Revisiting the Conditional Sentence of Imprisonment after 20 years:

Is Community Custody now an Endangered Species? [1]

A generation has passed since Canada's first comprehensive sentencing reform. Proclaimed into law in 1996, Bill C-41[2] codified the purposes of sentencing and introduced a number of substantive and procedural reforms.[3] The legislation changed the landscape of sentencing[4] and the full consequences of the reforms are only now becoming clear. One of the most important elements[5] of the sentencing reform has attracted considerable media and political comment, yet surprisingly little empirical research. The Conditional Sentence of Imprisonment (hereafter CSI) is a novel form of custody created by Bill C-41. The CSI is a term of custody discharged in the community, where the offender is subject to a number of potentially demanding conditions. Unjustified violation of the conditions results in a breach hearing with a judicial presumption of committal to custody for breach. The CSI differs from other alternatives to imprisonment. For example, unlike the suspended sentence which exists in almost all common law jurisdictions, offenders serving a CSI are deemed to be serving a term of imprisonment; no element of the sentence is suspended. The sanction was conceived to reduce the use of incarceration for nonviolent offenders[6], although as first enacted, the statutory limit permitted courts to impose a CSI even for very serious crimes of violence. When this occurred, newspaper headlines inevitably followed.

Objectives of the Conditional Sentence of Imprisonment

[1] Our thanks to the following for comments on an earlier draft of this article: Judge David Cole; Keir Irwin Rogers; Martin Andresen and Dawn North.

[2] *An Act to amend the Criminal Code (Sentencing) and other Acts in consequence thereof*, S.C. 1995, c.22. The Bill was proclaimed into force on September 3, 1996.

[3] David Daubney & Gordon Parry (1999) "An Overview of Bill C-41 (The Sentencing Reform Act)" in Julian V. Roberts & David Cole, eds, *Making Sense of Sentencing* (Toronto: University of Toronto Press, 1999) 31; Allan Manson "The Appeal of Conditional Sentences" (1997) 5 C.R. 279; Julian V. Roberts & David Cole, eds, *Making Sense of Sentencing* (Toronto: University of Toronto Press, 1999).

[4] Patrick Healy & Hélène Dumont, eds, *Dawn or Dusk in Sentencing* (Montreal: Canadian Institute for the Administration of Justice, Editions Themis, 1997).

[5] The sentence was described by the Department of Justice architects of the legislation as 'Unquestionably the most novel aspect of Bill C-41' David Daubney & Gordon Parry, supra note 3 at 40.

[6] Jack Gemmell "The New Conditional Sentencing Regime" (1997) 39 Crim.L.Q. 334.

The CSI had multiple objectives, some of which have been overlooked by academics. Beyond the goal of reducing admissions to custody, the architects of Bill C-41 hoped to change the landscape of sentencing by creating a form of imprisonment which could be served in the community. As such, the CSI is not so much an alternative to custody but rather a way in which a sentence of custody may be discharged.[7] The CSI was also conceived to provide courts with a punitive sanction which also creates opportunities for restorative justice. In this sense the new sanction was one means by which courts might give force to the statement of the overall purpose of sentencing found in s. 718 of the Criminal Code. This provision was the first common law sentencing statute to formally recognise the importance of restorative justice.[8] The potential of the conditional sentence to promote restorative justice objectives has been overlooked by most scholars, but not the judiciary. As one Chief Justice noted, the CSI was "designed to address both the perceived problem of over-incarceration and the need to promote restorative justice".[9] Research by Stephens also documents judicial awareness of this purpose of the CSI.[10] Finally, the CSI was also created with the intention of providing a means by which s. 718. 2(e) could be implemented; the sanction was seen as being particularly appropriate to the sentencing of Aboriginal offenders.

Critiques of the Conditional Sentence of Imprisonment

Almost from the outset, the CSI attracted widespread public and media opprobrium, as well as academic criticism.[11] Indeed, within two years an appellate judgment noted that: "[d]uring its short life span, the concept of conditional sentencing has been vilified as being 'soft on criminals' and praised as one of the most enlightened sentencing revisions ever enacted".[12] Much

[7] There are parallels with the intermittent sentence of imprisonment. An offender serves say 60 days intermittently, discharging his custodial sentence, albeit in a different manner (and setting) compared to an offender sentenced to 60 days 'straight time'.

[8] David Daubney & Gordon Parry, supra note 3.

[9] Chief Justice Michael MacDonald "The Conditional Sentence Option" Nova Scotia Courts: From the Bench 2003 at p. 3; Laura Barnett et al. also note that the conditional sentence 'provides an opportunity to further incorporate restorative justice concepts into the sentencing process'. Bill C-10. Legislative Summary (Ottawa: Library of Parliament, 2012) at 59.

[10] Megan Stephens, "Lessons from the Front Lines in Canada's Restorative Justice Experiment: the Experience of Sentencing Judges" (2007) 33 *Queens LJ* 19.

[11] See discussion in Julian V. Roberts, "Conditional Sentencing: Sword of Damocles or Pandora's Box?" (1997) 2 Can Crim L Rev 183; Julian V. Roberts, *The Virtual Prison* (Cambridge: Cambridge University Press, 2004); Cheryl Webster & Anthony Doob "Missed Opportunities: A Postmortem on Canada's Experience with the Conditional Sentence" (2019) *Law and Contemporary Problems*, in press.

[12] R. v. R. (R.A.), [2000] 1 S.C.R. 163.

of the adverse media commentary focused on the apparent paradox that the offender was serving a sentence of imprisonment yet residing in the community rather than a prison. How, critics asked, could living at home (albeit subject to conditions), equate to a term of imprisonment in a penal institution[13]? Indeed, as originally structured, the CSI struggled to carry the same 'penal weight' as the term of custody it replaced, and most conditional sentences were regarded (not unreasonably, perhaps) as a mitigated sentence. This weakness of the regime was particularly apparent when the CSI was applied in cases involving the more serious forms of violent crimes.

The CSI regime was also seen as too permissive; with a ceiling of two years less one day, almost 95% of custodial sentences being imposed across Canada at that time were eligible (if the other statutory prerequisites were met), including the most serious crimes of violence. For example, at the time C-41 was enacted, almost all sentences of imprisonment imposed for sexual assault, aggravated assault and assault with a weapon were under two years and therefore within the ambit of the CSI.[14] The initial Code provisions also permitted considerable latitude to courts when responding to breach of conditions.[15] A court could choose from a range of options, including simply admonishing the offender and allowing the sentence to continue to run. Finally, the Criminal Code provision implied that the CSI would be of the same length as the institutional sentence it replaced:

> 'Where a person is convicted of an offence, except an offence that is punishable by a minimum term of imprisonment, and the court (a) imposes a sentence of imprisonment of less than two years…..the court may, for the purpose of supervising the offender's behaviour in the community order that the offender served the sentence in the community, subject to the offender's complying with the conditions of a conditional sentence order made under section 742.3'.

[13] A conditional sentence may not be imposed in sentence lengths of two years or longer; hence all conditional sentence prisoners fall within the provincial jurisdiction.

[14] See Appendix A in Julian V. Roberts, supra note 7. And for more detailed statistics, Andy Birkenmayer & Julian V. Roberts, (1997) "Sentencing in Adult Provincial Courts. A Study of Nine Canadian Jurisdictions: 1993 and 1994" 17 Juristat 1. These trends in average sentence length have not changed appreciably since these reports.

[15] Although this has been identified as a weakness of the regime, as North noted in an early commentary, preserving judicial discretion with respect to breach is one way of attempting to limit any net-widening effect. See Dawn North, "The Catch 22 of Conditional Sentencing" (2001) 44 Crim.L.Q. 342.

This wording may have discouraged courts from, for example, replacing a 6-month prison sentence with a 12-month CSI, following the reasoning that only by protracting the duration of the latter does it approach the penal equivalence of the former.

Legislative and Judicial Reform

Criticism of the conditional sentence regime led Parliament to rapidly amend the Criminal Code provisions by adding another condition to the statutory perquisites.[16] As a result, courts had to ensure that the imposition of a CSI did not undermine the fundamental statutory principle underlying sentencing in Canada, namely that of proportionality.[17] Parliament was not finished with the CSI regime, however; additional legislative amendments were introduced by the Harper government. The conditional sentence regime was further restricted (emasculated, some would say) by subsequent amendments introduced by the federal Conservative government, and ultimately ratified by Parliament. These were *An Act to Amend the Criminal Code (Conditional Sentence of Imprisonment)* and *The Safe Streets and Communities Act* which came into force in 2007 and 2012 respectively.

The reforms[18] were criticised by practitioners and academics alike.[19] The first amendments removed a court's discretion to impose a CSI for terrorism offences, offences associated with a criminal organization, serious personal injury offences prosecuted by way of indictment and punishable by a maximum term of ten years or more. These legislative amendments to the conditional sentence regime (particularly the second) significantly restricted the legal ambit of the sanction. The '*Safe Streets and Communities Act*' further reduced the list of offences for which a CSI was available. The new exclusions included crimes carrying a maximum

[16] The amendment was passed on the last day before the legislative session which ended with the federal election, without any debate outside the legislature. Manson rightly describes this hasty response as 'shocking', although he acknowledges the amendment was consistent with the majority of appellate decisions to that point. See Allan Manson, "The Appeal of Conditional Sentences of Imprisonment" in Patrick Healy & Hélène Dumont, supra note 4 at 300.

[17] S. 718.1 of the Criminal Code designates proportionality as 'the fundamental' principle of sentencing.

[18] The Harper government was not solely responsible for the ill-conceived reforms to the conditional sentence regime. Several provinces had led the charge against the sanction before Mr. Harper's government was elected. The Alberta Attorney General produced a paper advocating the restriction of the sanction in which it was noted that five provinces 'strongly recommend that the [CSI] legislation be amended' (see Justice and Attorney General (1993-2011), *The Conditional Sentence of Imprisonment: The Need for Amendment* (Edmonton: Alberta Justice, 2003) at 4. The Attorney General proposed a series of options including statutory presumptions against the use of a CSI and lowering the two years less one day ceiling. In addition, the BC legislature passed a motion the same year to remove a court's discretion to impose a CSI for offenders 'convicted of serious crimes of violence, including the offence of criminal negligence causing death arising out of street racing'. April 7, 2003.

[19] Julian V. Roberts, "Reforming Conditional Sentencing: Evaluating recent legislative proposals" (2006) 52 Crim.L.Q. 18.

penalty of 14 years or life; offences involving the export or import, trafficking and production of drugs, or offences involving the use of weapons liable for imprisonment of ten years or more when prosecuted by way of indictment and carrying a maximum term of 10 years or more (including motor vehicle theft and fraud over $5,000).

For its part, the Supreme Court addressed several critiques of the statutory framework in a landmark judgment in 2000.[20] In *Proulx,* the Court provided guidance on a number of aspects of the sanction, including the critical question of whether a conditional sentence had to be of the same length as the term of custody which it replaced. One of the directions in *Proulx* was that having decided to impose a CSI, courts could make the duration longer than the term of institutional imprisonment which it replaced. The Court's directions attempted to ensure that the use of the CSI would not undermine key sentencing concepts such as proportionality and parity, both of which had been placed on a statutory footing by C-41.[21] The Supreme Court judgment was a welcome corrective to a flawed regime and illustrates the functional relationship between the legislature and the courts. If the former creates a sanction with problematic elements, the latter can shape the sentence. Legislatures legislate, and courts interpret.[22] Finally, as noted in *Gladue*, the Supreme Court affirmed that enhancing the use of restorative justice was a principle underlying the creation of the conditional sentence.[23]

Empirical Research on Conditional Sentencing

In 2012, a Parliamentary review noted that empirical research upon the conditional sentence has been limited. [24] Although several studies explored the use of the new sanction in the first few years,[25] little has been published since then, particularly over the past decade. A number of authors have explored the impact of *Proulx*. Lehalle, Landreville and Charest demonstrated the significant impact of the judgement on conditional sentencing in Quebec. For example, the number of conditions imposed increased following the judgement, and in particular the use of a

[20] R. *v. Proulx*, [2000] 1 S.C.R. 61.

[21] Julian V. Roberts, "Unearthing the Sphinx: The Evolution of Conditional Sentencing" (2001) 80 Can. B. Rev. 1019; Julian V. Roberts & Patrick Healy, "The Future of Conditional Sentencing" (2001) 44 Crim.L.Q. 309.

[22] Another example discussed later in this paper is the Suspended sentence order in England and Wales. This sanction has been repeatedly amended by Parliament and the subject of numerous Court of Appeal judgements.

[23] R. v. Gladue [1999] 1 S.C.R. 688.

[24] Library of Parliament, *Bill C-10. Legislative Summary* (Ottawa: Library of Parliament, 2012) at 68.

[25] For an overview, see Julian V. Roberts & Carol LaPrairie, *Conditional Sentencing in Canada: An Overview of Research Findings* (Ottawa: Department of Justice Canada, 2000).

curfew (Table 2), both trends consistent with the judgment. North reported a similar impact in British Columbia.[26] Other publications addressed a range of issues including public reaction[27]; judicial attitudes[28]; the conditions attached to conditional sentences[29]; the use of the sanction in cases of Aboriginal offenders[30]; conditional sentencing and the perspectives of victims;[31] the perceptions and experiences of offenders serving a conditional sentence[32], and the evolution of the sanction as manifested in appellate judgements.[33] Some studies have focused upon the use of conditional sentences for specific offences including domestic violence and impaired driving causing death. [34] Finally, the Adult Criminal Court Survey (ACCS) (conducted by Statistics Canada) results in an annual publication containing limited descriptive statistics[35] on the volume of CSIs imposed.[36]

When a new sanction is introduced with the intention of reducing the number of admissions to custody, there is the danger that courts may apply the sanction instead to the most serious cases which previously attracted a noncustodial sentence. If all cases attracting the new

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[26] Dawn North, *Conditional Sentencing post R. v. Proulx* (Department of Criminology, Simon Fraser University, 2001).

[27] Voula Marinos & Anthony Doob, "Understanding Public Attitudes Toward Conditional Sentences of Imprisonment" (1999) 21 C.R. 31; Trevor Sanders & Julian V. Roberts, "Public Attitudes towards Conditional Sentencing: Results of a National Survey" (2000) 32 Can J Behavioural Science 199.

[28] Julian V. Roberts, Anthony Doob, & Voula Marinos, *Judicial Attitudes Towards Conditional Sentences of Imprisonment: Results of a National Survey* (Ottawa: Department of Justice Canada, 2000); Julian V. Roberts & Allan Manson, *The Future of Conditional Sentencing: Perspectives of Appellate Judges* (Ottawa: Department of Justice, 2004).

[29] Isabelle Dufour, Renée Brassard, & Jean-Pierre Guay, "Sursis, recidive et reinsertion sociale: un equilibre Precaire" (2009) 51 Can J Crim & CJ 303; Julian V. Roberts, Daniel Antonowicz, and Trevor Sanders, "Conditional Sentences of Imprisonment: An Empirical Analysis of Conditions" (2000) 30 *C.R.* 113.

[30] Andrew A. Reid, "The (Differential) Utilization of Conditional Sentences among Aboriginal offenders in Canada" (2017) 22 Can Crim L Rev 133.

[31] Julian V. Roberts & Kent Roach, "Conditional Sentencing and the Perspectives of Crime Victims: A Socio-legal Analysis" (2005) 30 Queen's LJ 560.

[32] Julian V. Roberts, Lana Maloney, & Robert Vallis, Coming Home to Prison: *A Study of Offender Experiences of Conditional Sentencing* (Ottawa: Department of Justice Canada, 2003).

[33] Julian V. Roberts & Patrick Healy, "The Future of Conditional Sentencing" (2001) 44 Crim.L.Q. 309.

[34] Carmen Gill and Luc Theriault, "Using Conditional Sentences in Domestic Violence Cases" (2009) 63 Can Rev Social Policy 83; David Paciocco & Julian V. Roberts, *Sentencing in Cases of Impaired Driving Causing Bodily Harm and Impaired Driving Causing Death, with Particular Attention to Conditional Sentencing* (Ottawa: Canada Safety Council, 2005).

[35] ACS publications generally report the breakdown of conditional sentence admissions by jurisdiction. See for example: Jamil Malakieh, "Adult and Youth Correctional Statistics in Canada, 2016/2017" (2018) Juristat 1.

[36] For example, Statistics Canada, "Adult Criminal court statistics in Canada, 2014/2015" (2017) *Juristat*, Catalogue no. 85-002-X.

sanction are drawn from the community caseload, there would be no reduction in the use of imprisonment. This phenomenon is described as 'Widening of the Net' of penal control and has been observed repeatedly following the introduction of alternative sanctions in other jurisdictions.[37] As several authors have noted, the nature of the CSI makes it particularly susceptible to the problem of net-widening.[38] Scholars in Canada warned about the potential of the CSI to create this problem.[39] It would be unrealistic to expect courts never to apply a new form of custody to the community caseload. Indeed, if judges impose a new form of imprisonment in cases formerly attracting a community penalty, this misapplication should provoke a closer examination of the alternative sanction, in this case terms of probation.

The introduction of the CSI could have had two effects: a decarceration effect and a 'widening of the net' effect; it may have reduced the volume of both prison sentences and terms of probation. The first analysis exploring decarceration and net-widening was reported by Laprairie and Koegl who examined trends over the first two years of the new regime (1996-1998).[40] They found evidence of both trends: reductions in the volume of admissions to custody in some jurisdictions, widening of the net in others.[41] Another early study also addressed the critical question of how the introduction of the CSI changed sentencing practices, albeit with a different methodology. Drawing upon a slightly longer period (to 2001), these researchers also concluded that the CSI had had the dual effect of reducing the number of terms of imprisonment (the *Decarceration Effect*) and reducing the volume of probation sentences (the *Widening of the Net Effect*). These authors reported that eight of the nine provincial jurisdictions included in the analysis experienced a net decline in the volume of admissions to custody. This aggregate 13% decline, however, masked great variation between provinces, with some (Saskatchewan) reporting a significant fall in admissions to custody (- 47%) while elsewhere the reduction was only modest: Quebec and Ontario – the most populous provinces -- experienced

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[37] See for example, Anthony Bottoms, "The Suspended Sentence in England, 1967-1978" (1981) 21 *Brit J Crim* 1; Carol Hedderman & Rebecca Barnes, "Sentencing Women: An Analysis of Recent Trends" in Julian V. Roberts, ed, *Exploring Sentencing Practice in England and Wales (*London*:* Palgrave Macmillan, 2015).

[38] See Dawn North, supra note 26.

[39] Jack Gemmell, supra note 6; Kent Roach, "Conditional Sentences and Net Widening" (2000) 43 Crim.L.Q. 273.

[40] Carol Laprairie and Chris Koegl, *The Use of Conditional Sentences: An Overview of Early Trends*. Ottawa: Department of Justice, 2000.

[41] Laprairie and Koegl note that the 'total number of conditional sentences imposed is far greater than the decrease in sentenced admissions', but noted that these trends may also be explained by changes in crime or charging rates; Ibid.

declines of only 5%.[42] With respect to net-widening, the analysis found a small (1%) intrusion into the probation caseload, suggesting that in this percentage a conditional sentence had been imposed in a case which would have attracted a probation order prior to the creation of the CSI. The key finding from this research, however, was the variable nature of the experience across the country: any conclusions based on the aggregate effect across the country would fail to capture the more important finding of wide provincial variation.

Finally, analysis of the early years of the sanction appeared in 2003, when Statistics Canada published data from the first four years of the conditional sentencing regime. Their data were drawn from the annual Adult Correctional Services Survey (ACS) and their conclusions were consistent with the limited academic analyses. Statistics Canada concluded that: 'The implementation [of the CSI] clearly coincides with a reduction in sentenced custody admissions in most jurisdictions.'[43] The Statistics Canada report noted that conditional sentences as a proportion of all correctional admissions increased from 7% in 1997/98 to 9% in 2000/01, while custodial sentences had decreased by 5%.[44] With respect to net-widening Statistics Canada concluded that the effect was 'less clear, with some jurisdictions showing an increase and others a decrease'.[45]

These trends provide only a preliminary indication of the impact of the new sanction, however. Only four years of data were available at the time of the analyses, and did not include statistics in the period following the landmark Supreme Court judgment in *Proulx* (released in 2001) which provided much-needed judicial interpretation of the provisions. Thereafter there was no further empirical research into the issue, as noted by Lehalle et al. in 2009: 'L'effet net des ordonnances de sursis sur 'elargissement du filet carceral reste a etre evalue empiriquement'.[46] Most recently, Webster and Doob[47] conducted what they describe as a 'postmortem' into the (presumably) lifeless sanction. After reviewing trends in the use of the

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[42] Julian V. Roberts & Thomas Gabor, "Living in the Shadow of Prison: Lessons from the Canadian Experience in Decarceration" (2004) 39 Brit J Crim 92 at Table 2.

[43] Dianne Hendrick, Michael Martin, & Peter Greenberg, *Conditional Sentencing in Canada: A Statistical Profile 1997-2001* (Ottawa: Statistics Canada, 2003) at 20.

[44] Ibid, Table 2.1.0.

[45] Ibid, at 20.

[46] Sandra Lehalle, Pierre Landreville, & Mathieu Charest, "L'Emprisonnement avec sursis au Quebec: impact de l'arret *Proulx"* (2009) 51 Can J Crim & CJ 277 at 298.

[47] Cheryl Webster and Anthony Doob, supra note 11.

sanction they conclude that 'one would be hard-pressed to consider [the CSI] a success on any dimension'.[48] We respectfully disagree. In our view the sanction is alive, if not exactly in rude health. It appears to have contributed to decarceration and continues to offer courts an alternative to institutional confinement, although its efficacy has been much undermined by recent legislative changes.

Overview of Article

This article builds upon previous research to explore the use and impact of the CSI on sentences of imprisonment and probation. We apply a new approach to the problem and analyse data from 1995 to 2016, addressing the following questions:

- Did the introduction of the CSI reduce the use of provincial terms of custody across Canada?
- To what extent have courts applied the CSI to cases which previously would have received a term of probation?
- Were the impacts of the CSI uniform across the jurisdictions?

To the extent possible, we provide analyses for the country as a whole and also the individual provinces and territories. Inter-jurisdictional variation is a particularly important aspect of this research since the courts of appeal across Canada have adopted rather different approaches to interpreting key provisions of Bill C-41.[49] After reviewing empirical trends we consider the case for reform.

Methods

Data

Data were drawn from the Adult Correctional Services (ACS) survey. Counts of custodial and community admissions to provincial and territorial programs were retrieved for the period 1995-2016. These included counts of admissions aggregated to the provincial/territorial unit of analysis with details on the type of sanction (e.g., sentenced custody, probation, and CSI) for each admission. Although the ACS is Canada's most comprehensive source for correctional admission data, several limitations exist. Most importantly, not all jurisdictions consistently

[48] Ibid, p. x. These authors evaluate the CSI on a single dimension, its ability to significantly reduce the volume of admissions to provincial correctional institutions. In our discussion we adopt a wider perspective, considering the role of the CSI in changing the penal landscape and assisting efforts to reduce Aboriginal incarceration.

[49] Allan Manson, *Sentencing Law in Canada* (Toronto: Irwin Law, 2001).

reported admission counts to the survey during the 1995-2016 period.[50] Nunavut became a Canadian territory in 1999 after separating from Northwest Territories. Because it was not possible to accurately report on correctional admissions for these jurisdictions throughout the 22-year period, both were excluded from this study. Alberta did not report custodial admissions from 1995 through 2004, nor any correctional admissions from 2012 through 2015. In light of these large gaps in the data, Alberta was also excluded from this study.

In addition, Prince Edward Island did not report any admissions from 2004 through 2006, New Brunswick did report custodial admissions in 2000, and Manitoba did not report probation admissions in 1999. Due to the importance of annual trends in our analytic approach, all data in a particular year and particular jurisdiction were omitted when any single data point in that year/jurisdiction was missing. As a consequence, statistics reporting on a year with data missing from the previous year(s), report on the change since the last year for which data was available. The same approach was taken when reporting on the combined-jurisdictional unit (i.e., the 10-province/territory average). If any data point was not available for a particular jurisdiction in a particular year, that jurisdiction was excluded from that annual calculation.

The method for aggregating admissions in the ACS also presents some challenges. Sentenced custody admissions include intermittent sentences so there is no way to tease out changes to these distinct forms of custody over time. In addition, probation admissions include suspended sentences (where probation is the sole sanction applied) but also sentences where probation may be attached to other principle sanctions such as custody and fines. Further, an admission is counted each time a person begins a period of supervision. Therefore, it is possible for a person to be admitted into multiple segments of the correctional system in a fiscal year as he/she moves from one segment to the next (e.g., multiple admissions to custody in a year, an admission to a CSI followed by an admission to custody after a breach of conditions, etc.). As a result, the results presented in this study should be considered preliminary. Further research into the impact of multiple admissions by the same individual should be the focus of future research.

In total, this study records 1,502,493 custodial sentence, 1,572,485 probation order, and 312,778 CSI admissions across ten provincial and territorial jurisdictions during the 22-year period. Considerable variation emerged among the provincial/territorial jurisdictions with respect to the counts of correctional admissions. Three jurisdictions accounted for

[50] In addition, the ASC notes that Nova Scotia and New Brunswick began reporting to the most recent version of the survey in 2002/2003, Ontario began reporting in 2003/2004, and British Columbia began reporting in 2008/2009. Although counts of admissions are available for these jurisdictions, comparisons with other time periods are recommended to be made with caution.

approximately three-quarters of all custodial (79%), probation (76%), and CSI (73%) admissions. Admissions in Ontario made up approximately half of all custodial (46%) and probation (49%) admissions, yet only about one third of all CSI (30%) admissions. Quebec accounted for 20% of all custodial, 12% of all probation, and 25% of all CSI admissions, while British Columbia accounted for 14% of all custodial, 15% of all probation, and 19% of all CSI admissions.

Inferential Challenges

Determining the impact of the CSI on prison admissions and populations is challenging task, to say the least.[51] The most obvious (but least accurate) method would explore whether the volume of admissions to provincial custody (or the size of the provincial/ territorial prison populations) had changed following the introduction of the CSI. However, this approach fails to consider other influences on these indicators. A decline in the crime rate could account for any drop in the admissions to custody, as fewer sentences of imprisonment are imposed. If the mix of offences appearing for sentencing shifted – for example if the proportion of more serious crimes which were more likely to attract a prison term declined – this too could explain any decline in the prison population.[52] These changes all constitute potential 'threats to validity' of any decarceration claims. The danger is that any decline in admissions could be the result of other factors.

For these reasons, we employed an analytic strategy that focuses on the use of the CSI. In addition to reporting descriptive statistics for the frequency of CSI admissions, we include measures that relate the CSI to the two other principal sanctions (custody and probation). The changes which constitute a threat to validity are those which suggest an alternate explanation for a decline in custodial admissions associated with an increase in the volume of CSIs. There are fewer of these explanations. For example, imagine there has been a disproportionate decline in the volume of serious crimes which normally attract custody. The volume of admissions therefore falls, in a way unrelated to the CSI. However, by examining changes in the use of the CSI relative to custodial admissions, we can account the relationship between these sanctions.

Analytic Strategy

[51] Pierre Lalande, "Des solutions de rechange à l'incarcération : pour un peu plus de modération, d'équité et d'humanité" (2007) 40.2 *Criminologie*, 67 at 83.

[52] As per Cheryl Webster and Anthony Doob, supra note 11: a change in remand trends (more defendants serving longer periods of pretrial detention) could also result in a fall in admissions to custody, as more defendants were sentenced to 'time served'. The frequency of this occurrence is, however, currently unknown.

In order to provide a comprehensive assessment for the impact of the CSI, we employ a series of measurement strategies:

Count: The first and most basic measurement is the count of CSI admissions. While a count on its own may only serve a descriptive purpose, with respect to the CSI specifically, it provides important information about its likely impact. Because the CSI was intended only to replace custodial sentences of less than two years, it ought not to have had any impact on other available options at sentencing. The count of CSIs, therefore, provides an estimate of the number of custodial admissions to provincial/territorial institutions that have been diverted and discharged in the community. Although simple and intuitive, the count must be interpreted with caution as it does not account for changes to the volume of the overall caseload nor changes to the use of other available sanctions.

Percent: Another simple and intuitive measure is the percent. The advantage of this measure is that it controls for changes to the overall volume of admissions. This is important as an increase to CSI admissions could simply reflect a general increase in convictions. By calculating the percent of CSI admissions of total correctional admissions, we report on the use of the CSI while controlling for any changes to the overall caseload volume. While this may be seen as an improvement over the count, it too is not without limitations. The percent is unable to control for changes to the use of other principle sanctions that may have impacted the use of the CSI.

Conditional Sentence Utilization Percent: A slightly more complex measure is the conditional sentence utilization percent.[53] Because the CSI was intended to be used in place of a custodial sentence of less than two years, it is important to assess its use relative to total imprisonment. This is calculated as follows:

$$CSU\ (\%) = \frac{\text{conditional sentence (count)}}{\text{conditional sentence (count)} + \text{prison admission (count)}}$$

The numerator is simply a count of CSI admissions. Because the CSI is a form of imprisonment that is discharged in the community, combined with custodial admissions it forms the total provincial/territorial imprisonment admissions – the denominator. This measure represents the percent conditional sentences of total imprisonment admissions and may be used to compare the relative utilization of the CSI between different jurisdictions or time periods. This measurement technique is more robust than the standard percent as it tracks the relationship between the CSI and custodial admissions. That said, it must also be interpreted

[53] See Reid, supra note 29 for a more detailed description.

with caution because it fails to capture changes to the use of other options at sentencing. Indeed an initial assessment of the CSI found some evidence that the sanction was used in place of community supervision orders.[54] The conditional sentence utilization percent is unable to detect the extent to which this form of net-widening occurred.

Year-over-year Trends of Correctional Admissions: In order to assess the effect of the CSI on correctional admissions, we also studied annual trends in the percent of admissions to each segment of the correctional system of the total for all correctional admissions (i.e., custody, probation, and conditional sentences). By employing percentages, we control for any potentially confounding factors associated to changes in the crime, arrest, charge, or conviction rate. We calculate two measures – one for the impact of the CSI on custody and another for changes to total imprisonment. By tracking the two measures over the entire 22-year period, we are able to report on the impact of the CSI on admissions to prison and probation.

CSI Impact on Custodial Admissions: Our measurement strategy for the impact of the CSI on custody isolates the effect of annual change to the percent of CSI admissions on the annual change to the percent of custodial admissions. In order to accomplish this, it was necessary to account for all possible scenarios that could occur with respect to annual change in the three correctional sanctions. Six patterns of annual change are possible in any given year – three contributing to decarceration and three contributing to an increase in custody.[55]

The following matrix summarizes these possibilities:

	Scenario 1	**Scenario 2**	**Scenario 3**	**Scenario 4**	**Scenario 5**	**Scenario 6**
% Custody	–	–	–	+	+	+
% Probation	–	+	+	+	–	–
% CSI	+	+	–	–	–	+

[54] Julian V. Roberts and Thomas Gabor, supra note 41.

[55] It was also deemed possible for there to be no annual change to the percent of any or all of the admission types between any two years. After careful inspection of the data, however, only one instance of no annual change was identified. In Manitoba there was no change to the percent of CSI admissions between 1995 and 1996 – both years recorded zero admissions.

Scenario 1: The percent of custodial and probation admissions decrease while the percent of CSI admissions increases. Since the increase in CSIs may have contributed to the decrease in probation, the decrease to probation is subtracted from the increase to CSIs. This leaves the difference as the CSI impact on decarceration.

Scenario 2: The percent of custodial admissions decreases while the percent of probation and CSI admissions increase. Since the full magnitude of increase for both probation and CSIs is the only explanation for the decrease to custody, the full percent of increase for CSI admissions is recorded as having an impact on decarceration.

Scenario 3: The percent of custodial and CSI admissions decrease while the percent of probation increases. Since the increase to probation is the only explanation for the decrease to custody, the decrease to CSI admissions is recorded as having no impact toward decarceration.

Scenario 4: The percent of custodial and probation admissions increase while the percent of CSIs decreases. Since the decrease in CSIs could have contributed to the increases in both custody and probation, the magnitude of the increase to probation is subtracted from the CSI decrease. This leaves the difference as the CSI impact toward increasing custody.

Scenario 5: The percent of custodial admissions increases while probation and CSI admissions decrease. Since the full magnitude of decrease for both probation and CSIs is the only explanation for the increase to custody, the full percent change to CSI admissions is recorded as having an impact toward increasing custody.

Scenario 6: The percent of custodial and CSI admissions increase while the percent of probation admissions decreases. Since the decrease to probation is the only explanation for the increase to custody, the increase of CSI admissions is recorded as having no impact toward increasing custody.

By adopting this approach, we calculate the most conservative estimate for the impact of the CSI. To summarise, where there is the potential for a change in probation to have decreased custodial admissions, we discount that effect. In addition, where there is the potential for a change in CSI admissions to have increased custody, we include that effect in our calculations.[56] Our decarceration analyses begin by comparing the first year that the CSI was available (1996) to

[56] In order to provide further confidence in our findings, we also compared annual changes to custodial admissions to annual changes in the crime severity index (beginning in 1998). By studying the relationship between these two measures, we were able to understand the extent to which changes in offence seriousness may have influenced changes to sentencing (i.e., the use of custody) in any given year. Our analyses reveal very little correlation between annual change to the percent of custody and annual change to the crime severity index. In fact, in eight of the ten jurisdictions included in this study we found the direction of change to be the same in 50% or less of the years (1998-2016).

the previous year when the CSI was not available as a sanction (1995). All subsequent decarceration calculations compare the next year to the previous year of data.

Changes to Total Imprisonment

In addition to the impact of the CSI on custody, we studied annual changes to total imprisonment (i.e., custody and CSI). Two effects may occur. 'Net-widening' refers to an expansion of total imprisonment admissions due to the availability of the CSI. Although the CSI was not intended to be used for cases that would have received a sanction less severe than custody, net-widening may occur if a proportion of the caseload that otherwise would have received probation is given the more severe CSI option. 'Narrowing of the net' refers to a reduction to total imprisonment admissions that may not be accounted for by an increase to the percent of CSI admissions alone. Narrowing of the net may occur if a proportion of the caseload that otherwise would have received custody or a CSI, is given the less severe option of probation.

Net-widening and narrowing are assessed simultaneously by the same calculation. For the purposes of this study, two measures are employed: one at the introduction of the CSI in 1996 and another during its continued use through to 2016. For the first year when the CSI was introduced, we calculate annual change to total imprisonment as follows:

$$(I_{t2} + C_{t2}) - (I_{t1})$$

Where I_{t2} is the percent of custodial admission in 1996 and C_{t2} is the percent of conditional sentence admissions in 1996; and I_{t1} is the percent of custodial admissions in 1995. By subtracting the sum of custodial and CSI admission percentages in 1996 from the custodial sentence percent in 1995, we observe any change to the overall proportion of imprisonment admissions. If the total percent of imprisonment increased following the introduction of the CSI, it would suggest that there was either an increase in the use of custody (that some cases receiving a CSI were taken from the pool of cases that would otherwise have received a sentence of probation) or a combination of the two effects. When combined with the analysis that calculates the impact of the CSI on custody, we can confirm the observed effect. If a decrease in custodial admissions occurred alongside an increase in total imprisonment, then net-widening must have occurred. Conversely, if a decrease in custodial admissions occurred alongside a decrease in total imprisonment, then a narrowing of the net effect would have occurred (i.e., there was a greater reduction of custody than can be accounted for by the CSI alone).

For all years following the immediate introduction of the CSI, we calculate changes to total imprisonment as follows:

$$(I_{t2} + C_{t2}) - (I_{t1} + C_{t1})$$

Where I_{t2} is the percent of custodial admission in a given year and C_{t2} is the percent of conditional sentence admissions in the same year; and I_{t1} is the percent of custodial admissions in the previous year and C_{t1} is the percent of conditional sentence admission in the same (previous) year. By subtracting the sum of custodial and CSI admission percentages in any given year from the sum of custodial and CSI admissions in the previous year, we measure any change to the overall proportion of imprisonment admissions between the two years.

Results

Count

Table 1 summarises the total volume of CSI admissions for the 10 jurisdictions combined as well as each individual province or territory. The most significant finding is that a large number of offenders received a conditional sentence over this period. If one were to assume that all judges had used the CSI as instructed by its statutory framework and appellate court guidance, then one might conclude that more than 314,000 admissions to custody had been prevented since the introduction of the sanction in 1996. It is, however, important to recognize that net-widening may have occurred. As noted, the early evaluations reported a 1% net-widening effect.[57] If that magnitude of effect were to have remained constant to the present, then we might adjust the figure to approximately 311,000 admissions to custody prevented. Of course, the actual magnitude of net-widening, if any, is unknown.

Table 2 summarises the year-by-year count of CSI admissions for the combined 10-jurisdiction unit over the period and reveals an initial increase in admissions for the first seven years (1996-2002) after the sanction was introduced. Admissions levelled off over the next seven years (2003-2009) before beginning a dramatic decline over the most recent seven-year period (2010-2016). At its peak (in 2002) there were 17,345 CSI admissions. This coincided with the period immediately following the landmark judgement in *Proulx*. The most recent three years, on the other hand, mark the fewest CSI admissions since its initial introduction in 1996.

< Tables 1 and 2 about here >

Percent

[57] Julian V. Roberts & Thomas Gabor, supra note 41.

Table 3 reports CSI admissions as a percentage of total correctional admissions. This summary provides important context to the relative use of the CSI among the provinces and territories. In seven jurisdictions (including Saskatchewan, Quebec, and Yukon), the CSI accounted for a non-trivial proportion of the correctional caseload (i.e., greater than 10%). In others such as Prince Edward Island and Ontario, the CSI has been less frequently imposed. While some readers may interpret even the larger percentages as relatively small when considering them in the context of total correctional sanctions, it is important to regard the statistics in the context of the sentencing regime in Canada. Since the CSI is a term of imprisonment and the principle of restraint is codified, it was to be expected that the CSI will account for only a small minority of total cases.

< Table 3 about here >

Conditional Sentence Utilization percent

Table 4 reports the conditional sentence utilization percent for each of the 10 jurisdictions and the jurisdictions combined. Overall, the CSI accounted for more than 18% of total imprisonment admissions. In other words, based on the assumption of zero net-widening effects, the CSI replaced close to one in five custodial sentences throughout its 21-year history. Saskatchewan, Nova Scotia and Yukon are found to have the highest conditional sentence utilization percentages with 26.5%, 25.7% and 25.2% respectively. Prince Edward Island and Ontario are found to have the lowest (4.8% and 12.8%).

< Table 4 about here >

Year-over-year Trends of Correctional Admissions

Combined 10-province/territory jurisdiction

Figure 1 charts the year-over-year CSI impact on custodial admissions and change to total imprisonment in the combined jurisdictions. The analyses reveal that immediately following the introduction of the CSI in 1996 there was a nearly -4% decrease in the proportion of cases resulting in a custodial admission. Importantly, this decrease is independent of any changes to the probation caseload. In fact, the proportion of cases that resulted in probation rose slightly (+0.7%) in 1996. In other words, a narrowing of the net effect took place whereby the proportion of total imprisonment (custody and CSIs) shrunk by just over half a percent. It is also worth noting that the decrease to custodial admissions came on the heels of two consecutive years of increases to the percent of custodial admissions (in 1994 the percent of custodial admissions increased from 57.9% to 58% and in 1995 the percent of custodial admissions

increased from 58% to 58.3%). Therefore, the decrease observed in 1996 could not have been the result of a pre-existing trend of decarceration.

< Insert Figure 1 about here >

Figure 1 confirms visually what would be expected in light of legislative developments, and provides validation of the methodology employed. It would be reasonable to expect a significant uptake in the early years of the new sanction. Equally we would predict a decline in usage as the CSI attracts adverse media attention, and particularly after the restrictive legislative amendments introduced in recent years. Both trends are apparent in Figure 1.

In 1997 there was an additional -4% decrease in the proportion of custodial admissions and an additional -0.6% narrowing of the net. This trend continued in 1998 although custodial admissions only declined by approximately -0.4% with a greater than -1% narrowing of the net. 1999 is the first year in the CSI regime where we observe a shift in this pattern. Although the proportion of custodial admissions continued to decline (another -1.2%), there was evidence of a very small widening of the net effect (approximately +0.2%). The proportion of custodial admissions decreased from 47.6% (in 1998) to 46.4% (in 1999) and the percent of probation admissions decreased from 44% to 43.9%. The increase in CSIs from 8.3% (in 1998) to 9.7% (in 1999) contributed to decarceration but the effect was not large enough to account for the full decrease to custody. The decrease of probation, therefore; contributed to the total percent of imprisonment sanctions increasing from 55.9% (in 1998) to 56.1% (in 1999).

The next two years (2000-2001) continued to reveal further decarceration effects with magnitudes of -0.2% and -0.7%, respectively. Despite further increases to the percent of CSIs in 2002 and 2003, the percent of custodial admissions rose. Therefore, the CSI had no impact on the increase of custody during these years. During the first nine years of the new sanction (1996-2004), a total decarceration effect of -10.5% was observed. There was, however, also evidence of both narrowing and widening of the penal net during these years. Importantly, narrowing of the net was the more powerful of the two with an average effect of -5.4% on the total percent of imprisonment. After 2004 the trend changes dramatically. Of the remaining 12 years in the study period (2005 through 2016), only one (2008) recorded a decarceration effect. Although increases to the percent of custodial admissions never exceeded +1%, their combined effect during the 12-year period records a total increase of +2.9% to the percent of admissions to custody. Widening of the net is also found to be the predominant effect during this period (+0.1%).

Despite the drastic change to the impact of the CSI over the past 12 years, Table 5 reveals that in the 21-year history of the CSI the 10-province/territory jurisdiction experienced a

-7.65% decrease in the percent of correctional admissions resulting in provincial/territorial custody. This -7.65% decrease is independent of any reduction in probation admissions. At the same time, there was a -5.54% narrowing of the net. Importantly, all 10 jurisdictions save one (British Columbia) were found to have experienced decarceration as a result of the CSI. In Saskatchewan this effect was in the magnitude of a -14% reduction with no evidence of net-widening. The two largest jurisdictions by case volume experienced decarceration with modest magnitudes of effect: Ontario experienced a -7% decarceration effect and -5% narrowing of the net while Quebec experienced an -10% decarceration and -24% narrowing of the net.

< Insert Table 5 about here >

Only three jurisdictions reported an average net-widening effect over the 21 years. British Columbia stood out with a +15% effect. It also experienced an increase of custody due to the impact of the CSI. In other words, even after accounting for the effect of the CSI (which led to a +0.65% increase of custody), probation decreased more rapidly during the study period. This led to an overall expansion of the proportion of custodial admissions by +15%. Even though Nova Scotia and Manitoba recorded modest decarceration effects for the CSI, widening of the net effects were larger in magnitude and resulted in increases to overall imprisonment in those jurisdictions.

Individual Provinces/Territories

In this section we focus our attention on the year-over-year trends in five provinces beginning with Quebec and moving across the country west to British Columbia.[58]

Quebec

Figure 2 provides a graphical depiction of the year-over-year CSI impact on custody and the change to total imprisonment for Quebec. As is evident, the first 12 years of the CSI proved to have a considerable impact on custody. In each year with the exception of 2003 and 2005 which recorded no impact, the CSI was found to have decreased custodial admissions between -0.5% to -5.0%. In the first four years alone, the CSI contributed to a greater than -14% decline in custody and over the 12-year period 1996 to 2007, close to a -20% decline was recorded. During that same period, narrowing of the net was found in all but two years (1996 and 2007). That effect contributed to a -25% decline in total imprisonment. In 2008 there was a dramatic change in the annual trend. In eight of the next nine years Quebec experienced an increase in custodial admissions due to changes in the use of the CSI. In addition, net-widening was found to have

[58] Results for the remaining provinces/territories may be made available from the authors upon request.

occurred in five of those years contributing to further increases in total imprisonment admissions. Despite the poor performance of the CSI in recent years, Quebec averaged a greater than -10% decline in custody due to the effect of the CSI with an additional -24% decline to total imprisonment due to changes in the use of probation during that period.

Ontario

Figure 3 presents the year-over-year analyses for Ontario. While the initial impact of the CSI is similar to that of Quebec with considerable reductions to custody in 1996 and 1997, the remaining trend is somewhat different. In total, six years revealed a reduction to custody, 6 years were found to have increased custody, and in eight years the CSI was found to have had no effect. Most annual reductions to custody were also more modest than Quebec. Between 2000 and 2015, no reductions to custody that were attributable to the CSI exceeded -1%. Nevertheless, across the 21-year history Ontario was found to have experienced a -7% decline in custodial admissions due to the effect of the CSI.

< Insert Figures 2 and 3 about here >

Both net-widening and narrowing of the net were also found to have occurred. While there was greater evidence of net-widening in the most recent 10-year period, 14 of the 21 years recorded narrowing effects leading to an average reduction of -5% for total imprisonment admissions.

Manitoba

Figure 4 presents the annual trend analyses for Manitoba. Interestingly, this province experienced rather dramatic changes for the effect of the CSI on both decarceraton and increases to custody. Decarceration varied from -0.1% to -9.4% while increases to custody due to changes in the use of the CSI varied from +0.1% to +4.0%. Despite a major impact on custody in 1997, only one other year (1998) in the study period recorded a greater than -1% decarceration effect. Annual changes to total imprisonment were also found to exhibit considerable variation. The net-widening effect peaked at +12% in 2002 while narrowing of the net was greatest in 1996 with a greater than 10% decline to total imprisonment. Despite an average -3% decarceration effect by the CSI, there was a greater proportion of admissions to imprisonment (i.e., both custody and CSI) throughout the 21-year period compared to the pre-CSI regime.

Saskatchewan

Saskatchewan's annual trends depicted in Figure 5 are reminiscent of those for Quebec. In the first five years of the CSI regime, the new community custody sanction was found to

contribute to major reductions to custody with an average impact of nearly -17%. The next several years reveal fluctuation and the period since 2008 is found to exhibit a predominant pattern of increasing custody. Still, across the study period, Saskatchewan experienced a -14% decline to custodial admissions due to the effect of the CSI. Narrowing of the net was also the predominant effect for total imprisonment in Saskatchewan. Over the first five years when the province experienced a -17% decline to custody due to changes in the use of the CSI, a -10% decline to total imprisonment was recorded. This dropped the percent of custodial admissions from 66% in 1995 to 40% in 2000.

< Insert Figures 4 and 5 about here >

British Columbia

Figure 6 presents the year-over-year trend analyses for British Columbia. While a modest --3.7% decarceration effect was recorded in 1996, only one other year (2009) was found to have a greater than -1% decarceration effect. Importantly, the decarceration effects that were experienced in seven of the 21 years were tempered by the CSI's impact on increases to custodial admissions. Overall the CSI was found to have contributed to a +0.65% increase to custody during the study period. Net-widening contributed further to the poor performance of the CSI in British Columbia. Despite some evidence of narrowing of the net, the proportion of total imprisonment admissions was found to have expanded by +15% during the CSI regime. In other words, not only was the CSI found to have contributed to an increase in custody during the 21-year period but there was also evidence that a large proportion of cases that would have previously received a probation order were admitted to either custody or a CSI.

< Insert Figure 6 about here >

Summary of Findings

We now return to the research questions set out in the introduction of this paper:

Did the introduction of the CSI reduce the use of provincial custody across Canada?

Across the four sets of analyses, results reveal a modest impact of the CSI on the use of custody. The count demonstrates that over 300,000 CSIs have been imposed across the 10 jurisdictions over the past 21 years. Further, although the CSI has only accounted for a small (8.7%) proportion of total correctional admissions, that figure masks provincial/territorial variation. The CSI accounted for greater than 15% of admissions in Saskatchewan but less than 6% in Ontario. After comparing the count of CSIs to total imprisonment sanctions (i.e., custody

and CSI), another perspective was offered. The CSI was found to account for greater than 25% of total imprisonment admissions in four jurisdictions and close to one in five admissions across the 10 jurisdictions combined. The most conservative estimate for the impact of the CSI was calculated by analysing the year-over-year trends in admissions for all three correctional sanctions. After removing any effect that probation may have had on changes to the percent of custodial admissions it was found that the CSI contributed to a -7.65% decrease in institutional admissions.

While positive in terms of decarceration, our analyses also revealed concerning trends in the use of the CSI. The count of CSIs was found to have increased quite rapidly in the first seven years but has diminished very rapidly over the most recent seven-year period. In fact, CSIs were used less frequently in 2016 than any other year except 1996 when the sanction as first introduced. The year-over-year analyses confirmed that this concerning trend was not simply a finding isolated in the count data. Since 2005, the CSI has only contributed to decarceration in a single year (2008). In the most recent 12 years, changes to the use of the CSI have resulted in a +3% increase in custodial admissions.

To what extent have courts applied the CSI to cases which previously would have received a term of probation?

The year-over-year trend analyses included a measurement for two effects: widening of the net and narrowing of the net. Overall, there was only minimal evidence of net-widening. While net-widening was observed in some years in each jurisdiction, narrowing of the net was the predominant effect in most. In fact, on average across all 10 jurisdictions during the entire CSI regime we found evidence of a modest (-5.54%) narrowing of the net effect. In other words, in addition to the CSI contributing to a -7.65% decline to custody, there was a shift towards greater use of probation resulting in further reductions to custody over the past 21 years.

Were the impacts of the CSI uniform across the jurisdictions?

Considerable variation between provincial/territorial jurisdictions was observed across all analyses. While differences in counts of CSI admissions may likely be explained by variation in caseload sizes across the jurisdictions, the percent, conditional sentence utilization percent, and year-over-year analyses must be explained by other factors. Seven of the 10 jurisdictions included in this study experienced average effects of decarceration and narrowing of the net, two experienced decarceration and net-widening, and one experienced an increase in custody and net-widening. As noted earlier in this paper, appeal courts across the country have taken different approaches to provisions of Bill C-41, including the CSI. It will be important for future

research to explore the use of the CSI within jurisdictions to understand why the impact has been so different across the country.

Discussion and Conclusions

Trends over the period 1996-2015 suggest that the CSI has modestly contributed to reducing the volume of admissions across Canada, although the effect has been variable: some jurisdictions experienced more significant reductions in admissions to provincial jails, one experienced an increase (i.e., British Columbia), and three were found to have experienced net-widening. The finding that both decarceration and net-widening occurred (although the former to a greater degree than the latter), is consistent with the limited analysis of the early years of the new sanction. In the first report of statistics related to the CSI, Laprairie and Koegl documented declines in admissions to custody yet the declines were insufficient to account for all CSIs imposed.[59] In their study drawing on data through to 2001, Roberts and Gabor found a -13% decline in custody but a 1% net-widening effect.[60] Further, a report by Statistics Canada in 2003 reported that the introduction of the CSI had coincided with reductions to sentenced admissions.[61]

These trends are also aligned with the expected impact of legislative amendments passed by the federal government. Following the coming into force of *An Act to Amend the Criminal Code (Conditional Sentence of Imprisonment)* in 2007 which restricted the use of CSIs, we noted one final year of decarceration for the combined 10-province/territory jurisdiction. In 2009 the trend shifted with the CSI having no effect on custody. That was immediately followed by three years of incremental increases to custody due to annual changes in the use of the CSI. after the enactment of *The Safe Streets and Communities Act* in 2012, we noted even greater increases to custodial admissions as a result of annual changes to the CSI. In fact, three of the last four years (2013-2015) are among the worst performing years for the CSI in our year-over-year analyses.

The primary purpose of this research was descriptive; we sought to assess the impact of the conditional sentence upon the volume of admissions to provincial prison across Canada. Additional, more fine-grained analyses will be necessary to answer secondary questions, such as why the pattern across jurisdictions is so variable. Does this reflect variation in levels of judicial confidence in the sanction? Does this factor in turn reflect variation in the adequacy of

[59] Carol Laprairie and Chris Koegl supra note 39.

[60] Julian V. Roberts & Thomas Gabor, supra note 41.

[61] Dianne Hendrick, Michael Martin, & Peter Greenberg, supra note 42.

supervision of CSI cases? Does it reflect different Crown prosecution policies regarding the conditional sentence?

Even advocates of conditional sentencing would have to concede that the sanction has failed to fully realise its potential as a diversionary sanction to institutional imprisonment. It could have achieved more in terms of decarceration and the question is why has it not captured more of the provincial custodial caseload? There is little doubt that the effectiveness of the sanction has been undermined by its flawed statutory framework and the repeated legislative restrictions placed upon it. Adverse media coverage has also played a role in undermining community and judicial confidence. Webster and Doob (in press) describe the CSI conditional sentence was a 'missed opportunity'.[62] We concur, but raise the question of what steps should now be taken. If the sanction has indeed moved onto the list of endangered sanctions, should it be amended in order to allow its numbers to grow, or should it be allowed to decline into desuetude?

Much may depend upon the interpretation of the threshold for success. Webster and Doob conclude that the sanction has failed because it failed to have an '*important* impact on incarceration rates' (emphasis in original). Well, no-one could describe the CSI as having achieved this high standard of success. The sanction was conceived to contribute to decarceration and was never expected to achieve a radical transformation. The architect of the conditional sentence, David Daubney, recently noted that back in 1995 he believed it was 'extremely unlikely to expect the CSI to have an immediate or dramatic impact on carceral populations'. [63] Reducing the current level of admissions to custody was only one the reform's objectives, and requiring an important impact sets an inappropriately high bar for success. In addition, the overall impact analysis masks important variation: in some jurisdictions the CSI accounted for a significant percentage of total admissions to custody. If the sanction had generated net-widening across all jurisdictions and failed to achieve any decarceration, it may reasonably be deemed to have failed in this objective. But the provincial variation offers proof that the sanction has the potential to reduce admissions to custody in a more significant way. The question then, is why was the sanction successful in some jurisdictions yet a failure in others?

The Future of the CSI: Finding a Place for the Conditional Sentence

[62] Cheryl Webster and Anthony Doob, supra note 11 at 31.

[63] Email communication to the authors, August 1, 2018.

Almost 20 years ago Allan Manson attempted to situate the CSI within the Canadian sentencing regime.[64] We have yet to succeed in this task and the result is that Canada is at the crossroads with respect to the conditional sentence. The federal government has expressed a desire to undertake sentencing reform but nothing has been said about the conditional sentence. Without reform, usage of the CSI will likely decline still further and become a rarely imposed. Abolition of the sanction would create a vacuum which would likely be filled by sentences of custody. It would also deprive courts of a viable and valuable sanction which has demonstrated its utility in other jurisdictions.[65] Prison and probation represent conceptually distinct sanctions appropriate to very different offence and offender profiles. Yet there will be numerous cases which do not fall squarely within the 'job description' of these sanctions, and for such cases an intermediate sanction is necessary. We favour reform, for several reasons.

First, the experience in another jurisdiction carries an important lesson for the future of the conditional sentence in Canada. The suspended sentence order (SSO) in England and Wales shares a number of common elements with the CSI and has been subject to comparable critiques.[66]. Like the CSI, it had become a peripheral element of sentencing. In fact, by 2000, the first year of our CSI period, it was used far less frequently than the CSI in Canada. For example, in 2000, a SSO was imposed in only 2,519 cases. However, legislative amendments over the next few years changed this state of affairs, and in 2015, 57,072 SSOs were imposed.[67] The striking increase in the use of an equally controversial sanction demonstrates that incremental change is possible: a once moribund sanction now flourishes.

Second, many other jurisdictions have also introduced analogous sanctions of imprisonment, including several Australian states and New Zealand. New South Wales is the most recent jurisdiction to create a form of 'community custody' named the Community Correction Order.[68] The concept of serving a sentence of imprisonment in the community is therefore neither new nor unique to Canada. Indeed, early conceptions of what it means to be 'imprisoned' were founded upon liberty restrictions placed upon offenders in the community;

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[64] Allan Manson, "Finding a Place for Conditional Sentences" (1997) 5 C.R. 283.

[65] See for example Department of Corrections, *Community Sentence Patterns in New Zealand: An International Comparative Analysis* (Wellington: Department of Corrections, 2012).

[66] Keir Irwin Rogers & Julian V. Roberts, "Swimming against the Tide: The Suspended Sentence Order in England and Wales, 2000-2017" (2019) *Law Contemporary Problems,* in press.

[67] ibid, Table 1.

[68] Arie Freiberg, "The Road Well Travelled in Australia: Ignoring the Past, Condemning the Future" in Michael Tonry, ed, *Sentencing Policies and Practices in Western Countries* (New York: Oxford University Press, 2016).

the uniquely institutional version of imprisonment which predominates today is more modern.[69] Clearly, other jurisdictions see merit in a sentence of community custody or home confinement, (albeit often differently defined); it would be anomalous for Canada to restrict courts to a less flexible range of sentencing options.

It is a mistake to omit the perennial problem of high Aboriginal incarceration rates from discussion of the CSI. As noted earlier in this article, the CSI was conceived as another tool to helping ameliorate this problem in Canada's prisons. And in some provinces, it is clear that the CSI has been used this way in Quebec, particularly in the early years of the sanction's existence. Reid reported that the rate of CSIs was significantly greater for Aboriginals than nonAboriginal offenders (Table 5).[70] Without further investigation it is unclear why Quebec emerges as the jurisdiction where the CSI has had the greatest impact on Aboriginal offenders. Our point, however, is rather different. The experience in that province demonstrates that the sanction is capable of attracting judicial support. Finally, when the sentence accounts for 20% of all sentences of imprisonment over a sustained period, it is hard to dismiss the CSI in Quebec as being a trivial sanction.

Our last comment to be made in justifying reform invokes the principle of restraint or parsimony at sentencing. This principle has long been a feature of common law sentencing around the world, and in particular Canada. Restraint was also endorsed by two landmark reports: the Canadian Sentencing Commission (in 1987) and the House of Commons Standing Committee on Justice and the Solicitor General (in 1988).[71] As a result, Parliament codified the principle as part of the reforms introduced by Bill C-41. Any penal regime which takes restraint seriously needs to incorporate elements promoting the principle. This includes creating statutory provisions which require courts to work through steps before imposing custody, or to fulfil criteria which must be met before the offender may be imprisoned. An even more important way of promoting restraint is through the creation of alternatives to imprisonment, and alternative forms of imprisonment which do not involve institutionalisation of the offender. In this respect, the conditional sentence can contribute to greater restraint even if the sanction's full potential has yet to be realised.

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[69] See discussion in Julian V. Roberts, supra note 11, Chapter 1.

[70] Andrew A. Reid, supra note 30.

[71] Canadian Sentencing Commission, *Sentencing Reform: A Canadian Approach* (Ottawa: Supply and Services Canada, 1987); David Daubney, *Taking Responsibility: Report of the Standing Committee on Justice and Solicitor General on Its Review of Sentencing, Conditional Release and Related Aspects of Corrections (*Ottawa: Queen's Printer for Canada, 1988).

Reform Proposals

We advocate reform of the CSI regime, beginning with a thorough examination of its current use, and limitations. Parliament, through the Standing Committee on Justice, is the appropriate authority to undertake such an exercise. It could conduct or commission original research, receive evidence, and hold hearings on the future of the sanction. If the CSI is to achieve its potential, reform is imperative. Within the limits of this article[72] we can only sketch some possible options. Increasing judicial confidence is one priority. How can this be achieved? Greater investment in community supervision would be a good place to start. Anecdotal evidence suggests that one reason courts are reluctant to impose the CSI is because many judges are unconvinced the appropriate monitoring and supervision is available. Indeed, the adequacy of supervision was identified from the early days of the regime as the likely to key to the success or failure of the sanction.[73]

Second, the statutory restrictions introduced by the Harper government should be removed. Parliament legislates, while courts interpret and apply the law. Judges are much better placed than Parliamentarians to determine the kinds of offenses for which a conditional sentence is (or is not) appropriate. Courts are also better able to understand the relationship of the sanction to other sentences such as probation, and also to consider the impact of the CSI upon third parties such as the family of the offender, both issues overlooked by Parliament.[74] It is worth noting in this context that recent research suggests that Canadians are strongly supportive of retaining judicial discretion at sentencing. Recent polling by the federal government found that nearly eight in ten Canadians supported the ability of a court to exercise discretion at sentencing, even when the offence carries a mandatory minimum sentence (Department of Justice Canada, 2018).

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[72] For discussion of a model regime for a community custody sanction such as the conditional sentence, see Chapter 8 in Roberts supra note 11.

[73] See for example, Carol Laprairie, (1999) Some Reflections on New Criminal Justice Policies in Canada: Restorative Justice, Alternative Measures and Conditional Sentences. *The Australian and New Zealand Journal of Criminology*, 32(2): 139-152, at pp. 148-149. Judicial unease regarding the adequacy of supervision can be read in a number of judgments, particularly in Ontario – see for example R. v. Patterson (2000), 33 C.R. (5th) 45 (Ont. C.A.) at para 72. Research with probation officers revealed that they were never or almost never able to ensure compliance with the key condition of curfew or house arrest: Roberts, J.V., Hutchison, C., and Jesseman, R. (2005) Supervising Conditional Sentence Orders: The Perceptions and Experiences of Probation Officers in Ontario. 29 *C.R* 107.

[74] The most egregious example of the myopic legislative response to the CSI can be found in the fact that having disallowed a CSI for specified offences, Parliament allowed courts to impose a lesser sentence for these crimes. A court may not impose a CSI for these crimes, but may sentence the offender to a less severe sanction, namely a term of probation. How much sense does that make?

Third, if the CSI is to attract the confidence of the community as a form of custody, it should come closer than at present to carrying the same penal weight as a term in a provincial reformatory. Since the CSI is a form of imprisonment, careful consideration should be directed at the mandatory and optional conditions attached to a CSI. The severity of an institutional prison sentence is largely determined by its duration. A community-based sanction, or community-based form of imprisonment is as affected by the number and intrusiveness of the conditions imposed on the offender. For this reason, the Criminal Code provisions regulating these conditions should be reviewed, as well as the resources devoted to close supervision, an issue that falls within the jurisdiction of the provinces and territories.[75]

Consideration should be given to lowering the ambit from two years less one day to something shorter, a proposal which has been around for many years now. This would have the effect of removing the most serious personal injury offences, which although small in number, trigger highly critical media coverage when the offender receives a CSI. Since these offences are relatively uncommon, the ability of the CSI to reduce admissions to provincial institutions would be relatively unaffected. Thus, in the most recent year for which statistics are available (2014/2015), 97% of terms of custody imposed across Canada were under two years, and therefore under the statutory ceiling of the conditional sentence.[76] The median sentence in 2014/2015 was one month and approximately 80% of sentences were three months or less.[77] Short prison sentences are ineffective at rehabilitating offenders, yet very effective at disrupting professional and family life. This explains why short prison terms are associated with higher recidivism rates than noncustodial options.[78] The vast majority of prison sentences in Canada are

[75] If Canada operated a Sentencing Commission which issued sentencing guidelines this body could provide guidance in the form of tables of 'penal equivalents'. This would enable a court to replace a six-month prison term with a CSI constructed to be approximately as onerous. Absent such a Commission, the provincial courts of Appeal might provide such guidance to lower courts.

[76] Ashley Maxwell, "Adult criminal court statistics in Canada, 2014/2015" (2017) *Juristat,* Canadian Centre for Justice Statistics.

[77] Ibid.

[78] The Ministry of Justice in the U.K., has conducted a series of studies comparing re-offending rates of offenders sentenced to custody with a control group sentenced to community-based sentences. After controlling for background variables of offenders this study found higher rates of re-offending in the group sent to prison. Offenders sentenced to custody re-offended at a higher rate than offenders who received a community order (Ministry of Justice 2015, Table 1). In the most recent and the most sophisticated research to date, Aerten et al., compared re-offending rates for two carefully matched samples of offenders, some of whom has received a custodial sentence, others a suspended sentence. The researchers found that offenders sentenced to prison were more likely to re-offend than those receiving a suspended sentence. Pauline Aarten, et al., Reconviction Rates after Suspended Sentences: Comparison of the Effects of Different types of Suspended Sentences on Reconviction in the Netherlands" 59 Int'l J Off Ther & Comp Crim 143.

short: the most recent data show that 90% were 3 months or less, up from 88% a couple of years earlier.[79] The high volume of short sentences in Canada represents a clear opportunity for the CSI. It may be hard to construct a CSI which carries the same penal weight – and attracts the same degree of public support (for those concerned about public opinion – as a 12-month sentence of imprisonment. But a 30-day sentence of imprisonment? Surely it is possible to conceive and construct a rigourous CSI which would carry (and be seen to carry) the same penal value thus obviating the need for the offender to enter a provincial jail.

Net-widening and the Parasitical Sanction

Our findings suggest that there has been a degree of net-widening. The CSI has emerged as a parasitical sanction, and as with most parasites, it has not restricted itself to single host species. The tendency on the part of courts to apply the CSI to the probation caseload needs to be corrected. The CSI needs to develop a profile which enables courts to see more clearly the kinds of cases which are appropriate. Net-widening has occurred with many sanctions in different jurisdictions. A good example is found in England and Wales. The suspended sentence order (SSO) may be imposed only once a court has determined that the custody threshold has been met. This means that a court may not impose an SSO in place of an intensive community order. Despite this, research conducted over the past 20 years has demonstrated that courts have used the SSO in this way.[80] In order to correct this misapplication of the SSO the Sentencing Council in that jurisdiction issued a guideline to courts regarding the appropriate use of the SSO (to replace a term of immediate custody). Canada has no equivalent of the English Sentencing Council, and so a corrective guideline is not an option. However, Parliament could amend the CSI provisions to require that a court first impose a term of custody, and the provincial and territorial courts of appeal could also issue guidance in this respect, particularly in those jurisdictions where our analysis suggests net-widening has been most striking.

The concept of net-widening also needs further discussion. Limitations on space prevent a thorough exploration, but some comments may be offered. One view of this phenomenon is that courts are simply thwarting the will of Parliament, and need to be 'corrected' in their practices. Yet there is more to the phenomenon. Parliament defines sanctions in relatively general terms and the courts subsequently apply those sanctions. If courts begin to use a given sentence in a way not envisaged by the legislature, this usage should be given careful

[79] Table: 35-10-0018-01 (formerly CANSIM 251-0024) *Geography:* Canada, Province or territory. Downloaded August 2, 2018: https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3510001801

[80] Irwin Rogers and Roberts, supra note x.

consideration, as courts are far better placed to determine the kinds of cases which should result in custody or a community-based sanction. There is an argument that net-widening in the case of the CSI is a consequence of provincial governments failing to invest sufficiently in probation services. Once courts lose their faith in the ability of a community penalty to achieve the objectives of sentencing, they are likely to employ ersatz forms of custody – in this case the CSI in place of probation. Net-widening in short may be seen as an understandable judicial reaction to an inadequately resourced community sanction.

The sanction also needs to be 'rebranded'; the term 'conditional sentence of imprisonment', as Webster and Doob note, was unwise.[81] It was overly-ambitious of the architects of the CSI to assume that the public would accept some form of home confinement as a 'term of imprisonment'. Replacing the name CSI with 'community confinement', 'home confinement', 'house arrest' or some similar term might also restore some public confidence. It is noteworthy that legal professionals and judgments routinely refer to a conditional sentence as 'house arrest' or some similar term.

Finally, we return what we (and many others) regard as the most pressing problem in Canadian sentencing, namely the high rates of Aboriginal incarceration. Another priority for future research is to better understand how the CSI has affected imprisonment among Aboriginal offenders. After all, the CSI constituted another tool in the sentencing toolbox intended to help address the inveterate problem of Aboriginal over-incarceration.[82] Although the goal was not made explicit, there was an expectation that the new sanction would be used more often when a court was sentencing an Aboriginal offender, as the sanction enables an Aboriginal person to remain in his or her community. This application of the CSI was subsequently endorsed by appellate courts.

The focus of this article has been upon the diverse application and the variable impact of the CSI upon prison admissions across the jurisdictions. Yet it would be an example of penal myopia to examine the CSI solely in terms of the sanction's capacity to reduce the use of institutional imprisonment. As noted, the CSI has the potential to contribute to a longer-term shift in conceptions of imprisonment. To the extent that community acceptance is important, the public is only likely to accept a reduction in committals to custody on an incremental basis.

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[81] Cheryl Webster and Anthony Doob, supra note 11.

[82] Julian V. Roberts & Andrew A. Reid, "Aboriginal Incarceration in Canada since 1978: Every Picture tells the same story" (2017) 59 Can J Crim & CJ 313.

The CSI represents a step towards fewer committals. In this sense it is a *pis aller* towards a more liberal sentencing regime, and possibly one with a more restorative element.

To conclude, Bill C-41 attempted to change the landscape of sentencing in Canada. Following recent legislative amendments, however, use of the sanction is declining. If current trends continue, the CSI will wither still further and become a minor element of sentencing, imposed in a very small number of cases. A bold, and evidence-based approach to reform would surely increase the effectiveness of the sanction in a principled fashion. Without reform, Canada will have a lost an important, but underachieving, tool with which to constrain the use of institutional imprisonment. The key question is whether there is a place for a community-based form of imprisonment. There is, if the sanction is appropriately conceived, administered, and supported. The conceptual sanction should not be confused with any specific legal construction; the concept is sound even if the statutory regime is flawed. Pierre Lalande captured the CSI well when he wrote that: "malgre le fait que l'emprisonnement avec sursis possede les attributs necessaires pour etre une solution de rechange credible et efficace, cette mesure est deja malmenee sans avoir pu deployer tout son potential"[83] The challenge lies in realising the sanction's full potential.

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[83] Pierre Lalande supra note 50 at 83.

Table 1. Count of CSIs by jurisdiction (1996-2016).

Jurisdiction	CSI Admissions
Newfoundland	8008
Prince Edward Island	588
Nova Scotia	13974
New Brunswick	11880
Quebec	76853
Ontario	94503
Manitoba	18735
Saskatchewan	29613
British Columbia	58168
Yukon	1722
10-Jurisdiction Total	314044

Table 2. Annual count of CSI admissions for the combined 10-jurisdiction unit of analysis (1996-2016).

Year	CSI
1996	6669
1997	13265
1998	13201
1999	14088
2000	14844
2001	16675
2002	17345
2003	16951
2004	17337
2005	17132
2006	16250
2007	16465
2008	17191
2009	17122
2010	16696
2011	16493
2012	15607
2013	14492
2014	12456
2015	11150
2016	11349

Table 3. Percent of CSIs by jurisdiction (1996-2016).

Jurisdiction	% CSI Admissions
Newfoundland	12.15%
Prince Edward Island	2.38%
Nova Scotia	11.33%
New Brunswick	12.30%
Quebec	12.35%
Ontario	5.58%
Manitoba	8.19%
Saskatchewan	15.39%
British Columbia	10.36%
Yukon	12.31%
10-Jurisdiction Total	8.66%

Table 4. Conditional sentence utilization percent by jurisdiction (1996-2016).

Jurisdiction	CSU %
Newfoundland	25.40%
Prince Edward Island	4.79%
Nova Scotia	25.70%
New Brunswick	19.65%
Quebec	22.53%
Ontario	12.76%
Manitoba	17.67%
Saskatchewan	26.53%
British Columbia	22.45%
Yukon	25.20%
10-Jurisdiction Total	18.19%

Figure 1. Year-over-year trends in custodial admissions and changes to total imprisonment, Combined 10-province/territory jurisdiction (1996-2016).

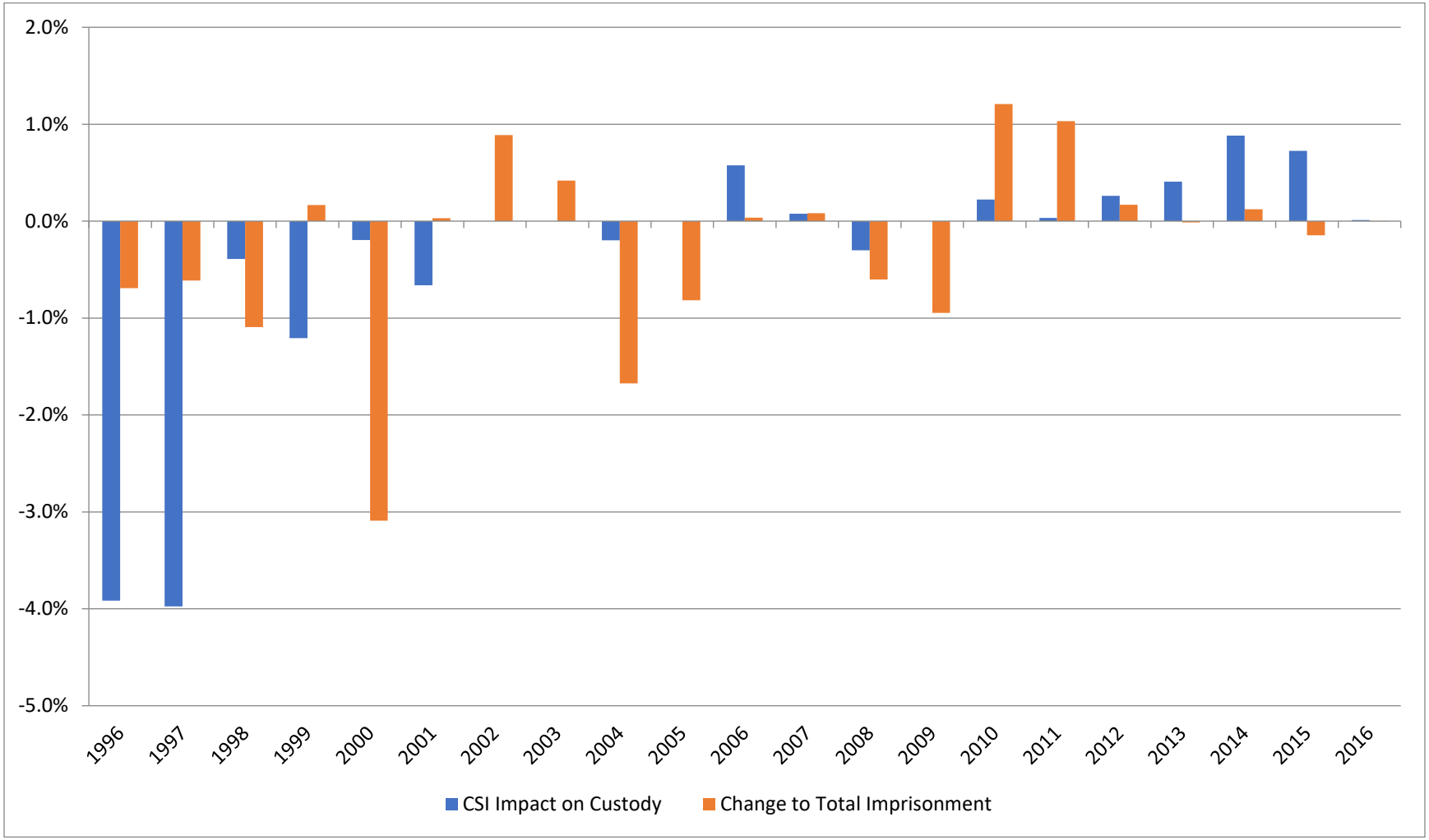

Table 5. 21-year average CSI impact on custody and change to total imprisonment (1996-2016).

Jurisdiction	CSI Impact on Custody	Change to Total Imprisonment
Newfoundland	-11.09%	-3.39%
Prince Edward Island	-3.13%	-18.47%
Nova Scotia	-9.15%	5.29%
New Brunswick	-11.71%	-0.10%
Quebec	-10.37%	-23.88%
Ontario	-7.13%	-5.45%
Manitoba	-3.23%	7.49%
Saskatchewan	-14.23%	-10.81%
British Columbia	0.65%	14.61%
Yukon	-5.41%	-14.39%
10-Jurisdiction Average	-7.65%	-5.54%

Figure 2. Year-over-year CSI impact on custodial admissions and change to total imprisonment, Quebec (1996-2016).

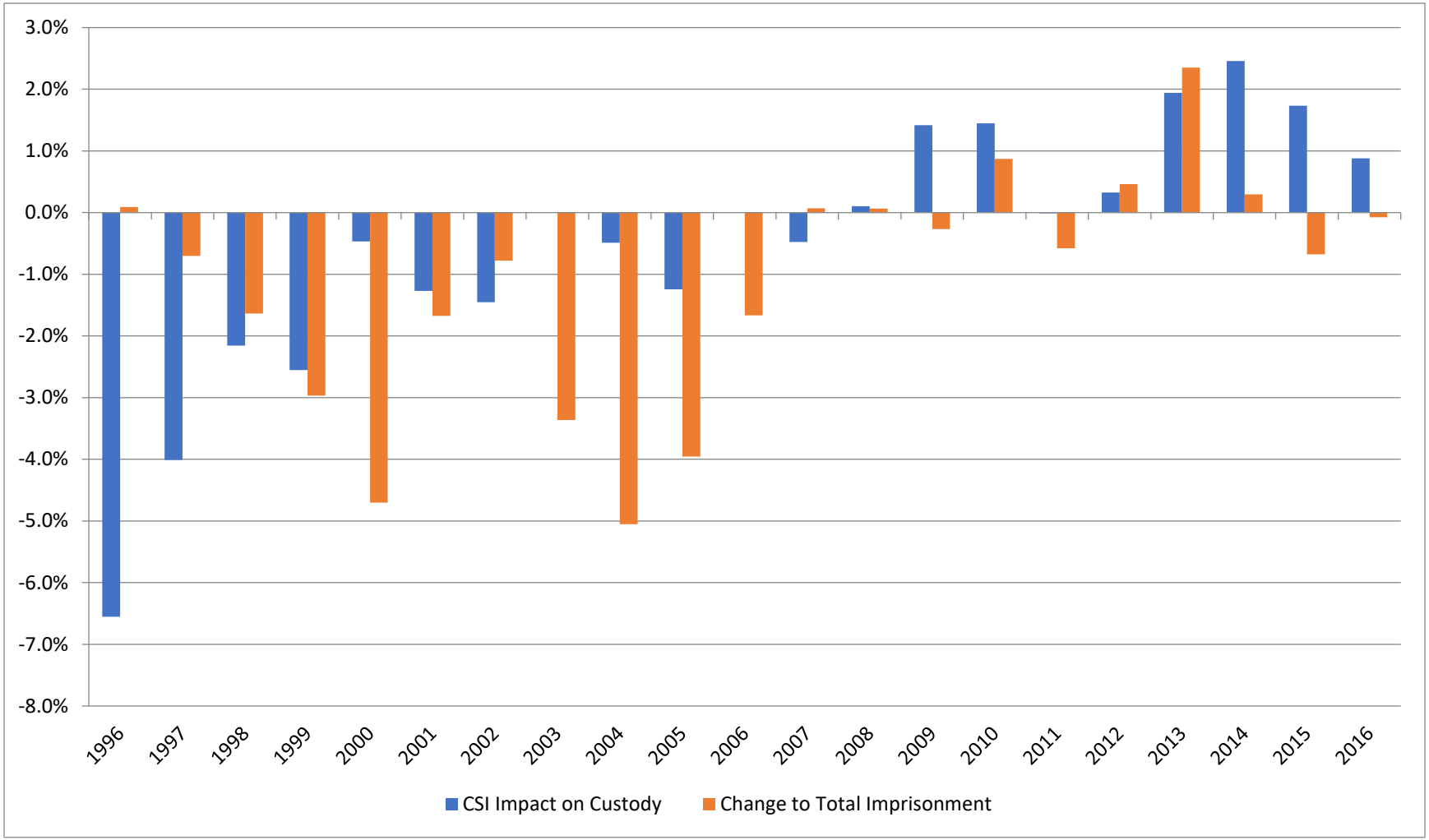

Figure 3. Year-over-year CSI impact on custodial admissions and change to total imprisonment, Ontario (1996-2016).

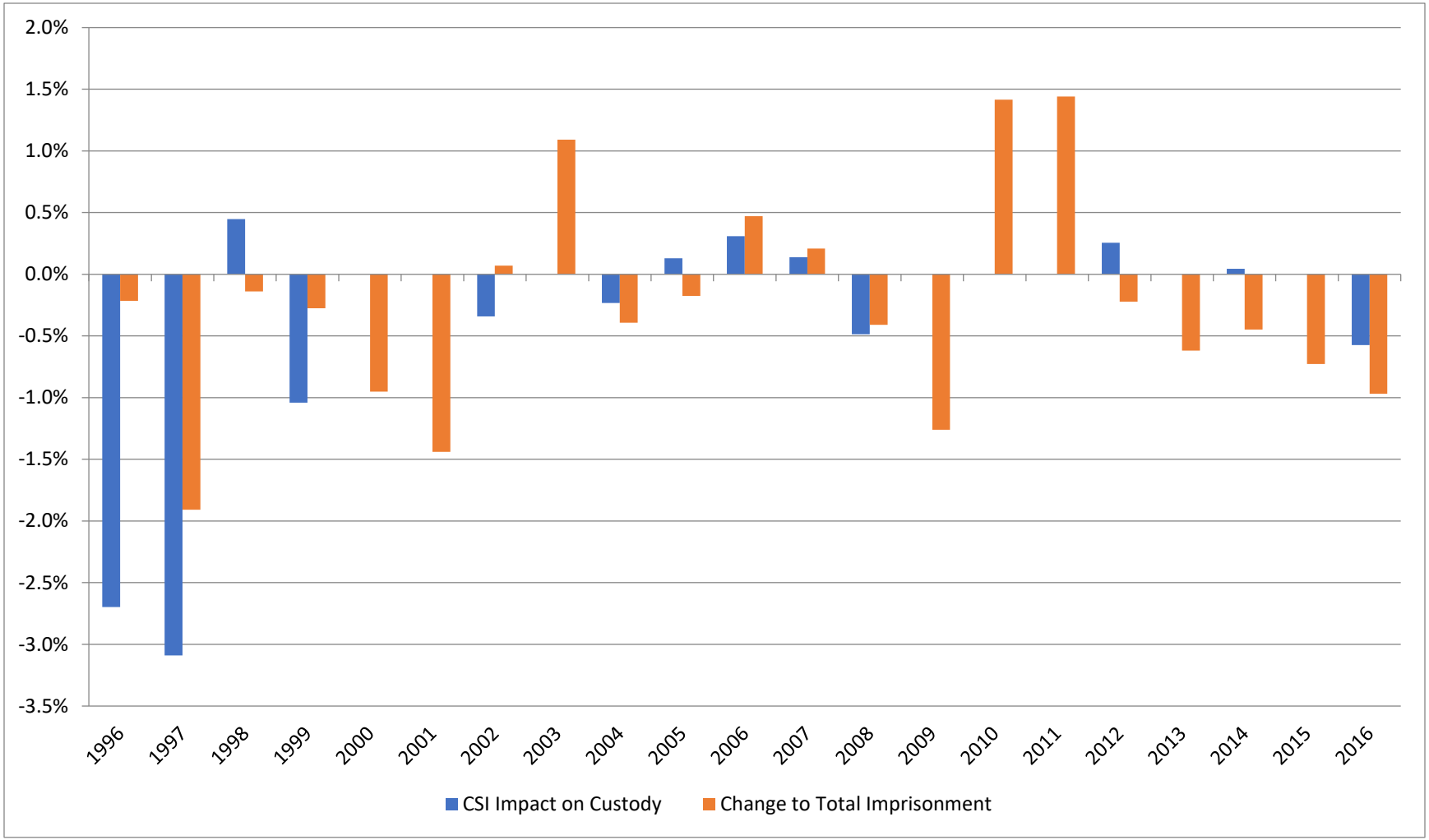

Figure 4. Year-over-year CSI impact on custodial admissions and change to total imprisonment, Manitoba (1996-2016).

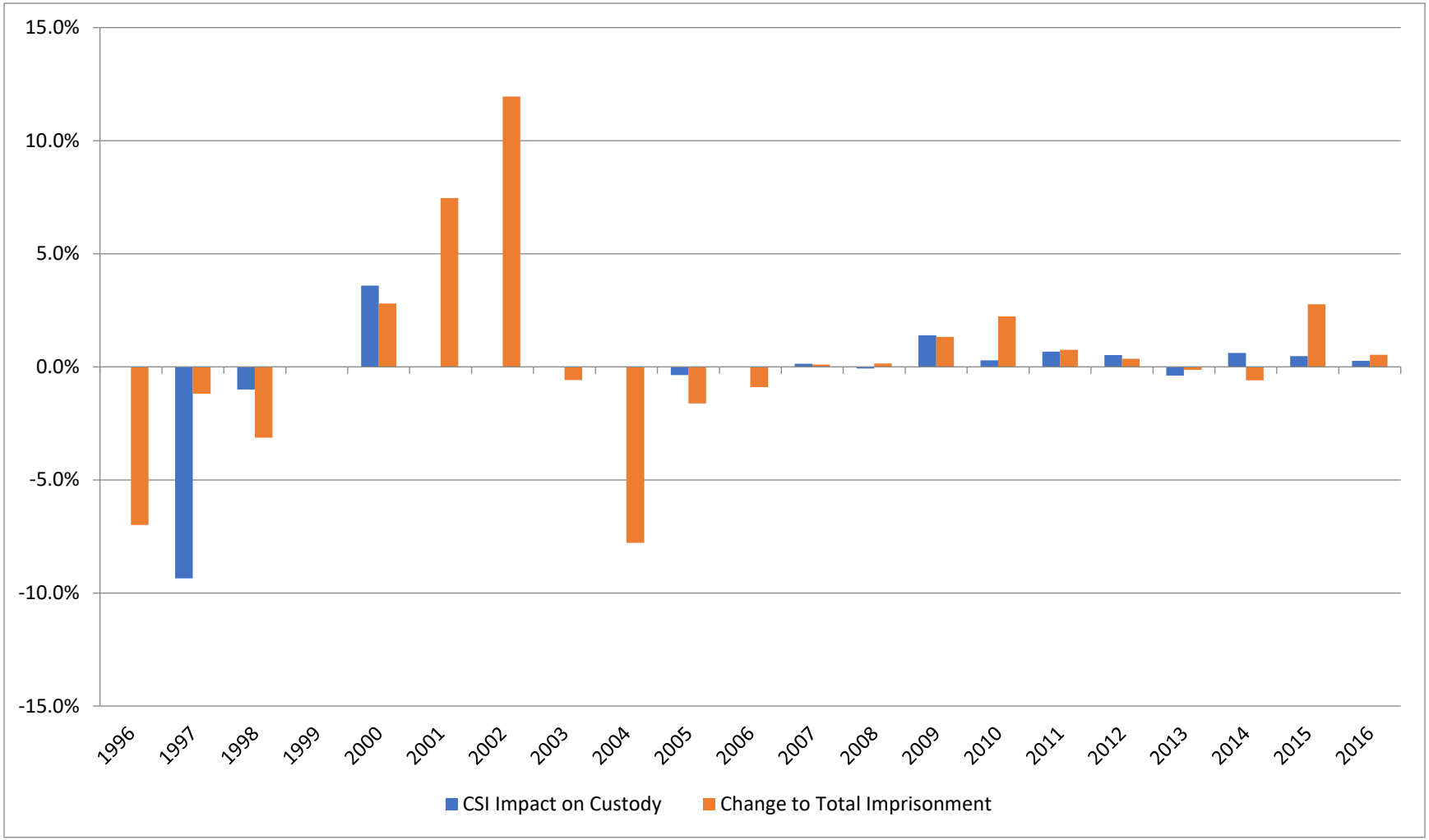

Figure 5. Year-over-year CSI impact on custodial admissions and change to total imprisonment, Saskatchewan (1996-2016).

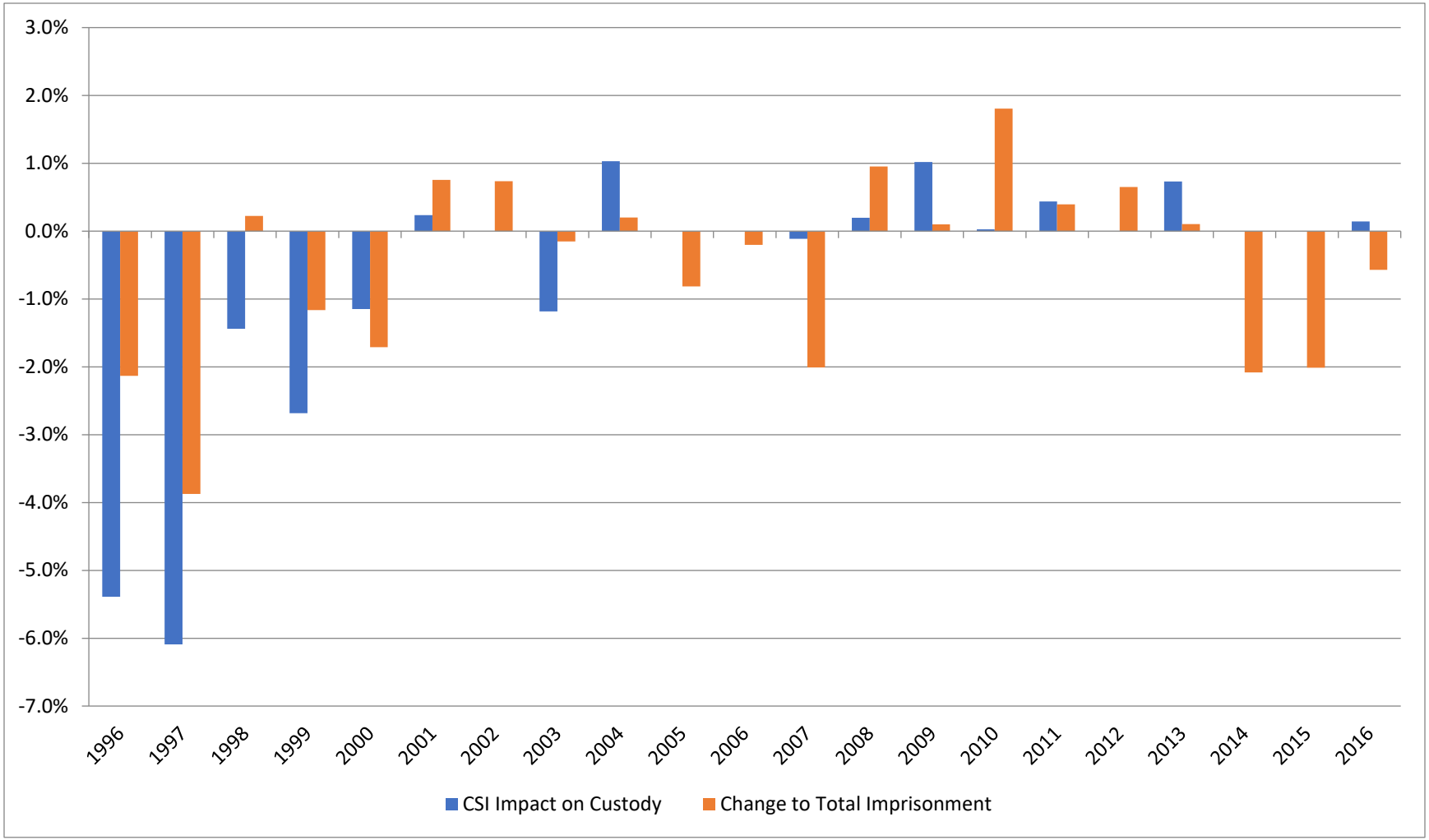

Figure 6. Year-over-year CSI impact on custodial admissions and change to total imprisonment, British Columbia (1996-2016).