

SUMMARY OF RECENT CHANGES TO SENTENCING LAW IN CANADA

The *Criminal Code of Canada* states that the fundamental principle guiding sentencing is proportionality, relating to the gravity of the offence, and the degree of responsibility of the offender. Both of these considerations clearly require judicial acumen, as every case is unique. Judges are required to make determination on what constitutes “justice” in sentencing, based on the facts before them, and the circumstances of the offender.

2008 and 2009 have seen dramatic changes in the criminal law in terms of sentencing. Parliament’s attempts to get “tough on crime” in recent years have been focused on reactionary measures, increasing penalties for those who have already offended, rather than preventing crime, or increasing its detection. In doing so, Parliament has introduced two new pieces of legislation that constrain judicial discretion to a considerable degree. Below is a summary of this legislation, and a discussion on the effects each Act has had on judicial discretion with respect to sentencing.

Bill C-2, the “Tackling Violent Crime Act”

In 2008, provisions under Bill C-2, the *Tackling Violent Crime Act*, came into force. As a result, significant changes were made to the *Criminal Code*, affecting sentencing provisions for firearms offences, dangerous offenders, sexual offences, and impaired driving.

Impaired Driving

The mandatory minimum sentences for impaired drivers have increased in severity. For a first-time offence, the mandatory minimum fine has increased from \$600 to \$1000. For a second offence, the mandatory minimum has increased from 14 days in jail to 30 days, and for a third offence, the minimum penalty has increased from 90 days in jail to 120 days.

Firearms Offences

For specific crimes (attempted murder, discharging a firearm with intent, sexual assault with a weapon, aggravated sexual assault, kidnapping, hostage taking, robbery, and extortion), when a restricted or prohibited firearm is used in the commission of the offence, or the offence is gang-related, the amendments mean an increase in the mandatory minimum sentence. For a first offence, the *Criminal Code* now mandates a

five-year jail sentence. For a second or subsequent offence, a minimum sentence of seven years is required.

For “serious firearm-related” offences (including firearm trafficking, possession of the purpose of firearm trafficking, firearm smuggling, and illegal possession of a restricted or prohibited firearm with ammunition), the amendments to the *Criminal Code* mandate a three year sentence for a first offence, and five years on a second or subsequent offence.

Dangerous Offender Applications

When one has been accorded Dangerous Offender Status, she is subject to imprisonment for an indeterminate period of time. Prior to the enactment of the *Criminal Code* amendments under Bill C-2, the Crown was required to prove that an offender’s circumstances warranted this status. Section 753 (1.1) of the *Criminal Code* now indicates a presumption that a person who has been convicted three or more times of a designated violent or sexual offence is a Dangerous Offender, deserving of an indeterminate sentence. The onus is thus shifted to the offender to prove that she does not deserve Dangerous Offender Status.

Bill C-25, the “Truth in Sentencing Act”

Courts are entitled to take a convicted person’s time spent in custody prior to sentencing when determining what an appropriate sentence should be. The common formula used by courts has been 2-for-1 credit for each day spent incarcerated before sentencing.

One reason for applying 2-for-1 credit is that the conditions in a remand centre are often worse than those an offender would experience post-conviction in a provincial institution or a federal penitentiary. (see *R. v. Wust*, 2000 SCC 18. [*Wust*]) It may be argued, however, that providing less incentive for one to remain in remand would reduce overcrowding in centres, improving conditions. The more persuasive argument for the application of this formula is that pre-trial custody is “dead time”, not counting toward statutory remission (entitlement to be released after serving two-thirds) of an offender’s total sentence. (*Wust*)

The introduction of Bill C-25 means that judges will only be permitted to issue a maximum of 1.5 days credit for each day spent in pre-sentencing custody, and that only 1-for-1 credit may be given to persons who were originally detained because of their criminal records, or breaches of bail conditions.

The Supreme Court stated in *Wust* that no precise formula should be applied when calculating the credit to be given for pre-sentencing custody, as a judge is in the best position to determine what is appropriate based on the unique circumstances before her. The effect of this change in sentencing legislation is that judges are less entitled to make decisions on appropriate sentencing based on individual circumstances. Imposing a limit on judicial discretion in this regard fails to recognize the diversity in each offender's pre-sentencing position.