Sexual Predator Laws in Canada

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Eleven-year-old Christopher Stevenson was the victim of a lust murder committed by a volunteer in the youth program that he attended. The offender, Joseph Fredericks, a convicted homosexual pedophile, was in the community on mandatory parole after serving two-thirds of a five-year sentence for sexually assaulting another 11-year-old boy. As a result of the public outcry and media attention surrounding the case, a coroner's inquest reviewed the offense and in the end recommended the establishment of a sexual predator law in Canada. This prompted the striking of a federal task force, which was charged with considering the question of preventative detention of sexual predators in Canada. Task force members represented a variety of constituencies including the Canadian Academy of Psychiatry and the Law and the Canadian Psychiatric Association.

Some members of the task force favored institution of sexual predator legislation paralleling that of the State of Washington Sexual Predator Law.[1] Other members, most notably the psychiatric representatives, argued against the notion on the grounds that the criminal justice system should be responsible for designing legislation that does not place the burden of responsibility for detaining dangerous offenders (DOs) onto psychiatrists. The Justice Department concurred with the psychiatric position and further predicted that such legislation would not survive a constitutional challenge. Although the aim of reproducing the State of Washington Law in Canada was not reached, other recommendations of the task force did find their way into Part XXIV of the criminal code of Canada (CCC),[2] modifying previous DO legislation and establishing a new long-term offender (LTO) category.

As a result of these changes, Canada now has four types of legislation pertaining to the situation in which a sex offender is about to be released from incarceration into the community. The first type is psychiatric gating, an informal mechanism whereby offenders are certified by a physician under the Mental Health Act[3] as requiring detention in a psychiatric facility on the grounds that they present a danger to themselves or others. Second, police may obtain a preventative peace bond with the consent of the attorney general. This bond may be applied at the end of an offender's prison term or parole and can set certain conditions for behavior such as abstaining from alcohol or avoiding parks and playgrounds. The final two measures use DO legislation or LTO legislation.

This article reviews Part XXIV of the CCC, which pertains to the detention and long-term monitoring of convicted sexual offenders, and Section 810 of the CCC, which provides for a preventive peace bond. We begin with a history of DO legislation in Canada. Next, we review the requirements and implications of the new legislation. We will not deal with the issue of psychiatric gating because this requires a separate discussion of mental health legislation in Canada.

History of DO Legislation

In 1947 the Habitual Offender Act[4] was proclaimed as a means of protecting society from any type of repeat offender. Under this act, offenders could be given an indeterminate sentence provided they met the following criteria: (1) had at least three previous convictions in adulthood for which the

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Table 1 DSO Convictions by Province

Province	Criminal Sexual Psychopath			Dangerous Sexual Offender			Dangerous Offender		
	1949–1953	1954–1958	1959–1963	1964–1973	1974–1977	1978–1982 (4 years)	1978–1982	1983–1985 (3 years)	Total
British Columbia	5	4	3	17	9	2	4	12	56
Alberta	3	1		1	3	2	5	4	19
Saskatchewan		2		1	1	1	1		6
Manitoba				2					2
Ontario	4	6	9	7	2	6	16	13	63
Quebec	3		1	3	4				10
Nova Scotia		1				2	2	1	6
Prince Edward Island		1							1
Northwest Territories	1		1	2				1	5

Sources: Greenland[8] and Jakimiec, Poporino, Addario, and Webster.[17]

maximum penalty was at least five years; and (2) led a persistent criminal lifestyle.[5] In 1948 the Criminal Sexual Psychopath Act (CSP)[6] was added to the legislation to specifically target sex offenders. This act defined a criminal sexual psychopath as a person who by a course of misconduct in sexual matters had evidenced a lack of power to control his sexual impulses and who as a result was likely to inflict injury or evil on another person.[7] In 1953, this legislation was modified to expand the definition of the offense from indecent assault and rape to include buggery, bestiality, and gross indecency.[7] When first introduced in 1948, the CSP legislation reflected a lack of confidence in traditional penal methods. The case for indeterminate sentence was based on the premise that it would enhance the protection of the public and through psychiatric assessment and treatment, reduce the offender's assaultive potential.[8]

Criticisms of the CSP included concerns that the term sexual psychopath was vague and unscientific and that obtaining convictions under the Act was exceedingly difficult.[9] As a result the Act was again modified in 1960 and became the prevailing legislation until 1977. The new Dangerous Sexual Offender Act (DSO) changed the term "lack of power to control" to "failure to control" and changed "inflict injury" to "cause injury" and reduced the required number of offenses from three to one.[10] Consistent with the aim of this legislation of increasing the ease with which convictions could be obtained, the number of DO designations did rise in the succeeding years as evidenced on Table 1.[8]

In 1975, proposals to reform dangerous sexual offender legislation were put forward to ease public concern about the abolition of the death penalty in Canada.[9] Different from earlier legislation, the new DSO allowed for either the definite or indefinite detention of a person who was proven in effect to be dangerous.[11] Although the Solicitor General was not obligated to provide psychiatric treatment and prisoners could not be compelled to accept it, it generally was assumed that treatment should be made available to the individuals confined under DSO legislation.[8]

This act remained in force for 20 years and withstood many court challenges. For instance, *R. v. Langevin*[12] challenged the provision to have psychiatric evidence for a DO application, charging that it violated the right against self-incrimination. The judge concluded that such evidence did not violate rights under the Canadian Charter of Rights and Freedoms[13] and further that the psychiatrist was not required to provide a warning regarding possible outcomes of the examination. In addition, a 1987 Supreme Court decision (*R v. Lyons*)[14] found that the legislation did not provide unfairly for an indeterminate detention and further that it did not violate the unfair deprivation of liberty, arbitrary detention, or cruel and unusual punishment provisions of the Canadian Charter of Rights and Freedoms.[9] Finally, in *R. v. Currie*,[15] a Supreme Court decision ruled that the presiding trial judge need not focus on the objective seriousness of the predicate offense to conclude that a DO designation is warranted. The observation that the predicate offenses were of a less serious nature than the accused's earlier offenses in this case did not translate to the conclusion that the DO designation was misplaced, rather that the focus was placed appropriately on the future risk of pain, evil, or injury toward another person.[15]

The DO

The most recent legislation, Part XXIV of the Criminal Code of Canada proclaimed in 1997, slightly attenuated the previous DO Act and added a new category referred to as "the long-term offender" (LTO). Under Part XXIV of the CCC,[16] the criteria for finding an accused person to be a DO follows the example of the previous legislation. Consequently, the language in this act is a compilation of the previous varied legislation leading to relatively cumbersome antiquated linguistics. For the purposes of this article, we have attempted to distill it to its essential characteristics. As a first criterion to be declared a DO, the person must have been convicted of a personal injury offense and found to constitute a threat to life, safety, or physical or mental well being of others according to one of the following criteria: (1) has a pattern of repetitive behavior that shows an inability or a failure to restrain dangerous behavior resulting in the likelihood of causing death, injury, or psychological damage to others; (2) shows a pattern of persistent aggressive behavior and indifference to the consequences of that behavior; (3) has committed an offense of such a brutal nature that one is compelled to conclude that the offender is unlikely to be inhibited by normal standards in the future; and (4) has presented conduct in any sexual matter that has resulted in a personal injury offense, indicating a failure to control sexual impulses and suggesting a future likelihood of causing injury, pain, or other evil by a failure to control sexual impulses.

For the crown attorney to proceed with a DO application, the attorney general's consent is required. After consent is acquired, a mandatory order for a 60-day psychiatric assessment by a mental health expert designated by the courts is issued. Routinely, these psychiatric assessments are performed in provincial psychiatric facilities, which is a source of contention, particularly among defense counsel. A psychiatric report must be made available to the courts within 15 days of the conclusion of this assessment. Although previous legislation allowed the court to nominate one psychiatrist for the defense and one for the crown, the new Act has a provision for the nomination of only one expert. This change, as far as we can discern, is for purely fiscal reasons.

The application for classification as a DO usually is made between conviction and sentencing. However, under the new legislation, the crown has six months after sentencing to raise the issue of DO or LTO if new evidence emerges. For example, after the publication of a conviction, new complainants may emerge with evidence pertinent to the fulfillment of the criteria noted previously. Finally, and of perhaps greatest importance, in contradistinction to the previous legislation, the designation of DO results only in an indefinite sentence. There is no provision for a finite sentence. Once an individual is found to be a DO, the first parole review occurs after seven years and subsequently every two years.

LTO

A second provision made to Part XXIV of the CCC is the new designation of LTO. This new category was mutually agreed on by officials from the Ministry of Justice and psychiatric representatives on the task force. It is our contention that the mental health input provided was influential in shaping this aspect of the legislation. This change in legislation arose from concerns over certain provisions for parole or probation within Canadian law, which limited the ability of authorities to monitor the behavior of individuals at the time of their release from incarceration for severe personal injury crimes. In Canada a probationary sentence can be imposed only if the custodial part of the sentence is for less than two years, after which a sentence of up to three years community probation can be added to the period of incarceration. If an offender is sentenced to two years or longer, he will spend the time in a federal penitentiary (as opposed to a provincial correctional center). However, no term of probation can be attached to the sentence. The new LTO legislation is an opportunity to institute a very structured federal probation for a period of up to 10 years.

The crown attorney can apply for an LTO hearing immediately after conviction or, alternatively, the crown attorney may make the application as a fallback position should a DO application narrowly fail. This designation can be used for any offender, not just sexual offenders, although it is intended for and will likely be used mainly for sex offenders. The conviction must be for an offense for which a period of greater than two years' incarceration is appropriate. The crown must prove that there is a substantial risk of reoffending and the criteria considered are similar to those used in DO proceedings. The crucial difference lies in the fact that the court must find that there is a *reasonable likelihood of eventual control.* There-

Table 2 Provincial Distribution of Offenders Classified as DOs

Province	of Canadian DOs (%)	of Canadian Population (%)
British Columbia	30	13.6
Alberta, Saskatchewan, and Manitoba	18	8
Ontario	42	40.5
Quebec	4	26
Nova Scotia, New Brunswick, Prince Edward Island, Newfoundland, and Labrador	6	8

fore, it is envisaged that this legislation will be appropriate for individuals such as those who have had a history of child molestation but are motivated to seek treatment and have a reasonable chance of successfully resolving their issues and learning to control their abusive behavior. The LTO could be considered a halfway point on the continuum to being designated a DO.

Use of DO Legislation in Canada

According to Corrections Canada (the Federal Ministry of Corrections), currently, there are 219 DOs in the Canadian correctional system. This includes nine offenders who were covered under the Habitual Offender Act and 47 offenders who were sentenced under the Dangerous Sexual Psychopath and the DO Acts (1947–1977). Critics charged that that the Habitual Offender Act had inadequate provisions for release and those held under it were incarcerated for unduly long periods of time even after the legislation was repealed.[17] Consequently, special judicial hearings were held to review the cases of 87 individuals incarcerated under the Habitual Offender Act. Seventy-three of these individuals were found not to meet the criteria of the 1977 Act and thus were pardoned and set free.[18] The remaining 163 DOs presently in custody have entered the system since 1977. Of these 219, five currently are on conditional release. Unfortunately, similar figures are not available for the newer legislation involving LTOs.

Table 2 provides a provincial breakdown of offenders holding the DO designation provided by Corrections Canada. It is evident that British Columbia uses the DO legislation more frequently than other provinces. Conversely, Quebec uses this legislation very rarely. Although there is an increase in crime as one goes from east to west in Canada, the increase is not as significant as these figures would suggest. Disparate use of this legislation probably is attributable to differences within the ministry of the attorney general of each jurisdiction and the willingness of individual crown attorneys and assistant crown attorneys to enter into lengthy and expensive proceedings. The rarity of its use in Quebec, for instance, reflects a policy from the attorney general of that province.

Use of DO legislation has increased steadily in recent years. Between 1977 and 1985 there was an increase of seven and one-half percent per year.[17] It climbed to eight percent per year by 1992.[18] This increase is likely a result of policy considerations rather than any particular change in offenders. The success rate of DO applications has ranged from 82 to 90 percent,[17,18] suggesting that the provision is pursued only in the most serious of cases. From 1977 to 1985, 78 to 84 percent of applications were for sex offenders; it rose to 92 percent in 1998.[17,18] When compared with other violent offenders, DOs were more likely to be white, have more victims overall, and have more female and child victims.[18] According to Corrections Canada, a trend is emerging for the use of the legislation in nonviolent sexual offenders, although empirical data are not available on this point. In addition, there appears to be an increasing trend to use the brutality section in which the brutality of a single offense implies that the accused is inherently dangerous. Consequently, it is anticipated that the use of this legislation will continue to rise, presenting problems for resources within the correctional system and adjunctive mental health services.

The Preventive Peace Bond

A further piece of legislation also was introduced in the current wave of seeking to control the behaviors of dangerous individuals for the safety of others in society. This legislation, Section 810.1 of the CCC, states that any person who fears on reasonable grounds that another person will commit a sexual offense, as specified in the code, against someone who is under the age of 14 years may lay the information before a provincial court judge who has a duty to have the parties appear before him. If the judge finds that there are reasonable grounds for fear, he or she can order the defendant to enter into a recognizance and comply with certain conditions. The code specifically states that provisions may involve (1) prohibiting any contact with persons under

the age of 14 years; (2) prohibiting the defendant from attending a public park or public swimming area where persons under the age of 14 years are present or can reasonably be expected to be present; or (3) attending a daycare center, playground, school ground, or community center, for any period up to 12 months. If the defendant fails or refuses to enter into the recognizance, he may be sent to prison for up to 12 months.

The criminal code only notes two cases of relevance to this legislation. The first case was the 1996 case of *R. v. Budreo*[19] in which the constitutionality of this section was challenged unsuccessfully. The higher court judge noted that this legislation is intended to keep individuals at risk away from their child targets, but he went on to note that the word "fear" must be objectively provable. The learned judge cautioned his colleagues to take care when using this legislation. He believed that the appropriate threshold would be quite high, indicating, on a balance of probabilities, that there is a risk of serious and imminent danger. In the related case of *R. v. Harding*,[20] the information was laid by a police officer regarding Otis Harding who had pleaded guilty to forcing a 12-year-old girl to have sex with him, although he later denied this admission at a hearing regarding his application. He also pleaded guilty to performing activities as a pimp for a 14- and a 16-year-old girl, and sexually assaulting one of these girls.

During the hearing, a psychologist from the penitentiary was called and testified that Mr. Harding was a difficult client who claimed that his activities were related to pimping and denied any sexual offenses. It was noted that phallometric testing was not conclusive with the exception of one positive test related to child sexual violence. He also noted that Harding had a paraphilia and a schizotypal personality disorder with narcissistic and antisocial features. The court heard evidence that actuarial instruments predicted a moderate to high risk of recidivism. Nevertheless, the learned judge found that the evidence fell short of establishing on a balance of probabilities that there were grounds for believing that Mr. Harding would commit a sexual offense on a child under the age of 14 years. The judge noted that the police officer believed that Mr. Harding would become involved in pimping again but found that Section 810.1 is not concerned specifically with pimping activities and that it would be an abuse of the court's authority to use it as such. Although the judge expressed concern about recidivism based on the subject's psychological reports, he found that he could not conclude that there was a reasonably grounded fear of serious and imminent danger, which the section requires. Based on the evidence, including the fast that Harding had served five years in jail, the judge did not believe that the section would significantly reduce any potential danger to the public. If Harding were not already deterred by his last sentence and his knowledge of future penalties, recognizance would not provide any additional protection for the public. Therefore, the application was dismissed.

In practice, this legislation has been used rarely to date. Theoretically, the legislation may apply to someone with no criminal record or criminal charges. However, the courts have made it clear that there is a high threshold for the use of this type of preventative detention or recognizance. Based on the salutary warnings by the judiciary and the resultant hurdles to be crossed, it is unlikely that this section will be used as frequently or indiscriminately as might have been thought. However, it is of note that a special section of the police force in at least one major city has been set up to flag the likely candidates for this legislation and initiate proceedings.

Conclusion

Canadian legislation and practice uses four procedures for dealing with sexual predators. In 1997, a federal task force with input from the Canadian Psychiatric Association and the Canadian Academy of Psychiatry and the Law led to amended sexual predator legislation to create an indeterminate sentence for DOs and include the new category of LTO. LTOs are those sexual offenders who would appear to have a reasonable prospect of successful treatment. Further, a new section that amounts to a preventive peace bond has been enacted for situations in which there is a reasonable fear of a sexual offense. Finally, an informal mechanism of "psychiatric gating" exists, in which a person is certified under provincial mental health legislation and sent to any hospital.

We are seeing an increasing use of DO legislation. Presently, the LTO designation and preventative peace bonds are new and have been infrequently used to date. However, it is anticipated that the use of all these mechanisms will increase as the system becomes more familiar with them. The resulting im-

pact on public safety and on the resources of mental health and criminal justice systems have yet to be seen.

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