



THE DANGEROUS OFFENDER AND LONG-TERM OFFENDER REGIME

Dominique Valiquet
Legal and Legislative Affairs Division

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PURPOSE OF THE REGIME

The provisions applicable to offenders presenting a high risk of recidivism are set out in Part XXIV of the *Criminal Code*⁽¹⁾ (the Code). It is important to note that these rules apply at the sentencing stage on application by the prosecutor after conviction.

The primary objective of this regime is thus to protect the public from offenders who have committed serious sexual or violent offences (except murder) and continue to pose a threat to society. A very high proportion of these criminals have committed sexual offences.⁽²⁾

Within this very limited group, dangerous offenders are, by definition, considered more likely to reoffend than are long-term offenders. Thus, a long-term offender could, after being sentenced to a term of imprisonment of two years or more,⁽³⁾ be released under the conditions of a long-term supervision order;⁽⁴⁾ by contrast, unless a judge directs otherwise, a dangerous offender will have to serve a prison sentence of indeterminate length.⁽⁵⁾

BACKGROUND

In response to the recommendations made in 1938 by the Archambault Commission,⁽⁶⁾ the first habitual offenders act was adopted in Canada in 1947.⁽⁷⁾ An “habitual

(1) R.S. 1985, c. C-46 (s. 752 ff).

(2) Indeed, in roughly 80% and 75% of cases, respectively, the offence that gave rise to the dangerous offender or long-term offender designation (“the underlying offence”) was of a sexual nature (Public Safety and Emergency Preparedness Canada, *Corrections and Conditional Release Statistical Overview*, December 2007, pp. 103 and 105).

(3) Subsection 753.1(3) of the Code.

(4) Of a maximum duration of 10 years (ibid).

(5) Subsection 753(4.1) of the Code. This is “preventive detention.”

(6) Royal Commission to Investigate the Penal System of Canada, *Report of the Royal Commission to Investigate the Penal System of Canada*, Ottawa, 1938.

offender” was a person who had been convicted of three criminal offences. An offender of this type, and, later on, an offender who was a “criminal sexual psychopath,”⁽⁸⁾ could be imprisoned indefinitely. The rules were criticized, however, for applying to non-dangerous offenders as well⁽⁹⁾ and for requiring recidivism as an eligibility condition.⁽¹⁰⁾

Feeling that the applicable regime did not adequately protect the public, the *Criminal Law Amendment Act, 1977*⁽¹¹⁾ started from scratch and enacted the current rules on dangerous offenders. In 1997, the long-term offender category was introduced in order to monitor these offenders in the community on a long term-basis because, even though they present a risk of recidivism, they cannot be qualified as dangerous offenders.⁽¹²⁾

On 2 July 2008, the *Tackling Violent Crime Act*⁽¹³⁾ tightened the rules that apply to dangerous offenders who are repeat offenders. To facilitate the designation of a dangerous offender, this legislation established a presumption that a person who had committed three serious offences was a dangerous offender.

PROVISIONS OF THE *CRIMINAL CODE*

A. The Dangerous Offender Application: When to Present It

A Crown attorney may present a *dangerous* offender application after an offender has been found guilty, but before sentencing.⁽¹⁴⁾ However, if new evidence comes to light, an application can be made up to six months after sentencing.⁽¹⁵⁾

(7) *Act to amend the Criminal Code* S.C. 1947, c. 55. It was inspired by an Act in the United Kingdom, the *Prevention of Crime Act, 1908* (8 Edw. 7, ch. 59).

(8) That is, a person incapable of controlling his sexual impulses (*An Act to amend the Criminal Code*, S.C. 1948, c. 39, s. 43). Subsequent amendments would replace this expression by the term “dangerous sexual offender” (*An Act to amend the Criminal Code*, S.C. 1960–61, c. 43, s. 32).

(9) For example, offenders convicted of property offences.

(10) See, for example, Committee on Corrections, *Report of the Canadian Committee on Corrections: Toward Unity: Criminal Justice and Corrections* (Ouimet Report), Ottawa, 1969.

(11) S.C. 1976-77, c. 53 (came into force on 15 October 1977).

(12) *An Act to amend the Criminal Code (high-risk offenders)*, S.C. 1997, c. 17 (came into force 1 August 1997). This Act also introduced other amendments, such as extending a dangerous offender’s period of ineligibility for parole (from three to seven years) and creating the recognizance to keep the peace for individuals likely to commit serious personal injury offences (s. 810.2 of the Code). We should also note that, in 1995, a national system to detect high-risk offenders was created.

(13) *An Act to amend the Criminal Code and to make consequential amendments to other Acts*, S.C. 2008, c. 6 (Bill C-2).

(14) Subsection 753(2) of the Code.

The initial *long-term* offender application must be submitted before sentencing.⁽¹⁶⁾ It cannot therefore be submitted once the offender has begun serving his or her sentence. However, a long-term offender application that has been converted from a dangerous offender application by the court⁽¹⁷⁾ may be submitted after sentencing.⁽¹⁸⁾

B. Procedural Safeguards

The Crown attorney must obtain the consent of the province's attorney general and give the offender seven clear days' notice before the date of the application hearing.⁽¹⁹⁾ The notice must contain the grounds for making the application.

C. Offender Assessment

Before the court submits a dangerous offender or long-term offender application, experts in corrections and mental health must assess the offender's behaviour in order to establish a psychological diagnosis.⁽²⁰⁾ In the case of a sexual offender, the sexual preferences and deviances will also be assessed. The assessment, which lasts a maximum of 60 days, is based on reasonable criteria for dangerousness⁽²¹⁾ and on the possibility of supervising the offender in the community. The assessment report will be entered into evidence and the experts will be able to testify in court.

(15) Para. 753(2)(b), subsections 753(3) and 753(4.2) of the Code. The Crown attorney will also have to inform the offender of the possible intention to submit an application (para. 753(2)(a) of the Code).

(16) *R. v. Whittaker*, 2005 CarswellAlta 595 (ABPC).

(17) Para. 753(5)(a) of the Code.

(18) In that case, the initial prison sentence stands (subsection 753.1(3.1) of the Code).

(19) Paras. 754(1)(a) and (b) of the Code.

(20) S. 752.1 of the Code. See Solicitor General of Canada, *High-Risk Offenders: A Handbook for Criminal Justice Professionals*, May 2001, http://ww2.psepc-sppcc.gc.ca/publications/corrections/200105_Handbook_e.asp.

(21) For example: preference for children; criminal social environment; mental problems; antisocial tendencies (characterized by impulsiveness, egocentricity, thrill-seeking, inability to control one's actions, as well as a criminal propensity and flagrant indifference to the welfare of others). See James Bonta, Andrew Harris (Solicitor General of Canada) and Ivan Zinger, Debbie Carrière (Carleton University), *The Crown Files Research Project: A Study of Dangerous Offenders*, May 1996, http://ww2.psepc-sppcc.gc.ca/publications/corrections/199601_e.asp.

D. Evidence

Depending on whether it is a dangerous offender application or a long-term offender application that is being considered, the prosecution will have to prove, beyond any reasonable doubt, very specific elements. It will also have to convince a judge sitting without a jury⁽²²⁾ that the offender presents a high risk of recidivism.

In the case of a dangerous offender, the judge will first have to be convinced that the underlying offence constitutes a “serious personal injury offence.”⁽²³⁾ Then it will have to be shown that the offender represents a danger to society. To do that, the prosecution will have to prove that the offender demonstrates a marked indifference to the consequences of his persistent aggressive behaviour, that his or her behaviour is so brutal that it cannot be controlled or that the offender is incapable of controlling his or her actions or sexual impulses and will in all probability⁽²⁴⁾ cause death or other serious injury if he or she is not put in preventive detention.⁽²⁵⁾

The *Tackling Violent Crime Act* adds another means of obtaining a dangerous offender designation.⁽²⁶⁾ It creates a presumption of dangerous offender for some repeat offenders. Therefore, an offender who is convicted for a third time⁽²⁷⁾ for a “primary designated offence”⁽²⁸⁾ is presumed to be a dangerous offender. The offender can rebut the presumption by providing evidence to the contrary on a balance of probabilities.

(22) Subsection 754(2) of the Code.

(23) According to s. 752 of the Code, “serious personal injury offence” means “(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 on another person [for example: incest, manslaughter, conspiracy to commit murder, attempted murder, discharging a firearm, driving while impaired causing bodily harm or death, assault with a weapon or causing bodily harm, aggravated assault, kidnapping, forcible confinement, robbery, arson and weapons or drug trafficking], and for which the offender may be sentenced to imprisonment for ten years or more, or (b) an offence or attempt to commit an offence mentioned in section 271 (sexual assault), 272 (sexual assault with a weapon, threats to a third party or causing bodily harm) or 273 (aggravated sexual assault).”

(24) See *R. v. Currie*, [1997] 2 S.C.R. 260, para. 42.

(25) Para. 753(1)(a) and 753(1)(b) of the Code.

(26) Subsection 753(1.1) of the Code.

(27) The underlying offence and the prior offences, for each of which a term of imprisonment of at least two years was imposed.

(28) The definition of “primary designated offence” in section 752 of the Code contains a list of 12 offences, such as certain sexual offences against minors, sexual assault, attempted murder, assault with a weapon, causing bodily harm and kidnapping, in addition to former sexual offences such as rape and indecent assault.

In the case of a long-term offender, the underlying offence must be, above all, a serious personal injury offence or a sexual offence covered by paragraph 753.1(2)(a) of the Code. The judge will then have to be convinced that there is reason to impose a prison sentence of two years or more, that the offender presents a high risk of recidivism and that there is a real possibility of eventually managing that risk within the community.⁽²⁹⁾

In both cases, evidence concerning the offender's morality or reputation is admissible in court.⁽³⁰⁾ And while prior convictions are not essential to decide that the dangerous offender or long-time offender designation is warranted,⁽³¹⁾ most of these offenders have a criminal record.⁽³²⁾ The prosecution may also enter into evidence behaviour that did not result in a charge.⁽³³⁾ The judge will also examine the offender's previous behaviour to help evaluate the potential dangerousness.⁽³⁴⁾ In order to determine whether the risk can be controlled within the community, the court will consider, among other things, the offender's age, character, family or community support, and the circumstances of the offence.⁽³⁵⁾

E. Sentencing

Unless the court finds that a less severe measure⁽³⁶⁾ will adequately protect the public, a dangerous offender designation will result in an indeterminate prison sentence.⁽³⁷⁾ Thus, no statutory release date is set.⁽³⁸⁾ However, a dangerous offender imprisoned for an indeterminate duration is eligible for day parole after four years' imprisonment⁽³⁹⁾ and for

(29) Subsection 753.1(1) of the Code.

(30) S. 757 of the Code.

(31) *R. v. Langevin*, (1984) 39 C.R. (3d) 333; (C.A. Ont); Solicitor General of Canada (2001).

(32) Ninety-three percent of dangerous offenders and ninety-eight percent of long-term offenders have at least one prior conviction as an adult (Shelly Trevethan, Nicole Crutcher and John-Patrick Moore, *A Profile of Federal Offenders Designated as Dangerous Offenders or Serving Long-Term Supervision Orders*, Correctional Service of Canada, Research Branch, December 2002, p. 21).

(33) *R. v. Neve*, (1999) 137 C.C.C. (3d) 97 (C.A. Alta).

(34) See *R. v. Ménard*, REJB 2002-35993 (C.A. Que).

(35) *R. v. Blair*, (2002) 164 C.C.C. (3d) 453 (C.A. BC).

(36) For example, the imposition of a minimum sentence of imprisonment for a term of two years followed by long-term supervision (para. 753(4)(b) of the Code).

(37) Subsection 753(4.1) of the Code. Many dangerous offenders have been incarcerated for over 20 years (Solicitor General of Canada [2001]).

(38) See s. 127 of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20.

(39) Para. 119(1)(b) of the *Corrections and Conditional Release Act*. In day parole, the offender must return to the correctional institutional or community residential facility each night.

ordinary parole after seven years.⁽⁴⁰⁾ Dangerous offenders who are paroled are monitored for the rest of their lives.⁽⁴¹⁾ If they continue to present an unacceptable risk for society, they will stay in prison for life.⁽⁴²⁾

In the case of long-term offenders, a prison sentence of two years or more⁽⁴³⁾ will be followed by a long-term supervision order (LTSO), of a maximum duration of 10 years, in order to ensure the offender is monitored in the community.⁽⁴⁴⁾ It is important to note that a long-term offender remains eligible for parole. The LTSO does not take effect until the expiration date of the warrant of committal.⁽⁴⁵⁾

While the order is in effect, the long-term offender will have to respect the conditions imposed by the National Parole Board (NPB).⁽⁴⁶⁾ Failure to observe the conditions of an LTSO is punishable by a maximum of 10 years' imprisonment.⁽⁴⁷⁾

(40) After that, the Parole Board will have to assess the offender's file every two years (subsection 761(1) of the Code). In May 2005, out of a total of 336 active dangerous offenders, 17 benefited from some form of parole (Public Safety and Emergency Preparedness Canada, *Dangerous Offender Designation*, http://www.psepc-sppcc.gc.ca/prg/cor/tls/dod-en.asp?lang_update=1).

(41) Solicitor General of Canada (2001).

(42) See ss. 101 and 102 of the *Corrections and Conditional Release Act* and Charles B. Davison, "The Next Step after *Johnson*: The Royal Prerogative of Mercy and Dangerous Offenders," (2003) 13 C.R. (6th) 227.

(43) The court must not take the long-term offender's period of community supervision into account when determining the appropriate term of imprisonment (*R. v. L.M.*, 2008 SCC 31).

(44) Subsection 753.1(3) of the Code. The average length of the prison sentences imposed is a little more than four and a half years (Trevethan et al. [2002], p. 24). In 71.4% of cases, the court imposed a monitoring period of 10 years (Public Safety and Emergency Preparedness Canada [2007], p. 105). The LTSO extends the period of monitoring in the community, because research shows that the recidivism period is longer in the case of sexual offenders (Trevethan [2002], p. 4); see Public Safety and Emergency Preparedness Canada, *Sex offender recidivism*, Research summary, Vol. 9, No. 4, July 2004, http://www.psepc-sppcc.gc.ca/res/cor/sum/cprs200407_1-en.asp?lang_update=1.

(45) Subsection 753.2(1) of the Code. As well, the period required to review an application for pardon (three or five years) will not begin until the LTSO expires (ss. 4 and 4.01 of the *Criminal Records Act*, R.S. 1985, c. C-47).

(46) Subsections 134.1(1) and (2) of the *Corrections and Conditional Release Act*. For example: abstain from consuming intoxicating substances; do not possess a firearm; participate in a program for sexual offenders or a 90-day residency condition (*Normandin v. Canada (Attorney General)*, 2005 FCA 345). The offender or the NPB can ask the court to reduce the supervision period or cancel the order (subsection 753.2(3) of the Code).

(47) Subsection 753.3(1) of the Code. The prison sentence will be served in a penitentiary, even if it is a sentence of less than two years (subsection 743.1(3.1) of the Code). As of 8 April 2007, 23 long-term offenders (out of a total of 194 long-term offenders subject to an LTSO, which represents close to 12%) had been declared guilty of a new offence while they were being supervised under the LTSO (Public Safety and Emergency Preparedness Canada (2007), p. 106). In those cases, the LTSO was suspended until the offender had finished serving the new sentence (subsection 753.4(1) of the Code).

In the case of a dangerous offender who is subject to an LTSO, a later violation of the LTSO can result in a sentence of indeterminate detention.⁽⁴⁸⁾

As a preventive measure, the NPB may even, in order to prevent a potential violation of the LTSO or to protect society, order the offender's imprisonment for a maximum period of 90 days.⁽⁴⁹⁾

The Code allows an appeal of the dangerous offender or long-term offender designation.⁽⁵⁰⁾

PROFILE OF OFFENDERS

A. A Limited Group

Between 1978 and April 2007, a total of 427 criminals were designated dangerous offenders.⁽⁵¹⁾ In April 2007, there were 349 in the prison population.⁽⁵²⁾ While, on average, 15 people a year are designated dangerous offenders, that number has generally increased in recent years, rising from 9 (1978 to 1991) to 20 offenders a year (1992 to 2005).⁽⁵³⁾ According to data collected in April 2007, there were no women in this group, while the Aboriginal population accounted for 23.0% of dangerous offenders.⁽⁵⁴⁾

From 1 August 1997 to 8 April 2007, 441 criminals were designated long-term offenders, an average of some 40 a year.⁽⁵⁵⁾ As of the later date, there were four women in this group. It is worth noting that, according to the 2001 data, the number of long-term offenders has increased continuously since the new provisions came into force in 1997.⁽⁵⁶⁾

(48) S. 753.01 of the Code.

(49) Para. 135.1(1)(c) and subsection 135.1(2) of the *Corrections and Conditional Release Act*.

(50) S. 759 of the Code.

(51) Public Safety and Emergency Preparedness Canada (2007), pp. 103 and 104. A large number of criminals were designated dangerous offenders in Ontario (176) and British Columbia (94), followed by Quebec (43), Alberta (33), and Saskatchewan (33).

(52) Public Safety and Emergency Preparedness Canada, (2007), p. 103.

(53) Public Safety and Emergency Preparedness Canada (2007), p. 103. The lowest number of persons designated dangerous offenders was 3 in 1979 and the highest was 29 in 1997.

(54) Ibid.

(55) Ibid., pp. 105 and 106. The majority were designated long-term offenders in Ontario (119), Quebec (117) or British Columbia (64).

(56) Trevethan et al. (2002), p. 15.

B. The Offences

Many dangerous offenders and long-term offenders are habitual criminals. According to a Correctional Service of Canada report, when they are designated, 45% of dangerous offenders and 26% of long-term offenders have 15 or more previous convictions on their adult record.⁽⁵⁷⁾ And this cycle of criminality often begins at an early age, the average age on first conviction being 22 (dangerous offender) and 25 (long-term offender).⁽⁵⁸⁾ However, the average age at the time of designation is around 40.⁽⁵⁹⁾

When the underlying offence is not a sexual offence⁽⁶⁰⁾ – typically sexual assault or an act of pedophilia – it is still serious⁽⁶¹⁾ and involves violence and coercion,⁽⁶²⁾ typically armed assault⁽⁶³⁾ or kidnapping or forcible confinement.

C. Victims and the Risk of Recidivism

According to the Correctional Service of Canada report, most dangerous offenders and long-term offenders with previous offences have three or more victims.⁽⁶⁴⁾ Female victims predominate.⁽⁶⁵⁾ Given that studies show that the majority of dangerous offenders (49%) and long-term offenders (61%) have victimized children,⁽⁶⁶⁾ and that a preference for children is the most predictive factor of sex offence recidivism,⁽⁶⁷⁾ it is not surprising to learn that 98% of dangerous offenders and 90% of long-term offenders are classified as at high risk to reoffend.

(57) Ibid., p. 21.

(58) Ibid., p. 27. Moreover, according to a 1996 study, 75% of dangerous offenders had a juvenile record and 96.6% showed evidence of forcible sexual activity before the age of 16. What is more, many dangerous offenders admitted committing numerous sexual offences for which they were not charged, an average of 27 (Bonta et al. [1996]).

(59) Trevethan et al. (2002), pp. 19 and 27.

(60) In other words, in 20% (dangerous offenders) and 25% (long-term offenders) of cases (Public Safety and Emergency Preparedness Canada [2007], pp. 103 and 105).

(61) Trevethan et al. (2002), p. 66. The dangerous offenders caused physical injury and serious psychological damage in 31% and 88% of cases, respectively. The percentages are 9% and 89% in the case of long-term offenders.

(62) Ibid., pp. 23, 26 and 60.

(63) Forty percent of dangerous offenders used a weapon while committing the underlying offence (ibid, p. 26).

(64) Ibid., p. 25. In other words, 80% of dangerous offenders and 75% of long-term offenders.

(65) Ibid., p. 26.

(66) Ibid., p. 25. Few offenders in the general prison population have victimized children.

(67) Bonta et al. (1996).