ABSOLUTE AND CONDITIONAL DISCHARGE

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I. INTRODUCTION

In July 1972, the Criminal Code[1] was amended to provide for the granting, in appropriate cases, of "absolute" and "conditional" discharges.[2]

* B.Eng., 1964, R.M.C. Common Law III.

[1] CAN. REV. STAT. c. 34, § 662.1 (1970).

[2] Can. Stat. c. 13, § 57 (1972).

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 or by death, 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

662.1 (1) Lorsqu'un accusé autre qu'une corporation plaide coupable ou est reconnu coupable d'une infraction autre qu'une infraction pour laquelle la loi prescrit une peine minimale ou qui est punissable, à la suite des procédures entamées contre lui, d'un emprisonnement de quatorze ans, de l'emprisonnement à perpétuité ou de la peine de mort, la cour devant laquelle il comparaît peut, si elle considère qu'une telle mesure est dans l'intérêt véritable de l'accusé sans nuire à l'intérêt public, au lieu de condamner l'accusé, prescrire par ordonnance qu'il soit libéré inconditionnellement ou aux conditions prescrites dans une ordonnance de probation.

(2) Sous réserve des dispositions de la Partie XIV, lorsqu'un accusé qui n'a pas été mis sous garde ou qui a été mis en liberté aux termes ou en vertu d'une disposition de la Partie XIV plaide coupable ou est reconnu coupable d'une infraction mais n'est pas condamné, la sommation ou citation à comparaître à lui délivrée, la promesse de comparaître ou promesse remise par lui ou l'engagement contracté par lui demeure en vigueur, sous réserve de ses dispositions, jusqu'à ce qu'une décision soit rendue à son égard en vertu du paragraphe (1) à moins que, au moment où il plaide coupable ou est reconnu coupable, le tribunal, le juge ou le juge de paix n'ordonne que le prévenu soit mis sous garde en attendant cette décision.

(3) Lorsqu'une cour ordonne, en vertu du paragraphe (1), qu'un accusé soit libéré, l'accusé n'est pas censé avoir été

The obvious purpose of the enactment was to provide the courts with an alternative to convicting an accused when the consequences of such a conviction would outweigh the benefit normally obtained through securing a conviction after a finding or admission of guilt. These consequences are not that of any "sentence" which might be passed, for it is likely, that in most cases where a discharge is considered, no "sentence" would follow in the ordinary sense, but rather they are those which would flow from the mere fact of registering a conviction and hence acquiring a criminal record. Depending on an individual's circumstances and aspirations, these consequences could amount to a *de facto* punishment far greater than any which might otherwise be imposed.

That this objective has not been altogether realized has been commented upon elsewhere [3] but even accepting it as a worthwhile addition on the "half-

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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 or the Attorney General 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 or, in the case of an appeal by the Attorney General, a finding that the accused was not guilty of that offence; 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."

déclaré coupable de l'infraction quant à laquelle il a plaidé coupable et à laquelle la libération se rapporte, sauf que

a) l'accusé ou le procureur général peut interjeter appel de l'ordre de libération de l'accusé comme si cet ordre était une déclaration de culpabilité relativement à l'infraction à laquelle se rapporte la libération ou, dans le cas d'un appel interjeté par le procureur général, une conclusion portant que l'accusé n'était pas coupable de cette infraction; et

b) l'accusé peut plaider *autrefois convict* relativement à toute inculpation subséquente relative à l'infraction à laquelle se rapporte la libération.

(4) Lorsqu'un accusé qui est soumis aux conditions d'une ordonnance de probation rendue à une époque où sa libération a été ordonnée en vertu du présent article est déclaré coupable d'une infraction, y compris une infraction prévue par l'article 666, la cour qui a rendu l'ordonnance de probation peut, en plus ou au lieu d'exercer le pouvoir que lui confère le paragraphe 664(4), à tout moment où elle peut prendre une mesure en vertu de ce paragraphe, annuler la libération, déclarer l'accusé coupable de l'infraction à laquelle se rapporte la libération et infliger toute sentence qui aurait pu être infligée s'il avait été déclaré coupable au moment de sa libération, et il ne peut être interjeté appel d'une déclaration de culpabilité prononcée en vertu du présent paragraphe lorsqu'il a été fait appel de l'ordonnance prescrivant que l'accusé soit libéré.»

[3] *See*, Swabey, *Annotation* 20 Crim. R. (n.s.) 132. Absolute and Conditional Discharges under the Criminal Code (1973). Also *see* Greenspan, *Absolute and Conditional Discharge* in STUDIES IN CRIMINAL LAW AND PROCEDURE at 64 (1973).

a-loaf" principle, it is clear that a number of problems with the application of the provision itself exist. Two main areas have received judicial consideration.

As might be expected, the main question is under what circumstances should a discharge be granted. The other question is whether an appeal lies from a refusal of a court to grant a discharge and, if so, how.

II. GRANTING A DISCHARGE

The issue here is not so much that of when will a discharge be granted, but rather when it will not be granted. Subsection 662.1(1) itself limits its availability to an accused, that is not a corporation and for an offence which has no minimum punishment and for which the maximum punishment is less than 14 years or is not life or is not death.

Once these initial conditions are satisfied the court has to decide whether it should order a discharge "instead of convicting the accused." It may do this if it considers it to be (1) in the best interests of the accused; and (2), not contrary to the public interest.

While most judicial activity has been directed towards the granting of a discharge without questioning the pre-condition of the appropriateness of the offence, two Nova Scotia cases have dealt with the applicability of the provisions to certain types of offences.

In *R. v. Gower*,[4] it was held that a discharge was not available for offences against provincial statutes. This was decided on the ground that it was not the intention of Parliament to include therein offences under provincial statutes.[5] It is submitted that while this result may be so, in Nova Scotia, it is not for that reason. The intention of Parliament is not relevant as to provincial offences as they are provincial matters and do not come under the federal criminal power. As such the Criminal Code would not ordinarily reach provincial summary matters. The Nova Scotia Summary Convictions Act[6] provides a comprehensive code for dealing with provincial offences and does not incorporate the summary conviction provisions of the Criminal Code.

However it is submitted that the position in Ontario is somewhat different. Section 3 of the Ontario Summary Convictions Act[7] adopts by reference, Part XXIV of the Criminal Code, as amended, and/or re-enacted from time to time and providing it is not inconsistent with the Act itself. As the

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[4] 21 Crim. R. (n.s.) 230 (N.S. County Ct. 1973).

[5] *Id.* at 231.

[6] N.S. REV. STAT. c. 295 (1967).

[7] ONT. REV. STAT. c. 450 § 3 (1970). "Except where inconsistent with this Act, Parts XIX and XXIV of the *Criminal Code (Canada)* as amended or re-enacted from time to time apply *mutatis mutandis* to every case to which this act applies as if the provisions thereof were enacted in and formed part of this act."

Ontario Act presently stands there does not appear to be an inconsistency.[8] As such a discharge should be available in Ontario, when dealing with a provincial matter.

The other Nova Scotia case opened the door to a type of offence which appeared to be excluded. In *R. v. Millen*[9] the accused had pleaded guilty to a section 236 breathalyser offence. This offence is punishable by a fine of not less than fifty dollars nor more than one thousand dollars *or* to imprisonment for not more than six months, or both. County Court Judge McLellan reasoned that the provisions as to a fine or imprisonment were alternative and should he consider a fine inappropriate, he could decline to impose one. Then he would be left with the option of imprisonment for which there is no minimum prescribed. He was therefore free to consider granting a discharge. While on first perusal the reasoning smacks of sophistry, on closer examination it is logically sound. If he can chose either *A* or *B* or both *A* and *B*, clearly *B* is available and if *B* is chosen and there is no minimum with *B*, then the condition is met. The difficulty in accepting the conclusion is that the provisions are ordered in a hierarchy that is normally thought of as running from least severe to most severe. Once this normal thought pattern is disturbed, it is not quite so difficult to accept the result.

It is also significant that the consequence McClellan wished to avoid was the automatic suspension of the accused-driver's license which would ensue under provincial legislation should a conviction be entered.[10]

III. When Will a Discharge be Granted?

The granting of a discharge is discretionary. The court *may* by order

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[8] *Supra* note 3, Greenspan in his article at p. 70-71 in discussing the Ontario position says that an inconsistency might be argueable on the basis of a provision for a suspended sentence after conviction in the Ontario Act. He offers the counter-argument that suspended sentences co-exist with discharge under the Code. It is submitted that an alternative argument is that the question of discharge is to be considered in the somewhat metaphysical area between a finding of guilt and a conviction and that as this area had hitherto not existed, the Ontario Act cannot be taken to operate on it.

[9] 21 Crim. R. (n.s.) 225 (N.S. County Ct. 1973).

[10] *Id.* at 227. McClellan also alluded to the fact that some amelioration might be possible through the granting of a "restricted" licence under § 238. However it was viewed at the time that this would be of no use or, the license would be automatically revoked under provincial legislation. This has since been confirmed by an as yet unreported decision of the Supreme Court of Canada, (Regina v. Ross, Globe and Mail (Toronto), at page 4, November 6, 1973).

By granting a discharge this penalty or consequence could be avoided but it appears that it is flying in the face of provincial policy. It would also be at the expense of foregoing any other available punishment such as a monetary fine. Quaere, however whether the objective of allowing an offender to drive for certain specified purposes might be achievable by ordering a conditional discharge and making it a term of the probation order that driving be restricted in whatever manner seems appropriate.

Editor's Note: Since this comment was put into print, the N.S. Court of Appeal reversed the decision of McClellan, J., holding that § 236 provides for a minimum punishment. *See* R. v. Millen, 24 Crim. R. (n.s.) 242 (1973). In imposing sentence the court allowed for a restricted license per § 238. In view of the *Ross* decision noted above, this seems rather futile.

direct a discharge "if it considers it to be in the best interests of the accused and not contrary to the public interest. [11]

In *Regina v. Derkson,* [12] Provincial Court Judge Ostler in one of the first reported cases on the provision made it clear that it was the function of the court to decide the appropriateness of a discharge. After a plea of guilty to a charge of possession of *cannabis resin* [13] the Crown applied for an absolute discharge indicating that it was now policy to ask for this disposal in like matters. The court refused to accept this as an indication that it would not be contrary to the public interests to grant the discharge. In fact, it held that it is:

> necessary that the courts express the moral condemnation of the community for deliberate infractions of the criminal law . . . the discharge . . . should never be applied routinely to any criminal offence, in effect labelling the enactment violable. It should be used frugally, selectively and judiciously as Parliament obviously intended. If it is considered that an absolute or conditional discharge is the appropriate penalty for a first offence under this section, then Parliament should so declare. The courts should not compromise or circumvent the law. [14]

While rejecting its blanket application to cases of simple possession and to the case before him, Ostler stated that: "of course, there will be cases under this section [section 3 (2) of the Narcotics Control Act] and for other infractions of the criminal law, where a discharge is appropriate, depending upon the age and antecedents of the accused and the circumstances of the case." [15]

In *Regina v. Sanchez-Pino* [16] the Ontario Court of Appeal dealt at some length with the criteria to be used in deciding whether or not to grant a discharge. Speaking for the court, Mr. Justice Arnup held that when the issue is raised, "the trial judge *must* consider whether he should apply it in the particular case, or whether he should register a conviction." [17] The trial judge must judicially exercise his discretion after properly instructing himself. In considering whether a discharge is in the best interests of the accused, the deterrence of the offender himself must be found not to be a relevant consideration in the circumstances, except to the extent required by conditions in a probation order. The offender should normally be of good character, "or at least of such character that the entry of a conviction against him may have significant repercussions." [18]

Deterrence to others will be a factor to be assessed when considering the "contrary to public interest" limb. "The more serious the offence, the less likely it will appear that a [discharge] is 'not contrary to the public interest.'" [19]

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[11] *Supra* note 2, § 662 1(1).
[12] 20 Crim. R. (n.s.) 129 (B.C. Prov. Ct. 1972).
[13] CAN. REV. STAT. c. N-1 § 3(2) (1970).
[14] *Supra* note 12, at 132.
[15] *Supra* note 12, at 130.
[16] 11 Can. Crim. Cas. 2d (Ont. 1973).
[17] *Id.* at 55.
[18] *Id.* at 59.
[19] *Id.* at 59.

Mr. Justice Arnup refused to go further, stating that:

> To attempt more specific delineation would be unwise, and might serve to fetter what I conceive to be a wide, albeit judicial, discretion vested in the trial Court. That Court must consider all of the circumstances of the accused, and the nature and circumstances of the offence, against the background of proper law enforcement in the community, and the general criteria that I have mentioned. [20]

In the case before him for review the offender was a mature adult of high educational and intellectual attainment. The offence was that of shoplifting. The circumstances indicated that it was pre-planned and deliberate and not the result of momentary impulse. The Crown Attorney opposed the application and indicated the widespread incidence of shoplifting prevalent in Metro Toronto—a matter of public notoriety. The consequences of conviction would be loss of employment and deportation. Considering all the circumstances, it was found that there was no room to grant a discharge.

In *Regina v. Christman* [21] the Alberta Court of Appeal considered the criteria. Mr. Justice Clement, speaking for the court, seemed to place the emphasis on the public interest limb. He stated that he was:

> of the opinion that the public interest in respect of the offence in question must be fully and carefully canvassed and given due weight before a disposition can be made. Much of the public interest in this area is exemplified by the well-known considerations which a court takes into account in determining sentence. If relief from all these considerations would not be contrary to the public interest, and the best interests of the accused determined upon a rational basis would be thereby served, the case would be one for an order directing a discharge. [22]

This view may be contrasted with that of McLellan, in *Millen* [23] where he stated:

> The section under which the power to direct a discharge is given specified the two matters to be taken into consideration by the court in acting under the section, and, as well, indicates the weight to be given to each. The first and more important factor is whether to grant a discharge is in the best interests of the accused. The second and, in my view, because of the negative phraseology adopted by Parliament in enacting this amendment, a factor of less importance is whether to grant such a discharge is not contrary to the public interest. [24]

It seems clear that no explicit criteria or tests will be delineated nor, it is submitted, is this desirable. The obvious difficulty, however, is the potential for divergence from court to court. In debating this proposal prior to second reading of the Act, the then Minister of Justice, Otto Lang, said that: "The key to how this power is used will be the way the judges and magistrates apply it. We are very conscious of our responsibility to help them

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[20] *Id.* at 59.
[21] [1973] 3 W.W.R. 478-79 (Alta.).
[22] *Id.* at 478.
[23] *Supra* note 9.
[24] *Id.* at 226.

understand the scope of their power and to promote a uniform and enlightened approach throughout the country." [25]

While a measure of uniformity is desirable it is likely achieveable only by laying down rigid rules and final tests. This, it is submitted, would be too high a price to pay. On the other hand, guidance is needed as to the "public interest" aspect. The view taken by the B.C. Provincial Court Judge in *Derkson* [26] seems far from that of the Nova Scotia County Court Judge in *Millen.* [27] Unlikely and non-uniform interpretations have occurred [28] and will undoubtedly occur again until and unless a definitive statement as to the "public interest" that is meant to be served is given as well as an indication of the criteria to be used in weighing them against the best interests of the accused.

IV. Appeal from a Refusal to Grant a Discharge

The very nature of the discharge provision indicates that in the majority of cases summary conviction matters will be in issue. However, the reported cases show a significant number of instances where the matter is proceeded with by indictment. [29] These in the main are shoplifting or petty thefts and come under section 294(b) of the Criminal Code. Appeals from these matters are proceeded with under Part XVIII, of the Criminal Code.

Subsection 662.1(3) preserves the rights of appeal of both the accused and the Attorney-General when a discharge is granted. Both may appeal as if a conviction had been entered and the Attorney-General may appeal as if the accused had been found not guilty.

The definition of "sentence," found in both section 601 and section 720, [30] was amended to include a disposition (*i.e.*, an order for a discharge) made under subsection 662.1(1).

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[25] 11 H.C. Deb. 28th Parl. 4th Session 1700.

[26] *Supra* note 12.

[27] *Supra* note 8.

[28] For instance in R. v. Sanchez-Pino, an appeal from a decision of a Provincial Court Judge who felt § 662.1 had been passed "primarily for the marijuana simple possession"; or Regina v. Fallofield, 22 Crim. R. (n.s.) 342 (1973) on an appeal from a refusal to grant a discharge because the trial judge did not think that "this was a case of strict liability or that it is a case where the offense being committed was entirely completely unintentional or unavoidable." As for divergent views as to "public interests" there is the position of the Court in Millen where to avoid the repercussions of Provincial Legislation (which surely must be considered as a manifestation of public interest, albeit provincial) a discharge was granted. Contrast that with the decision of the Alberta Court of Appeal in Regina v. Fung, 11 Can. Crim. Cas. 2d 195 (1973), where it was argued that the interest of the accused would be unduly prejudiced because a conviction would bring into play consequences under the Immigration Act. The court turned this argument around and held that the public interest required a conviction so that the Immigration authorities could take action.

[29] For instance *Sanchez-Pino, Stafrace, Fallofield,* and *Christman.*

[30] Can. Stat. (1972), c. 13 § 52. § 601 "sentence" includes a declaration made under subsection 181(3), an order made under §§ 95, 653, 654 or 655, and "a disposition made under subsection 662.1(1)", subsection 663(1) or subsection 664(3) or (4).

It seems reasonably clear that it was intended to preserve full rights of appeal for the both the accused and the Crown. The amending legislation itself provides for appeals in cases where a discharge is granted and normal appeal procedures seemed to have been contemplated in cases where a discharge is refused. [31]

However the Ontario Court of Appeal in *Regina v. Stafrace* [32] seemed to arrive at the conclusion that the accused had no right of appeal against a refusal to grant a discharge. Speaking for the court, Mr. Justice Schroeder stated that:

> If parliament had intended that the Court should have the power to grant an accused person a conditional or absolute discharge in accordance with the provisions of § 662.1 even in a case where a conviction has been entered in the Court below, the legislation could have been couched in language which would confer that power on an appellate court. [33]

In interpreting section 614, [34] which details the powers of an appeal court on an appeal as to sentence, he held that there is no power to grant a discharge as the *conviction* cannot be quashed. This power to quash is only as to appeals against convictions under section 613(2), [35] and even then the only alternatives available are either to acquit or to order a new trial.

He stated that "Once the judge in the trial court has entered a conviction the die has been cast as far as the appellate court is concerned and the

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[31] The amended definition of sentence coupled with the power of an appeal court to vary sentence under § 614, (*supra* note 3) reasonably gives rises to the inference that *ex facie* existing procedures were considered adequate once the definition of sentence was expounded.

[32] 10 Can. Crim. Cas. 2d 181 (1973).

[33] *Id.* at 183-84.

[34] CAN. REV. STAT. c. C-34, § 614 (1970).

1. Where an appeal is taken against sentence the court of appeal shall, unless the sentence is one fixed by law, consider the fitness of the sentence appealed against, and may upon such evidence, if any, as it thinks fit to require or to receive,
   (a) vary the sentence with the limits prescribed by law for the offence of which the accused was convicted, or
   (b) dismiss the appeal.
2. A judgment of a court of appeal that varies the sentence of an accused who was convicted has the same force and effect as if it were a sentence passed by the trial court, 1953-54, c. 51, s. 593.

[35] CAN. REV. STAT. c. C-34, § 613 (1970).

613. (1) On the hearing of an appeal against a conviction or against a verdict that the appellant is unfit, on account of insanity, to stand his trial, or against a special verdict of not guilty on account of insanity, the court of appeal	613. (1) Lors de l'audition d'un appel d'une déclaration de culpabilité ou d'un verdict portant que l'appelant est incapable de subir son procès, pour cause d'aliénation mentale, ou d'un verdict spécial de non-culpabilité pour cause d'aliénation mentale, la cour d'appel
(2) Where a court of appeal allows an appeal under paragraph (1)(*a*), it shall quash the conviction and	(2) Lorsqu'une cour d'appel admet un appel en vertu de l'alinéa (1)*a*), elle doit annuler la condamnation et
(*a*) direct a judgment or verdict of acquittal to be entered, or	*a*) ordonner l'inscription d'un jugement ou verdict d'acquittement, ou
(*b*) order a new trial.	*b*) ordonner un nouveau procès.

alternative course provided for by section 662.1(1) can no longer be exercised unless *the conviction can be vacated on proper grounds.*" [36]

The situation was further reviewed by the Ontario Court of Appeal in *Sanchez-Pino* [37] where Mr. Justice Arnup, speaking for the court, explained and distinguished *Stafrace*. He determined that the proper route to be followed on an appeal against a refusal to grant a discharge is to appeal against the conviction. He decided that a trial judge could make an error in considering whether to make an order for discharge or to register a conviction and that this error would affect the validity of the conviction. This would be an error in law and the court would be entitled to review the conviction. Section 613(2)(b) could then be used to quash the conviction and order a new trial at which time the trial judge would then consider whether he should make an order for discharge or enter a conviction after judicially applying the appropriate principles.

At about the same time the Alberta Court of Appeal faced the same issue. In *Regina v. Christman* [38] the appeal from a refusal was taken against sentence alone. Mr. Justice Clement, speaking for the court, read section 614 along with the extended definition of sentence in section 601. Since section 614(1) gave the court the power to vary the sentence within the limits prescribed and since a disposition made under section 662.1(1) is a sentence, a discharge could be substituted by section 614(2). This would have the same force and effect as if it were a sentence passed by the trial court and, as a consequence, the conviction registered against the accused must be expunged, since an order directing a discharge is made instead of registering a conviction.

In *Christman*, the court allowed the appeal to the extent that it granted a conditional discharge. It remitted the matter to the trial court so that the accused might undertake to bind himself to the terms of the probation order. It would seem to follow that if an absolute discharge was felt in order, there would be no necessity to remit the matter to the trial court, a step which appears necessary under the Ontario decision.

The reasoning followed by both courts is logically supportable. The divergence arises from the Ontario Court focussing on "conviction" and the Alberta Court focussing on "sentence."

Prior to the enactment, an accused was either found guilty or his guilty plea was accepted. Sentence was then passed and a conviction in form 31 was required to be drawn up. [39]

Now, after the guilty plea or the finding of guilt, a discharge must be considered. Depending on the result of this consideration, either a conviction will be entered or an order for discharge will be made. If the former, sentence may then be passed and in either case a Form 31 may be drawn up. [40]

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[36] *Supra* note 32, at 183 [Emphasis added].
[37] *Supra* note 16. [38] *Supra* note 21.
[39] CAN. REV. STAT. c. C-34, § 500 (1970).
[40] Can. Stat. (1972), c. 13, § 42.

To determine what it is an appeal court is being asked to do on an appeal against a refusal to grant a discharge, one must examine carefully the senses in which the term "conviction" is used in the relevant sections.

That the term "conviction" can be used in different senses is fairly evident. It has received judicial consideration on a number of occasions. In *Burgess v. Boetefeur* [41] Mr. Justice Tindall stated that "The word 'conviction' is undoubtedly *verbun acquivocum.* It is sometimes used as meaning the verdict of a jury, and at other times, in its more strictly legal sense, for the sentence of the court."

This was restated by the Ontario Court of Appeal in *Rex v. Vanek* [42] where it was held that "conviction is an equivocal word. It may include both the adjudication of guilt or conviction properly so called *and* the adjudication of punishment, or sentence properly so called; or it may refer only to the adjudication of guilt." [43]

It is submitted that the term "conviction" is used in different senses throughout sections 613.1 and 662 and that this is clearly shown when the French versions are compared with the English versions. [44]

In section 662.1(1) a discharge may be granted "instead of convicting the accused." The French version provides for a discharge "au lieu de condamner l'accusé." Clearly the sense in which "convicting" is used is that of imposing sentence.

If this is accepted, sense can be made of section 662.1(3) where it is provided that an accused is not to be deemed convicted (except for certain specified purposes) after he has been granted a discharge instead of being convicted. This can only make sense if "convicted" in sub-section (3) is read in the sense of having been declared guilty. When compared with the French, "déclaré coupable" it is clear that that is what is meant.

Now in looking at section 613(1) it is seen that the concern is as to powers of the court on an appeal against a conviction. The corresponding French term is as to an appeal against "une déclaration de coupabilité." Clearly, the section is meant to apply to grievances as to the finding of guilt in the original matter.

On a successful appeal, what the court is empowered to do by sub-section (2), is to quash the conviction. By looking at the French version, it is seen that this is a power to quash the sentence (annuler la condamnation).

This is surely not what an appellant is seeking on such an appeal. He can hardly quarrel with the declaration of guilt (as he has generally pleaded guilty). What he is seeking is a variation of the sentence. This surely

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[41] 135 E.R. 193, at 203.

[42] [1944] Ont. 428, at 433.

[43] *Supra* notes 35 and 2.

[44] The B.C. Court of Appeal in Regina v. Fallofield, 22 Crim. R. (n.s.) 342 (1973), rejected the Ontario approach in Stafrace and Sanchez-Pino and opted for the Alberta rationale in *Christman.* This case is also useful for a survey of specific situations where discharges were or were not granted.

should be proceeded with by way of section 614 particularly in view of the amended definition of sentence in section 601.

It is submitted that in focussing on "sentence" the Alberta Court intuitively realized that the "conviction" which followed a refusal to grant a discharge was a "conviction" in the sense of a "sentence" and that in most cases the proper approach to follow against such a refusal is an appeal against sentence. [44a]

This approach seems the sounder. The appeal can be considered in terms of the general principles of sentencing. There will generally be no necessity to remit the matter back to the trial court. In addition it will not be necessary to label such an appeal as one against conviction (in the sense of a finding of guilt), when guilt is not in issue; what is in issue is merely the consequential disposition of the matter after an admission or finding of culpability.

V. SUMMARY

While the discharge provision is undoubtedly a worthwhile addition to the tools at the disposal of the trial judge, the few reported cases dealing with it indicate that problems do exist. The most serious criticism is that a discharge, even an absolute one, does not in fact free the offender from a criminal record. [45]

Uncertainty as to its scope and conflicting views as to the proper mode of appeal will eventually be resolved. What will require clarification is the criteria required in assessing the interests of the accused and the interests of the public.

There is more than a hint in *Sanchez-Pino* that consideration of the question of granting a discharge is mandatory. [46] In the main, discharges will

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[44a] Since the submission of this comment for publication the Ontario Court of Appeal has reconsidered the matter and has brought itself into line with British Columbia and Alberta. In Regina v. McInnis, 23 Crim. R. (n.s.) 152 (1973), Martin, J.A., speaking for a five-judge bench, overuled *Sanchez-Pino* and *Stafrace* and held that the Court of Appeal has jurisdiction to substitute discharge for the sentence imposed by the trial court. He further held "that a decision not to make a disposition under § 662.1(1) is a disposition within the meaning of § 601 of the Code." He relied on the fact that R. v. Vanek, *supra* note 42, was not cited to the court in Stafrace and said "it may very well be that the Court would have reached a different conclusion after a consideration of the line of authority dealing with the meaning of the word 'conviction.'"

[45] *Supra* note 3. In summary the author of the annotation points out that if the provision for discharges in the Code are read with the Criminal Records Act, CAN. REV. STAT. 1970 (1st Supp. c. 12 as amended by Can. Stat. 1972 c. 13), it becomes clear that the offender gets a record in fact notwithstanding a discharge and that in order to remove this record an application for pardon has to be made. Even if such a pardon will be granted routinely, the offender must initiate action. It does not seem unlikely that many offenders, having been granted discharges, particularly those unrepresented by counsel, will leave the courtroom with the impression that that is the end of the matter when in fact it is not.

[46] *Supra* note 16, at 55, "§ 662.1 requires consideration of the question whether some form of conditional or absolute discharge should be granted . . . ."

most likely be considered appropriate in less serious offenses, where guilty pleas have been entered and where offenders are not represented. If the trial judge is to exercise his discretion judicially, a method of eliciting the circumstances of the offender must be developed. The presence of legal aid duty counsel and probation officers in many remand courts will assist in this aspect. Nevertheless, due to the relatively short time available for the disposal of these matters, it would be useful to have rather clear cut guidelines as to the relevant considerations.