Legislative Update: The Get Tough on Crime Agenda[1]

Getting Tough on Crime: The Amendments to the *Criminal Code of Canada*

Pre-Sentence Custody

The *Truth in Sentencing Act*[2] has amended the *Criminal Code* to limit the credit a judge may give to an offender upon sentencing for any time spent in pre-sentence custody. Section 719 of the *Criminal Code* provides that in determining a sentence to be imposed a Court *may* take into account time spent in pre-sentence custody but the Court *shall* limit the credit for that time to a maximum of one day for each day spent in custody. However, if and only if, the circumstances justify it, a judge may allow for a maximum of one and one-half days for each day spent in pre-sentence custody. A court is required to give reasons for this credit. This is never the case where the offender was detained because of a criminal record or breach of bail conditions.

In *R. v. Johnson*,[3] the Honourable Melvyn Green of the Ontario Court of Justice recently held that subsections 719 (3) and (3.1) of the *Criminal Code*, as amended by the *Truth in Sentencing Act*, are not unconstitutional and do not offend the *Charter*. However, he was satisfied that subsection 719 (3.1), which stipulates that, "if circumstances justify," the ratio of 1:1 can be evaluated instead as 1.5:1, empowers the sentencing judge to grant enhanced custody credit where warranted, and where reasons are enunciated.

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[1] Patrick J. Ducharme, Ducharme Fox LLP. Prepared and presented on behalf of the L.S.U.C.'s C.L.E. Program Series The Six Minute Criminal Lawyer on April 2, 2011, Toronto Ont.
[2] S.C.2009, c. 29.
[3] [2011] O.J. No. 822 (C. J.).

Justice Green remarked that, rather than construing subsection 719 (3.1) as an exceptional or rare departure from the 1:1 ratio, it should be understood to be an available discretionary tool of the sentencing judge where there are qualitative deprivations or onerous remand conditions.

Justice Green recognized that individuals detained in pre-trial custody often confront two major inequalities. One is the squalor that habitually prevails in remand centres. The other is that the "dead time" in pre-trial custody is not included in the prisoner's earned remission and parole eligibility, should the prisoner eventually be convicted.

But, as Justice Green has demonstrated, sentencing judges still have the discretionary means to overcome these inequalities. The sentencing judge can first reduce a sentence he or she intends to impose in order to reflect the harsh conditions of remand custody. Then the judge can apply the law's new 1.5-to-1 credit solely for the purpose of replacing "lost" parole consideration.

In 2007 the *Criminal Code* was amended to prohibit the imposition of a conditional sentence for offences defined as serious personal injury offences in section 752. These offences include:

i) indictable offences involving use or attempted use of violence;

ii) conduct endangering or likely to endanger the safety of another person or likely to inflict severe psychological damage, for which an offender may be sentenced to imprisonment for ten years of more; and,

iii) sexual assault (s. 271), sexual assault with a weapon, threats to a third party or causing bodily harm (s. 272), aggravated sexual assault (s. 273), or attempts to commit these offences.

Bill C-16, discussed below, proposes legislation that would eliminate reference to serious personal injury offences and place greater emphasis upon the maximum term of imprisonment applicable to any particular offence. The overall effect of this proposed legislation would be to eliminate the possibility of conditional sentences for many more offences than presently allowed.

Firearms

In May 2008 the *Criminal Code* was amended to increase the mandatory minimum sentences for a host of offences[4] as follows: for first and second (and subsequent) offences that are committed with a restricted or prohibited firearm or any firearm to 5 years and 7 years respectively if committed for the benefit of or in association with a criminal organization.[5] If a firearm is used in any other case a minimum sentence of 4 years must be imposed regardless of whether the offence is a first or subsequent offence.[6]

***Serious Time for the Most Serious Crime Act* ("*STMSC*")**

On March 23, 2011 the *STMSC Act* was proclaimed in force. It has prospective effect, not retrospective effect. The *Act* amends the *Criminal Code* to eliminate the faint hope clause for those serving a life sentence for murder or high treason after serving 15 years of their sentence. The *Act* provides for several changes to the process of applying for judicial review of a life sentence. The faint hope clause is eliminated by this *Act*, except for persons tried and convicted

[4] Attempt murder; assault causing bodily harm; sexual assault with a weapon; aggravated assault; kidnapping; hostage-taking; robbery and extortion.
[5] Subection 85 (1) (a).
[6] See sections 239; 244; 272 (2) (a); 273 (2) (a); 279 (1.1) (a); 279 (1.1) (a); 344 (a).

prior to the coming into force of this Act. Because the *Act* is not retrospective the faint hope regime will continue to apply to those who are currently serving or awaiting sentencing for murder at the time of its passage, however, the *Act* makes it more difficult for those offenders to apply for early parole under the faint hope clause by imposing more stringent conditions. The new conditions are:

i. A judge must be satisfied on a balance of probabilities that there is a "substantial likelihood" that a jury would agree unanimously to reduce the applicant's parole eligibility date. Previously, the applicant was only required to establish that there was a "reasonable prospect" that the application will succeed;[7]

ii. After serving at least 15 years of his or her sentence, an offender will have only three months in which to apply or re-apply to be considered for the faint hope reduction;

iii. If the offender does not comply with the strict time requirements he or she will have to wait a minimum of 5 years before making another application; and

iv. Unsuccessful applicants will also have to wait a minimum of 5 years before they can re-apply, and of course, must re-apply within the 3 month statutory limitation.

Consequently, an application for release from custody after serving 15 years of a sentence, if not made within 90 days of the end of the 15 years, requires the applicant to wait another 5 years before bringing a fresh application, an increased length of time from the previous 2-year period. The effect of this is that applicants who do not bring a timely application, or who are unsuccessful, will be able to apply only twice after becoming eligible. Previously, applicants were given 5 opportunities to re-apply when unsuccessful.

[7] Section 745.61 of the *Code.*

The new legislation also extends to international transfer of prisoners. The previous *International Transfer of Offenders Act* is amended such that an applicant seeking to serve his or her sentence in Canada for what would be considered a first-degree murder offence in Canada under the *Act* will also not be eligible for parole prior to serving 25 years if the offence was committed after the passage of this *Act*.

Standing up for Victims of White Collar Crime Act (“SVWCC”)

On March 23, 2011 the *SVWCC Act* was proclaimed into law. This version of the *Get Tough on Crime* agenda imposes much harsher penalties for those convicted of serious financial crimes. The new law provides for 2-year minimum mandatory sentence for frauds prosecuted by indictment if the subject matter of the offence is over $1 million. This includes separate frauds if the total of the combined frauds exceed $1 million.

The *Act* mandates the court to consider, in determining the aggravating circumstances of an offence, the magnitude, complexity, duration or degree of planning of the fraud committed. The court must also consider as an aggravating factor an offence that has significant impact on the victim(s) given their personal circumstances, including their age, health and financial situation. A further aggravating factor to be considered is evidence that the offender did not comply with a licensing requirement, or professional standard normally applicable to the activity or conduct forming the subject matter of the offence. And, the court must consider if the offender concealed or destroyed records related to the fraud or to the disbursement of the proceeds of the fraud.

The same mandatory considerations are applicable to the offences of fraudulent manipulation of stock exchange transactions (s. 382), prohibited insider trading (s. 382.1), and the making, filing or publishing of a false prospectus (s. 400). The fact that the subject matter of the offence is greater than $1 million remains for these offences only an aggravating circumstance to be considered. The minimum mandatory 2-year sentence is not applicable.

Additionally, when the court imposes a sentence for an offence referred to in sections 380, 382, 382.1 or 400, it *shall not consider* as mitigating the circumstances the offender's employment, employment skills, status or reputation in the community *if those circumstances were relevant to, contributed to or were used in the commission of the offence*. Lastly, the court is required to state for the record the aggravating and mitigating circumstances it considers when determining the sentence.

The Response to the Supreme Court of Canada's Decision in R. v. Shoker Act

This *Act* was also proclaimed into law on March 23, 2011. It creates a new section of the *Code*, section 729.1. In *R. v. Shoker*[8] the Supreme Court of Canada ruled that demands for bodily samples from individuals subject to probation conditions were unlawful. Section 729.1 now provides that a judge may impose conditions requiring samples to be provided by individuals under probation orders, conditional sentences and peace bonds.[9] In a prosecution for failure to comply with a condition in a probation order that an accused not to consume drugs, alcohol or any other intoxicating substance, or, in a hearing to determine whether an offender breached such

[8] [2006] 2 S.C.R. 399
[9] Section 810 recognizances.

a condition of a conditional sentence or peace bond, a certificate signed by an analyst stating that the analyst has analyzed a sample of a bodily substance and providing the results of the analysis is admissible in evidence, and, in the absence of evidence to the contrary, is proof of the statements contained in the certificate without proof of the signature or official character of the person who signed the certificate.

Subsections 732.1 (3) (c) is amended by adding two new conditions that a court may prescribe in a probation order. They are:

i. provide, for the purpose of analysis, a sample of a bodily substance prescribed by regulation on the demand of a peace officer, a probation officer or someone designated under subsection (9) to make a demand, at the place and time and on the date specified by the person making the demand, if that person has reasonable grounds to believe that the offender has breached the condition of the order that requires them to abstain from the consumption of drugs, alcohol or any other intoxicating substance; and,

ii. provide, for the purpose of analysis, a sample of a bodily substance prescribed by regulation at regular intervals that are specified by a probation officer in a notice in Form 51 served on the offender, if a condition of the order requires the offender to abstain from the consumption of drugs, alcohol or any other intoxicating substance.

Under subsection 732.1 (7) the notice required to be given to a person placed on the terms of the probation order must specify the places and times, and the days on which, the offender must

provide samples of a bodily substance under a condition prescribed. The first sample may not be taken earlier than 24 hours after the offender is served with a notice, and subsequent samples must be taken at regular intervals of at least seven days. The Attorney-General of a Province or the Minister of Justice of a Territory shall designate the persons or classes of persons that may take samples of bodily substances and must designate the place or classes of places at which the samples are to be taken and specify the manner in which the samples are to be taken.

Internet Sexual Exploitation: Mandatory Reporting of Internet Child Pornography

March 23, 2011 Parliament proclaimed into law "*An Act Respecting the Mandatory Reporting of Internet Child Pornography by Persons Who Provide an Internet Service"*. A person who provides Internet services to the public, including those who provide electronic mail services, Internet content hosting services and social networking sites must:

i. report to a designated agency any tips they receive regarding websites where child pornography may be available to the public; and

ii. notify police and safeguard evidence if they believe that a child pornography offence has been committed using an Internet service that they provide.

Failure to comply with the duties under this legislation constitutes an offence punishable by graduated fines. For individuals or sole proprietorships the maximum penalty is a fine of $1000 for a first offence, $5000 for a second offence and for third or subsequent offences $10,000 or 6 months imprisonment or both. For corporations and other entities the maximum fines are

$10,000 for a first offence, $50,000 for a second offence and $100,000 for a third or subsequent offences.

Bill S-10: Outline of the Proposed Mandatory Minimum Sentences to the *Controlled Drugs and Substances Act* (*CDSA*)

The *Controlled Drugs and Substances Act* (*CDSA*) criminalizes the possession, trafficking, importing, exporting and production of certain types of drugs and associated substances. Although the *CDSA* legislates maximum terms of punishment for the commission of offences, it does not currently legislate mandatory minimum terms of imprisonment. Bill S-10 proposes mandatory minimum sentences as punishment for the commission of certain offences under the *CDSA*. The following is a review of the current legislation and proposed legislative changes to the *CDSA*.

Sections 5 to 7 of the *CDSA* respectively detail the offences of trafficking, importing, exporting and production of a controlled substance. Clauses 2 to 4 of Bill S-10 propose to amend each of these sections.

The current subsection 5(3) (a) of the *CDSA* makes trafficking a substance in Schedule I and II an indictable offence. The maximum term of punishment for the commission of this offence is imprisonment for life.

Clause 2 of Bill S-10 proposes to amend subsection 5(3) (a) of the *CDSA* to provide mandatory minimum terms of imprisonment for one year for the offence of trafficking in a substance included in Schedule I and II, if the amount for the Schedule II substance (i.e. cannabis) exceeds the amount for the substance outlined in Schedule VII (3 kg). Bill S-10 also proposes mandatory minimum terms of imprisonment when any of the following aggravating factors are involved in the commission of the offence: the offence was committed for a criminal organization; violence was used or threatened; a weapon was carried, used or threatened to be used; the offender has a previous conviction of a designated substance offence; and the offender served a term of imprisonment for a designated substance offence in the previous 10 years.

A designated substance offence is defined in section 2 of the *CDSA* to mean an offence in section 4 to 10 of the *CDSA*, except the offence of possession of a substance found in Schedule I, II, or III to the Act as set out in subsection 4(1).

Clause 2 of Bill S-10 proposes to amend the *CDSA* to impose mandatory minimum terms of imprisonment of two years, if other aggravating factors are involved in the commission of this offence:

i) the offence was committed in or near a school, on or near school grounds, or in or near a public place usually frequented by persons under the age of 18 years;

ii) the offender used the service of a person who is under the age of 18 years of age;

iii) the offence was committed in prison or on its grounds.

The current subsection 6(3) of the *CDSA* provides that the importing into Canada or exporting from Canada of a substance included in Schedule I or II is an indictable offence with a maximum term of imprisonment for life.

Clause 3 of Bill S-10 proposes to amend subsection 6(3) of the *CDSA* to impose a mandatory minimum sentence of imprisonment for one year, if the offence is committed for the purpose of trafficking and the substance is included in Schedule I or II and does not exceed 1 kg. If the amount exceeds 1 kg, then Bill S-10 proposes to impose a mandatory minimum sentence of two years' imprisonment.

The current subsection 7(2) (a) of the *CDSA* legislates the production of a substance included in Schedule I and II (other than cannabis) as an indictable offence with a maximum term of imprisonment for life. Subsection 7(2) (b) of the *CDSA* legislates the production of cannabis as an indictable offence with a maximum punishment of seven years imprisonment.

Clause 4 of Bill S-10 proposes a mandatory minimum term of imprisonment of two years, if the subject matter of production is a substance included in Schedule I of the *CDSA*. This mandatory minimum punishment is increased to three years if there are any health and safety factors involved in the commission of the offence:

i) the offender used real property that belongs to a third party;

ii) the production constituted a security, health or safety hazard to a person under the age of 18 years;

iii) the production constituted a potential public safety hazard in a residential area; or

iv) the offender placed or set a trap that is likely to cause death or bodily harm to another person in the location where the offence was committed.

Bill S-10 also proposes mandatory minimum punishments for the production of cannabis, with the length of the punishment dependent upon the number of plants produced. Where the number of plants is more than 5 and less than 201, the proposed mandatory minimum punishment is 6 months' imprisonment. This sentence increases to 9 months if the commission of the offence involves any of the health and safety factors identified above. Where the number of plants is more than 200 and less than 501, the proposed mandatory term of punishment is 1 year imprisonment. This sentence increases to 18 months if the commission of the offence involves any health and safety factors as identified above. Where the number of plants is more than 500, then the mandatory minimum punishment is 2 years' imprisonment. This sentence increases to 3 years if the commission of the offence involves any health and safety factors identified above.

Other Proposed Legislative Changes of Significance

Bill C-52

This proposed legislation would require telecommunication service providers to create and maintain systems that facilitate the lawful interception of information transmitted by telecommunications and to provide basic information about their subscribers to the RCMP, CSIS, the Commissioner of Competition and any police service constituted under the laws of a

Province or Territory. A companion Bill, C-50, proposes to amend Part VI of the *Criminal Code* to permit the issuance of an intercept authorization and a search warrant simultaneously. It would also permit the use of a telephone number recorder without a warrant and extend the maximum period for the use of this electronic surveillance technique in investigations into organized crime or terrorism. It would also extend the maximum period for the use of tracking devices in investigations of terrorism or organized crime.

Bill C-16

This proposed legislation is under the title, "Ending House Arrest for Property and Other Serious Crimes by Serious and Violent Offenders Act". The new legislation if passed would eliminate the reference to "serious personal injury offence" in section 742.1. Instead, the new law would place greater emphasis upon the maximum term of imprisonment applicable to any particular offence. Offences targeted are those for which the maximum term of imprisonment is 10 years and that result in bodily harm, involve the import, export, trafficking or production of drugs or involve the use of a weapon. Also ineligible for conditional sentences when prosecuted by way of indictment would be:

i) prison breach (144),

ii) luring a child (172.1),

iii) criminal harassment (264),

iv) sexual assault (271),

v) kidnapping, forcible confinement (279),

vi) trafficking in persons (279.02),

vii) abduction by parent or guardian of a person under 14 (283),

viii) theft over (334),

ix) breaking and entering a place other than the dwelling house (348 (1) (e)),

x) arson for fraudulent purpose (435) and

xi) any offence prosecuted by way of indictment for which the maximum term of imprisonment is 14 years or life.

Consequently, this new legislation would add at least 39 offences to the already long list of offences that are ineligible for conditional sentences because they provide for a maximum sentence of 14 years or life imprisonment. These 39 offences cover a wide range of offences from conspiracy to commit murder to money crimes. It is important to note that the 14 year threshold does not distinguish between violent and non-violent offences or between personal and property offences. Although the new legislation would remove the "serious personal injury offence", sexual assault will still be specifically excluded from the offences for which a conditional sentence is available.

Bill C-4

This proposed legislation seeks to amend the *Youth Criminal Justice Act* to place greater emphasis on the importance of protecting society and to facilitate the detention of young persons who re-offend or pose a threat to public safety. The law would establish deterrence and denunciation as sentencing principles applicable to young offenders in a similar fashion to the adult system. It expands the present law interpreting a violent offence to also include reckless behaviour endangering public safety, and, would require the Crown to consider the possibility of seeking an adult sentence for young offenders 14 to 17 years of age convicted of murder,

attempted murder, manslaughter or aggravated sexual assault. It would also make possible the publication of the names of young offenders convicted of violent offences.

The Impact of the Legislative and Proposed Legislative Changes on the Canadian Criminal Justice System

A proper and just sentence must be one that is fit and just, according to the circumstances of the offence and the offender. A just sentence requires the flexibility and breadth of judicial discretion.

The fundamental purpose of sentencing is to foster respect for the law and to maintain a just, peaceful, and safe society. The court attempts to achieve this purpose by imposing just penalties that have one or more of the six objectives enumerated in s. 718: denunciation; specific and general deterrence; separation of the offender from law-abiding society; rehabilitation; reparation; and the promotion of a sense of responsibility in offenders and acknowledgement of the harm they have done to victims and to the community.

Section 718.2 of the *Code* also requires the court to take into account other principles, including:

(i) that a sentence should be increased or decreased to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender;

(ii) that a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;

(iii) that an offender should not be deprived of liberty, if less restrictive

sanctions may be appropriate in the circumstances; and

(iv) that all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

By including these last two principles, Parliament has directed courts, in effect, to consider imprisonment as a last resort.

This is an enlightened approach to sentencing, reflecting the reality so eloquently described by Chief Justice Lamer in *R. v. C.A.M.*[10]*:*

> A sentencing judge . . . possesses the unique qualifications of experience and judgment from having served on the front lines of our criminal justice system. Perhaps most importantly, the sentencing judge will normally preside near or within the community which has suffered the consequences of the offender's crime. As such, the sentencing judge will have a strong sense of the particular blend of sentencing goals that will be "just and appropriate" for the protection of that community. The determination of a just and appropriate sentence is a delicate art which attempts to balance carefully the societal goals of sentencing against the moral blameworthiness of the offender and the circumstances of the offence, while at all times taking into account the needs and conditions above and in the community. The discretion of the sentencing judge should thus not be interfered with lightly.

The new and proposed legislative changes interfere with the discretion of the sentencing judge far more than lightly. Most significantly, the changes eliminate the principles of proportionality, parity and restraint as substantive rules that govern the imposition of a fit sentence.

[10] [1996] 1 S.C.R. 500, at para.91.

Social Comment on the Legislative and Proposed Legislative Changes

The *Get Tough on Crime* agenda is informed not by principle, but by politics and polls. It exploits and deliberately exacerbates the public's misguided fears that crime is increasing, when crime is actually decreasing. The agenda is regressive, costly (projected to increase federal spending by billions of dollars per year and requiring the construction of numerous U.S.A.-style super-prisons), and does nothing at all useful or inventive to address the culture and recidivistic nature of crime. On Friday, March 25, 2011 the federal Conservative government was defeated on an historic vote in Parliament setting the stage for a May election. MPs voted 156-145 in favour of a motion citing the federal Conservatives for contempt of Parliament and expressing a non-confidence in the government. Commons Speaker Peter Milliken was reportedly poised, even prior to the non-confidence motion, to find the government in contempt for refusing to disclose the costs related to its *Get Tough on Crime* agenda.[11]

The agenda completely ignores the abundant and compelling evidence that a substantial amount of criminal behaviour is directly correlated to mental illness, addiction and poverty. Rather than "getting tough on crime" by placing more people that suffer from mental illness and addictions in prison for greater periods of time, the government should be investing in programs that end the cycles of crime, addiction and mental health illness. Until a government has the will and the wisdom to make this kind of reform happen, offenders will continue to leave our country's

[11] TheChronicleHerald.ca by Joan Bryden, the Canadian Press, Tuesday, March 22, 2011.

prisons with the same or more severe mental health issues, dependencies and addictions as when they entered, thereby rendering Canadian communities, if anything, more dangerous.

The *Get Tough on Crime* agenda takes no interest in, and, worse, has the potential to completely destroy, an offender's prospect of rehabilitation, in turn, endangering the community in the future. In *R v. Woolcock*, the Ontario Court of Appeal observed that "[o]ne of the dangers of imposing a lengthy term of imprisonment . . . is that it could impair the rehabilitation and reintegration of this person as a responsible member of his community."[12] The Court relied upon its own earlier decision in *R. v. Pearce* in which Dubin J.A., dissenting, stated:

> It ought not to be overlooked that it is important that persons in prisons who are to be released at some time will not return to a life of crime but will become self-supporting, capable of assuming new responsibilities and turn in the direction of becoming useful members of society. If a prison term is of such a length as to endanger the future rehabilitation of an accused, then the term of imprisonment imposed on him will not protect society in the future.[13]

Despite the smug, self-congratulatory tone conveyed by such titles as the *Truth in Sentencing Act*, or, *Standing Up for Victims of White Collar Crime*, this agenda has nothing whatsoever to do with truth in sentencing or standing up for victims. The *Get Tough on Crime* agenda has the unclean odour of politics all over it. It plays to the public's irrational fears. It flies in the face of an ever-developing and now overwhelming body of literature going to suggest that harsher sentences lead, if anywhere, to the same or more crime, not less. It flies in the face, too, of the

[12] [2002] O.J. No. 4927, para. 13 (C.A.).
[13] Ibid.

accumulated wisdom of our finest judges, who are now being told, in unmistakeable terms, that they cannot be trusted to exercise their discretion reasonably, competently, and compassionately. These legislative amendments represent the government, like the crayfish, crawling backwards into the future.

References

Truth in Sentencing Act S.C.2009, c. 29.

R v. Johnson, [2011] O.J. No. 822 (C. J.).

R. v. Shoker, [2006] 2 S.C.R. 399 (S.C.C.)

Bill S-10 An Act to amend the Controlled Drugs and Substances Act and to make related and consequential amendments to other Acts

Bill – C-52 – An Act regulating telecommunications facilities to support investigations

Bill S-6 An Act to amend the Criminal Code and another Act (Serious Time for the Most Serious Crime Act)

Bill C-16 An Act to amend the Criminal Code which can be referred to as the Ending House Arrest for Property and Other Serious Crimes and Violent Offenders Act

Bill C-4 An Act to Amend the Youth Criminal Justice Act and to Make Consequential and Related Amendments to Other Act

Bill C-21 An Act to amend the Criminal Code which can be referred to as the Standing up for Victims of White Collar Crime Act.

R v. C.A.M., [1996] 1 S.C.R. 500 (S.C.C.).

TheChronicleHerald.ca by Joan Bryden, the Canadian Press, Tuesday, March 22, 2011

R v. Woolcock, [2002] O.J. No. 4927 (C.A.)