X. SENTENCING

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A. *Introduction*

Bill C-19[1] proposes numerous modifications and some innovations in criminal sentencing which may be viewed as a continuation of the building process in criminal sanctions initiated by the Ouimet Report.[2] Many of the proposals originate from the 1969 Ouimet Report and ensuing discussions. Others have developed as a result of other policies, such as the desire to make the criminal law more responsive to the needs and views of the public. There are proposals, discussed in this paper, that create some difficulty in terms of conflicting policies.

This paper attempts, in the limited space available, to highlight not only the substantive changes proposed for sentencing, but also the shifts in policy which the changes themselves illustrate. Reference is made throughout the paper to both the Ouimet Report and the government policy paper entitled Sentencing,[3] in order to provide a policy framework for discussion.

Initially, the paper examines the first legislative attempt at enunciating the purposes and principles of sentencing. This is followed by a survey of the major changes proposed regarding the sentencing alternatives available to the court. Finally, special attention is given to the proposals dealing with dangerous offenders. This last part presents an opportunity to examine the evolution of these unique provisions in the Criminal Code, from the harsh criticisms of the Ouimet Report[4] through the 1977 amendments[5] which followed the Law Reform Commission of Canada's recommendation that they be abolished,[6] up to the proposed model.

Certain features of Bill C-19 will not be examined. As part of its comprehensive approach to sentencing, the Bill also contains numerous provisions, that is, sections 646 to 658, that deal with evidential and

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[1] Criminal Law Reform Act, 1984, Bill C-19, 32nd Parl., 2d sess., 1983-84 (1st reading 7 Feb. 1984) [hereafter cited as Bill C-19].

[2] REPORT OF THE CANADIAN COMMITTEE ON CORRECTIONS (Ouimet J. Chairman 1969) [hereafter cited as OUIMET REPORT].

[3] DEPARTMENT OF JUSTICE, SENTENCING (1984) [hereafter cited as POLICY PAPER].

[4] *Supra* note 2, at 241-71.

[5] Criminal Law Amendment Act, 1977, S.C. 1976-77, c. 53.

[6] IMPRISONMENT AND RELEASE, WORKING PAPER 11, at 28-31 (1975).

procedural matters at the sentencing hearing. They are extensive and worthy of discussion but space does not permit that here.

In addition, although not contained in Bill C-19, the Policy Paper sets out the government's intention to establish a Sentencing Commission to study and make recommendations regarding some of the more fundamental issues which were not addressed during the sentencing project due to the time constraints placed upon the Department of Justice.

B. *Purposes and Principles*

In an effort to meet a need cited by the Ouimet Report[7] and left unfulfilled since the first Criminal Code of 1892,[8] the proposed sentencing provisions begin with a declaration of purposes and principles in section 645 so as to provide a general policy statement on sentencing that is intended to inform the public and guide judicial discretion. Subsection 645(1) preserves the current judicial position that the fundamental purpose of criminal sanctions is to protect the public, which purpose may be furthered by one or more of several means listed. The Bill, like our courts, rejects a single-theory approach to the aims of sentencing by recognizing a bundle of aims that will lead to the overall goal of public protection. Three of the approaches for protecting the public, deterrence, incapacitation and rehabilitation, repeat both the current judicial position and that of Ouimet,[9] although there is a significant change of emphasis in relation to rehabilitation. Two additional aims are also set out.

With respect to incapacitation, the statement in paragraph 645(1)(b), that there should be separation of offenders from society "where necessary", attempts to emphasize that incapacitation is a matter of last resort, an approach which is consistent with the guidance given in subsection 645(3) containing the principles of sentencing. The Policy Paper points out that incapacitation through imprisonment should be used selectively and with restraint because our ability to predict future criminality is extremely limited and further studies have suggested that the net reduction in crime rates through the use of long and expensive incapacitative sentences would be slight.[10]

Given the fall from favour that the rehabilitative ideal has suffered in the past decade, it is perhaps surprising, but nonetheless commendable, that the Bill refers to it at all. The Policy Paper refers to the debate over the effectiveness of penal sanctions and notes that no firm conclusions can be supported by the research undertaken to date.[11] This

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[7] *Supra* note 2, at 185.
[8] S.C. 1892, c. 29.
[9] *Supra* note 2, at 188.
[10] *Supra* note 3, at 8.
[11] *Id.* at 7.

fact forms an important premise to all the sentencing proposals[12] and leads to the conclusions that more options with greater flexibility must be provided and that jail should be used as little as possible. In relation to rehabilitation the conclusion is that, while its success cannot be positively proven, its benefit has yet to be disproven; thus it is maintained. The proposal on this matter has a new approach that is more realistic yet remains positive in outlook.

Whereas the Ouimet Report held the achievement of rehabilitation as a definite goal, the new proposal has what is at present the more realistic aim of providing opportunities for rehabilitation rather than expecting success in all cases. This stance is also beneficial because, if followed consistently, it would remove the coercive elements of imprisonment and parole.[13] Opportunities would be provided, but success would not be expected. In addition, success itself is redefined. The proposal refers to helping the offender to become law-abiding rather than rehabilitated. The latter term suggests general moral reform based on middle-class values. That kind of reform has created tension and disappointment in the prison and parole systems because inmates' values differ from those of their supervisors. A shift in emphasis to conformity with the law removes the more otiose connotations of the "medical" model. However, there is no indication that this new outlook will be implemented in prisons and during parole where it would have the greatest impact. The proposed Sentencing Commission would have as part of its mandate a liaison with the Corrections Project;[14] this would be one important point of contact that would require a coordinated and unified approach. The Bill itself is consistent with and reinforces this point by stating in subsection 645(3) that one of the principles of sentencing is that a term of imprisonment should not be imposed, nor its duration determined, solely for the purpose of rehabilitation. If genuinely applied, the subsection would address the concern that rehabilitative sentencing now inflates the length of prison terms. At the primary level of deciding whether to impose any jail term, it emphasizes that, since we cannot be sure that jail rehabilitates, choosing incarceration solely on that basis is unjustified and other measures ought to be used.[15] Although this change is realistic and positive, it remains to be seen whether it will be used simply as an excuse to decrease the level of rehabilitative programs. It is interesting to note that, while deterrence cannot be shown empirically to be a valid theory, it has suffered no loss in emphasis. Thus, some courts may take these provisions as a signal to concentrate on deterrence and abandon sensitivity to rehabilitation altogether.

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[12] *Id.* at 8.

[13] *See, e.g.*, the discussion in N. MORRIS, THE FUTURE OF IMPRISONMENT 12-27 (1974) and in Mandel, *Rethinking Parole*, 13 OSGOODE HALL L.J. 501 (1975).

[14] *Supra* note 3, at 67-69.

[15] *Id.* at 38.

Of the two new aims listed in Bill C-19, the first is the promotion of respect for the law through the imposition of just sentences. Of course, this merely begs the question of what a just sentence is, and thereby raises more questions than it answers. However, given the tone of the Policy Paper, which seeks to satisfy public concern over current sentencing standards, it may be interpreted as sending a retributivist signal for higher sentences, which would be contrary to the government's actual concern that present sentences are too harsh, especially the use and length of jail terms. The second aim is the promotion and provision of redress for victims of offences or for the community. This would emphasize the increased concern for victims and encourage the use of the proposed reparative provisions and perhaps of community service orders as well.

Following the provision relating to the purposes of sentencing are statements of sentencing principles which are intended to give guidance as to how the purposes are to be implemented. Subsection 645(2) reaffirms our reliance upon judicial discretion as the means for determining disposition. The issue of the discretionary system is too large to discuss here, as it also was for the Department of Justice. This fundamental question has been left to the proposed Sentencing Commission which will investigate and consider the use of a more structured "guidelines" system. Some implications of continuing the current level of discretion will be addressed below.

The general principles aimed at structuring discretion are contained in subsection 645(3). Most of these merely restate current judicial principles. The first principle, in paragraph 645(3)(a), states that the "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". This principle, together with the second, found in paragraph 645(3)(b), that like cases should be treated alike, embodies the notion of a tariff. It is not certain to what extent Canadian courts employ a tariff system similar to the English one described by Professor Thomas,[16] but the use of some notion of fixing an appropriate sentence within a range determined by aggravating and mitigating circumstances is certain. These two principles do not give any more guidance as to where on the tariff an offence should be placed than already exists. They do not answer the difficult questions inherent in our system, such as what factors may legitimately be considered as aggravating or mitigating. No closed list is possible but examples include such controversial issues as whether a good job, family and social standing should properly be considered in mitigation and whether the fact that a female was socializing with an attacker before a sexual assault should be considered to decrease the gravity of the offence. There is also the problem of what weight should be assigned to such factors. Even at

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[16] PRINCIPLES OF SENTENCING 29-73 (2d ed. 1979).

the most basic level, the Bill does not give any guidance as to what Professor Thomas calls the primary decision: the choice between an individualized and a tariff sentence.[17] In fact the two principles in the Bill imply that all sentences are to be tariff-type sentences. One could not expect all of the above concerns to be addressed in detail in a statute, especially within the time frame of the current proposals; nevertheless, it should be recognized that these principles will not bring about a totally unified approach or solve the problem of disparity as suggested by the government in its Policy Paper.

The third principle in paragraph 645(3)(c) states that "a sentence should be the least onerous alternative appropriate in the circumstances". This is in keeping with one of the main thrusts of the Policy Paper and the overall review of the criminal law by the Department of Justice[18] that criminal law and its sanctions should be employed only to the extent necessary to achieve its ends. Although the principle provides no specific guidance as to what is an appropriate sentence, it does indicate to the courts that sentencing options are to be viewed as a hierarchy, and a minimalist approach is to be taken to them. This view that the options are hierarchical is reinforced by their arrangement in ascending order as will be seen below. The next two provisions, paragraphs 645(3)(d) and (e), repeat the current judicial principles that maximum punishments should be reserved for the most serious instances of an offence, that is, the "worst case" principle, and that "the court should consider the total effect of [a] sentence and [its] combined effect [with] any other sentence imposed on the offender", that is, the totality principle.

Paragraphs 645(3)(f) and (g) seek to guide the exercise of discretion regarding the imposition of imprisonment in an attempt to decrease its use, a concern clearly stated in the Policy Paper.[19] As mentioned earlier, the current proposals clearly depart from the Ouimet Report[20] (which adopted the principles of the Model Penal Code[21]) by ruling out the imposition of imprisonment solely for rehabilitative purposes. The last two principles in the Ouimet Report, which concern the use of incarceration to provide public protection when less restrictive alternatives are inadequate and its use to mark the gravity of the offence, are incorporated in the current proposals. The latter principle may not significantly alter current sentencing practice as it is a matter of discretion whether the gravity of an offence warrants the use of jail, a conclusion too readily reached at present. However, the proposals must

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[17] *Id.* at 8-14.

[18] DEPARTMENT OF JUSTICE, THE CRIMINAL LAW IN CANADIAN SOCIETY 52-53 (1982).

[19] *Supra* note 3, at 8-10.

[20] *Supra* note 2, at 191.

[21] AMERICAN LAW INSTITUTE, MODEL PENAL CODE (Proposed Official Draft, 1962).

be considered as a whole, and perhaps this trend will be offset by the expanded non-custodial measures to be discussed below. In addition, the proposed legislation also states that imprisonment should be used when non-custodial measures would not sufficiently reflect the repetitive nature of the offender's criminal conduct. This may be counter-productive if it leads the courts to conclude that whenever there is repetitious conduct, jail should be used. Surely, regard should be had to the nature of the conduct and the measures that were applied to the offender in the past. As it is now stated, the principle may lead to unnecessary use of imprisonment and place some offenders too high up the "penal ladder" too soon. The basic principle is acceptable but the guidance offered is far too blunt.

Two further principles relating to the use of incarceration are that protection should be provided against violent or dangerous offenders and that offenders should be penalized for wilful non-compliance with the terms of sanctions previously applied to them. The latter principle is intended to balance the widened application of non-custodial measures in the proposed legislation and is necessary and acceptable as long as its emphasis is on wilfulness. However, it would be improved by indicating that the breach should be more than trifling or technical.

Of the several rationales for stating the purposes and principles in the Policy Paper, the most important is the need for Parliament to provide guidance so as to attain a unified, national approach to sentencing.[22] In particular, the Policy Paper concentrates on sentencing disparity. However, the Paper grossly oversimplifies the matter by stating that this disparity has been purely the result of the absence of Parliamentary guidance[23] and, more important, it is naive to assume that the proposed statement of purposes and principles will remedy the matter, since that statement largely repeats the very judicial practices that are said to cause disparity. It is true that, by providing a common point of reference and a framework, the proposed statement may ameliorate some of the variation between jurisdictions caused by the general absence of sentence appeals to the Supreme Court of Canada. However, any divergence in principle at the level of generality expressed in the proposed statement is not the main source of sentencing variation; rather, the main cause is our reliance upon extensive judicial discretion.

It is not possible to discuss here the merits or demerits of judicial discretion in sentencing and how it might be structured. The only point that can be made is that as long as we continue to rely on a relatively unstructured discretion, any concerns over a lack of national uniformity will continue unabated. The Policy Paper acknowledges that case law will continue to add detail and meaning to the purposes and principles set out there. Thus, despite its claim that the framework it provides will be

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[22] *Supra* note 3, at 33.
[23] *Id.*

more substantial than in the past,[24] the Paper offers little prospect of any substantial change. The proposals provide no more structure than exists at present. Professor Hogarth's landmark study[25] indicates that while judges are familiar with the same purposes and principles of sentencing, they have different penal philosophies that cause them to differ both in the emphasis they place upon the purposes of sentencing and in the interpretations and weight they place upon the principles of sentencing and, thus, the facts of any given case. Since the proposed legislation would provide only relatively general guidance and leave the same scope for divergence in application, any claim that it will make a substantial impact is but a pious hope. The proposed statement is worthwhile since it would make the entire sentencing scheme more comprehensive, but it is hardly a fundamental reform. Such will have to await more extensive work of the nature envisaged for the proposed Sentencing Commission.

C. *Sentencing Options*

With some reservations, the most commendable part of the proposed sentencing provisions of Bill C-19 is also the most substantial: that dealing with sentencing options. The thrust of the proposals, as explained in the Policy Paper, is to decrease the inappropriate use of incarceration by promoting the use of other measures. This is to be done by fostering the view that non-custodial measures should be treated as legitimate and independent sanctions, not merely as alternatives to jail. The provisions relating to sentencing options are intended to build upon the sentiments of the opening statement of purposes and principles. This is to be done first by removing some of the present restrictions on the use of non-custodial measures and, second, by creating adequate sanctions to deal with wilful breach of these measures. The latter provision is intended to produce a climate in which these measures will be seen as serious, legitimate alternatives that the courts will be more inclined to employ.

The proposed provisions dealing with sentencing options begin with an overview in section 659, which sets out schematically all of the dispositions available to the courts, ascending from the least to the most serious sanctions in terms of the degree of imposed control. At the most basic level this section provides an outline or index to all that follows. In fact, this entire portion of the Bill is to be commended for its schematic order. However, while the Policy Paper also claims that the section establishes that non-custodial dispositions "are to be viewed as legitimate and independent sanctions",[26] this section contains no wording to this effect and might well be taken to be nothing more than an

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[24] *Id.* at 33-34.

[25] J. HOGARTH, SENTENCING AS A HUMAN PROCESS (1971).

[26] *Supra* note 3, at 44.

index. It would be better if express wording were included either to indicate this intention or to impose an onus upon the Crown to show the necessity of going up each step of the ladder, similar to the operation of section 457 of the Criminal Code relating to the imposition of more onerous release conditions.

The least onerous measures in the hierarchy continue to be the absolute and conditional discharges set out in proposed section 660. These continue to be unavailable to both corporations and those found guilty of offences with minimum punishments or punishments of fourteen years' or more imprisonment. However, although the Policy Paper states that the essential elements of the current discharge provisions have been retained,[27] it is interesting to note that the proposed section removes without any substitution the present provision that discharges be used when it is in the best interests of the accused and not contrary to the public interest. No explanation has been given for this. It may be that the general guidance in the proposed paragraph 645(3)(c) that "a sentence should be the least onerous alternative appropriate in the circumstances" was considered sufficient.

A probation order continues to be required for conditional discharges. Although the proposed legislation generally requires that all probation be supervised, an express exception in subsection 660(2) has been created to allow for unsupervised probation for conditional discharges at the discretion of the court. Any other probation conditions in proposed section 663 (to be discussed below) may be attached.

The only substantial initiative regarding the discharge proposals is an attempt to address the problem that, despite the misleading impression created by the absence of conviction, a discharged offender still acquires a criminal record. Subsection 660(5) removes any disqualification that the offender is subject to by reason of a conviction or discharge and subsections 660(6) and (7) make it an offence for any federal department or agency to request disclosure of a charge or determination of guilt in respect of a discharged offence on an employment application. As acknowledged in the Policy Paper, these measures will be insufficient to remove the anomaly of a criminal record.[28] This issue has been referred to the Clemency Project[29] of the Department of the Solicitor General.

The next proposed sentence in the hierarchy is a new sanction called a conditional sentence, found in section 661. It is similar to the current suspended sentence but differs significantly in that probation is not to be used in conjunction with it. The rationale, as stated in the Policy Paper,[30] stems from the fact that conditional discharges and suspended sentences are at present both tied to probation orders, thereby blurring the

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[27] *Id.* at 45.

[28] *Id.*

[29] DEPARTMENT OF THE SOLICITOR-GENERAL, CLEMENCY REVIEW: ISSUES PAPER (1981).

[30] *Supra* note 3, at 45-46.

qualitative distinction that the former does not entail conviction while the latter does. There is the additional concern that requiring probation with suspended sentences is often unnecessary and wasteful of probation resources. Finally, it was thought that the term "suspended sentence" was inaccurate because, first, during the currency of the probation there is a penal sanction and, second, if the conditions are satisfied, the "suspended sentence" is the actual sentence. Thus, the term "conditional sentence" was chosen so as to accurately reflect the fact that the nature of the sentence is conditional on the satisfaction of certain terms and the fact that it may not be the final sentence if the conditions are not met.

A conditional sentence would be unavailable to corporations and for offences with a prescribed minimum punishment, but there would be no restriction based on the prescribed maximum sentence such as that retained for discharges. Under its terms the imposition of any other sanction would be suspended with the only requirement being that the offender enter into a recognizance without sureties to keep the peace and be of good behaviour for a period of up to two years at the discretion of the court. Not only is there to be no supervised probation, but there are to be no other conditions that might be found in a probation order, beyond the above-mentioned recognizance. The sentence is conditional in the sense that, if the recognizance is breached, under proposed paragraph 668.17(5)(b) the court may re-sentence the offender for the original offence and impose any other sanction.

This proposal represents a positive reform in that it provides a sanction that may be used where it is determined that a discharge would not sufficiently mark the gravity of the offence or would be otherwise inappropriate, and the court is satisfied that probationary supervision is not needed. However, some reservation as to its possible effect will be expressed after the probation proposals are addressed.

As already mentioned, proposed section 662 establishes probation as an independent disposition that need not be tied to any other sanction as is presently required. The current requirement in the Criminal Code,[31] that the court have regard to the age and character of the accused and the nature and circumstances of the offence, is absent in the Bill. Perhaps probation will cease to be a sanction associated almost exclusively with younger offenders, although under the general principles set out in the Bill a court may still decide that it is not appropriate for older people. The proposal would appear to exclude such *a priori* views. The Policy Paper states that probation may be ordered on its own or in addition to any other sanction,[32] but there is no express indication of this in proposed section 662. In subsection 662(2) there is an express ban on its

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[31] R.S.C. 1970, c. C-34, sub. 663(1).

[32] *Supra* note 3, at 46.

imposition in conjunction with imprisonment for two years or more,[33] but the current limitation[34] disallowing the use of probation in conjunction with both a fine and jail is omitted.

Proposed subsection 663(1) changes supervision from a discretionary to a mandatory condition of probation. The two mandatory requirements currently in the Criminal Code[35] are retained in proposed subsection 663(1) and discretionary conditions, which vary somewhat from those in the Criminal Code,[36] are provided for in proposed subsection 663(2). For example, the current condition that the offender abstain from alcohol consumption has been deleted in favour of a condition that the offender submit to treatment for alcohol or drug abuse if necessary and where he is found to be a suitable candidate. This is a sensible shift from unrealistic expectations to more positive assistance in suitable cases. A new addition is the condition that an offender attend a driver education or improvement program, although this is already being imposed in some locations. The current residual clause, which allows any other reasonable condition in the court's discretion, is retained, but there is a new requirement in subsection 663(3) that, whenever this is invoked, the court must provide reasons for so doing. This should encourage more thoughtful use of the residual clause and avoid some of the problems evident in past cases. Breach of the conditions or the commission of a further offence during the term of probation may result in imprisonment for up to two years, where the original offence to which the probation related was an indictable offence, and up to six months, if it was an offence punishable on summary conviction, according to proposed paragraph 668.1(5)(d).

Reservation must be expressed about the conditional sentence and the probation as proposed. The net effect of these proposals may be an increase in the use of supervised probation, not a decrease as intended. Whereas at present supervision is discretionary, it will become mandatory whenever probation is used, and the structure of the proposed conditional sentence may force unnecessary use of probation in some cases. The conditional sentence excludes the imposition of any conditions, and a judge who wishes to impose one or more conditions, other than supervision, will be forced to impose probation, which will in turn entail supervision. It might be argued that any condition should be supervised, but that is not the case at present, nor need it become so. Consequently, the structure of the proposals may cause enough use of probation, and thus of supervision, to outweigh any saving of resources

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[33] Currently para. 663(1)(b) of the Criminal Code refers to a term not exceeding two years. The result of the new provision would be that no one serving a penitentiary term could receive probation.

[34] R.S.C. 1970, c. C-34, sub. 663(1)(b), as judicially interpreted. *See, e.g.*, R. v. Blacquiere, 24 C.C.C. (2d) 168 (Ont. C.A. 1975); R. v. Smith, 7 C.C.C. (2d) 468 (N.W.T. Terr. Ct. 1972).

[35] Present sub. 663(2).

[36] Present sub. 663(2).

that results from the exclusion of supervision from the conditional sentence. Use of probation may also be increased by the fact that, as proposed, intermittent sentences would require probation. This is also true of the present intermittent sentence but currently the probation need not be supervised. Certainly this matter should be considered more carefully; the provinces in particular should be concerned about any potential for increased demand on probation resources. In addition, the gross distinction between the two sanctions means that some offenders will receive the more serious sanction where it is not warranted. Thus, despite the Policy Paper's claim that the difference between the two proposed measures addresses corresponding qualitative differences between offenders and offences,[37] the relationship between them lacks sufficient flexibility. These concerns could be ameliorated by allowing the use of some conditions, other than supervision, in conjunction with conditional sentences, so as to make it a more flexible sanction, yet distinct from probation. Any conditions in a conditional sentence would have to be of a nature not requiring supervision.

Restitution, provided for in sections 665 to 668, is the next sanction contained in the proposals and represents a substantial reform in keeping with the government's concern for victims of crime. The current measures provided in the Criminal Code are complex enough to daunt the most industrious and informed and, hence, have been greatly under-utilized. The measures in the proposed legislation are contained in a single sanction called restitution; there is no longer any reference to "compensation" as there is in the present Criminal Code.

Restitution can be imposed on the court's own motion without an application by the victim, as is presently required, and may be applied to both corporate and individual offenders. The most significant feature of the sanction is that, under proposed section 665, it provides for the making of restitution in a number of different ways, which can be ordered alone or in any combination that is applicable and appropriate. The offender may be ordered to return property or, where that is lost, damaged or destroyed, to pay an amount not exceeding its replacement cost at the date of the order. The sanction has also been extended to include restitution for bodily injury in an amount equal to all special damages plus any loss of income or support resulting from the injury, as long as the value of these can be readily ascertained.

The greatest extension, however, lies in the provision for punitive damages up to a maximum of $2,000 for damages arising out of summary offences and $10,000 for those arising out of indictable offences, if the offender is an individual. If the offender is a corporation, the limit for summary offences is $25,000 but there is no limit for indictable offences. The Policy Paper states that "an award for 'punitive damages' need not

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[37] *Supra* note 3, at 47.

be concerned with the niceties of a specific assessment of quantum".[38] It is suggested that the entire notion of punitive damages is misplaced in criminal law. The Policy Paper states that "restitution as a sanction . . . responds to certain societal needs that may be paramount to those of an individual victim".[39] We already have provided for fines, a punitive monetary sanction, to address societal needs. Punitive damages are no more than fines made payable to an individual instead of to the state and are inappropriate if the individual has already been compensated. Once an individual has been compensated the only remaining needs are societal which should be left to the fine. Punitive damages are particularly inappropriate where a fine is also ordered, as would be allowed by the new proposals.

A further provision, subsection 665(2), would permit a restitution agreement between the victim and the offender for the return of property, payment of money or the provision of unpaid work. However, no punitive damages may be agreed to, as a protection against abuse. Proposed paragraph 665(1)(e) states that the agreement may become an order of the court. As the agreement may be made prior to the sentencing hearing, it may be a mitigating factor which the court will take into account when considering other sanctions.

There are several ancillary provisions, designed to protect third parties who are holders of property in good faith, to give notice to the victim and interested parties prior to disposition, and to provide for payment by instalment, subject to time limitations. One provision that warrants special mention is proposed subsection 667(1), which states that, where a fine or forfeiture is also contemplated by the court and the offender cannot meet both obligations, then restitution is to have priority. A means inquiry and alternative enforcement measures are also provided for and will be discussed below along with fines.

With respect to the fine, the proposed sections 668.1 and 668.11 would remove the current restrictions[40] on its use, thus allowing it to be imposed as the sole sentence for any offence, regardless of the prescribed maximum term of imprisonment. This is in keeping with the objective of not imprisoning non-violent offenders unnecessarily. The amount of the fine is to be at the court's discretion for indictable offences, but for summary offences the maximum for individuals is set at $2,000 (up from $500) and $25,000 for corporations (up from $1,000). This will make it a more credible option, thus encouraging its use. The major thrust of the fine provisions is to confront the high incidence of imprisonment for non-payment of fines with measures designed first to reduce default and, second, to restrict the use of imprisonment in the event of default. Unless the offender acknowledges his ability to pay, an inquiry must be held into both present and future ability to pay before ordering restitution or a fine.

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[38] *Id.* at 49.
[39] *Id.*
[40] Present s. 646.

Proposed paragraph 655(1)(d) states that the inquiry is also to be used to determine the amount and conditions of payment, such as time allowed to pay. At present, a "means" inquiry for fines is only required for young offenders and only upon default,[41] although the case law has held that there should be an inquiry whenever a fine is considered because the imposition of a fine where there are no available means to pay it is improper.[42] Nevertheless, the reform is still significant because that judicial principle is often ignored. Alternative enforcement measures are also provided to help prevent imprisonment for default. A fine option is created under proposed section 668.11, whereby an offender other than a corporation may discharge all or part of a fine with credits earned for performing work during a two-year period. However, it is at the discretion of each province whether to establish such a program and, if established, to determine the rate of credit earned. The option may therefore not be available everywhere, or anywhere, and there may be divergent credit rates. It would be in the interest of the provinces to establish such a program as a less expensive alternative to jail. As a further measure, subsection 668.17(5) proposes that there be no imprisonment for default on restitution or a fine, unless it is without reasonable excuse. However, the offender bears the onus of proving a reasonable excuse and the court need only be "satisfied" that such excuse does not exist. To further prevent unnecessary detention, if no excuse is found the court may still order garnishment or forfeiture but, if necessary, imprisonment may be imposed under paragraph 668.17(5)(e). If a reasonable excuse is shown, the terms, other than the amount due, may be altered to make payment easier, but the Bill does not address genuine inability to pay, whatever the terms. Proposed subsections 668.19(1) and (5) retain provision for pro-rated reduction of a prison term upon part payment of restitution or fine with priority placed on the former. Thus, there is a commendable increase in the means available to reduce default imprisonment.

Community service orders are finally given express and independent statutory recognition, having been a judicial creation to the present time. There is no limitation on them in terms of types of offences; the only requirements are the existence of a provincially created program and satisfaction on the part of the court that the offender is a suitable candidate for such an order. A limit of 400 hours is imposed, to be completed in one year. There is no linkage to a probation order. In contrast to the terms of the sanctions discussed above, there is no alternative means of enforcement provided; under proposed paragraph 668.17(5)(d) wilful breach will lead to a jail term of six months or up to two years depending on the type of offence.

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[41] Present sub. 646(10).

[42] *See, e.g.*, R. v. Snider, 37 C.C.C. (2d) 189 (Ont. C.A. 1977).

Proposed section 668.13 retains intermittent sentences of imprisonment in substantially the same form as at present.[43] The sentence must be completed within one year and probation is required which would entail supervision, which is not required at present. One new feature is the requirement that facilities must be shown to be available before the sanction may be used. This is designed to prevent a recurrence of the situation that has occurred in the past where offenders were released after only a few minutes due to lack of space. The same sanction for breach that is applicable to community service orders applies here as well, with no alternative sanction.

Following the intermittent sentence provisions are several lengthy sections, 668.14 to 668.19, which deal with the variation and enforcement of sanctions. No discussion of these will be undertaken here other than to point out that, except for their substantive aspects, the terms of sanctions may be altered. Some of the enforcement and alternative enforcement provisions have been discussed above in relation to individual sanctions. The thrust of this section of Bill C-19 is intended to ensure that non-custodial sanctions are viewed as credible and effective, so as to encourage their use instead of imprisonment.[44] This portion of the Bill is commendable in that it brings these related provisions together in one organized scheme.

The following provisions of the Bill are also intended to assist in the creation of credible and effective alternatives to custody, but they are less commendable. Bill C-19 proposes that generally applicable forfeiture provisions, sections 668.2 to 668.22, apply where the specific provisions currently in the Criminal Code, which are retained, do not apply. While the current provisions are by and large directed at the subject or the instruments of crime, the proposed sections extend to cover property generally, whether obtained directly or indirectly as a result of an offence. The object is to create a deterrent by taking the profit out of crime.[45] There are also new freezing and seizure powers designed to attach property before a trial so that it cannot be disposed of. A court need only be satisfied on the civil burden of proof that the property comes within proposed subsection 668.2(1). Furthermore, proposed subsection 668.2(3) provides a rebuttable presumption by which property is deemed to have been indirectly realized through an offence where the evidence establishes that the total value of the offender's property is greater after the crime than before it and the increase cannot reasonably be accounted for by legitimate sources. Taken together, these measures are sweeping and may leave the accused in the position of having to defend his title to his entire property. The Policy Paper recognizes the danger of infinite

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[43] The maximum term for which an intermittent sentence may be given is extended to 92 days from 90 days in order to deal with months containing 31 days: *supra* note 3, at 55.

[44] *Supra* note 3, at 55.

[45] *Id.* at 50.

regression in tracing the origin of property yet, questionably, relies upon judicial discretion and proportionality as safeguards.[46]

Proposed subsection 668.2(2) does direct a court to consider any undue hardship resulting from the order, but the potential remains for large scale seizure of the property of those who cannot account for it in a detailed way. This may unduly affect the families of offenders and give offenders who lose their property through these measures the incentive to commit another offence. The forfeiture of property that the Crown can prove, beyond a reasonable doubt and with sufficient safeguards, was obtained through crime or used in its commission is acceptable, but such safeguards are lacking in the Bill. Its scope is far too wide.

D. *Dangerous Offenders*

The Criminal Law Amendment Act, 1977[47] represented a change in form and attitude toward chronic and sexual offenders. Previous provisions of the Criminal Code[48] allowed indeterminate incarceration as preventive detention[49] for either habitual criminals[50] or dangerous sexual offenders.[51] The 1977 changes amalgamated those two provisions into the present section 688, which permits the preventive detention of dangerous offenders. This revision reflected the need for change, particularly in terms of the purpose upon which and parameters within which the criminal law was to operate in determining that an individual was to be incarcerated, potentially for life.[52]

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[46] *Id.* at 51.

[47] S.C. 1976-77, c. 53, s. 14.

[48] S.C. 1953-54, c. 51, *as amended by* S.C. 1960-61, c. 43, sub. 33(1).

[49] Present sub. 659(a).

[50] Present s. 660.

[51] Present s. 661.

[52] The proposed dangerous offender sections generally incorporate the recommendations of the OUIMET REPORT. The REPORT discussed the purpose and major criteria for preventive detention. The purpose is the removal of the offender from society for long periods of time in order to protect the public; the principal justification for such a drastic step should be that the individual is a dangerous offender: *supra* note 2, at 244.

One of the major problems with the habitual criminal provisions was that an offender with a history of repetitive petty, non-violent crimes could be incarcerated indefinitely. In Hatchwell v. The Queen, [1976] 1 S.C.R. 39, 21 C.C.C. (2d) 201 (1974), the accused was sentenced to preventive detention on the basis of 28 convictions for non-violent crimes against property. The British Columbia Court of Appeal dismissed the accused's appeal of sentence in 14 C.C.C. (2d) 556, [1974] 1 W.W.R. 307 (1973). The Supreme Court of Canada (Martland and Ritchie JJ. dissenting) allowed the appeal and set aside the sentence of preventive detention. In so doing, Dickson J. (as he then was) queried whether Hatchwell was a menace to society or merely a nuisance and discussed the policy considerations and the purpose of the habitual criminal sections: [1976] 1 S.C.R. at 43, 21 C.C.C. (2d) at 206:

> These are not easy matters of decision for one must balance the legitimate right of society to be protected from criminal depredations and the right of the man to freedom after serving the sentence imposed on him for the

The further changes proposed in Bill C-19 reflect concerns regarding first, the Charter of Rights and Freedoms,[53] second, reliance upon expert psychiatric evidence to predict with accuracy the proclivities toward future violent behaviour on the part of an accused,[54] and third, the sanction of indeterminate preventive detention and the *prima facie* distinction between violent offences and sexual offences in the definition of a "serious personal injury offence" in section 687 of the Criminal Code.[55] To a large extent a number of the concerns have been addressed and the proposed changes to the dangerous offender provision will bring about more certainty in terms of its procedure, its definitions and the sanction itself.

The major criterion in defining a dangerous offender in Part XXI of the Criminal Code is that the person have been convicted of a "serious personal injury offence". While this requirement has been maintained in the proposals, there are some important changes. No longer will there be a differentiation between crimes of violence and sexual offences.[56] Serious personal injury offences are defined to mean indictable offences punishable by imprisonment for ten years or more, excluding high treason, treason and first or second degree murder, in which there was either the use or attempted use of violence against another person or conduct which endangered or was likely to endanger the life or safety of another person.[57] This definition still includes the sexual offences listed in the present section 687, as well as the violent crimes included in the present definition. The major change in the definition of a "serious

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substantive offence which he committed. Habitual criminal legislation and preventive detention are primarily designed for the persistent dangerous criminal and not for those with a prolonged record of minor offences against property. The dominant purpose is to protect the public when the past conduct of the criminal demonstrates a propensity for crimes of violence against the person, and there is a real and present danger to life or limb.

[53] Constitution Act, 1982, Part I, *enacted by* Canada Act, 1982, U.K. 1982, c. 11. The indeterminate sentence has been challenged unsuccessfully as a violation of ss. 7, 9 and 12 of the Charter. *See Re* Moore and The Queen, 45 O.R. (2d) 3 (H.C. 1984); *Re* Mitchell and The Queen, 42 O.R. (2d) 481, 35 C.R. (2d) 225 (H.C. 1983); R. v. Gustavson, 1 C.C.C. (3d) 470, 143 D.L.R. (3d) 491 (B.C.S.C. 1982); R. v. Simon (No. 3), 38 A.R. 393, 141 D.L.R. (3d) 380 (N.W.T.S.C. 1982). In addition, in R. v. Simon (No. 2), 38 A.R. 390, 141 D.L.R. (3d) 374 (N.W.T.S.C. 1982), it was held that sub. 11(f) of the Charter was not violated because the accused is not entitled to a trial by jury after conviction. (Note: Bill C-19 would remove sub. 689(2) of the Criminal Code which prohibits a jury determination).

[54] *Supra* note 3, at 28, 58-59.

[55] *Id.* at 59.

[56] The sexual offences portion in s. 687 was amended in 1982 to reflect the changes in the Criminal Code respecting sexual offences so that the sexual offences which would now amount to serious personal injury offences are s. 246.1 (sexual assault), s. 246.2 (sexual assault with a weapon, threats to a third party or causing bodily harm) and s. 246.3 (aggravated sexual assault), and attempts to commit any of these offences.

[57] S. 668.3, as proposed in Bill C-19, cl. 209.

personal injury offence'' is that conduct that inflicts or is likely to inflict severe psychological damage upon another person is no longer included. It would appear that, in the reorientation of the dangerous offender provisions, emphasis has been placed exclusively on acts involving or likely to result in serious physical harm to others.

There are also notable modifications proposed for the second portion of the criteria for the determination of a dangerous offender in subsection 668.31(1). When an application is made for a dangerous offender determination after the conviction of an offender for a serious personal injury offence, the court, at the time of the sentence hearing, must be satisfied not only that the offence for which the accused was convicted is a serious personal injury offence, but also that it is either so brutal as to compel the conclusion that the accused constitutes a threat to the life, safety, or physical well-being of others, or is part of a pattern of repetitive behaviour that indicates a failure by the accused to restrain such behaviour and a wanton and reckless disregard on his part for the lives, safety or physical well-being of others. It should be noted that this proposal, once again, removes the consideration of psychological or mental well-being of other persons.

The most notable change arising from the proposed criteria for dangerousness is the emphasis put upon the current risk to society created by the offender's past and present conduct, in contrast to the present provisions, which emphasize the prediction of future risk. Although there are parallel provisions in proposed subsection 668.31(1) and the current section 688, the language in the former does not contain the explicit references to future conduct found in subsection (a) of the latter.[58]

The questionable ability to predict with accuracy an offender's future tendencies towards ''dangerous'' behaviour has been the subject of much discussion.[59] Recognition of this difficulty is also manifested in Bill C-19 by the removal of the requirement in section 690 of the Criminal Code that the court shall hear evidence from at least two psychiatrists at a dangerous offender hearing. This deletion of mandatory psychiatric evidence would appear to further emphasize that a dangerous offender sentence should be based on either the brutal nature of a serious

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[58] For example, para. 688(a)(i) refers to ''a pattern of repetitive behaviour by the offender . . . showing a failure to restrain his behaviour and a likelihood of his causing death or injury to other persons . . . through failure in the future to restrain his behaviour''. In contrast, the parallel wording in para. 668.31(1)(b) states: ''forms a part of a pattern of repetitive behaviour by the offender showing a failure to restrain his behaviour and a wanton and reckless disregard for the lives, safety or physical well-being of others . . .''. Other references to future conduct can be found in paras. 668(a)(iii) and (b).

[59] *See, e.g.*, C. GRIFFITHS, J. KLEIN & S. VERDUN-JONES, CRIMINAL JUSTICE IN CANADA 324 (1980); Price & Gold, *Legal Controls for the Dangerous Offender*, in STUDIES ON IMPRISONMENT 175-84, 205-06 (Law Reform Commission of Canada ed. 1976); *supra* note 6, at 28.

personal injury offence for which the offender has been convicted[60] or a pattern of repetitive behaviour, of which a serious personal injury offence forms a part, indicating both a failure to restrain such behaviour and a wanton and reckless disregard for the lives, safety or physical well-being of others.[61] While there is no prohibition against expert psychiatric evidence in a dangerous offender determination, the position taken in the Bill is that the sanction of life imprisonment for dangerous offenders should be imposed on the basis of what the offender has done, rather than what might transpire in the future. It might then be said that the punishment should fit the crime rather than the offender's potential for crime.

The proposed sanction for dangerous offenders contains two major changes. The first is that the sanction itself will be a mandatory sentence of life imprisonment, in lieu of any other sentence that might have been imposed for the offence,[62] without eligibility for parole until ten years of the sentence have been served.[63] In contrast, the present sanction of detention in a penitentiary for an indeterminate period, in lieu of any other sentence that might be imposed for the offence,[64] amounts to preventive detention, with a possibility of parole three years from the date on which the offender was taken into custody.[65] The change provides certainty for the dangerous offender in that it would mean imprisonment for at least ten years before parole eligibility instead of the possibility of parole after three years and thereafter on subsequent biennial reviews. The change also provides certainty for society, because no longer would it be possible to grant parole to a dangerous offender before the expiration of at least ten years.[66]

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[60] Para. 668.31(1)(a), while similar to the present para. 688(a)(iii), is notably different in that the proposal links the brutal nature of the offence to a "conclusion that the offender constitutes a threat to the life, safety or physical well-being of other persons". The present para. 688(a)(iii) links the brutal nature of the offence to a "conclusion that his behaviour in the future is unlikely to be inhibited by normal standards of behavioural restraint".

It is of course open to the court to conclude that an offender "constitutes a threat . . ." based in part upon conjecture regarding future conduct. However, it appears that the conclusion of a present threat in light of the brutal nature of the offence will be necessary for the imposition of a dangerous offender sentence of life imprisonment.

[61] Proposed para. 668.31(1)(b). Note the similarity to the definition of criminal negligence in sub. 202(1) of the Criminal Code, which states that a person "is criminally negligent who . . . shows wanton or reckless disregard for the lives or safety of other persons".

[62] Sub. 668.31(1), as proposed in Bill C-19, cl. 209.

[63] Bill C-19, subcl. 210(2).

[64] Present s. 688.

[65] Present sub. 695.1(1). Furthermore, sub. 695.1(1) states that the National Parole Board shall review the case not later than every two years following the first review.

[66] The certainty provided to the public may be more form than substance. Since the current dangerous offender provisions came into force in 1977 (and until August

The second change regarding the proposed sanction for dangerous offenders involves the elimination of any discretion on the part of the court. Under the current provisions, the sentencing of a dangerous offender is a two-stage process. The first stage is a status determination, where the individual is found to be a dangerous offender, based upon the criteria given in the section. Although the language of present section 688 states "the court may find the offender to be a dangerous offender . . .", these words have been regarded as mandatory once the court is satisfied that the criteria have been established.[67] The second stage is the imposition of the sentence of detention for an indeterminate period. The language of section 688 with regard to this stage uses the same verb, stating that, once the offender is found by the court to be a dangerous offender, the court "may thereupon impose a sentence of detention . . . for an indeterminate period . . .". This provision however has been interpreted as discretionary rather than mandatory.[68]

Proposed subsection 668.31(1) removes the discretion which currently exists. There does not appear to be a two-stage process in the proposed legislation nor does there appear to be any discretion regarding the imposition of the sanction. If the court is satisfied that the criteria for a dangerous offender have been established, it "shall impose a sentence of imprisonment for life . . .".[69] One can only speculate regarding the possible effect a mandatory life sentence (with its ten-year minimum parole eligibility) will have upon a determination of the "dangerousness" of the offender. However, it should be noted that from the enactment of the current Part XXI in 1977 until August 1983, there were only two cases in which offenders were found to be dangerous yet fixed rather than indeterminate sentences were imposed by the courts.[70] It may be that a court will take into account the propriety of a mandatory life sentence in determining whether the criteria for a dangerous offender have been established to the satisfaction of the court.

One issue, which has caused some difficulty concerning the present dangerous offender provisions, is that of the burden of proof. A number of cases have stated that the burden in determining dangerous offender status is the same burden imposed upon the Crown in proving guilt, that is, proof beyond a reasonable doubt.[71] The difficulty with proof beyond a

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1983) there have been 36 successful applications under Part XXI and "none [of the dangerous offenders] has been granted any form of unescorted conditional release", *supra* note 3, at 57.

[67] Carleton v. The Queen, 32 A.R. 181, at 187, [1981] 6 W.W.R. 148, at 154-55 (C.A.) (McGillivray C.J.A.); *id.* at 205, [1981] 6 W.W.R. at 171-72 (Clement J.A.).

[68] *Id.* at 188, [1981] 6 W.W.R. at 155 (McGillivray C.J.A.); *id.* at 205-06, [1981] 6 W.W.R. at 172-73 (Clement J.A.).

[69] Sub. 668.31(1), as proposed in Bill C-19, cl. 209.

[70] *Supra* note 3, at 57.

[71] *See, e.g.*, Carleton v. The Queen, *supra* note 67, at 214-15, [1981] 6 W.W.R. at 181 (McGillivray C.J.A., Lieberman, Prowse and Rowbotham JJ.A. concurring); *id.* at 215, [1981] 6 W.W.R. at 182 (Moir J.A. dissenting on other grounds). However,

reasonable doubt in a Part XXI determination proceeds from the use of the words "established to the satisfaction of the court" in present section 688[72] and that section's requirement of a prediction of future dangerousness.[73] Proposed subsection 668.31(1) maintains the requirement that the criteria be "established to the satisfaction of the court". It is suggested that this provision should not create a significant difficulty in terms of the burden of proof, since only Clement J.A. in *Carleton v. The Queen* has characterized those words as creating a different burden of proof than that of proof beyond a reasonable doubt.[74]

The requirement of proof beyond a reasonable doubt as it applies to forecasts of future behaviour has created some confusion. The problem arises because the requirement reveals an inherent contradiction in that the court must be satisfied beyond a reasonable doubt that there is a likelihood that the offender will cause injury or death for example.[75] Since it appears that proposed subsection 668.31(1) no longer requires such a prediction, it can be concluded that the concerns or confusion regarding a lessening of the burden of proof from beyond a reasonable doubt, which arose because of the use of words such as "likelihood" and "unlikely" in present section 688, will no longer be in issue. The Crown would be required to prove beyond a reasonable doubt the present "dangerousness" of the offender under the terms of proposed subsection 668.31(1).

A note[76] should be made of a procedural change proposed regarding notice. Paragraph 668.31(2)(b) would require that notice, that an application for a dangerous offender hearing will be made if there is a

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McDermid J.A. stated, *id.* at 191, [1981] 6 W.W.R. at 158, that proof beyond a reasonable doubt of a likelihood is equivalent to proof on a balance of probabilities and Clement J.A. stated, *id.* at 197-202, [1981] 6 W.W.R. at 164-68, that the wording of s. 688 of the Criminal Code indicates in clear and unambiguous terms the directive of Parliament that the burden of proof upon the Crown is "to establish to the satisfaction of the court". It should be noted that Clement J.A. did state, *id.* at 200-01, [1981] 6 W.W.R. at 167, that, by whatever standard of proof to be applied, he could find no trace of doubt on the part of McDonald J. at the court below.

See also R. v. Jackson, 46 N.S.R. (2d) 92, at 97, 61 C.C.C. (2d) 540, at 544 (C.A. 1981) (Hart J.A.); R. v. Klassen, 1 Sask. R. 419, at 424 (C.A. 1980) (Hall J.A.); R. v. Butler, 41 C.C.C. (2d) 410, at 412 (Alta. S.C. 1978) (O'Byrne J.).

[72] Carleton v. The Queen, *supra* note 67, at 197-202, [1981] 6 W.W.R. at 164-68 (Clement J.A.).

[73] *Id.* at 191, [1981] 6 W.W.R. at 158 (McDermid J.A.); *id.* at 214-15, [1981] 6 W.W.R. at 181-82 (Moir J.A.).

[74] *Id.*

[75] The requirements for prediction of future harm have been discussed at note 58 *supra*.

[76] One other minor procedural change is proposed. Para. 668.31(2)(a) would require the personal consent in writing of the Attorney General of the province before the hearing of a dangerous offender application. The present para. 689(1)(a) does not require the "personal" consent of the Attorney General nor does it require that the consent be in writing. Instead, sub. 689(4) provides for a presumption of authenticity of documentation purporting to contain the consent of the Attorney General.

conviction, be given by the prosecutor to the offender or to counsel before the offender has pleaded to the offence. No similar notice requirement is contained in the present Part XXI. While this change may provide the offender with adequate notice before possibly entering a guilty plea,[77] it is also conceivable that the notice requirement could become a useful tool in plea bargaining.

The dangerous offender provisions of Bill C-19 may be viewed as another progression in restricting the application of this unusual measure to those who present a danger to society by the commission of acts that involve violence or that endanger the physical well-being of others. Persons who have caused serious physical injury to others and are a current risk because of the brutality of their conduct or the repetitive nature of their acts will be determined to be dangerous offenders. For them, the proposals have, in effect, created a different sentencing alternative which will impose a minimum punishment of life imprisonment with a guaranteed ten-year incarceration. While the incapacitative and retributive aspects are clear, so too is the abandonment of the possibility of rehabilitation within that decade.

E. *Conclusion*

The sentencing provisions of Bill C-19 represent a timely attempt to take a holistic approach to criminal sanctions. Furthermore, they indicate a movement toward a positive role for Parliamentary guidance in an area of criminal law which has previously been left to the discretion of the judiciary. However, the guidance offered is hardly substantial, as it relies heavily upon current judicial norms. In substance, there is a noticeable shift away from an emphasis upon rehabilitation in the imposition of custodial sanctions. The proposed hierarchical arrangement of sentencing alternatives in section 659, together with the statement of purposes and principles and the nature of the alternatives themselves, indicates that imprisonment is to be employed as a last resort, in those situations in which a lesser sanction would create an undesirable danger to society.

However, the proposed changes presuppose an ability on the part of the courts to make neat distinctions that will easily indicate the proper sanction to be applied. It is questionable whether Bill C-19 provides sufficient guidance to enable such compartmentalization. It is suggested that, in order to achieve such an objective, a more detailed and comprehensive investigation, as proposed by the establishment of the Sentencing Commission, is required.

Furthermore, the general guidelines do not present a clear focus. The proposals appear to be sending contradictory or mixed messages regarding the principles to be utilized in sentencing. Bill C-19 attempts to

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[77] *Supra* note 3, at 59.

grapple with penal theory and the results of numerous studies that lean toward a lesser reliance upon extended periods of incarceration on the one hand, and the public demand for more severe custodial sentences on the other. The balancing of these divergent viewpoints is not an easy task and, politically, may not be achievable.