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MANDATORY INDETERMINATE SENTENCES UNDER DANGEROUS OFFENDER LEGISLATION

JENNIFER SOWARD[†]

I. INTRODUCTION

On September 17, 1996, Allan Rock, Minister of Justice and Attorney General of Canada, and Herb Grey, Solicitor General of Canada, announced "tough new measures"¹ to deal with dangerous offenders. These measures were introduced in Bill C-55, which received Royal Assent on April 15, 1997. The following comment focuses on only one significant change to the dangerous offender legislation.² As part of these measures, the new section 753(4) of the *Criminal Code* removes a judge's discretion to award a determinate sentence once an accused is found to be a dangerous offender. This discretionary power is which existed in the former legislation replaced with a mandatory indeterminate sentence imposed once an offender is labelled a dangerous offender.

First, this comment briefly examines the application process and the procedure formerly involved with the dangerous offender provisions of the *Criminal Code* prior to the Amendment.³ This will serve to demonstrate the procedures and safeguards the courts must follow when labelling an accused a dangerous offender.

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¹ Government of Canada, Press Release "Government Announces High-Risk Offenders Initiative" (17 September 1996).

² *An Act to amend the Criminal Code (high risk offenders), the Corrections and Conditional Release Act, the Criminal Records Act, the Prisons and Reformatories Act and the Department of the Solicitor General Act*, S.C. 1997, c. C-17 [hereinafter "the Amendment"]. This amendment partially came into force on July 3, 1997 and the balance came into force on August 1, 1997. As of yet, there has been no litigation on the new dangerous offender legislation.

³ The dangerous offender provisions are contained in Part XXIV of the *Criminal Code*, R.S.C. 1985, c. C-46, ss. 752-761 [hereinafter "Part XXIV"].

This comment will then use two cases⁴ to illustrate the expansive use the courts are making of the dangerous offender legislation.

After a discussion of the purpose of the amendment, this comment turns to an examination of the *Canadian Charter of Rights and Freedoms*⁵ and the potential for new *Charter* challenges arising from the amendment. An expansive use of Part XXIV coupled with the mandatory indefinite sentence could result in the violation of an accused's *Charter* rights. It is likely that the courts will find a violation of section 7 of the *Charter* based on the Supreme Court of Canada's decision in *R. v. Heywood*.⁶

Subsequently, this comment analyzes the Supreme Court's past reasoning on certain issues with respect to section 7 and section 12 *Charter* challenges. The issues considered include the reliance of the courts on unreliable psychiatric evidence and faulty procedural safeguards. The discussion involves looking at how the Court has justified Part XXIV of the *Criminal Code* in the past and how some of these justifications may no longer be available since the passage of the amendment.

The final section provides recommendations to address the real dangers of a mandatory indeterminate sentence and possible opportunities for new *Charter* challenges.

II. DANGEROUS OFFENDER DETERMINATIONS UNDER THE FORMER PROVISIONS

The provisions in Part XXIV of the *Code* prior to the Amendment provide an extraordinary remedy for a specific class of criminals. Dangerous offenders are considered a "small minority of offenders who are not specifically deterred or reformed by ordinary punishment and who pose a serious risk to the mental or physical

⁴ *R. v. Neve* (1995), 160 A.R. 255 (Q.B.) [hereinafter *Neve*] and *R. v. Gaudry* (1996), 186 A.R. 91 (Prov. Ct) [hereinafter *Gaudry*].

⁵ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter the *Charter*].

⁶ [1994] 3 S.C.R. 761 [hereinafter *Heywood*].

well-being of other members of society.”⁷ It is important to understand the requirements and the procedure used under the former legislation to label an accused a dangerous offender in order to appreciate the impact of the Amendment.

An old dangerous offender application had four main aspects. First, the Crown had to prove beyond a reasonable doubt that the accused had been convicted of a “serious personal injury offence” which was appropriately linked to the type of “dangerousness” the Crown intended to prove. Second, “dangerousness” had to be proved beyond a reasonable doubt based on the requirements listed in section 753. Third, the court had to determine whether the accused was a dangerous offender based primarily on the psychiatric evidence presented to the court during the course of the hearing without regard to the probability of a cure. The court did have the discretion to refuse to designate an offender as dangerous, even in circumstances where all of the psychiatric criteria were met.⁸ Finally, the court had to decide whether a determinate or indeterminate sentence would be imposed.

As is still the case following the amendment, these accused had to be found guilty of an offence defined as a “serious personal injury offence” in section 752 of the *Code*.⁹ These offences can be one of two types: one, an indictable offence (other than murder or treason) with a maximum prison sentence of ten years or more where there is the use or attempted use of violence against another person, or conduct endangering or likely to endanger the life or safety of another person or inflicting or likely to inflict severe psychological damage upon another person; or two, an offence or attempt to commit an offence under sections 271 (sexual assault), 272 (sexual assault with a weapon, threats to a third party or causing bodily harm) or 273 (aggravated sexual assault).

Only after the accused had been found guilty of one of the offences mentioned above could an application be made by the Crown to have the offender labelled “dangerous”; again, this is still

⁷ W. N. Renke, “Case Comment: Lisa Neve, Dangerous Offender” (1995) 33 *Alta. L. Rev.* 650 at 654.

⁸ *R. v. Lyons*, [1987] 2 S.C.R. 309 at 328.

⁹ *Criminal Code* s.753(1)(a).

the case with the enactment of the amendment. However, the application had to be made before the offender was sentenced.¹⁰

The third stage of the application process involved, and still does, the Crown proving beyond a reasonable doubt that "the offender constitutes a threat to the life, safety or physical or mental well-being of other persons" on the basis of evidence proving:

(i) a pattern of repetitive behaviour by the offender, of which the offence for which he has been convicted forms a part, showing a failure to restrain his behaviour and a likelihood of his causing death or injury to other persons, or inflicting severe psychological damage on other persons, through failure in the future to restrain his behaviour,

(ii) a pattern of persistent aggressive behaviour by the offender, of which the offence for which he has been convicted forms a part, showing a substantial degree of indifference on the part of the offender respecting the reasonably foreseeable consequences to other persons of his behaviour, or

(iii) any behaviour by the offender, associated with the offence for which he has been convicted, that is of such a brutal nature as to compel the conclusion that his behaviour in the future is unlikely to be inhibited by normal standards of behavioural restraint.¹¹

The fourth stage of the process under the previous dangerous offender legislation involved consideration of whether a determinate or indeterminate sentence would be awarded to an offender labelled "dangerous". The court was to look at several factors including the protection of the public, the possibility of recidivism, and the possibility of cure and treatment, and was to base its final decision on the evidence put before it during the course of the hearing. The process involved balancing the protection of the public with the offender's individual circumstances. This is no longer the case with the introduction of the Amendment. Now,

¹⁰ *Criminal Code*, s.753(2). This section allows the Crown to file an application up to six months after the imposition of the sentence.

¹¹ *Criminal Code*, s.753 (a)(i)-(iii).

a court must impose an indeterminate sentence once an offender has been labelled "dangerous".¹²

As a result of the severity of the punishment under the old dangerous offender legislation, there were several procedural safeguards set up within the system to protect the accused. For example, section 754 required the Attorney General of the province to approve the application, and the offender had to be given seven days notice of the dangerous offender application. This safeguard was left untouched by the amendment. In addition, two psychiatrists were appointed pursuant to section 755 to evaluate the offender; one was chosen by the Crown and one by the offender.¹³ Another safeguard involved a statutory right of appeal available under section 759 against the sentence handed down (i.e. an indeterminate detention), but not the finding of "dangerousness".¹⁴ Finally, for those offenders found to be "dangerous" and incarcerated indefinitely, section 761 provided a parole eligibility review every two years after three years of incarceration had been served.¹⁵

In summary, the current and former legislation concerning dangerous offenders is drafted broadly and is therefore open to inconsistent application. The most significant change from the old procedure is the removal of the court's discretion to choose the sentence it saw fit. Formerly, when the accused was labelled "dangerous", the court had to then balance the interests of society and the individual offender in determining an appropriate sentence. The trend in the case law is towards an expansive use of the courts powers to declare an accused a dangerous offender.

¹² *Criminal Code*, s.753(4).

¹³ This section was replaced by s. 757 which allows the offender, with the court's permission, to tender evidence as to his or her character and reputation. Furthermore, s. 755 has been amended by s. 752.1(1) which limits the psychiatric assessment. It dictates that the court may order a psychiatric assessment to be done by one psychiatrist (or expert) as selected by the court. Clearly, this presents a host of other problems.

¹⁴ *R. v. Langevin* (1984), 45 O.R. (2d) 705 at 710 (C.A.). This is amended now as a result of the new s. 759(1) and again gives rise to potential litigation.

¹⁵ This section was also repealed and replaced by s. 761(1) so that the first review is seven years after initial incarceration as opposed to three years.

III. HOW THE COURTS EXPANDED THE USE OF THE FORMER PROVISIONS

Between 1977 and 1995, there have been approximately 176 successful dangerous offender applications under the former legislation.¹⁶ The question that naturally arises is why a successful application is brought against one offender and not another? One possible answer is that "the label of dangerousness is a political choice. It is a reflection of the degree to which we are willing to infringe on the liberty of others for the benefit of society as a whole."¹⁷ In other words, since a court has the discretion to label an accused dangerous, the definition of "dangerous" tends to reflect society's or a particular decision maker's beliefs and experiences. For example, the Supreme Court of Canada had at one point used earlier forms of the dangerous offender legislation to label consensual homosexual activity as "dangerous".¹⁸ This clearly illustrates the breadth of discretion that was given to courts under the former legislation.

The case of *R. v. Neve*¹⁹ is an interesting example of a court interpreting the dangerous offender provisions broadly. The accused's crime was probably not one against which the provisions of Part XXIV were originally intended to be used. How then, did the court decide the accused was dangerous?

In Lisa Neve's hearing, the judge chose to interpret the evidence of Lisa's entire criminal past, including her criminal records, Alberta Hospital records, young offender centre records, and written documents, as supporting the notion that Neve was both a "psychopath" and "male lust murderer".²⁰ The first problem with the characterization as a "male lust murderer" is the fact that she was never convicted of, or even charged with, murder. The dangerous offender application made against the 22-year old was a result of her conviction for aggravated assault. Despite the fact that over the course of her life, she was charged a number of times for offences such as break and enter, uttering threats and assault with a weapon, there were never any "serious personal injury offences"

¹⁶ *Supra* note 7.

¹⁷ I. Grant, "Dangerous Offenders" (1985) 9 Dalhousie L.J. 347 at 368.

¹⁸ *Klippert v. R.*, [1967] S.C.R. 822.

¹⁹ *Supra* note 4.

²⁰ *Supra* note 7 at 669.

committed as defined in section 752 of the *Code*. Murray J.'s comparison to a murderer is believed to be based on the following line of reasoning: "a murderer would be dangerous, Neve is the equivalent of a murderer, therefore Neve is dangerous."²¹ This is significant as it shows the Judge in this particular dangerous offender hearing is basing his decision on a false premise, instead of the facts presented to him, to find the accused "dangerous".

The second problem with finding Neve a "psychopath" and "male lust murderer" is the fact that neither of these terms are diagnostic terms according to the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders*,²² nor are they considered to be necessary conditions of "dangerousness". Essentially, the Court here is accepting psychiatric terms which are not even accurate. Such a lack of scientific recognition "casts doubt on the appropriateness of the use of [psychological terms] in a legal setting, where the liberty of the offender—indeed the rest of the life of the offender—depends on accuracy."²³

Renke, clearly sees the potential dangers of this legislation being used to catch the wrong offenders: "Neve should've been punished as an ordinary offender, not as one of the special, small criminal class the dangerous offender provisions were designed to control."²⁴

When comparing Neve's conduct with that of other offenders who have been labelled "dangerous" by courts, this particular dangerous offender hearing becomes even more of an anomaly. For example, some accused have been found to be dangerous offenders based on convictions for the following: indecent assault, attempted rape, and rape.²⁵ As well, accused have been declared dangerous offenders where they have been convicted of numerous sexual offences involving young girls over a twelve year period,²⁶ nine counts of indecent assault and ten counts of sexual assault upon nineteen different children over a period of fifteen years involving

²¹ *Supra* note 7 at 671.

²² 4ed. (Washington, D.C.: American Psychiatric Association, 1994).

²³ *Supra* note 7 at 672.

²⁴ *Supra* note 7 at 676.

²⁵ *R. v. Gustavson* (1982), 143 D.L.R. (3d) 491 (B.C.S.C.).

²⁶ *R. v. Jones* (1994), 30 C.R. (4th) 1 (S.C.C.).

children ranging in age from six to fifteen.²⁷ Such examples hardly compare to Lisa Neve's one charge of aggravated assault.

The *Neve* case simply illustrates the problem with a court's ability to find "dangerousness" at their discretion. One hypothesis is that the courts are simply lowering the "dangerousness" threshold for women because they are not as likely to commit serious and heinous crimes in the same numbers as men. If this is the case, it demonstrates how broad and expansive the powers granted to the courts under the dangerous offender legislation actually are. The concern is that a court may incarcerate someone indeterminately based on false premises, extraneous facts and unrecognized terms.

Nevertheless, the expansive use of the dangerous offender legislation may in fact be desirable. For example, an Alberta Provincial Court judge in *R. v. Gaudry* recently found a chronic wife-beater to be a dangerous offender. *Gaudry*, however can be contrasted with *Neve* since there was a history of repeated violent behaviour and thirtyseven domestic-violence convictions since 1981, including ten in eight years against the accused's common-law wife. It was even noted by the Court that dangerous offender proceedings are generally reserved for murderers, rapists and paedophiles, but that courts "must clearly recognize" the effects of long-term domestic abuse.²⁸ Justice Chisholm explained that he was satisfied, in a case such as this, that the provisions of the *Code* are "available to deal with an individual whose behaviour toward another, in a domestic context, is such that the entire relationship is comprised of long-term, repetitive acts of violence."²⁹ Few would argue that the expansive use of the court's discretion in *Gaudry* was undesirable. It is a reflection of society's need to deal effectively with domestic violence. However, there is still concern that the same discretion may be used against an accused not so deserving.

The key element in both cases is the broad use of the former legislation by the courts when applying their discretion to label offenders "dangerous". Arguably, courts are using the dangerous offender legislation to catch individuals that the original legislation may not have intended to catch. According to at least one

²⁷ *R. v. Noyes* (1986), 6 B.C.L.R. (2d) 306 (S.C.C.).

²⁸ B. Daisley, "Chronic Wife Abuser Declared Dangerous Offender" *The Lawyers Weekly* (20 September 1996) 3.

²⁹ *Ibid.*

commentator, however, the legislation was broad enough and should have simply been used with caution.³⁰ It was significant that in the former legislation, the court's wide discretion to label offenders was coupled with the option of sentencing the offender to a definite period of time. As a result of the amendment, a court no longer has this option. Instead, an indefinite sentence is required if the offender is found to be a dangerous offender. Thus, there is a danger that mandatory indefinite sentences coupled with an expansive use of the dangerous offender legislation would cast the net too wide, resulting in the courts catching offenders who do not necessarily deserve to be locked up indefinitely.

IV. THE PURPOSE OF THE AMENDMENT

Minister Allan Rock described the purpose of this amendment to be the promotion of community safety. He stated "[in] bringing forward these measures to control high-risk offenders, we are...making more progress on our Safe Homes Safe Streets Agenda. These measures will enhance public safety in this country..."³¹ In other words, the imposition of a mandatory indeterminate sentence as per section 753(4) is an effective means of promoting long term protection of the public.

This assertion is problematic. As illustrated, the expansive use of the former legislation coupled with the mandatory indefinite sentence may have resulted in the violation of an offender's *Charter* rights. With this amendment, there may be new possible *Charter* challenges because of overbreadth, the court's reliance on unreliable psychiatric evidence, the lack of discretion for the court to tailor a sentence, and the court's reliance on faulty procedural safeguards. It must be noted that the potential problems with this amendment, as outlined in this comment, are based on the assumption that the courts will still use the dangerous offender legislation in an expansive manner in labelling an offender "dangerous". However, if this assumption is false, the practical effect of the amendment may be that courts will simply label fewer offenders "dangerous" because an automatic indeterminate sentence would be an inappropriate

³⁰ *Supra* note 7 at 663.

³¹ *Supra* note 1.

punishment for particular offenders. In turn, the purpose of the amendment may be defeated because less offenders would be found "dangerous" who may have otherwise been given this label under the old Part XXIV of the *Criminal Code*.

V. MANDATORY INDETERMINATE SENTENCES - SECTION 7 VIOLATION?

1. Overbreadth

As of 1987, at least eight *Charter* challenges to the former dangerous offender provisions have been initiated. All have failed miserably.³² However, there appears to be potential for a new section 7 *Charter* argument of overbreadth since, under the new amendment the discretion of the court is removed and judges are forced to sentence all persons labelled dangerous offenders indeterminately as prescribed by section 753 (4). Overbreadth is argued when the measures prescribed by law are too sweeping in relation to the objective of the legislation. By removing the discretion to issue a determinate sentence, there is a threat of catching persons in the net who do not deserve to be incarcerated for an indefinite period of time.

That the legislation could have this effect is easily understood when one examines the thought process behind its implementation. Legislators determine the worst case scenario and work from that perspective, whereas the courts come up with the most sympathetic case and work from that end; legislators intervene for the political purpose of articulating public condemnation of specific crimes and courts are uniquely concerned with exceptional cases.³³ The courts therefore act as a check on the Legislature. It is the courts that are concerned with the individual and his or her special circumstances, not the Legislature. Moreover, it is the courts that interpret legislation when looking at its effect on the individual and have the power to decide what will stand and what will fall.

³² R. M. Gordon & S. M. Verdun-Jones, "The Trials of Mental Health Law: Recent Trends and Developments in Canadian Mental Health Jurisprudence" (1987) 11 Dalhousie L.J. 833 at 853.

³³ K. Roach, "Smith and the Supreme Court: Implications for Sentencing Policy and Reform" (1989) 11 S.C.L.R. 433 at 454.

In *Heywood*, the Supreme Court of Canada held that, "reviewing legislation for overbreadth as a principle of fundamental justice is simply an example of the balancing of the State interest against that of the individual."³⁴ Although *Heywood* was not a dangerous offender case, the concerns with respect to overbreadth are applicable to an analysis of section 753(4). The issue in *Heywood* concerned. 179 (1)(b) of the *Criminal Code*, which made it illegal for convicted sex offenders to loiter "in or near a school ground, playground, public park or bathing area."³⁵ The Court found that this provision restricted liberty far more than was necessary to accomplish its goal: to control the impulses of the potential re-offender and to protect the public. As a result, the section was struck down.

With the introduction of the amendment to the dangerous offender legislation, the court is only able to balance the interests of the public and that of the individual when deciding if the offender was "dangerous", as opposed to during the sentencing stage under the old legislation. Once again, this amendment combined with the continued expansive use of Part XXIV, could result in the courts labelling too many offenders "dangerous" and incarcerating people indeterminately that do not deserve such a punishment.

Before the enactment of this amendment, the court decided whether an offender labelled as dangerous could be ameliorated within a determinate amount of time. If so, the determinate sentence was appropriate; if not, an indeterminate sentence was warranted.³⁶ This method of sentencing is no longer an option. The court is not able to give any real weight to the possibility of

³⁴ *Supra* note 6 at 776.

³⁵ *Supra* note 3.

³⁶ *Supra* note 4 at 664. See *R. v. Oliver* (1997), 193 A.R. 241 at 247 (Alta. C.A.). Here the court held that the trial judge did not err by finding the appellant to be a dangerous offender, however did err by not considering whether a determinate sentence would be appropriate. Hunt, J.A., stated, "[the trial judge] imposed an indeterminate sentence without appreciating that he had the discretion to impose a determinate sentence". In addition to this case, the court in *R. v. Hamilton (L.J.)* (1996), 463 A.P.R. 38 at 46 (N.B.C.A.) affirmed the trial judge's recognition of the fact that "[t]he legislation provides that an indeterminate sentence does not automatically follow such declaration, as there remains a residual discretion...to impose a fixed term of imprisonment."

rehabilitation and the purpose of sentencing has become strictly the protection of the public and retribution for crimes committed.

Nonetheless, because of the nature of the crimes and the public's desire to punish these kinds of offenders, there is still a window of opportunity for the court to distinguish *Heywood* from the situation which can arise under the dangerous offender provisions. First, the impugned provision in *Heywood* created an offence, whereas the dangerous offender legislation has clearly been categorized by the Supreme Court of Canada as a sentencing scheme.³⁷ In *Lyons*, LaForest J. held, for the majority, that as this legislation deals only with sentencing, the substantive features are consistent with section 7 of the *Charter* because of the valid penological aim (i.e. protection of the public).³⁸ This was affirmed in later cases by the Supreme Court of Canada³⁹ and seems to be the Court's method of justifying this kind of legislation. The Court simply argues that the notions of fundamental justice are not to be taken as seriously in the sentencing context as in the determination of guilt or innocence.⁴⁰

Another way for the court to distinguish *Heywood* and uphold the validity of mandatory indeterminate sentences would be to follow the court in *Lyons* and argue that "[Parliament] has made a diligent attempt to carefully define a very small group of offenders whose personal characteristics and particular circumstances militate strenuously in favour of preventive incarceration."⁴¹ In other words, unlike the provision in *Heywood*, the dangerous offender legislation is not overbroad with respect to the group to whom it applies.

However, this argument is not as strong as the first one, especially if one refers back to the *Neve* and *Gaudry* cases. Both cases demonstrate how the former legislation was being extended to catch people it was not originally intended to catch. Therefore, for a court to justify mandatory indeterminate sentencing by arguing that Part XXIV carefully defines a group is inherently problematic: this group of offenders is not clearly defined. The

³⁷ *Supra* note 8.

³⁸ *Supra* note 8 at 325.

³⁹ See also *R. v. Jones* (1994), 30 C.R. (4th) 1 (S.C.C.).

⁴⁰ E. Colvin & T. Quigley, "Developments in Criminal Law and Procedure: the 1987-88 Term" (1989) 11 *Supreme Court L.R.* 165.

⁴¹ *Supra* note 8 at 339.

government's attempt to protect the public is desirable. Nevertheless, the *Charter* requires that it must not be at the expense of those who do not deserve indeterminate sentences.

2. Unreliable Psychiatric Evidence

There were numerous problems with relying on psychiatric evidence in a dangerous offender application hearing as the legislation stood before the enactment of the current amendment. However, as the legislation now stands, the real issue becomes: how can anyone ever feel morally certain as to the future likelihood of "dangerousness" beyond a reasonable doubt and jail an accused indefinitely based on unreliable evidence? "We must ask ourselves whether society has the right to act upon a guess - and a highly inaccurate one at that - when such an intrusive means of social control as denial of liberty is involved."⁴²

In the past, offenders have argued that their section 7 rights were violated because "evidence as to the future threat to society or dangerousness is so inherently speculative that it violates the aspect of fundamental justice that evidence to be admissible must have some probative (i.e. relevant or logical) value."⁴³ The evidence referred to here is of course the psychiatric assessments of the accused that are required for the dangerous offender hearing. In *R. v. Langevin*, the court countered this argument by stating that, "while the unreliability studies may affect the *weight* of psychiatric predictions of future dangerousness, they do not affect the *admissibility* of such evidence."⁴⁴

The first problem with this logic is that as soon as an application is made by the Crown, the court's perception of the offender changes and there is more of a likelihood to rely on what "experts" say with respect to the offender's personality and character.⁴⁵ This can lead to the problem of over-prediction. Some studies suggest that once someone has been labelled by a psychiatrist, or some other kind of "expert", as "dangerous", courts and review boards tend to err on the side of caution and keep the offender in prison,

⁴² J. F. Klein, "The Dangerousness of Dangerous Offender Legislation" (1976) 18 Can. J. of Crim. & Corr. 109 at 115.

⁴³ *Moore v. R.* (1984), 45 O.R. (2d) 3 at 7 (H.C.).

⁴⁴ (1984), 45 O.R. (2d) 705 at 723 (C.A.).

⁴⁵ *Supra* note 43 at 112.

rather than let him or her out and risk having the offender commit another crime.⁴⁶ One statistic revealed that in order for the courts to confine ten dangerous persons, they would have to confine between 20 and 1000 non-dangerous offenders.⁴⁷ This seems to go against the trite but basic tenet of the Canadian criminal justice system: it is better to let ten guilty persons go free, than imprison one innocent person.

The problem is compounded by the fact that the courts rely on the procedural protection provided by the Parole Board to justify this legislation and dismiss a section 7 violation.⁴⁸ It is believed that the existence of a Parole Board review every two years, and consequently the opportunity for release, protects the offender from a section 7 breach. However, the Parole Board is relying on this same unreliable psychiatric predictions of future dangerousness when making their decisions.⁴⁹ Once labelled a dangerous offender, the onus shifts to the offender to establish that he or she is no longer a threat to society. This is an extremely difficult task in the prison environment. It is not only a problem because of the weight that a label from an "expert" psychiatrist carries with it, but some commentators have suggested that reviews by the Parole Board actually aggravate the situation and enhance the offender's hostility towards the institution.⁵⁰ It is argued that to go through "a process

⁴⁶ See L. J. Chapman & J. P. Chapman, "Genesis of Popular but Erroneous Psychodiagnostic Observation" (1967) *Journal of Abnormal Psychology* 72 at 193-204.

⁴⁷ *Supra* note 17 at 364.

⁴⁸ *Supra* note 39 at 3.

⁴⁹ *Supra* note 33 at 855. See also: *R. v. Yanoshevski* (1996), 104 C.C.C. (3d) 512 at 525 (Sask. C.A.) where the court expressed its concern about this very problem: "the mere labelling of offenders as dangerous offenders makes it practically impossible for them to get parole because of the extreme adverse reaction which would arise should they reoffend while on parole; that dangerous offenders with indeterminate sentences are given low priority for treatment because they are seen in the system as long-term prisoners; that the result of all this is that dangerous offenders serving indeterminate sentences are very seldom released on parole. In short, it is said, the system is not working as it was intended to work...it imposes what usually amounts to life imprisonment."

⁵⁰ *Supra* note 17 at 359. See also: *R. v. Oliver* (1997), 193 A.R. 241 at 247 (Alta.C.A.) where Hunt J.A. expressed his concern about relying on the system's effectiveness, "I have deep concerns...that a person of the appellant's relatively low level of intelligence will not, with an indeterminate sentence, receive the kind of attention he requires within the prison system."

repeatedly that inevitably results in failure is devastating in any context; but even worse when one is incarcerated.”⁵¹

Another problem with the reliance on psychiatric evidence is that labelling an offender “dangerous” tends to become a self-fulfilling prophecy. Klein has suggested that psychiatric labelling is largely an outcome of the setting in which the patient is seen, the social class of the patient, and the biasing effect of other clinicians’ diagnoses.⁵² As soon as a label is attached, all of the offender’s behaviour is seen as a function of that label. If the offender protests, it is seen as a problem with the offender rather than with the system.⁵³

This could have been one of the factors working against Lisa Neve. The Court in that case relied on a statement from Emery Ewanyshyn, her supervisor at the Calgary Young Offenders’ Centre, who testified that Neve was “the most dangerous inmate of either gender.”⁵⁴ Perhaps the court gave too much weight to this person’s assessment of Neve’s personality and the link to “dangerousness”; or, maybe since Neve was already in the system, no matter what her actions, her behaviour would be interpreted in a certain way.

There are also basic problems with the criteria used by psychiatrists to label someone a dangerous offender as evidenced by the blurry labels given to Lisa Neve. Psychiatrists often work from lists of factors that are supposed to be predictive devices. Some of the factors on the list may include: brutality sustained in childhood; bedwetting, firesetting, and cruelty to animals; assorted delinquent acts during puberty; lack of concern for the victim; explosive outbursts; high I.Q.; loneliness; and excessive truancy.⁵⁵ It is clear from this list that such criteria are not necessarily reliable indicators of dangerous offenders. These characteristics or experiences may also be found in non-violent persons with emotional problems. This

⁵¹ *Supra* note 17 at 359.

⁵² *Supra* note 42 at 112.

⁵³ *Supra* note 17 at 366.

⁵⁴ *Supra* note 7 at 653.

⁵⁵ *Supra* note 17 at 362. See also J. Bonta et al., *The Crown Files Research Project: A Study of Dangerous Offenders* (Solicitor General of Canada, 1996) at 16, where a diagnosis of Antisocial Personality Disorder was the highest ranked predictor of “dangerousness” by the twenty-one Crown Attorneys interviewed for this survey.

is where the critique arises: how does anyone know which characteristics are signs of dangerousness and which ones are not? Furthermore, how many factors on the list have to be present to make someone dangerous and who decides? Klein's article outlines three issues which explain why the designation of someone as "dangerous" is inaccurate and unreliable: (1) there is no agreed upon definition of dangerousness; (2) there is no provision made in psychiatric nosology upon which to base such a prediction; and (3) psychiatrists and clinical psychologists receive no special training to equip them to make such predictions.⁵⁶ This list is not exhaustive, but illustrates the essence of the problem: how can a court incarcerate someone indefinitely based on this kind of illusive criteria?

Even before the *Charter*, there was criticism regarding the use of psychiatrists as agents of social control. Ericson wrote that:

Just as the student health service of a university should have no direct influence on a student's ability to stay in and graduate from an academic program, so a penitentiary health service should play no direct role in the institutional program and release decisions affecting the inmate.⁵⁷

Psychiatrists and psychologists themselves have gone to great lengths to discredit themselves as accurate sources for the prediction of dangerous behaviour. In 1969, the *Report on the Canadian Committee on Corrections* blatantly admitted that "many Dangerous Sexual Offenders have been wrongly classified as such and that an extensive rescreening and reappraisal of the people in this category might result in the reclassification and possible earlier

⁵⁶ *Supra* note 42 at 113. See also J. Bonta et al., *supra* note 55 at 24 where the survey explains the various ways of diagnosing an Antisocial Personality Disorder and the way the results differ depending on the test used: "When relying on DSM-IV criteria and psychiatric judgement, the incidence of an Antisocial Personality Disorder appears no different from that found in general offender population. However, the incidence of Clinical Psychopathy as measured by the PCL-R was almost double the rate found in forensic and correctional populations." This illustrates the dangers in relying on this kind of evidence to sentence someone indeterminately.

⁵⁷ R. V. Ericson, "Penal Psychiatry in Canada: The Method of Our Madness" (1976) 26 U of T L.J. 17 at 27.

discharge.”⁵⁸ Some commentators claim that “the most accuracy that can be reached with predictions of dangerousness to date is 50%.”⁵⁹

Dangerousness is not an objective concept that can be easily defined; it is a matter of judgment or opinion, there is no psychological or medical entity as a “dangerous” person—it is a question of what society is prepared to endure.⁶⁰ As demonstrated by the *Neve* hearing, a court can and will rely on this kind of questionable evidence when it wants to label an offender “dangerous”. Despite the evidence that the prediction of “dangerousness” or the “likelihood of dangerousness” by psychiatrists and other experts is clearly fallible, section 7 challenges on this point have failed in the past.

The courts must be forced to ask how many “false positive” predictions are justified for the social benefits derived from the “true positive prediction” without violating an offender’s section 7 right under the *Charter*.⁶¹ This is an especially significant question in light of the new amendment. The unreliability of diagnostic evidence becomes even more serious as a result of the automatic indeterminate sentences that follow from the label of “dangerous”. Again this is based on the assumption that the courts will continue to take an expansive approach to the use of Part XXIV even now that indeterminate sentences are mandatory.

VI. MANDATORY INDETERMINATE SENTENCES— SECTION 12 VIOLATION?

1. Discretion to Tailor the Sentence

It appears from an examination of the case law that an offender’s best option is to argue mandatory indefinite sentence is a violation of section 12 *Charter* rights. Of course, this statement does not take

⁵⁸ Oimet, *Report of the Canadian Committee on Corrections*, (Ottawa: Queen’s Printer, 1969) at 17.

⁵⁹ C. P. Ewing, “Preventive Detention and Execution, The Constitutionality of Punishing Future Crimes” (1991) 12 A.J.I.L. at 143.

⁶⁰ J. Floud, “Dangerousness and Criminal Justice” (1982) 22 *British Journal of Criminology* 213.

⁶¹ M. Manning, “Lyons: A One-Stage Approach to the Charter and Undue ‘Constitutional Notice’” (1988) 61 C.R. (3d) 72.

into consideration the reality of the situation; namely, that most offenders lack sufficient resources to pursue a *Charter* challenge.

In *R. v. Gustavson* the court's dismissal of a section 12 violation was expressly premised on the fact that the judge in a dangerous offender hearing had the discretion to tailor the sentence to fit the particular offender. The majority held that:

[No] two dangerous offenders are precisely alike, nor are their offences. That truth carries over to offenders and offences of every sort. Save when supplied with a mandatory penalty, every judge is left with the task of making the penalty fit the crime, and [the judge's] reasons will be closely confined to the particular facts of each case. A judge must ponder individual circumstances on his way to finding a fitting sentence for each case. That mental process is a vital part of the exercise of judicial discretion.⁶²

It is suggested that the courts do not prefer mandatory sentences because they do not allow for an examination of the offender's individual circumstances. As a result of the court's inability to tailor a sentence, the offender becomes an "abstraction" and is not considered in his or her contingent particularities.⁶³ In *R. v. Smith*, Lamer J. (as he then was), for the majority, expounded a test which reflected the same dislike for mandatory sentences.⁶⁴ Although *Smith* did not involve a dangerous offender hearing, the principles set out in the case with respect to sentencing and section 12 violations are still relevant.

The mandatory indeterminate sentence required by the amended dangerous offender legislation completely eliminates the court's opportunity to tailor a sentence to the offender based on his

⁶² (1982), 143 D.L.R. (3d) 491 at 495 (B.C.S.C.). See *R. v. Lyons* *supra* note 8 at 341, where Justice LaForest expressed the same kind of sentiment: "In my opinion, if the sentence imposed under Part [XXIV] was indeterminate, *simpliciter*, it would be certain, at least occasionally, to result in sentences grossly disproportionate to what individual offenders deserved."

⁶³ K. Roach, "Smith and the Supreme Court: Implications for Sentencing Policy and Reform" (1989) 11 S.C.L.R. 433 at 442. See also: *R. v. Yanoshevski* (1996), 104 C.C.C. (3d) 512 at 526 (Sask. C.A.) where the court held, "the indeterminate sentence will usually be used as a last resort where the usual sentences and programs of treatment and rehabilitation have been tried and failed..."

⁶⁴ [1987] 1 S.C.R. 1045 at 1072-74.

or her particular problems and needs. As a result, under Chief Justice Lamer's "effects test": "individuals caught in guidelines which ignore or devalue their own particular mitigating circumstances could raise constitutional claims of disproportionality in their defence."⁶⁵ It was held that a sentence would be considered unconstitutional if it "is so unfit having regard to the offence and the offender."⁶⁶

Furthermore the Court in *R. v. Noyes* held that: "providing for a sentence that is indeterminate, a sentence that never ends...[that] imposes a cruel and unusual punishment that is disproportionate to any crime or situation contemplated [regardless of the purpose of the legislation]."⁶⁷ This is clearly a positive statement by the court for a dangerous offender willing to challenge the amendment in the *Code*. However, there must be more than just disproportionality for an offender to successfully challenge section 12 of the *Charter*.

The test as outlined by the Court in *R. v. Smith* was "one of gross disproportionality, because it is aimed at punishments that are more than merely excessive."⁶⁸ However, the courts could follow the reasoning used in *Lyons* where the majority held that "grossly" reflects the "court's concern not to hold Parliament to a standard so exacting, at least in the context of section 12, as to require punishment to be perfectly suited to accommodate the moral nuances of every crime and every offender."⁶⁹ Yet, this approach is disturbing in that it seems to dismiss the significance of the fundamental principle that the punishment must fit the crime. Is the Supreme Court of Canada really saying that this principle does not apply to dangerous offenders?

It must be recognized that in the majority of these hearings, "gross disproportionality" would probably not result from the handing down of an indefinite sentence. Nevertheless, if the courts continue to use the new dangerous offender legislation in an expansive manner, there is the potential for grossly disproportionate sentences to result from an offender being labelled "dangerous". The assumption is that since the enactment of the amendment, the

⁶⁵ Roach, *supra* note 63 at 451.

⁶⁶ *Supra* note 64 at 1072.

⁶⁷ (1986), 6 B.C.L.R. (2d) 306 at 309-10 (S.C.C.).

⁶⁸ *Supra* note 64 at 1072.

⁶⁹ *Supra* note 18 at 344-45.

courts will not simply begin to label fewer people "dangerous" because of the mandatory indeterminate sentence.

2. Faulty Procedural Safeguards

In the past, courts have held that there was no section 12 violation with respect to dangerous offender legislation because of Parliament's overall objective of protecting society and that it was not likely that the offender would remain in custody "beyond the period of time during which [the offender] is considered dangerous" because the National Parole Board was charged with making periodic reviews of a dangerous offender's detention.⁷⁰

The fact is that this two-tiered sentencing structure (i.e. the Parole Board is there to correct any errors made by the court) was dropped by the legislature in 1961.⁷¹ The Parole Board is there to ensure that no injustice is done and that the offender is released when he or she has received "the maximum benefit"⁷² of the incarceration. Furthermore, the Board must consider whether the release would constitute an "undue risk" to society and must be satisfied that the inmate's reform and rehabilitation would be aided by release. Therefore if the accused remains "dangerous" according to the Board's definition, this criterion remains unsatisfied.

Nonetheless, it is not the Board's duty to remove or alter the label of dangerous. Dangerous offenders have argued that they are less likely than other offenders to satisfy these requirements. Yet, the Court in *Lyons* held that fact to be "primarily a function of their dangerousness, not of the punishment imposed."⁷³ This seems to be circular reasoning on the Court's part; the only reason the offender has been given that particular punishment is because of the "dangerousness" label, yet it is the label which will keep the offender in prison. As stated earlier, it is virtually impossible for an offender once labelled "dangerous" to prove otherwise to a Parole Board. This potential for a breakdown in the system is bound to result in some "cruel and unusual punishment". As a result, the Parole Board's ability to tailor a sentence seems illusory.

⁷⁰ *Supra* note 44 at 731.

⁷¹ *Supra* note 17 at 372.

⁷² *Steele v. Mountain Institution*, [1990] 6 W.W.R. 673 at 693 (S.C.C.).

⁷³ *Supra* note 18 at 344.

This was exactly the problem in *Warden of Mountain Institution v. Steele*.⁷⁴ In that case, Steele had pleaded guilty to a charge of attempted rape when he was 18 and declared a "criminal sexual psychopath". He was sentenced to indeterminate detention and the Judge emphasized that the offender must receive proper psychiatric treatment. After 37 years and numerous recommendations for some form of release by medical experts, the offender still remained behind bars. The Parole Board had repeatedly denied parole. The Supreme Court of Canada held that Steele's incarceration was "cruel and unusual" and had thus violated section 12 of the *Charter*. The important message from the *Steele* case is the fact that the system is not perfect. Despite the presence of perceived safeguards (i.e. the Parole Board), an offender can still have his or her *Charter* rights violated. According to Grant, there is a dangerous shift in authority which does not guarantee the same kind of protection that should be afforded to the offender: "what we have, in effect, is a delegation of the sentencing authority from the judiciary to the Parole Board."⁷⁵

It is unfair for the courts to rely strictly on this kind of illusory procedural safeguard as a means of justifying this new legislation. However, the Court in *R. v. Moore* went even further by holding that the proceedings of the National Parole Board are subject to judicial review.⁷⁶ In that case, it appears that a possible violation of an offender's rights is allowed because farther down the administrative line, if the offender wants, he or she can try and have the Parole Board's decision judicially reviewed. This clearly shows the lengths the courts will go to avoid finding a *Charter* violation with respect to dangerous offender legislation.

According to Lamer J. (as he then was), and the majority in *Smith*, another aspect of a section 12 inquiry involves looking at the way in which the effects of punishment are likely to be experienced.⁷⁷ The seriously detrimental effects of an indeterminate sentence on an offender are discussed in Grant's article:

The dangerous offender is already the lowest of the low in the prison hierarchy; if he is a sexual offender, as most

⁷⁴ *Supra* note 72 at 1385.

⁷⁵ *Supra* note 17 at 358.

⁷⁶ (1984), 45 O.R. (2d) 3 at 5 (H.C.).

⁷⁷ *Supra* note 64 at 1072.

dangerous offenders are, he faces constant abuse and even threats to his life from the other inmates. It is not surprising that if and when a dangerous offender does get out, his anger and sense of persecution could add to an already violent potential. The system perpetuates violence, it does not alleviate it.⁷⁸

According to a 1985 study, most dangerous offenders were in protective custody, segregation or in institutions with protective custody facilities.⁷⁹ An indeterminate sentence saps the will of an offender, removing any incentive to rehabilitate himself or herself as a result of there being no apparent end in sight. In *R. v. Oliver*, the defence psychiatrist, testified that those sentenced to indeterminate sentences, "often get lost in the shuffle in a correctional setting and, that, as a result, such individuals sometimes lose motivation for being treated...persons with indeterminate sentences receive the least priority for treatment."⁸⁰ It is the parole process that is supposed to be the factor capable of providing the convicted offender with that "end in sight" by "truly accommodating and tailoring the sentence to fit the circumstances of the individual offender."⁸¹ However, courts should clearly not rely on the illusory effect of the Parole Board as a procedural safeguard as it has in the past in order to save the legislation.⁸²

Once again, section 12 appears to be the offender's best chance at establishing a *Charter* violation if given a mandatory indeterminate sentence as required by section 753(4) of the *Code*. However, the reality is that a sentence will violate section 12 only in "rare and unique" cases: "The test for determining whether a sentence is disproportionately long is very properly stringent and demanding. A lesser test would tend to trivialize the *Charter*."⁸³ This unfortunately gives the court a generous opportunity to not

⁷⁸ *Supra* note 17 at 367.

⁷⁹ J. Jakimiec, F. Porporino, S. Addario & C.D. Webster, "Dangerous Offenders in Canada, 1977-85" (1986) 9 *Int'l J.L. & Psy.* 479 at 485.

⁸⁰ *Supra* note 36 at 247.

⁸¹ *Supra* note 8 at 341.

⁸² See *R. v. Lyons*, *supra* note 8 at 341. After saying that across the board indeterminate sentencing might occasionally result in s. 12 violations, the Court justified it by relying on the presence of procedural safeguards.

⁸³ *Supra* note 72 at 697.

find a section 12 violation with respect to the new dangerous offender legislation.

VII. RECOMMENDATIONS WITH RESPECT TO THE NEW DANGEROUS OFFENDER LEGISLATION

First and foremost, the amendment requiring mandatory indeterminate sentences for dangerous offenders is not a good idea and should not have been made law. The provision is overreaching and will, for reasons stated throughout this comment, likely result in the violation of an offender's *Charter* rights.

Nevertheless, since section 753(4) has come into force, Parliament should implement stricter guidelines as to when dangerous offender applications can be made.⁸⁴

A national list of criteria which must be met before a dangerous offender application can be successfully made might be sufficient. This would be an attempt to deter any overzealous Crown Attorneys or judges and make the procedure seem less arbitrary. This step is necessary to avoid relying on the assumption that Crown Attorneys are capable of recognizing dangerousness and identifying who should and should not be labelled.⁸⁵

Second, Parliament must deal with the continued reliance of the courts on fallible psychiatric evidence. There is a desperate need for clear and certain definitions of "dangerousness" and "likelihood" in order for the courts to be able to label an offender with more accuracy. These definitions should also be based on some kind of a national standard, not just on a judge's or psychiatrist's own personal views of what constitutes "dangerousness" or a "likelihood" of repeating violent behaviour.

Finally, the legislation should shift the onus of establishing continued dangerousness onto the Crown for the purposes of a

⁸⁴ See also J. Bonta *supra* note 55 at 2 where the twenty-one Crown Attorneys interviewed overwhelmingly endorsed the dangerous offender legislation as it was prior to the amendment of the *Criminal Code*. The message was clear that, rather than replacing the dangerous offender legislation, the Crown saw a need to make improvements to the existing legislation as well as the policies and procedures supporting its application.

⁸⁵ *Ibid.* at 47.

Parole Board hearing. Based on the problems discussed earlier in this comment, it is unfair that the accused must convince the Parole Board that her or she is no longer dangerous.

VIII. CONCLUSION

There is a perception in Canada that public safety is in jeopardy and that community and victim needs are being overlooked by the government in favour of offenders' rights. The problem is that society's fears are often exaggerated by extensive, highly sensationalized news coverage of a very small number of post-release offences. However, "[to] introduce laws which can be abused in the belief that they will not be abused is not sound policy."⁸⁶ Parliament appears to have done exactly that with the introduction of the dangerous offender amendment.⁸⁷

There will always be the "Paul Bernardos" of the world which clearly deserve the label of "dangerous" and Part XXIV of the Criminal Code was obviously designed to deal with those types of offenders. However, the problem lies in the fact that a grey area of offenders exists who should be spared this label because ordinary criminal sentencing provisions would be more appropriate. This large grey area combined with the courts' expansive use of their discretion to label offenders "dangerous" and the new automatic mandatory sentence has the potential to lead to unjust results. Parliament should not simply implement this amendment without amending other aspects of the criminal justice system in order to ensure that Part XXIV is not abused.⁸⁸ Sentencing an offender to an

⁸⁶ As cited in J. Floud, *supra* note 60 at 225.

⁸⁷ See also M. Jackson, "Sentencing of Dangerous and Habitual Offenders in Canada", *Federal Sentencing Reporter*, vol. 9, no. 5, March/April 1997 258 at 259. Jackson articulates the problem with the government's reaction to public pressure when he states that notwithstanding the "recent evidence of a general decline in the violent crime rate, such [Dangerous Offender] cases have fueled a public demand for more preventative detention, a demand which the federal government has found difficult to resist."

⁸⁸ *Ibid.* at 261. Jackson illustrates a rather cynical, yet somewhat accurate, image of the real problem with the amendment:

The situation [today] finds its mirror image in the seeming inability of governments, on both sides of the 49th parallel, to resist the political benefits which are perceived to flow from

indeterminate period of time may very well have been justified by the courts in the 169 successful applications, yet there have been seven determinate sentences given under the dangerous offender legislation that were tailored in order to reflect the individual circumstances of the offender.⁸⁹ The courts should not be denied the discretion to award the sentence they see fit.

criminal justice policies that redraw the precarious balance between the state and individual freedom...away from the adjudication of demonstrated blameworthiness and due process in favor of the prediction of future dangerousness and crime control.

⁸⁹ C. Schmitz, "High-risk Offenders Law Comes Under Fire" *The Lawyers Weekly*, vol. 16, no. 22, (18 Oct. 1996) 1 at 14. See also *R. v. Oliver*, *supra* note 50.