Appendix I — Canadian Police Association Brief — High Risk Offenders

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The essence of the discussion concerning high risk offenders is contained in the very description "high risk". What has prompted this debate are a series of cases, some of which are attached as Appendix III. In each instance, the public outrage that occurred following the offenders' conviction led to a question of *how* could our system deal with such, apparently only after the fact, recognizable high risk offender. That being so, asking *why* it is necessary to deal with such offenders may indeed more importantly reveal *who* these kinds of measures are required for.

Thus, any such analysis must cover what can be done to improve existing laws (*Code* or Conditional Release Act[1]) to meet the challenge to public safety these kinds of offenders pose, and what new provisions are required, if at all, once that is done.

I. EXISTING LEGISLATION

A. Part XXIV

In our previous Submissions on Crime Prevention (September 1993) we outlined a series of measures designed to improve the use of the Preventive Detention provisions already in existence. These are reproduced again.

i) How application is launched. Consider amendment to section 754 allowing Sentencing Court to initiate proceedings and hearing without Crown application if Court felt it potentially appropriate (like ordering a Pre-Sentence Report to assist in sentencing).

ii) Amend section 752(b) to include sections 151, 152, 153, and 155 (child sex offenses).

iii) Make use of previous transcripts from earlier convictions to reduce trauma for former victims being forced to testify again at DO (dangerous offender) Hearing. Expand use of reference to medical files by psychiatrist at hearings.

iv) Reintroduce presumption of status if (eg.) three previous convictions for a section 752 offense and all attracting separate federal sentence.

v) Amend section 753(b) to make declaration mandatory, NOT discretionary where court concludes criteria met. This would eliminate much of the "what if psychiatric guessing about future therapy or drug treatment". Also, anyone declared a DO is in fact, eligible for parole three years from arrest, and every two years thereafter. Such future "improvement" can be canvassed in the parole setting.

vi) Consider provincial prosecution and Sentencing Court designation of specialist prosecutors and judges to deal with such cases and provide

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1. R.S.C. 1985, c. P-2 (this statute has been repealed; it is replaced by *Corrections and Conditional Release Act*, S.C. 1992, c. 20).

appropriate training re psychiatry and behaviourial science (assuming that exists).

vii) Amend section 757 to make admission of character evidence of the offender admissible by the Crown as of right and not by discretion.
viii) Specify by amendment that evidence of activity of the offender is admissible even where no criminal conviction and include victim impact statements.

ix) Amend section 755(3) to ensure that Crown has right of cross-examination where offender refuses to name psychiatrist.

x) Allow Court to draw negative inference where offender refuses to speak with either or both psychiatrists (akin to section 258(3)).
xi) Allow victim participation and require Crown participation at any conditional release application brought by Dangerous Offender.
xii) Mandatory notification of police/victims where any conditional release of DO.
xiii) Specify through amendment to section 754(1)(c) that notice filed with Court is a public document subject only to victim identification restrictions which the Court may impose.
xiv) Examine how registration of DO status for any on conditional release can be effected in particular re child sex offenders.

An examination of the Pepino Working Group on High Risk Offenders will show a great deal of similarity in proposals. Of all of these recommendations, it is our suggestion that the following are of the highest priority :

a) Presumptive status if third separate conviction for serious personal injury offense where all had attracted federal sentence.

b) Amend section 753(b) to make declaration mandatory and not discretionary once court concludes criteria met. For an example of the mental contortions a court is currently required to go through see, *R.* v. *Williams.*[2]

c) Amend section 754 to allow Court to consider indefinite sentence without Crown application

Amend section 753 criteria as outlined in Department of Justice proposals although modified to read :

> *(a)* [...] *was committed in such a brutal manner as to compel the conclusion that the offender constitutes a threat to the life, safety or physical or mental well-being of others or,*
>
> *(b) that it has been shown that the offense is part of a pattern of repetitive behaviour showing a failure on the part of the offender to restrain his*

2. *R.* v. *Peter Vesey-Sawyer Williams aka Peter Williams (1983),* (Alb. C.Q.B.).

behaviour, and a wanton and reckless disregard for the lives, safety or physical or mental well-being of others.

B. Conditional Release Act

1. Restrictions for early release based on past record

As the Community Safety and Crime Prevention (CSC) brief to the High Risk Offenders Working Group showed, more than 70 percent of all inmates currently declared dangerous offenders had at least one previous federal sentence. A review of the list of offenders on Appendix III also makes clear that it is the persistent criminal activity that is a common factor in almost all of these people. The other consistent factor is that despite this track record these individuals continued to be granted the same kinds of conditional release programs as are available to the general inmate population. In our view, this is a recipe for disaster and indeed, has the potential of destroying public acceptance of the overall regimen of supervised early release for re-integration into society. To be blunt, this discussion would not be taking place if the level of public outrage was not so great over these identifiable and preventable cases.

What is required, finally, is the recognition that differentiation among different kinds of inmates is required. While the Americans speak of a new "three strikes and you're out" philosophy, ours should be, "three strikes and you're in". That is to say, an inmate who has been released on any form of conditional release and re-offended while on early release on three separate occasions, is thereafter disentitled to that which is available to other inmates. Instead they should serve the entirety of their sentence with the last six months being served in a Community Correctional Facility which has the highest level of supervision.

The early release from custody of an offender is done by sentence administration authorities with three basic assumptions. First, that gradual reintegration is more likely to produce an individual that does not re-offend. Second, that such early release ought only be used when the risk of that offender committing new crimes is controllable. Third, that there are no guarantees in predicting human behaviour and that the best indicator of future behaviour is past conduct.

Although recommended many times over the past three years, no accurate analysis has yet taken place of offenses committed by people on any form of early release from their Court imposed sentence. Evidence given at the Stephenson Inquest suggests that for parolees alone, the number may be approximately 25 percent. The real figure should of course include those who re-offend at all, if we are attempting to gauge the validity of continued early release in spite of past conduct. That figure, we are confident, is well in excess of 50 percent. Such systems obviously are failing in the sense that they do not disentitle those people from the very real benefit of release from custody when they have continually committed new offenses while on early release. To meet the concerns of releasing an individual at warrant expiry with no supervision, we suggest a mandatory restrictive and brief period of community supervision for those inmates that this reform would keep in custody for all of the Court imposed sentence. These proposals place value on the specific and general deterrence aspects of sentencing. As well, it reflects what is a common experience, namely that all individuals are not equally rehabilitatible and that for many repeat offenders

rehabilitation, if it comes at all, comes from themselves and not from the best efforts of others. In practical terms, it's called burnout.

It is suggested therefore that after a number of instances of early release that have resulted in more offenses being committed, what is appropriate is greater emphasis on societal protection through the elimination of entitlement or eligibility for early release. The same principle applies in situations of temporary absence and for sentences which are served in provincial jails. What will remain is an early release program focused on those offenders most likely to benefit from it and a concurrent protection for society from those offenders who pose an unacceptably high risk of re-offending based on their own past conduct.

The benefits of such an approach would include a restoration of public confidence in the overall conditional release programs (such confidence clearly at an all time low, hence this very discussion), real deterrence to the career criminal, and a likely savings based on this active segment of the criminal population. Quite apart from all of this is the immeasurable benefit of restricting the human devastation wreaked by this small group of persistent offenders.

2. Recommendation No. 1

That all programs of conditional release pursuant to the *Conditional Release Act* be amended so as to statutorily disentitle any offender to any kind of early release when that person has, on three separate and distinct occasions, committed an indictable offense or violated the terms of the early release resulting in its suspension while on a previous early or conditional release from custody.

3. Recommendation No. 2

That any offender, so disentitled under Recommendation No. 1, complete the sentence in custody as imposed by the Court and that thereafter be subject to a mandatory, restrictive six month parole including the imposition of such conditions to minimize risk to the public and specifically respecting treatment, residency, and reporting.

4. Recommendation No. 3

That a separate new offense (section 145) be enacted in the *Criminal Code* with a minimum sentence of one year to be served in its entirety for a breach of any condition referred to above and that an automatic mandatory further period of post release supervision follow release.

As a part of this overall approach to better deal with existing high risk offenders the amendments to the *Conditional Release Act* as appended should be implemented. In effect, an improvement to our existing ability to supervise, detain, and make parole decisions through accountability will reduce the risk posed by high risk offenders. Equally, there must be a termination of the practise of employment of non-CSC personnel in the supervision of federal inmates. The process is fraught with enough risk without using prisoner advocates to be the guardians of public safety where vigilance may literally mean a return to custody.

II. NEW POWERS REQUIRED

Sentencing

One way of dealing with the dilemma of risk posed by offenders that are not declared dangerous offenders is to allow supervision past warrant expiry. This would be particularly effective in cases of repeat child sex offenders and is in part already contemplated by the new section 161 prohibition orders. Unfortunately, the new section, while a step in the right direction, has no real vehicle of enforcement other than after a new offense which is of course, that which is sought to be avoided. A power of long term supervision as suggested below would be necessary to deal with this but it must be noted, as well, that there must be a penal consequence for violation of such a provision in order for it to be in any way meaningful.

III. POST RELEASE SUPERVISION — LONG TERM FOR REPEAT SEX OFFENDERS

An obvious flaw in the current criminal justice system is the reality demonstrated by the Joseph Fredericks and Ray Budreo cases. Both were child sex offenders and both were to be released early of their sentence imposed by the Court for a child sex crime that was itself committed while on a previous early release for an earlier child sex crime. Both were diagnosed as being high risk in the sense of committing a further sex crime against a child. In Budreo's case, public outrage led the National Parole Board to reassess what constituted serious harm. In Frederick's case, no one outside the system knew of his release and he gained his freedom. Christopher Stephenson was shortly thereafter abducted, raped, and murdered by Fredericks. From the needless death of this child have come multiple recommendations from a Coroner's Inquest Jury. One (number 3) deals specifically with the need for an authority short of indefinite detention but beyond normal warrant expiry to deal with the continued risk posed by such individuals. What is contemplated is the ability of a Sentencing Court on any sexual offense to impose a finite term but to recognize that continued, lengthy, and restrictive supervision is desirable for these kinds of offenders. The Court, at sentencing, could therefore direct a period of supervision following release for up to, for example, ten years. It is envisaged that residency and treatment conditions be a part of such a structured release and that a penal consequence follow a breach of any

condition. As well, a yearly review of such supervision, open to the public, would allow for early termination where it was felt that the interests of public safety were not jeopardized by the termination of the supervision.

A. Recommendation No. 4

That the *Criminal Code* be amended so as to permit the imposition of up to ten years of restrictive supervision out of custody for certain high risk offenders such orders to be made at time of sentencing. Supervision would include restrictive authority on treatment, residency, and reporting; a breach of such condition to be an indictable offense (as amended under section 133 of the *Criminal Code*) resulting in a minimum one year sentence to be served without eligibility for conditional release of any kind and further conditional release as described on release. Imposition of the extended term of supervision to be ordered at the discretion of the Sentencing Court or at the future initiative of the National Parole Board (through CSC referral) before warrant expiry.

B. Recommendation No. 5

That a review of such long term supervision be allowed on application by the offender before the National Parole Board. Such a review, open to the public, should only be granted where the Board is satisfied that such cancellation of supervision is not contrary to the interests of public safety.

C. Supervision Orders for Current High Risk Offenders Past Warrant Expiry

Our proposals in this area essentially suggest a differentiation among offenders based on their past records. Put more directly, we accept that all early release in the hope of rehabilitation involves risk. We simply wish to statutorily reduce the risk to the public basing our suggestions on the past records of the proposed candidates for early release.

Secondly, we believe that the current process of sentence administration and granting of early release is secretive to the point of being inconsistent with a democracy such as our own. Accordingly, a major thrust of our proposals in this area is to open up the process to both victims and the public at large and to foster a specific reality of accountability for decisions made.

Finally, it is also our belief that the situation should be addressed of the offender who has reached warrant expiry date yet is still believed to be a substantial risk to cause death or injury to individuals within the community. Currently, there is quite literally nothing which can be done to deal with this situation and the potential

trauma and danger is by no means illusory. While the dangerous offender provisions with indeterminate detention exist there are cases where that procedure was not followed yet parole authorities believe an individual to pose a substantial risk. It is our understanding that this is particularly acute in situations of child sex offenders where treatment has been refused throughout the sentence. We do not exclusively advocate some formula of further incarceration or a sort of retroactive dangerous offender application but rather suggest that the Parole Board be empowered to bring an application to the Court that sentenced the inmate for an order requiring indefinite parole supervision even past warrant expiry date.

This provision, aimed at what is fortunately a relatively few (but with equally disproportionately high rates of re-offending and causing harm) high risk repeat offenders, balances the protection of the public with the basic fairness of ending the state's control over an inmate once an imposed sentence is completed. It is clearly a departure from a general idea of a sentence ending on warrant expiry although even that could be addressed by a new warrant issuing in accordance with any such amendment.

What such a new process is aimed at is providing protection from an identifiable danger but attempting to do so in a non-custodial setting if conditions were followed by the offender, if not, the alternative is a return to custody.

As such, these proposals will, of course, be challenged under sections 7, 9, 11 and 12 of the Charter in that it restricts the liberty of a citizen in addition to the penalty originally imposed. This is rather obvious and there is no point in pretending that it is not so. Rather, this is as clear an example of why we have section 1 in our Charter because if it cannot justify such measures then the alternative is that we must simply wait for the next victim before the state can intervene. While the Supreme Court may say that, we suggest it is unconscionable for our elected National government to do so. This is a fundamental issue and we must not be hesitant to argue the position. As for those who will say that it is "life on the instalment plan", it is well to remember that this is entirely up to the offender.

Further, these proposals strike a middle ground between outright retroactive detention as originally proposed in May of 1993 and the current practise of doing nothing and quite literally, waiting for another victim. Such an approach has the benefit of likely meeting the proportionality test required by the Supreme Court in considering the applicability of section 1 of the Charter in saving an impugned section of a Statute. It is perhaps wise to pause and consider the words of section 1 of the Charter which serves as a shield from absolutist individual rights claims :

> *The* Canadian Charter of Rights and Freedoms *guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.*

In *R.* v. *Oakes*,[3] the Supreme Court made it clear that the proposed measures must be fair and not arbitrary, proportionate to the objective, and ultimately the least intrusive to accomplish the purpose. The measures suggested herein, meet this test.

D. Dealing with those Currently Detained or Eligible for Referral

Given that Joseph Fredericks was not even referred for detention and that Ray Budreo was originally not detained, a thorough examination of existing policy and procedure in these areas is clearly called for. Obviously, caution and public safety should be the guiding principles and not CSC Corporate Objective Number 1 (or "Get Them Out" as the Leech case more precisely revealed).

Until such time as new legislation is in place, we recommend that in all circumstances where an inmate has been detained under section 129 or its predecessor sections, and no later than 60 days prior to the warrant expiry date, CSC invoke section 8(2)(m) of the *Privacy Act*[4] (public interest) and convey ALL of its files on the inmate to the appropriate Provincial Attorney General Department for possible invocation of certification under the *Mental Health Act*.[5] This procedure to continue until a decision reached on legislation re : detention or supervision past previous warrant expiry date and such legislation implemented or rejected.

CONCLUSION

As is apparent from this Preliminary Report on High Risk Offenders, a multi-faceted approach is required if we are to maintain our overall corrections and parole process but, at the same time, ensure that preventable mistakes do not continue to occur.

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3. *R.* v. *Oakes* (1986), 24 C.C.C. (3d) 321 (S.C.C.).

4. *Privacy Act*, R.S.C. 1985, c. P-21.

5. *Mental Health Act*, R.S.O. 1990, c. M-7.