

Canadian Police Association Brief to the Standing Committee on Justice and Legal Affairs on Bill C-41

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* An Act to Amend the Criminal code (sentencing) and other Acts in consequence thereof, S.C. 1995, c. 22.

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This Bill bears striking similarity to a previous Conservative Government's effort of late spring 1993, then known as Bill C-90. It was at the time referred to as the companion piece to Bill C-36 which supposedly reformed sentence administration in Canada. It is no small irony that on the day our Association is asked to appear before a new Justice Committee to discuss this same topic, we are also asked for our views on a Bill to reform Bill C-36. In that sense, it is not surprising because as the "companion piece" to Bill C-36, Bill C-90, now renumbered as C-41 is equally flawed.

The major thrust of public calls for sentencing reform has focused on the dual elements of enhanced safety and greater clarity, and indeed honesty, in how the criminal justice system, including sentencing, operates. It is in this vein that this Bill is a vast and profound disappointment to those who seek real reform. Reform of sentencing practise and procedure involves changing what we do and not just putting new names or labels on the same old practises and pretending something real or substantial has occurred. It is not creating new bureaucracies to deal formally with that which is already occurring and it is certainly not redefining basic concepts in the arrogant belief that principles developed by the courts over a hundred plus years are inadequate and inferior to criminological concepts.

We have had the benefit of reading and analyzing Bill C-42 which also amends the *Criminal Code* but mostly in procedural matters. It affords a valuable comparison to this Bill as it is practical, direct, and shows the hallmark signs of legal craftsmanship. Bill C-41, by contrast, with a few exceptions, is unwieldy, complicated, internally self-contradictory, duplicitous and what's worse, in almost all of it, completely unnecessary for anyone with any knowledge of, or use for, the common law heritage of Canada. While it would attempt to codify basic sentencing principles, eliminating this most basic judicial discretion, at the same time it would bestow huge new discretionary powers to a whole range of persons within the justice system. The common thread in those new powers is that all are to the benefit of the offender in the sense of non-custodial consequence for criminal actions.

Where sentencing reform calls for protection, this Bill offers platitudes; where it calls for clarity, it offers confusion and outright hypocrisy. Given its previous life as Bill C-90, it is in no way a creature of this Government yet if passed it will certainly be identified as just that. It will almost certainly cause the already skyrocketing criminal justice budget to expand further still, in particular the fastest growing component of that, namely Legal Aid.

When all is said and done, and when one considers the truly great challenges the justice system faces in real crime prevention and protection of the public, it is tragic that this Bill occupies debate while other, legitimate issues are ignored. That too will be the legacy for the Government should this Bill be passed into law.

I. TOPIC ANALYSIS

A. Escape

The Bill proposes that a sentencing Court, dealing with an offender convicted of escaping from prison, or for being unlawfully at large, can direct that the sentence

imposed be served in a penitentiary. There is however, absolutely nothing in terms of sentence calculation or future parole eligibility for a person so convicted which is far more important than this clause. When such persons get out, next is at least as important as to where they serve the sentence.

One possibility would be to require a person so convicted to serve the sentence either originally or subsequently imposed until warrant expiry date and not allow the current practice of "sentence merging" to take place for such a conviction.

B. Alternative Measures for Adults

Faced with rising crime rates, escalating costs, and insufficient personnel, civilian authority in criminal justice clearly has a number of options. It can attempt to get at why people commit crimes in the first place (Justice Committee Report on Crime Prevention); it can seek by sterner measures to deter people from committing crimes; it can provide more funds to meet the increase of crime; it can reduce its costs (like in cutting legal aid budgets or eliminating unnecessary preliminary inquiries) or, it can just redefine crime to deny the increase. In proposing Adult Alternative Measures, C-41 selects this last option by virtue of proposed Section 717.

Although we have grave reservations about such a scheme for adults, what follows are observations about the current proposals.

- a) The applicability of any such program including criteria for use will vary from province to province.¹
- b) There is nothing specifically precluding certain offenses from having alternative measures applied.
- c) There is nothing specifically precluding offenders from being diverted from the criminal courts in this fashion on more than one occasion.
- d) Unlike the *Young Offenders Act*,² section 717 contains a generic statement that alternative measures for adults are only to be employed "where it is not inconsistent with the protection of society". Whatever that means. If it means they should not be employed where it is felt appropriate that a criminal record be maintained, that is one thing but if instead it is interpreted to mean that the person does not impose an immediate risk to society, then that is quite another.
- e) This section does not specify who, or what agency, will make this determination, Crown, police, probation or some combination thereof. This also will therefore vary from province to province.

1. Bill C-41, s. 717(1)(a). *R. v. T.* (1990), 57 C.C.C. (3d) 255 (S.C.C.).

2. *Young Offenders Act*, R.S.C. 1985, c. Y-1.

- f) Subsection 5 is meaningless as the Crown which presumably made the decision to use alternative measures in the first place, enjoys the authority to take control of a prosecution commenced by a privately sworn information.
- g) The effect of subsection 4 makes enforcement of the conditions of alternative measures (like the terms of probation) extremely difficult. In at least one jurisdiction the sentiment has been expressed that for young offenders not truly motivated to perform the conditions, the end result is simply to ignore that breach due to the lack of likelihood of success because of this section.

As anti-social criminal conduct escalates, there are of course many different ways of trying to deal with that reality. Society can simply prosecute more, it can try and identify what causes such conduct, and where possible or practical deal with the causes, or as this section proposes simply say the conduct just isn't criminal any more. Actually to be precise, it still recognizes it as being criminal, it's just that the same sanctions don't apply.

It should not be forgotten that every time a Police Officer breaks up a fight in a bar without charges or catches a thirteen-year-old shoplifting and takes that youth home to his/her parents without processing a charge, that in effect alternative measures have been employed. It is done without a large bureaucracy and without volumes of forms being filled out. It is also far more likely to be successful in our experience in deterring future criminal behaviour than the cumbersome regimen contemplated by this *Act*. There is not necessarily anything the matter, particularly with young people, in having them understand that a Police Officer has given them a break.

It would also be instructive to see what kind of charges are currently processed under alternative measures. Are they ones which could simply be dealt with by Police Officers again taking individuals home? If so, why create and invoke a formalized and costly process? Our suggestion is that alternative measures certainly be kept for young offenders. Much greater caution should be taken where adult offenders are concerned. We would suggest that all straight indictable offenses be excluded from the process and similarly, any driving offenses be required to proceed to court where it is a matter of public record. In our view this is too important a question of national interest to be left to variance from province to province.

This entire scheme is founded on the granting of broad discretionary powers, authorized by someone that Parliament hasn't bothered to name. As well, the criteria for inclusion in such a program appear, by virtue of section 717(1)(a), to be variable from province to province. This is an extremely odd way to introduce procedural uniformity or consistency in the justice system which appears, in part, to be a goal of this Bill.

C. Purpose and Principles of Sentencing

Presumably what is meant to be included in this is the purpose of the criminal justice system in invoking sentences on convicted persons. Sentencing of course, does not exist in a vacuum. It is instead a function whereby a number of sometimes competing,

sometimes co-existing, factors exist. Through it all however, is the rationale of the entire system which is the protection of the public. Section 718 as drafted, makes the mistake of substituting objectives for means. The objective of a sentence is to protect the public. The means employed to do that are indeed the ones listed in subsections (a) to (f) and are properly described as specific deterrence, general deterrence, rehabilitation and denunciation, segregation, and reparation. While this distinction as noted may seem trivial or semantic, it is not. A sentence should be crafted as a blend of these means all done to accomplish the purpose of the protection of the public. Losing sight of that can contribute to improperly balanced results which sentence administration officials, probation officers or the public at large have to deal with down the road. It is interesting to note that the predecessor Bill C-90 is a word for word duplication of this section except for the order of objectives (offender rehabilitation moved up which prompts the thought that the drafters of the Bill obviously were thinking in terms of "ranked" priorities), a modification to only separate offenders, where necessary, and the very awkward inclusion of, "along with crime prevention initiatives" as a fundamental purpose of sentencing, which, of course it is not. It may well be that this Government, or the current group of Justice Department employees are big on crime prevention which is understandable. Simply throwing in the concept in this place however is not only confusing but unclear. That is a very ominous combination in criminal justice legislation, not to mention expensive.

Another curious feature of these proposals is the disinclination to thoroughly specify aggravating or mitigating principles to be applied to a sentence. The drafters of this Bill did not seem shy about rejecting the common law approach in section 718 yet have done nothing to categorize criteria which courts deal with on a day to day basis. One suspects that is so because to do so may well illustrate their significance more in their breach than their observance.

Some of these factors include :

1. Past criminal history (record)

We don't sentence people again for offenses they have already been convicted of but by the same token it should wear a little thin to hear of counsel suggesting a repeat offender should have the benefit of the same balance of rehabilitation and other factors as a first offender. The critical importance of a record is that it shows someone who has already gone through the system once and has NOT been deterred, by the penalty imposed, from committing further anti-social acts. As a general rule, a first offense may arguably be an insight into the nature of our society. A second offense however, is an insight into the offender. The offender is not getting the point. A third offense is an insight into the system. It is not making the point.

2. Offenses committed while on early release, bail or probation

It is hard to imagine a greater flaunting of the whole process of law than the person who can't even wait to complete the benefit imposed on them from a previous anti-social act before committing yet another. We have the capacity to direct that such offenses be served consecutively or that parole eligibility be negatively affected. This Bill does neither.

3. Particular nature of victim and trauma resulting

It is fair to say that this is an area which appears to be receiving greater priority in sentencing yet one needs only consider the analysis underway in Ontario with respect to restricting the use of victim impact statements to recognize that the psyche of excluding victims from the process remains. In fairness, this Bill cannot be accused of that. The irony, of course, is that there are two people who really don't want to be involved with the criminal justice system although for different reasons; the criminal and the victim.

4. Remorse and the Guilty Plea

Courts have increasingly recognized that a plea of guilty should be a mitigating factor if only because the State has been spared the expense and inconvenience of proving its case. This is by no means insubstantial. It had been almost routine that a plea of guilty was equated with remorse on the part of the offender which as often as not, was far from the truth. It was instead a simple recognition that the offender was inescapably caught. There are of course, situations where the plea of guilty is also a manifestation of remorse and credit should be given where that is so. We are not suggesting that offenders who are convicted after trial should automatically be penalized more, but instead, simply point out that if part of the whole process, including the formality of appearing in court, was to teach the lesson of responsibility for action, then the time to recognize that that point has not been made is at sentencing such an offender. It is appropriate to temper a sentence because the offender clearly understands that what they did was wrong (or as often as not stupid) and that is manifested by the EARLY entry of a guilty plea. On the other hand, for the person who has taken a whole day of court time for an impaired driving charge for which no realistic defense existed, a different sentence should be imposed to make the point that the person did not get himself/herself. Nothing of this is in Bill C-41.

While there are many other factors which courts consider as aggravating or mitigating, these four have been chosen to make the point. It is worth noting that the previous Bill simply stated the generic principle that aggravating or mitigating circumstances can exist and ought to be taken into account. That, of course, is what happens every single day in the criminal courtrooms of this country, without the guidance of the drafters of Bill C-41. This Bill, however, has gone farther and chosen to state that circumstances of trust are aggravating factors as are certain specified motives for an offense being committed. Again, this principle is applied already and not because of a

particular inclusion on a current list. We wish to point out that the amendment as to offender motivation deriving from bias, prejudice or hate based on "...race, nationality, colour, religion, sex, age, mental or physical disability or sexual orientation of the victim..." is not disputed as to relevance but as to necessity. First of all, some people's actions are based on belief not bias, prejudice or hate, yet they are equally reprehensible and worthy of denunciation. This section could interfere with that. Second, we are specifically concerned that this approach is one with a certain philosophy which sees the justice system as a contest or dynamic between the offender and the victim, with the state a mere passive referee. We fundamentally reject this view. **All** of society has issues and values at stake when crimes, especially crimes of violence are committed. It's why we called it Regina v. "X" and why we always should. This provision, from that perspective is a step in the wrong direction.

One suggestion for its inclusion here is the blanket statement that the recognition of such factors as aggravating factors in sentencing are not uniformly applied in criminal courts in Canada.³ We note **no** reference to it not being an aggravating factor nor are we aware of any instance where a sentencing court has said it is not. Before being stamped off into passing this rather unique clause, it might be prudent to actually identify instances that justify this amendment. Further, should such a case occur in the future, we have no hesitation whatsoever in suggesting it would be an error of law correctable on appeal. To be blunt, this aspect of the sentencing process is not broken, it should therefore be left alone.

The sentencing principles listed in section 718.2 are in our judgement also not properly reflective of the true purpose and function of sentencing. Missing in part or in whole from the list are :

- The need to enforce society's right to be protected from anti-social conduct and that different measures are required for different people.
- Criminal history of an offender should be taken into account as a demonstration of a reduced likelihood of rehabilitation of an offender and a corresponding increase in the need for the protection of society from the offender. To put it a different way, at some point crime prevention is enhanced by doing things to offenders instead of for them.
- Where a concurrent sentence is imposed, a greater number of offenses should attract a more onerous penalty.
- Reliance on an alternative to imprisonment should entail an understanding of what that alternative practically offers society by way of protection and to the offender by way of enforcing the particular "message" a sentence was meant to send. (Serving time on weekends is a classic example.)

3. See *R. v. Peter Vesey-Sawyer Williams aka Peter Williams* a well used Sentencing Digest which shows the contrary to be the case.

We also find it necessary to denounce proposed section 718.2(e). To specify one race in particular as requiring special treatment not afforded to others on the sole basis of membership in a racial group has no place in legislation such as this. It is paternalistic discrimination of the worst kind and philosophy aside, it just does not work. One need only examine our history of dealing with native people to see that this approach is doomed to failure.

Philosophy aside, the inclusion of a section like this, and indeed the entire scheme from section 718 to section 730, will inevitably lead to a great volume of cases seeking to reinterpret that which has already been decided or indeed what is already contained in the *Code*. As one example, can anyone truly doubt that section 718.2(e) will not be used to challenge, for example, the second offender provisions where the repeat offender is aboriginal? The additional dollar costs to our system could be immense and should not be underestimated. Our experience is that tinkering is usually a very expensive proposition in the criminal justice context.

Section 718.3(2) also appears aimed at eliminating tariff sentencing as practised by various Courts of Appeal across this country. In essence, such as in cases of domestic assault, armed robbery, child sexual assault, or sexual assault, the Appellate Court has given guidelines to lower courts on sentencing in specific areas. They are free, of course, to add or detract from such a starting point but these judgements serve as important expressions of society's positions on social issues involving specific criminal behaviour. They also help to produce greater uniformity in sentencing as one is not faced with the prospect as it were of reinventing the wheel on each case that comes before the courts.

Section 719(1) of the Bill does not deal with the identified problem of sentence calculation as it currently exists under the *Conditional Release Act*.⁴ This issue is fully canvassed in our Brief on Crime Prevention to the Justice Committee in November 1992 as well as in our Brief to the National Symposium on Community Safety and Crime (CSC) Prevention in March of 1993 and in several others including the Brief on Bill C-45. It has been the subject of a special interdepartmental study group and of public comments repeatedly from past and present Solicitors General of Canada. All of the above indicate that the current practice must change. Bill C-41 perpetuates the status quo and changes nothing. We see no point in passing into law a reconfirmation of something that requires change.

Finally, section 719(3) continues the existing practice of allowing a court to consider pre-trial custody in assessing sentence. Nothing more is offered. Should it be straight calculation deducting pre-trial custody from an intended sentence or should credit be given for the reality that one month of pre-trial is certainly the equivalent of more post sentence time because of early release? Is it 1=1.5 or 1=2 or 1=3? All of these various formulas have at one point or another been used by sentencing courts to arrive at the ultimate conclusion. As can be imagined, this often descends into some bizarre "Discount Days at Zellers" approach to assessing sentence which we suggest is undesirable. This Bill offers nothing by way of guidance.

4. *Conditional Release Act*, 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).

This also raises the question that if a court can take into account pre-trial custody (being certain) why not statutory release? To do so currently in sentencing is an error of law. Given the certainty involved on many offenses (our information from CSC is that approximately 99% of all federal inmates are released from custody no later than the 2/3 point of their sentence) why should that theory not apply? This would introduce some badly needed honesty and candour into the process of sentencing which would go a long way in enhancing public confidence in the entire process.

The effect of this consideration of pre-trial custody is also felt all the way through the system and appears at parole consideration. If an offender is given credit for pre-trial custody at an inflated rate why is that not present in parole decision making? The reality is, in our view, the sad truth that parole decisions simply don't consider what early release may do to the intention of a sentence imposed by a court. That flaw left by Bill C-36 remains unaltered by Bill C-41.

II. SENTENCING PROCEDURE AND EVIDENCE

These sections propose to codify what should take place at determination of sentence following conviction. We are unaware if any kind of survey was ever done to ascertain procedure or practice from province to province. It should also be remembered that "sentence hearings" range from multi-day affairs with *viva voce* evidence to the more usual ten to fifteen minute procedure following trial or plea. What is appropriate to one is not necessarily so for the other. Of the suggested procedure we offer the following observations :

- A. Section 722(1) would make reception of the victim impact statement mandatory and not within the discretion of the sentencing court. While we applaud this change it should be noted that according to subsection (2) the Crown must file the statement before the court can consider it. While this is certainly understandable it might be helpful to include a clause of intent to have the sentencing court receive the information thus CLEARLY placing the Crown on notice that such a document is to be tendered. Similarly, it would be advisable to seek consensus from all Provincial Attorneys General that there is a commitment on their part in the administration of justice to ensure such victim impact statements are produced and tendered.
- B. Section 722.1 appears to contemplate an absolute right for the offender to the entire contents of the victim impact statement. This may be unwise given the nature of what may be contained in some such statements and we would recommend a residual discretion for the sentencing judge to exclude certain portions/details especially in cases of sexual offenses against women and children. Knowing that the offender can read the details of their impact statement may severely restrict the production of such reports. It may be that this could be supplied to counsel for the offender where an undertaking is given not to share the details with the offender. Such a circumstance will be rare and is, admittedly,

a departure from the notion of providing everything to a person whose liberty is at stake but may in these cases be justified.

- C. Section 722(4) is an unduly restrictive definition of victim in that people robbed or whose homes have been broken into could be excluded from making a victim impact statements by this section. We would suggest emotional loss be replaced by emotional trauma as the precondition. As will be noted below we have specific suggestions to make in terms of compensation to witnesses and victims as part of a sentence imposed.
- D. Section 723(2) should be amended to read; "The court may hear any evidence that it deems relevant which is presented by the prosecutor or the offender."
- E. One effect, it seems, of section 724 is to require a different standard of proof for the Crown and the offender, if a fact is disputed. The Crown is required to prove what would be an aggravating fact beyond a reasonable doubt, but the defense only on a balance of probabilities. This does not make a great deal of sense for a number of reasons. First, the question of guilt with its beyond a reasonable doubt standard, is no longer an issue. Second, while there are constitutional requirements of disclosure to an offender, no such reverse provisions exist. To require the Crown therefore in effect to disprove something the particulars of which are known to the accused is very difficult if not next to impossible. The same is not true the other way as the accused knows in advance on what the Crown is relying. One of the great tip-offs that something less than reliable is coming from a defense counsel in mitigation on behalf of an accused is the phrase "I am informed that...". This allows counsel to make the pitch without being accused of misleading the court if it proves false. This different standard of proof for disputed facts will not be at all helpful for a court trying to get an accurate picture of the offender it must sentence. The burden on disputed facts should be the same; beyond a reasonable doubt.
- F. Section 725 is very confusing. If it means that courts can take pleas and sentence people awaiting sentence then that is of no consequence. Why exactly a court would direct a separate prosecution as per (b) is unclear seeing as how it could sentence on the new offense accordingly. The power to note that other conduct constitutes a separate offense and to treat this as an aggravating factor, presumably increasing the sentence, is enunciated in (c). Subsection (2) would then require such taking into account to be noted on the information or indictment which would then be a procedural bar akin to *autrefois convict*.
- G. Both sections 726 and 726.2 are codifications of usual practice at time of sentencing (section 668) although there is nothing in Bill C-41 which confirms that failure to complete these tasks does not invalidate the sentence imposed. This is the current state in section 668 and this new section could clearly lead to an argument that by its removal Parliament intended to make a sentence illegal if these tasks were omitted. This would be the height of folly and should be corrected.
- H. Proposed section 727(1) would continue the notice requirement for second offenders to receive the special penalty Parliament intended by passage of a

special penalty section. (See for example section 255(1)). The practical effect of this is to leave the decision as to whether repeat offenders be treated as such in the hands of individual Crown attorneys and more accurately provincial Attorney General Departments. If the second offender notice, as contemplated by this section, is not introduced at time of sentencing, even though properly served, then the offender does not get the mandatory treatment sentence which Parliament had intended. As might be imagined the whole second, or third offender status ends up very much a bargaining chip in plea negotiation. This also may not be an intended consequence.

In our view, this section is no longer necessary given the constitutional entitlement to full disclosure which includes the offender's record. There are no surprises, as is obvious given the fact that the offender knows about his/her own record or can find out about it if for some strange reason he/she does not. This second offender notice is an artificiality that the sentencing system could do without.

- I. Section 729 allows for the use of certificate evidence to prove the existence of a drug presumably seized where such evidence is to be used in a breach of probation order. While we agree with this, the logic of it should be extended as follows :
 - a) this should allow breathalyser certificates regarding the presence of alcohol, and,
 - b) this section should apply to breach of recognizance, undertakings etc., covering bail or peace bond situations.
 - c) the court should be empowered at its discretion to order costs against an accused where that party has subpoenaed a breathalyser technician in any circumstance where they could have sought a court order directing the technician's attendance. Cost schedules should be set at a maximum of \$ 500/day but should, as close as possible, reflect the cost to the police service. This proposal will not likely meet an enthusiastic response from the defense bar, but is a fair way of reducing very expensive fishing expeditions.

III. PROBATION

When one considers the content of current discussions surrounding long term supervision of child sex offenders and high risk offenders through extended probation orders, the suggestions contained in Bill C-41 for probation as an integral part of sentencing make very little sense. Both the Pepino Report on High Risk Offenders and the Stephenson Inquest Jury Recommendations contain the idea of use of probation for such a purpose. Our previous Briefs and indeed the recent comments of the Solicitor General all suggest that is the direction in which we should be heading, yet this Bill would do nothing in that area. While it is true that most of this Bill was drafted prior to these trends

emerging, all that means is that the Bill is out of date. Why enact this if it is going to change in the immediate future? Also worthy of note in the proposed scheme :

- No long term supervision via probation order for repeat child sex offenders. Attached as Appendix I to this Brief is our earlier Brief on High Risk Offenders which demonstrates how such a process could work. Also attached as Appendix II are relevant portions of the SafetyNet Final Report pertaining to the same subject.
- Allow for proof of order through entry of certified copy which includes the explanation of terms and content to offender.
- No residency restrictions specifically authorized as condition of probation
- The creation of a two-tiered probation system which, unbelievably has reporting as an optional condition. The process has just been watered down by the formalization enacted by this section.
- Requirement for offender consent for treatment.
- Maximum of six weeks of community service (at 40 hours/week).

If we are going to bother imposing probation it should mean something. It is supposed to be inconvenient. It is supposed to teach something to an offender.

IV. DRIVING PROHIBITIONS

The current sentencing provisions of section 259 mandate that a maximum driving prohibition of three years is possible for a straight impaired, refusal or over .08 conviction. Unfortunately there are some chronic offenders who amass multiple convictions and pose horrendous risk to the public, yet are not prohibited for longer than three years. Both for protection of the public and the denunciatory value, such repeat offenders should be subject to lifetime driving prohibitions. Such lengthier prohibitions are only currently available where injury or death results from the drunk driving.

V. EXPANDED SECTION 553 — PROVINCIAL COURT JURISDICTION

Increase Jurisdiction of Provincial Court re Section 553

What is proposed here is essentially a suggestion to eliminate unnecessary expenses of duplication which characterize much of criminal proceedings today. Section 553 lists a series of offenses over which a Provincial Court judge maintains absolute jurisdiction whether the Crown has proceeded by indictment or not. It is our view that

with the requirement for disclosure now enunciated in *R. v. Stinchombe*⁵ by the Supreme Court of Canada, preliminary inquiries in many cases are expensive proceedings which can be eliminated without compromising an accused person's right to a fair trial.

It would of course be necessary to comply with Section 1(f) of the Charter where the Crown sought to invoke the expedited process proposed to have a reduced maximum penalty of four years less one day. In practice this will probably encompass 99% of all such charges suggested which are currently prosecuted before the courts as sentences in excess of that are extremely rare. At any event, an alternative indictable procedure with judge and jury or superior court judge alone elections should remain for those cases where the Crown felt a period in excess of the five years was appropriate.

The offenses proposed to be included (where the Crown so elected thereby also triggering the reduced maximum penalty) are :

1. s. 253(a) and (b) - Impaired Driving and over .08.
2. s. 254(5) - Refusing to provide samples of breath as required by law.
3. s. 259(4) - Driving while prohibited.
4. s. 221 - Criminal Negligence Causing Bodily Harm.
5. s. 244 - Causing Bodily Harm with Intent.
6. s. 249 - Dangerous Driving and Dangerous Driving Causing Bodily Harm.
7. s. 252 - Hit and Run.
8. s. 264.1 - Uttering Threats.
9. s. 266 - Assault.
10. s. 267 - Assault Causing Bodily Harm.
11. s. 268 - Aggravated Assault.
12. s. 269 - Unlawfully Causing Bodily Harm.
13. s. 271 - Sexual Assault.
14. s. 279(1) and (2) - Kidnapping and Unlawful Confinement.
15. s. 281, 282 and 283 - Abduction of Children in relation to custody orders or where no custody orders.

5. *R. v. Stinchombe* (1991), 68 C.C.C. (3d) 1 (S.C.C.).

16. s. 334 - Theft Over.
17. s. 342 - Theft or Possession of Stolen Credit Cards.
18. s. 348 - Break and Enter.
19. s. 349 - Unlawfully in a Dwelling House.
20. s. 351(1) and (2) - Possession of Housebreaking Instruments or being masked while committing an indictable offense.
21. s. 354 - Possession of Stolen Property over.
22. s. 362 - False Pretences over.
23. s. 366 - Forgery and Uttering a Forged Document.
24. s. 403 - Personation with Intent.

While other offenses could have been added to the list, the selected ones account, in our view, for a significant amount of charges where unnecessary duplication currently exists. This restructuring of the criminal process will in our opinion result in savings in time and money to police budgets which can be redirected into more police presence where it is now lacking. We suspect as well that the savings to provincial Legal Aid systems would be substantial.

VI. FINES

Section 734 changes the entire applicability of fine alone offenses. Current section 718 authorizes a fine alone penalty only for offenses punishable by imprisonment for five years or less. This Bill would only prohibit a fine for offenses with specified minimum punishments such as murder or second offense drunk driving etc. All other offenses could be dealt with by way of fine. This Bill, with all its pretensions of codifying accepted sentencing practises would make possible a fine for attempted murder or aggravated sexual assault. It is absolutely inconsistent with the premises of sentencing referred to earlier, and is a further demonstration of the utter inadequacy of this Bill as true sentencing reform. As if to demonstrate the folly of this provision even further, this Bill would only allow the imposition of a fine if it is satisfied that the offender could pay it (section 734).

This unusual section also virtually does away with the process of the court ordering default time on a fine which is a part of the sentencing array employed by judges and often was used to give offenders a choice of options. What is proposed is a byzantine mathematical process that must have come from the authors of sentence calculation based on its uncertainty. It is, based on our review, likely going to prove to be completely unenforceable, although the concept of tying fine enforcement to provincial and federal licensing is a potentially excellent one. The civil enforcement route proposed by section 734.6 will be about as much of a success as bail forfeiture enforcements which we would

venture to guess are virtually **never** collected on. Suggesting this is an alternative is misleading.

It is wrong, and probably unlawful that people should have to serve sentences of imprisonment because they are genuinely unable to pay a monetary penalty imposed by a sentencing court. We are capable of fine option programs to encourage people so sentenced to work off their fines. Second, some people who are fully capable of paying fines will attempt to avoid any penalty at all and those offenders ideally should be subject to a negative consequence. Again it comes down to attitude and the ability of a sentencing court to assess who is genuinely unable to pay. We therefore support the retention of the discretion of the trial/sentencing judge to refuse time to pay. That rare decision having been made, it should not be overridden by provincial correctional authorities who release such an offender on their own "fine option" program. If a court, acting under authority of a federal statute denies time to pay, it is inappropriate and quite likely without lawful authority for a provincial bureaucracy to contradict such an order. Thus, this section should be amended to reflect this supremacy of such a denial of time to pay all the while allowing a right of appeal to a superior court.

We wish to point our support for section 737(4) of the Bill which appears to target victims as the beneficiaries of the victim fine surcharge. Section 737(2) is, however, badly drafted as while some discretion should exist, it should be predicated on the unique nature of the offense and not just the inconvenience to the offender. The whole idea was a levy on people generally who broke the law to assist those victimized by such crimes. When one considers the over 10 billion dollar estimate given recently by the Minister of Justice for the cost of the Criminal Justice System, the amount spent on the care and compensation of victims is shameful.

VII. RESTITUTION

The concept of restorative justice through restitution by offenders to victims is a valuable part of our sentencing process although one which we believe to be underutilized. The application for restitution currently requires Crown application and this necessitates police securing the information from victims, preparing it in a comprehensible format for the Crown and a sentencing court willing to take the time to hear a possible contested application. Our experience suggests that too many courts, crowns and police agencies still take the attitude that the compensation for loss "is a civil matter". While it may be, the *Code* provides a vehicle of redress for victims of crime which, if used to the extent possible, may go a long way to help them. Of the provisions in Bill C-41 we make the following observations :

- A. The precondition for restitution is the loss of or damage to property or damages including loss of income arising from bodily harm. While we agree that it is unwise to convert sentencing courts into damage assessment tribunals regarding emotional or mental trauma, the court should be able to order restitution for financial loss suffered as a result of the commission of the crime and the subsequent prosecution of the offender. As dollars have become more scarce,

provincial governments have chosen to eliminate compensation for witnesses appearing in court. One day they may well have to make similar assessments in terms of unlimited access to Legal Aid for offenders but it must be recognized that it is a virtual certainty that the state will not reassume financial responsibility for monetary loss incurred by victims as a result of being called to court. Why not require the offender, once convicted, to contribute to defraying the expense inasmuch as it was their action which caused the entire process to commence. As a secondary benefit, such orders would illustrate in very stark terms that offenders are responsible for their actions and that the systems in place are theirs in the real sense that they have to pay for them when their actions cause them to be used. Sort of like user fees in the criminal justice system except that unlike the health care system people can control their visits to the courts. We can't stop ourselves from getting sick but we can stop ourselves from committing crimes.

- B. The process of enforcing restitution orders via probation orders, which is an effective tool, is left up to the Provinces via section 738(2). Our suggestion is that this is a fundamental mistake. It must be remembered that in many instances the offer to make restitution comes as a part of defense submissions and is used to show remorse, understanding of harm done, and in general to reduce the penalty (i.e. jail) which the court might otherwise impose. Seen in that light, failure or refusal to comply with the order should be more than just enforceable as a civil debt; it should have immediate penal consequences. What is recommended is a discretionary power to be added to proposed section 738 which would allow the sentencing court to impose default time for non-payment of restitution. The offender would still have the ability during the life of the order to apply to the court to extend the time due to changed circumstances but failing that on default a warrant of committal would issue. It may be desirable on arrest on such a warrant to bring the offender before the same court to confirm the committal to custody or consider new circumstances. Serving the default time would eliminate the criminal enforcement of the order but would still leave the offender liable to civil consequences.
- C. This would also appear to be an area where victim surcharge dollars might be put to appropriate use. Why not create a separate account of sorts within Legal Aid plans which could be used by victims of crime in these circumstances or others where they wish counsel. Currently we are unaware of any legal aid program which would cover this area. Such a service would be self sustaining and require no extra dollars from either federal or provincial budgets, rather it would be a re-priorization of existing expenditures based on a clear direction within the *Criminal Code*. This concept should be managed provincially but could indeed be administered federally were some provinces disinclined to participate.

VIII. CONDITIONAL SENTENCE

Of all of that in this Bill which is likely to increase public distrust and cynicism towards the criminal justice system and those politicians that supposedly reform it, the provisions pertaining to supposed "conditional sentences" are the most extreme. These

provisions are simply an attempt to convert custodial sentences into probationary sentences and deceive the public at the same time. It is an attempt to take the principles of deterrence and denunciation out of sentencing for offenses of under two years. It is extremely difficult to analyze such provisions because, to be blunt, they do not merit serious consideration. If, after considering all the relevant principles of sentencing and their blend necessary to fashion a sentence for the offender and the offense committed, a court concludes a probationary sentence is merited then it should go ahead and do so. If the Crown disagrees, it can appeal. The reverse is true if the court rejects a probationary sentence. These sections are nothing less than a barely concealed attempt to undo hundreds of years of political legal development and eliminate the concepts of denunciation and deterrence from our sentencing responsibilities. To couch this in the deception of a "conditional" sentence is symptomatic of an arrogance that assumes Canadians can be told anything about their criminal justice system without consequence. It is the epitome of why our justice system has become an increasing target of disdain and disrespect. Proceeding with this clause will send a very clear signal to Canadians about their Government's priorities and commitment to truth.

IX. IMPRISONMENT

Bill C-41 simply reiterates that which is now found in the *Conditional Release Act*.⁶ As such, it is out of date. As our Briefs described above (and virtually everyone else involved in the process seems to say) make clear, sentence administration must be reformed in this country. Of specific concern, and absent from C-41, are :

- A. Sentence Calculation so as to remove the artificial backdating of sentences imposed for crimes committed while on early release.
- B. Removal of Judicial Reviews after fifteen years on life sentences with no parole eligibility for twenty five years. This point is fundamental to our Association and while we appreciate the inclusion of victim *viva voce* evidence (specifically guaranteed by the Minister of Justice), the 2/3 verdict remains as does the applicability of the *Privacy Act*⁷ which severely restricts the flow of information quality and reliability in such hearings. What is required, until the section is repealed, is a Federal Code of Procedure for these hearings which are increasing in number.
- C. Increased negative consequences for parole eligibility in the case of convictions for more than one murder, rather than current concurrent practise. As one victim put it, Adolf Hitler would have been eligible for parole eligibility review in fifteen years in Canada.

6. *Supra* note 4.

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

- D. Requirement for ability to impose consecutive sentences for an offender serving life sentence but who, while on early release, commits other offenses. Currently only a concurrent sentence can be imposed.
- E. Amend section 745.1 so as to allow submissions to jury on question of whether to increase parole eligibility date beyond ten years. This is not currently the law.
- F. Complete reworking of early release eligibility including temporary absences in accordance with Justice Committee's Fourteenth Report, and CPA Briefs on Crime Prevention.
- G. Allow for publication of full details of evidence adduced at trial of offender when up for judicial review.

X. HOSPITAL ORDERS

This is an area which should be considered in light of the Stephenson Jury recommendations, the Pepino/De Villiers Report on high risk offenders, and the yet to report Federal/Provincial Territorial Committee on High Risk Offenders. It may well be that these ideas could be incorporated into these kinds of orders but this Bill was drafted before any of the above noted Reports were started, much less completed.

XI. PARDONS AND REMISSIONS

The main question here is who is getting these and how are the decisions made. It must always be kept in mind that there are valid public policy reasons behind maintaining criminal records and they should not lightly be removed. This is particularly true in crimes of violence, sexual crimes, drunk driving, and domestic violence, threats or harassment.

XII. COSTS

The concept of imposing costs in a criminal action is probably best described as something which used to happen and now virtually never does. It appears by way of section 840 of the *Code* that the power to order costs is confined to summary conviction proceedings although Superior Courts have inherent jurisdiction to order costs. At any event, the best indicator of how this is a concept from our past is the schedule of fees which can be ordered as costs. The amounts listed are so low as to make them irrelevant.

We raise the issue of reintroducing the power of a court to order costs, **against either the Crown or the offender or counsel for the offender** for a number of reasons.

As described above, it would make very clear the reality of being responsible for one's actions and that the offender has a personal stake in how this system of society is

used. As well, it is appropriate that frivolity, from either side, pay for itself or at least contribute to the cost it causes. Our courts are jammed and that which introduces increased responsibility to either the Crown or the offender in how precious court time is invoked is welcome. No one would seriously deny that many trials are run not because there is a fundamental belief that the offender is not guilty of the offense but rather in the hope, and often nothing more than the hope, that somehow the police or the Crown will forget to prove what province the offense occurred in; sort of like manna from heaven. This is really plain and simple in the courtrooms of this nation on a daily basis. While our system obviously tolerates this, there is no logical reason for not imposing a cost on the person embarking on such an expensive voyage. In short, we won't change the process and it is there to be used but if it is invoked needlessly then the offender may have to pay the cost.

Clearly this would require a discretionary decision by the trial judge which should only be implemented in the case where after trial the court is of the view that there was no substantive issue in fact, evidence or law. It should also be kept in mind that as dollars shrink it is necessary to re-examine how the criminal justice system is funded and where the dollars are spent in terms of effectiveness. These proposals regarding costs are just that; proposals. They need to be looked at in much greater detail and carefully structured to keep the appropriate balance in our system.

CONCLUSIONS

Bill C-41 is confused, contradictory and in large part wholly unnecessary. It is a blatant example of what a former Liberal Member of the Justice Committee described as "smoke and mirrors" legislation. It is put forward as meaningful sentencing reform but it is only that in the sense that it will generate endless litigation with huge attendant costs for little or no purpose. It is a blatant example of our worst tendencies in criminal law amendment in that it is impractical, badly drafted, and will produce results wholly inconsistent with the overwhelming majority of Canadians' sense of what needs to be done. It is a Bill that was not created or refined in any sense by the political response of elected members of the Government who will be responsible to their constituents once its results are made clear, as they will be.

In these days when so much needs to be done to prevent crime from occurring in the first place and to provide protection to society from those chronic violent offenders, Bill C-41 is, and will be, an embarrassment.