

## An Evaluation of Canada's Dangerous Offender Legislation

Jacques J. M. Shore

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Résumé de l'article

L'auteur s'intéresse dans cet article à la partie XXI du *Code criminel* relative aux délinquants dangereux. L'évolution historique des dispositions législatives concernées est tracée à l'aide d'une comparaison avec la législation en vigueur en 1977. Les problèmes juridiques découlant de ces dispositions et les objectifs de la législation sont ensuite présentés ainsi que la procédure spécifique d'obtention d'une sentence de période indéterminée. L'auteur décrit les difficultés d'application de la loi et identifie certains résultats incongrus transparaissant de la jurisprudence récente. De plus, l'impact potentiel des articles 1, 9, 11 et 12 de la *Charte canadienne des droits et libertés* sur la partie XXI du *Code criminel* est évoqué.

L'auteur critique les procédures de remise en liberté des délinquants dangereux et suggère que les tribunaux plutôt que la Commission nationale des libérations conditionnelles soient habilités à rescinder une sentence de période indéterminée.

L'article conclut en recommandant que les dispositions existantes de la loi relatives aux délinquants dangereux soient abrogées et qu'un nouveau régime sentenciel, excluant l'option d'une sentence pour une période indéterminée, soit établi. L'auteur suggère également, advenant que la législation actuelle relative aux délinquants dangereux perdure, que soient réévaluées les règles de preuve et d'audition responsables de l'échec du système existant.

# An Evaluation of Canada's Dangerous Offender Legislation \*

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Jacques J.M. SHORE \*\*

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\*\* Of the Ontario Bar, Executive Assistant and Research Program Administrator (Legal/Constitutional), the Royal Commission on the Economic Union and Development Prospects for Canada. Formerly Policy Analyst, Policy Branch (Criminal Justice), Ministry of the Solicitor General of Canada.

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## Introduction

« It seems clear to me that God designed us to live in society — just as He has given the bees the honey ; and as our social system could not subsist without the sense of justice and injustice, He has given us the power to acquire that sense. » (François Voltaire).

Our Canadian criminal justice system must be vigilently monitored if it is to continue to act in a manner consistent with the fundamental principles of justice. The elements which cause injustice within the system and mechanisms which in the result cause unjust consequences must be eliminated. This task is incessant as society and its attitudes transform.

It is the goal of identifying those injustices which plague Part XXI of the *Criminal Code* which motivates the author to prepare this paper.

This brief overview of Canadian Dangerous Offender legislation is intended to acquaint the reader with the problems associated with the current provisions and provide a short evaluation of its contents. The material also includes a brief discussion on recent jurisprudence in the area and comments on what effects the *Canadian Charter of Rights and Freedoms* may have on this legislation.

### 1. Background

The current dangerous offender provisions<sup>1</sup> are contained in Part XXI of the *Criminal Code*.<sup>2</sup> These provisions, proposed and enacted as part of the 1977 *Criminal Law Amendment Act*, regarding « Peace and Security », came

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1. *Criminal Law Amendment Act*, S.C. 1976-77, c. 53, s. 14. The provisions were proclaimed in force October 16, 1977.

2. *Criminal Code*, sections 687 to 695.1.

about as a response to the considerable amount of criticism raised against the previous « habitual criminal » and « dangerous sexual offender » sections of the *Criminal Code*.

The former « habitual criminal » legislation was first enacted in 1947. Under these provisions it was possible to impose preventive detention if (a) the accused was found to be an « habitual criminal » and (b) the court was of the opinion it was expedient for the public's protection to sentence him to preventive detention. If the person became rehabilitated he was released on parole, but if he had not, he was kept under custody until there was strong evidence that he had been rehabilitated.

Between 1947 to 1977, the *Criminal Code* defined « habitual criminals » as :

- having three previous convictions for an indictable offense for which the maximum penalty is at least five years, and
- « leading persistently a criminal life ».

Critics and legislators expressed concern that the legislation was not only being applied to dangerous offenders but also to menaces and nuisances.<sup>3</sup> Such a view is to be found in even the highest levels of the judiciary. In *Mendick v. The Queen*<sup>4</sup>, Mr. Justice Ritchie in his dissenting opinion (Fauteux, Abbott, Martland, J.J., concurring) held in the Supreme Court of Canada that being a « menace » to society was sufficient reason to sentence a person to preventive detention as an « habitual criminal ». According to Ritchie, J. the element of dangerousness did not need to be found in order to grant an « habitual criminal » application. He stated :

I do not find any decision so far rendered by this court which makes it plain that a sentence of preventive detention is only imposed on persons who have been guilty of repeated crimes of violence, and I can find nothing in S. 660 itself to indicate that it is directed solely to the protection of the public against violence, it rather appears to me that the section is to be applied in the cases of persons who have shown themselves to be so habitually addicted to serious crime as to constitute a threat to other persons or property in any community in which they live and for so long as they remain at large without supervision.<sup>5</sup>

It was the opinion of the Ouimet Committee<sup>6</sup> that these legislative provisions were not effective measures for the protection of the public. The

3. *Canadian Committee on Corrections: Toward Unity: Criminal Justice and Corrections* (Ouimet Committee), Ottawa, Information Canada, 1969, page 252.

4. [1970] 1 C.C.C. 1 (S.C.C.).

5. *Ibid.*, page 11. Cartwright, C.J.C., on page 6, expressed the majority's view by saying that preventive detention can only be applied where the offender constitutes « so grave a menace » that the protection of the public requires that freedom be deprived for such a period.

6. *Supra*, footnote 3.

Committee found them too infrequently and randomly applied to be a deterrent. Many « habitual criminals » were considered not to be a threat to personal safety, but rather « nuisances » and merely « petty persistent » property offenders. It was believed that the requirement of three prior convictions often prevented its use against truly dangerous offenders.

Furthermore, it was concluded that the legislation was being applied in an inequitable and discriminatory manner because of local and regional variance,<sup>7</sup> different prosecutorial and judicial attitudes<sup>8</sup> towards preventive detention, and unfair use of plea-bargaining with persistent property offenders.

Persons sentenced as « habitual criminals » before 1977 are still subject to possible lifetime preventive detention, despite the abolition of the law.<sup>9</sup> The National Parole Board was required to review all habitual offender cases within the year after the new legislation came into force and each year thereafter (as under the old legislation) in order to determine whether any offenders so detained should be released.<sup>10</sup>

There are currently 36 such « habitual » offenders in Federal penitentiaries, and 54 are on parole.<sup>11</sup>

With regard to the « Dangerous Sexual Offender » provisions which were abolished in 1977, the *Criminal Code* defined such offenders as :

- someone convicted of rape, indecent assault, gross indecency, buggery, bestiality or sexual intercourse with a female under seventeen (or of an attempt to commit any of the above), and
- who, by his conduct in any sexual matter, has shown a failure to control his sexual impulses, and

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7. In 1976 approximately half of all « habitual criminals » in Canada came from British Columbia.

8. In its decision in *Hatchwell v. The Queen*, (1975) 21 C.C.C. (2d) 201, the Supreme Court of Canada stated that the dominant purpose of the legislation was to protect the public from an accused who had shown a propensity for violent crimes, the determination of which involved a balance of the legitimate right of society to be protected with the right of the accused to freedom after serving the sentence imposed for the substantive offences committed. The Court thereafter rejected Justice Ritchie's dissenting opinion in *Mendick v. The Queen*, *supra*, footnote 4.

9. For additional background in this area, see M. JACKSON, *Sentences that Never End: The Report on the Habitual Criminal Study*, unpublished paper prepared for the British Columbia Connections Association, Dec. 1982.

10. Section 695.1(2), *Criminal Code*.

11. Data according to Operational Information Services — Correctional Service Canada (Analysis and Information Section), as of April 30, 1983 (unpublished).

— who is likely to cause injury pain or other evil to any person, through failure in future to control his sexual impulses.<sup>12</sup>

Critics contended that these sections were not broad enough to permit preventive detention of dangerous offenders who do not commit sexual offences. The Ouimet Committee<sup>13</sup> believed that many of those caught by these provisions did not present a threat of physical violence and that the legislation was being applied in an inequitable and inconsistent manner.

As was the case with « habitual criminals » before 1977, « dangerous sexual offenders » were subject to a similar review by the National Parole Board under the new legislation.<sup>14</sup>

Under the old legislation there are currently 50 « Dangerous Sexual Offenders » in Federal penitentiaries and an additional 32 on parole.<sup>15</sup>

## 2. Current Dangerous Offender Legislation

On March 8, 1976, the Minister of Justice, Ron Basford, stated the following in the House of Commons :

indeterminate sentencing should no longer be used against criminals who do not pose a continuing and serious threat to the life, safety and well-being of others... This type of sentencing, however, is a necessary mechanism to protect society against dangerous criminals when it is virtually impossible, at the point of sentencing, for a judge to determine the appropriate length of sentence to be imposed...<sup>16</sup>

Accordingly, Mr. Basford acknowledged there were individuals who were not dangerous, yet sentenced to preventive detention.

New legislation was introduced in Parliament in 1976 and proclaimed in force on October 6, 1977. Under the legislation the requirements for a « Dangerous Offender » designation are provided in section 688 of the *Criminal Code*. It states :

688. Where, upon an application made under this Part following the conviction of a person for an offence but before the offender is sentenced therefor, it is established to the satisfaction of the court

(a) that the offence of which the offender has been convicted is a serious personal injury offence described in paragraph (a) of the definition of that

12. Section 689 *Criminal Code*, R.S.C. 1970, c. C-34. Sections 687 to 695 were repealed and a new Part XXI (s. 687 to 695.1) was substituted by the *Criminal Law Amendment Act*, S.C. 1976-1977, c. 53, s. 14. The sections were proclaimed in force on October 16, 1977.

13. *Supra*, footnote 3.

14. *Supra*, footnote 10.

15. *Supra*, footnote 11.

16. *House of Commons Debates — Official Report* (Hansard), page 11582, March 8, 1976.

expression in section 687 and the offender constitutes a threat to the life, safety or physical or mental well-being of other persons on the basis of evidence establishing

- (i) a pattern of repetitive behaviour by the offender, of which the offence for which he has been convicted forms a part, showing a failure to restrain his behaviour and a likelihood of his causing death or injury to other persons, or inflicting severe psychological damage upon other persons, through failure in the future to restrain his behaviour,
  - (ii) a pattern of persistent aggressive behaviour by the offender, or which the offence for which he has been convicted forms a part showing a substantial degree of indifference on the part of the offender as to the reasonably foreseeable consequences to other persons of his behaviour, or
  - (iii) any behaviour by the offender, associated with the offence for which he has been convicted, that is of such a brutal nature as to compel the conclusion that his behaviour in the future is unlikely to be inhibited by normal standards of behavioural restraint, or
- (b) ...

Section 687 defines « serious personal injury offence » as :

- (a) an indictable offence (other than high treason, treason, first degree murder or second degree murder) involving
  - (i) the use or attempted use of violence against another person, or
  - (ii) conduct endangering or likely to endanger the life or safety of another person or inflicting or likely to inflict severe psychological damage upon another person.

and for which the offender may be sentenced to imprisonment for ten years or more, or

- (b) an offence mentioned in section 144 (rape) or 145 (attempted rape) or an offence or attempt to commit an offence mentioned in section 146 (sexual intercourse with a female under fourteen or between fourteen and sixteen), 149 (indecent assault on a female), 156 (indecent assault on a male) or 157 (gross indecency). 1976-77, c. 53, s. 14.

Under the alternate category of « dangerous offender », section 688(b) replaces the former « dangerous sexual offender » provisions and demands the following for a positive finding :

- (b) that the offence for which the offender has been convicted is a serious personal injury offence described in paragraph (b) of the definition of that expression in section 687 and the offender, by his conduct in any sexual matter including that involved in the commission of the offence for which he has been convicted, has shown a failure to control his sexual impulses and a likelihood of his causing injury, pain or other evil to other persons through failure in the future to control his sexual impulses...

As was the case in the previous legislation, it is necessary that the Attorney-General of the province in which the offender was tried, either before or after the making of the application, consent to the application.<sup>17</sup>

17. Section 689(1)(a), *Criminal Code*.

Evidence of at least two psychiatrists was required under the old provisions as proof for a dangerous sexual offender application, but not for a determination of habitual criminal designation. The new sections require the evidence of at least two psychiatrists in all cases. One psychiatrist must be nominated by the prosecution and the other nominated by the offender.<sup>18</sup>

Under the 1977 provisions, when an individual is found by the court to be a « dangerous offender » and has been sentenced to a penitentiary for an indeterminate period, the National Parole Board reviews the condition, history and circumstances of that person after three years of custody and not later than every two years thereafter to determine whether parole should be granted.<sup>19</sup>

There are currently 29 « dangerous offenders » serving indeterminate terms of imprisonment in Federal penitentiaries. An additional two offenders have been designated as « dangerous » under the legislation but were given definite sentences in lieu of the usual indeterminate period. None of these offenders have been granted any form of conditional release.<sup>20</sup> Dangerous offenders applying for parole release are subject to the same criteria as other offenders seeking parole. The offender must not constitute an « undue risk », his grant of parole must aid in his « reform and rehabilitation », and must have « derived the maximum benefit from imprisonment. »<sup>21</sup>

### 3. Experience and Criticism Regarding the Present Legislation

While Parliament was successful in eliminating some of the injustices that arose from the previous dangerous offender provisions of the *Criminal Code*, there still exists a significant amount of criticism regarding the current dangerous offender legislation.<sup>22</sup>

Critics such as Greenland believe that the former provisions were being applied inconsistently and arbitrarily by Crown attorneys because the sections were applied to a broad variety of offenders.<sup>23</sup> From his research

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18. Section 690, *Criminal Code*.

19. Section 695.1, *Criminal Code*.

20. *Supra*, footnote 11.

21. *Parole Act*, R.S.C. 1970, c. P-2, s. 10.

22. See: Law Reform Commission of Canada, Working Paper » 11, *Imprisonment and Release*, 1975. See also, *Dangerous Sexual Offender Legislation 1948-77 — A Misadventure in State Psychiatry*, 1981, unpublished paper presented to the Canadian Psychiatric Association; G. GREENLAND, « The Prediction and Management of Dangerous Behaviour », (1978), *International Journal of Law and Psychiatry* 215; M.E. SCHIFFER, *Psychiatry Behind Bars, A Legal Perspective*, Toronto, Butterworths, 1982, p. 289.

23. *Supra*, footnote 22, p. 37.



Greenland states that only approximately two per cent of all sexual offenders were subjected to proceedings under the former dangerous offender provisions.<sup>24</sup> He also criticized the Attorneys-General for not issuing guidelines to assist Crown counsel with the selection process. As a result, Greenland feels the threat of dangerous offender prosecution is always available to the Crown to assist in obtaining a desired plea bargain with the defence.<sup>25</sup> In the author's opinion, Greenland's appraisal applies equally to the current provisions.

The use of the threat of a « dangerous offender » application has been admitted by many Crown attorneys. Because of the often heavy work load plaguing Crown counsels, unless the case is considered as most serious under the circumstances, the plea negotiation is often considered a welcome aid. Furthermore, defence lawyers, finding it in the best interests of their clients, tend to avoid risking the possibility of having their clients sentenced for a number of years without any idea of when release can be expected. The threat being so severe leaves the accused with little choice.

Furthermore, it should be noted that while the person who is sentenced to an indeterminate period of detention may appeal to the Court of Appeal against the sentence on any ground of law or fact, or mixed law and fact,<sup>26</sup> the Attorney-General may only appeal against the dismissal of an application for a dangerous offender order on any ground of law.<sup>27</sup> Therefore it has been argued by Crown attorneys that if they cannot convince the reluctant trial judge at first instance that the accused is in fact « dangerous » as per the provisions of Part XXI of the *Criminal Code*, and no error in law has taken place, their efforts become a waste of time.

It also appears that judges are quite reluctant to send individuals to prison for indeterminate periods. While a life sentence is very lengthy in terms of sentence, it still provides for a definitive eligibility date for parole. Recently, a judge of the Supreme Court of Ontario refused to imprison indefinitely a man who raped a woman (not his first offence) because he was « not persuaded beyond a reasonable doubt that the accused was likely to commit rape or cause harm again. »<sup>28</sup>

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24. *Ibid.*

25. *Ibid.*

26. Section 694(1), *Criminal Code*.

27. Section 694(2), *Criminal Code*.

28. This case was provided as an example of the Court's reluctance to use the Dangerous Offender Legislation in an article by Cyril Greenland, prepared for the *Globe and Mail*, July 23, 1982, entitled « Making the Sentence Fit the Sex Criminal ». No citation for this case was given.

In 1975 the Law Reform Commission of Canada recommended that both the habitual criminal and dangerous sexual offender legislation be abolished because it had concluded that the provisions had proven to be ineffective. For several reasons, such as the difficulty of reliably defining « dangerousness », and lack of fairness and procedural safeguards, the Commission believed that preventive detention was unnecessary.<sup>29</sup> In their Working Paper *Imprisonment and Release*, the Law Reform Commission states :

Serious offences, including sexual offences, should be dealt with under the ordinary sentencing law. If the offence warrants a sentence of imprisonment for purposes of separation, this offers the possibility of a long period of custody and release under controlled supervision where needed... In view of the limits of rehabilitation, the costs of over prediction... a possible sentence of up to twenty years in cases of serious violence against persons should be adequate to deal with offenders who are thought to be a continuing risk to the personal security of others.<sup>30</sup>

Although the above comments are aimed at the pre-1977 dangerous sexual offender and habitual criminal provisions, the comments continue to be used by those proponents seeking to abolish the current dangerous offender legislation.<sup>31</sup>

An additional problem which has recently surfaced is causing further uncertainty regarding the application of the legislation.

Until lately it appeared that anyone found to be a « dangerous offender » would receive an indeterminate sentence, however, the practice has changed due to recent jurisprudence. « Split determinations » regarding dangerousness and indeterminate sentences are possible according to the Alberta Court of Appeal's decision in *Regina v. Carleton*.<sup>32</sup> The Court refused to accept the trial judge's finding of dangerousness and agreed with his *obiter dictum* that a « dangerous offender » (so found) is not obliged to receive an indeterminate sentence. Although the trial judge decided that Carleton was a dangerous offender and did in fact impose a sentence of preventive detention, he concluded that the latter decision should not be considered as an automatic event following a positive determination of dangerousness. An appeal by Carleton from the Alberta Court of Appeal to the Supreme Court of Canada proved to be fruitless. Mr. Justice Dickson speaking on behalf of the Court dismissed the appeal indicating that no error

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29. Law Reform Commission of Canada, Working Paper # 11, *Imprisonment and Release*, 1975, page 27.

30. *Ibid.*, page 30.

31. *Supra*, footnote 23, p. 1.

32. (1981) 23 C.R. (3d) 181 (Alta. C.A.).

was found in the judgment of the majority of the Court of Appeal of Alberta<sup>33</sup>.

In *Regina v. Ringland*<sup>34</sup>, the defence counsel persuaded the trial judge to respect the *obiter* remark in the *Carleton* case. Although, Mr. Justice Foisy found Ringland to be a dangerous offender, he refused to impose an indeterminate sentence believing that special treatment (which Ringland agreed to take) would substantially decrease the offender's sexual drive and aggressive tendencies. An application for leave to appeal based solely on the point of correctness of the « split determination » was made by the Crown to the Alberta Court of Appeal. The Court held that the trial judge had a discretion to impose a sentence other than one of indeterminate imprisonment and chose not to interfere with the exercise of his discretion<sup>34a</sup>. The application for leave to appeal to the Supreme Court of Canada was dismissed<sup>34b</sup>.

Since it appears that the current purpose of Part XXI is to sentence « dangerous offenders » for an indeterminate period, it is odd that a judge, after imposing the label « dangerous offender » on a person could then use a determinate sentence for the specific crime committed. Generally an individual subjected to the provisions under Part XXI is penalized for the type of person he is rather than for the actual crime committed. Certainly under the current legislation a more logical approach would be to assess all the required evidence before a finding of « dangerous offender » is made, and then decide whether it would be in the public's interest to impose a sentence of preventive detention upon the offender. If so, the person found to be a « dangerous offender » would then automatically receive the sentence expected under Part XXI. Otherwise, there would be no actual benefit served by simply labelling a person as a « dangerous offender ». It seems that the Supreme Court of Canada did not properly assess the Alberta Court of Appeal decision on this subject since the conclusion of a « split determination » appears illogical.

The ability of psychiatrists to properly predict the behaviour of dangerous offenders is another feature which is often criticized.<sup>35</sup> There was considerable controversy during the 1950's and 60's as to whether dangerous offenders could be accurately identified. It was not until the late 1960's, that

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33. *Carleton v. The Queen*, (1983) 6 C.C.C. (3d) 480, 36 C.R. (3d) 39.

34. *R. v. Ringland* (unreported), Court of Queen's Bench of Alberta, Judicial District of Calgary, No. 81-01-C-0945, January 18, 1983.

34a. *R. v. Rignland* (unreported), Court of Appeal of Alberta, Appeal No. 15104, March 9, 1984.

34b. Leave to appeal refused May 17, 1984 (Coram : Estey, McIntyre and Lamer JJ.)

35. See M. PETRUNIK, *The making of Dangerous Offenders: A Study of the Politics of Dangerousness*, Unpublished Study, Ministry of the Solicitor General, Ottawa, 1979.

this criticism was recognized as valid as by that time it was recognized that no objective data of successful predictive skills could be offered by psychiatrists as proof of their methods.<sup>36</sup>

Greenland, commenting on the current dangerous offender provisions explains that :

The most grievous failure of all has been that neither the Parole Board nor the psychiatrists and psychologists employed by it have demonstrated a capacity to reliably predict the DSO's future capacity for dangerous behaviour. The relatively high rate of parole revocations; thirty-eight per cent, indicates the crude state of the art of clinical prediction... it can reasonably be assumed that this degree of error works in both directions.<sup>37</sup>

Greenland severely blames psychiatrists for taking part as expert witnesses in dangerous offender proceedings. He submits :

... they have abandoned their primary function to provide competent medical service with compassion and respect for human dignity.<sup>38</sup>

According to one Canadian psychiatrist :

As a psychiatrist I am frequently asked to make an assessment with regard to possible future dangerousness of a patient, and I must confess that I can find no firm psychiatric criteria for so doing.<sup>39</sup>

The problem and difficulty of predicting the likelihood of an offender's future conduct is a matter of concern as it pertains to the standard of proof required. Mr. Justice Morden declared in the judgment of *R. v. Knight* :

I wish to make it clear that when I refer to the requisite standard of proof respecting likelihood, I am not imposing on myself an obligation to find it proven beyond a reasonable doubt that certain events will happen in the future... (but rather) likelihood of future conduct.<sup>40</sup>

The difficulty for the court to determine the likelihood of an offender's future conduct and the dissatisfaction directed towards the methods of psychiatric assessment of dangerous offenders has led many commentators to believe that the time has come to establish a study on the state of the art of psychiatric techniques of prediction so as to determine whether as much weight should be placed upon expert psychiatric evidence as has been in the

36. *Ibid.*, p. 15.

37. *Supra*, footnote 23, p. 44.

38. *Ibid.*, p. 45.

39. R. MCCALDON, « Reflections on Sentencing », (1974) 16 *Can. J. Corr.* 291, p. 295. Cited in his book *Psychiatry Behind Bars. A Legal Perspective*, 1982, Toronto, Butterworths and Co. Canada Ltd., p. 271 ; Marc E. Schiffer suggests reference be made to *Tanner v. Norys*, [1980] 4 W.W.R. 33 (Alta. C.A.) regarding the ability of psychiatrists to predict dangerousness.

40. *R. v. Knight*, (1976) 27 C.C.C. (2d) 343 (Ont. High Court), p. 356.

past. It is recommended that the appraisal of this area and its position between criminal law and psychiatry should occur before any significant criminal law reform on this subject takes place.

#### 4. Charter Considerations

One can anticipate that sections 9 and 12 of the *Canadian Charter of Rights and Freedoms*<sup>41</sup> regarding protection against arbitrary detention or imprisonment and the right not to be subject to any cruel and unusual punishment respectively, will continue to be used in the courts by defence counsel to reject the use of indeterminate sentences until the matter is settled by the Supreme Court of Canada. However, thus far it appears there is little basis to these arguments. In *R. v. Simon*<sup>42</sup> the Northwest Territories Supreme Court rejected Simon's contention that section 688 is rendered inoperative by the *Canadian Charter of Rights and Freedoms*. In his decision, de Weerd J. explained that sections 9 to 12 of the Charter are analogous to section 2 of the *Canadian Bill of Rights*,<sup>43</sup> which according to the Supreme Court of Canada did not affect the court's discretion to impose indeterminate sentences under relevant *Criminal Code* provisions:

Section 688, in its present form, provides for a rational and principled determination to be made by the courts, always predicated on the establishment of a sufficient foundation in fact, so as to remove the imposition of a sentence of indeterminate detention under the section from the realm of arbitrariness contemplated under S. 9 of the Charter. And as to section 2, it need only be mentioned that both capital punishment and long minimum sentences of imprisonment have also been held to conflict with S. 2(b) of the *Canadian Bill of Rights*: *Miller v. R.*, (1977) 23 S.C.R. 680, (1976) 5 W.W.R. 711, 38 C.R.N.S. 139, 31 C.C.C. (2d) 177, 70 D.L.R. (3d) 324, 11 N.R. 386, affirming (1975) 6 W.W.R. 1, 33 C.R.N.S. 129, 24 C.C.C. (2d) 401, 63 D.L.R. (3d) 193; *R. v. Shand*, (1976), 13 O.R. (2d) 65, 35 C.R.N.S. 202, 30 C.C.C. (2d) 23, 70 D.L.R. (3d) 395 (C.A.). These decisions, it seems to me, are fully consistent with the incisive and unanimous decision of all nine judges of the Supreme Court of Canada in *Ex Parte Matticks*.<sup>44</sup>

Regarding the *Simon* case, it is interesting to note that the trial judge never referred to the « reasonable limit » provision of the Charter. Apparently, de Weerd J. was convinced that there was no violation of section 9 and 12 in this matter which would have required the section 1 exception. Judging from the results of previous attempts to eliminate Part XXI's harsh sanction, it

41. *Constitution Act, 1982, Part 1.*

42. [1982] 5 W.W.R. 729 (N.W.T.S.C.).

43. R.S.C. 1970, App. III.

44. *Ibid.*, p. 732.

seems doubtful that the Supreme Court of Canada will reject its line of thinking in this area.<sup>45</sup>

Although the Court of Appeal for the Northwest Territories overturned Judge de Weerd's decision regarding the declaration that Simon was a « dangerous offender » under Part XXI of the *Criminal Code*, McClung J.A. made no mention in his oral judgment on behalf of the court that the trial judge's comments regarding the Charter were incorrect.<sup>46</sup>

Another provision of the *Canadian Charter of Rights and Freedoms* could be offered to assist in an argument to restructure the use of Part XXI of the *Criminal Code*. An original method of attempting to attack the improper nature of the dangerous offender determination would be to use section 11(f) of the Charter. It provides :

11. any person charged with an offence has the right...

(f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or more severe punishment ;

While it would probably be disputed that an individual found to be a « dangerous offender » and given an indeterminate sentence under section 688 is not convicted of an offence per se but rather has his status determined ; it would be fair to contend that the decision as to his status results from the previous offence committed. Therefore, without trying to create an « extravagant interpretation », the benefit of a jury trial in section 688 proceedings may be regarded as a right in future cases. To outrightly reject this proposition because it is not the offence which carries a potential penalty of more than five years imprisonment but rather the person's character that deems he could be subject to a penitentiary sentence for the rest of his days is a bizarre response. Ultimately, the determination of whether a jury decision is required should be based on the potential penalty available in a particular case. Disregarding section 11(f) when dealing with Part XXI would be a most unwelcome narrow interpretation and would, in the author's opinion, tend to « trivialize and diminish respect for the Charter ».<sup>47</sup>

45. *R. v. Roestad*, [1972] 1 O.R. 814, 19 C.R.N.S. 190, 5 C.C.C. (2d) 564, leave to appeal refused 19 C.R.N.S. 235n ; *Hatchwell v. R.*, [1974] 1 W.W.R. 307, 14 C.C.C. (2d) 556, reversed on other grounds [1976] 1 S.C.R. 39, [1975] 4 W.W.R. 68, 21 C.C.C. 201, 54 D.L.R. (3d) 419, 3 N.R. 571. The effect of the *Canadian Bill of Rights* was discussed in the Supreme Court of Canada.

46. Court of Appeal for the Northwest Territories, Edmonton Criminal Sittings, January 18, 1983 (unreported).

47. *R. v. Altseimer*, [1982] 38 O.R. (2d) 783. In this case, at page 788, Zuber J.A. stated the following in his penultimate paragraph :

Criticism could also be foreseen regarding Part XXI's provisions on conditional release. In light of the fundamental justice requirement of the *Canadian Charter of Rights and Freedoms*,<sup>48</sup> the process of having the court rather than the National Parole Board review a dangerous offender's parole application arguably may be regarded as a more just proceeding under the circumstances of an indeterminate sentence. At present, while the dangerous offender defendant is allowed to have a lawyer assist him at his hearing, the extent of this assistance is limited by regulations under the *Parole Act* and Parole Board policy. Because of the serious consequence of possibly having to wait a further two years following the initial unsuccessful attempt to obtain parole, a normal open court setting would amply provide the offender with an opportunity to present his case thoroughly. Such procedure would provide greater judicial awareness of the effects of indeterminate sentences.

Formal procedures could be devised and implemented, setting out the manner in which the parties will state their case. Provisions within Part XXI could also be enacted to assist the judge in his decision as to whether parole should be granted. Furthermore, mechanisms for appeal could be established. Rigorous judicial supervision of indeterminate sentences would ensure that reports submitted to the court regarding the treatment received by the offender, his behaviour in the correctional facility, his current condition and prognosis for release under certain circumstances would be properly presented. Furthermore, such reform would provide an offender with what may be considered as an added protection in that his case would be receiving a « fresh look » after an initial period has passed.

While one may argue that the National Parole Board should continue to review these cases since the considerations are the same in determining whether other parole applications ought to be granted, it should be remembered that an automatic date for mandatory supervision does not apply to persons given indeterminate sentences under the provisions of Part XXI. Therefore, potential for parole release depends entirely upon the discretion of the National Parole Board.

In a recent judgment of the Supreme Court of Ontario, Mr. Justice Eugene Ewaschuk rejected the argument that Part XXI of the *Criminal Code* is a violation of the Charter. He concluded :

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« In view of the number of cases in Ontario trial courts in which Charter provisions are being argued, and especially in view of the bizarre and colourful arguments being advanced, it may be appropriate to observe that the Charter does not intend a transformation of our legal system or the paralysis of law enforcement. Extravagant interpretations can only trivialize and diminish respect for the Charter which is a part of the supreme law of this country. »

48. Section 7.

(It) is difficult to comprehend how the dangerous offender provisions of the *Criminal Code* would shock the general conscience so as to be intolerable in fundamental fairness given all the requirements and safeguards written into the process.<sup>48a</sup>

## Conclusion

Whether the legislation regarding dangerous offenders ought to be eliminated altogether, as has been recommended in the past by the Law Reform Commission, deserves substantial consideration. Abolishing the current provisions is a viable option provided that a new sentencing structure could be created that would, within its realm, deal with dangerous offenders. This structure would, hopefully, not categorize such individuals as part of a special and separate group, as is the present situation, but rather as offenders who have committed significantly dangerous crimes, thus becoming liable to certain possible penalties (severe custodial sentences). In view of the availability of life sentences for a wide variety of defences (many of which at present trigger a dangerous offender application under Part XXI), the present sentencing structure is, in the author's opinion, believed to be more than adequate. Hopefully, the effect of such change would eliminate existing regional disparities regarding the use of Part XXI<sup>49</sup> and bring Canadian Law in line with current laws in the United Kingdom,<sup>50</sup> the United States<sup>51</sup> and

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48a. *Re Moore and the Queen*, [1984] 45 O.R. (2d) 3, p. 9.

49. *Supra*, footnote 11. More than half of the « dangerous offender » applications were made in Ontario. The breakdown is as follows: 4 in British Columbia, 6 in Alberta, 1 in Saskatchewan, 18 in Ontario, and 2 in Nova Scotia. Of these dangerous offenders, two (one in Ontario and one in Alberta) were given determinate rather than indeterminate sentences (14 and 10 years respectively).

50. While the old habitual and dangerous sexual offender provisions were modelled on the United Kingdom's provisions, its legislation was repealed by the 1948 *Criminal Justice Act* which limited the use of preventive detention soon after Canada introduced these sections in 1947. Preventive detention was finally abolished in 1967 and replaced by the « extended sentence for persistent offenders ».

51. Recently several U.S. states repealed their indeterminate legislation which was similar to the existing Canadian provisions, following serious civil rights considerations. In 1977, the State of California eliminated indeterminate sentences by amending Chapter 7 of Title I of Part 3 of their *Penal Code*, relating to mentally disordered violent offenders. During the same year, the Governor of Maryland introduced a bill in the legislature which eventually abolished the indeterminate sentence of « defective-delinquents ». Such offenders were defined by the *Annotated Code* of the State of Maryland as persons who, by the demonstration of persistent aggravated anti-social or criminal behaviour evidenced a propensity toward criminal activity, intellectual deficiency or emotional unbalance... as to clearly demonstrate an actual danger to society.



other jurisdictions.<sup>52</sup> Whether such change would be desirable politically is another matter entirely and one which would have to be dealt with by the government in power.

In the event that the dangerous offender provisions continue to exist, or that some form of dangerous offender legislation is retained, the choice of trial and evidentiary procedures will need to be seriously reevaluated, since the failure, injustices and inconsistencies created by the current law results from these procedures.

It is inevitable that Part XXI will be carefully scrutinized in the near future. Hopefully its dark face will be eliminated from the *Criminal Code*, leaving other sentencing options available to deal with dangerous offenders.

To conclude the author provides the following quote by Plato believing that the wise words of this philosopher apply to the situation at hand :

Mankind censure injustice, fearing that they may be the victims of it and not because they shrink from committing it.<sup>53</sup>

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52. Several European and Scandinavian Countries have been eliminating preventive detention under recidivist and dangerous offender legislation. The Danish *Criminal Code* (Preventive Detention for Dangerous Offenders, Section 70) was amended in 1973 and 1975 to substantially limit the category of offenders that could be subject to the «forvaring» (preventive detention sanction). Finland altered its *Penal Code* in 1977 by providing that recidivism is only one of four grounds for aggravating a sentence. While Finland continues to retain legislation pertaining to «dangerous recidivists», it only applies to situations where a history of extreme violence has occurred or been attempted.

53. *The Republic*, Book I, 344-C. Translation by Benjamin Jowett, Oxford University Press.