary funds to provide restitution and, unless there is some evidence to the contrary, she will likely be held to not have wilfully failed to pay restitution.

The involvement of a probation officer may be of some assistance to the Crown. That is, evidence from a probation officer may assist in establishing that an accused was able to pay restitution. For example, the offender may have advised the probation officer of taking a trip to Hawaii during the period of probation. It must be emphasized that a person who has failed to pay restitution may also fail to report to a probation officer. Therefore, without evidence from the probation officer, there may be no evidence to negate claims by the accused regarding an inability to pay.

Regarding ability to pay, Judge Barnett (1977) has submitted:

> Restitution can fairly be ordered in instances where the court is reasonably satisfied that the offender has the ability to work and then earn the money to pay restitution. If he makes no real effort to do so, he can be convicted under S.666 of the Code but if he falls short despite reasonable efforts he cannot (p.197).

With all due respect, Judge Barnett does not seem to have contemplated the difficulties in proving what a "reasonable" effort is. The problems, inter alia, will be described in the section dealing with employment conditions.

The wording of restitution conditions is all important. Judge Barnett (1977) has noted:

> A common concern of the probation officers about probation orders containing restitution conditions is that judges frequently do not specify how much has to be paid, when payment is to be made, who is to receive the benefit of the payment, or where payment is to be made. (And these concerns relate to orders made after the decision in Shorten) (p.202).[24]

The concerns regarding wording are similar to those relating to other conditions; that is, wording can be incomplete, vague, incomprehensible, and ambiguous. Two short examples will sufficiently illustrate the difficulties. A provincial court made the following order in 1982: "To make restitution for the broken window to the complainant through the probation officer prior to February 1,1982". The reader should already recognize some of the issues which can be raised with respect to such a condition: which probation officer? how much restitution? which complainant? which window? etc. Another restitution condition made by a county court states: "You will make restitution in the amount of eleven hundred dollars ($1,100.00) to (name of victim), payable to the clerk of the court on or before November 3rd, 1983". The issue here might relate to the questions: which clerk of the court? and which court? For example, the Crown might be in a position of having every clerk of the court in Vancouver give evidence at trial that the person did not pay restitution to any one of them.

If the sentencing court named the victim as the person who is to receive direct payment of restitution, the Crown will then be in the uncomfortable position of having the victim give evidence regarding the offender's failure to pay. The victim will then be in the position of having to answer questions regarding the amount, the possibility of a failure of memory, and so on.

A court clerk would be questioned at trial, regarding recollection of payment. Of course, court clerks would usually be unable to recall specific amounts of payments and payment dates if there are a number of restitution orders for which they are responsible. Thus, individual records are kept. The record has the offender's name on it and, perhaps further biographical details. However, the court clerk may be asked how he knew the accused was the only offender with a given last name who had a restitution payment card at the court registry. If he is unable to affirm that is the case, the identity of the accused becomes an issue.

The court clerk, in the foregoing example, may also be asked if he is the only one who makes entries in the record of payment card. If he answers in the negative, then the issue will be the possibility of someone else receiving a payment but not recording it. The clerk might also be asked whether it is possible, on a busy day, to have received payment but not recorded it. The Crown may be able to negate some of the foregoing possibilities by having other court clerks provide evidence. The victim may also be called. Because, after all, if the payment was not made to the court clerk, the victim would not have received payment.

The use of the record of payment card may also cause some difficulties. It is submitted that the payment record card is a "business" record pursuant to section 30 of the Canada Evidence Act.[25] If that is the case, it is necessary for a notice of

intention to be served upon the accused (Sub-section 7 of Section 30). This may be very difficult if an uncooperative probationer is not available for service. Of course, questions regarding the proper procedure for service and the identity of the person named may also arise.

It is hoped that this short presentation of some of the problems with enforcement of restitution orders has assisted in an understanding of how complex such matters can be, notwithstanding apparent simplicity. It is also hoped that it has fostered an understanding that problems with enforcement are not mutually exclusive.

Employment

It is quite clear that finding and maintaining employment may relate to an offender's offence and rehabilitation. For example, at the time of sentence, the offender's counsel may point out to the court that the offender was involved in an offence partly because of unemployment. That is, the offender had excessive idle time and limited funds and as a consequence decided to commit a theft. Defence counsel might even assist the court in sentencing by suggesting a period of probation with a condition requiring the offender to seek employment.

Section 663 (2) (g) of the Criminal Code states: "make reasonable efforts to find and maintain suitable employment". Judge Barnett (1977) rightly offers a terse and self-explanatory

description of that wording:

> [But] the condition suggested in S.663 (2) (g) of the Code is totally inadequate and of no real value at all in a probation order. Unless an otherwise uncooperative probationer is so foolish as to admit to his probation officer that he has made no effort to find employment and prefers to draw unemployment benefits or welfare, there is virtually no way to prove the fact where the 'standard condition' is the condition appearing on the probation order (p.202).

Judge Barnett (1977) offers the following condition as a substitute:

> Make diligent effort to find and maintain employment approved by the probation officer. If on any occasion that he reports to the probation officer as required by the order, he is not actually then employed, he must provide the probation officer with a written report concerning all efforts made by him to find employment since ceasing to be employed or since last reporting. This report must detail: (a) who was seen, (b) what work was sought, (c) what response was received."[26]

Judge Barnett (1977, p.203) adds: "Where necessary, the condition can be supervised and enforced".

With all due respect, it is suggested that Judge Barnett's wording is not much better, in terms of enforcement, than is the Criminal Code wording. The key feature in that regard, is that his wording substitutes the offence of failing to provide a probation officer with a written report for the offence of failing to seek and maintain employment. The report, in turn, will supposedly be proof of failure in certain instances. It is submitted that an uncooperative probationer who would not be "so foolish as to admit to his probation officer that he had made no effort to find employment" would also not be so foolish as to not give his probation officer a report regarding his efforts.

The uncooperative probationer may very well falsify the report to the probation officer. The relevant question may be whether or not it is an offence to lie to one's probation officer. A court may very well find, that failure to seek and maintain employment is proved by failure to provide a written report, perhaps on only one occasion, to a probation officer. However, the writer has some reservations about that possibility.

In the foregoing paragraph, it was assumed there would be evidence of the presence of the person's falsification of the report. It is quite likely that assumption is incorrect, in that proof of the falsity would be most difficult. First, how many falsifications would be necessary in order to prove a lack of diligent effort? It is unlikely that only one or two falsifications would suffice. Second, if the accused named a "secretary" as the person who was seen, the Crown might be obliged to have every secretary of a firm attend a trial. Third, the number of witnesses would become ridiculous only to prove that the accused falsified a report. The number of witnesses could grow even greater if it was necessary to prove wilfull failure over time.

The reality of enforcing an order as suggested by Judge Barnett, is that it is unlikely to be enforced. It must be remembered that breach of probation is a summary offence. The logistics of proving a breach of such an "enforceable" order are so onerous, the effort is not worth the possible result.

The interdependence of probation conditions is illustrated by the foregoing discussion of the wording suggested by Judge Barnett. It will be recalled Barnett suggested: "That restitution can fairly be ordered if the court is satisfied the offender has the ability to work and then earn the money to pay the restitution". It is submitted that an "employment" condition would have to be included in a probation order which required restitution pursuant to the circumstances suggested by Judge Barnett. However, if the Crown was unable to prove failure to seek and maintain employment, then the proof of wilfull failure to pay restitution may also fail.

Residence

A probation condition requiring residence at a particular location or in a particular facility may be appropriate in certain circumstances. For instance, an offender may have had a history of alcohol related offences. Through counsel, the offender may hold out to the sentencing court a readiness and willingness to attend at an alcoholism treatment facility for a fixed period of time. The court may make an order accordingly. Once again, there is more to enforcement of such a condition than is readily apparent.

In addition to the legal problems with a residence condition, there are practical problems which often have legal ramifications. For instance, the sentencing court might make an order requiring an offender to reside at the No Booze Alcohol

Treatment Facility for a period of six weeks. It is submitted that operators of community facilities may not like conditions of this sort. The dislike may have to do with a feeling of obligation to keep a particular person for a stated period, notwithstanding the person's behaviour. The present legislation, unfortunately, requires wording with fixed dates so that there is at least a slight chance of enforcement.

The situation described above also involves a proof problem for the Crown. An offender might misbehave to the point where he is asked to leave the facility. The misbehaviour might involve the bringing in of liquor and disturbing other residents. However, how does the Crown prove the wilfull failure to reside at the residence? Perhaps the way to do that would involve the attendance, at trial, of the administrator of the facility to give evidence of the misbehaviour. The attendance of the administrator may not be sufficient as he may not have personally observed the breaking of the rules or the misbehaviour. Thus, the Crown, once again, may be required to produce a series of witnesses: other workers at the facility. The entire exercise may be futile in any event. The question which remains is: does misbehaviour constitute wilfull failure to reside at a residence?

The sentencing court may have anticipated the foregoing questions and made an order requiring observance of the rules of the facility. It is submitted that such a modification would provide little assistance to the Crown at trial. A number of

witnesses may be required to provide proof of wilfull failure to observe the rules. In addition, evidence will be required as to the offender being informed of the rules. Even that is not as simple as it seems. The facility may be one which has a relaxed atmosphere for therapeutic reasons and because most residents are voluntary attendees. Perhaps the administrator and staff will not be able to recall informing a particular person about the rules.

The foregoing case assumes the sentencing court had presentence information regarding the length of the program, the location of the facility, and the goals and purposes of the program. It is submitted that this is not always the case. Defence counsel, speaking to sentence, may have suggested it without prior consultation with anyone but his client. Rather than postpone sentence, the court may have made an order requiring attendance at an alcohol treatment facility as directed by a probation officer. Such a condition would create problems in addition to those which have already been presented. For example, questions may be raised as to the specificity of the directions given by the probation officer regarding the location of the facility, observance of rules, time limits, and so on.

The condition requiring attendance as directed by the probation officer gives a probation officer considerable discretion. This may be problematic in terms of the decision in R. v. Shorten and Shorten, (1975), 29 C.C.C. (2d) 528, [1976] 3

W.W.R. 187 (B.C.C.A.). In that case, the appeal court held that a probation officer could not direct the timing and amount of restitution payments notwithstanding the fact that a specific amount of restitution was set by the court. A residence requirement at a facility designated by a probation officer appears to parallel that situation in terms of the authority delegated to a probation officer.

In fact, and with all due respect, most probation conditions giving discretion to a probation officer would appear to fall within what is considered improper delegation of duty in the Shorten case. For example, a one year probation order requiring the offender to "report to a probation officer immediately and thereafter as and when directed" would also appear to be a delegation of the court's duty. The amount of probation would be set by the court but the timing and frequency (amount) of reporting would be set by the probation officer.

The reader should now be able to comprehend the difficulties in enforcing probation because of the myriad of defences available to the accused. The reader should also be able to appreciate that most of the defences occur as a result of the fact that most offences of breach of probation involve omissions by the accused and probation conditions vary from court to court.

Most common types of probation conditions have been discussed so far. There is little purpose in describing other conditions which are omissions and have similar problems.

Therefore, two conditions which involve "acts" by the accused will be presented. By way of contrast, it will be readily apparent there is far less difficulty in enforcing these types of conditions.

Area Restrictions

A condition restricting a person from a certain area may be considered appropriate by a sentencing court in certain circumstances. It would appear the appeal courts have "grave doubts" about such conditions (Barnett, 1977, p.191). Nevertheless, they are used. For example, the sentencing court may restrict the accused from being in a certain area which is frequented by drug traffickers. The accused's counsel may have presented the court with the fact that her client's court history involves drugs and drug related offences.

Judge Barnett (1977) has indicated there can be difficulties with respect to enforcing poorly worded orders of this sort. He stated:

> See Regina v. Matrai, [1972] 2 O.R. 752, 6 C.C.C.(2b) 574 (C.A.), and consider the difficulties one could reasonably expect in attempting to enforce the condition there ordered by the Ontario Court of Appeal (p.191).[27]

The condition made by that court was:

> During the period of probation the accused shall not for any purpose leave the Municipality of Toronto without first notifying his probation officer of where he intends to go and the purpose of such departure whenever reasonably possible.

Difficulties in prosecution would likely involve the definition of "reasonably possible". It would not seem difficult to raise a reasonable doubt.

In the Matrai matter, there would be less difficulty in enforcing the order if the restriction to Metropolitan Toronto was an absolute one. If that was the case and the accused was found in Ottawa, perhaps by an Ottawa police officer, the matter would be much more straightforward. The only problem may arise in having an Ottawa policeman transport himself to Toronto in order to give evidence for a summary proceeding, (i.e., the Crown may not think it is worthwhile).

It should be noted that only one policeman is necessary to prove a breach of the actual condition. It should also be noted that it is a policeman. It is unlikely that the offender's probation officer or a member of the public would make the observation. In restrictions from certain areas, it is highly likely police will be involved.

The difficulty of proving wilfull failure to remain out of an area is obviously far less than other failures. The offender is physically found in a certain area and the Crown need only prove that fact with respect to the condition.

Abstention from Alcohol

A condition requiring abstention from alcohol is not as straightforward as it seems, notwithstanding the fact a failure to comply with the order requires the physical act of drinking by the accused. An example will illustrate the difficulty. The probation condition might be "abstain from the consumption of alcohol". An offender is found, in a state of intoxication in a beer parlor, by his probation officer. There were a number of glasses of beer sitting on the table at which the accused was located. The probation officer reports those facts to the Crown and a charge is processed.

There are many arguments which can be raised by the defence in such a case. The probation officer may not have actually observed the accused drink from one of the glasses at the table. Therefore, there is no evidence as to the actual consumption of alcohol. Even if the observation had been made, there may not be any evidence the liquid in the glass contained alcohol. It is submitted that it is doubtful the probation officer would have acquired a sample of the liquid for analysis. With respect to the state of intoxication, the probation officer might be questioned regarding his expertise in determining intoxication and whether or not that apparent state of intoxication was by alcohol or some other mood altering substance.

It should be clear that an order to abstain from alcohol by itself is virtually useless in terms of its enforceability.

Judge Barnett (1977) has suggested a solution to the problem:

> It is suggested in cases where the court considers it necessary to order that a probationer abstain from the use of alcohol that the condition be an absolute one and be followed by a condition requiring the probationer: 'to submit to a breathalizer test upon the demand of any peace officer who has reasonable and probable grounds to believe that there has been a failure to comply with the immediate preceding condition of this order' (p.194).

In the event the accused refuses the demand there is a failure to comply with the order and the readily observable act of refusing is available as evidence. If the offender "blows" on the breathalizer and the machine registers, there will be other observable evidence that the accused used alcohol.

It should now be obvious that failures to comply with probation conditions which involve "acts" are not devoid of proof problems but are much more easily proved than those failures which involve omissions. In fact, it should now be clear that with omissions, proof of wilfull failure is virtually impossible in many instances. It should also be clear that the more uncooporative a probationer is, the greater the likelihood proof problems will exist and may compound themselves.

The latter point is best explained by way of example. It will be assumed that a probationer walks out of a courtroom after sentence and ignores the entire probation order just imposed, inclusive of reporting to the court registry. The probation order required the offender to report immediately to a probation officer and thereafter as required. Another condition required the offender to complete fifty hours of community work service under the direction of a probation officer. It is

submitted there is every likelihood the offender will not be charged if the above noted conditions are ignored entirely. First, the person would not be bound by the probation order because he had not read, or did not have read to him, the probation order, and he had not received a copy. Second, the Crown will likely not be prepared to have the entire probation service in court to prove the offender did not report to a probation officer. Of course, the offender did not receive direction from a probation officer as to what community work service to do and a charge regarding failure to do work service would, therefore, fail as well.

It will now be assumed that another probationer with identical conditions did report. However, after a period of several months, the person, perhaps due to a return to excessive use of alcohol, failed to continue reporting and to complete the work service. It is submitted this person would likely be charged as there is, at least, the availability of some evidence regarding identity and direction to do work service. There are other defences available to the person and he may not be convicted. Nevertheless, the point is that the entirely uncooperative person is unlikely to be charged whereas the partially cooperative person is more likely to be charged. It is also submitted that the partially cooperative person may even be more likely to plead guilty than is the totally uncooperative offender as he has only the less obvious defences available to him.

Attempts to Solve the Problems

Administrative and Legal Attempts

Judge Barnett's excellent article is clearly an attempt to rectify some of the problems with enforcement of probation; particularly hording difficulties. He wrote (1977):

> It has been pointed out on occasion that the meaning and effect of probationary dispositions is often misunderstood by the public and not fully understood by the judiciary (see Martin's Criminal Code 1955 ed., at 972 and Parker at P.93). The present paper written primarily for the benefit of the judges of the provincial court of British Columbia, attempts to remedy this situation. The approach of the paper is essentially a pragmatic one (p.168).

Judge Barnett's paper may have contributed to an improvement in the making of probation orders. However, it by no means contributed to a substantial reduction in the difficulties of enforcement. Poorly worded probation orders continue to be very common. In any event, it has been shown that even well-worded probation orders are difficult, and often not possible, to enforce. The administration of probation services, the criminal justice bureaucracy, and the day to day realities of probation work, negate the possibility of probation orders being worded with sufficient precision to make successful prosecution a likelihood. For example, the naming of a specific probation officer at a specific location in a reporting condition involves the incorrect assumption that the judiciary

is aware of the name of every probation officer, the location of every probation officer, and the shifts, days off, and annual vacations, of every probation officer. In other words, exact and precise wording may cause administrative difficulties and lack of it causes enforcement difficulties.

Mr. C. Dymond, an area manager for the Ministry of Correctional Services in Ontario, provided the writer with materials relating to attempts to resolve probation enforcement problems in Ontario. He forwarded a probation enforcement guide prepared for the use of probation officers in Ontario (Ministry of Correctional Services, 1979). Much, if not most, of the text relates to legal issues and attempts to resolve same. Mr. Dymond indicated the correctional service in that Province has gone so far as to provide probation officers to act as court liaison officers who sit in court in major centres in order to, inter alia, ameliorate the difficulties of enforcement. For instance, the court liaison probation officer is able to approach the probationer in the court in order to give direction to her, pursuant to an order requiring the offender to report as directed by a probation officer.

The writer has had occasion to meet with Mr. Dymond and he advised that the procedures referred to have by no means eliminated the difficulties. The practice of placing probation officers in every court would be very costly, if it was initiated on a province-wide basis. It would appear practicable only in very large centres. In any event, one wonders what the

probation officer does with probationers who are waiting while he gives others specific directions.

The B.C. Corrections Branch has made some attempts to deal with the problems. The requirement that all apparent breaches be reported to the Crown prosecutor has been referred to previously. Needless to say, that requirement is simply an exercise in futility in many cases.

The British Columbia Corrections Branch has developed an "evidence check list", to assist probation officers in presenting an enforceable case to the Crown. The check list is of limited utility. It would appear the check list assumes that breaches are only of the simplest variety. One item on the list states: "Accused reported to a probation officer who can identify the accused, name of probation officer____." Another item on the list states: "failure to perform community work service; name of supervisor who was on site at the time of breach and noted accused's failure to comply____." With respect to the latter item, it is hard to conceive of a situation where a supervisor would stand on site for, perhaps, fifty hours and watch the offender do nothing.

A good example of an administrative practice which has been developed, by some British Columbia probation officers, to deal with a legal problem is known as 'double booking'. Argument for its use is compelling as the practice would appear, superficially, to solve a problem with proving failure to report when a transfer takes place. However, the process is based upon

faulty logic and is, therefore, a good example of the failure of administrative practices to resolve legal problems regarding enforcement of probation.

'Double booking' must be explained before proceeding. When a probationer transfers from one probation office to another, the referring probation officer will provide the offender with a particular date on, or before, which to report. 'Double booking' involves the additional procedure of making a further appointment with the referring probation officer on a specific date. The probationer is advised that if he attends at the probation office to which he is referred, there will be no necessity to report to the referring probation officer as that officer will be informed that the probationer reported as directed.

The argument for the procedure is that it eliminates the necessity of having personnel from the distant office attend at a trial in the event the transferred probationer fails to report. The reasoning is that the referring probation officer will be able to provide evidence regarding the probationer's identity and failure to report, on a specific date, to him.

Notwithstanding its superficial appeal, the 'double booking' procedure amounts to nothing more than a bluff of the legally unsophisticated offender and is useless in terms of proving a failure to report. The reason is that the personnel from the distant office will still be required to provide evidence, at trial, that the person did not report to that

office. It is quite clear the referring probation officer created that possibility by the act of referring the probationer. Competent defence counsel will make short work of any charge involving 'double booking', provided there is no evidence of the probationer's failure to report to the distant office.

Judicial Review

Some of the judiciary have made attempts to see to it that probation conditions are fulfilled by requiring the offender's appearance in court, by a condition of probation, at a subsequent date. This is commonly known in the probation service as a probation review.[28]

The apparent purpose of the review is to ensure compliance with probation conditions through the strength of the court. It has been the writer's experience that reviews are effective. That is, the writer has never observed a probationer with an impending review date fail to comply with probation conditions. However, if reviews were used extensively, the practical problem of a probation officer's time would soon create a problem. The probation officer would be spending so much time going from review to review that very little other work could be performed.

Notwithstanding the effectiveness of reviews, it is submitted they amount to nothing more than a bluff by the court. There are several reasons for that opinion. First, in the case

of a probationer with a conditional discharge or suspended passing of sentence, nothing can happen in the event the probationer foolishly admits a failure to comply with a probation condition. Revocation of a conditional discharge or the suspended passing of sentence requires conviction of an offence including an offence under Section 666 (S.662.1(4) and S.664(4)(d) respectively). Second, other types of probation can only be enforced by conviction pursuant to Section 666. It is submitted the court may have some difficulty in finding guilt, without giving the accused an opportunity for a trial, or in directing that a charge be laid. Third, one might assume the uncooperative offender, apprehensive of the court, might acquire counsel who will advise him regarding the protections of the Canada Evidence Act regarding incriminating statements.(Section 5(2) Canada Evidence Act).

It is submitted that the court can usually not even modify a probation order in a review. Section 664(4)(e) of the Criminal Code requires a conviction for an offence, including an offence under Section 666, before an order can be modified with regard to alteration of, or addition of, conditions or extension of the length of the order. Section 664(3) requires an application by the accused or prosecutor before any changes in or additions to the conditions can be made. With respect to this latter point, in a review, neither the accused nor the prosecutor has made an application. Further, with respect to that point, in R. v. Shorten and Shorten, (supra), McIntyre, J.A., stated:

> In reaching this conclusion I am not overlooking the provisions of S.664(3) of the Criminal Code which provides for the modification of a probation order after its making. The operation of this section, however, depends upon an application by the prosecutor or accused. No such application has been made and the possible operation of that section in this circumstance is therefore not before us.

If the court of appeal feels it cannot modify an order without an application by the accused or prosecutor, it is doubtful a lower court will feel so empowered.

Non-technical Violations

So far in this chapter, problems relating only to technical violations of probation conditions have been discussed. It is clear that commission of an offence while subject to a probation order can result in a charge of breach of probation. This type of non-technical violation is obviously the most blatant form of breach of probation. It is a failure to comply with the standard and statutory condition to "keep the peace and be of good behaviour"(S.663(2)). Yet, many problems exist with respect to legal questions and application of the relevant section of the Criminal Code (S.666).

Perhaps the greatest problem with enforcement of non-technical violations is that the procedure is only rarely applied. The extent of the lack of application will be described in a later chapter. This section will simply discuss some of the possible reasons for the lack of such proceedings.

It is submitted that proceeding with a breach of probation charge because of a subsequent conviction may be a fruitless effort as the consequence for the accused may merely be a nominal sentence. In addition, proceeding with a charge may be the source of a professional dilemma for the prosecutor. The basis of that issue is the possibility of double punishment for the accused.

Nadin-Davis (1982) has indicated the substance of the problem:

> Principles of sentencing must be applied with particular care in breach of probation cases. The breach is an offence, and the courts are understandably reluctant to impose mere token penalties upon offenders who commit crimes in defiance of the conditions of their probation. However, it must be remembered that many offenders who come before the courts on S.666 charges will already have been convicted of other offences giving rise to these charges. If sentence on other offences was imposed taking into account that they were committed in breach of probation a penalty other than nominal comes perilously close to violating the principal that no man should be exposed to double punishment (p.472).

In R. v. Chinn (1977), 38 C.C.C. (2d) 45, [1978] 1 W.W.R. 418, 11 A.R. 18 (Dist.Ct.) Stevenson, D.C.J. upheld a sentence of one day concurrent for a breach of probation charge. The circumstances were that the accused was subject to a probation order for breaking and entering when he was convicted and sentenced for a subsequent theft. The trial judge noted the accused was on probation and sentenced accordingly. He then imposed a nominal sentence for the breach. Stevenson, D.C.J.,

noted (p.48):

> In considering the matter anew, I am very much of the view that to impose anything other than a nominal punishment, if it did not violate the principle [of double punishment], would certainly give a convicted person the impression that it did so and leave him with a grievance which fairness dictates be removed.

It is submitted that Crown counsel are reluctant to proceed with a breach of probation when there has been a subsequent conviction. The rationale for not proceeding is often similar to that expressed in R. v. Chinn (supra), that double punishment would be imposed if anything more than a nominal sentence was imposed. Further, if a nominal punishment is imposed what is the point of the exercise? The key issue in R. v. Chinn (supra) is that if the sentencing judge takes into account the person was on probation when sentencing for the subsequent offence, then the principle of double punishment might be violated when sentencing for the breach involves more than a nominal sentence. Notwithstanding the apparent logic of the decision, there are some problems with the view expressed in that case and the ramifications of that decision.

In R. v. Chinn (supra), Stevenson, D.C.J. also stated:

> If the judge who sentenced the accused for the crime which gave rise to the breach decided to ignore the fact that the accused was on probation or determined not to reflect that fact in the sentence, different considerations might apply. This could be brought to the attention of the judge dealing with the sentence of the breach.

The problem here is one of distinction. That is, the sentencing judge might take into account that the person had been previously convicted and placed on probation in any event.

Therefore, is it the previous conviction and the offender's recidivism which gave rise to an increased penalty for the subsequent offence or the fact the person was already on probation?

The foregoing discussion raises another very practical difficulty. It may be the case that the Crown would be obliged to order and peruse sentencing transcripts in order to establish whether or not probation, as opposed to a previous conviction, was a factor considered by the court regarding sentence for the subsequent offence.

Stephenson, D.C.J., indicated he felt the accused would not be "much deterred by the sure and certain knowledge that he would get a short additional gaol sentence for breach of probation." One must question why, then, did parliament deem it necessary to require the court to inform an accused of the provisions of Section 666 of the Criminal Code (S.663(4)(c)? Further, if specific and general deterrence are not factors to be considered in breach of probation sentences, the disposition of probation might not be meaningful to those who receive it.

With respect to the last point, some explanation is necessary. It will be assumed that an individual may receive an incarceratory sentence for the subsequent offence and a nominal sentence for the breach. This person may very well discuss the sentence for the subsequent offence with other offenders and discover that his sentence was not exceptional or even greater than the norm notwithstanding other factors considered.

Therefore, the person may very well conclude, and transmit the impression, that no exceptional consequence occurs when one commits an offence while subject to a probation order. This does nothing for the community, the victim, or the offender.

Time Constraints

It has already been noted that Section 721 (2) of the Criminal Code, with respect to summary proceedings, states:

> No proceedings shall be instituted more than six months after the time when the subject matter of the proceedings arose.

The application of the section may cause some difficulties for enforcement of probation when there has been a subsequent offence. The issue involves whether or not there has to be a conviction for the subsequent offence before the breach can be proceeded with and whether or not the original probation order must be in effect at the time the breach is processed.

There does not appear to be any authority which speaks to the above noted questions. With respect to subsequent convictions and revocation of probation, Nadin-Davis (1982, p.468) has noted that the weight of authority is that a revocation application must be made before the probation period expires. The question here is: What is the case when the offender has been charged with an offence alleged to have occurred during the probation period, but has not been convicted until after the probation period?

Nadin-Davis, in discussing the weight of authority, cites Montanaro v. Greenberg, J. et al., (1980), 15 C.R. (3d) 346 (Que.C.A.). Montanaro was convicted of a subsequent offence and the original suspended passing of sentence was revoked during the probation period. The sentence was not imposed until after the probation order had expired. It was held that this was appropriate. However, Nadin-Davis (1982) notes:

> The 'revocation' must be within that period, if for no other reason than that something which no longer exists cannot be revoked (p.469).

The foregoing discussion relates to revocation of the suspended passing of sentence. However, it is submitted that a similar situation exists with respect to breach of probation for a subsequent offence when the conviction does not occur until after the probation period has expired.

A hypothetical example will assist in explaining the situation. An offender is placed on probation for one year. Six months later, the offender commits another offence and is charged. However, the trial and conviction do not occur until after the probation period has expired. The question is: Can the offender be convicted of breach of probation? It is obvious that the breach is the actual subsequent offence, but the offence is not proven until after the probation has expired.

The practical difficulty arises with respect to the laying of an information for breach of probation. This situation has been discussed with defence counsel and prosecutors. The weight of opinion is that the breach does not occur until the person

has been convicted of a subsequent offence. Therefore, if the conviction occurs after the order has expired, then a breach cannot be proceeded with because the order does not exist.

In the event the above noted opinion is correct, great problems will exist for breach of probation with respect to subsequent offences. Offenders will very quickly realize that to delay the trial for the subsequent offence and thus be "off probation" when conviction occurs may be in their best interest. In addition, those offenders who are not apprehended at the time of the subsequent offence are better off than those who are. That is, the offender who actually committed an offence while on probation but who is not apprehended and charged until quite some time later would be assured of not having a breach charge proceeded with. Of course, statutory provision for stopping or "tolling" a probation order, as in some American jurisidictions, would resolve the problem, because the original probation order would not run on, in time, when a susbequent offence has been alleged.

Conclusion

The more prominent difficulties with the offence of breach of probation have been discussed in this chapter. It is clear the offence is, at best, a difficult one to prove given the nature of the present legislation, the common law surrounding that legislation, and the administrative realities of the

criminal justice system and probation operations. It is submitted these difficulties have, or will have, the effect of reducing the real and perceived effectiveness of probation to offenders, practitioners, and the public.

This chapter has dealt with some of the legal technicalities and administrative difficulties which have arisen as a result of the Crown prosecutor having to prove beyond a reasonable doubt that an offender failed to comply with a condition of probation. Some of the ramifications of making breach of probation an offence were predicted by Kenneth L. Chasse (annotation to R. v. Borland 5 C.R.N.S., 255):

> Will the requirement of proof beyond a reasonable doubt and the strict application of the rules of evidence interfere with the effective administration of probation by shielding the probationer from the sanctions of the court? It may mean that although the probation may not be working out satisfactorily, the court can do nothing because proof beyond a reasonable doubt cannot be given. The new law will mean that a great many more breaches of probation will be defended in order to prevent another offence being added to one's record. It may put the probation officer in the awkward position of having to keep one ear open for sufficient evidence to prove an offence while supervising any probationer, in case the probation breaks down and a breach of probation charge has to be laid. As persons in authority, will probation officers have to read out the standard form of police caution each time they meet with the probationer? Once it becomes an offence, breach of probation becomes subject to all the rules dealing with the investigation of the offence and the handling of the accused as well as the rules of trial procedure. All of which may not be compatible with the week by week supervision of the probationer.
>
> Will it make any difference that Crown attorneys, being responsible for a sufficiency of evidence necessary to prove an offence, will rely on the investigative powers of the police, as can be contrasted with the present set up under which the court relies on the probation officer to inform it of misbehaviour? Considering that under this new bill [reference to

> 1968/69 amendments] any one can be put on probation, including the repeated offender or professional criminal (except where there is a minimum penalty prescribed), it is doubtful that the prosecution of probation offences will be left to the probation officer. However, since there is to be no limitation on the use of probation it was probably intended that there be greater enforcement of the terms of probation. This in itself may mean that a freer use of probation may not turn out to be as dangerous as may be thought. Police surveillance will have another offence to pursue.
>
> But by making a breach of probation an offence, the probation officer will cease to be a professional assistant, aiding the court in its administration of probation, and become instead a professional Crown witness in regard to whom the court must impartially apply all the rules of evidence. The court will lose the benefit of the informal sentencing procedure wherein it can conduct the inquiry of the probation officer. It will no longer be able to apply the past knowledge it has gained of the probationer in determining whether the latest breach of good behaviour is serious enough to be considered an offence. In short, the informality of the administrative tribunal is more conducive to determining what is a breach of probation than is the rigidity of the trial court.

Mr. Chasse is to be congratulated for the accuracy of his predictions. Of particular interest is the irony of the statement: "however, since there is to be no limitation on the use of probation it was probably intended that there be greater enforcement of the terms of probation". It is submitted that if the intention was to create greater enforcement, the legislation has failed.

NOTES

1. See R. v. Bara (1981), 26 B.C.L.R. 79, 58 C.C.C. (2d) 243 (B.C.C.A.).

2. The probation officers in the office alternate as to "duty" days. For example, if there are five probation officers at a particular location, each one will serve one day per week.

3. The British Columbia Corrections Branch staff directory indicates most probation offices have less than five probation officers and many offices have only one or two probation officers covering a large geographical area.

4. The probation order form presently used in British Columbia lays out Sections 664 (4) and 666 of the Criminal Code on the back of the form. The following words are also laid out on the back of the form: I, the undersigned accused, acknowledge: (1)that I have read the probation order or had it read to me (2)that I have received a copy of the order (3)that I have been informed of provisions of Sections 664 (4) and the provisions of Section 666 of the Criminal Code by the Court. A space is left for the probationer to sign the above noted acknowledgement.

5. For example, see R. v. Bara (supra).

6. This would seem to be the case, notwithstanding the findings in cases which have held that there is a presumption of regularity with respect to the statutory requirements and the court informing the probationer of them. That is, most of the case law deals with whether or not the court is able to delegate the statutory requirements and it does not negate the necessity of informing the accused. See R. v. Legouilloux (1979) 51 C.C.C. (2d) 99 B.C.C.A.)

7. The court may not, technically, be able to order that the offender be held in custody until the statutory requirements are fulfilled. That is, the judge is functus officio once the sentence is made.

8. The standard probation order form referred to by Judge Barnett is no longer in use in British Columbia. Another set of forms, each specifying the disposition and without standard conditions, other than the statutory condition, are used. For example, there is a form for a suspended sentence which only requires the probationer to keep the peace and be of good behaviour. All of the conditions

required by the court must be placed on the form. Appendix 'F' contains an example of the 'old' form and the 'new' form.

9. This was a random sample of 150 probation orders taken from several hundred copies of probation orders forwarded to the writer from probation offices throughout the Province.

10. There is no identity of the case because it is hypothesized, in the example, what may have happened if the probationer breached the probation order. The writer does not wish to imply or have the case misconstrued such that an assumption would be made the person actually did breach or violate the order.

11. See R. v. Ziatas (1973), 13 C.C.C. (2d) 287 (Ont.C.A.)

12. See Cross on Evidence (1974) pp. 75 to 99.

13. It has been the writer's experience that this type of mistake happens with great regularity.

14. The present case example, as well as others in this thesis, represents one which the writer has supervised. There are no citations for them as such matters do not often get to the trial stage and similar cases are unreported. For instance, the issue of different wording, between what the sentencing judge actually said and the wording of a probation order, is not often raised, in the writer's experience, at breach of probation trials. No reported case could be found regarding that issue. However, a defence counsel advised he often deals with breach of probation charges by acquiring a transcript of the sentencing and pointing out the disparities, between what was said by the judge and the wording of the probation order, to Crown counsel. The result is the charge is not proceeded with.

15. The usual practice in a transfer is to direct the probationer to report to a certain probation office on, or before, a certain date. When the referred office notifies the referring probation officer of the probationer's arrival, the officer will forward the file and necessary documentation.

16. The writer has not observed a trial in such a situation. Furthermore, in doing the research for this thesis, no such trials were encountered.

17. See Section 639(4) of the 1968 Criminal Code.

18. See British Columbia Corrections Branch manual of standards for the entire procedure.

19. As in the case of intra-provincial transfers with significant distances between probation offices, the writer has never observed an inter-provincial transfer matter go to trial and none were found in the research.

20. The Ouimet Committee had a similar recommendation and rationale.

21. For the sake of brevity, the other two examples were not detailed. Perusal of the relevant Sections of the Criminal Code with a view to the discussion, will point out the likelihood of the availability of evidence in those matters.

22. Section 1.01 of the B.C. Corrections Branch Service Delivery Standards regarding revocation, modification, and breach of probation, requires the supervising probation officer to report: "all wilfull violations of conditions of probation which are specific and allow no discretion on the part of the probation officer". This would be an exercise in futility with respect to the case being discussed.

23. A court may be prudent in having a presentence report prepared and the victim contacted by the probation officer in cases where victim reparation is to be considered.

24. In R. v. Shorten and Shorten, 29 C.C.C.(2d) 528, the British Columbia Court of Appeal held that a judge cannot delegate his duty to a probation officer. The condition of probation objected to, was: "Restitution in such a manner and at such times as the probation officer shall order at his complete discretion, until $4,060.50 is repaid. The probation officer to take into account additional funds received by Shortens".
In R. v. Beam 109 C.C.C.381, the Ontario Court of Appeal held that a judge could not delegate his duties. The condition objected to stated: "That during the period of probation he will from time to time promptly and faithfully obey the direction of the probation officer as to his habits of life and mode of living". It should be noted that the condition is much broader in the Beam case in terms of the power delegated to the probation officer.

25. See definition of business record in Section 30 (12) of the Canada Evidence Act.

26. It should be noted the condition necessitates reporting to the probation officer. Judge Barnett clearly recognizes the need of someone being aware of the offender's efforts and, perhaps, counselling in that regard.

27. The Matrai case involved the accused's assault of Premier Kosygin of Russia on the occasion of a visit to Ottawa.

28. It has been the writer's experience that review dates are often set without the probation officer's presence at the time of sentencing. In addition, no one contacts the probation officer to determine if he is available on the date of review. The probation officer may be required in another court, at a different location, on the same date or the probation officer may have to rearrange time off, appointments with probationers, and presentence report investigations.

V. OTHER FORMS OF ENFORCEMENT

A breach of probation charge is one method of enforcing probation orders. It can be applied in every type of probation. That is, a breach of probation charge is possible with probation in relation to a conditional discharge, a suspended passing of sentence, a fine, a gaol sentence, and an intermittent gaol sentence. It must be remembered that a breach of probation charge and modification of a probation order are the only possible methods of enforcing probation which has been imposed in conjunction with a fine, a gaol sentence, or an intermittent gaol sentence. All probation orders can be modified under certain circumstances (S.663 Criminal Code). Only conditional discharges and the suspended passing of sentences can be revoked (S.662.1(4) and S.664(4)(d) respectively).

This chapter will describe and discuss the various legal and administrative problems with revocations and modifications. In addition, philosophical issues and practical problems which relate generally to probation enforcement will be described.

Revocation

Revocation of a conditional discharge or the suspended passing of sentence is not directly possible for failure to comply with a probation condition. Revocation is only possible when there has been a conviction for a subsequent offence during

the probation period. A subsequent offence can also include a conviction for breach of probation. In that sense, revocation is indirectly available for failure to comply with a probation condition. However, to convict and punish for a breach of probation charge and to then revoke a suspended passing of sentence or conditional discharge for the same reason comes perilously close to double punishment. In any event, it has already been shown that a conviction for a breach of probation might be very difficult to obtain and, therefore, the notion of double punishment might only be theoretical in many cases. Additionally, the courts must be trusted to determine the appropriateness of punishment in specific cases.

It should be noted, again, that in most American jurisdictions and in England, revocation is the only means of enforcement and it applies to failure to comply with probation conditions as well as subsequent offences. The issue of double punishment will not arise in those countries because the offence of breach of probation does not exist.

The Case Law Regarding the Suspension of the Passing of Sentence

It has already been noted that it is the passing of sentence which is suspended in Canada. Perhaps the most cited case with respect to that point is R. v. Sangster (1973), 21 C.R.N.S. 339 (Que. C.A.). In that case, Mr. Justice Kaufman pointed out: "[The] intent of S.663(1)(a) of the Code is to

suspend the passing of sentence and not the sentence itself". He went on to indicate that if the offender is advised of the actual sentence to be imposed, that would:

> ...put the sentencing Judge in a predicament. Keep his word and sentence an accused to a term of imprisonment which might be considerably longer than the circumstances would warrant or, in the alternative, give a proper sentence, but lose credibility.

The Sangster decision is obviously correct within the context of Canadian legislation. Section 663(1)(a) of the Criminal Code clearly refers to the suspension of the passing of sentence. Section 664(4)(b) refers to revocation and the imposition of "any sentence that could have been imposed if the passing of sentence had not been suspended".

The Sangster case also points to the relative rigidity of the Canadian legislation and, perhaps, the point of view of our courts. It might be recalled that in U.S. Federal probation cases the actual sentence can be imposed and then suspended. The U.S. Federal legislation allows for modification and other alternatives when an order is revoked. It does not solely require that the court impose "any sentence which could have been imposed". It would seem likely, therefore, that the predicament suggested by Mr. Justice Kaufman also does not exist. After all, if the court modifies the probation order it may very well do so because the circumstances do not warrant imposition of the original sentence and imposition of a lesser penalty may not cause any loss of the court's credibility when the reasons for a lesser penalty are clearly enunciated to one

and all, particularly the accused.

Time Constraints Regarding Revocation

An issue arises as to when a probation order (conditional discharge or suspended passing of sentence) can be revoked. For instance, can an order be revoked after it is ended when the subsequent offence occured during the probation period? Nadin-Davis (1982, p.468) notes that the balance of authority holds that the revocation must take place when the order is in effect. The conclusion is that something which no longer exists cannot be revoked.

As was noted in the previous chapter, Nadin-Davis (1982), cites Montanaro v. Greenberg J. etc., supra, as a leading case. The decision was that revocation must take place when the probation order is in effect. He cites a similar decision in Regina and Paquette 1980, 53 C.C.C. (2d) 281 (Alta.Q.B.). What should be obvious in both of these decisions and, in fact, any other matter dealing with revocation, is that a conviction is a necessary pre-condition to revocation. Therein lies a major problem with enforcement through revocation.

The balance of authority requires that revocation occur before the probation period ends. Revocation necessarily implies a subsequent conviction. Nadin-Davis (1982, p.470) notes that "a controversial point arises when a probationer reoffends near the end of his term". The difficulty he implied in that statement is

one involving time constraints. Namely, how does a probationer become convicted of a subsequent offence and then have probation revoked during the probation period when he reoffends near the end of the probation period?

Mr. Nadin-Davis is quite correct in his apparent assumption of difficulty with time constraints when there is a subsequent offence. However, he is quite incorrect regarding his apparent view that the difficulty arises only when the subsequent offence occurs near the end of the probation term. It is submitted that the reality is that in many cases the new offence need not be near the end of the term. The offender may have reoffended early in the probation term and the subsequent conviction and revocation may not be performed within the original probation period.

A hypothetical, but not uncommon, type of case will illustrate the problem. An offender is given a suspended passing of sentence and is placed on probation for one year as a result of conviction for break, enter, and theft. Within one week, the offender commits an identical offence. The item stolen by the offender in the subsequent offence was a camera with the owner's identification mark inscribed within it. It is well known by all practitioners in the criminal justice system that few individuals are apprehended at the time of the offence. This has also been found in academic research (Griffiths, et. al., p. 101). In this case, and many similar cases, it is submitted that the offender may not have even been apprehended prior to the

termination of the probation order. (Selected Trends, Ministry of the Solicitor General, 1979).

It will be assumed the above noted offender was apprehended three months after the offence was committed. The police may have, for example, stopped an accomplice who was in possession of the stolen camera. The accomplice subsequently implicated the offender. A charge of break, enter and theft is processed against the offender. He subsequently makes a first appearance in provincial court and advises the court he is in need of a two week remand period in order to engage counsel. At the offender's next appearance, his counsel requests a further remand period to discuss a plea with her client and in order to acquire particulars of the offence from Crown counsel. A three week remand period is granted by the court. At the next appearance, the offender, through his counsel, pleads not guilty and elects to be tried by a judge without a jury (S.484(1) of the Criminal Code). The provincial court judge will then be obliged to hold a preliminary enquiry. A date may then be set for the preliminary hearing, perhaps three or four months hence. After the preliminary enquiry, the offender may be committed for trial. A trial date may be set for county court four months later. Thus, the accused person may not even be convicted before a probation term ends, notwithstanding the fact an offence was committed shortly after the probation order was granted and the offender was apprehended nine months before the probation term ended.

The length of remands for a preliminary hearing and trial, used in the above noted description, are not unusual for urban courts in British Columbia. Indeed, it is submitted they may be quite conservative estimates. In any event, the offender may still have further delaying options available. For example, he may have elected to be tried by a judge with a jury (S.484(2) of the Criminal Code). The offender, three weeks prior to his trial before a judge and jury, may then decide to re-elect under Section 492(1)(a) of the Criminal Code. Thus, another lengthy period of time may pass before a trial date is set and the trial held.

A philosophical issue which will be discussed in another part of this chapter, should be mentioned here. The issue is that the law pertaining to revocations appears to be inequitable in practice. It punishes the offender who pleads guilty to a subsequent offence and it bestows a benefit on those who wish to avoid being liable to revocation by delaying proceedings until the probation term is over.

Revocation of the suspended execution of sentence, or the suspended passing of sentence, does not cause such difficulties in the United States. As previously noted, some states toll (interrupt) the probation order when a subsequent offence is alleged and until there is a disposition for the new offence. Other states hold that:

> Revocation of probation may occur at any time during the period within which the defendant might have been imprisoned even though that is longer than the term of probation. (Killinger et. al., 1974, p.185.)

The U.S. Federal statute is restrictive in terms of the time period allowed for a revocation action. Nevertheless, it is certainly not as restrictive as Canadian legislation and, it would seem, it would all but eliminate the type of inequity referred to earlier. Killinger et. al. (1974) note:

> A federal [U.S.] statute apparently permits revocation of probation after the probated term has expired provided that revocation takes place within the five years maximum probation period allowed by law and that the violation of condition upon which revocation is based occurred during the original probated term [Citing Title 18, U.S.Code, S.3653] (p.186).

A Concurrent Term when a Probation Order is Revoked

A decision of the Ontario Court of Appeal may, at least partially, explain the paucity of revocations of the suspended passing of sentence. That is, general legal opinion, particularly Crown counsel opinion, may agree with that court's interpretation of S.664(4)(b) of the Criminal Code. In R. v. Oakes (1978), 37 C.C.C. (2d) 84 (Ont.C.A.),

> It was held that sentences on revocation of the original order could not be set to run concurrently to the sentence on the later offence. Section 664(4)(d) authorized the court to:
>
> impose any sentence that could have been imposed if the passing of sentence had not been suspended. At the time sentence was suspended, there was no sentence being served to which the revocation sentence could be made consecutive (Nadin-Davis, 1982, p.468).

Thus, the question must be asked: "What is the point in proceeding with an application for revocation?" There was a

similar decision made by the B.C. Supreme Court in Ex Parte Risby (1975) 24 C.C.C.(2d.) 211.

It is submitted that a concurrent term for a revocation sentence makes a mockery of the concept of probation. A concurrent sentence for an offence committed while on probation is no consequence whatsoever. Indeed, a concurrent sentence makes a mockery of the original sentencing court which is required to warn the offender of the provisions of Section 664(4) of the Criminal Code pursuant to Section 663(4)(c) of the Criminal Code.

The problems of both time constraints and concurrent sentences for revoked orders is addressed in an edited version of a criminal report headnote (Montanaro) quoted by Nadin-Davis (1982):

> It is not unusual that an accused who is charged with an offence committed while subject to an order cannot be tried and convicted in sufficient time to have the application made before the order expires. On the other hand, even where an accused pleads guilty and is sentenced and does not appeal, an application by the Crown prosecutor may be futile, because any sentence imposed in virtue of S.664(4)(d) will be concurrent with the sentence imposed for the offence committed while on probation (p.469).

The court was concerned about the apparent problems. Nadin-Davis (1982) notes:

> Despite its own certainty on these issues, the court went on to comment that difficulties in this area are not uncommon, and suggested that some clarification from parliament may be in order (p.470).[1]

The Situation in England

The result of committing an offence while subject to a probation order in England can be identical to the result in Canada in the sense that the probation order can be revoked and a sentence can be imposed.[2]

There is a similarity in the wording of the legislation in both countries. The powers of criminal courts act (1973) allows the English courts to deal with the offender "for the original offence in any way it could deal with him if he had just been convicted by the court of that offence".

The time constraints imposed by Oakes (supra) and Montonaro (supra) are non-existant in England. Jarvis (1980) notes:

> No process can issue until after conviction. The conviction must be in a court in Great Britain, but the offence may have been committed outside Great Britain. The offence must have been committed during the occurrence of the probation order. It does not affect the issue that the conviction was not until after the order had expired. In respect of a summary offence, process must issue within six months from the date of the conviction of the further offence (p.73).

It would appear the English have taken a pragmatic and realistic approach in terms of resentencing an offender because of a subsequent offence.

The English courts may make a sentence for the original offence concurrent or consecutive. Jarvis (1980) has noted a former Lord Chief Justice's opinion in that regard:

> A prison sentence concurrent with that passed for the subsequent offence is normally undesirable since it would encourage offenders to regard probation as a 'let off' and its conditions ineffective.[3]

Jarvis (1980) also notes:

> Where, however, the offender is to undergo Borstal training for the further offence, a consecutive term of imprisonment is not appropriate. A concurrent sentence of imprisonment of six months may be passed or another sentence of Borstal training (R. v. Stuart [1964] 3 All E.R.672) (p.76).

Suspended Sentence Revocation when the Subsequent Offence Results in a Non-Incarceral Disposition

Part of the foregoing discussion has focussed on revocation when the subsequent offence has resulted in incarceration. With respect to time constraints, nothing is different when the subsequent sentence is non-incarceral. However, it is submitted there is considerable difference with respect to the issue of consecutive sentences. The key difference is, of course, that the issue then becomes a non-issue as no gaol sentence is imposed. There are, however, other problems.

Perhaps the most obvious problem is the possible sentence for the revoked probation order could nullify the sentence for the subsequent conviction. For instance, Crown and defence counsel may have had a pretrial discussion regarding the subsequent offence and decided that it would not be expedient to advise the sentencing court of the previous conviction and the fact the offender was on probation at the time of the subsequent offence. Thus, the sentencing judge may have arrived at the same sentence as the judge who initially suspended the passing of

sentence. A probation officer who now has the probationer under supervision for both matters might then advise Crown counsel, at the original court location, of the disposition.[4] That prosecutor may make an application for revocation which results in a prison term for the original offence: thus nullifying the subsequent probation order which will run concurrently to the period of incarceration.

The foregoing description does not exhaust the possible problems when there is not a period of incarceration imposed for a subsequent offence. It is submitted there are other possible problems, some of which may be unfair to the accused and place the administration of justice in disrepute. For instance, in a similar situation, without pretrial discussion, a Crown prosecutor may be dissatisfied with the sentence for the subsequent offence. Therefore, instead of appealing same, the prosecutor may choose to make an application for revocation with respect to the original offence. This is unlikely but it is, nonetheless, possible.

Modifications

The Criminal Code provides for modification of probation conditions under certain circumstance: S.664(3) of the Criminal Code states:

> Where a court has made a probation order, the court may at any time, upon application by the accused or the prosecutor, require the accused to appear before it and, after hearing the accused and the prosecutor,

(a) make any changes in or additions to the conditions presecribed in the order that in the opinion of the court are rendered desirable by a change in the circumstances since the conditions were presecribed,
(b)relieve the accused, either absolutely or upon such terms or for such period as the court deems desirable, of compliance with any condition described in any of paragraphs 663(2)(a) to (h) that is prescribed in the order, or
(c)decrease the period for which the probation order is to remain in force, and the court shall thereupon endorse the probation order accordingly and, if it changes or adds to the conditions prescribed in the order, inform the accused of its action and give him a copy of the order so endorsed.

One problem with S.664(3) is its limited application. That is, only adding or modifying conditions is possible as a consequence to a lack of cooperation by a probationer. It must be shown that there has been a change in the circumstances since the order was made. If a probationer has not been reporting to his probation officer, how likely is it that the prosecutor will be aware of a change in the circumstances? It must also be decided as to <u>what</u> is a change in the circumstances. For instance, is a person's failure to report to a probation officer a change in the circumstances or does a change in circumstances mean a change in some aspect of the probationer's lifestyle?

Sub-sections (b) and (c) of S.664 are truely useful. They are helpful in terms of reducing the number of conditions or the probation period itself. It has been the author's experience that these sub-sections are used more often than sub-section 664(3)(a). Most often, the probation conditions are reduced or the probation period is reduced as it is apparent that further application of the conditions, or probation itself, are not necessary. For example, a probationer with a drinking problem

may have resolved that problem through attendance at an alcoholism facility and no further benefit can be achieved by maintaining that person's probation.

Modification of a probation order is also possible under S.664(4) of the Criminal Code:

> Where an accused who is bound by a probation order is convicted of an offence, including an offence under section 666...upon application by the prosecutor. [The court may] require the accused to appear before it and, after hearing the prosecutor and the accused,... (e)make such changes in or additions to the conditions prescribed in the order as the court deems desirable or extend the period for which the order is to remain in force for such period, not exceeding one year, as the court deems desirable.

There are several problems with S.664 (4) (e) in terms of field application. Perhaps the greatest problem is the dilemma created for probation officers. The dilemma arises when the probation officer feels the probation period should be extended but does not feel the probationer should be charged with an offence. For example, a probationer with a substantial amount of restitution to pay as a condition of probation may not be able to satisfy the condition totally prior to expiration of the probation period but would be able to do so if the probation period was extended for a longer period. It is not possible, however, to extend a probation order unless the probationer is convicted of a subsequent offence including an offence under S.666. Therefore, the probation officer must charge the probationer with failure to comply before the order can be extended.

The dilemma is further complicated by the lack of influence the probation officer may have over the results of the conviction for S.666. For instance, the court may sentence the offender to a gaol term for failure to comply. In addition, of course, the offender may suffer the effects of another criminal conviction in numerous other ways.

Another situation which may develop relates to an uncooperative probationer or one in need of further direction. For example, a probationer who has not been particularly cooperative due to apparent mental illness but who refuses to attend at an appropriate medical facility, unless it is required by the court, might benefit from extension of the probation period. Once again, the probation officer might be in the unreasonable position of processing a charge in order to extend the probation period. By so doing, the probation officer might only hope that the mentally ill or emotionally disturbed person will not be incarcerated for the breach offence. The person could suffer irreparable harm at the hands of inmates in a penal institution.

The situation with modifications is considerably different in England. An order can be extended up to three years from the date the order was made and conditions can be added, altered, or substituted (Jarvis, 1980, p.448). It is not necessary for a subsequent offence to have occurred before such action can be taken. The situation is also different in the United States. The Federal Probation Statute (S.3651, Title 18, U.S. Code) simply

provides: "The court may revoke or modify any condition of probation, or may change the period of probation". Of course, in both England and the United States the principles of natural justice apply. That is, abuse of the convenient and workable legislation is subject to appeal and the abuser is subject to admonishment or censure.

The Case Law Regarding Modifications

The case law regarding modifications is very limited. Nadin-Davis (1982) notes:

> Even scarcer than substantial reported decisions in the area of revocation are those concerning variation. Procedural matters have occasionally been considered. In Muise [(1980), 44 N.S.R. (2d) 324, 83 A.P.R. 324 (C.A.)] it was held that a variation effected after hearing the accused ex parte errs in law. The Code required that both the accused and the prosecutor must be heard (p.470).

Philosophical Issues and Practical Problems Relating to Enforcement

There are a number of problems with the present application of enforcement which have not been discussed or discussed fully as yet. They are, for the most part, general problems as opposed to specific problems in one area of enforcement. That is the reason they will be detailed in this section. Certain philosophical issues will also be discussed as they relate to

the application of enforcement. Most importantly, the possible connections between philosophical position and the behaviour of actors in the system will be discussed.

Problems with and for the Judiciary

The problems with wording have been discussed fully in a preceding chapter. However, certain factors regarding wording, or related to wording, require mention. One of those factors is the writer's observation that the wording of probation orders does not improve as the type of court increases in order of superiority. For example, county court probation orders are not necessarily better worded than provincial court orders. In a recent matter, a probationer who received a substantial fine and 18 months probation, committed an identical offence, possession of a narcotic for the purpose of trafficking, six months after being placed on probation. The offence in both instances involved marihuana. The offender was convicted and sentenced for the second offence approximately one month prior to the expiration of the initial probation order. The county court judge, dealing with the subsequent offence, decided to place the person on probation again. The disposition was a gaol sentence of one day and another period of probation with various conditions inclusive of community work service. The county court judge made the second probation order consecutive to the first and was, therefore, obviously aware the person was on probation

at the time of the second offence.

The central issue with respect to the above noted order is that the second probation order was made consecutive to the first. This is clearly an unenforceable probation order. Section 664(1) of the Criminal Code states:

> A probation order comes into force,
> (a) on the date on which the order is made, or
> (b) where the accused is sentenced to imprisonment under paragraph 663(1)(b) otherwise then in default of payment of a fine, upon expiration of that sentence.

In the present case, subsection (b) applies. The offender did not actually go to gaol as the sentence was only one day. Therefore, the order commenced on the day it was made. In any event, it is sufficient to state that the Criminal Code does not provide for consecutive periods of probation.[5]

One must question why probation orders made through higher courts may often be unenforceable. There are plausible explanations. Perhaps the most obvious is that higher courts do not often deal with probation. The offences dealt with in those courts are generally of a more serious nature and would most often result in sentences other than probation. In the same sense, the higher courts do not deal with breaches of probation and, therefore, there may not be an awareness of the difficulties with enforcement. In other words, there is minimal feedback regarding the effectiveness of probation and compliance with conditions of probation. It must be remembered that breach of probation (S.666), being a summary conviction matter, is initially dealt with only in the provincial court.

One problem with enforcement of probation in relation to the provincial courts, often mentioned by probation officers, is the leniency of sentences for the offence of breach of probation. There will be some data presented in Chapter VII with respect to that factor. For the present, it will be assumed that this is the case. One obvious factor in explaining the assumed leniency is the fact that breach of probation is a summary matter involving a maximum penalty of six months imprisonment, a $500 fine, or both (S.722(1) of the Criminal Code). In other words, parliament chose to classify breach of probation as only a summary conviction offence and sentences must reflect the relative lack of seriousness of such matters.

Another contributing factor could be a lack of information for the court. One problem in this area is that a specific date is usually set out on an information alleging failure to report. The probation officer may be questioned at trial about factors to do with that date. The fact that the probationer did not report for six months may not be determined in a trial. Of course, only a specific date was used in the information to increase the likelihood of successful prosecution. In any event, the court may hear, subsequent to conviction, defence arguments that only one date in involved in terms of reporting and that missing only one appointment does not call for anything other than a minimum sentence. At the same time, the court may not call for information from the probation officer. Perhaps the court would have some difficulty with hearing the Crown's main

witness as to how the probationer not only missed an appointment on one date, but on several other dates as well; alleged offences which have not been proved. This is clearly another difficulty arising from the fact that breach of probation is a substantive offence requiring a trial.

Another factor which may lead to leniency is the fact that any provincial court may deal with the offence of breach of probation. In Burnaby, British Columbia, for example, the assignment of cases of breach of probation has nothing to do with the judge who originally sentenced the offender to probation. Assignment of cases is done on an ad hoc basis.[6] This situation was contemplated by the Ouimet Committee (1969):

> If a new offence of breach of probation is created, the breach would be heard either by the court that heard the original charge who would find it as convenient to deal with the original charge, or by a court not originally involved in the case, handicapped by a lack of knowledge of the offender (p.302).

Certain appeal court decisions seem to indicate a lack of understanding of the workings of probation. For example, regarding R. v. Shorten and Shorten (supra), it has been mentioned earlier that a logical extension of the court's decision would lead to an impossible situation for probation officers; they would not be able to direct probationers to do much of anything. That is, any wording on a probation order, allowing for discretion by a probation officer, could be seen as an improper delegation of the court's duty.

The 1968/69 Criminal Code amendments allowed for the involvement of Crown Counsel in probation proceedings inclusive of: the charge of breach of probation, applications for revocation of conditional discharge and the suspended passing of sentence, and applications for modification. The probation officer is not mentioned in those code sections. Obviously, then, the probation officer must initiate action through the prosecutor. The previous legislation stated:

> 638(4) The person designated by the court under sub-section (3) [usually probation officers] shall report to the court if the accused does not carry out the terms on which the passing of sentence was suspended, and the court may order that the accused be brought before it to be sentenced.

The modification section (S.638(2)(b)) did not require the involvement of the prosecutor.

The involvement of the prosecutor in breach of probation proceedings is necessitated by the fact that breach of probation is now an offence. Thus, a legally trained prosecutor is required to prove all the elements of the offence and to deal with other technical problems which may occur. In other words, the fact that breach of probation was made an offence necessitated prosecutorial involvement.

One problem which arises because of the involvement of prosecutors has previously been mentioned. The problem has to do with the possibility of conflict of interest when there has been plea bargaining. It is quite clear prosecutors have the

discretion not to proceed with a charge pursuant to section S.666 and to enter a stay of proceedings, etc. It is submitted that it would be very tempting for defence counsel to agree to a guilty plea for an offence committed while his client was subject to a probation order in exchange for an undertaking by the Crown to not proceed with a probation matter. Similarly, the Crown will be tempted to not proceed with a breach of probation for a failure to comply with a probation condition if the accused undertakes to plead guilty to another matter for which he is charged. It is submitted that entering into plea bargaining arrangements related to breach of probation charges is even more likely because of the technical difficulties in proving the offence.

Plea bargaining is well known although difficult to quantify (Klein, 1976, pp.1-20). According to Klein (1976), there have been arguments regarding the problematic nature of plea bargaining:

> Some concerns include the destruction of the value of the trial process, the prevention of public adjudication, the elimination of some of the protections inherent in the adversarial approach, and the impact of such an approach upon sentencing decisions (p.2).

It is submitted that in the case of breach of probation, plea bargaining could place the administration of justice into disrepute. Breach of probation involves a person's failure to comply with a sentence of the court. It is not an offence in the first instance; in which the conviction or sentence may have already involved plea negotiations. Plea negotiation regarding

breach of probation flouts the authority of the court in passing sentence with respect to the original offence.

A problem area related to prosecutorial discretion has to do with information about the offender. That is, a prosecutor may be assigned a case of breach of probation and not know anything about the original offence or, more importantly, the sentencing court's opinion about, or aspirations for, the offender. The Ouimet Committee (1969, p.302) was concerned that courts would be "handicapped" by a lack of knowledge of the offender. It is submitted that a prosecutor may decide that it is not expedient, necessary, or worthwhile, for a court to deal with an offender; notwithstanding the fact that prosecutor may not have been a participant in the original proceedings and is, for that reason, "handicapped" by a lack of knowledge of the offender.

Probation officers have complained about the failure of Crown Counsel to proceed with charges of breach of probation (see Chapter VI). One contributing factor to that alleged failure is likely the technical nature of the offence. Many of these technical difficulties have already been examined. Another contributing factor could be perceived leniency when a conviction is obtained. That is, prosecutors may perceive the technical difficulties in relation to the 'bottom line', the disposition for the offence, and determine that it is not worth the effort to proceed with the charge.

It is necessary for procecutors to be involved in breach of probation as parliament chose to make failure to comply with a probation order an offence. However, it is difficult to understand why prosecutors are necessary for applications to modify probation orders; matters which do not involve offences. One possible reason is that parliament wished to protect the court from frivolous appearances for the purpose of modification. That theory assumes, of course, that the court, as well as the probation officer, is incapable of determining what is frivolous. It also assumes, perhaps, that the court will not chastise a probation officer for making a frivolous application.

One reason for a formal application by a prosecutor may be that it is the duty of the prosecutor to represent the interests of society at a modification hearing. While that may be the case, the argument assumes the court is incapable of balancing the interests of society with those of the accused. Further, if drawn to its logical conclusion, the argument suggests the Crown should be involved in the administration of sentences. The converse argument is, assuming an administration of sentence perspective, that the Crown should have no more to do with the administration of probation as a sentence than it does with the administration of correctional institutions.

It is submitted that prosecutors are not necessary with respect to modification applications. The involvement of prosecutors merely adds another level of communication and bureaucracy to what should be a simple process of amending a

probation order. If probation officers were able to make application directly to the court, the process would be simplified and the possibility of miscommunication would be decreased. The probation officer's credibility, with respect to applications for modification, would stand on it's own merit.

The present situation causes real difficulties for probation officers in some locations. Quite obviously, applications by prosecutors to modify are generally initiated by probation officers. However, court lists are controlled, to a large extent, by prosecutors. As a result, a probation officer who reports a modification may find herself waiting a considerable period of time on a particular court day because the prosecutor may wish to deal with other matters first. For example, the prosecutor may wish to deal with first appearance matters before dealing with a modification. Thus, the probation officer and probationer may wait while defence counsel, in order of seniority, set dates for further appearances.

Problems with, and for, Defence Counsel

There is no issue with the fact Defence Counsel is necessary in enforcement proceedings in order to ensure that the rights of the accused are protected. It is noted that in the United States, where enforcement is administrative, presence of defence counsel is a right of the accused (see Gagnon v. Scarpelli, supra). However, there is a certain inconsistency

with respect to defence counsel actions regarding a breach of probation charge in Canada. This will be the only matter discussed, regarding defence counsel, in this section.

At the time an offender is sentenced, it can readily be observed that defence counsel will often make submissions which point to a non-incarceral sentence. A sentence suggested by defence counsel will often be probation. Defence counsel might include, in submissions, statements regarding a client's willingness and ability to comply with certain probation conditions. For example, counsel may point out that the offender is willing to pay restitution to the victim and able to do so because of newly found employment. Thus, the court may be satisfied the offender has the ability to pay at the time of sentencing (see R. v. Dashner, supra).

Defence counsel will argue for a probationary sentence as it is perceived that such a sentence will be in the client's best interest as opposed to incarceration. Counsel might also defend the person with respect to a charge of breach of probation as that will also be in the client's best interest as a conviction would mean a criminal record for a further offence and the penalty may be incarceration. Therein lies the inconsistency; defence counsel presents the case for probation in the first instance and defends, with equal vigour, a failure to comply with the order initially requested. Indeed, defence counsel may even present a defence which is technical and has nothing to do with the actual compliance with a probation

condition. It is posited this is a different situation from that of defence counsel merely defending an accused for an alleged offence with which defence counsel had no prior involvement.

The chief difficulty with the foregoing situation, in practice, is that the defence counsel might be the only one, other than the accused, who is aware of the accused's situation during the period of probation. For example, an offender who is required to pay restitution might also be required to report to a probation officer, but does neither. Therefore, the probation officer will likely not be able to give evidence as to the offender's ability to pay restitution at a subsequent trial for breach of probation. The offender might advise counsel that he did not willfully fail to pay restitution as he was unemployed. Similarly, the accused might have advised his counsel that he could not pay the restitution as he had purchased a new car and felt obliged to pay for it before restituting the victim. It is submitted defence counsel is likely to present the argument regarding employment with respect to wilfull failure and unlikely to present an argument regarding car payments as a defence.

Notwithstanding the foregoing, it is submitted defence counsel are only doing what is required in instances of making submissions to sentence and in defending subsequent breaches of probation within the context of the present legislation. However, it is also submitted the role of defence counsel should be similar to that of defence counsel in the United States; to

ensure protection of the accused's rights and to ensure that the allegation of failure to comply is substantive. If enforcement of probation was administrative, defence counsel might feel more comfortable in making suggestions to the court regarding the use of probation in the first instance.

Problems with and for the Police

The present legislation allows anyone to proceed with a charge of breach of probation. Section 666 does not specify that only a probation officer or, for that matter, a peace officer may proceed with a charge. The modification sections and revocation sections only specify that an application can be made by a prosecutor. The prosecutor may do so on information received from a probation officer, police officer, or other person. The previous legislation required that a person designated by the court would report to the court if the conditions of probation were not followed (S.638(4) of 1968 Criminal Code). The person designated by the court would, in most instances, be a probation officer. The person requesting modification was not specified in the previous legislation but it would usually be the probation officer as well.

It is submitted police officers would likely be the individuals who would proceed with a charge under S.666 other than when probation officers are involved. This causes difficulties for the administration and enforcement of

probation. The supervising probation officer no longer has the discretion, in all instances, to deal with matters relating to an offender's rehabilitation and to appropriately enforce an order of the court.

An example will best illustrate the difficulty. A probationer who has an alcohol problem and a history of alcohol related offences is placed on probation with a condition to be under treatment for alcoholism and to abstain from the use of alcohol. The probationer attends for alcohol counselling as required and significant progress is made. The alcohol counselling service has advised the probation officer that instances of the offender "falling off the wagon" have not occurred. Perhaps, after six months of not drinking, the offender succumbs and attends at a beer parlour. The police enter the bar and, having previous knowledge of the accused, notice the offender is intoxicated. The offender is asked to attend at the police station for the purpose of taking a breathalizer examination and is found to have been drinking. The person is charged by the police for the offence of breach of probation. There is no obligation by the police to even notify the probation officer of the charge.

The above noted description depicts a situation which might negate a considerable amount of progress made by the accused and a considerable amount of rehabilitative effort made by a probation officer and alcohol counsellor. With respect to this type of situation, the U.S. Federal Probation Officers Manual

states:

> The United States Supreme Court has continued to stress rehabilitation when construing the purpose of probation and the role of the probation officer. In Gagnon v. Scarpelli, 411 U.S. 778,(784)(1973), the court held that the probation officer's responsibility was 'not so much to compel conformance to a strict code of behaviour as to supervise a course of rehabilitation'. It was recognized that the probation officer has broad discretion to judge the progress of rehabilitation in individual cases (pp.5-13).

It is fair to say Canadian courts have also recognized the rehabilitative role of probation as well as the punitive and controlling roles (Barnett, 1976, pp.176-181). However, it is also fair to say that Canadian courts have not often directly commented on the roles of probation and of the probation officer.

If the incident in the example occurred in Canada prior to the 1968-69 Criminal Code amendments, the police would have likely informed the probation officer as no action could have been taken by them directly. The probation officer would then have made a decision as to whether or not the incident would be appropriate for court action.

The present legislation is problematic in terms of enforcement in addition to the administrative difficulties. A police officer, who stops a probationer and finds the probationer in violation of a probation condition, may not advise the supervising probation officer. The police officer may also use discretion or, for some other reason, not proceed with the charge. The probation officer may not, therefore, be aware of certain incidents which, cumulatively, would indicate the

appropriateness of court action. The police are not obligated, by legislative necessity, to inform the probation officer. Any information provided by the police is given voluntarily and arrangements for provision of information are informal.

The police have hundreds of Criminal Code offences to deal with and the corresponding 'paper work'. It is not necessary for them to be involved directly in proceedings with breach of probation matters. It would be more efficient for them to refer such matters to supervising probation officers. The police may also not be concerned with balancing rehabilitation and control.

Enforcement and the Public

It would appear the public is not fully informed about probation operations. For instance, it is not uncommon for members of the public to use the terms probation and parole interchangeably. With respect to enforcement, the public is very uninformed. It is submitted that it is likely most members of the public assume some sort of automatic consequence in the enforcement process. For instance, if a probationer is convicted of an identical offence to the original offence, while subject to a probation order, lay people may think the person is automatically punished for the original matter.

The foregoing paragraph is, of course, speculative as it is based only on the writer's experience. However, it is interesting to speculate on what the cumulative response of the

public would be to many of the situations presented in this thesis. For instance, if a probationer ignores all conditions of probation and was not convicted of breach of probation as no witness could identify the accused, it is likely most members of the public would have difficulty in understanding how that could be the case. Perhaps the public would have some difficulty in accepting the fact that a person who is convicted of an offence and is sentenced is able to ignore the sentence with impunity.

Probationers and Inequality

This thesis is directed at enforcement of probation for those persons who fail to comply with probation conditions or commit an offence while subject to a probation order. This section will discuss lack of enforcement as it relates to probationers who comply with their respective probation orders and there will be further discussion about those probationers who are not fully culpable with respect to a failure to comply with a probation order.

The British Columbia Corrections Branch does not collect data regarding the success rate of probation. There have been studies in other provinces which have indicated success in the majority of cases (see Chapter II). Therefore, notwithstanding methodological problems, it is likely that most probationers in British Columbia comply, for the most part, with their probation orders and are not involved in further offences while on probation.

An inability to enforce probation orders is patently unfair to those persons who comply with probation orders. Many individuals comply with their probation conditions at great personal expense. If others are able to ignore probation orders with impunity and without effort, there is inequity.

The inequity is a result of an inability to enforce which, in turn, is a product of the legislation and related administrative problems. It has already been shown how the transient probationer is less likely to be convicted of breach of probation than is the probationer who remains close to the area of jurisdiction of the sentencing court. It has also been shown how the quasi-responsible probationer who might report several times and then fail to report is more likely to be convicted than is the person who fails to report entirely. There are further instances of inequity.

A case was discussed earlier in this chapter in which a probationer was convicted of an identical offence to the original, trafficking in a narcotic, while subject to a probation order. The sentence for the subsequent offence was one day incarceration and one year probation. The sentence for the original offence was a fine and probation. In such instances, the only sanction which can be imposed is the charge of breach of probation (S. 666) as probation in addition to a fine or incarceration does not involve a suspended passing of sentence.

A typical case of shoplifting can be compared to the foregoing case. The shoplifter, a first offender, is given a conditional discharge with one year probation. The shoplifter then commits an identical subsequent offence. In this case, the person is liable to greater sanctions. First, it is possible a conditional discharge might be revoked (S.662.1(4)). Second, the offender might be charged with breach of probation.

In the case of the shoplifter, the offender may have failed to comply with the order instead of being involved in a subsequent offence. However, that offender is subject to the same penalties: a breach of probation charge and revocation. The drug trafficker, if he has failed to comply with a condition of probation or has been convicted of a subsequent offence would only be subject to a charge of breach of probation; notwithstanding the fact that the actual one day in gaol consisted of being in a sherriff's custody for a few moments.

The foregoing situation illustrates an inequity in addition to the difference in the quantity of sanctions available; there is also a difference in the type of sanctions available. In the case of the shoplifter, a sentence of two years could be imposed upon revocation; provided the original matter was proceeded with by indictment (see S.294(b)(i) of the Criminal Code). The drug trafficker could only receive the maximum penalty for a breach; a $500 fine and/or a six month period of incarceration (see S.722(1) of the Criminal Code).

An example using a more serious case will further illustrate the inequity. A person in a relatively recent case, was convicted of criminal negligence causing death. The person burned a building down and someone was killed in the process.[7] The sentencing court was the Supreme Court of British Columbia. The person received a short gaol sentence followed by a lengthy period of probation. One of the conditions of probation was to receive treatment for psychological difficulties. Upon conviction of a subsequent offence or a failure to comply, the only action that could be taken would be with respect to Section 666 of the Criminal Code; a summary matter. Therefore, in comparison with the case of the first offence shoplifter and proceedings by summary conviction, the extent of the maximum penalty is the same and would be greater for the shoplifter if the matter was originally proceeded with by indictment.

Another comparison will illustrate further inequity. It will be assumed a shoplifter, convicted summarily, received a seven day gaol sentence followed by one year probation. It was the person's third conviction. The person convicted of criminal negligence received a similar sentence. It is submitted the criminal negligence matter remains the more serious offence. Yet, the possible penalty for failure to comply with the respective probation orders is identical; a $500 fine and six months incarceration. In other words, the possible consequence for breach of a sentence of the court does not reflect the seriousness of the original offence.

It should be noted the foregoing inequities do not exist when the sentence is imposed and then suspended as in many U.S. jurisdictions. For example, a person who is sentenced to two years incarceration may have one year and nine months of the sentence suspended and to be served on probation. The sentence may reflect the seriousness of the original offence. That sentence, to have the same affect in Canada, would involve the accused being sentenced to three months incarceration followed by one year and nine months probation. However, in the U.S., a technical or non-technical breach of the order could result in the remainder of the sentence being served; provided the court felt the breach was sufficiently serious. In Canada, the maximum penalty could be six months and a $500 fine; provided the court, which may not be the sentencing court, finds the breach to be sufficiently serious.

Double Jeopardy

Issue was taken with Boyd's notion of triple jeopardy in the second chapter. It is fair to say, however, that whether or not double jeopardy exists in a particular case is situational. For example, in the instance of a person who is sentenced for a subsequent offence and the judge takes into consideration the fact the person was on probation and imposes a more severe penalty, the possibility of double jeopardy exists. It would exist if the person was then charged, convicted, and sentenced

for a breach of probation because of the subsequent offence. On the other hand, if the judge was of the opinion the person had little chance of rehabilitation and did not consider the fact the person was on probation when passing a more severe sentence for the subsequent offence, double jeopardy does not exist.

The difficulty with the foregoing situation, in practice, is that it is almost impossible to distinguish one situation from another unless there are overt statements made by the respective sentencing courts (see for example R. v. Chinn, supra). In any event, if the sentencing court mentions that the sentence for the subsequent offence does not reflect the fact the person was on probation, but some other factor such as recidivism, some observers will be left with doubts. That is, some observers may decide it is impossible for the judge to disabuse his mind of the fact the offender was on probation and a relatively severe sentence may reflect that inability. One solution to the problem is to not proceed with a breach of probation charge and thereby eliminate the possibility of double jeopardy. The cost of so doing is, of course, to make the concept of probation less meaningful.

The foregoing difficulty does not seem as likely in the United States because the offence of breach of probation does not exist. The offender can be returned to court for a hearing and the court can invoke the sentence which was originally suspended or impose sentence when the passing of sentence was suspended. This applies to both technical violations and

subsequent offences. The key factor to note is that the solution to the possible problem of double jeopardy in Canada is not complete removal of all sanctions for committing an offence while subject to a probation order, as is now the case.

The situation in England is very similar to that of the United States. A person on probation does not have a suspended sentence but he can be returned to court for a technical violation and for commission of a subsequent offence. The court can deal with him as if it had just convicted him of the offence. Once again, there is no separate offence of breach of probation. It has been previously noted the English courts take the view that sentences for the original offence and the subsequent offence should not usually be concurrent (p.76, 1980, Jarvis).

Breach of Probation as a Unique Matter

Breach of probation is distinguished from most other offences in the Criminal Code by the fact that probation is a sentence of the court and breach of probation is an offence because the sanction was not complied with. In other words, breach of probation is not like an offence in the first instance such as a breaking and entering. It has been mentioned that breach of probation is distinct from most other offences because most failures to comply involve omissions and there is usually a distinct absence of physical evidence. These factors combine,

along with other administrative and legal difficulties, to depreciate the ability to enforce probation orders. In this section, some of the unique qualities of probation will be discussed in relation to other offences. Hopefully, the discussion will also point to the need for legislative change.

In explaining to a lay person how a person can fail to comply with a sentence of the court with impunity, a lawyer might simply point out that breach of probation is an offence like any other offence and that it must be proved beyond a reasonable doubt. He may go further to explain the elimination or reduction of the possibility of an innocent person being convicted necessitates proof beyond a reasonable doubt. The explanation might include the assumption that breach of probation is similar to any other offence when, in fact, the reality indicates otherwise.

A common Criminal Code offence is breaking and entering. In a typical case, the police may be notified by a home owner. They may find that a lock has been broken, articles have been taken from the home, and the next door neighbour describes a young man seen running from the home. The police later apprehend a person fitting the description. The individual does not give a statement to the police and the articles are not found in the person's possession. In the event the matter goes to trial, the entire case may turn on whether or not the neighbour can positively identify the person seen running out of the victim's residence. The neighbour may not be entirely sure the accused is

the person seen running from the residence and the accused is acquitted. This is obviously the correct outcome. It is quite possible that someone else broke into the home and stole the articles.

It will now be assumed the person was apprehended in possession of the stolen articles, gave an inculpatory statement to the police, and was positively identified at trial by the neighbour. The result is conviction for the offence and the sentence was one year probation with a condition requiring reporting to a probation officer and another condition requiring 50 hours community work service. The offender does not report to a probation officer or to a community work service officer. The offender is charged with failing to report and failing to do the community work service.

A situation similar to the foregoing has already been presented. It is quite likely the offender will not be convicted as the probation officer assigned the case will not be able to identify him and, in any event, he may have reported to another probation officer. Similarly, a community work service officer will not be able to identify him.

The distinction to be made here, is that with the breaking and entering acquittal it is quite possible someone else could have committed the offence. However, it is not possible that someone else failed to report as required or failed to do the community work service. The salient point is that in most other Criminal Code offences there is a possibility that some unknown

person committed the offence whereas no one but the person named in the probation order can fail to comply with a particular probation order.

The foregoing distinction requires further examination. In the case of the person accused, but acquitted, of committing break and enter, the accused may have no knowledge of the actual offender. That is, if he is not, in fact, the offender, he will likely not know who is and he may have no other knowledge of the case. In the breach of probation matter, only the person named in the probation order can fail to comply with the requirements of a particular probation order. The accused, if wrongly accused, (excluding wilfulness arguments) will have knowledge of the case. That is, the person must have, to be wrongfully accused, reported to a probation officer and completed the community work service. It is submitted the person would not have been charged in that event.

The foregoing description of the police investigating a break and enter raises another issue. The police, when investigating an alleged offence, are seeking out the individual who is responsible for the offence. They will likely attempt to question the suspected person and find other evidence which will assist in convicting that person. The probation officer, on the other hand, may attempt to contact the probationer in order to establish contact and advise the person of his responsibilities regarding the probation order. In other words, if a probationer does not respond to a letter the probation officer may attempt

some other form of contact, perhaps telephoning the offender. If the probationer is contacted, it is likely a further appointment will be made. In other words, the probation officer's investigation is not truly an investigation, it is an attempt to contact the offender in order to prevent a charge being laid. The probation officer already knows the name of the offender.

A comparison of probation with other sentences of the court is revealing. Probation can be called a 'run on' sentence because failure to comply does not affect the term of probation. When a probationer fails to report, over an extended period of time, the order continues in effect. A sentence of incarceration is far different. If a person escapes from an institution, he is not credited with the time spent while unlawfully at large, the balance of the sentence is served upon apprehension. To consider the time on escape as time served would be a clear incentive for the inmate to escape. It would appear that such considerations were not addressed when the present probation legislation was drafted.

Another comparison is the offence of breach of probation with a fine. When the time to pay a fine has elapsed, there is a warrant of commital issued for the offender. There is no dispute as to the wilfulness of the failure to pay and there is usually no dispute as to the identity of the offender. These are, of course, factors in certain breach of probation matters.

Probation as an Alternative to Incarceration

It can be argued that probation is always an alternative to incarceration when the original offence is one which has a possible penalty of incarceration. However, others have argued probation expands the social control net over a greater number of people (e.g., Boyd, 1977-78). It might be the case that both arguments are, at least partially, correct. It would seem the argument would have to be settled by considerable empirical research of individual cases to determine if the sentencing courts were considering probation in lieu of incarceration. The argument here is that probation cannot, and may not, be considered an alternative to incarceration because of the difficulties with enforcement. It is submitted the ability to enforce must be enhanced by legislative change before probation can legitimately be considered an alternative to incarceration.

Probation Overused

An argument related to the expansion of social control model is that probation is overused. That is not to say all people placed on probation should receive a less onerous form of punishment. Rather, it is an argument which holds that probation is overused for less serious offences. It has been stated, and needs repeating, that the American model of passing sentence and then suspending sentencing may alleviate the problem.

An example will illustrate. A first offence shoplifter is given a suspended passing of sentence and one year probation in Canada. In the event there is a subsequent conviction and revocation, that offender could receive "any sentence that could have been imposed if the passing of sentence had not been suspended" (Section 664 (4) (d) of the Criminal Code). The range of sentences "that could have been imposed" is from an absolute discharge to a $500 fine and/or six months incarceration; assuming the original offence was a summary matter.

It will now be assumed the same type of offender received a hypothetical sentence involving the suspended execution of sentence and probation; a sentence which could be imposed in the United States. The offender might receive a three month period of incarceration with the sentence suspended and probation for that period. Therefore, probation resources would be used for only a quarter of the time. In addition, if the offender received a suspended execution of sentence of one year incarceration, it is submitted that defence counsel would have had an exact term to appeal and a good case to argue that the sentence was excessive; provided the offence did not involve exceptional circumstances.

In the event the suspended execution of sentence was incorporated in Canadian law, it might also be the case that first offence shoplifters, and other minor 'property' offenders, would not be placed on probation. Perhaps they would be fined as a short period of probation might not be deemed necessary or

effective by the courts. In other words, use of the suspended execution of sentence could limit the extent of the net of social control in terms of dealing with those offenders who could appropriately be dealt with through a very short period of probation or alternative measures such as fines.

NOTES

1. It should be noted that the issue of consecutive or concurrent terms is not truly settled. According to Nadin-Davis (1982, p.393) much of the controversy has to do with S.664 (4) being an exclusion from S.645 (4) which sets out when a consecutive sentence might be imposed. He also notes that in Paquette (1981 58 C.C.C. (2d) 413 (Que.C.A.) the court held that a sentence passed upon revocation could be made consecutive to terms not being served at the same time of original disposition. To find otherwise, thought Owens J.A., would render pointless the suspension of sentence in cases where the offender commits another crime (p.470).

2. In England, this is distinct from the suspended sentence procedure wherein the sentence is imposed and then suspended without probation.

3. Jarvis (1980),indicates this issue was expressed by Lord Parker's address to the Magistrates Association training conference in 1967 P.76).

4. This is an unusual but not rare situation. The Writer has had probationers with as many as three active probation orders overlapping each other in time.

5. The writer has never observed a consecutive probation order made in the lower provincial court.

6. Judge K.D. Page, administrative judge of the Burnaby Provincial Court, advised that assignment of cases is not done according to who the original sentencing judge was. Consequently, the judge sitting on the breach matter may not have had knowledge of the offender or the facts of the original matter.

7. The present case involved a person supervised by the writer. As in other case examples mentioned in this thesis and not designated as hypothetical, there is no citation or identity of the offender. There are three reasons for that fact: first, it is often only assumed a particular event might happen and it is not the writer's intention to leave the impression a particular offender breached probation; second, it was felt that it would not be ethical to name individuals merely because the writer is privy to their involvement with the courts due to his employment; and third, the cases often do not involve reported court decisions because they do not go to trial due to technical problems.

With respect to the hypothetical cases, they are ones which have been typical for the writer's probation caseload. That caseload should not differ significantly from most others as cases are, for the most part, assigned on a random basis.

VI. THE PERCEPTIONS OF SIGNIFICANT ACTORS IN THE CRIMINAL JUSTICE SYSTEM REGARDING THE EXISTENCE AND EXTENT OF ENFORCEMENT PROBLEMS

The Study

The purpose of the study is to determine if there are significant problems related to enforcement of probation in British Columbia. Due to the complexity of the subject, it was decided descriptive statistics would be most appropriate. Inferential statistics would be problematic because of the large number of variables involved.

The study utilizes a multifaceted quantitative and qualitative approach. There are several elements to the study: a questionnaire was administered to significant actors in the criminal justice system; interviews were conducted with probation officers; court dockets and files were examined; and, probation orders were content-analyzed. The foregoing elements comprise the research for the study. Each element, the methodology related to it, and the results will comprise a section of this chapter and the following chapter. This chapter deals exclusively with the questionnaire and the interviews.

The Questionnaire

- (See Appendix F)

Description and Methodology

The questionnaire was administered to almost all provincial court judges, county court judges, Crown counsel, and probation officers in the Province of British Columbia. A few individuals were excluded because they would not have had experience with enforcement of adult probation orders. For example, some probation officers work exclusively with family court matters. However, if there was some contact with adult enforcement possible or evident, the questionnaire was administered. The results, therefore, may be somewhat unrepresentative because individuals with limited or no experience may have responded and others may not have responded because they felt unqualified to do so.

The questionnaire contained a series of questions relating to a respondent's experience in his respective occupation, knowledge of enforcement of probation, and attitudes toward the enforcement of probation.

The questionnaires administered to Crown counsel and probation officers were identical except for the first page which differed only slightly.[1] The questionnaires administered to judges also differed only slightly with respect to the first page. However, a complete section was deleted from those

questionnaires. Section C was administered to probation officers and Crown counsel but not to judges as it was decided that some members of the judiciary would find the questions in that section to be inappropriate.[2]

The questionnaire was comprised of five major sections and a lengthy general comment section. Section A, a small section, consisted of questions relating to demographic variables. For example, "number of years employed as Crown counsel". Section B, was the largest section and consisted of four subsections. The first subsection, containing nine questions, asked for opinion regarding the laying of a charge of breach of probation (Section 666 of the Criminal Code) under certain circumstances (i.e., if a charge should be laid for failing to report to a probation officer, pay restitution, complete community work service, etc.).

The second and third subsections, each containing four questions, asked for opinion with respect to the appropriateness of revoking a suspended passing of sentence and conditional discharge, respectively, under certain circumstances. The questions in those subsections asked if revocation should occur when a subsequent offence has taken place and when the subsequent offence was an indictable offence, a similar offence, or an identical offence to the original.

The first three subsections generally sought information regarding respondent opinion about the appropriateness of official action under certain circumstances. The primary purpose

was to determine the overall level of opinion regarding when official action should take place. The secondary purpose was to determine if there were any significant differences between occupational group responses. The general response level and occupation-specific responses were examined with respect to an indication of the inappropriateness of official action as well. An indication of that sort may partially explain a low level of prosecution and/or conviction.

The fourth subsection contained 14 questions. Most of them requested opinion regarding the actual level of probation enforcement. The questions were of a more general nature than in the previous subsections as questionnaire size was limited.

The responses in Section B are ordinal in nature. The first three subsections all have the following range of responses: "almost always"," usually", "sometimes", and "almost never". Seven of the questions in subsection 4 were the same with the addition of a "don't know" response. That response was added because respondents were asked about the actual level of enforcement and some may have felt a need to be less specific. Further, it was decided that quantification of that particular response may provide some measure of general knowledge regarding actual enforcement levels.

Section four contained nine 'Yes' or 'No' response questions. Six of those questions were contained in questions 13 and 14, which were comprised of three questions each. There were two questions in subsection four which had the following

responses: "a small number", a "'middle' number", a "large number", and "don't know".

With the exception of two questions in subsection 4 (questions 13 and 14), all of the questions in Section B had an additional response; "other". It was felt respondents may wish to be more absolute or more specific in their responses. For example, a respondent may have decided to add "never" or" always" instead of "almost never" or "almost always".

Each question in Section B allowed for subjective comment. It was felt respondents may wish to qualify their answers or elaborate upon them.

Section C consisted of ten questions. Each question had a number of specific ordinal responses deliniated below it. Respondents were given the following request:

You are asked to do <u>three</u> <u>things</u>:

1. Circle the numbers of those responses which you feel are appropriate.
2. Add responses, if any, you consider to be important. There are three numbered spaces left blank for that purpose, and
3. Indicate the number of the factor you consider most significant in the space provided and the number you consider least significant in the space provided.

The purpose of Section C was to examine, at a lesser level of abstraction, what possible reasons there may be for a lack of official response to enforcement situations. Because of the interrelationships between the variables (responses) in practice, respondents were also asked to identify the most significant and least significant. They were asked to add additional responses as the listings were not deemed to be exhaustive.

It has been noted that an attempt was made in Section C to be more specific with respect to identifying variables which may be problematic in enforcement proceedings. It must be emphasized the nature of the problems does not allow for the identity of specific variables which are not interrelated. For example, "lack of evidence" may evoke a response because a respondent is aware of administrative shortcomings regarding the gathering and classification of evidence or he may have had difficulty in acquiring the necessary evidence required by law, notwithstanding an impression that there was sufficient evidence. Further, there may have been a lack of evidence because of a difficult procedure (another response) in entering the evidence, a poorly worded probation order (another response), or an excessive number of witnesses required to prove the offence (see Chapter IV).

Section D was a short section consisting of four "Yes" or "No" responses. Respondents were also asked to explain their responses. The questions were related to general areas of concern regarding probation enforcement including probation as an alternative to incarceration, the possibility of greater use of probation if there was greater enforcement, possible improvements to the Criminal Code, and improvements in administrative procedures.

Section E consisted of five questions related to the five conceptions of probation enunciated by Diana (see Chapter II).

It was decided that quantification of the responses in Section E may be useful in terms of determining the predominant conceptualization of probation at this time.

A lengthy comment section was included on the last page of the questionnaire. It was hoped that respondents would offer further insights into enforcement problems and offer possible solutions to same.

The questionnaire was revised several times before pretesting. It was pretested with thirteen probation officers who were readily available. The pretest was followed by personal interviews with the thirteen respondents. It was determined that the chief criticism related to the length of the questionnaire. However, the criticism of length reflected opinion about the length in absolute terms and not the amount of time taken to complete it. Therefore, the questionnaire was not modified subsequent to the pretest.

Considerable negotiation with officials occurred prior to distribution. Corrections Branch and Crown counsel managers were concerned with the aggregate amount of staff time to be used in completing the questionnaire. For that reason, it was designed to be completed very quickly with check marks although ample opportunity was provided for open-ended subjective responses if a respondent wished to comment in greater detail.[3] The discussions with the justice system managers affected the design as an attempt was made to satisfy all concerns without making the questionnaire occupation-specific.

All parties to the predistribution discussions were concerned with anonymity to some extent. It was agreed that respondents would likely be concerned as well. Thus, an introductory letter was attached to each questionnaire. It assured respondents of anonymity. When the questionnaires were returned, therefore, no data was codified with respect to location other than by Corrections Branch Region: North, Interior, Fraser, Vancouver, and Island. The population of concern in this research was the aggregate of those actors in the Criminal Justice System who might have involvement with the enforcement of probation. Defence counsel and police were not included because of expense and the logistics of distribution.

There was no sample taken. An attempt was made to survey the entire population of concern; all of the provincial and county court judges, Crown counsel, and probation officers in the Province. Some appropriate individuals were undoubtedly omitted accidently. For example, the provincial list of probation officers changes occasionally and some probation offiers may have been excluded due to staffing changes immediately preceding distribution. In any event, it was expected that the actual number of probation officers would not change significantly. Local directors (office managers) were asked to distribute questionnaires to those members of their staff who were involved fully, or partially, with adult probation. A similar method was employed with Crown counsel offices. The questionnaires were distributed to provincial court

judges directly by mail. Distribution to the county court judiciary was handled, for the most part, in a similar manner. Four were distributed directly to county court judges in New Westminster and thirty were given to a county court judge in Vancouver who then distributed them throughout the Province.

The total number of questionnaires distributed was 557; 34 to county court judges, 113 to provincial court judges, 170 to Crown counsel, and 240 to probation officers. Three were returned by provincial court judges and one by a county court judge with the explanation that it would be inappropriate for them to respond as they had only recently been appointed to their positions. Therefore, the maximum number of questionnaires to be returned was 553.

The return rate was surprisingly high. The total number of returns was 305; 55.2% of the total distributed. The occupational breakdown, in absolute terms and by percentage, is as follows:

	Number Sent	Number Returned	Percentage Returned	Percentage of Total Returned
County Court Judges	33*	27	81.8	8.9
Provincial Court Judges	110*	45	40.9	14.8
Crown Counsel	170	81	47.6	26.5
Probation Officers	240	152	63.3	49.8
	553	305		100.0

The mean rate of return was 58.4%.

*Four questionnaires were returned as previously noted. Also, some were not sent when it was known to the writer that a particular judge was not sitting in the criminal courts.

Results

A. The Respondents

There is a total of 305 respondents. The experience and representativeness of the respondents can be established, to some degree, by examining the demographic data.

One hundred and fifty-one probation officers completed the years of service question. The total number of years of service was 1,198.2. The mean number of years of service was 7.94 and the median was eight years. The range was from one quarter of a year to thirty years. Seventy-eight Crown counsel responded to the equivalent question. The mean number of years employed was

4.66 and the median was four. The range was from one quarter of a year to twenty-five years. Forty-five of the provincial court judges responded; the range of service was from one to twenty-four years. The mean was 9.4 and the median was eight. Twenty-seven county court judges responded. The range of service was from one year to twenty-one years. The mean was 10.63 and the median was eight.

It would appear the respondents were an experienced group overall. The mean for the entire group was 7.55 years experience. The occupation-specific data and the overall experience level may be understated. For example, one Crown counsel noted he had one year experience as Crown counsel but had been called to the bar for eight years. Similarly, some of the judges may have had several years experience as defence counsel or Crown counsel before being appointed to the bench. In spite of the fact that some of the respondents may have included related experience, the years of service is likely understated as the question asked for the years of service in a specific occupation.

Table 1 indicates the estimated percentage of current work load, in adult criminal cases, in a consolidated cross-tabulated form. The upper number in each box is the number of respondents and the bottom number is the percentage of the occupational group. The column and row totals, with related percentages of the total number of respondents, are also presented.

Table 1

Respondent Estimates of Workload in Adult Criminal Cases

	0-25%	26-50%	51-75%	76-100%	Row Total
Probation Officers	15 10%	41 27.33%	38 25.33%	56 37.33%	150 50.2%
Crown Counsel	4 5.12%	0 0.0%	2 2.56%	72 92.31%	78 26.1%
Provincial Court Judges	1 2.27%	2 4.54%	11 25.0%	30 68.18%	44 14.7%
County Court Judges	6 22.22%	11 40.74%	9 33.33%	1 3.7%	27 9.0%
Column Total	26 8.7%	54 18.0%	60 20.1%	159 53.2%	299* 100.0%

* six missing responses

With respect to the lowest category (0-25%), some of the county court judges, provincial court judges, and Crown counsel responded with zero. Only two probation officers responded similarly.

Responses to the question relating to career workload have not been tabulated for the sake of brevity. However, some of the data should be examined. Only one probation officer had no experience and none of the Crown counsel had no experience in adult criminal cases. Twenty-one (13.8%) probation officers had spent less than 25% of their respective careers involved with

adult criminal cases and 102 (67.1%) had spent 50% or more of their careers involved with adult criminal cases. None of the Crown counsel had spent less than 25% of their careers in adult criminal cases and 76 (93.8%) had spent 50% or more of their careers in adult criminal cases. The relatively lower percentage of probation officers who had spent 50% or more of their careers in adult work might be explained by the movement and location of probation officers. For example, a probation officer may have spent a considerable part of his career in a probation office solely responsible for juvenile matters. Also, a probation officer can be located in a generic or one-person probation office in which considerable time is spent with family court counselling, juvenile matters, and parole; inclusive of national parole supervision.

It was anticipated that most respondents would be able to identify whether or not they worked in a small town (a community of less than 5,000 people) or in a city. Greater difficulties were expected with respect to respondents' selection of either a medium size community (between 5,000 and 25,000 people) or a large size community (between 25,000 and 50,000 people). Therefore, the categories "medium size community" and "large size community" were joined for the purposes of presentation. Table 2 provides the quantified responses to the question relating to location of work.

Table 3 provides the expected responses to the question of location of work. It is based on where the questionnaires were

Table 2

Respondent Work Location

	Small Town (<<5,000)	Medium and Large Communities (5,000-50,000)	City (>>50,000)	Row Total
Probation Officers	16 10.7%	77 51.7%	56 37.6%	149 49.8%
Crown Counsel	3 3.7%	25 30.9%	53 65.4%	81 27.1%
Provincial Court Judges	1 2.2%	22 48.9%	22 48.9%	45 15.1%
County Court Judges	0 0.0%	7 29.2%	17 70.8%	24 8%
Column Total	20 6.7%	131 43.8%	148 49.5%	299* 100%

* six missing responses

forwarded and the possible results which would occur if all questionnaires were returned. There is no estimate for County Court judges in Table 3 as the questionnaires were not directed to them by the researcher. However, it was expected that almost all of the County Court judges would be sitting in courts in larger communities; mostly cities. That appears to be the case from analysis of Table 2.

The occupational groups seem to be reasonably represented by work location. No outstanding disparity is indicated when Table 2 (actual returns by work location) is compared with Table

Table 3

Anticipated Respondent Work Location

	Small Town (<<5,000)	Medium and Large Communities (5,000-50,000)	City (>>50,000)	Row Total
Probation Officers	27 11.3%	117 48.7%	96 40.0%	240 43.4%
Crown Counsel	5 2.9%	51 30.0%	114 67.1%	170 30.7%
Provincial Court Judges	1 .9%	48 43.6%	61 55.5%	110 19.9%
County Court Judges	N/A	N/A	N/A	33 6.0%
Column Total	33	216	271	553 100%

3 (anticipated returns by work location). Some very crude measurements have been applied, regarding Table 3, and respondents could be unaware of the actual populations of the communities in which they work. Nevertheless, the groups generally appear to be adequately represented by area.

The questions in the first three parts of Section B requested opinion about the appropriateness of breach of probation charges, revocations of the suspended passing of sentence, and revocations of conditional discharge. The purpose of those questions was twofold: first, to develop a

quantification of opinion as to what is, and what is not, appropriate action under certain circumstances and; second, to determine if there were a significant number of extreme positions.

It would appear that opinion regarding breach matters is similar with respect to the appropriateness of official action. Table 4 displays group responses to the question: "Do you feel a person should be charged with a breach of probation (666) if they miss an appointment with their probation officer?" Table 4 seems to indicate that very few respondents take an extreme position in such a circumstance. It was decided that an extreme response would be that a charge should 'almost always' be laid if an appointment was missed. Only 3.6% of the respondents took that position. The County Court judges seemed to take the firmest position in that regard. Perhaps the relative seriousness of cases they deal with is reflected in their overall response.

The respondents who commented on the question generally qualified their response in terms of the frequency and deliberateness of missed appointments. For example, one judge stated: "Not unless a deliberate flouting of the order". Another stated: "Assume probationers are warned after first appointment missed".

Table 5 displays group response to the question: "Do you feel a person should be charged with a breach of probation (666) if they do not report to their probation officer at all?" In

Table 4

Opinion Regarding a Charge for a Missed Appointment

	Almost Always	Usually	Sometimes	Almost Never	Other	Row Total
Probation Officers	1 0.7%	9 6.0%	89 58.9%	49 32.5%	3 2.0%	151 49.8%
Crown Counsel	4 4.9%	7 8.6%	47 58.0%	19 23.5%	4 4.9%	81 26.7%
Provincial Court Judges	2 4.5%	11 25.0%	27 61.4%	2 4.5%	2 4.5%	44 14.5%
County Court Judges	4 14.8%	7 25.9%	12 44.4%	3 11.1%	1 3.7%	27 8.9%
Column Total	11 3.6%	34 11.2%	175 57.8%	73 24.1%	10 3.3%	303* 100%

* two missing responses

essence, this question indicates a situation in which the probationer would be completely ignoring a probation order condition. Therefore, it was decided that an extreme position would be an "almost never" response.

Table 5 indicates that respondents felt a charge should be laid if the probationer does not report at all. The respondents, who commented, usually qualified their responses by indicating that the circumstances, such as "a very good excuse", are important.

Table 5

Opinion Regarding a Charge If There Is a Complete Failure To Report

	Almost Always	Usually	Sometimes	Almost Never	Other	Row Total
Probation Officers	129 85.4%	19 12.6%	2 1.3%	0 0.0%	1 0.7%	151 49.8%
Crown Counsel	61 76.3%	18 22.5%	0 0.0%	0 0.0%	1 1.3%	80 26.4%
Provincial Court Judges	45 100.0%	0 0.0%	0 0.0%	0 0.0%	0 0.0%	45 14.9%
County Court Judges	23 85.2%	4 14.8%	0 0.0%	0 0.0%	0 0.0%	27 8.9%
Column Total	258 85.1%	41 13.5%	2 0.7%	0 0.0%	2 0.7%	303* 100%

* two missing responses

Responses to the question: "Do you feel a person should be charged with a breach of probation (666) if they do not pay restitution by the required date?" are not set out in a table. 35.2% of the respondents felt the charge should 'almost always' be proceeded with when restitution is not paid and 39.5% felt that a charge should 'usually' be proceeded with. Subjective commentary indicated concern regarding ability to pay and time to pay.

Responses to the question: "Do you feel a person should be charged with a breach of probation (666) if they do not complete

their community work service hours by the required date?" are not set out in a table. 43% of the respondents felt a charge should 'almost always' be laid for failing to complete community work service and 42% felt that a charge should 'usually' be the result. Subjective commentary was minimal but did indicate concern with the wilfullness of the failure.

The foregoing material dealt with opinion regarding charges when there are technical violations of probation. The following material will deal with opinion about breach of probation charges, revocation of the suspended passing of sentence, and revocation of conditional discharge, when there has been a subsequent conviction. In other words, it will deal with non-technical violations.

The cross-tabulated responses for each question will not be presented. Rather, the worst case situation will be presented, i.e., a subsequent conviction for an identical offence. The data indicate a tendency similar to that indicated for the technical violations; a stronger position in the worst case situation.

Table 6 displays the quantified responses to the question: "Do you feel a person should be charged with a breach of probation (666) when the person has been convicted of an offence identical to the original offence for which they were placed on probation?"

Table 7 displays the responses to the question: "Do you feel a person should be returned to court for sentence revocation (664(4)(d)) and sentencing (to be sentenced on the

Table 6

Opinion Regarding a Charge When There Has Been a Subsequent Conviction for an Identical Offence

	Almost Always	Usually	Sometimes	Almost Never	Other	Row Total
Probation Officers	108 71.1%	31 20.4%	8 53.0%	4 2.5%	1 0.7%	152 49.8%
Crown Counsel	35 43.2%	19 23.5%	16 19.8%	9 11.1%	2 2.5%	81 26.6%
Provincial Court Judges	27 60.0%	8 17.8%	4 8.9%	5 11.1%	1 2.2%	45 14.8%
County Court Judges	24 88.9%	0 0.0%	2 7.4%	0 0.0%	1 2.7%	27 8.9%
Column Total	194 63.6%	58 19.0%	30 9.8%	18 5.9%	5 1.6%	305 100%

'suspended sentence') when: the person has been convicted of an identical offence while on probation?"

The results of Tables 6 and 7 indicate that the majority of respondents held the expected view regarding the worst case situations. There were similar results with respect to the questions regarding revocation of conditional discharge; 69.5% of the respondents felt a person should 'almost always' be returned to court when there has been an identical subsequent offence.

Table 7

Opinion Regarding Revocation When There Has Been a Subsequent Conviction For an Identical Offence

	Almost Always	Usually	Sometimes	Almost Never	Other	Row Total
Probation Officers	101 66.4%	33 21.7%	15 9.9%	1 0.7%	2 1.3%	152 50.2%
Crown Counsel	43 54.4%	19 24.1%	13 16.5%	3 3.8%	1 1.3%	79 26.1%
Provincial Court Judges	34 75.6%	5 11.1%	2 4.4%	4 8.9%	0 0.0%	45 14.9%
County Court Judges	27 100.0%	0 0.0%	0 7.4%	0 0.0%	0 2.7%	27 8.9%
Column Total	205 67.7%	57 18.8%	30 9.9%	8 2.6%	3 1.0%	303* 100%

* two missing responses.

Overall, there is no indication, with respect to any given question, that respondents were not representative. That is, there is no indication of a disproportionate number of extreme positions in responses to the opinion questions.

B. The substantive questions

Of central importance to this study is whether or not there are perceived and real problems with enforcement of probation.

The following material will attempt to answer the first question. As in the previous section, all of the questionnaire responses will not be presented in cross-tabulated form.

There were three questions which asked for opinion regarding the general state of probation enforcement. The first of these questions asked: "Is the criminal justice system dealing adequately with breach of probation offences at this time (666)?" The responses were cross-tabulated and are shown in Table 8.

69.1% of the respondents felt the criminal justice system was not dealing adequately with breach of probation, while 18.1% felt that it was. The occupation-specific range of "No" responses was from 73% for probation officers to 60% for county court judges. However, it must be noted that none of the county court judges felt the criminal justice system was dealing adequately with breach of probation.

There was not a great deal of subjective comment regarding this question. Most of the commentary focused on leniency of sentencing for breach of probation or evidentiary problems. For example, one comment, from a Crown counsel, was: "Frequently can't even charge because of evidentiary problems". Another Crown counsel commented: "Judges often do not take breaches seriously so effort wasted". A probation officer qualified his 'Yes' response by stating: "In my community (Yes), but only because of a dearth of (defence) lawyers". There were no comments suggesting adequate functioning of the breach process.

Table 8

General Opinion Regarding Breach of Probation

	Yes	No	Don't Know	Other	Row Total
Probation Officers	27 18.2%	108 73.0%	10 6.8%	3 2.0%	148 49.7%
Crown Counsel	22 27.5%	51 63.8%	6 7.5%	1 1.3%	80 26.8%
Provincial Court Judges	5 11.1%	32 71.1%	8 17.8%	0 0.0%	45 15.1%
County Court Judges	0 0.0%	15 60.0%	9 36.0%	1 4.0%	25 8.4%
Column Total	54 18.1%	206 69.1%	33 11.1%	5 1.7%	298* 100%

* seven missing responses.

The second question, relating to the general level of enforcement, was: "Is the criminal justice system dealing adequately with revocations of suspended sentences at this time (664(4)(d))?" Table 9 displays the cross-tabulated responses.

70.9% of the respondents felt the criminal justice system was not dealing adequately with revocations of the suspended passing of sentence and 11.3% felt that it was. The range of occupation-specific "No" responses was from 81.8% for provincial court judges to 48.1% for county court judges. However, none of the county court judges or provincial court judges felt the

Table 9

General Opinion Regarding Revocation of the Suspended Passing of Sentence

	Yes	No	Don't Know	Other	Row Total
Probation Officers	19 12.7%	110 73.3%	21 14.0%	0 0.0%	150 49.7%
Crown Counsel	15 18.5%	55 67.9%	11 13.6%	0 0.0%	81 26.8%
Provincial Court Judges	0 0.0%	36 81.8%	8 18.2%	0 0.0%	44 14.6%
County Court Judges	0 0.0%	13 48.1%	13 48.1%	1 3.5%	27 8.9%
Column Total	34 11.3%	214 70.9%	53 17.5%	1 0.3%	302* 100%

* three missing responses.

system was dealing adequately with revocations.

There was some commentary with respect to this question. With one exception, the commentary related to the rarity of the procedure: "It rarely happens"; "I have had one revocation out of six applications"; "Crown counsel seldom, if ever, takes this approach". One Crown counsel implied wasted effort in his comment: "The few I have done have resulted in either no change or in concurrent time equal to the subsequent offence".

The third question relating to the general state of enforcement was: "Is the criminal justice system dealing

adequately with conditional discharge revocations (662.1(4))?" Table 10 indicates the cross-tabulated responses.

57.2% of the respondents felt the criminal justice system did not deal adequately with conditional discharge revocations. However, only 12.8% felt that such revocations were being dealt with adequately.

There was very little subjective comment with respect to the third question. All commentary was directed toward the paucity of conditional discharge revocations. "We get too few to comment" and "havn't ever seen it done", were typical responses.

Respondents were asked to estimate the extent of certain general problems with enforcement. The results were cross-tabulated and are presented in the following section.

Table 11 indicates the responses to the question: "How often do you estimate a breach of probation charge (Section 666) will proceed to the trial stage after it is reported to Crown counsel?" It should be mentioned there is no way of quantifying the actual number of charges not proceeded with to trial as there is no official data kept with respect to same. A partial estimate can be made by quantifying the number of charges which are withdrawn or for which a stay of proceedings is entered. However, if Crown counsel does not process a charge for technical reasons, there is no way of determining the actual extent of the problem. Therefore, the responses noted in Table 11, and the following tables in this section, are likely based upon the personal experiences of each respondent.

Table 10

General Opinion Regarding Revocation of Conditional Discharge

	Yes	No	Don't Know	Other	Row Total
Probation Officers	21 13.9%	88 58.3%	42 27.8%	0 0.0%	151 49.7%
Crown Counsel	17 21.0%	45 55.6%	18 22.2%	1 1.2%	81 26.6%
Provincial Court Judges	0 0.0%	30 66.7%	14 31.1%	1 2.2%	45 14.8%
County Court Judges	1 3.7%	11 40.7%	14 51.9%	1 3.7%	27 8.9%
Column Total	39 12.8%	174 57.2%	88 28.9%	3 1.0%	304* 100%

* one missing response

The greatest number of respondents (37.6%) felt that breach charges only 'sometimes' get to the trial stage. Of course, a number of people might plead guilty to the charge and that may account for the relatively low number of proceedings to the trial stage. There were very few subjective comments to the question.

Because of technical difficulties of proof or, perhaps, a feeling that charges are inappropriate when there has been a violation, a significant number of violations may not be reported to Crown counsel by probation officers. For example, a

Table 11

Respondent Estimates of Breach Charges Reaching Trial Stage

	Almost Always	Usually	Some times	Almost Never	Don't Know	Other	Row Total
Probation Officers	19 12.5%	45 29.6%	65 42.8%	15 9.9%	8 5.3%	0 0.0%	152 50.2%
Crown Counsel	5 6.2%	36 44.4%	29 35.8%	6 7.4%	5 6.2%	0 6.0%	81 26.7%
Provincial Court Judges	1 2.3%	5 11.4%	17 38.6%	4 9.1%	15 34.1%	2 4.5%	44 14.5%
County Court Judges	0 0.0%	1 3.8%	3 11.5%	4 15.4%	18 69.2%	0 0.0%	26 8.6%
Column Total	25 8.3%	87 28.7%	114 37.6%	29 9.6%	46 15.2%	2 0.7%	303* 100%

* two missing responses

probation officer may have encountered difficulties in having Crown counsel proceed with a charge regarding a probationer's failure to report when there is a general reporting condition. Therefore, the probation officer may not take the time to report other such matters to Crown counsel. Once again, there is no official data available regarding the number of failures to comply which are not reported by probation officers.

Table 12 displays the responses to the question: "What is your estimate of the number of individuals who fail to comply with specific probation conditions (breaches of probation

-Section 666) and are not reported to Crown counsel by probation officers?"

It is not surprising to find a large number of responses in the 'don't know' category with respect to the foregoing question. Crown counsel and the judges comprise 86.6% of those responses. It is submitted those responses are a result of the fact the individuals who comprise those groups would likely not have directly experienced the reasons for not reporting failures. It is apparent that probation officers were more sure of making an estimate. It would also appear likely that a significant number of failures are not reported; 58.5% of the probation officers indicated that, at least, a middle number are not reported.

Table 13 provides the responses to the question: "What is your estimate of the number of individuals who commit subsequent offences while on probation and are not reported to Crown counsel by probation officers?"

The question relating to Table 13 is also one which probation officers are best able to answer. That is indicated by the relatively small percentage of 'don't know' responses given by probation officers and the relatively large number of those responses provided by the other occupational groups. In any event, it would appear there are a significant number of probation officers who feel there are, at least, a 'middle number' of subsequent offences which are not reported to Crown counsel; 30.9% marked a 'middle number' and 5.9% marked a 'large

Table 12

Respondent Estimates of Breaches
Not Processed by Probation Officers

	A Small Number	A Middle Number	A Large Number	Don't Know	Other	Row Total
Probation Officers	50 32.9%	64 42.1%	25 16.4%	13 8.6%	0 0.0%	152 49.8%
Crown Counsel	14 17.3%	24 29.6%	7 8.6%	36 44.4%	0 0.0%	81 26.6%
Provincial Court Judges	7 15.6%	6 13.3%	5 11.1%	27 60.0%	0 0.0%	45 14.8%
County Court Judges	0 0.0%	2 7.4%	3 11.1%	21 77.8%	1 3.7%	27 8.9%
Column Total	71 23.3%	96 31.5%	40 13.1%	97 31.8%	1 0.3%	305 100%

number'.

The relatively large percentage, 50.7%, who responded 'a small number' might be partially explained by the more concrete nature of a subsequent offence. It should be noted, however, that probation officers may not be aware of all subsequent offences.

There were very few subjective comments regarding this question.

The question relating to Table 11, asked for an estimate of those matters which would be proceeded with to trial by Crown

Table 13

Respondent Estimates of Subsequent Offences Not Processed by Probation Officers

	A Small Number	A Middle Number	A Large Number	Don't Know	Other	Row Total
Probation Officers	77 50.7%	47 30.9%	9 5.9%	18 11.8%	1 0.7%	152 49.8%
Crown Counsel	20 24.7%	22 27.2%	5 6.2%	34 42.0%	0 0.0%	81 26.6%
Provincial Court Judges	11 24.4%	5 11.1%	4 8.9%	24 53.3%	1 2.2%	45 14.8%
County Court Judges	2 7.4%	4 14.8%	4 14.8%	16 59.3%	1 3.7%	27 8.9%
Column Total	110 36.1%	78 25.6%	22 7.2%	92 30.2%	3 1.0%	305 100%

counsel. The questions relating to Tables 12 and 13 requested estimates of those matters which are not processed. That is, the responses are indicators of the extent of matters which do not go to trial and represent a "dark figure" of unreported crimes. The responses indicate there is probably a very significant number of unreported offences.

Table 14 indicates respondent opinion about the extent of convictions when the matter is reported to Crown counsel; Crown counsel decides that a charge is appropriate; the accused pleads not guilty; and there is a trial for breach of probation. The

question was: "How often would you estimate breach of probation charges (666) result in conviction when there is a trial and the accused is represented by counsel?"

Representation by counsel is an important factor. It is submitted most accused are likely not aware of the many technical defences to a Section 666 charge. There is data available regarding conviction with and without counsel. That data will be discussed in the following chapter.

The responses to the question indicate the likelihood of problems at the trial stage notwithstanding pretrial screening by probation officers and Crown counsel respectively. 34.2% of the respondents, the largest percentage, felt that accused persons are only 'sometimes' convicted and 10.9% felt they are 'almost never' convicted.

Commentary was limited regarding the foregoing question. One probation officer qualified his estimate by stating there would be convictions "about 30% of the time". Another stated, "about 60% will be convicted". The few Crown counsel who commented expressed concern over the technical difficulties. For example, one person stated, "in the absence of admissions, by accused, the offences are often difficult to prove". Other similar comments were: "the charges usually don't get to that"; "sometimes these cases become difficult to prove with identification problems and lack of proper witnesses"; "evidence problems abound".

Table 14

Respondent Estimates of Conviction
For Breach of Probation

	Almost Always	Usually	Some times	Almost Never	Don't Know	Other	Row Total
Probation Officers	17 11.2%	33 21.7%	66 43.4%	24 15.8%	12 7.9%	0 0.0%	152 50.0%
Crown Counsel	5 6.2%	37 45.7%	27 33.3%	7 8.6%	4 4.9%	1 1.2%	81 26.6%
Provincial Court Judges	1 2.2%	22 48.9%	10 22.2%	2 4.4%	9 20.0%	1 2.2%	45 14.8%
County Court Judges	0 0.0%	7 26.9%	1 3.8%	0 0.0%	17 65.4%	1 3.8%	26 8.6%
Column Total	23 7.6%	99 32.6%	104 34.2%	33 10.9%	42 13.8%	3 1.0%	304* 100%

* one missing response

So far in this section, respondent estimates have related to the offence of breach (Section 666). Table 15 relates to revocation of the suspended passing of sentences.

The responses cross-tabulated in Table 15 were regarding the question: "In your opinion, how often are individuals returned to court for sentencing pursuant to the revocation and suspended sentence provisions (664)(4)(d))?" Table 15 indicates the respondents were generally of the opinion that revocation is a rarely used procedure.

Table 15

Respondent Estimates of Revocation

	Almost Always	Usually	Some times	Almost Never	Don't Know	Other	Row Total
Probation Officers	3 2.0%	7 4.6%	37 24.3%	94 61.8%	11 7.2%	0 0.0%	152 50.0%
Crown Counsel	0 0.0%	3 3.7%	19 23.5%	50 61.7%	9 11.1%	0 0.0%	81 26.6%
Provincial Court Judges	0 0.0%	0 0.0%	4 8.9%	38 84.4%	3 6.7%	0 0.0%	45 14.8%
County Court Judges	0 0.0%	0 0.0%	3 11.5%	10 38.5%	11 42.3%	2 7.7%	26 8.6%
Column Total	3 1.0%	10 3.3%	63 20.7%	192 63.2%	34 11.2%	2 0.7%	304* 100%

* one missing response.

The related commentary, almost without exception, was regarding the rarity of revocations. One Crown counsel responded: "pretty rare. Only once since I have been 'Crowning'" A judge responded: "I have had one in nine years and the suspended sentence is probably my most common form of disposition. It sure makes my comments to the accused at time of sentence hollow words indeed". Another judge stated: "Never in ten years".

A similar set of responses was received regarding the question: "In your opinion, how often are individuals returned to court to have their probation conditions altered, or their

probation period extended pursuant to Section 664(4)(e)?" 43.5% responded 'sometimes' and 44.9% responded 'almost never'. Only 1.7% responded 'usually' and no one responded 'almost always'.

Revocations of conditional discharges were also perceived to be extremely rare by most respondents. 68.4% felt it was 'almost never' done and 11.8% felt it was 'sometimes' done. Only 1.7% and 2.3% felt it was 'almost always' and 'usually' done respectively.

It must be emphasized that specific problems are virtually impossible to identify on a quantitative basis. The problems are interrelated and interdependent. For example, a problem of poor wording on a probation order can be related to evidentiary difficulties and administrative difficulties. That is, a judge might make a probation condition requiring the offender "to report to a probation officer immediately and thereafter as directed". The court clerk might copy the wording as "report immediately to a probation officer". Upon failure to convict for a charge regarding failure to report, it would be most difficult to attribute the fault to the general wording of the order as it was made in court as opposed to how it was laid out in the probation order due to the court clerk's interpretation. Furthermore, some individuals might see the problem as being purely evidentiary because the Crown failed to prove the wilfull failure given the wording of the order. In any event, an attempt will be made, in this section, to identify problem areas at a more specific level.

The gathering of evidence for the prosecution of breach charges, with respect to compliance with most probation conditions, must naturally be the responsibility of probation officers. Table 16 displays the responses to the question: "In your opinion, are probation officers presently gathering the necessary evidence adequately with respect to breaches?"

The responses indicate that the majority of probation officers feel they are gathering adequate evidence while the majority of Crown counsel feel that is not the case. The responses of probation officers might be explained by reasoning that many probation officers are not aware of the difficulties of proving the offence. For example, a probation officer may not think it is necessary to provide Crown counsel with the names of all probation officers to whom an accused might have reported. Conversely, many Crown counsel may not appreciate the difficulty, indeed impossibility, of gathering such evidence.

The wording of probation orders is another obvious problem area. Table 17 indicates responses to the question: "Presently, are probation orders worded adequately for purposes of prosecution under Section 666?"

The majority of respondents, 53.8%, felt probation orders were 'usually' worded adequately. However, 27.2% felt they were only 'sometimes' worded adequately and 8.2% felt they were 'almost never' worded adequately. Only 7.9% felt they were 'almost always' worded adequately. Therefore, it would appear there may be significant problems with the wording of probation

Table 16

Opinion Regarding Adequate Evidence Gathering

	Yes	No	Don't Know	Row Total
Probation Officers	95 63.8%	26 17.4%	28 18.8%	149 49.7%
Crown Counsel	31 38.8%	35 43.8%	14 17.5%	80 26.7%
Provincial Court Judges	17 37.8%	3 6.7%	25 55.6%	45 15.0%
County Court Judges	1 3.8%	5 19.2%	20 76.9%	26 8.6%
Column Total	144 48.0%	69 23.0%	87 29.0%	300* 100%

* five missing responses.

orders. One Crown counsel commented: "The condition is clear, but wording poor". In the subjective commentary for other parts of the questionnaire, there were responses which indicated a negative opinion regarding adequate wording.

Section C of the questionnaire represents an attempt to identify those factors which may result in no official response when enforcement procedures are possible. That is, it is an attempt to account for, at least partially, a significant "dark figure" of unreported matters. It is also an attempt to identify factors which may have contributed to the generally negative

Table 17

Opinion Regarding Adequacy of Probation Condition Wording

	Almost Always	Usually	Some times	Almost Never	Don't Know	Row Total
Probation Officers	11 7.2%	73 48.0%	50 32.9%	15 9.9%	3 2.0%	152 49.8%
Crown Counsel	6 7.4%	45 55.6%	24 29.6%	5 6.2%	1 1.2%	81 26.6%
Provincial Court Judges	3 6.7%	31 68.9%	5 11.1%	4 8.9%	2 4.4%	45 14.8%
County Court Judges	4 14.8%	15 55.6%	4 14.8%	1 3.7%	3 11.1%	27 8.9%
Column Total	24 7.9%	164 53.8%	83 27.2%	25 8.2%	9 3.0%	305 100%

respondent opinion regarding enforcement and difficulties with enforcement. As previously noted, judges were excluded from Section C.

All of the questions in Section C asked respondents to circle the responses which were considered to be appropriate reasons for not acting and to indicate the most and least significant factors

The first question asked: "What reason(s) would Crown counsel have to not proceed with a breach of probation charge (666) for a violation of a probation condition?" Table 18

indicates the frequency of those factors considered appropriate by probation officers and Crown counsel. Column 1 provides those factors considered appropriate by probation officers and Column 4 indicates those factors considered appropriate by Crown counsel. Columns 2 and 5 indicate the frequency of particular responses considered most significant for probation officers and Crown counsel respectively. Similarly, Columns 3 and 6 indicate the frequency of the responses to the factors considered least significant for probation officers and Crown counsel respectively.

The factor which elicited the highest percentage of responses from Crown counsel was "lack of evidence", 81.5%. That response was also considered to be the most significant by the greatest number of Crown counsel, 46.6%. It is interesting to note the frequencies of the responses of probation officers were similar, i.e., the highest percentage was regarding "lack of evidence" (70.9%) and that factor was considered to be the most significant by the greatest number of probation officers, 31.1%.

Table 18

Importance of Factors Related to Crown Counsel Decisions to not Proceed with Breach of Probation

	Proba-tion Officer	Most Signi-ficant	Least Signi-ficant	Crown Counsel	Most Signi-ficant	Least Signi-ficant
Triviality of the matter	68 45.9%	6 4.4%	33 24.4%	64 79.0%	4 5.5%	19 26.0%
Too Busy	39 26.4%	4 3.0%	38 28.1%	4 4.9%	0 0.0%	31 42.5%
Staleness of the Violation	65 43.9%	2 1.5%	13 9.6%	57 70.4%	2 2.7%	5 6.8%
A Summary Offence only	16 10.8%	3 2.2%	9 6.7%	5 6.2%	0 0.0%	3 4.1%
Unlikelihood of Conviction	95 64.2%	33 24.4%	8 5.9%	50 61.7%	16 21.9%	1 1.4%
Lack of Consequ-quence upon Conviction	42 28.4%	7 5.2%	11 8.1%	24 29.6%	41 5.5%	2 2.7%
Reported but not recommended by Prob. Officer	76 51.4%	12 8.9%	2 1.5%	41 50.6%	6 8.2%	2 2.7
Lack of Evidence	105 70.9%	42 31.1%	1 0.7%	66 81.5%	34 46.6%	1 1.4%
Poorly worded Probation order	87 58.8%	16 11.9%	4 3.0%	63 77.8%	4 5.5%	2 2.7%
Difficult Procedure	24 16.2%	4 3.0%	16 11.9%	9 11.1%	2 2.7%	7 9.6%
Other	17 11.5%	6 4.4%	0 0.0%	5 6.2%	1 1.4%	0 0.0%
Missing Responses	4	17	17	0	8	8

The frequencies lend support to the argument that technical violations, involving evidentiary problems, are likely significant factors in the lack of enforcement. Further, the findings lend some support to the argument that there may be a significant number of unreported and unprocessed breach of probation offences.

The frequencies of responses to a similar question are illustrated in Table 19. The question was: "What reason(s) would a probation officer have to NOT advise Crown counsel of a violation of a probation condition (666)?"

Table 19

Importance of Factors Related to Probation Officer Decisions to not Report Breach of Probation

	Proba-tion Officer	Most Signi-ficant	Least Signi-ficant	Crown Counsel	Most Signi-ficant	Least Signi-ficant
Triviality of the matter	91 61.1%	19 14.2%	31 23.8%	62 83.8%	21 32.3%	16 26.2%
Too Busy	25 16.9%	1 6.7%	33 25.4%	12 16.2%	2 3.1%	20 32.8%
Summary Matter Only	22 14.8%	1 0.7%	7 5.4%	3 4.1%	0 0.0%	1 1.6%
Staleness of the Matter	60 40.3%	1 0.7%	10 7.7%	51 68.9%	1 1.5%	4 6.6%
Unlikelihood of Conviction	59 39.6%	10 7.5%%	6 4.6%	24 32.4%	3 4.6%	1 1.6%
Little Chance of Crown Proceeding	62 41.6%	8 6.0%	2 1.5%	19 25.7%	3 4.6%	8 13.1%
Lack of Punish-ment upon Conviction	48 32.2%	11 8.2%	9 6.9%	15 20.3%	0 0.0%	1 1.6%
Client doing Well	109 73.2%	61 45.5%	3 2.3%	62 83.8%	33 50.8%	3 4.9%
Poorly worded Probation order	71 47.7%	16 11.9%	7 5.4%	33 44.6%	2 3.1%	1 1.6%
Difficult Procedure	13 8.7%	1 0.7%	21 16.2%	3 4.1%	0 0.0%	6 9.8%
Other	16 10.8%	4 3.0%	0 0.0%	4 5.7%	0 0.0%	0 0.0%
Missing Responses	3	18	22	7	16	20

The frequency of responses by probation officers regarding the responses "Client doing well" and "Triviality of the matter" may reflect a social casework bias. However, it should be noted that a significant number of probation officers considered "unlikelihood of conviction", "little chance of Crown proceeding", and "poorly worded probation orders" to be appropriate reasons for not advising Crown counsel of a violation of probation.

Due to lesser importance, not all of the quantified responses to the questions in Section C will be discussed in detail. In terms of revocation procedures, only the questions pertaining to revocation of the suspended passing of sentence will be analyzed.

Table 20 indicates the frequencies of responses to the question: "What reason(s) would Crown counsel have to NOT proceed with an application for revocation of a 'suspended' sentence (664(4)(d))?"

Table 20

Importance of Factors Related to Crown Counsel Decisions to not Proceed with Revocation

	Proba-tion Officer	Most Signi-ficant	Least Signi-ficant	Crown Counsel	Most Signi-ficant	Least Signi-ficant
Triviality of the matter	57 38.8%	8 6.2%	37 28.9%	52 65.0%	8 11.1%	13 18.0%
Too Busy	30 20.4%	1 0.8%	38 29.7%	7 8.7%	0 0.0%	36 50.0%
Probation taken into account when person sentenced for subsequent offence	102 69.4%	57 44.2%	4 3.1%	64 80.0%	44 61.1%	4 5.6%
Reported but not Recommended by Probation Officer	77 52.4%	21 11.3%	4 3.1%	41 51.2%	10 13.9%	5 6.9%
Lack of Conse-quence upon Revocation	48 32.7%	9 7.0%	12 9.4%	30 37.5%	6 8.3%	5 6.9%
'Double Jeopardy'	60 40.8%	16 12.4%	17 13.3%	22 27.5%	4 5.6%	1 1.4%
Difficult Procedure	31 21.1%	15 11.6%	16 12.5%	8 10.0%	0 0.0%	4 5.6%
Other	5 3.4%	2 1.6%	0 0.0%	0 0.0%	0 0.0%	0 0.0%
Missing Responses	5	23	24	1	9	9

Table 21 illustrates the frequency of responses to the question: "What reason(s) would a probation officer have to NOT

suggest a revocation pursuant to 664(4)(d) of the suspended sentence provisions?"

Tables 20 and 21 indicate that most of the factors were considered as appropriate reasons for non-action. However, the frequency of responses is far more significant for certain cases. Nevertheless, no causality can be inferred from the responses. One or more of the factors may be operative in a decision to not proceed in a particular case. In addition, in practice, it may be the assumption of the existence of one of the factors which leads to non-action and not the actual existence of that factor.

The last point is important. An example will illustrate. A probation officer may decide not to suggest a revocation because an assumption is made that Crown counsel advised the court that the person was on probation at the time of the subsequent offence. It may be further assumed that this information was taken into consideration by the court and is reflected in the sentence. However, Crown counsel may not have informed the court of the existence of probation. It is submitted that in larger communities it is unlikely the probation officer would be in court for sentencing. Indeed, the prosecutor to whom a report of a subsequent offence would be submitted may not have been present when the offender was sentenced with respect to the subsequent offence.

Table 21

Importance of Factors Related to Probation Officer Decisions to not Process Revocations

	Probation Officer	Most significant	Least significant	Crown Counsel	Most significant	Least significant
Triviality of the matter	53 36.6%	6 4.6%	34 27.4%	45 61.6%	18 29.5%	12 20.7%
Too Busy	19 13.1%	1 0.8%	33 76.5%	7 9.6%	0 0.0%	26 44.8%
Probation taken into account when person sentenced for subsequent offence	93 64.1%	49 37.7%	13 10.5%	45 61.6%	27 44.3%	3 5.2%
Lack of Consequence upon Revocation	42 29.0%	9 6.9%	10 8.1%	21 28.8%	1 1.6%	5 8.6%
'Double Jeopardy'	37 25.5%	12 9.2%	10 8.1%	12 16.4%	1 1.6%	3 3.7%
Difficult Procedure	20 13.8%	6 4.6%	15 12.1%	2 2.7%	0 0.0%	6 10.3%
Client doing Well	80 55.2%	42 32.3%	8 6.5%	42 57.5%	13 21.3%	3 5.2%
Other	12 8.3%	5 3.8%	1 0.8%	3 4.1%	1 1.6%	0 0.0%
Missing Cases	7	22	28	8	20	23

The factor "probation taken into account when a person was sentenced for subsequent offence" was the most frequent response for both Crown counsel and probation officers in Tables 20 and 21. The question was meant to imply that the offender would receive additional punishment for the subsequent offence and to revoke the suspended passing of sentence would lead to a double punishment situation. It has been submitted that a probation officer may assume this to be the case when it is not. The most important point is that both probation officers and Crown counsel might assume the judge increased punishment because the person was on probation at the time of the subsequent offence when, in fact, sentence was increased for other reasons. That is, the judge might have increased sentence because of the fact the offender was a recidivist and the judge was most concerned with protection of the public and specific deterrence. It is submitted that increased punishment due to the existence of a probation order cannot be identified separately from increased punishment due to other factors such as protection of the public and specific deterrence. Yet, it would seem likely at least some Crown counsel and probation officers do not proceed with revocations on the assumption that probation was taken into account. It is further submitted that the safe course, in a due process environment, is not to proceed.

The purpose of Section C was, basically, to determine the number and weight of factors which influence decisions regarding enforcement. The lists of fixed responses were not intended to

be exhaustive. It would appear that a number of factors are considered in making the noted decisions. It would also appear that considerable weight is given to factors which relate to legal and administrative problems as well as problems which relate to possibly erroneous assumptions about the sentencing process.

Two questions in Section D related to possible ways of improving enforcement procedures. One question asked: "Could any improvements be made in the Criminal Code sections dealing with probation". The question asked for a "Yes" or "No" response. Table 22 indicates the results of the foregoing question. All of the questions in Section D were prefaced by a request for respondents to explain why they responded to each question as they did.

A large majority of respondents felt improvements could be made to the Criminal Code sections dealing with probation.

As was previously noted, subjective comment was requested for the question and there was considerable comment. For that reason, an attempt was made to partially categorize the statements. There is far too much commentary to detail every response; particularly for probation officers and Crown counsel.

Before proceeding, it is necessary to point out that the questions did not, in any way, indicate specific Criminal Code amendments. It should also be mentioned that if a multiple suggestion was made in the commentary, it was assigned to only one category. Further, certain comments were categorized as

Table 22

Opinion Regarding Criminal Code Improvements

	Yes	No	Row Total	Missing Cases
Probation Officers	102 76.7%	31 23.3%	133 52.0%	19
Crown Counsel	60 83.3%	12 16.7%	72 28.1%	9
Provincial Court Judge	23 65.7%	12 34.3%	35 13.7%	10
County Court Judge	12 75.0%	4 25.0%	16 6.3%	11
TOTAL	197 77.0%	59 23.0%	256 100%	49

"don't know", notwithstanding a "Yes" or "No" response in the objective part of the question.

Twenty probation officers indicated a need for a legislative change that would place the onus of proof upon the offender in breach of probation proceedings. Some typical comments were:

- "Treat breaches as are bail cases";
- "instant review, revocation procedure, and reverse onus".
- "Reverse onus is the only answer to effective probation supervision";
- "Probation orders will be readily enforced only when the Criminal Code is amended to provide for the consequence of a reverse onus being placed on the individual offender";

- "Increased onus on the client to comply with the terms"; and
- "Once again, the onus must be on the probationer, not the P.O.,to prove he is living up to his order".

Thirteen probation officers felt legislative change should make probation more like parole in terms of enforcement. The following are some of the comments:

- "Revoke probation as is done with parole"; and
- "Simplify enforcement, eliminate trial, etc. Report to prosecutor - more like parole".

"More like parole" was interpreted as being a more simplified system in which a hearing, instead of a trial, is held. A related concept, presented by respondents, is the "real" or "true" suspended sentence. This was interpreted as meaning the suspended execution of sentence as opposed to the suspended passing of sentence. It is also the opinion of the writer that this would implicitly mean a hearing process for revocation as is the case in the United States.

Ten probation officers indicated a legislative change should involve the use of a "true" or "real" suspended sentence. Some of the comments were:

- "Sentence to gaol first then suspend that sentence so probationer knows the consequence before breach";
- "Failure to comply would result in a specific gaol term known beforehand by the offender";
- "Eliminate breach and substitute suspended gaol sentences which would come into effect upon violation"; and

- "Give gaol sentence and suspend. If revoked accused should show cause why not to do sentence".

Nine probation officers felt the language of the Criminal Code should be made clear. It could be interpreted that Criminal Code clarification implies facilitation of enforcement. Some specific responses were:

- "Judges need to be more clear; perhaps the wording could be defined"; and
- "Tighten 666, 664, etc. Treat breach as contempt of court. Also standardize wording across Canada and B.C.".

Legislative change providing for increased penalties was indicated by 17 probation officers. It should be noted this categorization is difficult because of the nature of the responses and many of the responses in this category could be interpreted in terms of the other categories such as "Criminal Code clarification" or "more like parole". Some of the responses were:

- "In some cases, make breaches indictable";
- "Stricter sentence for breaches when probation is for indictable offence";
- "Make any breach sentence consecutive and possibly with a minimum sentence";
- "More teeth put in"; and
- "Perhaps conviction under 666, 664 and 662, should be changed to provide for automatic consequences (mandatory consequences) similar to new legislation for driving while

suspended. This would take the arbitrary discretion of P.O.'s and Crown counsel out".

The probation officers' subjective remarks indicating a need for legislative change were not all related to increased enforcement or penalties. One probation officer stated: "remove breach for subsequent convictions". Two probation officers felt legislative change should provide for a probationer's agreement to probation conditions. However, those three probation officers represent only 4.2% of the number of respondents who felt legislative change should occur.

Seventeen probation officers commented that legislative change was not necessary. It should be noted, however, that many of their remarks did not indicate satisfaction with present enforcement. Some of the responses were: "Cannot think of any"; "amply provided for by the Code"; "adequate if Crown would proceed"; "Crown acting without delay could be improved"; "I don't see the problem with the Code, but with the courts"; "Code sections are good. Case law regarding proof of violation and existence of the order is ludicrous".

The last two statements in the preceding paragraph, particularly the last statement, seem to indicate a fundamental misunderstanding of the court system. That is, the respondents do not seem to be aware that court decisions and case law are, for the most part, products of the interpretation of legislation.

Nineteen of the probation officers' subjective comments could be categorized as "not sure". Those responses were categorized as such because of the respondents' apparent ambivalance. Typical responses were: "I haven't been at it long enough to know"; "Improvements can always be made"; "Community needs keep changing".

Most of the subjective commentary of the probation officers was oriented toward legislative change which would assist in enforcement of probation. It is also apparent the responses, inclusive of negative responses, implicitly indicate a degree of dissatisfaction with present enforcement.

The responses of Crown counsel were also categorized. There were certain responses which occurred frequently and, for ease of presentation, were categorized under the following headings: Easier to prove, reverse onus, simplify procedures, stiffer penalties, and clarification of language. Some of the Crown counsel responses tended to be very specific and somewhat unique. Those responses are presented separately at the end of this section.

Fifteen Crown counsel suggested that legislative change should make breach of probation easier to prove. Some of the responses were:

- "Too much time is spent on one of these prosecutions";
- "make breaches easier to prove";
- "to assist the Crown in proving the technical aspects of a breach of probation charge";

- "make it easier to prove"; and
- "reduce witnesses and increase consequences".

There were nine Crown counsel who felt the onus should, to some degree, be on the accused. Typical responses were:

- "ease or remove proof of bound by probation order - onus on accused to rebut presumption of wilfull breach"; and
- "consider a reverse onus clause for the accused to meet".

Three of the Crown counsel indicated a desire for simplified procedures. One response was: "Simplify the revocation procedure and simplify the breach procedure".

Stiffer penalties were indicated by five Crown counsel. A specific response was: "make breach of probation a Crown election offence with stiffer penalties where Crown proceeds by indictment". Another was: "longer period should be available".

Clarification of language was indicated by four Crown counsel.

Two of the respondents suggested that intermittent sentences should be followed by probation.

Three of the Crown counsel felt an amendment should be made to allow for extension of probation or addition of conditions. One such response was: "amend S.664 to take in breaches which have not been prosecuted so conditions can be added and probation extended without another prosecution".

One respondent suggested something similar to the parole process: "there should be a power in the court to require a person's reattendance regardless of whether there is a technical

breach or not and a power to alter, revoke, or suspend the order".

One Crown counsel was concerned with the difficulty of proving a breach of probation when the order was made some distance from the location of the breach: "a certificate could be developed to allow prosecutions for breach in those areas where breach occurred without bringing P.O. from originating area".

One Crown counsel implicitly suggested amendment to Section 664 of the Code and was specific in complaint: "sec 664 is virtually useless in light of decision re: R. v. Paquette (1980) 53 CCC (2d) 28 (Alta.QB)".[4]

Only five of the Crown counsel who made comments suggested the present legislation is not in need of change. Three of those responses were:

- "adequate";
- "they are adequate"; and
- "just get the wording right".

Eight Crown counsel responses were categorized as "not sure". Some typical responses were:

- "My answer is probably that you are dealing with people who don't always obey anything";
- "Anything legislators draw can be improved on by those in the field";
- "I don't know";
- "I am sure anything can be improved although I have nothing specific in mind";

- "No concrete proposals per limited experience"; and
- "I would like to study the subject more carefully".

Similar to the probation officers, most of the Crown counsel who responded were concerned with enforcement and the problems related to it. Overall, the responses indicate the present legislation is inadequate for the purposes of prosecution.

The provincial court judges, because of their smaller number, made fewer responses in absolute terms. Overall, their responses were more general and not as focussed on enforcement difficulties. All of the responses were placed in three general categories, "Yes", "No", and "Not sure".

There were 16 clear "Yes" responses from provincial court judges:

- "Make it simpler to prove identification of probationers and existence of valid probation order";
- "Except perhaps in the area of evidentiary matters";
- "Amendments should be made to shift the evidentiary proof from the Crown to the accused and to require all suspended dispositions to be imposed upon further conviction during probation";
- "Use a reverse onus, so the accused has to prove, in effect, he complied";
- "How about reverse onus clause. 664(3) is hard to comply with";

- "Allow the court to compel the return before it of one who has committed a breach or a further offence";
- "I think they are unnecessarily complicated";
- "The condition should be defined with greater precision";
- "Clear precise wording";
- "Make it mandatory for probation officers to report breaches to Crown counsel";
- "The term of intermittent sentence should be variable";
- "(Probation) should be able to follow intermittent sentence";
- "Provision should be made for probation following an intermittent sentence";
- "Do community work service in default of time";
- "Ability to do sentence without commission of offence"; and
- "Could allow probation to follow prison term over two years".

There were four "No" responses made by provincial court judges:

- "None that I can think of";
- "Provisions appear adequate";
- "Terms now sufficiently wide"; and
- "I believe that there is sufficient scope now".

Five provincial court judges made comments which could be categorized as "Not sure" responses:

- "Don't know - a lot of the present sections have not been tested";

- "Nothing is perfect";
- "Yes, but the problems are not arising from the Criminal Code";
- "There is probably always room for improvement, but in general I think shortcomings in probation do not derive from the legislation"; and
- "Have not considered this - let's try and improve our enforcement of present laws".

The same general categorizations were used for the responses of county court judges. There were four "Yes" responses:

- "Section should expressly provide for monitory compensation to the community work projects as alternative to actual work by provisions which would give flexibility to community work service orders";
- "Give probation officers power to deal with minor breaches such as non-payment, failing to report, etc.";
- "Requirements of proof of breach could be simplified"; and
- "To provide that judges be notified re: success or failure of the order".

There were two "no" responses made by county court judges:

- "The Code sections are adequate in my view"; and
- "Provisions are adequate if properly enforced".

There were four undecided or "not sure" responses:

- "Enforcement provisions could/should be left discretionary";
- "I have no suggestion in this section either for or against";

- "Probably - but not qualified to comment"; and
- "I don't have enough experience in this area".

The county court judges were less focussed, in terms of enforcement problems, than were the provincial court judges. In terms of the responses of all judges, two reasons for their decreased focus on enforcement problems can be suggested. First, the judges may have been concerned about commenting on legislation. Being perceived as critical of the legislative branch of government, by suggesting specific legislative change, may have been a concern to many judges. Second, they may simply not appreciate the difficulty with enforcement of probation orders because of relatively limited encounters with the problems. This is undoubtedly correct for most county court judges as they do not deal with summary conviction matters. The provincial court judges might only see the relatively easily proven breaches. That is, after screening by probation officers and Crown counsel, the breaches that are heard in court are those for which there is, at least, some hope of prosecution.

Table 23 indicates responses to the question: "Can any improvements in enforcement of probation be made using the present laws?"

The results indicate a majority of respondents are of the opinion improvements can be made in enforcement within the context of the present legislation. This would appear to support the contention there are two problematic areas regarding

Table 23

Opinion Regarding Enforcement Improvement with Present Legislation

	Yes	No	Row Total	Missing Cases
Probation Officers	110 84.0%	21 16.0%	131 50.6%	21
Crown Counsel	52 68.4%	24 31.6%	76 29.3%	5
Provincial Court Judge	28 87.5%	4 12.5%	32 12.4%	13
County Court Judge	16 80.0%	4 20.0%	20 7.7%	7
TOTAL	206 79.5%	53 20.5%	259 100%	46

enforcement: administrative problems and legally technical problems. The findings are not contrary to the position that the problems are interrelated.

With respect to the subjective commentary, 16 probation officers indicated they were unsure of their opinion, or their comments could not be interpreted. Only four of the respondents explained "no" answers. Seventy-three commented on the possibility of increased enforcement. Many of those responses were similar. Therefore, the comments are presented in capsulated form as they were categorized under several general headings.

The most common type of comment (14) indicated a desire for Crown counsel to take a "more serious" view of probation violations. A typical response was: "Policy change by Crown - more rigorous prosecution of S.666 CCC".

The second most common type of response (13) was titled "Better wording". These responses tended to be directed toward the judiciary and court administration. Two examples are:

- "Tighten up the administration of the court in terms of drafting up the orders and their wording"; and
- "Start with having judges tighten up on wording and set up a procedure for a "chain of evidence" from court to probation officers".

The third most frequent type of response (12) was titled "Stronger enforcement by judges". Generally, these responses seem to indicate a desire for lengthier sentences for those convicted of breach of probation. Three examples are:

- "Stricter enforcement by judiciary";
- "Harsher sentences"; and
- "A greater commitment to enforcing must be made; jointly by P.O.'s, Crown counsel, and the courts. The court should have the greatest concern since it is their order that is being breached".

Seven probation officers articulated a desire for greater cooperation and/or communication between components of the criminal justice system; particularly between probation officers and Crown counsel. Some specific remarks were:

- "Better cooperation, communication, and understanding between probation staff and Crown counsel"; and
- "Improve liaison between justice components".

Improved evidence gathering and reporting of breaches was indicated by six probation officers. Some responses were:

- "Probation and Crown being more thorough"; and
- "Better wording on probation orders, better documentation of breaches by P.O.'s, more effort by Crown to press charges, and significant sentences for breach".

Five probation officers felt the processing of enforcement matters could be improved. Another five felt more staff would be of assistance. Two identified better training as a need and two felt more breaches should be processed. Four probation officers opined that Crown counsel procedures should be standardized. Remand in custody for breach by subsequent offence, more judicial reviews of probation performance, and more breaches processed by police were each identified by one probation officer.

The four "No" comments made by probation officers were:

- "Adequate tools exist";
- "Enforcement easy right now";
- "There seem to be so many loop holes in evidence of breach"; and
- "At present, too complex to breach or revoke".

It should be noted that two of the "No" responses implied that nothing could be improved as enforcement may be an exercise in

futility, i.e., those answers were interpreted literally.

Before discussing the remarks of Crown counsel and the judiciary, it should again be emphasized that categorization was entirely arbitrary. Many remarks could have been easily placed in another category due to interpretation or the multiplicity of answers. In any event, the purpose of the exercise is to distinguish a general trend, or trends, if any.

In addition to the tendencies indicated by the categorizations, there was another, more general, tendency indicated by the probation officers' responses. This was criticism of other components of the criminal justice system; namely Crown counsel and the judiciary. It is submitted that this tendency may, at least partially, be a manifestation of the lack of understanding, by probation officers, of the difficulties encountered by others in the process. For example, many of the probation officers may not have considered the staffing problems and legal technicalities with enforcement experienced by Crown counsel.

Many of the remarks made by Crown counsel were similar to those of probation officers. For example, increased cooperation and communication between justice components and increased or more efficient staff in the probation service and Crown counsel offices were concerns of Crown counsel. Some remarks which relate to the first type of response were:

- "There must be greater communication between probation officers and Crown counsel in preparation of cases. Crown

must monitor the wording of orders more closely when they are composed"; and

- "Greater communication between probation and Crown".

Two examples of the second category are:

- "Simply a question of money and manpower"; and
- "Need more staff".

Some Crown counsel, as was the case with certain probation officers, were critical of other components of the criminal justice system. That is, they were critical of probation officers and the judiciary. Crown counsel remarks regarding probation officers can be generally categorized in three areas:

- "Better evidence gathering";
- "Rapidity of reporting"; and
- "Frequency of reporting".

Crown counsel are responsible for prosecuting breach of probation charges. It could be expected, therefore, that there would be concern expressed about the quality of evidence gathering. The rapidity of reporting was also an expected concern as breach of probation is a summary conviction offence and there is a time limit with respect to reporting such matters to Crown counsel. Crown counsel remarks about the frequency of reporting reflects, perhaps, concerns about the discretion exercised by probation officers.

Crown counsel were critical of the judiciary primarily in one area; sentencing. Some of the responses were:

- "If some jurors would sentence an accused as if their

original sentence meant something; i.e., if the accused doesn't utilize the break of probation a more severe sentence will be imposed";

- "Convince judges to treat breaches as worthy of sanction"; and
- "Emphasis on greater results/consequences".

Some Crown counsel emphasized the need for legislative change in responding to the question "can any improvements in enforcement be made using the present laws". It should be mentioned that was also the case with several probation officers but the responses were not categorized. One Crown counsel's explanation of a positive response was: "(Yes) but law change better". Two explanations of a "No" response were:

- "Presumably we are already doing our best with current laws"; and
- Laws are too slack".

A majority of the remarks of the provincial court judges and county court judges seemed to reflect a general impression that a number of probation orders are not being enforced. Further, their remarks seemed to indicate an impression that probation officers and, perhaps, Crown counsel exercise excessive discretion with respect to probation violations. Some of the remarks were:

- "Greater emphasis should be placed on probation officers to report breaches";
- "Enforce - don't ignore violations";

- "Probation officers sometimes exercise too much discretion";
- "Make the probation officer more of a peace officer or court officer and less of a 'Big Brother'; make him accountable to the criminal justice system for overlooking flagrant breaches, or any breaches of the order";
- "Tighten up on enforcement in appropriate cases, when a breach is laid it should be dealt with immediately";and
- "Require probation officers to report breaches and let Crown counsel decide whether or not to proceed. As it is now, probation officers usurp the function of Crown counsel".

The remarks of the judges might be, at least partially, explained by the court process. For instance, a judge might sentence a person with an alcohol problem to a period of probation with a condition that he will "report to and be under the supervision of a probation officer" and "take such alcohol counselling as directed by the probation officer". At a later date, the same judge might be conducting a trial involving the same individual and evidence may emerge, during the trial or at the sentencing hearing, that the individual did not report to a probation officer or attend at alcohol counselling. The judge may also have been aware that no action was taken with respect to the person's failure. Thus, if this type of situation occurred with some degree of regularity, it would not be surprising to discover that the judge was of the opinion that too much discretion was being exercised by the probation service in general. This might be even more the case if the judge had a

lucid recollection of the intent of his original sentence.

It is submitted the judges may not appreciate the problems faced by probation officers and Crown counsel in proceeding with enforcement matters. In the foregoing example, a probation officer may have communicated with Crown counsel to advise the person had not reported. The officer might have been advised by Crown counsel that a charge would not be proceeded with because of the fact that no one probation officer could identify the accused. Further, Crown counsel may not have been prepared to have all the staff of a particular alcoholism facility attend at court in order to prove the person did not attend at counselling. An experienced probation officer may not have reported the breach to Crown counsel as he did not wish to waste time with a matter which would not be prosecuted.

One county court judge indicated there could be greater enforcement with present laws, "but more probation officers would be required. It is either that or more gaols". This response points to two very important issues: whether or not probation is considered to be an alternative to incarceration; and whether increased enforcement could result in increased use of probation as an alternative to incarceration. Two questions in Section D and a question in an earlier section relate to these issues.

The first question in Section D asked: "Generally, do you feel probation is currently used as an alternative to incarceration". Table 24 indicates the overall responses to that question.

A strong "Yes" response was anticipated. The question is dichotomous in terms of response and, given that fact, it was anticipated that undecided individuals would opt for the "Yes" response as it would seem probation is most likely an alternative. In addition, all Criminal Code offences could involve a gaol sentence. Strictly speaking, then, all probation sentences resulting from criminal matters are alternatives to incarceration. With that in mind, it is felt the "No" response total is an extremely conservative statistic.

To better identify the impressions of the practitioners, regarding probation as an alternative to incarceration, a similar question was asked in Section B: "Is probation presently used as an alternative to incarceration". A range of responses was available to that question. The results are indicated in Table 25.

It would appear the respondents were less sure of probation as an alternative to incarceration when a range of responses was available. Indeed, a large percentage felt it was only 'sometimes' used as an alternative to incarceration.

Very few probation officers commented on the question in Section B. The comments in Section D were varied and many could not be classified. However, for the most part, respondents indicated probation was sometimes used as an alternative to incarceration and it was sometimes a sentence in its own right. Typical comments were:

Table 24

Respondent Estimates of Current Use of Probation as Alternative to Incarceration

	Yes	No	Row Total	Missing Cases
Probation Officers	101 68.2%	47 31.8%	148 51.2%	4
Crown Counsel	63 78.7%	17 21.3%	80 27.7%	1
Provincial Court Judge	27 69.2%	12 30.8%	39 13.5%	6
County Court Judge	19 86.4%	3 13.6%	22 7.6%	5
TOTAL	210 72.7%	79 27.3%	289 100%	16

- "I think we have moved away from that concept. Probation is probation. Probation is only sometimes an alternative to incarceration";
- "What other alternative"; and
- "Probation is a dumping ground when courts can't make up their minds".

The comments of Crown counsel and the judiciary were similar to each other. That is, some of the comments indicated probation was usually an alternative to incarceration while others indicated it was usually not considered an alternative. Like probation officers, many of the respondents felt probation was a sentencing option standing as a separate disposition. Some

Table 25

Respondent Estimates of Current Use of Probation as Alternative to Incarceration

	Almost Always	Usually	Some times	Almost Never	Don't Know	Other	Row Total
Probation Officers	14 9.3%	51 33.8%	74 49.0%	9 6.0%	2 1.3%	1 0.7%	151 50.0%
Crown Counsel	10 12.5%	35 43.7%	32 40.0%	1 1.3%	1 1.3%	1 1.3%	80 26.5%
Provincial Court Judges	1 2.2%	17 37.8%	23 51.1%	3 6.7%	1 2.2%	0 0.0%	45 14.9%
County Court Judges	2 7.7%	13 50.0%	10 38.5%	0 0.0%	1 3.8%	0 0.0%	26 8.6%
Column Total	27 8.9%	116 38.4%	139 46.0%	13 4.3%	5 1.7%	2 0.7%	302* 100%

* three missing responses

of the judges were of the opinion it was "usually" an alternative for first offenders. Others indicated an opinion typified by the remark: "Whenever public safety is not jeopardized, treatment and rehabilitation is usually more effective".

The second question in Section D arrives at the crux of the matter. It asked respondents: "Could there be greater use of probation as an alternative to incarceration if there was greater enforcement". The results are illustrated in Table 26.

The majority of each respondent group, with the exception of Crown counsel, indicated there could be greater use of

probation if there was greater enforcement. The ramification of that overall opinion could be that a legislative or administrative change, which would lead to greater enforcement, would also lead to greater use of probation as an alternative to incarceration.

All of the respondents are involved in the sentencing process. Judges are the most important group in that regard. Therefore, their subjective commentary will be examined first.

Table 26

Opinion Regarding Greater Use of Probation if Greater Enforcement is Provided

	Yes	No	Row Total	Missing Cases
Probation Officers	113 75.8%	36 24.2%	149 52.3%	3
Crown Counsel	35 45.5%	42 54.5%	77 27.0%	4
Provincial Court Judge	25 67.6%	12 32.4%	37 13.0%	8
County Court Judge	18 81.8%	4 18.2%	22 7.7%	5
TOTAL	191 67.0%	94 33.0%	285 100%	20

A few county court judges responded to the subjective component of the question. The most frequent response indicated a dissatisfaction with present enforcement. Some responses were:

- "It's one use of probation. Without enforcement probation is toothless and useless";
- "I have limited confidence in the present system of probation"; and
- "Probation should be used more as an alternative to incarceration. Provided judges were sure that probation would be (1) enforced; (2) constructive; (3) fruitful".

Fourteen provincial court judges responded positively to the question in terms of their subjective responses. Ten of

those responses indicate the possibility of increased use of probation as an alternative to incarceration. Some of the responses were:

- "There may not be need of incarceration if effective probation orders are properly supervised";
- "Courts would feel more comfortable in the exercise of their duty to protect society";
- "Probation would be far more effective if it was known that it would and could be strictly enforced"; and
- "The sentence and its potential for enforcement must be meaningful to the offender. If there is no consequence to violation of probationary terms, court process becomes a waste of time".

The most frequent responses of Crown counsel are exemplified by the following:

- "If probation is effective and enforced -more viable";
- "Image of 'looseness' of probation and parole";
- "Courts recognize that enforcement of probation can be 'loose' in most cases";
- "If convicted persons took probation seriously (i.e., if greater enforcement) may be alternative";
- "Self-evident"; and
- "Would recommend more often".

There were a number of Crown counsel whose subjective responses indicated that probation should not be viewed as an alternative to incarceration as it is a separate sentencing

option. However, the most common negative comment related to the current use of probation. That is, many of the Crown counsel felt it was over used. Typical of those responses are the following comments:

- "Probation is too readily used as is where incarceration would be appropriate";
- "Its already used too extensively"; and
- "Probation seems well utilized currently".

The most frequent responses of Crown counsel were also those most frequent for probation officers; some felt increased enforcement would increase the use of probation as an alternative. Others were of the opinion it was already over used. There were a number of varied responses as well. Some probation officers felt increased enforcement was synonymous with increased workload. Similarly, others felt more staff would be necessary.

General Comments

The questionnaire was lengthy. It is likely the length of it affected the lack of general commentary at the end. However, some respondents took the time to comment. The commentary indicates that most of those respondents are dissatisfied with the current level of probation enforcement. It also indicates the complexity and variety of the problems with probation enforcement. In the writer's opinion, it is unfortunate that

many commentators chose to comment on the lack of effectiveness of other actors in the process. However, that commentary also tends to substantiate the view that there are multiple problems with enforcement and that many of those problems are not easily identified. The commentary further suggests a lack of communication between the various actors with respect to certain problem areas.

Limitations

The questionnaire's greatest limitations may be the possible misinterpretation of the questions and the range of the answers to some questions. Regarding misinterpretation, respondents may have perceived the questions in a number of ways. For instance, it was earlier emphasized that a question such as "Is probation currently used as an alternative to incarceration" could be interpreted in the most literal sense as opposed to a general opinion as to whether or not it is.

The range of answers provided may not accurately reflect the opinion of the subjects. This may be particularly true of Section C in which specific problems were identified. An attempt was made, generally, to alleviate the problem by allowing additional space for answers to be inserted.

Representativeness may also be a difficulty. That is, the respondents may have been those who were keenly interested in the subject or those who had additional time to answer the

questionnaire, etc. It can only be stressed that a significant number of respondents completed the questionnaire; over 55% of the total were returned. That fact certainly limits the possibility of a lack of representativeness.

Representativeness may also be a problem with respect to who was included as being an appropriate respondent. Obviously, defence counsel could have been included. However, it was felt that identification of those counsel who might have considerable experience with criminal law and the subject at hand might be difficult. Second, there were economic and logistical considerations. That is, there was concern the study might become too large and cumbersome as well as excessively costly.

Overall, it is felt the groups to whom questionnaires were sent constitute the most appropriate ones to be surveyed. In addition, it is felt the individuals who responded did not, overall, represent a biased segment of the total population.

Summary of the Questionnaire Results

The use of the questionnaire was an attempt to discern if there was dissatisfaction with enforcement of probation. The questionnaire was administered in the Summer of 1982. There appears to be nothing unusual about that particular time. Some administrative changes may have been made prior to, or after, that time. However, the law did not change. In any event, overall responses to the questionnaire indicate there is, or at

least was, a great deal of dissatisfaction with the level of enforcement.

The questionnaire also tried to determine what the nature of the problems were. The objective responses and the subjective commentary indicate two major problem areas: administrative and legal. It is also apparent those problems are, at least sometimes, interrelated. The responses indicate that both administrative and legislative change is desired.

Amongst other things, the questionnaire attempted to determine if respondents felt probation was an alternative to incarceration. While the majority indicated it was, a large number of respondents indicated it was not. It is submitted that it is possible significant social and economic costs may result from such attitudes. Simply put, if many of the respondents to the questionnaire are of the opinion probation usually cannot be enforced and it is not an alternative to incarceration, then it is likely sentences could be affected in terms of probation not being considered in many cases and incarceration imposed instead.

A more specific explanation is that judges sentence and Crown counsel and probation officers often affect sentences through submissions made to the court. Thus, if a recidivist offender has a presentence report prepared by a probation officer who is disillusioned with probation in terms of enforcing compliance, that probation officer may be less likely to support probation as a viable disposition. There may be a

similar situation with many Crown counsel. Most important, a judge who has had several years of experience and is aware that he has suspended the passing of sentence in, perhaps, hundreds of cases, without seeing even one revocation proceeding, might also be disillusioned.

Even if a judge does not accept probation as a means of control, but, rather, as a means of rehabilitation, he will likely realize that probation conditions must be complied with if the probation is to assist in rehabilitation. For instance, a probationer must attend at an alcoholism facility before the facility might have a chance of being effective. Some observers might deny this argument with the simple analogy: "You can lead a horse to water, but you can't make it drink". However, it is certain the horse may not have a chance to drink if it is not lead to water in the first place.

The results of the questionnaire indicate there are a significant number of individuals who appear dissatisfied with probation enforcement. In view of the present statute law, the interpretation of same in case law, and, perhaps to a lesser degree, the administrative process, it would be small wonder if disillusionment does not become a growing phenomenon.

The Interview

During the process of traveling to various locations in the Province, in order to acquire court registry data, the researcher also had occasion to visit various probation offices. It was decided the visits would provide an opportunity to interview probation officers regarding the subject of enforcement. A standard set of questions was used and appears in Appendix G. Twenty-one probation officers were interviewed. Some of the quantified responses will be presented here with interpretation and explanation.

The probation officers were asked to estimate the number of probationers on their present caseload who had breached their probation orders at least once. There was no distinction made between failure to comply with a condition and breach of probation through commission of a subsequent offence. The responses ranged from 10% to 93%. The mean response was 45%; the median was 50%; and the mode was 50%. It would appear that probation officers estimate approximately half of a caseload involves probationers who breach their respective orders at least once.

The probation officers were asked to estimate the actual number of probationers who were "breached" during a two year period. The range was from zero to 125. The mean was 21.4; the median was 12; and the mode was 12. The outstanding estimate of 125 increased the mean considerably. Without it, the mean would

have approximated 16. If the adjusted mean of 16 is accepted as a measure of central tendency, the monthly breach rate would be .066.

The number of probationers a probation officer would supervise in any given period would be difficult to calculate. Varying length of probation orders, transfers-in, transfers-out, new probation orders, and expiration of orders are all factors which would offset same. The current monthly average caseload in the New Westminster probation office is over 70 for the field probation officers dealing with adult cases. It will be assumed, conservatively, that 50 probationers would approximate an average monthly caseload, in most probation offices, over two years ago. A very crude estimate can now be made with respect to the difference between the number of probationers who breach their orders and the number charged. If the median number of breaches of 50% is accepted, that would mean 25 probationers breached their probation in a two year period. This is vastly different from the mean of 16 charges estimated for a two year period. It must be remembered the figure of 25 probationers is based on an assumption of a static caseload over a two year period; a conservative figure indeed.

It is recognized that many of the interview questions are only estimates made in a very casual and spontaneous manner. In addition, many of the questions pertained to areas addressed by the questionnaire. For these reasons, only three of the remaining interview questions will be discussed. With respect to

the questions which will not be discussed, it is sufficient to indicate that many of the probation officers expressed concerns regarding legal technicalities and communications with Crown counsel and the judiciary.

The three questions which will be discussed relate to revocation of the suspended passing of sentence. First, probation officers were asked if they had attempted to have a suspended sentence revoked in the last two years. Fifteen responded "No" and six responded "Yes". Second, they were asked if they had attempted a suspended sentence revocation in their career. Eleven responded "No" and ten responded "Yes". Third, they were asked if they had personally observed a revocation of the suspended passing of sentence; nine said "Yes" and eleven said "No" and two were "Unsure".

The interviews were not intended to constitute a major part of the research and were initiated as opportunities for interviews came available. The probation officers were asked questions for which they should have received more time to answer and for which preparation would have been appropriate. The interviews were done, essentially, for the purpose of determining, at a general level, if there were problems perceived and to what extent enforcement action is taken by individual probation officers. It was also hoped there would be some indication of the extent of action not taken.

Overall, the results of the interview indicate many breaches of probation are likely not proceeded with and that revocation proceedings are rare.

Summary

The questionnaire data and the results of the interviews with probation officers indicate there are problems with enforcement of probation in the opinion of the majority of the respondents. Overall, the results of the research presented in this chapter can be delineated as follows:

- The questionnaire respondents do not appear to be an exceptional group in terms of their attitudes towards enforcement or with respect to demographic variables.
- The majority of respondents hold the view that probation should be enforced and that it is not being enforced adequately.
- The interview and questionnaire responses generally indicate the likelihood that a significant number of offences are not detected or not reported.
- Most respondents are of the opinion probation is used as an alternative to incarceration but there could be significantly greater use of probation, as an alternative, if there was better enforcement.
- The majority of respondents feel legislative change is desirable.

NOTES

1. The variation only occurs because of differences in occupation. For example, probation officers were asked: "Number of years employed as a probation officer?" Crown counsel were asked "Number of years employed as Crown counsel?"

2. The decision to delete Section C was made under advisement of the former chief provincial court judge L.S. Goulet. Questions in Section C are relatively specific regarding the efficiency and ability of Crown counsel and probation officers and it was felt that many members of the judiciary would not wish to be placed in a critical position of that nature.

3. All of the questions and responses are subjective in the sense that respondent opinion was requested. However, for purposes of this thesis, the check mark responses have been designated 'objective' and the open-ended responses have been designated 'subjective'. The 'objective' designation results from the fact the responses were provided by the researcher as opposed to the respondents.

4. The respondent would appear to be commenting on the effects of R. v. Paquette, supra, regarding revocation of the suspended passing of sentence. In R. v. Paquette, the judge hearing the appeal held that an application for revocation could not be made effective after a probation order had expired. The decision was made notwithstanding the fact that Belzil, J. noted:

> "The Crown's main argument is that if the ruling of the learned Provincial Judge is accepted a probationer will have the power to frustrate an application by the Crown under S.664(4) by stalling, hiding or by whatever other means available to him delaying the breach of probation proceedings or the proceedings on the criminal charge constituting such breach until the probation period has expired".

VII. THE REMAINING RESEARCH

The perceptions of involved persons regarding the state of affairs in probation enforcement were presented in Chapter VI. The questionnaire, in particular, dealt with, inter alia, the perceived level of enforcement or lack of it. It is quite possible there was misinterpretation by the respondents. They may have had, for example, an exaggerated sense of a lack of enforcement; their perceptions may not have represented reality. Therefore, other research was conducted regarding the actual level of enforcement. That research was accomplished through a number of means: Overall research of court records, sampling court records for specific case research, sampling probation orders, and research of official data. The methodology, results, and interpretation of that research will be presented in this chapter.

Court Records

It has already been mentioned that the British Columbia Corrections Branch does not collect or quantify data regarding the level of enforcement of probation. That is, there is no direct way of determining how many charges of breach of probation were considered appropriate but were not proceeded with by probation officers; how many charges of breach of

probation were proceeded with but did not result in conviction; and how many revocations were considered appropriate, and were proceeded with, but nothing occurred. One possible method of determining these factors would have been to sample individual probation files. That would have been problematic for several reasons. First, the probation file may not have been accurate. Second, the required information may not have been in the file. Third, access to the files would have been difficult and cumbersome. Fourth, quantification and interpretation may have been difficult because probation running records have a significant subjective component. Therefore, it was decided the best method of determining the level of convictions for breach of probation and the level of revocations would be to examine court docket information.

Examination of court dockets does not provide information about possible charges or revocations which were not proceeded with by probation officers or Crown counsel. Those factors are impossible to determine from the recorded material. Crown counsel offices do not keep quantifiable records and probation records, as noted, are subject to interpretation problems. That is, the reasons for not proceeding in certain cases might only exist in the memory of the Crown counsel and probation officers dealing with those cases.

Examination of court data has one distinct advantage. It can be safely assumed most of the actions taken to the court level were processed by probation officers and approved by Crown

counsel. That is, action was considered appropriate and it is likely the respective parties felt the legal requirements could be sufficiently met and the result could be a conviction or revocation as the case may be. In other words, it is likely only the best cases, from a legal point of view, would result in court action. Furthermore, it is likely the conviction rate will, at least partially, reflect purely legal difficulties and administrative difficulties related to problems with the legislation.

Ten court registries were researched; a small registry and a large registry in each corrections region in the Province. The registries and the regions are: Kamloops and Merritt in the Interior Region; Prince George and Vanderhoof in the Northern Region; Nanaimo and Courtenay in the Vancouver Island Region; Burnaby and Matsqui in the Fraser Region; and Vancouver and Squamish in the Vancouver Region. The locations were basically selected for economic reasons; the ease and cost of travel. Time constraints were also a concern. Therefore, there was no random selection of location. On the other hand, there is no reason to believe these locations are unusual in any respect.

The time period studied was from October 1, 1980 to October 1, 1982. There is no reason to believe this was an extraordinary time period. The two year period was selected in order to provide a longitudinal component to the study and to minimize, to some extent, the possibility of historical effect. The time period chosen was selected because the questionnaires were to be

returned in, approximately, October 1982. Therefore, the registry research involved the two years proceeding that date in order to eliminate most of the possible effects of the questionnaire on court sentencing patterns.

The court registry research for the smaller centres and Kamloops, Prince George, and Nanaimo consisted of checking court dockets for every court day in the above noted period.[1] The results, then, are subject to input error as well as research error. For example, the compiler of the court list may not have indicated the name of the accused's counsel and the result of the matter may have been incorrectly catergorized to an accused appearing without counsel. Of course, the researcher may have missed the name of counsel. In any event, it is believed the court lists are reasonably accurate in most cases.

Table 27 indicates the results of the court registry research in the smaller centres. For the most part, the labelling is self-explanatory. It is readily apparent more people are convicted of Section 666 than are not convicted; approximately 62% are convicted. It must be remembered, however, that those are charges which have been approved by Crown counsel and they are charges which have arisen from alleged failure to comply with a sentence of the court. Just imagine if only 62% of the people who were alleged to have not complied with gaol sentences (escapees) were convicted.

Table 28 indicates the results of the court docket research in the larger centres. The total number of people convicted was

Table 27

Dispositions of Small Community Court Registries
During the Period October 1, 1980 to October 1, 1982

	With Counsel	Without Counsel	Total	Conv. Rate
Matsqui:				
Guilty Pleas	13	23	36	
Found Guilty	1	0	1	
Total Convictions	14	23	37	
Stay of Proceedings	27	14	41	
Dismissed	1	0	1	2.3%*
Total Not Convicted	28	14	42	46.8%**
Squamish:				
Guilty Pleas	4	13	17	
Found Guilty	0	2	2	
Total Convictions	4	15	19	
Stay of Proceedings	4	0	4	
Dismissed	1	2	3	22.2%*
Total Not Convicted	5	2	7	73.0%**
Courtenay:				
Guilty Pleas	30	14	44	
Found Guilty	2	1	3	
Total Convictions	32	15	47	
Stay of Proceedings	12	2	14	
Dismissed	2	0	2	15.8%*
Total Not Convicted	14	2	16	74.6%**

Table 27 (continued)

	With Counsel	Without Counsel	Total	Conv. Rate
Vanderhoof:				
Guilty Pleas	3	9	12	
Found Guilty	0	0	0	
Total Convictions	3	9	12	
Stay of Proceedings	6	0	6	
Dismissed	2	0	2	
Withdrawn	2	0	2	0.0%*
Total Not Convicted	10	0	10	54.5%**
Merritt:				
Guilty Pleas	5	6	11	
Found Guilty	0	0	0	
Total Convictions	5	6	11	
Stay of Proceedings	4	0	4	
Dismissed	0	0	0	0.0%*
Total Not Convicted	4	0	4	73.3%**

Average (mean) conviction rate with guilty pleas included = 64.5%
Average (mean) conviction rate with guilty pleas not included = 8.1%

* Conviction rate when guilty pleas not included.
** Conviction rate when guilty pleas included.

770 and the total number not convicted was 670. Therefore, approximately 54% of accused persons were convicted of breach of probation in larger centres. The discrepancy between the larger centres and smaller centres may be due to a number of factors. For example, there may be less legal aid counsel available in

smaller centres and identity of the accused may not be especially problematic. With respect to availability of counsel, it should be noted that in each of the smaller centres, with the exception of Courtenay, more people pleaded guilty without counsel than with counsel. There were time constraints involved in gathering this data and, thus, some misinterpretation may have resulted. It has already been mentioned that the input of data may be somewhat problematic. For instance, the name of defence counsel may have been omitted on occasion and results erroneously categorized to 'without counsel'.

The data for Vancouver and Burnaby was acquired from computerized court docket printouts. Once again, input problems and researcher interpretation problems may have been present. This data was, however, much less difficult to interpret.

Due to the possibility of researcher error, it was decided the data indicated in Tables 27 and 28 should be compared with official court registry data. Thus, official summaries were requested and acquired from the court administration branch of the Ministry of the Attorney General. It was provided for calendar years and is not, therefore, directly comparable to the court docket research. The official data is for the calendar years 1981 and 1982 as opposed to the period October 1, 1980 to October 1, 1982. Nevertheless, there is reason to believe a general comparison can be made. Table 29 provides a summary of the official court registry data provided by the court administration branch.

Table 28

Dispositions of Large Community Court Registries
During the Period October 1, 1980 to October 1, 1982

	With Counsel	Without Counsel	Total	Conv. Rate
Burnaby:				
Guilty pleas	18	12	30	
Found Guilty	1	0	1	
Total Convictions	19	12	31	
Stay of Proceedings	37	12	49	
Dismissed	9	1	10	
Quashed	2	0	2	
Withdrawn	13	0	13	
Nullity	2	0	2	1.3%*
Total Not Convicted	53	13	76	28.9%**
Vancouver:				
Guilty pleas	269	72	341	
Found Guilty	67	1	68	
Total Convictions	336	73	409	
Stay of Proceedings	207	55	262	
Dismissed	98	1	99	
Quashed	4	0	4	
Withdrawn	3	0	3	
Nullity	3	0	3	15.5%*
Total Not Convicted	315	56	371	52.4%**
Nanaimo:				
Guilty pleas	64	43	107	
Found Guilty	0	4	4	
Total Convictions	64	47	111	
Stay of Proceedings	81	14	95	
Dismissed	3	0	3	3.9%*
Total Not Convicted	84	14	98	53.1%**

Table 28 (continued)

	With Counsel	Without Counsel	Total	Conv. Rate
Prince George:				
Guilty pleas	76	100	176	
Found Guilty	1	0	1	
Total Convictions	77	100	177	
Stay of Proceedings	60	22	82	
Dismissed	5	0	5	1.1%*
Total Not Convicted	65	22	87	67.0%**
Kamloops***				
Guilty pleas	23	18	41	
Found Guilty	1	0	1	
Total Convictions	24	18	42	
Stay of Proceedings	29	4	33	
Dismissed	3	0	3	
Withdrawn	2	0	2	2.6%*
Total Not Convicted	34	4	38	52.5%**

Average (mean) conviction rate with guilty pleas included = 50.8%
Average (mean) conviction rate with guilty pleas not included = 4.9%

* Conviction rate when guilty pleas not included
** Conviction rate when guilty pleas included
*** (February 1, 1981 to October 1, 1982)

Table 29

Official Conviction Rate for Small and Large Community Court Registries during the Period January 1, 1981 through December 31, 1982

	Total Convicted	Total Not Convicted	Conv. Rate
*Matsqui	37	50	43%
*Squamish	16	8	67%
*Courtenay	55	11	83%
*Vanderhoof	15	5	75%
*Merritt	7	3	70%
**Burnaby	40	88	31%
**Vancouver	474	490	49%
**Nanaimo	97	56	63%
**Prince George	184	120	60%
**Kamloops	58	56	51%
Total	983	887	52.6%
Total for Province	2,603	2,038	56%

* Small community overall mean conviction rate = 67.6%
** Large community overall mean conviction rate = 50.8%

There is some discrepancy between the conviction rate indicated by the official court data and the conviction rate determined by the researcher for the individual communities. The researcher is not able to account for the difference other than through input error, research error, or the slight difference in the time period.[2] In any event, the mean rates do not vary a great deal for the small communities; 67.6% for the official data and 64.5% for the research data. The mean rate does not vary at all for the larger communities; it is 50.8% in both cases. In view of the closeness of the research findings with

the official data, there is reason to believe the official province-wide conviction rate of 56% is reasonably accurate.

It may be useful to compare the conviction rate for breach of probation, from official provincial summary data, with that of other offences. A comparison can then be made with respect to findings of guilt for other offences with findings of guilt for breach of probation. For the two year period, 1981 and 1982, 6,820 accused pleaded not guilty to assault and 5,635 pleaded not guilty to break and enter. Three hundred and fifty-one and 1,004, respectively, were committed for trial. It is the number found guilty in provincial court which is important for comparison purposes since breach of probation is only dealt with in provincial court. Therefore, the figures must be reduced accordingly to 6,469 for assault and 4,631 for break and enter. Two thousand and thirty-one accused were found guilty of assault and 898 were convicted of break and enter; 31.4% and 19.4% respectively. Two thousand, three hundred and sixty-two people pleaded not guilty to breach of probation in the same period and 361 were found guilty; 15.3% of those who pleaded not guilty were convicted. Therefore, the conviction rate for breach of probation is approximately half of the conviction rate for assault and considerably less than break and enter.

Whether the overall conviction rate, from official sources, of 56%, is used or the percentage of not guilty pleas resulting in conviction, 15.3%, is used, the results must be placed in perspective.[3] Diagram 1 illustrates the process of break and

enter victims' cases through three major stages in the criminal justice system.[4]

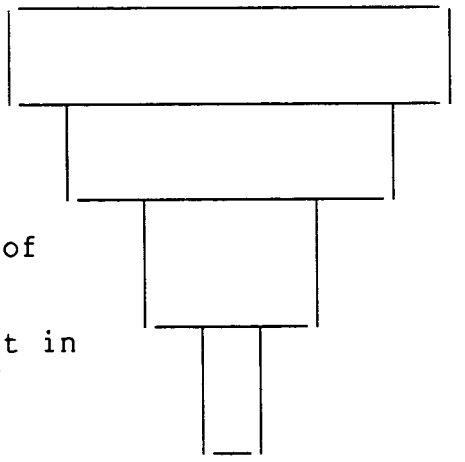
Diagram 1

All break and enters (estimated by survey of victims)

3/5 of all break and enters are reported to police

1/10 of all break and enters are eventually cleared by charge (1/6 of all reported to police

1/17 of all break and enters result in convictions (3/5 of all cleared by charge)



It has already been submitted that a substantial number of breach of probation charges may not be processed by probation officers even when they are aware of the breach and a number of charges may not be processed by Crown counsel. Inter alia, the legal complexity of proving the charge is likely a factor in the process. It is not the purpose here to make a comparison between break and enter matters which may not be reported to the police, and so on, and breach of probation. The purpose is to place the two types of conviction rates, the rate for breach of probation and the rate for break and enter, in a criminal justice perspective. Perhaps the best way of doing so is to think of a singular case of break and enter and a singular case of breach of probation.

If a person commits a break and enter, they would have a one in seventeen or 5.9% chance of being convicted according to diagram 1. Apparently, the data are not available with respect to how many persons convicted of break and enter are sentenced to imprisonment but it has been estimated to be 2.5% (Selected Trends, 1981, p.10). It would be fair to assume that at least that percentage would be placed on probation but it is likely a far greater percentage.

In British Columbia, in the calendar year 1980, approximately 720 persons, convicted of break and enter, received a disposition involving probation. Those admitted for break and enter represented 6.4% of all probation admissions.[5] If all of those probationers were alleged to have breached their respective probation orders and pleaded not guilty, a crude estimate of the number convicted would be 15.3% or 110. If the overall conviction rate were used, 56% or 403 would be convicted. For the individual, that would mean a one in six chance of being convicted of alleged non-compliance with the sentence provided he pleaded not guilty; and a one in two chance of being convicted if he was charged with not complying.

Not all probationers breach their probation orders. Nevertheless, it is submitted that, of those who do, a significant percentage would not be convicted. Diagram one could, therefore, be even further narrowed in terms of those individuals who are convicted of break and enter but receive no actual consequence.[6]

It can be argued that the overall conviction rate for breach of probation, 56%, is not excessively low whereas 15.3% is. However, it can be countered that even the higher figure might be excessively low in relation to the number of probationers. That is, perhaps the absolute numbers are of the greatest importance. The number of official charges for breach of probation, in the Calendar year 1980, was 1,742. Convicted persons numbered 1,009 or 58%. That is somewhat higher than the provincial average for the following two year period. In the fiscal year 1980-81 (April 1, 1980 to March 31, 1981) there were 11,247 admissions to adult probation. Unfortunately, the total number of probationers in that year is not available. It is submitted that figure could be considerably higher than 11,247. In any event, the total number of charges in the calendar year 1980 represents only 15.5% of the admissions to probation in the fiscal year 1980-81.

The figure, 15.5%, offers further support for the argument that a significant number of unknown or unprocessed offences exist. It will be recalled that the few studies in Canada which have looked into the success of probation, indicate a much higher number of failures; one of the more recent studies estimated a failure rate of 32.7% (Renner, 1978, p.9-2). There will be further discussion of the unknown number of failures later in this chapter. The point to be made here is that the number of charges (official failures) has to be considered a very low figure in absolute terms as well as in relation to the total number of persons on probation.

File Data

So far, this chapter has dealt only with the level of convictions for the offence of breach of probation in a general sense. Specific file information has not been discussed. Before doing so, it is necessary to explain the purpose of examining specific files and the methodology involved.

There is a vast difference between the percentage of people convicted when guilty pleas are included in the calculation and when they are not; 56% as opposed to 15.3%. The latter figure is obviously low. An argument might be made that the 56% figure is more valid in that a significant number of guilty pleas indicates defending a charge of breach of probation is not particularly simple. However, there are many possible reasons for a high level of guilty pleas. First, defences to the charge are highly technical and many accused persons might not think it worthwhile to acquire counsel as the offence appears obvious. That is, many accused persons might plead guilty as they are ignorant of the defences available. For example, a person who did not report to a probation officer might logically conclude that such an omission is obvious. Second, some individuals might plead guilty because counsel are not readily available. Third, guilty pleas might be entered because the accused has little to lose. That is, the offender may already be incarcerated and feel

that a guilty plea may only result in a concurrent sentence. Fourth, plea bargaining arrangements might influence the number of guilty pleas. Many breach of probation charges might occur because of subsequent offences. Therefore, the individual might plead guilty to a breach of probation charge if another charge is not proceeded with. Last, a person might plead guilty because the Crown has a very good case. With respect to that point, it must be remembered that not all breaches of probation involve omissions which are technical violations of probation orders.

It is submitted that other court dispositions should also be examined closely. For instance, a stay of proceedings might be entered for a breach of probation charge as a result of a plea bargaining arrangement. That is, a stay may have been entered as a result of a person's guilty plea to another charge. A stay may also be entered as a result of the Crown's inability to prove the offence.

The latter point is most important for the purposes of this thesis. It has been argued that breach of probation charges, of the type most often processed by probation officers, are usually omissions and difficult for Crown counsel to prove. Thus, examination of court files should indicate a significant number of stays of proceedings for such charges. A significant number of that type should also result in dismissals or acquittals. Conversely, of the more easily proved breach of probation charges (acts), it should be found that a significantly higher number result in guilty pleas and/or findings of guilt.

Methodology

Examination of individual files was performed in Vancouver and Burnaby. Both of these locations were accessible to the researcher on a long term basis. Additionally, because they are in a metropolitan area, it was decided a larger number of files with a wider variety of probation conditions would be available and thereby increase the validity of the samples.

Court files were selected randomly. That is, each case was numbered and the entire range of numbers was placed on individual tags and placed in a hat.[7] The numbers were selected blindly from the hat. The case file numbers relating to the selected files were then ascertained and the files were retrieved.

Guilty Pleas

Some further explanation is necessary before relating the results of the research. Several reasons why a person might plead guilty were offered in the beginning of this section. That list is not exhaustive. It is also important to note that many of those reasons are not verifiable and are speculative. For instance, an accused's ignorance of technical defences cannot be inferred simply from guilty pleas. Similarly, plea bargaining

cannot be inferred from a guilty plea for one offence and a stay of proceedings in another. In other words, any such interpretation must involve a great deal of caution.

The reasons for guilty pleas are likely not mutually exclusive. For example, a person might plead guilty because she is unaware of legal aid, is unable to afford a lawyer, feels she is guilty, and thinks there is no chance of being acquitted.

Table 30 provides the overall results of the Vancouver court file sample of guilty pleas. Thirty-seven cases were selected. The results of Table 30 appear to support the position that guilty pleas are likely to occur for those breaches which are least difficult to prove and most difficult to defend. The "acts" referred to are those matters in which somebody observed the accused doing something prohibited by a probation order and, thus, there is a witness available who can identify the accused. Most of the "acts" involved the offender's failure to stay out of a certain area or place and the observation of that person, usually by a police officer, in that prohibited place.

Of the 14 omissions (37.8% of sample), seven did not involve pleading to another offence or stays of proceedings with respect to other offences. That is, those factors may not have affected the decision to plead guilty. Four of that seven were without counsel. Three of the remaining seven omissions involved stays of proceedings regarding other charges. In one of the cases, four other counts of breach of probation were stayed and two of those counts were "acts". The remaining four cases all

Table 30

Sample of Guilty Pleas - Vancouver Provincial Court
October 1, 1980 to October 1, 1982

	Stay of Proceedings on Other Charges	Act	Omission	Person who Processed Charge: Probation Officer	Police Officer	** Waived In	Subsequent Offence
Without Counsel*		2	4	3	5	2	0
With Counsel	10	14	10	16	13	2	3
Total	10	16	14	19	18	4	3

* There is no way of determining precisely if the accused had counsel. For example, the accused may have been advised by counsel but appeared in court alone and, therefore, the persons file would not indicate he had counsel.

** A "waived in" charge is one brought from another jurisdiction subject to the accused undertaking to plead guilty to it.

involved pleading to other offences. All of them involved counsel and three of the four resulted in sentences running concurrent to the sentence for the other offences.

Breach of probation charges for subsequent offences are also offences for which documentation and witnesses are readily available. They can also be classified as offences to which accused are most likely to plead guilty.

There were four charges waived in and a person is required to plead guilty under those circumstances. That is, in order to bring a charge from another jurisdiction, the accused undertakes to plead guilty.

There is reason to believe the sample of guilty pleas is reasonably accurate. For the two year period October 1, 1980 to October 1, 1982, the total number of guilty pleas with counsel was 269 and the total number of guilty pleas without counsel was 72; a ratio of 3.74 to one. The ratio for the sample is 4.6 to one (also see note 8).

Found Guilty

If breach of probation is a difficult charge to prove when there are omissions involved, it can be expected that those charges which result in a finding of guilt at trial will be those which are the least difficult for Crown counsel to prove. That is, we would expect a significant number of "acts" to be included as well as other factors which may contribute to a lesser difficulty of proof.

Table 31 illustrates the results of a random sample of 31 "found guilty" cases in the Vancouver provincial court. The categories stay of proceedings and waived in are not applicable. The sample size was low because of time constraints.

A large percentage (42%) of the cases involved "acts" which were readily observable by the police. One case involved contact

Table 31

Sample of Offenders Found Guilty - Vancouver Provincial Court - October 1, 1980 to October 1, 1982

	Subsequent Offence	Act	Omission	Person Who Processed Charge: Probation Officer	Person Who Processed Charge: Police Officer
Without Counsel			1	1	
With Counsel	2	13	15	15	15
Total	2	13	16	16	15

with a victim when there was a prohibition from doing so. Another case involved the accused being found in a liquor store when prohibited from same. The remainder involved police officers' observing offenders in geographical areas prohibited by probation orders. This finding also supports the proposition that the least difficult charges to prosecute are the ones most likely to result in conviction. Of course, subsequent offences should also be so categorized.

Most of the charges processed by probation officers were omissions and related to failure to report. However, most of those matters appear to be of the type which has a lesser degree of difficulty in terms of proof. For example, most of the failures to report involved only one witness; the probation

officer to whom the case was assigned. In addition, in each case, the person had been reporting to a probation officer and did not attend at a specific time on a later date. If those persons had never reported to a probation officer or were transferred to a probation officer in another area, one wonders if a finding of guilt would have occurred. In terms of evidence, it is interesting to note the one person who appeared without counsel had orally, and in writing, advised the probation officer he had no intention of reporting or being under supervision. Evidence of that nature is likely available in very few cases.

Dismissals

The overall hypothesis of the thesis would be supported by a finding that most dismissals involved breach of probation charges which have been presented as the most difficult to prove. For example, it would be expected that a proportionately higher number of "omissions" would be involved. Table 32 illustrates the results of a sample of 30 cases of the Vancouver Provincial Court which resulted in dismissals.

Only six of 30 charges which were dismissed were "acts". There are no exact reasons for the dismissals provided in the court files. However, one of the "acts" alleged no contact with the victim when that was prohibited by the probation order and an indication in the file was that the victim did not attend

Table 32

Sample of Dismissals - Vancouver Provincial Court - October 1, 1980 to October 1, 1982

	Subsequent Offence	Act	Omission	Person Who Processed Charge: Probation Officer	Person Who Processed Charge: Police Officer
Without Counsel			1		1
With Counsel		6	23	13	16
Total	0	6	24	13	17

court for the breach of probation trial. Thus, proof of contact could not be made.

A large majority (80%) of the charges resulting in dismissal involved omissions. Thirteen of the 24 were for failing to pay resitution, seven were for failure to report, and three were for failure to complete community work service. One involved failure to attend at a narcotic addiction control centre. Any of the reasons for failure to convict offered in earlier chapters may have been operative, i.e., failure to identify the accused, lack of wilfulness, etc. It may be of interest to note the total restitution (compensation) not paid was in excess of $5,000.

Stays of Proceedings

The last sample taken in Vancouver was for the stays of proceedings. Thirty cases were randomly selected and that many files were researched. It is submitted that those charges which are most difficult to prove would represent a significant proportion of the total. In addition, it could be expected that at least some of the stays of proceedings may be indicative of plea bargaining arrangements. Table 33 illustrates the results of the sample.

Table 33 indicates that omissions are stayed more often than "acts". This further supports the contention that the more difficult charges to prove are not dealt with by the courts. In addition, it would appear that a significant number of stays of proceedings are related to probationers pleading guilty to other matters, i.e., plea bargaining is involved. That is, guilty pleas for subsequent offences may have resulted in stays of proceedings for breach matters.

According to official data, for the ten communities studied (see Table 29), Vancouver Provincial court dealt with 964 charges of breach during the period January 1, 1981 to December 31, 1982. That is slightly more than the other communities combined (906 charges). It is submitted the Vancouver conviction rate would, then, significantly effect the province-wide conviction rate. In view of that likelihood, it is important to calculate the Vancouver conviction rate when "acts" are deleted

Table 33

Sample of Stays of Proceedings - Vancouver Provincial Court - October 1, 1980 to October 1, 1982

	Subsequent Offence	Act	Omission	Person Who Processed Charge: Probation Officer	Person Who Processed Charge: Police Officer
Without Counsel	1	0	5	1	5
With Counsel	9	1	14	16	7
Total	10	1	19	17*	12

* one of the charges involved a private information sworn by a person other than a police officer or probation officer.

from the calculation.

The above noted calculation is appropriate because relatively few probation orders, from other jurisdictions, were found to involve "acts" such as entering a certain area. For example, only three "acts" were found in 76 files sampled in Burnaby. That is approximately 4% of the Burnaby sample cases.

Approximately 28% (36 out of 128) of the Vancouver cases sampled involved "acts". The overall conviction rate, based on the samples, is 53% and the overall conviction rate, without "acts", is 42.4%. Therefore, notwithstanding the disproportionate sample sizes, it would appear the Vancouver

conviction rate, determined from official data, may be somewhat misleading when compared with conviction rates for other communities.[8]

The Case in Burnaby

The conviction rate in Vancouver, with and without guilty pleas, is very close to the provincial average. Burnaby, which is also in a large metropolitan area, has a conviction rate of approximately 28.9% when guilty pleas are included in the calculation and only 1.3% when they are not considered.[9] It was felt that examination of the Burnaby files might, therefore, be of interest to the study.

Table 34 presents the results of researching all of the "guilty plea" files in Burnaby for the period October 1, 1980 to October 1, 1982.

Table 34 indicates there were 31 guilty pleas in Burnaby during the period October 1, 1980 to October 1, 1982. The results of Table 34 support the contention that the charges most easily defended and, conversely, most difficult to prove, are those least likely to result in guilty pleas. Charges involving omissions and for which the accused was represented by counsel, comprised only 16% of the total number of guilty pleas. The contention that breach of probation charges are technical is supported by the proportionately larger number of guilty pleas without counsel. The relatively large number of charges waived

Table 34

Sample of Guilty Pleas - Burnaby Provincial Court
October 1, 1980 to October 1, 1982

	Stay of Proceedings on Other Charges	Act	Omission	Person who Processed Charge Probation Officer	Police Officer	Waived In	Subsquent Offence
Without Counsel			11	12	0	1	1
With Counsel	1	1	5	6	2	10	2
Total	1	1	16	18	2	11*	3

* It was not possible to determine, with precision, who processed the waived in matters; a probation officer or police officer.

in might be explained by the fact Burnaby Provincial Court has within its jurisdiction the Lower Mainland Regional Correctional Centre. Persons already incarcerated might waive charges in order to clear them up and with the hope of a concurrent sentence.

There was only one person found guilty at trial in Burnaby in the two year period October 1, 1980 to October 1, 1982. That person was originally convicted of driving under suspension and was placed on probation with the sole condition that he was not to occupy the driver's seat of a motor vehicle. He was found in

just that position by a police officer; he was caught in the act. Therefore, not even the fact he had counsel was of much assistance in preventing conviction. However, it may have been helpful to have counsel at sentencing as a conditional discharge was imposed.

There were 48 stays of proceedings in Burnaby in the research period. Thirty-three of the cases were sampled. Table 35 illustrates the results of the sample.

Fifteen of the omissions were for failing to report. Six were for failing to do community work service. Four involved failure to pay restitution amounting to $1,065.25. The remainder were for failure to attend at a rehabilitation facility, attend at a driver's education course, and inform a probation officer of an address change. As was the case in Vancouver, most of the stays of proceedings were omissions and involved the accused having counsel. This is further evidence that the charges laid by probation officers will be the ones least likely to be proceeded with.

Eleven charges were dismissed in the two year period in Burnaby Provincial Court. Six of them were for failure to report; three were for failure to do community work service; one was for failure to attend at alcohol counselling; and one was for failure to pay restitution. All of these matters were omissions and all, but one, were defended by counsel.

Table 35

Sample of Stays of Proceedings - Burnaby Provincial Court - October 1, 1980 to October 1, 1982

	Subsequent Offence	Act	Omission	Person Who Processed Charge: Probation Officer	Person Who Processed Charge: Police Officer
Without Counsel	0	0	5	5	0
With Counsel	4	1	23	27	1
Total	4	1	28	32	1

Sentences for Breach of Probation

Vancouver had more breach of probation charges than the other communities combined. In addition, it has a relatively high number of provincial court judges sitting in that particular jurisdiction. Thus, it was felt that sentences for breach of probation in Vancouver would likely be most representative of the Province and would likely represent the fullest range of dispositions.

Table 36 presents the results of examining 341 dispositions of guilty pleas in Vancouver Provincial Court during the period October 1, 1980 to October 1, 1982. The dispositions are separated into six categories. There are two sub-categories for

gaol sentences as there was a large number of one day gaol sentences and it was decided these should be distinguished. The cases here are the ones for which the disposition was stated on data printouts provided by the Court Adminsitration Branch of the Attorney General's Ministry. Cases which were not clear were not included.[10]

The results of Table 36 indicate that less than half of those convicted of breach of probation actually served a custodial sentence (45.7%). The 60 persons who were sentenced to one day in gaol did not serve a day in gaol as they were in custody only long enough for the necessary paper work to be completed. In fact, they were only officially in custody and most were not actually transported to any form of custodial facility.

Certain results appear to indicate that convicted persons receive slightly more lenient treatment when they have counsel. For example, only seven persons without counsel received one day gaol sentences while 53 with counsel received such sentences. Furthermore, proportionately more of those without counsel received longer sentences (2 days to 6 months). The ratio of those with counsel to those without counsel is 3.74 to one. Therefore, if longer gaol sentences were meted out proportionately to those with counsel the figure would be 138 (3.74 x 37), rather than 119, for those with counsel who received gaol sentences longer than one day.

Table 36

Guilty Plea Dispositions - Vancouver Provincial Court - October 1, 1980 to October 1, 1982

	Other*	Prob-ation	Fine	Fine and Prob-ation	Gaol and Prob-ation	Sentenced to Gaol 1 day	Sentenced to Gaol 2 days to 6 mths.
Without Counsel	2	8	16	1	1	7	37
With Counsel	4	41	41	4	7	53	119
Total	6	49	57	5	8	60	156**

* Other includes: suspended sentence with no other disposition and absolute discharge. There were three of each.

** 45.7% of all dispositions.

Some further analysis of the dispositions is necessary. The mean gaol sentence, with counsel, was 27.8 days. The mode was one, but the second most frequent sentence was 30 days (inclusive of a one month sentence); of which there were 40.[11] The median sentence was 30 days. The maximum sentence of six months was imposed four times.

The median fine for those with counsel was under $185. The mode was $250 and the median was $200.

The mean sentence length of probation for those with counsel was 10.3 months. The mode and median were 12 months. The

important factor to note is that there were 41 further periods of probation imposed with counsel and 8 for those without counsel. The total number is 49 and it represents 14.4% of the total number of guilty pleas. This means that 14.4% of the people who pleaded guilty to breach of probation received more probation. In addition, five of the seven dispositions involving gaol followed by probation, with counsel, were one day gaol sentences followed by a mean of ten months probation. The remaining two dispositions of that type involved three months incarceration followed by six months probation in one case and one year probation in the other. There were four dispositions with counsel involving fines coupled with probation. The fines were: $40, $50, and two at $150. The respective probation periods were six months, three months, one year, and eighteen months.

The mean fine imposed upon those without counsel was $130. The mode was $100 and the median was $100. This was considerably less than the fines imposed upon those with counsel. Eight people without counsel were placed on further probation. One person, without counsel, was given one day in gaol and three months probation and another was fined $250 and placed on probation for three months. One person received a simple suspended sentence and another received an absolute discharge.

The mean gaol sentence without counsel was 24 days. The mode was 30 days and the median was 14 days. The maximum gaol penalty imposed upon a person without counsel was four months.

Therefore, in terms of gaol sentence length and most other dispositions, there appears to have been slightly greater leniency shown those without counsel.

Sixty-eight people were found guilty in Vancouver Provincial Court during the period October 1, 1980 to October 1, 1982. Table 37 presents the results of the examination of those guilty pleas in terms of dispositions. Since only one person was found guilty without counsel, that information is not included in the table.

The disposition for the person without counsel was the maximum gaol sentence of six months. That was the only maximum sentence imposed upon persons who pleaded not guilty and were found guilty. The most lengthy disposition for a person appearing with counsel was five months and that was the only disposition of that length. The next longest was two months.

The following examination pertains to persons with counsel. The mean length of gaol sentence was 25 days. The modal length was one day. The second most common disposition was 30 days. The median was 12 days. It would appear that persons who pleaded not guilty received slightly more lenient gaol sentences than those who pleaded guilty. 17.6% of those who pleaded guilty received one day gaol sentences whereas 20.8% of those who pleaded not guilty received one day gaol sentences. The mean sentence length for those with counsel and who pleaded guilty was 27.8 days.

The mean fine was $146 and the modal and median amount was $100. Thus, persons who pleaded not guilty received more lenient

Table 37

Found Guilty Dispositions - Vancouver Provincial Court
October 1, 1980 to October 1, 1982

	Other*	Prob-ation	Fine	Fine and Prob-ation	Gaol and Prob-ation	Sentenced to Gaol 1 day	Sentenced to Gaol 2 days to 6 mths.
Without Counsel	1	8	13	1	4	14	26**

* Other includes: suspended sentences with no other disposition and absolute discharge.

** 38.8% of all dispositions.

fines as well.

Eight persons who pleaded not guilty received more probation as a singular disposition. That is 12% of the total number of sentences. The mean length of probation was 12 months as was the median and the mode. These figures are comparable to the findings for those who pleaded guilty with counsel.

Four persons received gaol followed by probation sentences. However, three of the gaol sentences were for one day and those dispositions amounted to nothing more than periods of probation. The remaining individual received a 30 day gaol sentence followed by nine months probation. One person received a fine in addition to probation. The fine was $200 and the probation period was for one year. One person received an absolute discharge.

Overall, it would appear the people who pleaded not guilty received slightly more lenient sentences in most respects.

Involvement of Defence Counsel

In all of the tables dealt with so far there has been a separation with respect to the accused having counsel or appearing without counsel. The purpose was to illustrate the important role of defence counsel. It has already been mentioned that there is the likelihood of no conviction when the accused has counsel, due to the technical nature of the defences.

There are other factors resulting from the involvement of defence counsel which result in a low conviction rate and those will be examined in this section. The first factor involves defence counsel and guilty pleas. A number of factors may influence defence counsel in advising his or her client to plead guilty. Plea bargaining and simply no defence are examples.

Plea bargaining may be one of the most important factors. For example, the client may have pleaded guilty to other offences in exchange for a stay of proceedings with respect to a breach of probation charge. Another example might be a guilty plea in exchange for an undertaking by Crown counsel to not seek an incarceratory sentence. It must be noted that in the smaller communities, where overall conviction rates tend to be higher, and with the exception of Courtenay, there were more guilty

pleas without counsel than with counsel. Furthermore, in the only larger community with a conviction rate higher than the provincial average, Prince George, the number of guilty pleas without counsel exceeds the number with counsel.

A salient statistic with respect to the importance of defence counsel and the relative ease of defending many of the charges is the absolute number of people found guilty. For instance, in the ten communities studied there were only 81 persons found guilty (out of 1645 charges). If Vancouver is not included, there were only 13 people found guilty in the other nine communities (out of 865 charges and 391 "not guilty" pleas).[12] Further, it is submitted that a lay person will have great difficulty defending a charge of breach of probation since the defences tend to be technical. Therefore, self-defended findings of guilt must be discounted; at least to some degree. The number of persons who were found guilty with counsel in the nine communities, other than Vancouver, was six.

Not all legal arguments are made in the courtroom. It is submitted that it is not unusual for defence counsel to make his or her case over the telephone well before trial, or even first appearance, and often in the courthouse prior to trial. If they are effective in doing so, a stay of proceedings may be entered by Crown counsel. Therefore, perhaps the most important statistic is the number of stays of proceedings entered when defence counsel are involved. In the period October 1, 1980 to October 1, 1982, in the ten communities studied, there were 467

stays of proceedings with defence counsel involved. There were only 123 stays of proceedings without defence counsel.

It is also submitted Crown counsel must be satisfied, in the vast majority of cases, that the accused committed the offence and all the elements of the offence are present. It is testimony to the technical nature of the offence of breach of probation that such a large number of stays of proceedings had been entered. It should be noted that of the smaller communities, three out of five had no stays of proceedings entered without defence counsel involvement.

It cannot be overstated that there are a number of factors which may affect a defence counsel's decision to advise a client to take a certain action. There are a considerable number of alternative explanations for the findings of the court research in this study. Nevertheless, all of the research tends to support the argument that the offence is not easily prosecuted and is relatively easily defended if one is aware of the legal arguments.

Availability of defence counsel may be a factor in the conviction rate. This has already been noted. However, a comparison of Burnaby with Prince George may further illustrate. Burnaby had the lowest overall conviction rate of the larger communities and Prince George had the highest. Prince George had over five times as many guilty pleas with counsel but it had over eight times as many guilty pleas without counsel.

Quality of counsel may also be a factor. However, there is no available data which will allow for measure of that factor. Nevertheless, in terms of both availability and quality of counsel, it must be noted that Burnaby had a public defender program during the period under study and Prince George did not. The public defender program provides legal aid counsel who specialize in criminal law and are not retained on an ad hoc basis. Perhaps the fact that Burnaby had the lowest overall conviction rate of the ten communities is, at least partially, reflected by the availability and quality of counsel in Burnaby.

Revocation of Suspendend Sentences

Data relating to revocation of the suspended passing of sentence was not available from centralized court registry material. The data may not have been relied upon, if it was available, because many of the senior court registry workers, in the ten communities studied, had never seen a suspended passing of sentence revoked. The only data available with respect to revocations was from examination of court records in each of the ten communities.

It is not worthwhile creating a table in order to explain the revocations of the suspended passing of sentence and conditional discharge in the ten communities studied. For the period October 1, 1980 to October 1, 1982, the researcher could find only six revocations of the suspended passing of sentence

and only one revocation of a conditional discharge for all of the ten communities. The following list provides the location of the revocations, the original charge, the subsequent offence, and the sentence imposed upon revocation:

---

1. Vancouver
   - original offence theft over $200 (2 counts).
   - subsequently convicted of robbery,
   - "suspended sentence" revoked and four months incarceration imposed on each count. The four months to be served concurrently to each other and to the sentence being served for the robbery.

2. Vancouver
   - original offence theft under $200.
   - subsequently convicted of trafficking in LSD, possession of a narcotic (hashish), and theft under $200.
   - "suspended sentence" revoked and 14 days incarceration, concurrent, to sentence being served.

3. Vancouver
   - original offence wilful damage.
   - subsequent offence unknown.
   - "suspended sentence" revoked (police initiated) and seven days incarceration imposed.

4. Vancouver
   - original offence theft under $200.
   - subsequently convicted of theft under $200.
   - "conditional discharge" revoked and one day incarceration imposed.

5. Vander-Hoof
   - original offence theft over $200
   - subsequently convicted of impaired driving, possession of stolen property over $200, and breach of probation.
   - "suspended sentence" revoked and fine of $200 imposed.

6. Nanaimo
   - original offence forgery (two counts).
   - subsequent offence of breach of probation.
   - "suspended sentence" revoked and two years less one day imposed.

7. Nanaimo
   - original offence fraud and theft over $200.
   - subsequent convictions of fraud (10 counts) and fraudently obtaining food and lodging.
   - "suspended sentence" revoked and sentence

of five years incarceration (concurrent) imposed on each count. Sentence reduced on appeal to 30 months concurrent.

There is an obvious paucity of revocations. There is no point in calculating a revocation rate in relation to the number of probation orders involving suspended sentences and conditional discharges in the ten communities studied. The rate would be a small fraction of one percent; the absolute number of revocations indicates a problem situation. Further, examination of the sentences imposed indicates that only the Nanaimo sentences were substantial.

The Original Crime

So far in this chapter there has been an examination of, inter alia, the conviction rate when guilty pleas are entered and when they are not, the role of defence counsel, the form of punishment imposed upon conviction for breach of probation, and the form of punishment imposed upon revocation of the suspended passing of sentence or conditional discharge. It has been shown that only slightly more than half of the accused are convicted and less than one in six are convicted if there is a not guilty plea with respect to the offence of breach of probation. It has also been shown that only 46% of those who plead guilty to the offence are incarcerated for more than one day.

Some might respond to the foregoing findings by suggesting that a low conviction rate and a low level of consequence for

failing to comply with a probation order are appropriate because most of the people placed on probation should not have been placed on probation in the first instance. That is, the probation order was not necessary and a fine or an unsupervised suspended sentence would have been appropriate.

Any discussion in this area necessarily involves a value judgment about the seriousness of offences. That is, if seriousness of the offence is the criterion, one must decide when would it be appropriate to simply fine a person, place the person on unsupervised probation, impose a supervised probation order, or incarcerate the person. For example, a person who steals an automobile for the first time might be considered, by some, to be a person who should not be placed on probation but one who should be given a suspended sentence with no supervision or conditions other than to keep the peace and be of good behavior. For others, that person might only qualify for incarceration. The foregoing discussion illustrates the value-laden problem of what is, and what is not, an appropriate sentence. For the purposes of this study, it will be argued that indictable offences must involve something more than a simple suspended passing of sentence with no conditions other than to keep the peace and be of good behaviour. Indictable offences are, by definition, regarded as the most serious offences by legislators in our society.

The following is a list of 50 probation sentences, the courts which imposed the sentences, the crimes for which those

sentences were imposed, and the type of offence; whether it was summary, indictable, or mixed. The dispositions were randomly selected from a Vancouver probation office. It must be mentioned that the crimes noted are those indicated in the probation order. Therefore, the precise original offence is not known for each case and plea bargaining may have reduced the type of offence in terms of seriousness. For instance, an accused originally charged with assault causing bodily harm may have pleaded guilty to common assault and the common assault would be the offence stated in the probation order. In cases where the offences could have been proceeded with either by indictment or by summary conviction, they have been designated "mixed"[13]:

Sentence Imposed	Court	Original Offence	Type Of Offence
SS.+ 2 yrs. Prob.	Vancouver County	Theft over $200 ($1,100.00)	indictable
SS.+ 3 yrs. Prob.	Vancouver Provincial	Poss. Narcotic (Marijuana) for the purpose of trafficking	indictable
2 yrs. less 1 day gaol and 2 yrs. Prob.	B.C. Court of Appeal	Traff. Narcotic (heroin)	indictable
SS.+ 3 yrs. Prob.	Vancouver Provincial	1.Careless use of firearm (rifle) 2. Poss. dangerous weapon (knife)	1.mixed 2.indict.
Cond.Discharge + 6 mths. Prob.	Vancouver Provincial	Theft under $200	mixed
SS.+ 6 mths. Prob.	Vancouver Provincial	Poss. Narcotic (marijuana) (2 counts)	each count mixed

Sentence Imposed	Court	Original Offence	Type of Offence
$750 Fine + 2 yrs. Prob.	Vancouver County	1. Theft over $200 2. Wilful damage over $50.	1.Indictable 2.mixed
SS. + 2 yrs. Prob.	Vancouver County	Robbery	indictable
SS. + 2 yrs. Prob.	Vancouver Provincial	Assault causing Bodily Harm	mixed
2 yrs. less 1 day incar. + 2 yrs. Prob.	New West-Minster County	Armed Robbery (3 counts) Poss. Stolen Property over $200 and B.E.& Theft (2 counts)	each count indictable
SS. + 2 yrs. Prob.	Vancouver County	B.E. & Theft	indictable
SS. + 9 mths. Prob.	Vancouver Provincial	Theft under $200	mixed
SS. + 3 yrs. Prob.	Vancouver County	Theft over $200	indictable
SS. + 6 mths. Prob.	Vancouver Provincial	Theft under $200	mixed
SS. + 2 yrs. Prob.	Vancouver Provincial	Breach of Prob.	summary
Cond. Discharge + 12 mths. Prob.	Vancouver Provincial	Theft under $200	mixed
SS. + 18 mths. Prob.	Vancouver Provincial	Poss. Stolen Property over $200	indictable

Sentence Imposed	Court	Original Offence	Type Of Offence
$500 Fine + 18 mths. Prob.	Vancouver Provincial	Poss. Dangerous Weapon (knife)	indictable
SS. + 2 yrs. Prob.	Vancouver County	1.Forged document 2.Forged document	each count indictable
SS. + 18 mths. Prob.	Vancouver Provincial	Theft under $200	mixed
Cond. Discharge + 1 yr. Prob.	Vancouver Provincial	B.E. & Theft	indictable
21 days interm. incarceration + Prob. until time served.	Hope Provincial	Driving over .08	mixed
SS. + 1 yr. Prob.	Vancouver Provincial	Failing to appear in court	mixed
$350 fine + 2 yrs. Prob.	Vancouver County	Theft over $200	indictable
SS. + 9 mths. Prob.	Vancouver Provincial	Mischief by wilful damage	mixed
SS. + 1 yr. Prob.	Vancouver Provincial	Uttering Forged document	indictable
Cond.Discharge + 1 yr. Prob.	Vancouver Provincial	Poss. narcotic (marijuana)	mixed
Cond.Discharge + 1 yr. Prob.	Vancouver Provincial	Theft over $200	indictable
SS. + 1 yr. Prob.	Vancouver Provincial	Unlawful use of credit card (2 counts)	each count mixed
2 mths. Incarc.+ 2 yrs. Prob.	Vancouver Provincial	Theft under $200	mixed
$50 Fine + 6 mths. Prob.	Vancouver Provincial	Mischief by wilful damage	mixed

Sentence Imposed	Court	Original Offence	Type Of Offence
1 yr. gaol + 2 yrs. Prob.	Courtenay Provincial	Impaired Driving	mixed
Cond.Discharge + 6 mths. Prob.	Vancouver Provincial	Taking vehicle without owner's consent	summary
Cond.Discharge + 6 mths. Prob.	North Vancouver Provincial	Theft under $200	mixed
SS. + 1 yr. Prob.	North Vancouver Provincial	B. & E. with intent	indictable
SS. + 2 yrs. Prob.	Vancouver Provincial	Assault causing bodily harm	mixed
$100 Fine + 6 mths. Prob.	Vancouver Provincial	Driving over .08	mixed
3 mths. gaol + 2 yrs. Prob.	Vancouver Provincial	B. E. & Theft	indictable
SS. + 18 mths Prob.	Vancouver County	B. E. & Theft	indictable
SS. + 1 yr. Prob.	Vancouver Provincial	Theft under $200	mixed
Cond. Discharge + 1 yr. Prob.	Vancouver Provincial	Theft under $200	mixed
Cond. Discharge + 2 mths. Prob.	North Vancouver Provincial	Poss. narcotic (hashish)	mixed
SS. + 9 mths. Prob.	Vancouver Provincial	Common assault	summary
30 days gaol + 1 yr. Prob.	Vancouver Provincial	Theft over $200 ($2,200)	indictable
SS.+ 6 mths. Prob.	Vancouver Provincial	Mischief by wilful damage	mixed

Sentence Imposed	Court	Original Offence	Type Of Offence
$450 Fine + 2 yrs. Prob.	Delta Provincial	Assault causing bodily harm	mixed
60 days interm. incarceration + Prob. until expiration of sentence.	New Westminster County	B. E. & Theft	indictable
45 days incarceration + Prob. for 2 yrs.	Burnaby Provincial	Indecent assault	indictable
SS. + Prob. 1 yr.	Burnaby Provincial	Assault causing bodily harm	mixed
SS. + Prob. 1 yr.	Vancouver Provincial	B. E. & Theft	indictable
SS. + Prob. 2 yrs.	West Vancouver Provincial	B. E. & Theft	indictable

legend: SS = Suspended Passing of Sentence

There was a total of 60 offences in the 50 cases noted above. Twenty-nine (48%) of those were indictable offences; 28 were mixed offences; and three were summary matters. Many of the indictable offences were very serious; for example, armed robbery. Even if all of the mixed offences and summary offences were considered to be minor and not worthy of probation intervention, it is difficult to conceive of a situation where a person would be released on a simple unsupervised suspended passing of sentence for most indictable offences, particularly armed robbery and break and enter. On the other hand, it is

difficult to justify the incarceration of, perhaps, a young first offender who commits a break and enter. In any event, the cogent point is that for indictable offences probation supervision is justified in the sense that in the absence of the existence of probation offenders would likely be incarcerated.

Fifty cases were randomly selected from the Kamloops adult probation office for comparison purposes. Kamloops is a large community in the interior of British Columbia, but is considerably different from a large city such as Vancouver. The following is a listing of the 50 Kamloops cases:

Sentence Imposed	Court	Original Offence	Type Of Offence
SS. + 1 yr. Prob.	Kamloops Provincial	Theft under $200	mixed
SS. + 3 yrs. Prob.	Salmon Arm Provincial	B. E. & Theft (4 counts)	each count indictable
14 days intermit. gaol + 1 yr. Prob.	Kamloops Provincial	Poss. narcotic (marijuana) 2 counts	each count mixed
$100 Fine + 3 mths. Prob.	Kamloops Provincial	Theft under $200	mixed
10 days gaol + 1 yr. Prob.	Kamloops Provincial	Trafficking in a narcotic (marijuana)	indictable
$150 Fine + 6 mths. Prob.	Kamloops Provincial	Mischief by Wilful damage over $50	mixed

Sentence Imposed	Court	Original Offence	Type Of Offence
14 days gaol + 2 yrs. Prob.	Kamloops Provincial	Assault causing bodily harm	mixed
$500 fine + 2 yrs. Prob.	Kamloops Provincial	Poss. of stolen property over $200	indictable
6 mths. gaol + 2 yrs. Prob.	Kamloops Provincial	Poss. of stolen property over $200	indictable
Cond. discharge + 5 mos. prob.	Kamloops Provincial	Theft under $200	mixed
30 days gaol + 1 yr. Prob.	Alberta Court of Appeal	Uttering forged document	indictable
SS. + 18 mths. Prob.	Kamloops Provincial	Theft under $200	mixed
SS. + 2 yrs. Prob.	Kamloops Provincial	B. E. & Theft	indictable
SS. + 18 mths Prob.	Kamloops Provincial	Breach of recognizance	mixed
$300 fine + 2 yrs. Prob.	Kamloops Provincial	Poss. Stolen Property over $200.	indictable
SS. + 2 yrs. Prob.	Kamloops Provincial	B. E. & Theft (2 counts) Poss. of stolen property over $200	each count indictable
SS. + 3 yrs. Prob.	Kamloops Provincial	Hit & Run (4 counts)	each count mixed
SS. + 5 mths. Prob.	Kamloops Provincial	Theft under $200	mixed

Sentence Imposed	Court	Original Offence	Type Of Offence
2 mths.gaol + 2yrs Prob.	Kamloops Provincial	1.Wilful damage over $50 2.Resisting a peace officer 3.Assaulting a peace officer	each count mixed
$300 fine + 3 mths. Prob.	Kamloops Provincial	Driving over .08	mixed
SS. + 18 mths. Prob.	Kamloops Provincial	Theft under $200	mixed
SS. + 1 yr. Prob.	Kamloops Provincial	Possession of dangerous weapon (Pellet gun)	indictable
SS. + 6 mths. Prob.	Kamloops Provincial	Possession of stolen property over $200	indictable
SS. + 3 yrs. Prob.	Vancouver County	1.B. & E. with intent 2.Robbery	each count indictable
7 days intermittent + Prob. to expiration of sentence.	Kamloops Provincial	Driving under suspension (S.88.1(2) M.V.A.)	Provincial
Cond.discharge + 6 mths. Prob.	Kamloops County	1. Mischief by wilful damage over $50 2. Resisting a police officer	each count mixed
SS. + 1 yr. Prob.	Kamloops Provincial	Theft over $200	indictable
SS. + 2 yrs.Prob.	Kamloops Provincial	Impersonation (3 counts)	each count indictable
36 days gaol + 9 mths. Prob.	Kamloops Provincial	Mischief by wilful damage over $50	mixed

Sentence Imposed	Court	Original Offence	Type Of Offence
1 mth. gaol + 1 yr.Prob.	Kamloops Provincial	B.E. & Theft	indictable
6 mths. gaol + 1 yr. Prob.	Kamloops Provincial	Mischief by wilful damage over $50	mixed
$300 fine + 1 yr. Prob.	Kamloops Provincial	Theft under $200	mixed
$700 fine + 1 yr. Prob.(each count)	Kamloops Provincial	Poss. stolen property over $200 (3 counts)	each count indictable
SS. + 1 yr. Prob.	Kamloops Provincial	False Pretences (3 counts)	each count mixed
SS. + 2 yrs. Prob.	Kamloops Provincial	Assault causing bodily harm	mixed
SS. + 1 yr. Prob.	Kamloops Provincial	Obstructing a peace officer	mixed
SS. + 1 yr. Prob.	Kamloops Provincial	Theft under $200	mixed
SS. + 2 yrs. Prob.	Nanaimo Provincial	Arson	indictable
$500 fine + 1yr. Prob.	Dawson Creek Provincial	Dangerous Driving	mixed
SS. + 1 yr. Prob.	Fort St.John Provincial	Poss. stolen property over $200	indictable
SS. + 2 yrs. Prob.	Williams Lake Provincial	Poss. Dangerous weapon (shotgun)	indictable
SS. + 18 mths. Prob.	Kamloops Provincial	Theft under $200	mixed

Sentence Imposed	Court	Original Offence	Type Of Offence
3 mths. gaol + 6 mths. Prob.	Kamloops Provincial	Indecent act	summary
SS. + 1 yr. Prob.	Kamloops Provincial	Theft under $200	mixed
$50 fine + 10 mths. Prob.	Kamloops Provincial	Impaired driving	mixed
$100 fine + 1 yr. Prob.	Kamloops Provincial	Driving over .08	mixed
SS. + 9 mths. Prob.	Kamloops Provincial	Theft under $200	mixed
$300 fine + 2 yrs. Prob.	Kamloops Provincial	Driving over .08	mixed
$200 fine + 1 yr. Prob.	Campbell River Provincial	Impaired driving	mixed
1 day gaol + 3 mths Prob.	Kamloops Provincial	Theft under $200	mixed

legend: SS = Suspended Passing of Sentence

There were 69 offences contained in the 50 cases. Twenty-eight of the offences were indictable. Only two of the offences were minor matters and all the rest were mixed offences. Therefore, even if all the mixed offences were proceeded with summarily, 40% of the offences were indictable.

It is very difficult to make a decision about the seriousness of an offence unless all the circumstances are known. For example, it might be quite incorrect to assume all theft under $200 matters involve shoplifting; one can steal

anything worth less than $200 and be charged with that offence. Syphoning gasoline is a good example of a theft under $200 offence. Even that offence may have different aspects. For instance, taking someone's gasoline several miles off a main highway in the Kamloops area may cause serious problems for the person victimized whereas the offence is far less serious when committed in a city alley. Furthermore, a person convicted of theft under $200 might be a professional shoplifter with a long record of such offences. More has to be known about the offences than the designation of indictable, mixed, or summary before a truly informed judgment can be made; the designations are only crude indicators of the seriousness of offences.

The point to glean from the preceding discussion is that there are a substantial number of serious offences for which probationary sentences are imposed and there are a substantial number of minor offences for which probation is also imposed. It would be incorrect, therefore, to hold with the position that probationary sentences only represent a widening of the criminal justice net and do not constitute alternatives to incarceration. It would also be incorrect to hold that all probationary sentences are alternatives to incarceration notwithstanding the fact that may technically be the case. For example, it would approach absurdity, perhaps, to incarcerate a chocolate bar thief for a meaningful period of time. It may also not be necessary, or appropriate, to place such a person on probation.

Public Opinion

The British Columbia Corrections Branch published statistics, in August 1982, from a Province-wide gallup poll which included questions pertaining to probation issues (B.C. Corrections Branch Research Report, pp.1-4). It is of interest to examine some of the responses to the poll from a speculative perspective. That is, would the responses be the same if the public was aware of the statistics presented earlier in this chapter and the previous chapter. It is assumed that the problems with enforcement of probation are not public knowledge.

With respect to offender types, the Corrections Branch Survey asked the question: "When an offender is fined by a court and fails to pay that fine, which is the most appropriate response?". The majority (57.9%) responded that community work service was most appropriate as opposed to: a period of imprisonment (10.9%), confiscation of assets (9.4%), and garnisheement of wages (16.9%). It is here speculated that the responses would likely have been much different if the respondents were advised, before the fact, of the technical difficulties involved in convicting persons for failure to complete community work service.

Questions relating to correctional goals covering such issues as rehabilitation and protection of the public were asked. Generally, the responses indicated strong support for community programs such as probation. The writer is of the

opinion those responses would likely not indicate the same level of support for community programs if there was public awareness of the difficulties regarding enforcement. That is, it is likely the respondents assumed at least a reasonable level of enforcement.

The argument that there would be less support for a probationary program if there was public awareness of the inability to enforce is supported by one of the findings in the gallup poll. 33.2% of the respondents strongly agreed and 39.1% of the respondents agreed with the statement, "Offenders must be held responsible for their actions regardless of the circumstances".

Summary

It has been argued in this chapter, and elsewhere in this thesis, that it is likely the number of charges of breach of probation which are proceeded with by Crown counsel may be significantly less than the actual number of breaches of probation. It has been submitted that one of the key reasons for same is that the charge is difficult to prove and, therefore, probation officers may not forward proposed charges to Crown counsel and Crown counsel may not proceed with a significant number of them. No agency quantifies data relating to charges not proceeded with by probation officers or Crown counsel and, therefore, the extent of that possible problem is purely

speculative.

Examination of court registry case files in Vancouver and Burnaby supports the contention that breach of probation is a technically difficult charge to prove for Crown counsel. One may conclude this by comparing the conviction rate of Burnaby with that of Vancouver which had a higher conviction rate, with and without guilty pleas included. Burnaby did not have the number of charges, relating to "acts" laid by police, as did Vancouver. When "acts" are not included, the overall Vancouver conviction rate is reduced significantly. It has also been noted that a person charged with an "act" may be more likely to plead guilty, or be found guilty.

Perhaps the most crucial point made in this chapter relates to when breach of probation is placed in the perspective of being a sentence of the court resulting from an offence. That is, with respect to breaking and entering, it is unlikely offenders will be caught and convicted. However, even when that is the case, they may be placed on probation and choose to ignore the dispostion. If they do so, there is a likelihood they may not be charged with failing to comply with the order for technical reasons. If they are charged, it is likely they will not be convicted; particularly if they choose to plead not guilty. If they are convicted, they are most likely to receive a sentence which does not involve incarceration as a penalty, i.e., they will receive a lenient sentence. In the event they commit an offence while subject to a suspended passing of

sentence, it is very unlikely they will be sentenced with respect to the original matter; even if the subsequent offence was identical to the original. If they are sentenced, it is likely to be a concurrent sentence.

It must be remembered, with respect to the foregoing, that offenders can assist themselves. For instance, regarding breach of probation, the offender can fail to report entirely or report and indicate he must move to a distant community for employment purposes. Failure to report in the distant community is not only difficult to prove but costly; almost a guarantee of ignoring the order with impunity.

It was mentioned that it is highly unlikely the offender will have a suspended passing of sentence revoked. If it is revoked, the sentence might only be nominal if the sentencing court for the subsequent offence is thought to have taken the fact the person was on probation into consideration when sentencing for the subsequent offence.[14] Of course, there is no data available as to whether or not the subsequent disposition is more severe when the sentencing court is aware the person is on probation. If it is more severe, that may be the case because the person was a recidivist as opposed to being an offender on probation.

With respect to revocations, the probationer, in many cases, can almost guarantee that the original sentence will not be imposed by simply postponing the conviction date for the subsequent offence. For example, with respect to a breaking and

entering, the matter can be set for a preliminary hearing and a trial in a higher court. The original probation order, which continues to run, will likely expire before conviction for the subsequent offence occurs.

It would appear that probation is utilized as an alternative to incarceration in many cases. That is, samples of probation orders indicate that a significant number of probation cases involve indictable offences. It is submitted that it is likely even more cases involve the use of probation in lieu of incarceration because of offender recidivism and offence circumstance.

It was also offered that public opinion could change significantly if there was an awareness of the inability to enforce probation. This is purely speculative but one would find some difficulty in arriving at another conclusion.

NOTES

1. The Kamloops court registry dockets were not available for October, November, and December, 1980 and January, 1981.

2. It should be noted there is considerable discrepancy, between the official provincial summary data and the researach findings, in terms of the number of charges for each community (compare Table 29 with Tables 27 and 28). The discrepancy could not be accounted for by court administration personnel.

3. The figure 15.3% may be somewhat inflated. It is the percentage derived from the official provincial summary data exclusive of guilty pleas. There is a possibility of official input error or, perhaps, the ten communities studied by the researcher had relatively low conviction rates. There were 81 persons found guilty in the ten communities studied. There were 830 charges exclusive of guilty pleas. Therefore, the conviction rate, without guilty pleas, is calculated to be 9.8%.

4. Diagram 1 and the related figures are from Selected Trends in Canadian Criminal Justice (1981). The authors note:

> As nation-wide data do not exist on victimization for any offences, the rates were estimated for break and enter as it is a relatively frequent serious offence for which studies have been undertaken in British Columbia and Ontario (p.10).

5. The number of persons placed on probation in British Columbia in the 1980-81 fiscal year (April 1, 1980 to May 31, 1981) was 11,247. (B.C. Corrections Branch Research Report, February 1982).

6. There is an assumption being made that at least the majority of those charged are actually guilty.

7.

All of the "breach" cases dealt with by the Vancouver and Burnaby provincial courts, during the period October 1, 1980 to October 1, 1982, were numbered.

8.

The figure 128 represents the cumulative number of cases dealt with in Tables 30, 31, 32, and 33. The sample size for Table 30 is 37 and for the other tables it is 31, 30, and 30 respectively. Originally, 40 cases were selected for Table 30. However, three were unavailable and difficult to obtain. It was then decided a sample size at 40 would be unwieldy for the remaining Vancouver research. Therefore, the sample size was reduced.

It should be noted the overall conviction rate, pertaining to all the cases dealt with by the Vancouver Provincial court during the period October 1, 1980 to October 1, 1982, was 52.4%. The overall conviction rate for the sample was 53%; a most comparable figure.

9.

Based on research data as opposed to the official data. The overall conviction rate from official sources was 31%.

10.

According to official summary data, there was a total of 384 guilty pleas in the calendar years 1981 and 1982 in Vancouver. The discrepancy between the official data and the research results can be accounted for, at least partially, by interpretation. That is, ten cases were not included in research of the court registry printout because there was difficulty in interpreting them. There are 33 cases which cannot be accounted for. Perhaps there were simply more guilty pleas in the latter part of 1982.

11.

A sentence of one month could be calculated as 31 days. All sentences were converted to days in the calculations. Because a one month sentence is so similar to a 30 day sentence, all sentences were converted to days based on a 30 day month. Therefore, a six month sentence was calculated to be 180 days.

12.

Based on research findings as opposed to official data (see Tables 27 and 28).

13.

The term "mixed" offence is commonly used to describe Crown election offences. In the writer's experience, "mixed" offences are seldom proceeded with by indictment. The most common "mixed" offence has to be theft under $200 (usually shoplifting). The writer has rarely seen this offence proceeded with by indictment.

14.

See R. v. Chinn, supra, R. v. Paquette, supra, and Chapter V.

VIII. CONCLUSION

Summary

The general hypothesis, on which this study is based, was introduced in the first chapter. The hypothesis is: British Columbia and Canada are in need of a Criminal Code amendment regarding probation. This is due to an inability to enforce probation by means of the present legislation.

The first chapter delineated the purpose of the study in terms of attempts to answer several questions:

- Are there problems with enforcement of probation?
- Is the law a significant factor in contributing to those problems?
- How did the present probation law (Criminal Code sections) evolve?
- Do others in the criminal justice system perceive enforcement of probation to be problematic?
- What can be done about the problems if they do exist and what alternatives might be available?

The remainder of the first chapter included definition of the important terms; presented a brief discription of the problems; delineated a number of detrimental effects resulting from an inability to enforce probation; described the research

briefly; and presented a brief overview of the thesis.

The second chapter was devoted to a literature review relevant to enforcement of probation. The major models and philosophies were presented in the beginning of the chapter. The theme of that section was that an element of control is present in all of the major models. The first section was concluded with the following points:

- It is unlikely that the absence of coercion (regarding probation) is a possibility within an adverserial criminal justice system;
- An attempt to implement non-coercive probation, within an adverserial system, would be unfair to persons who felt coerced or morally responsible; and
- The possibility of sanctions for failure to comply should apply to all offenders as otherwise there would be inequities.

The second section of Chapter II concentrated upon Canadian literature regarding probation generally, and enforcement of probation specifically. The first part of the section criticized the Canadian literature with respect to two major assumptions which pervade the known literature, the assumption of comparability and the assumption of enforceability.

The assumption of comparability refers to the apparent assumption, by Canadian authors, that research and literature relating to probation in other countries can be

compared with Canadian probation without accounting for cultural and legislative differences. This is particularly the case with regard to the implicit assumption that American research findings can be generalized to the Canadian situation.

The assumption of enforceability is one which presumes that enforcement of probation is not problematic. Generally, Canadian authors make matter-of-fact statements regarding official sanctions when a person does not comply with probation.

The assumption of enforcement is discussed in detail in relation to social and economic costs, evaluation research, and textbook and journal articles. Overall, it is concluded that all of the foregoing types of literature assume enforcement and neglect to consider the lack of it as a meaningful factor.

The last part of the second section deals with Canadian enforcement literature and Royal Commissions which have considered probation. With respect to enforcement literature, the primary point relates to the rarity of it in relation to the overall literature regarding probation. The discussion of Royal Commission findings relates to three major commissions: The Archambault, Fauteux, and Ouimet Committees. It is noted none of the Commissions recommended probation law similar to the present legislation.

Chapter III included a brief history of probation, a description of the history of Canadian probation with a focus upon the 1968/69 Criminal Code amendments, and a brief description of probation enforcement in the United States and England.

Chapter III was concluded with a point form summary which has been further condensed as follows:

- Examination of the history of probation indicates it was intended to be an alternative to incarceration;
- Probation in Canada was less complicated prior to the 1968/69 Criminal Code amendments. Various groups recommended a legislative change prior to the amendments because probation was not possible for a number of offenders. However, none of the prominent groups appear to have recommended legislative change which would create a separate offence of breach of probation. In particular, the Ouimet Committee recommended against creation of that offence. The exact origin of the offence of breach of probation remains an enigma;
- Parliamentary screening of the 1968/69 legislative amendments appears to have been minimal. There was only limited debate on the proposed probation sections of the Criminal Code by the Standing Committee on Justice and Legal Affairs; and
- Probation enforcement in the United States and England is far different from that of Canada due to the differences in

legislation.

Due process requirements are evident in legislation and practice regarding enforcement of probation in the United States and England. However, these countries do not require a trial and the concomitant proof beyond a reasonable doubt in proving a person's failure to comply with a sentence of the court. Their legislators and jurists appear to have recognized that a probationer is not an accused before the court for the first time.

Chapter IV included a detailed description of problems associated with proving a charge of breach of probation. It is apparent the most significant difficulty arises from the fact that a breach of probation must be proved beyond a reasonable doubt, at a trial, when the charge usually involves an offence by omission. It was shown that even well worded probation conditions can be problematic in terms of proof.

Much of Chapter IV focussed on the reporting condition. This is because reporting to a probation officer is often the most important factor in proving failure to comply with other probation conditions.

It should be noted the case examples and hypothetical cases presented in Chapter IV were purposefully not of the most extreme variety. Much worse cases could have been utilized. For example, a person who fails to report and comply with other probation conditions may be a pedophile convicted of the sexual assault of a young child. That offender may have rationalized

the offence, such as claiming seduction by the child, and be inclined to seek out further seduction as opposed to treatment. It is submitted that it is most important for that person to comply with all probation conditions as they were likely imposed for the purpose of preventing further offences.

In the above noted case, the offender, perhaps buoyed by his indignance regarding the court's failure to understand, may choose to ignore the conditions of probation. It is submitted that person may not be charged for technical reasons. In any event, the person is likely to not be convicted if charged. In addition, while the court system deals with the summary matter of breach, the person will likely be remanded on his own recognizance with no compulsion to comply with the probation order and to not continue his former pattern. Thus, there may be other victims. In the event of acquittal for breach, after a lengthy court process, the offender may learn that he can be completely at large in the community simply by breaking his explict or implicit promise to the court.

Chapter IV detailed case law decisions and administrative problems which have limited the flexibility of probation. The chapter concluded by citing an annotation to R. v. Borland, Supra, written by Kenneth L. Chasse. Mr. Chasse predicted, with great accuracy, some of the legal and administrative problems arising from the fact that breach of probation is a substantive offence.

Chapter V dealt with the various legal and administrative problems surrounding revocations of the suspended passing of sentence and conditional discharge as well as modification of probation orders. It also dealt with problems involving practitioners and philosophical issues such as the inequitable treatment of offenders, the limitation of probation flexibility by case law, and the restrictive nature of certain sentencing decisions.

Regarding the suspended passing of sentence, it is submitted the various factors and problems presented in Chapter V culminate to make it an almost meaningless concept. For example, an offender who has committed a subsequent offence is unlikely to have the suspended passing of sentence revoked. The offender can facilitate same by delaying conviction until the probation has expired. Crown counsel may decide, in spite of subsequent conviction, that to proceed with revocation would be inappropriate. That decision may be based upon the assumption that the subsequent sentencing court took the fact the person was on probation into consideration when sentencing for the subsequent offence. There is no data available to support that assumption. In any event, the offender would likely receive a concurrent term if the revocation was processed.

Chapter VI presented the results of the questionnaire and interviews. The questionnaire results indicate there is widespread dissatisfaction among judges, Crown counsel, and probation officers, with respect to present levels of

enforcement. The majority of respondents indicated that legislative amendment is needed to increase enforcement. The majority of respondents would, apparently, approve of increased use of probation as an alternative to incarceration; provided there was greater enforcement of probation. The questionnaire and interview results seem to indicate there may be a significant number of breaches which are not reported by probation officers.

Chapter VII can be summarized as follows:

1. Only slightly more than half of those charged with breach of probation are convicted, notwithstanding the fact that a number of people plead guilty to the offence with and without counsel;
2. If the persons charged, but who did not plead guilty, are considered, slightly more than 15% are convicted of breach of probation. That is, if the guilty pleas are not considered, and thus much plea bargaining and offender ignorance is eliminated, very few people are convicted relative to the number charged;
3. In relation to the total number of persons subject to probation orders at any one time, the absolute number charged with breach is low. This further supports the supposition that there may be a significant number of persons who are not officially reported as being in violation of probation.
4. Sentences for breach of probation appear to be lenient;

5. Revocations of the suspended passing of sentence are very rare and revocations of conditional discharges are even more rare;
6. Whether or not probation can be considered as an alternative to incarceration is arbitrary. However, if it is very conservatively held that probation for indictable offences is always an alternative to incarceration, then it would appear that more than 40% of probation sentences serve as alternatives to incarceration.

Recommendations

A definite cause and effect relationship cannot be established between the problems with enforcement of probation and the low conviction rate for the offence of breach of probation as well as the low occurrence of revocations of the suspended passing of sentence. There are simply too many possible intervening variables involved and many of those defy quantification. For example, it is quite possible a low conviction rate for the offence of breach of probation is understated due to plea bargaining of a certain kind. That is, a significant number of people might plead guilty to other charges in exchange for a stay of proceedings with respect to the offence of breach of probation. On the other hand, perhaps the conviction rate is inflated because individuals plead guilty to the offence of breach of probation in exchange for a stay of

proceedings on other matters. The situation is further obfuscated by the fact that a stay of proceedings may not involve plea bargaining at all. That is, Crown counsel may enter a stay of proceedings in certain cases because it is called for under the circumstances; for example, there is simply insufficient evidence to proceed.

The foregoing paragraph indicates that stays of proceedings are unwieldly in terms of quantification and measurement. Perusal of Chapter VII will show that they are a significant factor in determining conviction rates. Other factors could affect conviction rates. For example, those charges not proceeded with by Crown counsel or probation officers. Particularly if there are difficulties with technical issues in the law, one might expect the unknown or 'dark figure' of unreported and unprocessed offences to be significant.

A significant 'dark figure' as a result of legal technicalities, is only supposition. However, it would seem fair to say that it is likely the majority of charges proceeded with by Crown counsel are the best cases in terms of evidence. In view of that possibility, the low conviction rates, with and without guilty pleas considered, become even more meaningful. That is especially the case when one contemplates that it is a sentence of the court which has not been complied with as opposed to an offence in the first instance. In any event, the important point is that the conviction rate is low and that is problematic in itself.

The problems with the law, presented throughout this thesis and detailed in Chapters IV and V, also stand by themselves. The legal problems become obvious when subjected to analysis within the context of probation operations and prosecutorial practice.

Notwithstanding the methodological difficulties, it would appear that the problems with the legislation often create administrative problems and are likely signficant factors regarding the low conviction rates. The questionnaire responses support that conclusion. It is submitted that it would be a formidable task to explain the low conviction rates in any other manner. That is, when the research is examined in toto, it tends to indicate that enforcement of probation is problematic because of the legislative problems.

The foregoing discussion paves the way for the two main recommendations to be made in this thesis: recommendations for further research and legislative amendment.

Further Research

Further research is necessary. It is incorrect to assume that enforcement is efficacious and that research results, regarding probation effectiveness, are applicable between countries; particularly between Canada and the United States. Effectiveness measures are typically based upon recidivism and compliance with probation conditions. Compliance measures relate to the legislation of a particular country. Therefore, before measures of Canadian probation effectiveness can be made using

research from other countries, the legislation must be examined in terms of its comparability.

The current probation legislation has been examined from a legalistic and experiential perspective. There has been an attempt to point out that the legal difficulties are likely responsible for a significant part of the lack of enforceability of probation. However, from a social science perspective, more precise identification of variables and the elimination of intervening variables is necessary, i.e., the effects of plea bargaining, defence counsel practice, etc.

A secondary recommendation arises from the recommendation for further research. It is a recommendation for readily quantifiable data to be collected by probation services. This should include a post-probation report, submitted for each probationer, which would indicate whether, or not, probationers comply with probation conditions or reoffend during their probation period. The report should also identify if any action was, or was not, taken and the reason. A report of that nature would assist in identifying specific legal problems, the extent of unreported offences, the degree of discretion exercised by probation officers and Crown counsel, and the effectiveness of probation. In other words, it would be a quality control measure which would assist correctional administrators in dealing with problem areas. It would also be helpful for academic research purposes.

Legislative Amendment

It is submitted that legislative amendment is the only means of correcting the majority of the difficulties with enforcement of probation orders. It is recommended that the legislation be altered to make it more comparable with the probation laws of the United States and England. Specifically, it is recommended that the offence of breach of probation be eliminated and that a hearing procedure be implemented. The hearing should deal with all matters involving failure to comply with probation conditions and the commission of subsequent offences. Of course, due process safeguards, similar to those in United States federal probation cases, should be available. There should also be sufficient flexibility to not bind the sentencing court to the original sentence in the event of a breach. That is, the consequences of failure to comply should reflect the seriousness of the breach.

It is recommended the Criminal Code be altered to make the suspended execution of sentence a part of all probation orders. That is, the sentence would be passed and then suspended for a duration set by the sentencing court. For example, a person could be sentenced to a period of incarceration of one year with the entire term suspended. If the court wished to impose a period of incarceration in addition to probation, it could impose the same sentence but suspend, perhaps, the execution of the last nine months.

The legislative amendments should also eliminate the negative effects of time constraints. That is, provision should be made for the 'tolling' of probation orders so that probation orders are not running on in time when the offender has decided to ignore his responsibilities. In addition, it should not be possible for an offender to avoid consequences merely by delaying subsequent court action until after a probation order has expired.

There should be provision in the Criminal Code for the delinquent probationer to appear before the original sentencing court in the event there is a hearing regarding a breach matter. In that way, the court which heard evidence and formed conclusions regarding the seriousness of the orginal offence, could deal with the revocation. Thus, for example, in the event the person was sentenced in Supreme Court for a serious offence, that person would be returned to the Supreme Court in the event of a breach. Of course, there should be provisions for transfer of jurisdiction; but only if evidence and court opinion can be provided by documentation.

Implementation of workable legislation, perhaps as suggested, might make probation a credible alternative to incarceration. Arguments for further decarceration might then be justifiable. More serious offenders would be accountable in the community. Certain parts of the recommended legislative amendments might serve to decrease the net of social control. The suspended execution of sentence might limit the use and

length of probation for minor offenders. Inequity between the treatment of offenders and between offenders and the public might also be reduced. All offenders would be accountable and the public would be better protected. The present legislation is counterfeit; it is not what it appears to be. Although it may not be perceived as such, it amounts to a bluff for most offenders and the public is mislead.

IX. APPENDICES

Excerpt from Martin's Criminal Code - 1968

638 (1) Where an accused is convicted of an offence and no previous conviction is proved against him, and it appears to the court that convicts him or that hears an appeal that, having regard to his age, character and antecedents, to the nature of the offence and to any extenuating circumstances surrounding the commission of the offence, it is expedient that the accused be released on probation, the court may, except where a minimum punishment is prescribed by law, instead of sentencing him to punishment, suspend the passing of sentence and direct that he be released upon entering into a recognizance in Form 28, with or without surities,

(a) to keep the peace and be of good behaviour during any period that is fixed by the court, and
(b) to appear and to receive sentence when called upon to do so during the period fixed under paragraph (a), upon breach of his recognizance.

(2) A court that suspends the passing of sentence may prescribe as conditions of the recognizance that

(a) the accused shall make restitution and reparation to any person aggrieved or injured for the actual loss or damage caused by the commission of the offence, and
(b) the accused shall provide for the support of his wife and any other dependents whom he is liable to support,

and the court may impose such further conditions as it considers desirable in the circumstances and may from time to time change the conditions and increase or decrease the period of the recognizance, but no such recognizance shall be kept in force for more than two years.

(3) A court that suspends the passing of sentence may require as a condition of the recognizance that the accused shall report from time to time, as it may prescribe, to a person designated by the court, and the accused shall be under the supervision of that person during the prescribed period.

(4) The person designated by the court under subsection (3) shall report to the court if the accused does not carry out the terms on which the passing of sentence was suspended, and the court may order that the accused be brought before it to be sentenced.

(5) Where one previous conviction and no more is proved against an accused who is convicted, but the previous conviction took place more than five years before the time of the commission of the offence of which he is convicted, or was for an offence that is not related in character to the offence of

which he is convicted, the court may, notwithstanding subsection (1), suspend the passing of sentence and make the direction mentioned in subsection (1).

639. (1) A court that has suspended the passing of sentence or a justice having jurisdiction in the territorial division in which a recognizance was taken under section 638 may, upon being satisfied by information on oath that the accused has failed to observe a condition of the recognizance, issue a summons to compel his appearance or a warrant for his arrest.

(2) A summons under subsection (1) is returnable before the court and an accused who is arraested under a warrant issued under subsection (1) shall be brought before the court or a justice.

(3) A justice before whom a warrant under subsection (1) is returned may remand the accused to appear before the court or admit him to bail upon recognizance, with or without sureties, conditioned upon such appearance.

(4) The court may, upon the appearance of the accused pursuant to this section or subsection (4) of section 638 and upon being satisfied that the accused has failed to observe a condition of his recognizance, sentence him for the offence of which he was convicted.

(5) Where the passing of sentence is suspended by a magistrate acting under Part XVI or Part XXIV or by a judge, and thereafter he dies or is for any reason unable to act, his powers under this section may be exercised by any other magistrate or judge, as the case may be, who has equivalent jurisdiction in the same territorial division.

640. For the puposes of sections 638 and 639, "court" means

(a) a superior court of criminal jurisdiction,
(b) a court of criminal jurisdiction,
(c) a magistrate acting as a summary conviction court under Part XXIV, or
(d) a court that hears an appeal.

Excerpt from Martin's Criminal Code - 1969

637. (1) A probation officer shall, if required to do so by the court that convicts an accused, prepare and file with the court a report in writing relating to the accused for the purpose of assisting the court in imposing sentence.

(2) Where a report is filed with the court under subsection (1), the clerk of the court shall forthwith cause a copy of the report to be provided to the accused or his counsel and to the prosecutor. 1968-69,c.38,s.75.

638. (1) Where an accused is convicted of an offence the court may, having regard to the age and character of the accused, the nature of the offence and the circumstances surrounding its commission,

(a) in the case of an offence other than one for which a minimum punishment is prescribed by law, suspend the passing of sentence and direct that the accused be released upon the conditions prescribed in a probation order; or

(b) in addition to fining the accused or sentencing him to imprisonment, whether in default of payment of a fine or otherwise, for a term not exceeding two years, direct that the accused comply with the conditions prescribed in a probation order.

(2) The following conditions shall be deemed to be prescribed in a probation order, namely, that the accused shall keep the peace and be of good behaviour and shall appear before the court when required to do so by the court, and, in addition, the court may prescribe as conditions in a probation order that the accused shall do any one or more of the following things as specified in the order, namely,

(a) report to and be under the supervision of a probation officer or other person desginated by the court;

(b) provide for the support of his spouse or any other dependants whom he is liable to support;

(c) abstain from the consumption of alcohol either absolutely or on such terms as the court may specify;

(d) abstain from owning, possessing or carrying a weapon;

(e) make restitution or reparation to any person aggrieved or injured by the commission of the offence for the actual loss or damage sustained by that person as a result thereof;

(f) remain within the jurisdiction of the court and notify the court or the probation officer or other person designated under paragraph (a) of any change in his address or his employment or occupation;

(g) make reasonable efforts to find and maintain suitable employment; and
(h) comply with such other reasonable conditions as the court considers desirable for securing the good conduct of the accused and for preventing a repetition by him of the same offence or the commission of other offences.

(3) A probation order may be in Form 44, and the court that makes the probation order shall specify therein the period for which it is to remain in force.

(4) Where the court makes a probation order, it shall
(a) cause the order to be read by or to the accused;
(b) cause a copy of the order to be given to the accused; and
(c) inform the accused of the provisions of subsection (4) of section 639 and the provisions of section 640A.
1968-69,c38, s.75.

639. (1) A probation order comes into force
(a) on the date on which the order is made; or
(b) where the accused is sentenced to imprisonment under paragraph (b) of subsection (1) of section 638 otherwise than in default of payment of a fine, upon the expiration of that sentence.

(2) Subject to subsection (4),
(a) where an accused who is bound by a probation order is convicted of an offence, including an offence under section 640A, or is imprisoned under paragraph (b) of subsection (1) of section 638 in default of payment of a fine, the order continues in force except in so far as the sentence renders it impossible for the accused for the time being to comply with the order; and
(b) no probation order shall continue in force for more than three years from the date on which the order came into force.

(3) Where a court has made a probation order, the court may at any time, upon application by the accused or the prosecutor, require the accused to appear before it and, after hearing the accused and the prosecutor,
(a) make any changes in or additions to the conditions prescribed in the order that in the opinion of the court are rendered desirable by a change in the circumstances since the conditions were prescribed,
(b) relieve the accused, either absolutely or upon such terms or for such period as the court deems desirable, of compliance with any condition described in any of paragraphs (a) to (h) of subsection (2) of section 638 that is prescribed in the order, or
(c) decrease the period for which the probation order is to remain in force,

and the court shall thereupon endorse the probation order accordingly and, if it changes or adds to the conditions prescribed in the order, inform the accused of its action and give him a copy of the order so endorsed.

(4) Where an accused who is bound by a probation order is convicted of an offence, including an offence under section 640A, and

(a) the time within which an appeal may be taken against that conviction has expired and he has not taken an appeal,

(b) he has taken an appeal against that conviction and the appeal has been dismissed, or

(c) he has given written notice to the court that convicted him that he elects not to appeal his conviction or has abandoned his appeal, as the cse may be,

in addition to any punishment that may be imposed for that offence the court that made the probation order may, upon application by the prosecutor, require the accused to appear before it and, after hearing the prosecutor and the accused,

(d) where the probation order was made under paragraph (a) of subsection (1) of section 638, revoke the order and impose any sentence that could have been imposed if the passing of sentence had not been suspended, or

(e) make such changes in or additions to the conditions prescribed in the order as the court deems desirable or extend the period for which the order is to remain in force for such period, not exceeding one year, as the court deems desirable.

and the court shall thereupon endorse the probation order accordingly and, if it changes or adds to the conditions prescribed in the order or extends the period for which the order is to remain in force, inform the accused of its action and give him a copy of the order so endorsed.

(5) The provisions of Parts XIV and XV with respect to compelling the appearance of an accused before a justice apply mutatis mutandis to proceedings under subsections (3) and (4). 1968-69, c.38, s.75.

640. (1) Where an accused who is bound by a probation order becomes a resident of, or is convicted of an offence including an offence under section 640A in, a territorial division other than the territorial division where the order was made, the court that made the order may, upon the application of the prosecutor, and with the consent of the Attorney General of the province in which the order was made if both such territorial divisions are not in the same province, transfer the order to a court in that other territorial division that would, having regard to the mode of trial of the accused, have had jurisdiction to make the order in that other territorial division if the accused had been tried and convicted there of the offence in respect of which the order was made, and the

order may thereafter be dealt with and enforced by the court to which it is so transferred in all respects as if that court had made the order.

(2) Where a court that has made a probation order or to which a probation order has been transferred pursuant to subsection (1) is for any reason unable to act, the powers of that court in relation to the probation order may be exercised by any other court that has equivalent jursidection in the same province. 1968-69, c.38, s.75.

640A. (1) An accused who is bound by a probation order and who wilfully fails or refuses to comply with that order is guilty of an offence punishable on summary conviction.

(2) An accused who is charged with an offence under subsection (1) may be tried and punished by any court having jurisdiction to try that offence in the place where the offence is alleged to have been committed or in the place where the accused is found, is arrested or is in custody, but where the place where the accused is found, is arrested or is in custody is outside the province in which the offence is alleged to have been committed, no proceedings in respect of that offence shall be instituted in that place without the consent of the Attorney General of such province.

640B. For purposes of sections 637 to 640A, "court" means

(a) a superior court of criminal jurisidiction;

(b) a court of criminal jurisdiction;

(c) a justice or magistrate acting as a summary conviction court under Part XXIV; or

(d) a court that hears an appeal. 1968-69, c.38, s.75.

Excerpt from Canadian Criminal Code - 1984

662. (1) Where an accused, other than a corporation, pleads guilty to or is found guilty of an offence, a probation officer shall, if required to do so by a court, prepare and file with the court a report in writing relating to the accused for the purpose of assisting the court in imposing sentence or in determining whether the accused should be discharged pursuant to section 662.1.

(2) Where a report is filed with the court under subsection (1), the clerk of the court shall forthwith cause a copy of the report to be provided to the accused or his counsel and to the prosecutor. R.S., c.C-34, s.662; 1972, c.113, s.57.

662.1 (1) Where an accused, other than a corporation, pleads guilty to or is found guilty of an offence other than an offence for which a minimum punishment is prescribed by law or an offence punishable, in the proceedings commenced against him, by imprisonment for fourteen years or for life, the court before which he appears may, if it considers it to be in the best interests of the accused and not contrary to the public interest, instead of convicting the accused, by order direct that the accused be discharged absolutely or upon the conditions prescribed in a probation order.

(2) Subject to the provisions of Part XIV, where an accused who has not been taken into custody or who has been released from custody under or by virtue of any provision of Part XIV pleads guilty to or is found guilty of an offence but is not convicted, the appearance notice, promise to appear, summons, undertaking or recognizance issued to or given or entered into by him continues in force, subject to its terms, until a disposition in respect of him is made under subsection (1) unless, at the time he pleads guilty or is found guilty, the court, judge or justice orders that he be taken into custody pending such a disposition.

(3) Where a court directs under subsection (1) that an accused be discharged, the accused shall be deemed not to have been convicted of the offence to which he pleaded guilty or of which he was found guilty and to which the discharge relates except that

(a) the accused may appeal from the direction that the accused be discharged as if that direction were a conviction in respect of the offence to which the discharge relates;

(a.1) the Attorney General may appeal from the direction that the accused be discharged, as if that direction were a judgment or verdict of acquittal referred to in paragraph 605(1)(a); and

(b) the accused may plead autrefois convict in respect

of any subsequent charge relating to the offence to which the discharge relates.

(4) Where an accused who is bound by the conditions of a probation order made at a time when he was directed to be discharged under this section is convicted of an offence, including an offence under section 666, the court that made the probation order may, in addition to or in lieu of exercising its authority under subsection 664(4), at any time when it may take action under that subsection, revoke the discharge, convict the accused of the offence to which the discharge relates and impose any sentence that could have been imposed if the accused had been convicted at the time he was discharged, and no appeal lies from a conviction under this subsection where an appeal was taken from the order directing that the accused be discharged. 1972, c.13, s.57; 1974-75-76, c.93, s.80, c.105, s.20.

663. (1) Where an accused is convicted of an offence the court may, having regard to the age and character of the accused, the nature of the offence and the circumstances surrounding its commission,

(a) in the case of an offence other than one for which a minimum punishment is prescribed by law, suspend the passing of sentence and direct that the accused be released upon the conditions prescribed in a probation order;

(b) in addition to fining the accused or sentencing him to imprisonment, whether in default of payment of a fine or otherwise, for a term not exceeding two years, direct that the accused comply with the conditions prescribed in a probation order; or

(c) where it imposes a sentence of imprisonment on the accused, whether in default of payment of a fine or otherwise, that does not exceed ninety days, order that the sentence be served intermittently at such times as are specified in the order and direct that the accused, at all times when he is not in confinement pursuant to such order, comply with the conditions prescribed in a probation order.

(2) The following conditions shall be deemed to be prescribed in a probation order, namely, that the accused shall keep the peace and be of good behaviour and shall appear before the court when required to do so by the court, and, in addition, the court may prescribe as conditions in a probation order that the accused shall do any one or more of the following things as specified in the order, namely,

(a) report to and be under the supervision of a probation officer or other person desiginated by the court;

(b) provide for the support of his spouse or any other dependants whom he is liable to support;

(c) abstain from the consumption of alcohol either absolutely or on such terms as the court may specify;

(d) abstain from owning, possessing or carrying a weapon;
(e) make restitution or reparation to any person aggrieved or injured by the commission of the offence for the actual loss or damage sustained by that person as a result thereof;
(f) remain within the jurisdiction of the court and notify the court or the probation officer or other person designated under paragraph (a) of any change in his address or his employment or occupation;
(g) make reasonable efforts to find and maintain suitable employment; and
(h) comply with such other reasonable conditions as the court considers desirable for securing the good conduct of the accused and for preventing a repetition by him of the same offence or the commission of other offences.

(3) A probation order may be in Form 44, and the court that makes the probation order shall specify therein the period for which it is to remain in force.

(4) Where the court makes a probation order, it shall
(a) cause the order to be read by or to the accused;
(b) cause a copy of the order to be given to the accused; and
(c) inform the accused of the provisions of subsection 664(4) and the provisions of section 666. R.S., c. C-34, s. 663; 1972, c. 13, s. 58; 1974-75-76, c.93, s.81.

664. (1) A probation order comes into force
(a) on the date on which the order is made, or
(b)where the accused is sentenced to imprisonment under paragraph 663(1)(b) otherewise than in default of payment of a fine, upon the expiration of that sentence.

(2) Subject to subsection (4),
(a) where an accused who is bound by a probation order is convicted of an offence, including an offence under section 666, or is impriosned under paragraph 663(1)(b) in default of payment of a fine, the order continues in force except in so far as the sentence renders it impossible for the accused for the time being to comply with the order; and
(b) no probation order shall continue in force for more than three years from the date on which the order came into force.

(3) Where a court has made a probation order, the court may at any time, upon application by the accused or the prosecutor, require the accused to appear before it and, after hearing the accused and the prosecutor
(a) make any changes in or additions to the conditions prescribed in the order that in the opinion of the court are rendered desirable by a change in the circumstances

since the conditions were prescribed,
(b) relieve the accused, either absolutely or upon such terms or for such period as the court deems desirable, of compliance with any condition described in any of paragraphs 663(2)(a) to (h) that is prescribed in the order, or
(c) decrease the period for which the probation order is to remain in force, and the court shall thereupon endorse the probation order accordingly and, if it changes or adds to the conditions prescribed in the order, inform the accused of its actions and give him a copy of the order so endorsed.

(4) Where an accused who is bound by a probation order is convicted of an offence, including an offence under section 666, and

(a) the time within which an appeal may be takend against that conviction has expired and he has not taken an appeal,
(b) he has taken an appeal against that conviction and the appeal has been dismissed, or
(c) he has given written notice to the court that convicted him that he elects not to appeal his conviction or has abandoned his appeal, as the case may be,

in additon to any punishment that may be imposed for that offence the court that made the probation order may, upon application by the prosecutor, require the accused to appear before it and, after hearing the prosecutor and the accused,

(d) where the probation order was made under paragraph 663(1)(a), revoke the order and impose any sentence that could have been imposed if the passing of sentence had not been suspended, or
(e) make such changes in or additions to the conditions prescribed in the order as the court deems desirable or extend the period for which the order is to remain in force for such period, not exceeding one year, as the court deems desirable,

and the court shall thereupon endorse the probation order accordingly and, if it changes or adds to the conditions prescribed in the order or extends the period for which the order is to remain in force, inform the accused of its action and give him a copy of othe order so endorsed.

(5) The provisions of Parts XIV and XV with respect to compelling the appearance of an accused before a justice apply mutatis mutandis to proceedings under subsections (3) and (4). 1968-69,c. 38, s. 75.

665. (1) Where an accused who is bound by a probation order becomes a resident of, or is convicted of an offence including an offence under section 666 in a territorial division, other than the territorial division where the order was made, the court that made the order may, upon the application of the prosecutor, and, if both such territorial divisions are not in

the same province, with the consent of

(a) the Attorney General of Canada, in the case of proceedings in relation to an offence that were instituted at the instance of the Government of Canada and conducted by or on behalf of that Government, or

(b) in any other case, the Attorney General of the province in which the order was made,

transfer the order to a court in that other territorial division that would, having regard to the mode of trial of the accused, have had jurisdiction to make the order in that other territorial division if the accused had been tried and convicted there of the offence in respect of which the order was made, and the order may thereafter be dealt with and enforced by the court to which it is so transferred in all respects as if that court had made the order.

(2) Where a court that has made a probation order or to which a probation order has been transferred pursuant to subsection (1) is for any reason unable to act, the powers of that court in relation to the probation order may be exercised by any other court that has equivalent jurisdiction in the same province. R.S., c. C-34, s. 665; 1974-75-76, c. 93, s.82.

666, (1) An accused who is bound by a probation order and who wilfully fails or refuses to comply with that order is guilty of an offence punishable on summary conviction.

(2) An accused who is charged with an offence under subsection (1) may be tried and punished by any court having jurisdiction to try that offence in the place where the offence is alleged to have been committed or in the place where the accused is found, is arrested or is in custody, but where the place where the accused is found, is arrested or is in custody is outside the province in which the offence is alleged to have been committed, no proceedings in respect of of that offence shall be instituted in that place without the consent of the Attorney General of such province. 1968-69, c.38, s. 75.

667. For the purposes of sections 662 to 666, "court" means

(a) a superior court of criminal jurisidiction,

(b) a court of criminal jurisdiction,

(c) a justice or magistrate acting as a summary conviction court under Part XXIV, or

(d) a court that hears an appeal. 1968-69, c.38, s.75.

APPENDIX D

Excerpt from Title 18, U.S. Code (1982)

3651. Suspension of sentence and probation

Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, any court having jurisdiction to try offenses against the United States when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may suspend the imposition or execution of sentence and place the defendant on probation for such period and upon such terms and conditions as the court deems best.

Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, if the maximum punishment provided for such offense is more than six months, any court having jurisdiction to try offenses against the United States, when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may impose a sentence in excess of six months and provide that the defendant be confined in a jail-type institution or a treatment institution for a period not exceeding six months and that the execution of the remainder of the sentence be suspended and the defendant placed on probation for such period and upon such terms and conditions as the court deems best.

Probation may be granted whether the offense is punishable by fine or imprisonment or both. If an offense is punishable by both fine and imprisonment, the court may impose a fine and place the defendant on probation as to imprisonment. Probation may be limited to one or more counts or indictments, but, in the absence of express limitation, shall extend to the entire sentence and judgment.

The court may revoke or modify any condition of probation, or may change the period of probation.

The period of probation, together with any extension thereof, shall not exceed five years.

While on probation and among the conditions thereof, the defendant-

May be required to pay a fine in one or several sums; and

May be required to make resitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which conviction was had; and

May be required to provide for the support of any persons, for whose support he is legally responsible.

The court may require a person as conditions of probation to reside in or participate in the program of a residential community treatment center, or both, for all or part of the

period of probation: Provided, That the Attorney General certifies that adequate treatment facilities, personnel, and programs are available. If the Attorney General determines that the person's residence in the center or participation in its program, or both, should be terminated, because the person can derive no further significant benefits from such residence or participation, or both, or because his such residence or participation adversely affects the rehabilitation of other residents or participants, he shall so notify the court, which shall thereupon, by order, make such other provision with respect to the person on probation as it deems appropriate.

A person residing in a residential community treatment center may be required to pay such costs incident to residence as the Attorney General deems appropriate.

The court may require a person who is an addict within the meaning of section 4251(a) of this title, or drug dependent person within the meaning of section 2(q) of the Public Health Service Act, as amended (42 U.S.C. 201), as a condition of probation, to participate in the community supervision programs authorized by section 4255 of this title for all or part of the period of probation.

The defendant's liability for any fine or other punishment imposed as to which probation is granted, shall be fully discharged by the fulfillment of the terms and conditions of probation.

3653. Report of probation officer and arrest of probationer

When directed by the court, the probation officer shall report to the court, with a statement of the conduct of the probationer while on probation. The court may thereupon discharge the probationer from further supervision and may terminate the proceedings against him, or may extend the probation, as shall seem advisable.

Whenever during the period of his probation, a probationer heretofore or hereafter placed on probation, goes from the district in which he is being supervised to another district, jurisdiction over him may be transferred, in the discretion of the court, from the court for the district from which he goes to the court for the other district, with the concurrence of the latter court. Thereupon the court for the district to which jurisdiction is transferred shall have all power with respect to the probationer that was previously possessed by the court for the district from which the transfer is made, except that the period of probation shall not be changed without the consent of the sentencing court. This process under the same conditions may be repeated whenever during the period of his probation the probationer goes from the district in which he is being supervised to another district.

At any time within the probation period, the probation officer may for cause arrest the probationer wherever found, without a warrant. At any time within the probation period, or

within the maximum probation period, or within the maximum probation period permitted by section 3651 of this title, the court for the district in which the probationer is being supervised or if he is no longer under supervision, the court for the district in which he was last under supervison, may issue a warrant for his arrest for violation of probation occurring during the probation period. Such warrant may be executed in any district by the probation officer or the United States marshal of the district in which the warrant was issued or of any district in which the probationer is found. If the probationer shall be arrested in any district other than that in which he was last supervised, he shall be returned to the district in which the warrant was issued, unless jurisdiction over him is transferred as above provided to the district in which he is found, and in that case he shall be detained pending further proceedings in such district.

As speedily as possible after arrest the probationer shall be taken before the court for the district having jurisdiction over him. Thereupon the court may revoke the probation and require him to serve the sentence imposed, or any lesser sentence, and, if imposition of sentence was suspended, may impose any sentence which might originally have been imposed. (As amended May 24, 1949, c. 139, #56, 63 Stat. 96.)

3654. Appointment and removal of probation officers

Any court having original jurisdiction to try offenses against the United States may appoint one or more suitable persons to serve as probation officers within the jurisdiction and under the direction of the court making such appointment.

All such probation officers shall serve without compensation except that in case it shall appear to the court that the needs of the service require that there should be salaried probation officers, such court may appoint such officers.

Such court may in its discretion remove a probation officer serving in such court.

The appointment of a probation officer shall be in writing and shall be entered on the records of the court, and a copy of the order of appointment shall be delivered to the officer so apponted and a copy sent to the Director of the Adminsitrative Office of the United States Courts.

Whenever such court shall have appointed more than one probation officer, one may be designated chief probation officer and shall direct the work of all probation officers serving in such court.
(As amended Aug. 2, 1949, c. 383 #2, 63 Stat. 491.)

3655. Duties of probation officers

The probation officer shall furnish to each probationer under his supervision a written statement of the conditions of probation and shall instruct him regarding the same.

He shall keep informed concerning the conduct and condition of each probationer under his supervision and shall report thereon to the court placing such person on probation.

He shall use all suitable methods, not inconsistent with the conditions imposed by the court, to aid probationers and to bring about improvements in their conduct and condition.

He shall keep records of his work; shall keep accurate and complete accounts of all moneys collected from persons under his supervision; shall give receipts therefor, and shall make at least monthly returns thereof; shall make such reports to the Director of the Adminsitrative Office of the United States Courts as he may at any time require; and shall perform such other duties as the court may direct.

Excerpt from Federal Rule of Criminal Procedure, Title 18 U.S. Code (1982)

32.1. Revocation or Modification of Probation

(a) Revocation of Probation

(1) Prelimianry Hearing. Whenever a probationer is held in custody on the ground that he has violated a condition of his probation, he shall be afforded a prompt hearing before any judge, or a United States magistrate who has been given authority pursuant to 28 U.S.C. S.636 to conduct such hearings, in order to determine whether there is probable cause to hold the probationer for a revocation hearing. The probationer shall be given

1. (A)notice of the preliminary hearing and its purpose and of the alleged violation of probation;
2. (B)an opportunity to appear at the hearing and present evidence in his own behalf;
3. (C)upon request, the opportunity to question witnesses against him unless, for good cause, the federal magistrate decides that justice does not require the appearance of the witness; and
4. (D)notice of his right to be represented by counsel.

The proceedings shall be recorded stenographically or by an electronic recording device. If probable cause is found to exist, the probationer shall be held for a revocation hearing. The probationer may be released pursuant to Rule 46(c) pending the revocation hearing. If probable cause is not found to exist, the proceeding shall be dismissed.

(2)Revocation Hearing. The revocation hearing, unless waived by the probationer, shall be held within a reasonable time in the district of probation jurisdiction. The probationer

shall be given
1. (A) written notice of the alleged violation of probation;
2. (B) disclosure of the evidence against him;
3. (C) an opportunity to appear and to present evidence in his own behalf;
4. (D) the opportunity to question witnesses against him; and
5. (E) notice of his right to be represented by counsel.

(b) Modification of Probation. A hearing and assistance of counsel are required before the terms or conditions of probation can be modified, unless the relief granted to the probationer upon his request or the court's own motion is favorable to him. (Added Apr. 30, 1979, eff. Dec. 1, 1980).

FORM 44 (SECTION 663)
REV. 7.83
SUSPENDED SENTENCE

PROBATION ORDER

Court File Number
PROV
CTY
SUP

CANADA:
PROVINCE OF BRITISH COLUMBIA

WHEREAS on the day of 19 , at
of
(address and phone)
, hereinafter called the accused, pleaded guilty to, or was tried under the Criminal Code and was convicted or found guilty, as the case may be, upon the charge that

And whereas on the day of , the Court adjudged that the passing of sentence upon the accused be suspended and that the accused be released upon the conditions hereinafter prescribed:

Now, therefore, the said accused shall, for the period of
from the date of this order comply with the following conditions, namely, that the said accused shall keep the peace and be of good behavior and appear before the Court when required to do so by the Court, and, in addition, [here state any additional conditions prescribed pursuant to subsection 663 (2)]

APPENDIX F

PROBATION QUESTIONNAIRE

CODE: ____ ____ ____

It is hoped the responses to this questionnaire will be of assistance in determining the effectiveness of probation in British Columbia. Judges, Probation Officers, and Crown Counsel throughout the Province are being asked to provide assistance in that regard. Their insights, gathered through experience in their respective fields, are essential to the development of a study regarding probation. Your responses will be greatly appreciated and will, undoubtedly,be very helpful. If you have any questions or concerns regarding the study, please feel free to contact the researcher at the addresses or phone numbers listed below. Please forward your completed questionnaires to the Burnaby Central Probation Office.

All responses will be held in strictest confidence. Indivuduals will not be identified in the study or any other related documents.

Every respondent is asked to provide a code at the top right of this page. It will safeguard anonymity. The code will also provide for the return or destruction of a questionnaire in the event a respondent chooses not to participate. It is suggested the first initial of your mother's name, followed by the first initial of your father's name, and the date of the month you were born, will be unique and easily remembered by you. For example, my mother's name is May, my father's name is Norman, and I was born on March 15th. Therefore, my code would be M N 15.

Jack Aasen
Criminology Department
Simon Fraser University
BURNABY, B. C.

or

Jack Aasen
Burnaby Central Probation Office
4425 Ledger Avenue
BURNABY, B.C.
V5G 3T2

TELEPHONE:

291-3213 (S.F.U.)
522-5586 (Home)
299-4364(Burnaby Central Probation Office)

SECTION A

1) Number of years employed as a Probation Officer? _____years.

2) Estimated percentage of current workload in adult criminal cases?_____%

3) Estimated percentage of career workload in adult criminal cases? _____%

PLEASE USE A CHECK (✓) IN THE APPROPRIATE SPACE FOR THE FOLLOWING QUESTIONS:

4) Location of the most adult probation supervision:
- Small town (population less than 5,000)..... _____.
- Medium size community (between 5,000-25,000) _____.
- Large size community (25,000 to 50,000).... _____.
- City (over 50,000).... _____.

5) Size of community you reside in:
- Small town (population less than 5,000)._____.
- Medium size community (5,000-25,000)...._____.
- Large size community (25,000 - 50,000).._____.
- City (over 50,000)....._____.

In the following questions you are asked to MARK (✓) ONE space ONLY.

If you mark OTHER, please define it or explain it in the space provided. If you wish to clarify your response or comment in some other way, please do so under the heading of COMMENT to each question. You are reminded there is space provided for general comment at the back of the questionnaire.

The following questions will involve the Criminal Code Sections dealing with probation. For your convenience, those sections are provided in an attached appendix.

1) Do you feel a person should be charged with Breach of Probation (666) whenever there is a violation of a probation order?

Almost always_____
Usually.....____ Other:_____
Sometimes....____ COMMENT:
Almost never_____

2) Do you feel a person should be charged with Breach of Probation (666) if they miss an appointment with their probation officer?

Almost always _____
Usually..... _____ Other:_____
Sometimes.... _____ COMMENT:
Almost never _____

3) Do you feel a person should be charged with a Breach of Probation (666) if they do not report to their probation officer at all?

Almost always _____ Other:_____
COMMENT:
Usually.....____
Sometimes.... _____
Almost never _____

4) Do you feel a person should be charged with a Breach of Probation (666) if they do not pay restitution by the required date?

Almost always _____ Other:_____
Usually..... _____ COMMENT:
Sometimes.... _____
Almost never _____

5) Do you feel a person should be charged with a Breach of Probation (666) if they do not complete their community service hours by the required date?

Almost always _____ Other:_____
Usually..... _____ COMMENT:
Sometimes.... _____
Almost never _____

6) Do you feel a person should be charged with a Breach of Probation (666) when there is a violation of a probation condition and the offence for which the person was originally placed on probation is a summary conviction matter?

Almost always_____ Other:_____
Usually.....____ COMMENT:
Sometimes....____
Almost never _____

SECTION B - cont'd

7) Do you feel a person should be charged with a Breach of Probation (666) when there is a violation of a probation condition and the offence for which the person was originally placed on probation is an indictable offence?

Almost always _____ Other:_____

Usually..... _____ COMMENT:

Sometimes.... _____

Almost never _____

8) Do you feel a person should be charged with a Breach of Probation (666) when the person has been convicted of a Criminal Code offence while on probation?

Almost always _____ Other:_____

Usually..... _____ COMMENT:

Sometimes.... _____

Almost never _____

9) Do you feel a person should be charged with a Breach of Probation (666) when the person has been convicted of an offence identical to the original offence for which they were placed on probation?

Almost always _____ Other:_____

Usually..... _____ COMMENT:

Sometimes... _____

Almost never _____

WHEN THERE IS A SUSPENDED SENTENCE, do you feel a person should be returned to Court for sentence revocation (664(4)(d)), and sentencing (to be sentenced on the 'suspended sentence') when:

1) the person has been convicted of an offence while on probation?

Almost always _____ Other:_____

Usually..... _____ COMMENT:

Sometimes... _____

Almost never _____

2) the person has been convicted of an <u>indictable</u> offence while on probation?

Almost always _____ Other:_____

Usually..... _____ COMMENT:

Sometimes.... _____

Almost never _____

3) the person has been convicted of a <u>similar</u> offence while on probation?

Almost always _____ Other:_____

Usually..... _____ COMMENT:

Sometimes.... _____

Almost never _____

4) the person has been convicted of an <u>identical</u> offence while on probation?

Almost always _____ Other:_____

Usually..... _____ COMMENT:

Sometimes.... _____

Almost never _____

SECTION B - cont'd

WHEN THERE IS A CONDITIONAL DISCHARGE, do you feel a person should be returned to Court for sentence revocation under Section 662.1(4) when....

1) The person has been convicted of an offence while on probation?

Almost always _____ Other:_____

Usually..... _____ COMMENT:

Sometimes... _____

Almost never _____

2) The person has been convicted of an indictable offence while on probation?

Almost always _____ Other:_____

Usually..... _____ COMMENT:

Sometimes... _____

Almost never _____

3) the person has been convicted of a similar offence while on probation?

Almost always _____ Other:_____

Usually..... _____ COMMENT:

Sometimes... _____

Almost never _____

4) the person has been convicted of an identical offence while on probation?

Almost always _____ Other:_____

Usually..... _____ COMMENT:

Sometimes... _____

Almost never _____

(1) How often do you estimate a Breach of Probation charge (Section 666) will proceed to the trial stage after it is reported to Crown Counsel?

Almost always _____ Other:_____

Usually..... _____ COMMENT:

Sometimes.... _____

Almost never.. _____

Don't know.... _____

(2) How often would you estimate Breach of Probation charges (666) result in conviction when there is a trial and the accused is represented by counsel?

Almost always _____ Other:_____

Usually..... _____ COMMENT:

Sometimes... _____

Almost never. _____

Don't know... _____

3) In your opinion, how often are individuals returned to Court for sentencing pursuant to the revocation and suspended sentence provisions (664 (4)(d))?

Almost always _____ Other:_____

Usually.... _____ COMMENT:

Sometimes.. _____

Almost never _____

Don't know... _____

SECTION B: cont'd

4) In your opinion, how often are individuals returned to Court to have their probation conditions altered or their probation period extended pursuant to Section 664(4)(e)? (Please do not confuse this Section with 664(3)(a), (b), and (c)).

Almost always _____ Other_____

Usually..... _____ COMMENT:

Sometimes... _____

Almost never _____
Don't know... _____

5) In your opinion, how often are individuals returned to Court for sentencing upon revocation of a conditional discharge (662.1 (4))?

Almost always _____ Other:_____

Usually..... _____ COMMENT:

Sometimes... _____

Almost never. _____
Don't know... _____

6) Is the criminal justice system dealing adequately with Breach of Probation offences at this time (666)?

Yes _____ Other:_____

No _____ COMMENT:

Don't know_____

7) Is the criminal justice system dealing adequately with revocations of suspended sentences at this time (664(4)(d))?

Yes _____ Other:_____

No _____ COMMENT:

Don't know_____

8) Is the criminal justice system dealing adequately with conditional discharge revocations (662.1(4))?

Yes _____ Other:_____

No _____ COMMENT:

Don't know_____

9) Is probation presently used as an alternative to incarceration?

Almost always _____ Other:_____

Usually..... _____ COMMENT:

Sometimes... _____

Almost never _____
Don't know... _____

10) Presently, are probation order conditions worded adequately for purposes of prosecution under Section 666?

Almost always _____ Other:_____

Usually..... _____ COMMENT:

Sometimes: _____

Almost never _____
Don't know... _____

11) What is your estimate of the number of individuals who fail to comply with specific probation conditions (breaches of probation - Section 666) and are not reported to Crown Counsel by probation officers?

A small number _____ Other:_____

A 'middle' number _____ COMMENT:

A large number... _____

Don't know..... _____

SECTION B: cont'd

12) What is your estimate of the number of individuals who commit subsequent offences while on probation and are not reported to Crown Counsel by probation officers?

A small number _____

A 'middle' number _____

A large number _____

Don't know.....

Other: _____

COMMENT:

13) Should probation officers be required to provide crown counsel with all the evidence necessary for court appearances with respect to:

a) Breaches (666)?
YES_____
NO _____
Don't know ___
COMMENT: _____

b) Revocations (662.1(4) and 664 (4)(d))?
YES_____
NO _____
DON'T KNOW ___
COMMENT: _____

c) Modifications? (664(4)(e))
YES_____
NO _____
DON'T KNOW____
COMMENT: _____

14) In your opinion, are probation officers presently gathering the necessary evidence adequately with respect to:

a) Breaches?
YES____
NO ____
DON'T KNOW___
COMMENT: _____

b) Revocations:
YES____
NO ____
DON'T KNOW___
COMMENT: _____

c) Modifications?
YES____
NO ____
DON'T KNOW___
COMMENT _____

SECTION C

For each question you are asked to do three things:

(1) Circle the numbers of those responses which you feel are appropriate

(2) Add responses, if any, you consider to be important. There are three numbered spaces left blank for that purpose.

(3) Indicate the number of the factor you consider most significant in the space provided and the number you consider least significant in the space provided.

1) What reason (s) would crown counsel have to not proceed with a breach of probation charge (666) for a violation of a probation condition?

Triviality of the matter 1
Too busy.....2
Staleness of the violation.....3
A summary offence only 4
Unliklihood of conviction.....5
Lack of consequence upon conviction.....6
Reported, but not recommended by probation officer..7
Lack of evidence.....8
Poorly worded probation order.....9
Difficult procedure.....10
_____11
_____12

Most significant ____
Least significant____

2) What reason(s) would crown counsel have to NOT proceed with an application for revocation of a 'suspended' sentence (664(4)(d))?

Triviality of the matter 1
Too busy.....2
Probation taken into account when person sentenced for subsequent offence..... 3
Reported but not recommended by probation officer...4
Lack of consequence upon revocation..... 5
'Double jeopardy'..... 6
Difficult procedure.....7
_____ 8
_____ 9

Most significant_____
Least significant____

3) What reason(s) would crown counsel have to NOT proceed with an application for revocation of a 'conditional discharge' (662.1(4))?

Triviality of the matter..... 1
Too busy.....2
Probation taken into account when person sentenced for subsequent offence.....3
Reported but not recommended by probation officer.. 4
Lack of consequence upon revocation..... 5
'Double jeopardy'..... 6
Difficult procedure.....7
_____8
_____9

Most significant_____
Least significant____

SECTION C: cont'd

4) What reason(s) would crown counsel have to NOT proceed with an application for amendment to a probation order (664(4)(e))?

Triviality of the matter..... 1
Too busy..... 2
Probation taken into account when person sentenced for subsequent offence..... 3
Reported but not recommended by probation officer. 4
'Double jeopardy'..... 5
Difficult procedure 6
_____ 7
_____ 8
_____ 9

Most significant_____
Least significant_____

5) What reason(s) would a probation officer have to NOT advise crown counsel of a violation of a probation condition (666)?

Triviality of matter.....1
Too busy.....2
Summary matter only.....3
Staleness of the matter.....4
Unlikelihood of conviction.....5
Little chance of crown proceeding 6
Lack of punishment upon conviction.....7
Client doing well.....8
Poorly worded probation order.....9
Difficult procedure.....10
_____11
_____12

Most significant_____
Least significant_____

6) What reason(s) would a probation officer have to NOT process a Breach of probation (666) for a subsequent conviction? (ie. Report it to Crown Counsel for charge).

Triviality of matter.....1
Too busy.....2
Summary matter only.....3
Staleness of the matter.....4
Unlikelihood of conviction.....5
Little chance of crown proceeding.....6
Lack of punishment upon conviction.....7
Client doing well.....8
Poorly worded probation order.....9
Difficult procedure.....10
_____11
_____12

Most significant_____
Least significant_____

SECTION C: cont'd

7) What reason(s) would a probation officer have to NOT suggest a revocation, pursuant to 664(4)(d) of the SUSPENDED SENTENCE provisions?

Triviality of the matter.....1

Too busy.....2

Probation taken into account when person sentenced for subsequent offence.....3

Most significant_____

Least significant____

Lack of consequence upon revocation.....4

'Double jeopardy'.....5

Difficult procedure.....6

Client doing well.....7

_____8

_____9

8) What reason(s) would a probation officer have to NOT suggest a an alteration of probation conditions or extension of probation pursuant to Section 664(4)(e)?

Triviality of the matter..... 1

Too busy..... 2

Probation taken into account when person sentenced for subsequent offence..... 3

Most significant_____

Least significant_____

'Double jeopardy'..... 4

Difficult procedure 5

Client doing well _____ 6

_____ 7

9) What reason(s) would a probation officer have to NOT suggest a revocation of a conditional discharge (662.1(4))?

Triviality of the matter 1

Too busy.....2

Probation taken into account when person sentenced for subsequent offence..... 3

Most significant_____

Least significant____

Lack of consequence upon revocation..... 4

'Double jeopardy'..... 5

Difficult procedure.....6

Client doing well..... 7

_____8

_____ 9

SECTION C: cont'd

10) What reason(s) would crown counsel have to NOT proceed with a Breach of probation charge (666) when there has been a subsequent offence?

Triviality of the matter.....1
Too busy.....2
Staleness of the subsequent offence.....3
A summary offence only.....4
Unlikelihood of conviction.....5
Lack of consequence upon conviction.....6
Reported, but not recommended by probation officer..7
Lack of evidence.....8
Poorly worded probation order.....9
Difficult procedure.....10
_____11
_____12

Most significant:____
Least significant:___

SECTION D

For the following questions, please Mark (✓)only ONE space. Regardless of your response, you are asked to briefly explain why you responded as you did.

1) Generally, do you feel probation is currently used as an alternative to incarceration?

YES _____
NO _____
EXPLANATION:_____

2) Could there be greater use of probation as an alternative to incarceration if there was greater enforcement?

YES _____
NO _____
EXPLANATION:_____

3) Could any improvements be made in the criminal code sections dealing with probation?

YES_____
NO _____
EXPLANATION:_____

4) Can any improvements in enforcement of probation be made using the present laws?

YES_____
NO _____
EXPLANATION:_____

SECTION E

For the following questions, please mark (✓) only ONE space.

1) In your mind, is probation a legal disposition which gives offenders a second chance, while threatening them with punishment in the event they fail to conform to the conditions of a probation order?

Almost always _____
Usually _____
Often _____
Sometimes _____
Almost never _____

OTHER _____

COMMENT:

2) In your mind, is probation a measure of leniency?

Almost always _____
Usually _____
Often _____
Sometimes _____
Almost never _____

OTHER _____

COMMENT:

3) In your mind, is probation a punitive measure in that both the conditions of the probation order and the threat of greater punishment, should the conditions not be met, represent an intrusive form of social control?

Almost always _____
Usually _____
Often _____
Sometimes _____
Almost never _____

OTHER: _____

COMMENT:

4) In your mind, is probation an administrative process which involves executing concrete measures such as helping the probationer find employment or assisting in training applications?

Almost always _____
Usually _____
Often _____
Sometimes _____
Almost never _____

OTHER _____

COMMENT:

5) Is probation a form of social casework treatment. That is, social casework to assist emotionally troubled individuals?

Almost always _____
Usually _____
Often _____
Sometimes _____
Almost never _____

OTHER _____

COMMENT:

Thank you for taking the time to complete this questionnaire.

Any other comments you might like to make below, would be appreciated.

COMMENTS:

APPENDIX G

INTERVIEW QUESTIONS

1) What is your estimate of the number of people on your present caseload who have breached their probation order at least once? For example, a person may have missed an appointment, a technical violation.

2) How many people have you breached in the last two years?

3) Of those, how many pleaded guilty?

4) How man pleaded not guilty?

5) What are the usual reasons for a breach?

6) Do you have problems with breaches of probation?

7) Why or why not?

8) Do you have any idea about which breach charges will or will not be proceeded with by the Crown?

9) Have you attempted to revoke a suspended sentence in the last two years?

10) Why would you attempt it?

11) Why would you not attempt it?

12) Have you attempted to revoke a conditional discharge in the last two years?

13) Why would you attempt it?

14) Why would you not attempt it?

15) Have you attempted a suspended sentence revocation in your career?

16) Have you personally seen a suspended sentence revoked?

17) If so, how many?

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