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ANALYSIS OF SENTENCING PROVISIONS CONTAINED IN BILL C-19

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Introduction

Recognizing the need for the criminal law to reflect the changes and concerns of our contemporary society, the federal government, in cooperation with the provinces, decided that a "thorough review of the Criminal Code should be undertaken as a matter of priority".1 In part, the necessity for review stems from the fact that our present Code was first approved in 1892 and has, since then, been the subject of a continuous process of ad hoc amendment. Paralleling the developments in the United States, France, West Germany, Great Britain and Australia the federal and provincial governments determined that it was time to examine all aspects of the criminal law and develop a modern Criminal Code. The Criminal Law Review Committee was therefore established in 1981 with a mandate encompassing a review of both substantive criminal law and the criminal procedure.

As part of that task, the Law Reform Commission of Canada, the Department of Justice and the Ministry of the Solicitor General embarked upon a review of the law and procedure as it relates to sentencing. The fruits of that labour are to be found in the sentencing proposals contained in Bill C-19 which was before the House of Commons at the time of dissolution.

Background to Reform

The document which provided the governing philosophy to the project was The Criminal Law in Canadian Society[2] which identified the sentencing process as an area of major concern requiring substantial reform.[3] The principles established by the document governing reform are as follows:

(a) the criminal law should be employed to deal only with that conduct for which other means of social control are inadequate or inappropriate and in a manner which interferes with individual rights and freedoms only to the extent necessary for the attainment of its purpose;

(b) the criminal law should clearly and accessibly set forth:
 (i) the nature of conduct declared criminal;
 (ii) the responsibility required to be proven for a finding of criminal liability;

(c) the criminal law should also clearly and accessibly set forth the rights of persons whose liberty is put directly at risk through the criminal law process;

(d) unless otherwise provided by Parliament, the burden of proving every material element of a crime shold be on the prosecution, which burden should not be discharged by anything less than proof beyond a reasonable doubt;

(e) the criminal law should provide and clearly define powers necessary to facilitate the conduct of criminal investigations and the arrest and detention of offenders, without unreasonably or arbitrarily interfering with individual rights and freedoms;

(f) the criminal law should provide sanctions for criminal conduct that are related to the gravity of the offence and the degree of responsibility of the offender, and that reflect the need for protection of the public

against further offences by the offender and for adequate deterrence against similar offences by others;

(g) whenever possible and appropriate, the criminal law and the criminal justice system should also promote and provide for:
   (i) opportunities for the reconciliation of the victim, community and offender;
   (ii) redress or recompense for the harm done to the victim of the offence;
   (iii) opportunities aimed at the personal reformation of the offender and his reintegration into the community;

(h) persons found guilty of similar offences should receive similar sentences where the relevant circumstances are similar;

(i) in awarding sentences, preference should be given to the least restrictive alternative adequate and appropriate in the circumstances;

(j) in order to ensure equality of treatment and accountability, discretion at critical points of the criminal justice process should be governed by appropriate controls;

(k) any person alleging illegal or improper treatment by an official of the criminal justice system should have ready access to a fair investigative and remedial procedure;

(i) wherever possible and appropriate, opportunities should be provided for lay participation in the criminal justice process and the determination of community interests.4

Governed by these principles, a sentencing project was established to examine the principles and assumptions underlying the sentencing process; to identify specific areas of concern; and to propose a new body of provisions relating to sentencing in both its substantive and procedural aspects. However, the concern with respect to sentencing had

arisen much earlier in the reports of the Committee on Corrections[5] and the Law Reform Commission of Canada.[6] Without reviewing these reports in detail, the themes which may be extracted from them are:

1. there should be restraint in the use of criminal sanctions, especially that of imprisonment. The Law Reform Commission of Canada had stated:

   > Imprisonment is an exceptional sanction which should be used: (a) to protect society by separating offenders who are a serious threat to the lives and personal security of members of the community, or (b) to denounce behaviour that society considers to be highly reprehensible and which constitutes a serious violation of basic values, or (c) to coerce offenders who wilfully refuse to submit to other sanctions.[7]

2. there is a need for the increased availability and and use of non-carceral sentencing alternatives.

3. there is a need for increased discretion in the system combined with a greater focus upon accountability for decisions.[8]

This did lead to amendments to the Criminal Code which expanded the available sentencing options through the addition of provisions for absolute and conditional discharges[9]; intermittent sentences[10]; forfeiture of firearms and prohibitions of possessing firearms;[11] and compensation for loss of property.[12] Although drawing heavily upon these reports in its study of the sentencing process, the Sentencing Project identified a number of issues which, it was felt, were not adequately dealt with by the existing provisions of the Criminal Code. Those issues may be described as follows:

1. The lack of knowledge about the effectiveness of sanctions was thought to be a matter of primary concern. On the one hand, the public has demonstrated concern that the criminal justice system has not demonstrated the necessary willingness to take strong action to protect society from crime.13 On the other hand, there exists a serious debate as to whether criminal sanctions have anything but a limited effect in deterring crime and rehabilitating offenders.14 This debate is most sharply concentrated around the issue of imprisonment. Studies have indicated that Canada places great reliance upon imprisonment as a sanction and that on a per capita basis Canada incarcerates more people than any other western country save the United States.15 Notwithstanding the increase in sentencing options, the trend has been toward an increased use of gaol with admissions to federal penitentiaries showing a 39% increase between 1980 and 1982. Additionally, concern has been expressed that minor property offences and driving offences represent a high proportion of those incarcerated in provincial gaols.16 While reliance upon incarceration has remained high,the available research defies any conclusion that it is an effective method of deterring crime or rehabilitating offenders.17 Concern about the effectiveness of imprisonment and its high economic costs have called into question the theoretical underpinnings of its usage. The theory of retribution (the "just desserts"

or deterrence model) requires imprisonment for its primary aim is to firstly punish and secondly deter the offender or others from committing further offences. The rehabilitative model, which became popular during the 1960's, also requires imprisonment in order to "treat" the offender and secondly to satisfy the demands of deterrence. Also known as the "utilitarian" model, its theory was that the most effective way to prevent crime is to convert the offender. Thus, while imprisonment was still important, the theory led to the expansion of sentencing alternatives designed to assist in the rehabilitative process. Probation is the obvious example. The third theory favoured by the Law Reform Commission of Canada[19] is the incapacitation model. Under this model, offenders who have committed serious crimes or who represent a serious threat to life or personal security of others must be separated from the public; and in some cases, simply separated from specific circumstances which leads to criminality, or from specific persons. Otherwise, other less liberty intrusive measures must be utilized unless it has been demonstrated that the other methods have failed and the offender refuses to conform to societal rules. Accordingly, while imprisonment remains a feature, it is to be used with restraint. As will be more fully developed below, it appears that the provisions of Bill C-19 are intended to adopt the third model. The second major issue relates to disparity in sentencing, both from a substantive and procedural viewpoint. The substantive aspect concerns

the perception that some portions of the population (natives) constitute a disproportionate number of those incarcerated;20 that offenders convicted of the same offence receive widely divergent sentences; that geographically there are divergent sentencing practices within Canada; that there is a public perception that sentences in Canada are too lenient; and that the role of the victim and the rights of victims are not adequately dealt with. The procedural aspect relates to the absence of clear guidelines in the law to direct the courts on how the question of sentencing should be approached--what weight should be attached to factors affecting a sentence; what procedures should be followed, as for example, in the usage of pre-sentence reports?21

The substantive issue is directly related to the Canadian system of sentencing which is based upon the English discretionary system. Few of the offences in the Criminal Code delineate a mandatory or minimum sentence.22 If a minimum punishment is not expressly established by the Criminal Code for an offence, then s.645(1) provides that the punishment is, subject to the limitations prescribed in the enactment, in the discretion of the court. As in the English system, the Criminal Code generally speaks in terms of maximum sentences with benchmarks of 6 months, 1 year, 2 years, 5 years, 10 years, 14 years and life imprisonment reflecting Parliament's view as to the seriousness of the offence. If a punishment is not expressly set out, then for

an indictable offence the maximum punishment is deemed to be 5 years[23] and for a summary offence the maximum is a $500.00 fine or 6 months imprisonment.[24] No further guidance is provided by the Criminal Code as to how punishment is to be meted out and so, theoretically, the parameters of a judge's discretion in any case are between 0 imprisonment (utilizing one of the other sentencing alternatives) and the maximum sentence expressed. Of course this is not what happens. The courts have developed principles of sentencing and general guidelines for categories of offences leading to what Cross has described as the "tariff" system of sentencing.[25] While some have described the term "tariff" as unfortunate[26] and the term has been criticized by the judiciary as suggesting that their approach to sentencing is an automatic and inhuman one;[27] the system reflects the reality of the sentencing process whatever descriptive term one uses. Thomas describes the "tariff" system as follows:

> Whatever terminology is used, the central idea is that within the scope of any legal definition a variety of typical factual situations will recur; with each of these typical factual situations there are associated upper and lower limits within which the sentence should normally fall, in the absence of exceptional circumstances in the offence and without regard to mitigating features peculiar to the offender himself. The difference between the upper and lower limits applicable to a particular typical situation constitutes the "range", "bracket", "normal level", or "pattern of sentence" for that variation of the offence. A sentence above the upper limit will be described as "excessive", "out of scale", "beyond the range", and is normally reduced. A sentence

> which is within the limits will not be reduced on the ground of disproportion alone, even though it is marginally more severe than the members of the Court might individually have passed;...28

Thus, the "tariff" or sentence guidelines established by precedent do not fix the final sentence. A complex set of factors including the gravity of the offence, age of the accused, presence or absence of a prior criminal record, prospects of rehabilitation, actual harm caused by the offence, must be examined to determine the final sentence within a range established by the courts. In effect, it narrows the area of discretion available to a sentencing judge in an attempt to establish some uniformity in sentencing and to reflect which principle of sentencing is to be predominant--deterrence or rehabilitation.

There is little academic agreement as to the existence of a "tariff" system in Canada. Ruby, for example states with respect to the tariff system:

> No appellate court in Canada has chosen to adopt this system.29

His view is that the Canadian courts put the particular offence and the particular offender first in priority in determining sentence. The converse view is expressed by Nadin-Davis and Sproule.30 Their viewpoint is that although never expressly stated, and often denied,31 the cours have in fact adopted a tariff system although using different

terminology.32

The term "tariff" is unfortunate for its usage is anaethma to many. It must be remembered that the English courts do not use the term. It is simply Thomas's description of what he perceives as the natural outgrowth of the usage of precedent in the sentencing process. In both England and Canada, the maximum sentence is generally reserved for the "worst" factual situation.33 At the same time, the courts may view the gravity of an offence (and not just the particular facts) as being so serious that the principle of rehabilitation is secondary to the principle of deterrence. Thus, a gaol sentence is required in the absence of exceptional circumstances, notwithstanding the existence of mitigating factors.34 As well, in order to achieve uniformity in sentences;35 or at least, to achieve uniformity in the approach to sentencing,36 it has been considered desirable that the appellate courts provide guidance to the trial courts in sentencing matters. As a result, we find references to a "range" of sentences in narcotics cases;37 "guidelines" in sexual cases involving children.38 More explicit guidance has been provided with respect to robbery cases. In R. v. Chaiasson39 it was held that 3 years is the minimum sentence for an armed robbery where the offender had no prior convictions. In Alberta the starting point for robberies of cab drivers and convenience stores is 3 years;40 and for robberies involving financial institutions the starting point is 4-6 years.41 References have been made to

a "normal range" in rape cases;46 and a "range" of 5 to 10 years for a manslaughter involving the death of a child.43 Whatever term one wishes to use, it is the "tariff" system.

That is not necessarily a criticism for the courts must be concerned with uniformity. Widely disparate sentences can foster criticism of the system. Given the lack of direction in the Criminal Code, it is little wonder that the need to have the sentence fit the crime and the particular offender remains a conundrum and it certainly proved to be no less difficult for the Sentencing Project. The project had to deal with a public perception that the courts were too lenient, although it was discovered that the more information about a case that was provided the more lenient the viewpoint of those surveyed and in many cases more lenient than the courts.44 The real difficulty that the project had with the sentencing process is the issue of disparity. On the basis of studies conducted for the project, it was found that there were large differences in the use of incarceration for certain offences in different geographic areas. Even taking into account the fact that no two cases are precisely the same; the geographic differences, and the differences in sentencing patterns of individual judges could not be explained. The study concluded that the differences originated from different perceptions of sentence severity; variability in information available, variability in sentencing practices; differences in the objectives sought; differences in the criteria used; and differences in

the weight assigned to those criteria.[45] The decision evidently was made that the problem could not be cured with the present system and so Bill C-19 proposes to establish statutory principles of sentencing; the establishment of a uniform sentencing procedure; and, once again, an increase in the sentencing alternatives. The problem of the victim was also examined. The Federal-Provincial Task Force on Justice for Victims of Crime concluded:

> the criminal justice system has relegated the victim to a very minor role and left victims with the conviction that they are being used only as a means by which to punish the offender.

As a result, the provisions of Bill C-19 attempt to place greater emphasis upon reparative sanctions.[46]

3. The Sentencing Project was of the view that another major problem was the lack of clarity in the law and practice of sentencing. They believed that the lack of clarity contributes to public misunderstanding and mistrust of the criminal law process. The contributing factors may be summarized as follows:

1. the present Code lacks certainty regarding overall sentencing principles and objectives

2. the present provisions do not articulate clearly the relationships between the various sentencing options

3. the present provisions are scattered throughout the Code

4. the Code does not provide guidance as to the

procedural and evidentiary rules governing the sentencing hearing

5. the current sentencing options are not organized according to any notion of priority or relative severity

6. the statement of maximum sentences in the Code offers little guidance to anyone as to the appropriate or expected sentence in the average case

7. there is no apparent consistency within the categories of maximum sentences.47

It should be noted that Bill C-19 does not purport to deal with lack of clarity resulting from the classification of offences in the Code and the maximum sentences assigned to those offences. A separate project of the Criminal Law Review is presently working on a new scheme of classification. An attempt has been made in Bill C-19 to gather the sentencing provisions into one comprehensive code of sentencing which includes a statement of principles, a delineation of sentencing alternatives in order of relative severity, and a codification of procedure for the sentence hearing.

Overview of Bill C-19

The above represents a summary of the policy issues which the Sentencing Project considered to be paramount in formulating a new code of sentencing law and procedure. The more detailed examination of the sentencing provisions of Bill C-19 to follow must be read in light of these policy

issues. A question that may remain is whether the new provisions adequately address the three major areas of concern identified.

The focus of the provisions might be described as uniformity and the compelling of the use of sentence alternatives other than incarceration. Uniform principles and uniform procedures are enunciated. The intended result is, to some extent, to reduce the extent of perceived unwarranted or unexplained disparity in sentencing. Questions as to the effectiveness of incarceration have led to a theme that gaol is a sentencing alternative to be used only in the most serious of cases; and in other cases, as a last resort. The increase in sentencing alternatives is intended to provide a scheme whereby the offender may be effectively dealt with and yet, at the same time, not leave the public with the idea that the system is weighted entirely in favour of the offender or that it is too lenient. Central to this notion is the provision of a means of compensating the victim.

This approach parallels developments in England and proposals in Australia.48 It is at variance with legislative action in most American jurisdictions. There, the trend in reform has been to reduce disparity in sentences by reducing the discretion of the judiciary. While it is dangerous to generalize about trends in criminal law reform in the United

States, given the complexity of the division of criminal jurisdiction between state and federal governments, there does appear to be a movement toward the usage of determinate sentencing.49 While the details of the determinate sentencing system vary from one jurisdiction to the next, the essential notion is that the sentencing authority must impose a legislatively mandated incarceration term which the offender must serve in full.50

The differences in approach between the Canadian and American jurisdictions are much more than differences as to procedure. Rather, they represent fundamental differences as to principles and objectives of sentencing. The California Penal Code states at the outset "the purpose of imprisonment for crime is punishment."51 The underlying philosophy is that efforts at rehabilitation efforts have failed and it is time to return to the punishment model.52 The approach taken in Bill C-19 is much more consistent with the philosophy outlined in 1976 by the Law Reform Commission of Canada. The existence of two fundamentally different models on the same continent should provide ample scope for studies as to the effectiveness of widely divergent sentencing processes. Given that the United States and Canada rank first and second respectively in the western world in terms of the per capita rate of incarceration it is perhaps appropriate that we should have the opportunity of studying the effectiveness of the two models.

Sentencing Provisions Contained in Bill C-19

Purposes and Principles of Sentencing

For the first time, it is intended that the Criminal Code contain a statement of the purposes which would govern the sentencing process. S.645(1) of the Bill sets out those purposes as follows:

> 645(1) It is hereby recognized and declared that the fundamental purpose underlying the imposition of a sentence for an offence is the protection of the public and that this end may be furthered by
>
> (a) promoting respect for the law through the imposition of just sentences;
>
> (b) separating offenders from society, where necessary
>
> (c) deterring the offender and other persons from committing offences;
>
> (d) promoting and providing for redress to victims of offences or to the community; and
>
> (e) promoting and providing for opportunities for offenders to become law-abiding members of society.

Although the section preserves the notion of judicial discretion,53 s. 645(3) directs that the exercise of that discretion must be exercised in accordance with a number of principles which are as follows:

> (a) a sentence should be proportionate to the gravity of the offence, the degree of responsibility of the offender for the offence and any other aggravating or mitigating circumstances;
>
> (b) a sentence should be similar to sentences

imposed on other offenders for similar offences committed in similar circumstances;

(c) a sentence should be the least onerous alternative appropriate in the circumstances;

(d) the maximum punishment prescribed should be imposed only in the most serious cases of the commission of the offence;

(e) the court should consider the total effect of the sentence and the combined effect of that sentence and any other sentence imposed on the offender;

(f) a term of imprisonment should be imposed only

(i) to protect the public from a violent or dangerous offender,

(ii) where a less restrictive alternative would not adequately protect the public or the integrity of the administration of justice or sufficiently reflect the gravity of the offence or the repetitive nature of the criminal conduct of an offender, or

(iii) to penalize an offender for wilful non-compliance with the terms of any other sentence that has been imposed on the offender; and

(g) a term of imprisonment should not be imposed, or its duration determined, solely for the purpose of rehabilitation.

Generally, it has been accepted that the principle purpose of the criminal process is the protection of society.54 The debate has largely centered around the question of what is the most effective method of doing so--the punishment model, the rehabilitative model, the incapacitation model. The purposes set out in s.645(1) embrace all three. If one believes in the punishment model, then 645(1)(c) establishes deterrence as a fundamental purpose. It is largely the theory of deterrence which has

been used to justify incarceration. If the rehabilitative model is one's choice then s.645(1)(e) states that rehabilitation is a fundamental purpose. The incapacitation model is well represented by s.645(1)(b) which requires persons to be separated from society, "if necessary". "Necessary" to satisfy the need for deterrence; "necessary" because other methods are impracticable or have proven unworkable? In short, there is something for everyone. The section does add concern for public perception and the rights of victims. Victims' rights are to be dealt with by provision for compensation, but it is difficult to discern what is meant by "promoting respect for the law through the imposition of just sentences". Is this simply meant as a direction that sentences should be uniform as far as possible? If that is the case, uniform based on which model? Whose view as to the justness" of the sentence is important-- the public's or that of the judiciary? The judiciary, to date, has considered that sentencing is not to be done in response to public clamouring although the process must have the support of the public.55 But, if anything, this has lent support to the theory of deterrence. The object of legislating purposes is to provide firm guidance to the courts. Yet, it is suggested, the section reveals the same conflicting policies and purposes that the courts have had to deal with. It does not provide clear direction, and adds little to the present law apart from codifying the conflicts in theory.

It is s.645(3) that actually provides implicit direction and appears to reveal the preference for the incapacitation model. S.645(3)(c) requires that the sentence be the least onerous alternative appropriate in the circumstances; s. 645(3)(f) limits the use of imprisonment to the most serious offences or situations where other alternatives have failed; and s.645(3)(g) prohibits the usage of imprisonment solely for rehabilitation. Presumably, if someone is capable of rehabilitation, another sentencing alternative must be used. It should also be noted that the reservations on the use of imprisonment are not restricted to young offenders who have generally been given special consideration by the courts.56 Some courts have held that the principle of avoiding the imposition of imprisonment in the case of a first offender applies to adults;57 but, generally, it has been used with reference to youthful first offenders. Apart from the provisions relating to imprisonment, s.645(3) is unremarkable. It recognizes the principles of proportionality;58 disparity;59 and totality;60 all of which have been accepted by the courts previously.61

Evidence and Procedure

Bill C-19 proposes to establish a uniform procedure for the conduct of a sentence hearing. There are presently no comparable provisions in the Criminal Code. The intended

rules are as follows:

1. There will be a requirement for a hearing and the court shall consider representations made on behalf of the prosecutor or the offender; the contents of a pre-sentence report or medical report; and shall give the offender an opportunity to make representations.62 More specific rules are set out in s.655(1) as follows:

> (a) the court shall
> (i) ask for submissions by the prosecutor and the offender on the facts relevant to the sentence to be imposed on the offender and as to the availability, practicality and effectiveness of the sanctions or other orders applicable in the circumstances of the case, and
> (ii) if the facts are disputed, hear evidence presented by the prosecutor and the offender;
>
> (b) the court may
> (i) question any witness,
> (ii) at the conclusion of the evidence presented by the prosecutor and the offender, call any person as a witness, other than the offender, deemed by the court to be necessary to the proceedings, and
> (iii) hear and consider any representations with respect to restitution made by or on behalf of any person to shom restitution may be ordered to be made under section 665 or 666;
>
> (c) any witness called pursuant to sub-paragraph (b)(ii) or, with leave of the court, any person heard pursuant to sub-paragraph (b)(iii), may be cross-examined by the prosecutor and the offender; and
>
> (d) before making an order to pay an amount by way of restitution under section 665 or 666 or a fine under section 668.1 and for the purpose of determining the amount to be paid, the time for payment and the method of payment, the court shall, unless the offender acknowledges his ability to pay, conduct or cause to be

conducted an inquiry concerning the present or future ability of the offender to pay the amount, and in so doing, the court shall consider

(i) except in the case of an order under paragraph 655(1)(a), the employment, earning ability and financial resources of the offender in the present or future and any other circumstances that may affect the ability of the offender to make restitution or to pay the fine;

(ii) any benefit, financial or otherwise, derived by the offender as a result of the commission of the offence, and

(iii) in the case of an order under 665 or 666, any harm done to, or loss suffered by, any person to whom restitution may be ordered to be made.

(2) Notwithstanding subparagraph (1)(b)(ii), the court may require the offender, for the purpose of paragraph (1)(d), to disclose to the court, orally or in writing, particulars of his financial circumstances in the manner and form prescribed by the court and such information shall not be used for any other purpose.

Comment

These provisions generally reflect current sentencing practice and does not alter the informal nature of the sentence hearing. It is well established that the sentence hearing is to be conducted more informally than the trial itself, and that many of the strict procedural safeguards observed at trial are not necessary at the sentence hearing.63

2. Despite the more informal nature of the sentence hearing, disputes as to facts do arise. Bill C-19 attempts to codify the evidentiary rules which will govern such

situations. They are as follows:

"656. (1) Except where material facts are disputed, in determining the sentence to be imposed on an offender, a court may accept as proved any information disclosed at the trial or at the hearing held by it pursuant to subsection 646(1) and any facts agred on by the prosecutor and the offender.

(2) Where a trial is held before a court composed of a judge and jury, the court

- (a) shall accept as proved all facts essential to the verdict of guilt found by the jury; and
- (b) may accept as proved any other material fact disclosed by the evidence taken at the trial or allow the prosecutor and the offender to adduce such additional evidence with respect to such fact as it deems appropriate in the circumstances.

(3) Where facts material to the determination of the sentence to be imposed on an offender are disputed at the hearing held pursuant to subsection 646(1), the following rules apply:

- (a) the hearing shall be conducted so as to ascertain the truth and promote the expeditious completion of the hearing;
- (b) all evidence relevant to the determination of the sentence is admissible unless its probative value is substantially outweighed by the danger of serious prejudice to the offender or an unreasonable delay that would be caused by the admission of the evidence;
- (c) except as provided in paragraph (d), the court may compel the appearance of any person who, or require the production of any evidence that, may be of assistance to the court in the investigation of the facts or in the provision of information relevant to sentencing;
- (d) the court shall give effect to all evidentiary privileges and rules relating to competency and compellability of witnesses recognized by the rules of evidence that apply to criminal matters.
- (e) hearsay evidence is admissible, but if a person with personal knowledge of a

matter is reasonably available he may, where it appears to the court to be in the interests of justice, be called to testify;

(f) except as provided in paragraph (g), the court shall be satisfied, on a balance of probabilities, of the existence of any disputed fact relevant to the determination of the sentence;

(g) the court shall be satisfied that the existence of any fact increasing the gravity of the offence or of any previous conviction of the offender that is alleged by the prosecutor and disputed by the offender is established by proof beyond a reasonable doubt; and

(h) where any fact relevant to the determination of the sentence, including a fact contained in a pre-sentence report, is disputed, the party wishing to rely on the fact has the burden of producing evidence to prove it.

Comment

With a couple of exceptions, these rules do not appear to change current law and practice. The basic rule is that established by the Supreme Court of Canada in R. v. Gardiner[64] in which the majority held that the Crown must prove aggravating circumstances beyond a reasonable doubt; and that in the event of a dispute as to those circumstances, the issue is to be resolved by "ordinary legal principles governing criminal proceedings..."[65] The parties must be provided with an opportunity to call evidence to establish which version of the facts is correct; and if that is not done, or the result is uncertain, the version most favourable to the accused must be drawn.[66] This does not mean that in the absence of proved aggravating circumstances that all possible mitigating factors must be assumed in favour of the

accused.67 Ordinary legal principles would at least place an evidentiary burden upon the accused to establish mitigating circumstances since ordinarily such facts would be a matter of knowledge peculiar to the accused.68 The provisions of the proposed s.656 are consistent with the current law although it should be noted that the wording of s.656(3)(h); "the party wishing to rely on the fact has the burden of producing evidence to prove it" is awkward. It is not clear whether the intent is to place an evidentiary or a persuasive burden upon the accused. The preferable interpretation would be that it places only an evidentiary burden upon the accused since ordinary legal principles would require that the persuasive burden remain with the Crown. The proposed s.656(3)(b) would certainly relax the rules of evidence at the sentence hearing and may represent a slight change in the law. Generally, hearsay evidence has been acceptable at the sentence hearing. In R. v. Gardiner it was held that hearsay evidence may be accepted where found to be credible and trustworthy, for a trial judge traditionally has wide latitude as to the sources and types of evidence upon which to base the sentence.69 The rationale for this is that the judge requires the fullest possible information in order that the sentence will fit the offender.70 However, at least some courts have been reluctant to receive evidence unless the usual pre-conditions to admissibility have been met. For example, it has been held that a confession must be proved to be voluntary before it can be adduced at the sentence

hearing;71 and that intercepted private communications should be proven to have been lawfully obtained.72 The proposed section may alter this position.

3. The proposed s.646(4) sets out the rules to be followed in the case of multiple offences or outstanding charges. If an accused has been determined to be guilty of multiple offences and it is possible and appropriate to do so, the sentencing court shall consider the sentence for each offence at the same time. Similarly, the court will deal with outstanding charges at the same time provided the Attorney General consents and the accused signifies his consent to plead guilty. The court may also consider any facts which form part of the circumstances of the offence before the court which could constitute the basis for a separate offence. If that occurs, that must be noted on the information or indictment and no further proceedings may be taken with respect to that separate offence unless the original conviction is quashed or set aside.73

Comment

Again, the proposals are largely consistent with current law and practice. It is well established that the offender may ask the sentencing judge to take into account outstanding charges;74 although it has been suggested that this practice should be followed only where the offence to be

taken into account is of the same class of offence for which the accused has been convicted.75 The proposals would alter this practice to the extent that guilty pleas must be entered.

4. Bill C-19 attempts to make the usage and content of pre-sentence reports uniform. S.647 of the Bill imparts a discretion to order a pre-sentence report;76 but makes it a mandatory step if imprisonment is being considered77 unless a minimum sentence must be imposed, or the offender is being sentenced for failure or refusal to comply with any sanction; or the judge considers it appropriate to dispense with it and states his reasons for doing so.78 A pre-sentence report must contain the following information:

> (a) the history of
>   (i) convictions of the offender and the sentences imposed in respect thereof,
>   (ii) absolute and conditional discharges directed in respect of the offender, and
>   (iii) findings of delinquency under the _Juvenile Delinquents Act_ or _The Welfare of Children Act_ of the Province of Newfoundland and of guilt under the _Young Offenders Act_ in respect of the offender and the orders or dispositions made in respect thereof;
>
> (b) where the offender is serving a sentence of imprisonment, the date of committal to, and release from, the place of confinement and a statement of the nature of the release and the conditions, if any attached thereto;
>
> (c) information concerning the age, marital and employment status and educational and social history of the offender;
>
> (d) information concerning the financial status of the offender and, in particular, his ability

to make restitution or to pay a fine;

(e) information as to any steps the offender has taken and any plans put forward by the offender to participate in rehabilitative activities or to otherwise improve himself;

(f) the results of an interview with any victim of the offence, including information concerning any harm done to, or loss suffered by, the victim, in cases where it is applicable and practicable to conduct such an interview; and

(g) any other information requested by the court.

(2) A pre-sentence report made in respect of an offender may contain

(a) an assessment as to the suitability of the offender for a particular sanction, other than a term of imprisonment or an order of forfeiture, and where such assessment is made, the report shall indicate the programs, services or resources available to give effect to that sanction; and

(b) any other information that the probation officer deems relevant to the case.

Pursuant to s. 650(2) the prosecutor and offender may apply to the court for an opportunity to cross-examine the person who made the report.

Comment

The inclusion of the victim impact statement is the major addition to the law. Courts in Ontario have permitted the victim to make representations as to sentence;[79] although, this practice has not been approved in all jurisdictions.[80] The provisions do not expressly permit the victim to make representations but adopts the procedure of placing the victim's statement in the report. A difficulty

will arise since the provisions do not indicate whether the accused may challenge the statements by cross-examination of the victim. Presumably, applications will be made pursuant to s.656(1)(c) to compel the attendance of the victim for purposes of cross-examination. It is unfortunate that more explicit guidance is not provided. Generally, the courts have preferred that the report confine itself to reporting on the background of the accused and not relate versions of the offence either from the Crown's or accused's standpoint.81 It will be left to the courts to make the uncomfortable determination whether a victim may be cross-examined. To not permit it would mean that the accused will be faced with accusations of aggravating circumstances with no effective means of refuting them.

The provisions will make uniform policy with respect to disclosure of a prior record in the report. Some courts have taken the position that the record should not form part of the report.82 These provisions make it clear that the report should include the record although it would have been preferable to have included the record only if the accused acknowledged the accuracy of the record to the person preparing the report.

5. S.649 of Bill C-19 provides that the court may order a medical report if there are reasonable grounds to believe that the offender may be suffering from a physical or mental illness, an alcohol or drug abuse problem, a

psychological disorder, an emotional disturbance, a learning disability or mental retardation. Such reports may be ordered where the accused and prosecutor have consented; or upon application by either, or upon the court's own motion. The medical reports and pre-sentence reports must be disclosed to both parties and will form part of the court record.83 However, the court may order non-disclosure to the offender of all or part of a medical report where it would be detrimental to the treatment or recovery of the offender or would likely result in bodily harm or be detrimental to the mental condition of a third party; or to a private prosecutor if the court is of the opinion that it would be seriously prejudicial to the offender and is not essential for the determination of the appropriate sentence.84 Medical and pre-sentence reports will form part of the record;85 although, the court may upon application by the offender order that the report shall not be made available for inspection if the prejudice to the offender takes precedence over the public interest in disclosure.86 The court may also prohibit publication of the contents;87 and may exclude any person, including the accused, from the court during the presentation of the report or questioning concerning the contents of the report.88 Notwithstanding non-disclosure orders, the reports may be made available for research or statistical purposes; and if the offender is sentenced to goal then the reports shall be given to the custodial institution.90 For the purposes of preparation of the

report, the court may order the accused to be examined and if necessary remand the accused in custody for the purpose. The remand may not be for longer than 8 days without the accused's consent.91

Comment

These provisions closely parallel the provisions of s.13(1)(e) of the Young Offenders Act. They bear no resemblance to the current provisions of the Criminal Code. Presently, pursuant to s.543(2), the court may order a psychiatric report where the parties consent, or there is evidence, or there is a report in writing indicating that an accused may be mentally ill. Obviously, there is proposed a broad expansion of the powers in order to provide the means by which the court will have complete information concerning the accused. The word "reasonable" will require interpretation and the courts will have to determine whether there should be some evidence before the court before making such orders.

One can safely predict that the provisions for non-disclosure of the reports to the accused, and the exclusion of the public and the accused from the courtroom will prove to be highly contentious. As indicated, the provisions closely parallel (indeed, virtually duplicate) the provisions of the Young Offenders Act. Presently, the only authority in the Criminal Code for exclusion is s.442 which

permits, in restrictive circumstances, the exclusion of the public but not the accused. The courts have generally been loathe to give this section a broad interpretation.92 It is not difficult to predict that the non-disclosure and exclusion provisions will face challenges under ss.7 and 11(d) of the Charter of Rights and Freedoms. A central question the courts will have to deal with will be whether the protective philosophy underlying the Young Offenders Act is demonstrably reasonable with respect to adult offenders.

Reasons for Decision

S.657 of Bill C-19 requires that the court give reasons for its selection of sentence if the court imposes a sentence of imprisonment, or is requested to do so by either party.

Comment

What is left unstated in the section is the effect of non-compliance. At present, the validity of a sentence is not necessarily affected by the failure to give reasons. The appellate courts will generally examine the sentence and the facts of the case to determine whether the sentence imposed discloses an error in principle.93 Again, it will be left to the courts to determine the effect of this mandatory provision.

Sentencing Alternatives

Bill C-19 draws together the sentencing alternatives and places them under the heading "Range of Sanctions". Although not expressly stated, it is apparent that the various alternatives have been placed in order or relative severity. Each sanction will be examined in turn.

1. Discharges

The proposed s. 660 permits a court, instead of entering a conviction, to order that an accused (except a corporation, or where a minimum sentence has been prescribed by law, or where the offence is punishable by 14 years imprisonment or more) to discharge the accused absolutely or on conditions prescribed in a probation order. If the discharge is conditional, the proposed s.660(2) makes it clear that the requirement of supervision by a probation officer may be dispensed with by the court. The effect of a discharge is that the person is deemed not to be convicted of the offence except for the purposes of appeals and a plea of autrefois convict.94 S.660(5) makes it clear that in the case of a conditional discharge it takes effect upon the expiry of the probation order.

Comment

The major change proposed by this provision is that

it eliminates the requirement that the court find that a discharge would be in the best interests of the accused and would not be contrary to the public interest which is presently required by s.662.1 of the Criminal Code. It may be that this is an attempt to encourage the use of this alternative.

2. Conditional Sentence

The proposed s.661 provides that the court may suspend the passage of and direct that the offender enter into a recognizance without sureties to keep the peace for a period not to exceed two years.

Comment

Although this sanction is not expressly set out in the Criminal Code at present, the provision merely makes clear that in the case of a suspended sentence there need not be requirement for supervision by a probation officer.

3. Probation

Pursuant to the proposed s.662, a convicted offender may be directed to comply with the conditions prescribed in a probation order; but, a probation order may not be combined with a term of imprisonment if the term is longer than two years. Under s.663(1) mandatory terms of a

probation order will be directions to keep the peace and be of good behaviour; appear before the court when required to do so; report to a probation officer or some other person designated by the court. Additionally, s.663(2) proposes a large number of optional conditions from which a judge may choose. They are as follows:

(a) refrain from residing or being in a designated place;

(b) provide for the support of his spouse or any other dependants whom he is liable to support;

(c) submit to treatment for alcohol or drug abuse if the court is satisfied that the offender is in need of treatment and is a suitable candidate for treatment

(d) abstain from owning, possessing or carrying a weapon;

(e) make restitution to any other person for any loss, damage or injury suffered by that person in respect of which an order under section 665 or 666 may be made;

(f) remain within the jurisdiction of the court and notify, in writing, the court or the probation officer or any other person designated by the court of any change in his address or his employment or occupation prior to such change;

(g) make reasonable efforts to find and maintain suitable employment or to attend educational or training programs;

(h) attend a program of driver education or improvement

(i) in the province in which the probation order was made, or

(ii) in the province in which the offender resides,

if the court is satisfied that the offender would benefit from such a program; and

(i)comply with such other reasonable conditions as the court considers desirable for securing the good conduct of the offender

and for preventing a repetition by him of the same offence or the commission of other offences.

Reasons for selecting one of the optional conditions must be provided[95] and the term of a probation order may not exceed three years.[96] Wilful breach of a probation order is punishable by up to 2 years imprisonment if the original offence was indictable, or up to 6 months if it was a summary offence.[97] The court can also vary the terms of the order, revoke the discharge, and revoke the probation order and impose the sentence of imprisonment. As well, a probation order may be extended for up to 1 year or reduce the term.[98]

Comment

Under these provisions, probation will stand as an independent sanction. Under s.663 of the Criminal Code, probation orders had to be combined with a suspended sentence; or combined with a fine or term of imprisonment so long as the totality of sentences to be served did not exceed two years.[99] The list of conditional options has been expanded with more emphasis upon diversion programs. The provision also resolves the issue as to the propriety of directing a person not to attend at or habituate certain areas.[100]

The provisions may, however, resurrect an argument that the power to re-sentence an accused following breach of an order is contrary to s.11(h) of the Charter of Rights and

Freedoms. The argument was previously raised in R. v. Linklater[101] but was rejected by Rattan, J. However, the reasoning was that because the order was combined with a suspended sentence, it could not be said that the accused had been finally punished when the order was originally imposed. However, under Bill C-19, the object is to establish probation as an independent sanction and one can anticipate that the argument will arise as a result.

4. Restitution

It is proposed that upon conviction an offender may be required to make restitution to another person in one or any combination of the following ways: return of property; payment of replacement value for property damaged, destroyed or lost; in cases of bodily injury, payment to the victim of special damages, loss of income or support where the value is readily ascertainable; payment of punitive damages in an amount not exceeding $2,000.00 (if the offence is a summary offence), or $10,000.00 (if it is an indictable offence) in the case of an individual; or $25,000.00 (if a summary offence), or in an amount in the discretion of the court (in respect of an indictable offence) in the case of a corporation.[102] Restitution may also be made by a written and filed agreement between the offender and victim. Such an agreement, may not include an amount for punitive damages; but, may include a provision for payment in the form of

unpaid work -- an option not available to the court.[103] An order for the return of property may not be made in situations where the property of a certain kind (negotiable instruments, property in respect of which there is a dispute as to ownership or right of lawful possession); or where lawful title has passed to a third party who received it in good faith.[104] An order of restitution may also be made for compensation to innocent third parties who received property but did not acquire title.[105] Rules have been set forth to deal with priorities to restitution,[106] and liability for payment where there are several offenders;[107] setting time for payment (up to 3 years);[108] provision of notice to interested persons;[109] notice to interested persons of the terms of the order;[110] forfeiture of moneys found in possession of the offender to satisfy the order;[111] variations of the order upon application;[112] filing of the order in superior court for enforcement as a judgment.[113] In the case of failure, refusal to comply with, or default under a restitution order, an information may be laid within 6 months of the breach; and the court may in the absence of a reasonable excuse order garnishment of wages or moneys, order seizure of property; direct entry of the order as a judgment, impose a term of imprisonment.

Comment

The present provisions for restitution in the Criminal Code are far less reaching than those proposed, but far less complex. Under s.653(1) a court that convicts an offender for an indictable offence may, upon application of the person aggrieved, order the accused to pay an amount as compensation for loss or damage to property suffered by the applicant. No procedural rules are provided but the Supreme Court of Canada has held that the section permits an inquiry.114 Under s.655 of the Code where an accused is convicted of an indictable offence the court shall order that property obtained by the commission of the crime be returned to the person entitled to it; and if there is no conviction, but the court finds that property was obtained by commission of a crime, may order the property returned. However, in both instances, the property must be before the court at the time of trial or has been so detained that it can be immediately returned. S. 663(2) also provides that as part of a probation order, the court may order the offender to make restitution for actuall loss or damage. That section has been construed as limiting the damages to special damages.115

The breadth of the proposed provisions make it virtually inevitible that constitutional challenges will arise. One argument that will be raised against is that the

provisions are a matter of property and civil rights and not a part of the proper exercise of the criminal law power. It was on this basis that the present provisions contained in ss.653-655 were challenged in R. v. Zelensky.116 The Supreme Court of Canada upheld the provisions, but Laskin, C.J.C. made a number of comments for the majority which provide scope for the argument to be raised again. The majority held that restitution is, in pith and substance, part and parcel of the sentencing process and a valid objective of the sentencing process.117 However, it was also stated that ss.653-655 reflect a scheme whereby property, taken or destroyed or damaged in the commission of a crime, is brought into account and may be ordered returned or that reparation be made by the offender. The orders of compensation are to be considered as the imposition or restitutionary fines, with a direction as to the destination of the money.118

The central notion is that there is a strict requirement that the application for compensation be directly associated with the sentence imposed as the public reprobation of the offence.119 The dividing line would appear to be where the order can be tied directly to the fruits of the crime. Laskin, C.J.C. indicated that in the exercise of the direction, the constitutional basis must be held in constant view.120 Therefore, a relevant consideration is whether civil proceedings are being pursued, the means of the offender must be considered; whether the court will be

involved in a long process of assessment of the loss is relevant as well.121 With respect to the current provisions the court held that they were inextricably part of the sentencing process; and not simply a method of compensating for loss which would be a matter for provincial jurisdiction.

It should be noted that under the proposed provisions, the order for return of property is not limited to property detained or within the control of the court; the order for reparation is not limited to actual loss, but requires an assessment of damages for bodily injury; and authorizes an order for payment of punitive damages. It would be surprising if the argument was not renewed. In any event, it would appear that the discretion to make an order should not be exercised if it appears that an applicant is attempting to use the criminal process for the purpose of obtaining comepensation.

Double punishment is undoubtedly a further argument that will be raised, pursuant to s. 11(h) of the Charter of Rights and Freedoms. Punitive damages are by definition intended to punish and not intended to be compensatory. If the order is the sole sanction utilized, no argument of double punishment could arise; but the new provisions authorize an order to be made in combination with other sanctions. It is on the principle that the courts should avoid double punishment that civil courts generally decline

to award punitive damages where the criminal courts have previously punished the individual.122 The courts will also have to establish a test as to when punitive damages should be awarded. The conduct of the offender will obviously have been found to be criminal. Will that be sufficient or will a higher test be established such as "...done in such a manner that it offends the ordinary standards of morality or decent conduct in the community in such marked degree that censure by way of damages is, in the opinion of the court, warranted?"123 It may also be that the Linklater issue124 may also arise in this context since restitution is an independent sanction, yet permits a re-sentencing for non-compliance.

If the validity of the provisions is assumed, a problem for the court will be to determine the amounts that should be ordered. It is interesting to note that the proposals do not provide any guidelines for those determinations. Civil damage awards will be of little use since civil awards are made without references to means of payment which is not possible in the criminal law setting.125 In England, where restitution awards may be made for personal injuries,126 the Court of Appeal emphasized that awards must be realistic. As a result, while awards are ordered, it would appear that the amounts appear to be small; it is done only in the clearest of cases and where there is no dispute as to property.127 The courts have also been concerned with

preventing the appearance that those with money are able to buy their way out of trouble.128

5. Fines

S. 668.1 of the proposed bill raises the ceilings of fines where an amount has not been set in the offence section. If the case involves and individual, the limit for summary offences is $2,000.00 and for indictable offences it is left to the discretion of the court. A corporation would be liable to fines of $25,000.00 in a summary offence matter, and the fine would be in the discretion of the court for an indictable offence. Payment of the fine could be ordered to be made forthwith, at a specified time, or in specified instalments.129 The Bill requires a means inquiry if the offender does not acknowledge the ability to pay a fine.130 This may be done by a formal hearing, by directing someone to conduct the inquiry, or by ordering the offender to make disclosure orally or in writing.

Provision is made for payment of the fine through a fine option program established by the provinces.131 Enforcement of the fine will be in the same manner as enforcement of an order for restitution.132

Comments

The major changes which would be effected by these provisions would be an increase in the size of the maximum fines; the mandatory means inquiry; and incarceration for non-payment of a fine could be made only in the absence of a reasonable excuse. The discretion to fix a term of imprisonment in the event of non-payment is abolished.

6. Community Service Orders

S. 668.12 proposes that the court may order the offender to provide up to 400 hours of community work if there is an approved program in the area and the offender is a suitable person for such an order.

This provision simply makes it clear that the community service order need not be part of a probation order as is the present practice.133

7. Intermittent Term of Imprisonment

S. 668.13 of Bill C-19 proposes that if a gaol sentence that does not exceed 92 days is imposed, the court may order the sentence to be served intermittently during a period not to exceed one year. During the times the offender is not in custody, he is to be bound by the terms of a probation order. Prior to ordering an intermittent sentence, the Attorney General would have to provide the court with a report on the availability of facilities. If no facilities

for the enforcement of the order are available, then the order must not be made.

Comments

The figure of 92 days was chosen as it was believed that the courts were interpreting the previous figure of 90 as meaning a sentence of three months.[134] The one year period for serving of the sentence was placed within the section as some courts had indicated that there was no limit.[135]

8. Forfeiture

Bill C-19 creates a new and radical scheme for seizing the fruits of crime through forfeiture provisions. Pursuant to the proposed s. 668.2 an order for forfeiture may be made with respect to property that the court is satisfied, on a balance of probabilities; was used directly in the commission of an indictable offence or used to avoid its detection or apprehension of the offender; was in the possession of the offender, or under his control, at the time of arrest in circumstances giving rise to the inference that it was intended for use in the commission of an offence or avoiding detection or apprehension; or where the offender is convicted of any offence, property obtained or derived, directly or indirectly as a result of the commission of the

offence. A hearing would be required for consideration of the use that was ordinarily made of the property; and any undue hardship to the offender or his dependants that may result from the order.136 Property would be deemed to be the result of the commmission of an offence if the evidence establishes that the property value of the offender after the offence exceeds his previous property value and legitimate income would not reasonably account for the difference.137 Provision is made for a declaration by the court setting aside conveyances or transfers made after a freezing order is made pursuant to s.445.2; and voiding transfers and conveyances prior to the freezing order unless the transfer was to a person acting in good faith and without notice.138 Notice would be provided to parties with a potential property interest to determine whether the lawful owner, or person entitled to possession, is innocent of any complicity or collusion.139 Any individual affected by the forfeiture order may apply for a hearing within 30 days of the order; and, if found to be free of complicity or collusion, the order will be vacated.140

Comments

The breadth of the forfeiture provisions extends well beyond the current provisions of the Criminal Code which largely provide for foreiture of objects which are criminal in and of themselves.141 The proposed provisions simply

cannot be compared with the existing ones. The provisions will authorize seizure and forfeiture of weapons, automobiles in impaired driving cases, proceeds from drug transactions or robberies. The sanctions are drafted broadly enough that they will permit tracing funds into such things as homes, investments, or purchases. The sections are not expressly directed to deal with organized crime but potentially reach all offenders convicted of criminal offences. 142 Given that complex tracing issues (potentially involving complex commercial transactions) it is surprising that so little guidance is provided as to how such issued are to be resolved; and similarly, little guidance is given with respect to resolving disputes as to ownership of property.

It is also evident that such provisions virtually invite challenges pursuant to the Charter of Rights and Freedoms. It will not be surprising if challenges to the freezing and forfeiture orders are made pursuant to ss. 7, 8, 11(d) and 12 of the Charter.

Final Comments

At the outset it was indicated that central to the provisions of Bill C-19 is the philosophical debate as to the purpose of the sentencing process. It was suggested that the philosophy adopted in the Bill is the incapacitation model. That conclusion cannot be stated with certainty for all of the provisions of a criminal code which have impact upon the

sentencing process are in the midst of preparation. A study is being made of the classification of our offences -- will the punishments stated in a new code contain lower maximums or will they remain the same? Further studies are being conducted with respect to reform of the law of parole and remission; and of the law and procedures with respect to the mentally ill offender. Any final conclusions must await the complete package.

Nevertheless, Bill C-19 appears to reveal a thought process that the old sanctions may not have proven effective. Tough, new economic sanctions such as forfeiture and restitution may be intended to replace imprisonment as the main sanction. Imprisonment, in accordance with the incapacitation model would be reserved for violent offenders or serious recidivists.[143]

The difficulties that the judiciary may have to face, quite apart from Charter applications, is that the provisions may result in more hearings, a lengthier sentencing process; and the introduction of whole areas of civil law, particularly tortious concepts. While the effectiveness of the sanctions will take years to determine, the procedural impact will be felt quite suddenly.

1. The Criminal Law in Canadian Society, Department of Justice (1982), at p. 10

2. Ibid.; adopted by the federal cabinet in 1981

3. Ibid.; at p. 2

4. Ibid., pp. 58 ff.

5. Ouimet Report, (1969)

6. Dispositions and Sentences in the Criminal Process, (1976)

7. Ibid., p. 129

8. Sentencing, Government of Canada, (1983), pp. 4-5

9. s. 662(1)

10. s. 663(1)(c)

11. s.98

12. s. 653

13. see results of surveys contained in The Criminal Law in Canadian Society, supra, n.1, p. 80.

14. Sentencing, supra, n. 8, p. 6

15. ibid., p. 8

16. ibid., pp. 8-9

17. See for example: Canadian Recidivism Index (1981), 23 Can. Jo. of Crim. 103; Grosman, New Directions in Sentencing, Toronto, (1981); Fattah, Making the Punishment Fit the Crime, (1982), 24 Can. Jo. of Crim. 1; Cousineau and Plecas, Justifying Criminal Justice Policy, (1982), 24 Can. Jo. of Crim. 79; Law Reform of Canada, supra, n. , pp. 95-97; California Legislature, Deterrent Effect of Criminal Sentencing, (1968); Jaffary, Sentencing of Adults in Canada, Toronto, (1963); Biles, Imprisonment and its Alternatives, (1981, 55 Aust. L.J. 280.

18. up to $40,000.00 per annum per inmate, Sentencing, supra, n. 8, p. 9

19. supra, n.6

20. Sentencing, supra, n. 8, p. 9.

21 Ibid., pp. 13-22

22 See: ss. 186, 234(1), (234(2), 236(1), 236.1 (greater punishment for commission of subsequent offences), s.83 (use of firearm during commission of an offence or flight from an offence); s. 218 (punishment for murder);

23 s. 658

24 s. 722(1)

25 The English Sentencing System, (3d), London, (1981), pp. 167-175.

26 Thomas, Principles of Sentencing, (2d), London, (1981), p. 29.

27 Cross, supra, n. 25, p. 169

28 Thomas, supra, n. 21, p. 33

29 Sentencing (2d), Toronto, (1980), p. 423

30 Canadian Sentencing Digest, Toronto, (1982), pp. 35 ff.

31 R. v. McLean et al (1981), 29 Nfld. & P.E.I.R. 194; R. v. Glubisz (No. 3), (1979), 9 C.R. (3d) S-42; R. v. Jonas et al (1983), 2 C.C.C. (3d) 490

32 supra, n. 30, pp. 37 ff.

33 See Thomas, supra, n. 35, pp. 36-37; R. v. Pruner (1979), 9 C.R. (3d) S-8; R. v. Ko (1980), 50 C.C.C. (2d) 430.

34 R. v. Sprague et al, (1975), 19 C.C.C. (2d) 513; R. v. Cooper (No. 2), 1977 35 C.C.C. (2d) 35; R. v. Johnas, supra, n. 31

35 R. v. Morrissette et al, (1971), 1 C.C.C. (2d) 307

36 R. v. Johnas, supra, n. 31

37 R. v. Hawley, (1984), 48 A.R. 269; R. v. Sabloff (1979), 13 C.R. 326

38 R. v. Crowshoe (1984), 50 A.R. 105

39 (1976), 24 C.C.C. (2d) 159

40 R. v. Johnas, supra, n. 31

41 R. v. Kurichh, unreported, Jan. 12, 1983; R. v. Williamson, unreported, Nov. 1, 1982

42 *R.* v. *Kanagarajah*, (1980), 4 Sask. R. 149

43 *R.* v. *Moracci* (1977), 20 N.S.R. (2D) 684

44 *Sentencing*, supra, n. 8, pp. 11-12

45 ibid., pp. 17-18

46 ibid, pp. 19-20

47 *Sentencing*, supra, n. 8, pp. 22-25

48 *Report of the Criminal Law and Penal Methods Reform Committee*, South Australia, (1973)

49 *Sentencing*, supra, n. 8, p. 5; Campbell, *Law of Sentencing*, Rochester, (1978); Federal Judicial Center, *The Sentencing Options of Federal District Judges*, (1982)

50 Campbell, ibid, p. 111

51 #1170(a)(1) (1977 Supp).

52 Campbell, supra, n.49, pp. 112-114.

53 s.645(2) Bill C-19

54 Ruby, *supra*, n. 29, p. 1

55 *R.* v. *Oliver*, [1977] 5 W.W.R. 344

56 *R.* v. *Rohr*, (1979), 44 C.C.C. (2d) 353; *R.* v. *Dyson* (1983), 69 C.C.C. (2d) 265

57 *R.* v. *Bates* (1977), 32 C.C.C. (2d) 493

58 s.645(3)(a)

59 s.645(3)(b)

60 s.645(3)(e)

61 Ruby, *supra*, n. 29.

62 *Bill C-19*, s. 646(2) & (3)

63 *R.* v. *Gardiner* (1983) 68 C.C.C. (2d) 477 at p. 514

64 (1983), 68 C.C.C. (2d) 477

65 *ibid*, p. 514

66 *R.* v. *Holt*, (1984), 4 C.C.C. (3d) 32; *R.* v. *Burchnall*

(1983), 65 C.C.C. (2d) 490.

67 *R.* v. *Holt*, *ibid*, pp. 51-52

68 *Diamond* v. *British Columbia Thoroughbred Breeders' Society et al* (1966), 52 D.L.R. (2d) 146

69 *supra*, n. 63, p. 514; see also *R.* v. *Marquis* (1951), 35 Cr. App. R. 33

70 *ibid*.

71 *R.* v. *Leggo*, [1962] 133 C.C.C. 149

72 *R.* v. *Sabloff*, unreported, October 10, 1979; Olah, *Sentencing, the Last Frontier*, 16 C.R. (3d) 125

73 *Bill C-19*, s.646(4)(c) and (5).

74 *R.* v. *Lauzon* (1943), 74 C.C.C. 37; *R.* v. *Garcia*, [1970] 3 C.C.C. 124; *R.* v. *Harris*, [1917] 30 C.C.C. 13; *R.* v. *Huchison* (1972), 56 Cr. App. R. 307; *R.* v. *Cote*, [1967] 3 C.C.C. 97

75 *R.* v. *Robinson* (1979), 49 C.C.C. (2d) 464

76 *Bill C-19*, s. 647(1)

77 *ibid.*, s. 647(3)

78 *ibid.*, s.647(4) & (5)

79 *R.* v. *Treadwell*, unreported, Dec. 18, 1978; *R.* v. *Ironstand*, unreported, Oct. 31, 1979

80 *R.* v. *Antler* (1983), 69 C.C.C. (2d) 480

81 *R.* v. *Rudyk* (1978), 1 C.R. (3d) S-27; *R.* v. *Trenchfield* (1979), 9 C.R. (3d) S-1; *R.* v. *Chase* and *Armigage* (1979), 10 C.R. (3d) S-1

82 *R.* v. *Bartkow* (1978), 1 C.R. (3d) S-36; *R.* v. *Arsenault* (1981), 21 C.R. (3d) 268

83 Bill C-19, s. 650

84 *ibid.*, s. 650(3)

85 *ibid.*, s. 651(1)

86 *ibid.*, s. 651(2)

87 *ibid.*, s. 651(3)

88 *ibid.*, s. 651(4)

89 *ibid.*, s. 652(1)

90 *ibid.*, s. 651(4)

91 *ibid.*, s. 649(3)

92 *R.* v. *Quesnel* (1979), 51 C.C.C. (2d) 270

93 *R.* v. *Sprague et al*, supra, n. 34

94 s. 660(4)

95 s. 663(3)

96 s. 663(6)

97 s. 668.17

98 s. 668.14(1)

99 *R.* v. *Currie* (1982), 65 C.C.C. (2d) 415

100 See *R.* v. *Melnyk*, [1974] 6 W.W.R. 202; *R.* v. *Malboeuf*, [1982] 4 W.W.R. 573

101 4 C.R.R. 173

102 s. 665(1)

103 s. 665(2)

104 s. 665(3)

105 s. 666

106 s. 667

107 s. 667

108 s. 668(1)

109 s. 668(2)

110 s. 668(3)

111 s. 668(6)

112 s. 668.15

113 s. 668.16

114 R. v. Zelensky (1978), 41 C.C.C. (2d) 97; see also R. v. Ghisleri (1980), 56 C.C.C. (2d) 4.

115 R. v. Groves (1977), 39 C.R.N.S. 366

116 supra, n. 114

117 ibid., p. 111

118 ibid., p. 103

119 ibid., p. 111

120 ibid.

121 ibid., pp. 111-112

122 See Elman and Klar, annotation, (1977-78), C.C.L.T. 145

123 Can Alta Carriers Ltd. v. Ford Motor Credit Co., [1975] 2 W.W.R. 381; Houle v. City of Calgary (1983), 26 Alta L.R. (2d) 34

124 supra, n. 101

125 Thomas, supra, n. , p.66

126 Powers of the Criminal Courts Act 1973, s. 35

127 Thomas, supra, n. , pp. 64-67

128 ibid.

129 s. 668.1(3)

130 s. 655(1)(d)

131 s. 668.11

132 s. 668.17

133 R. v. Shaw (1977), 36 C.R.N.S. 358

134 R. v. Ford (1972), 9 C.C.C. (2d 515; R. v. Miclette (1980), 16 C.R. (3d) 289

135 R. v. Lyall, [1974] 6 W.W.R. 479

136 s. 668.2(2)

137 s. 668(3)

138 s. 668.2(5)

139 s. 668.2(8) & (9)

140 s. 668.21(1)-(4)

141 For example see: s.281.2 (hate propaganda), 160 (obscene matter), s. 181 (lottery or gaming materials)

142 Particularly since there are few offences in the present Code which may be described as purely summary offences.

143 For example, the provisions of Bill C-19 would seem to enlarge the scope of the dangerous offenders provisions and make it easier to classify someone as a dangerous offender.