

DANGEROUS AND HIGH-RISK OFFENDER LEGISLATION IN CANADA: AN EXAMINATION OF HISTORY, OFFENDERS AND PROCESS

by

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ABSTRACT

Dangerous Offender (DO) legislation aimed at managing dangerous and high-risk individuals in Canada began development in the 1940s, and has since been the subject of considerable debate. DOs face Canada's most severe measure for offenders: the indeterminate sentence. Alternatives for dangerous people who do not meet statutory requirements for DO designation and indeterminate sentences, but still pose a serious threat to society include: Long-Term Offender (LTO) designation and the Long-Term Supervision Order (LTSO). This high-risk legislation involves complicated and lengthy legal processes, and is widely misunderstood by the public and justice system professionals. This project paper aims to thoroughly review, examine and critique dangerous and high-risk legislation and process in Canada; utilizing literature, case law and policy. Historical development, theory, current *Criminal Code* legislation and process, and research on dangerousness prediction related to specific groups of offenders are examined. Areas for future developments and research are also discussed.

Keywords: dangerous offenders; high-risk offenders; sex offender; preventive detention; indeterminate sentence; dangerousness

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GLOSSARY

COSA	Circles of Support and Accountability
CPIC	Canadian Police Identification Centre
DO	Dangerous Offender
LTO	Long-term Offender
NFS	National Flagging System
PCL-R	Revised Psychopathy Checklist
SPIO	Serious Personal Injury Offence

INTRODUCTION

The most feared members in society are the individuals who commit violent sexual crimes, especially against children. There are many ways in which violent and sexual offenders are managed under law in North America, including, but not limited to, terms of incarceration, community notification, death penalty, sex offender registries, minimum-maximum sentences, long-term supervision orders, electronic monitoring, surgical and chemical castration, peace bonds and treatment. In Canada, however, the most severe measure in existence (since capital punishment was abolished in 1976) is an indeterminate sentence. An indeterminate sentence means that an offender may be institutionally incarcerated indefinitely, and even if released, will be supervised for life. This sentence is strictly imposed for offenders who are designated as a "Dangerous Offender" (DO hereafter), and is usually reserved for the most offensive criminals such as pedophiles and violent predators who attack women. One of Canada's most notorious DOs is the Ontario serial sex offender, Paul Bernardo.

DO legislation aimed at managing such dangerous and high-risk individuals in Canada began development in the 1940s, and has since been the subject of considerable debate. Since the law's inception, the majority of designated offenders have been sexual offenders (Bonta, Zinger, Harris & Carriere, 1998; Petrunik, 1994; Weinrath, 2004; Yessine & Bonta, 2006), despite the legislation's intent to also target extremely violent non-sexual offenders. The DO legislation involves complicated and lengthy legal processes, and is widely misunderstood by the public and justice system professionals alike. Utilizing literature, case law and policy, this

paper aims to thoroughly review, examine and critique dangerous and high-risk offender legislation and the resulting process in Canada.

This examination will begin with an overview of the historical development of sexually dangerous and high-risk offender law in Canada and the United States, and will outline some of the major cases and court decisions that influenced legislative development. Next, current laws and practices in Canada will be reviewed in detail, utilizing the available academic literature. The conclusion will review future directions and contemplate possible development of present law and practices.

PART 1: HISTORICAL BACKGROUND

Indeterminate sentences have existed in Canada for over 60 years, and show no sign of disappearing. This background will include an examination of the factors that shaped the legislative route for Canadian high-risk offenders, including the role that the United States played in this progression. A review of related theory, and historical impressions of 'dangerousness' in the literature, will be critical to understand this development of law. We will see that the development of legislation over the years has been fuelled by our understanding of criminal behaviour, risk, and notions of treatment and punishment (Petrunik, 1982, 2003), but most influentially by public and political reaction to high profile incidents (Mercado, 2006; Petrunik, 1982; Petrunik, 2003; Sutherland, 1950; Swanson, 1960). In order to understand the development and progression of high-risk offender law, the first part of this paper is divided into distinct historical periods. Researchers have generally recognized three important periods in the evolution of interventions with sexual offending: the clinical model, the legal model, and the community protection model (Petrunik, 1994).

1900-1950s: The Clinical Model

The origins of the clinical model of social control for dangerous and high-risk offender legislation can be traced to the provisions in England's *Prevention of Crime Act 1908* (Canadian Committee on Corrections, 1969), and U.S. legislation (Wormith & Ruhl, 1986; Pratt, 1996). The 19th century development of psychology and ideas of 'the born criminal' influenced societal concepts of dangerousness (Foucault, 1978; Riebert & Vetter, 1979). During this

time, offenders were believed to suffer from a mental abnormality or pathology that caused their deviance (Petrunik, 1994; Pratt, 1996). These 'born criminals' were thought to have a propensity for criminal behaviour that was difficult to remedy, and were devoid of free will (Foucault, 1978). The legislation developed during this era was in response to society's fear of "a threat which is irrational and unpredictable and conduct which is physically and morally repulsive or bizarre" (Petrunik, 1994, pp.11-12). This fear was greatest for threats to the most vulnerable populations (especially children), and in response to rare, atypical offences over more prevalent danger. For example, children are more likely to be killed in motor vehicle accidents than by sexual predators, but the former is not feared nearly as much as the latter. At this time in history, sex offenders were thought to pose a high risk to the community owing to their impaired mental conditions (evidenced by deplorable sexual acts), and were targeted by legislation.

During this period, it became widely accepted that psychiatrists and other mental health professionals could assess the risk posed by dangerous offenders, and the treatment of such offenders included indeterminate imprisonment until the offenders were 'cured', or until they posed less risk (Kittrie, 1971, p.37; Petrunik, 1994). This type of intervention did not seek a substantial reduction of crime in communities, but was focussed on reducing the recidivism of a few brutal offenders. The concept of dangerousness, which fueled the development of DO legislation, was reflective of the perceived characteristics of the perpetrators instead of the acts they committed. Accordingly, offender punishments were based on their perceived level of dangerousness posed to society (and fear of possible future harm) instead of their actual offences (Foucault, 1978; Petrunik, 1994).

In the United States, the concept of sexually deviant, mentally disordered offenders was recognized through the development of the “Sexual Psychopath” and “Sexually Dangerous Persons” laws beginning in the 1930s. U.S. Sexual Psychopath laws originally targeted sex offenders and homosexual individuals (Hughes, 1940). Homosexuals and sexual offenders were viewed as sexually deviant and were perceived as a threat to the well-being of Western societies, due in part to recent concerns of population decline (Pratt, 1996). The most dangerous offenders were perceived to pose a threat to strangers, and less serious offences such as peeping and flashing were thought to progress quickly to more serious crimes such as rape and murder (Sutherland, 1950; Swanson, 1960).

The Habitual Criminal and Sexual Psychopath in Canada

Upon the recommendation of the 1938 Archambault Commission, Canada followed the international trend by developing Habitual Offender and Criminal Sexual Psychopath provisions in the *Criminal Code* in 1947 and 1948 respectively (Valiquet, 2008). The *Habitual Offenders Act* was enforceable after an offender committed three criminal offences, while the Criminal Sexual Psychopath laws targeted sexually deviant criminals. An offender could be incarcerated indefinitely under both provisions (Valiquet, 2008). In these cases, the application was brought by the Crown, and a hearing was held for those convicted of attempted or indecent assault, rape and carnal knowledge. Buggery, bestiality and gross indecency were added in 1953, as well as a requirement that at least two psychiatrists would give evidence at the hearing (McRuer, 1958).

1960-1970s: The Legal Model

By the 1960s and '70s, the use of psychiatric assessments was widespread, and thinking shifted from treatment to individual rights and retribution (Fogul, 1975; Petrunik, 1982). The legal model emerged in response to a lack of confidence in clinicians' ability to diagnose and treat dangerous, high-risk individuals. The belief was basically that, if these individuals could not be 'cured' of their disturbing behaviour, then it would be better for the criminal justice system to deal with them. This perspective saw all legally sane offenders as rational thinkers, and set forth the principles of proportionality and least restrictive measures (Petrunik, 2002). Offenders were to be punished according to the level of seriousness of their offence, harm done, and history of offences committed (Petrunik 1994).

The Dangerous Sexual Offender

In 1961, 'criminal sexual psychopath' was replaced with 'dangerous sexual offender' by suggestion of the McRuer Commission (1958). Legislation in both the U.S. and Canada was renamed to exclude 'psychopath' in light of challenges to the validity, reliability and effective treatment of psychiatric diagnoses that were raised in cases such as the 1966 U.S. Supreme Court case of *Baxstrom v. Herold*, where the accused was found to have been detained illegally (since his sentence had previously expired and there had been no review for continuation of civil commitment) (Steadman, 1972, p.265).

There appeared to be additional problems with the prevailing DO legislation. Cases, such as *Klippert v. The Queen* (1967), highlighted the fact that the provisions did not restrict the dangerousness designation to only truly 'dangerous' individuals. Klippert had been found a Dangerous Sexual Offender even though his offences appeared consensual, and it was

determined that he clearly did not pose any risk of physical violence or dangerousness to anyone (*Klippert v. the Queen*, 1967).

There were critiques by several prominent groups in the late 60s to 70s that pointed to these major flaws with the existing legislation, the most influential of these being the Canadian Committee on Corrections, which produced the Ouimet Report (1969). The Ouimet Report found that the prevailing habitual offender law focused on non-violent property offenders, and the dangerous sexual offender law failed to include dangerous non-sexual offenders (Canadian Committee on Corrections, 1969). Specifically, upon reviewing cases they found that there were a large number of breaking and entering and fraud convictions resulting in indeterminate sentences. The current law was also found to be discriminatory, in that it was applied to only a few offenders from among a large number of recidivists to whom it could potentially be applied (p.247), and it was being used disproportionately across Canada (p.252). The report recommended replacing, re-naming and creating a new category of offender who could be incarcerated indefinitely or definitely- not for punishment or as an example to others- but as physical detainment for protective and treatment purposes (p.190).

The Ouimet Report and other related critiques led to the 1977 enactment of Bill C-51 (or the *Criminal Law Amendment Act* of 1977), wherein both the habitual and dangerous sexual offender provisions were repealed, and replaced by 'dangerous offender' provisions (Jakimiec, Porporino, Addario & Webster, 1986).

1980s, 1990s, and Beyond: The Community Protection Model

Starting in the 1980s, a new movement emerged in response to campaigns from victim rights groups and crime prevention advocates. These groups endorsed maximum safety of the

public over the rights of offenders and opportunity for treatment (Petrunik, 1994, 2002 & 2003), especially as research on treatment for such individuals was found to be unsuccessful in the 1970s. Victim advocacy groups pressured for harsher legislation for criminals, arguing for increased use of indeterminate sentencing. Previous to this time, a determinate sentence could be imposed if a DO had the potential to be successfully treated in the community. However, after *R. v. Carleton* (1981), new legislation was put in place which mandated automatic indeterminate sentencing with a DO finding (Coles & Grant, 1999). The safety of the community had become the main focus and priority of the law.

Several high-profile cases with much public outcry (some examples from the United States and Canada to follow) were evidence to communities that the existing process failed to adequately monitor offenders and protect vulnerable populations (Petrunik, 1994). Owing to this increase in public concern over child sexual victimization, the Committee on Sexual Offences Against Children and Youth was established in Canada. In 1984, the committee published a report (the Badgley Report) based on survey data, which found that the prevalence of sexual victimization of children was high. As a result of the committee's recommendations, Bill C-15 was enacted in 1988 that made changes to the *Criminal Code* and *Canada Evidence Act*. This included the addition of three new *Criminal Code* offences: sexual interference, sexual exploitation and invitation to sexual touching (Lowman, Jackson, Palys & Gavigan, 1986, pp.11 & 16). The Badgley Report, along with Bill C-15 and extensive media coverage of a small number of cases (some of which are detailed below) created the perception that child sexual victimization was a major social problem (Petrunik, 1994).

American Cases

The first kind of preventive legislation resulting from major public fear was enacted in response to the case of sex offender Earl Shriver. While still incarcerated, Shriver had stated his intent to torture children when he was released (Boerner, 1992; Brooks, 1994; State of Washington, 1989); however, there were no laws in place to keep him detained. Although there was evidence that Shriver was at high risk and intended to reoffend, authorities were unable to prevent his release into the community. Subsequently, in 1989, Shriver kidnapped, raped, stabbed, strangled, and cut off the penis of a 7 year-old boy (Brooks, 1994). The enormous outpouring of public concern that ensued prompted the passage of Washington's *Community Protection Act* (1990), which required that sex offenders had to register with authorities upon release, and allowed for post-sentence civil commitment of offenders who might not be covered under the previously existing statutes (Brooks, 1992; Mercado & Ogloff, 2007). While Shriver's case initiated the first Sexually Violent Predator legislation in the U.S., the panic over sex crimes reached its height with the sexual assaults and murders of three young women: Diane Ballasiote, Polly Klaas, and Megan Kanka.

In 1988, Diane Ballasiote was abducted, raped and murdered in Seattle by Gene Kane; a sex offender on a work-release program. The victim's mother led a campaign to create harsher laws to keep sex offenders jailed indefinitely (Guffey, Larson & Kelso, 2009). In California in 1993, 12 year-old Polly Klaas was kidnapped and murdered by Richard Davis in the middle of a slumber party (Curtius, 1996). The accused entered her home with a knife, tied up the girls, placed pillow cases over their heads and abducted Klaas. Images of Klaas were distributed worldwide using the internet, and the case received coverage on programs such as "20/20" and "America's Most Wanted". Both the Ballasiote and Klaas cases are

considered to have influenced the initiation of the United States' first 'three-strikes' law in 1993 (Guffey et al., 2009). The three-strikes laws were different from existing post-sentence civil commitment legislation in that there were no requirements of mental abnormality. American states differ in specific offences included and terms of incarceration, but generally, after a specified number of serious offence convictions, offenders are mandated to serve a term of incarceration, often a life sentence (Kovandzic, Sloan & Vieraitis, 2002).

In 1994, seven year-old Megan Kanka was raped, beaten, and strangled by Jesse Timmendequas. Timmendequas, who was a previously convicted sexual offender and neighbour to the victim, he lured the girl with a puppy (Freeman-Longo, 2002). Megan's parents were outraged, and campaigned that communities had a right to know if a sex offender lived amongst them. A mere four months later, Megan's Law was enacted in New Jersey (Wright, 1995). This was the first legislation that mandated all convicted sex offenders to register with local law enforcement agencies prior to parole, probation or release from prison (Cote, 2002). The law also allowed notification to the community of serious and high-risk sex offenders. That same year (1994), U.S. President Bill Clinton helped ensure the passage of the Jacob Wetterling Act, which required that all states had to set up a sex offender registry by September of 1997 or else face a 10% cut in criminal justice funding (Freeman-Longo, 2002; Logan, 1999).

Kansas followed Washington in 1995, after Leroy Hendricks was scheduled to be released to a halfway house (Mercado & Ogloff, 2007). The U.S. Supreme Court decision in *Kansas v. Hendricks* (1997) allowed for indeterminate civil commitment after completion of a prison sentence for mentally abnormal offenders. The requirements were that the offender must suffer from mental abnormality rendering them likely to engage in repeated acts of sexual

violence. Hendricks met these conditions, as he was a pedophile who admitted he could not control himself when under stress, and he had an extensive history of sexually assaulting children. This law (based on civil and not criminal law) was upheld as constitutional (*Kansas v. Hendricks*, 1997; Mercado, 2006; Morse, 2004).

In 1998, the *Department of Commerce, Justice and State, the Judiciary, and Related Agencies Appropriation Act* was passed. This federal statute amended the *Jacob Wetterling Act*, and mandated states to identify certain types of offenders and required registration and notification for life (Petrunik, 2002). Television personalities Oprah Winfrey and John Walsh (who had lost a son to abduction) helped the promotion and passing of legislation during this time period (Wright, 1995).

Canadian Cases

Several high-profile Canadian cases similarly influenced the changes to legislation in the 1980s and 90s (Petrunik, 2002). The practice of “gating” was created as a response to the perceived threat posed by sex offenders Paul Kocurek and Duane Taylor, who were released on mandatory supervision and sexually assaulted and murdered children in 1981 (Petrunik, 1994). At that time, the law under the *Parole Act* stated that inmates must be released after serving two-thirds of their sentence. The National Parole Board responded by immediately issuing a warrant of apprehension for the dangerous individuals who had been released. The Supreme Court of Canada ruled against “gating” after 11 cases in 1983 (Ministry of the Solicitor General, 1993, p.3); however, the case of Allan Sweeney in 1984 essentially led to a reversal of this decision. Sweeney sexually assaulted and murdered 21 year-old Celia Ruygrok in 1984. The murder of the halfway house employee fuelled the creation of Bill C-67 in 1985-86. The Bill allowed the National Parole Board to detain offenders with serious violent

pasts beyond their mandatory release dates if there was a reasonable chance that they would similarly reoffend (Marshall & Barrett, 1990; Ministry of the Solicitor General, 1993).

Several cases challenged the constitutionality of the Bill C-67 legislation. However, the law was deemed constitutional in *R. v. Lyons* (1987). It was found that DO provisions were not in violation due to the fact that punishment flowed from the actual commission of a specific offence, and not for future offences that had yet to be committed (Petrunik, 1994; Solicitor General of Canada, 1993).

In the early 1980s, British Columbia's Clifford Olson abducted, tortured, sexually assaulted and murdered over 10 youths, targeting both males and females of various ages. In 1982, he pled guilty to 11 murders and was given 11 concurrent life sentences. Olson's case was especially controversial, as he demanded \$100,000 payment to reveal details of his crimes and locations of the victims' bodies. While incarcerated, Olson even wrote a letter to the family of one of his victims, detailing exactly how he had tortured their son (CBC News, 2006). Although never designated a DO, it is unlikely that Olson will ever be released into the community.

Canada's most well-known and highly publicized DO is most likely Paul Bernardo. Known as the 'Scarborough Rapist' and 'the Schoolgirl Killer', Bernardo was apprehended in 1993 after a lengthy history of highly publicized brutal assaults and murders. Bernardo began his assaults in Scarborough in the late 1980s when he committed over 10 rapes on local women. He usually stalked his victims after they had exited buses at night, and he often used knives in his attacks (Williams, 1998). In the early 1990s, with the help of his wife, Karla Homolka, he also assaulted and murdered three young girls: Tammy Homolka, Leslie Mahaffy, and Kristen French. Mahaffy's body parts were encased in cement and discovered in Lake

Gibson, while French was found naked in a ditch in Burlington with her hair removed. Along with his known victims, Bernardo has been linked to numerous other deaths, rapes and attempted sexual assaults, and has confessed to at least 10 other rapes (McCrary, 2003).

If any one offender can be said to have most influenced Canada's policy development for dangerous sexual offenders, it would be Joseph Fredericks. Fredericks, a pedophile on federal statutory release, kidnapped, sexually assaulted and murdered Ontario's 11 year-old Christopher Stephenson in 1988. Fredericks had previously been considered for a DO application, but the process was dropped due to problems obtaining testimony from victims. Legislation was created in response to enormous public concern, and resulted in many recommendations from the coroner's inquest, (coined 'the Stephenson Inquest') which included 71 recommendations to amend both the justice and mental health systems (Hudson, 1993; Sarick, 1993). One of the most important recommendations from the inquest was a recommendation for the creation of legislation permitting continued detention for high-risk sexual offenders past the expiration of their sentences, and provided for treatment during their confinement (Ministry of the Solicitor General, 1993). This case also prompted Canada's first sex offender registry, known as "Christopher's Law" in Ontario in 2001. Christopher's Law mandates all individuals convicted of specific sex offences in Ontario to automatically register, and includes in the registry the offender's name, date of birth, a current photograph, identifying information and offence information.

Further legislative changes occurred with the 1992 *Corrections and Conditional Release Act* (Bill C-36), which followed the case of Melvin Stanton, who raped and murdered Tema Conter in 1987, while on temporary absence leave. 1992 also saw the enactment of Bill C-30, which made changes to the mental disorder provisions in the *Criminal Code* to include individuals

found 'not criminally responsible.' Although repealed before it came into force, a provision was put forth that would have found offenders who were not responsible on account of a mental disorder, and who also met the criteria for a DO, to be declared a 'dangerous mentally disordered accused' person (Ministry of the Solicitor General, 1993). If passed, these individuals could have been held indefinitely in a mental health facility.

Recommendations from a Federal, Provincial and Territorial Task Force on High-Risk Offenders included introducing a new category of offender, which would come to be known as the Long-Term Offender (LTO hereinafter) under Bill C-55 in 1997. This new designation meant that the court could impose a term of up to ten years of community supervision upon completion of a prison sentence of two or more years. Along with the LTO category, the task force also suggested the creation of the National Flagging System (Bonta & Yessine, 2005), both of which will be detailed in the next major section. Bill C-55 also made changes to the DO application process by extending the period for an application to six months after sentencing if new evidence was in support (Valiquet, 2008). In addition, it reduced the standards for expert testimony so that an assessment from one psychiatrist (not two) was acceptable. Parole review eligibility for DOs was also changed from three to seven years (Coles & Grant, 1999; Petrunik, 2002, 2003).

While section 810 peace bonds (or recognizance orders) have been in existence since 1892 (Solicitor General Canada, 2001), and are unique to Canada (Grant, 1998; Neumann, 1994), the case of Wray Budreo in 1992 led to the creation of new peace bonds for sex offenders. These new peace bonds were also encompassed in Bill C-55, And were introduced by the federal government to specifically target dangerous high-risk individuals, and control their behaviour while in the community for a specified time period. Section 810.1 orders were

developed to target pedophiles like Budreo, while s.810.2 orders were introduced to target individuals at risk of committing other extremely violent and harmful acts. These orders exist separately from DO provisions, and individuals do not need to commit a crime to be eligible. They are commonly imposed at the expiry of a penitentiary sentence and before release to the community (Solicitor General Canada, 2001). Conditions attached to peace bonds commonly include reporting to police, mandatory participation in treatment or programs, and abstaining from going near particular high-risk areas frequented by potential victims. The constitutionality of s. 810 orders was upheld in *R. v. Budreo* (2000) (Abbate, 2001).

Budreo was a repeat pedophile with a history of 23 charges of sexual assault, and was due to be released on statutory release. Owing to strong public protest, the National Parole Board reversed a previous decision so that Budreo had to serve his full sentence (Appleby 1992; Vienneau, 1993). When released in 1994, Budreo was under a section 810.2 order, and had to be transported in the trunk of a car with police escort because protest was so prominent. The Peterborough police issued a public safety warning and released a photo to the media, marking this as the first occasion a police force in Ontario had made public this kind of information (Dunphy, 2007; Eagle, 2007). Protest from the Peterborough community had such strength that Budreo was forced to re-locate to Toronto soon after. It was in Toronto that Budreo would participate in a program called 'Circles of Support and Accountability' (or COSA) that would later cause his case to be labelled a success.

The COSA program was first sparked by the release of Budreo and Charlie Taylor in 1994. This new community intervention provided the offenders with support and friendship from a local Mennonite reverend and several congregants, and soon the Correctional Service of

Canada had contracted the Mennonite Central Committee of Ontario to create and administer this program with other sex offenders, thus creating Circles of Support and Accountability (Wilson, McWhinnie, Picheca, Prinzo & Cortoni, 2007). The aim of COSA is to reduce a sex offender's risk in the community by providing support using community volunteers (Correctional Service of Canada, 2002), and is especially used for offenders who are detained until their warrant expiry date due to high likelihood of risk of recidivism.

Recent Changes in Dangerous High-Risk Offender Law

Despite tracking systems for sex offenders spreading rapidly in the U.S. in the mid-1990s (Hebenton & Thomas, 1996, 1997), this was not the case in Canada. This prompted Canadian provinces and police services to create unique solutions. For example, in Ontario several police saw a lack of protection in legislation, and took matters into their own hands by releasing names of dangerous sex offenders to the media (including Ottawa, Gloucester, Nepean, North Bay, Barrie, Peterborough, and Brantford) (Richardson, 1993; Rogers, 1993). As previously mentioned, the first registry in Canada was Ontario's Christopher's Law in 2001. It was not until 2004 and after much pressure from provinces, that the federal government created the National Sex Offender Registry (Tibbits, 2002). New proposed federal legislation introduced in 2009 (under Bill C-34), and again in 2010 (under Bill S-2), called *Protecting Victims from Sex Offenders Act*, includes recommendations from victim's groups that all sex offenders be automatically included on the federal registry and databank; that sex offenders who commit acts occurring outside of Canada be included on the registry upon their return; and that detailed information about offenders' offences and offenders' vehicles be included on the registry (Dupuis, 2009).

Other major changes that were established in recent years include those brought about by Bill C-9 and Bill C-18 in 2007, and Bill C-2 in 2008. In 2007, Bill C-9 set forth that offenders who committed specific violent and sexual crimes would no longer be eligible for conditional sentences (Department of Justice Canada, 2007). Also in 2007, Bill C-18 was enacted, making it an offence to fail to appear for mandated DNA sampling (MacKay, 2007).

The largest changes impacting DO provisions in recent years were found in the *Tackling Violent Crime Act* (or Bill C-2) that was passed in 2008. The *Act*, which is a combination of five previous acts, included new *Criminal Code* legislation for impaired driving offences, gun crimes, sexual offenders, and DO and LTO offenders. Among other goals, the *Act* promised more effective sentencing and monitoring of DOs, and better protection for young persons from sex offenders (Department of Justice, 2007, 2008). Specifically, the *Act* assists Crown Counsel in obtaining DO designations with an automatic presumption of dangerousness after three convictions for designated sexual and violent crimes. The onus is now placed on the defence to prove that they should not be designated in these situations. Some critics of the previous DO legislation felt that proving dangerousness was too high a burden for the prosecutor (Laplante, 2008, p.65). A Crown must now also declare their intentions of pursuing, or not pursuing, a DO hearing in open court. Peace bond times were also extended, allowing them to be in effect for twice as long as was previously allowed. Other changes included raising the age of consent from 14 to 16 to allow more child sex predators to be charged, and increased chances for offenders to be declared DOs. For example, the legislation created a provision that allowed prosecutors to submit a new DO application for a DO on parole, and if they breached conditions of an LTO. Bill C-2 also made it so that a DO application cannot be automatically converted to a LTO (Laplante, 2008, p.82). The *Act*

also provides that a DO hearing should automatically occur if a LTO breaches their terms of release (Department of Justice, 2008).

Some of the most prevalent criticisms of the Bill C-2 legislation include an assertion that the presumption of dangerousness after three violent or sexual crimes bears too much resemblance to U.S. 'three-strikes' laws, and could lead to the overuse of Canada's harshest criminal sanction. Additionally, the reverse onus, which applies after three dangerous offences, may place unfair obligations on accused people, especially those offenders of low socio-economic status, and may overburden the legal aid system (Canadian Bar Association, 2007; Criminal Lawyers Association, 2008). Laplante (2008) argued that three-strikes laws disproportionately affect aboriginal offenders, as they are overrepresented in the justice system and that the laws may diminish the court's ability to consider special circumstances of Aboriginal sentencing as set out in the *Criminal Code* (pp.109-110). The legislation was also not based on empirical research that proves it more effective than previous DO legislation, and may arguably be in violation of the *Canadian Charter of Rights and Freedoms* (Laplante, 2008, p.72).

Historical Conclusion

Despite the U.S.'s influence on Canadian DO legislation over the years, there are many differences and distinguishing factors. Compared to neighbouring U.S., Canada has been considered significantly more conservative in the creation of dangerous violent and sex offender legislation (Petrunik, 2002, 2003; Petrunik & Weisman, 2005). However, considering the many problems cited in relation to the U.S.'s quickly produced and minimally researched *Megan's Law* and *Jacob Wetterling Act*, for example, the hesitation may be warranted. Some of the cited problems from widespread community notification of sexual

offenders include: innocent families being harassed, victims being identified, vigilante justice against mistaken innocents, and youth offenders being labeled as sexual offenders for life (Freeman-Longo, 2002). Since 1995, at least one U.S. jurisdiction also requires that information on sex offenders be available to the public through CD-ROMs. Independent sex offender registries in the U.S. are readily available on the internet, and some areas have set up child molester identification lines (Cote, 2002). It is important to note that community notification has not been proven to promote increased community protection or safety (and may in fact create panic) (Freeman-Longo, 2002). Although communities may feel safer, research has generally found that notification does not affect recidivism rates (Levenson, D'Amora & Hern, 2007; Schram & Milloy, 1995; Tewksbury & Jennings, 2007; Welchans, 2005; Zevitz, 2006).

Canada's National Sex Offender Registry remains inaccessible to the public. The only province that allows the public to access information on high-risk sex offenders is Alberta. The remaining Canadian provinces utilize police services to carry out notification, except in exceptional cases (Petrunik, 2003). Ultimately, the decision to release information on offenders is the responsibility of the Correctional Services of Canada (who oversee law enforcement, parole and probation) (Cooper & Lewis, 1997; Lieb, Quinsey & Berlinder, 1998; Solicitor General of Ontario, 2000).

One of the largest differences between U.S. and Canadian law is the criterion of mental abnormality in the U.S. civil commitment legislation. In Canada, mental abnormality does not need to be proven to confine offenders indeterminately. The inclusion of the mental abnormality component in sexual predator legislation is widely considered to be a critical flaw in U.S. legislation because of the civil commitment aspect of the legislation). Continued

incarceration even though offenders have served their sentences may be considered further criminal punishment and confinement without protections provided under criminal law, resulting in unjust treatment of sexual offenders. Also, civil confinement is to 'dangerousness' and not true mental illness, as the term 'mental abnormality' is not a term recognized by psychiatry (Brooks, 1994; Douard, 2007). Another difference is that Canadian provinces do not enforce mandatory surgical or chemical castration of dangerous sexual offenders, while this is the case in some U.S. states (Logan, 1999). Note, however, that Canadian sex offenders may be swayed or be coerced into taking chemical castration medications to be eligible for supervision in the community (Myer & Cole, 1997).

Throughout Canadian DO legislation's development, perceptions of offenders have progressed from the mentally abnormal 'born criminal', to the untreatable deviant, to the predatory social pariah. The focus of interventional concerns have shifted from treatment of offenders to individual rights, and finally to victim and community protection. Sexual offences against children remain the community's most feared crimes, and changes in legislation are most forcefully driven by media accounts, victim's movements, and public protest resulting from a few horrific incidents. Now that the historical development is understood, the next sections will delve into greater detail of Canada's current *Criminal Code* provisions and practices for high-risk violent and sexual offenders, and research on populations of offenders who are affected by DO legislation.

PART 2: CURRENT LAW AND PROCESS

This section aims to detail the current law and processes involved in DO and LTO designations in Canada. The different instruments, procedures and criteria used for sexually violent and dangerous offenders in current Canadian law will be broken down. The section will be divided into several parts. Firstly, the *Criminal Code* provisions and basic court process will be explained. Next, the current flagging procedures for offenders will be outlined based on the available literature. Lastly, this section will conclude with a critique of these provisions, systems and policies.

Criminal Code Provisions

Canada's present legislation for DOs is found under Part XXIV of the *Criminal Code*. There are several requirements that must be met to initiate a DO (or LTO) application. The first criterion for a DO application is that offenders must be convicted of a Serious Personal Injury Offence, or "SPIO" (s.753(1)). The SPIO offences include indictable offences involving the use of violence or specific sexual offences that carry a minimum sentence of 10 years upon conviction. The exceptional offences, which are not included in SPIO offences include: first and second degree murder, high treason and treason. Case law has shown that the current offence upon which the DO application was made does not necessarily have to be an extremely violent or serious offence if there are previous such SPIO offences for an individual (for example, see *R. v. Currie*, 1997).

In addition to the SPIO, the offender must meet at least one of two set criteria. The first is that the offender poses a significant threat to the well-being of others. This threat may be established if the offender's acts show a pattern of repetitive, aggressive behaviour that

suggests future similar reoffending, if the offender's acts show a repetitive pattern of aggressive behaviour that appears indifferent to consequences of violence to others, and if an act was brutal enough to conclude that such future behaviour will be difficult to control (s.753(1)(a)). Alternatively, the second criterion is that there is a likelihood of causing future injury to others due to lack of control over sexual impulses (s.753(1)(b)). The first step for a Crown Attorney is to petition to evaluate an offender (under s.752.1) after conviction and before sentencing (s.753(2)). The offender is remanded for the expert assessment for a period not exceeding 60 days, and the subsequent report must be filed to the court within 30 days following the assessment (s.752.1). Note that since 1997, the current *Criminal Code* does not specify the type of expert acceptable for the evaluation, although previously, testimony from two psychiatrists, and optionally, criminologists were included (Coles & Grant, 1999). After the assessment, the Crown must decide whether or not to proceed with the application. Research has shown that Crown attorneys place particular importance on psychiatric diagnoses and criminal histories when deciding to initiate a DO application (Bonta et al., 1996). If proceeding with the application, the next step is to obtain consent from the provincial Attorney General (for the provinces), or the Federal Minister of Justice (for the territories). At a DO hearing, the Crown must prove very specific *Criminal Code* requirements to the judge (which have already been outlined), and that the offender is at a high risk to reoffend. The exception is when an offender has committed three or more violent and dangerous crimes (under the *Tackling Violent Crime Act* of 2008), at which time the defence must prove to the judge that the offender does *not* meet the DO criteria (s. 753 (1.1)).

At the hearing, evidence may be heard from psychiatrists, psychologists, criminologists and other relevant experts. Eaves, Douglas, Webster, Ogloff and Hart (2000) produced a guide

to assist mental health professionals advising in DO and LTO hearings. They advise that assessors must be trained in risk assessment, be knowledgeable in the clinical history of the offender, and be well versed in the scientific literature on risk for offenders. They should also be able to demonstrate a history of predictive success. They advise that the risk assessment employed should have a widely accepted empirical basis, and their assessment should address issues of treatability and considerations of risk management. The designation decision is ultimately up to the discretion of the judge, and there have been some cases where the judge used the offender's criminal history rather than expert testimony in deciding potential treatability (see *R. v. Carleton*, 1981, for an example). However, substantial weight is generally given to expert testimony for the determination of dangerousness.

R. v. Mohan, in 1994, set the standards for the admissibility of expert testimony. Testimony should be offered by a qualified expert, be relevant to the issue before the court, be necessary to assist in the decision, and should not be subject to any exclusionary rule (Coles & Grant, 1999). During the hearing, evidence of the offender's criminal history will be provided in detail. This history may even include previous crimes of which the offender was suspected, but not charged or convicted. A current example of this situation is that of Ontario's Stanley Tippett. Tippett was recently found guilty of kidnapping and assaulting a 12 year-old Peterborough girl. For Tippett's upcoming DO hearing, Crown counsel is planning on including evidence of the yet unsolved murder of Sharmani Anandavel, Tippett's 15 year-old former neighbour, who disappeared and was found in a nearby ravine in 1999. Although Tippett was highly suspected of the crime, he was never officially charged (Loriggio, 2008). If a finding of dangerousness occurs from the hearing, the individual may be sentenced to indeterminate detention, a fixed sentence followed by a supervision order,

or a fixed sentence. Research has revealed a very high success rate for DO applications (Bonta et al., 1998).

As previously mentioned, the LTO (or Long-Term Offender) provision was added in the *Criminal Code* as a result of Bill C-55 in 1997. Originally, LTO designations were only intended for sexual offenders who were thought to be manageable in the community (Solicitor General of Canada, 1998), however, like DO designations the LTO finding is not limited to criminals who offend sexually (for an example, see *R. v. McLeod*, 1999). The LTO provisions are defined in s. 753.1 of the *Criminal Code*. As with DO applications, the LTO assessment application is submitted before sentencing (except if converted from a DO application.) The idea that such an offender can be reintegrated and successfully managed in the public is the defining distinction from its DO counterpart. For a LTO hearing, the Crown must convince the judge that the offender meets the sentencing requirements of at least two years of incarceration, is at high risk to reoffend, and that this risk has the possibility of management in the community.

If designated, the LTO is then sentenced to a definite term of incarceration of up to 10 years, followed by up to 10 years of supervision in the community, as set out by a Long-Term Supervision Order, or "LTSO" (s.753.1 & s.753.2). However, the LTO may be eligible for parole before their LTSO term begins (Valiquet, 2008). Failure to abide by the terms of the LTSO is punishable by a maximum of 10 years of incarceration (s.753.3(1)). DOs can also have LTSOs if they are eventually released into the community; upon which a violation of the order may result in indeterminate detention. Like other criminal justice system decisions, the DO and LTO designation can be appealed (s.759). A failed DO application

can also be automatically transferred to a LTO designation, if appropriate, as set out in *R. v. Johnson* (2003).

Generally, DOs and LTOs do not differ in the types of offences that incarcerated them, and most of the LTOs have also had sexual offences. Research has shown differences in DO and LTO populations, such as DOs had a larger proportion of female victims, and (consistent with legislative aims), DOs caused more physical and psychological harm, were more likely to use a weapon, had a higher number of previous adult convictions, were considered at high risk to reoffend, and classified as maximum security; in comparison to LTOs (Trevethan et al., 2002).

In the majority of cases, the expert assessment testimony heavily influences the judge's decision regarding manageability in the community, and potential for treatment; factors which would determine eligibility for LTO designation. The case of *R. v. McCallum* in 2005 illustrates the weight given to expert testimony. In this case, Noel Joshua McCallum was found a LTO despite the offender's horrific history and the Crown's attempt for DO determination. A couple of McCallum's previous violent sex offences included the rape of a 55 year old woman resulting in injuries so severe that she required surgery to her vagina, and the attack and rape of a 46 year old woman with cerebral palsy. However, there was disagreement between the two psychiatrists who testified at the hearing. While one stated that the accused was severely psychopathic and was a sexual sadist, the other disagreed.

The National Flagging System

Alongside *Criminal Code* provisions, Canada currently attempts to manage high-risk individuals through the National Flagging System (NFS). As previously mentioned, the

system was introduced in 1995 after recommendations from the Federal, Provincial and Territorial Task Force on High-Risk Offenders (Bonta & Yessine, 2005). The system was created to better protect vulnerable populations by tracking high-risk individuals. The aim is to “flag” potentially dangerous offenders after they commit sexual and violent offences, and before they are prosecuted for a subsequent similar crime. The idea is that Crown Attorneys will be more successful in applications of DOs because they will be better prepared to catch potentially dangerous offenders and show that they fit the criteria (Yessine & Bonta, 2006). The NFS ensures that Crowns are fully informed on the history, assessments of dangerousness, and all offences of potential candidates. Although originally intended to identify DO candidates, in 1998 the system extended to include flagging potential LTOs (Bonta & Yessine, 2005).

Crown counsel are guided by provincial policies and practice memoranda on dangerous and high-risk offenders. Each province (or territory) has a NFS coordinator who oversees and accepts DO referrals by Crown counsel, police services and other correctional agencies within their jurisdiction. Information is researched, gathered and reviewed, and the coordinator decides whether or not to flag each offender on the Canadian Police Identification Centre (CPIC) system. The criteria for flagging are obviously closely related to DO and LTO provisions in the *Criminal Code*, and differ slightly for each jurisdiction. The coordinator is also responsible for communicating flagging decisions with police, prosecutors and coordinators in other jurisdictions, and acts as the contact person listed in CPIC for the flagged offenders (Bonta & Yessine, 2005; Yessine & Bonta, 2006). Files for flagged offenders generally contain: the offender’s criminal record, reports (psychiatric, probation, pre-sentence, correctional, etc.), court transcripts, names and addresses of victims, and police and Crown contacts (Bonta & Yessine, 2005; Yessine & Bonta, 2006).

Yessine and Bonta (2006) examined the effectiveness of the Canadian National Flagging System by comparing the profiles and recidivism of 256 flagged offenders with 97 high-risk violent offenders. Their results found that the system successfully flagged offenders who fit the profile of DOs and LTOs, (who posed a high risk to communities). This research also suggests that high-risk violent offenders may have more risk of violent recidivism, while flagged offenders are more at risk for general recidivism (p.588; see also Trevethan et al., 2002).

Issues Surrounding DO and LTO Legislation

Legal and Moral Concerns

DO legislation involving indeterminate sentencing has been critiqued since its inception. Radzinowicz and Hood (1981) stated that the concept of “dangerousness” is vague and subject to shifts in meaning, so that it can be easily applied to large numbers of people, leaving its laws open to serious abuse. Some argue that, once detention becomes preventative (instead of punitive), this detention is unjust because it focuses selectively on only some offenders, and on perceptions of risk instead of actual crime committed (Bottoms & Brownsword, 1983; Floud & Young, 1981; Petrunik, 1994).

DO legislation focuses on dangerous individuals instead of widespread danger for society. The strict focus on certain types of danger posed by individuals (who commit deviant sexual offences or violence to few people) is arguably fuelled by our primal feelings and fears (Petrunik, 1982, 2003). Thus, we see dangerous and sexual predator provisions in Canada and the United States focus on a handful of sensationalized violent predatory sexual offences against children, despite the fact that events where a child is abducted and sexually assaulted

by a stranger are rare (Best, 1990). DO laws are inclusive of offences that society finds disturbing rather than threatening due to true prevalence. Douard (2007) explains that “the moral panic over sex offending amounts to a social interpretation of such conduct that is not supported by data” (p.44). Further, he warns that laws based on society’s social revulsion and disgust of specific types of behaviours or individuals are likely to result in the unjust treatment of offenders.

The historical origins of Canadian DO legislation have been criticized as being a quick solution modelled after another country’s failed venture. Canada’s first Habitual Offender legislation borrowed from England’s *Prevention of Crime Act*, 1908, despite its marked deficits and problems (Canadian Committee on Corrections, 1969, p.243; Radzinowicz, 1968). It has also been noted that DO legislation was created as a compromise for the abolishment of capital punishment (as the death penalty still had substantial public support at that time) (Petrunik, 1982, p.245). Webster, Dickens & Addario (1985) suggested that DO provisions should be eliminated, as there was already separate legislation in existence to deal with these types of offenders.

Problems in Practice

Although studies have revealed that high-risk, violent offenders are indeed being targeted by current DO legislation (Bonta et al., 1996), there are still many identified problems with these laws. Many feel that the DO application process is unnecessarily complex and lengthy (Bonta et al., 1998; Yessine & Bonta, 2006, p.599). There have also been suggestions for changes to both the criteria and the designation process.

Overall, Canadian research involving Crown attorneys reveal positive attitudes towards the current laws. Bonta and colleagues (1996) conducted qualitative research with Crown counsel involved in DO and LTO cases. They found that Crowns felt that the present legislation effectively dealt with high-risk violent offenders, and they were generally satisfied with current definitions of SPIO and DO statutory criteria. However, portions of the *Criminal Code* appeared to be redundant, and several criteria were often not clearly understood and agreed upon. In particular, the “brutality” criterion was found to be subjective and difficult to define. Prosecutors also suggested that “severe psychological damage” to young victims should be presumed, as evidence may not emerge until later in life, and it is desirable to avoid re-victimization arising through the need to testify (p.31). Prosecutors cited situations where they had decided not to proceed with a DO application owing to victim interests.

There lacks a general consensus regarding when to use LTO versus DO applications. The language distinguishing between DO and LTO designations (essentially the difference between eventual release in the community and potential incarceration for life) may be open to subjective interpretation. There is no clarification as to what constitutes the LTO criterion of “a reasonable possibility of eventual control of the risk in the community” in the *Criminal Code* (s.753.1(1)); for example, how long is “eventual”? (Coles & Grant, 1999).

Half of the Crown counsel in Bonta et al.’s study also found the 10-year-minimum requirement for SPIO offences to be unnecessarily limiting, and suggested the following offences be added: uttering threats, sexual interference, stalking (criminal harassment), common assault, and attempt to assault with a weapon (1996, p.30). The problem identified with the exclusion of many of these offences is that they had to wait until a threat had been

acted upon to take action. Bonta and Yessine (2005 & 2006) have also suggested that specific criteria be identified to Crown counsel during the flagging process. These should reflect what is known about DOs. For example, the criterion of psychopathy (as measured by Hare's Revised Psychopathy Checklist) should be noted, as it has been found to be quite reliable for both general and violent recidivism (see "Risk Factors" in Part 3).

Implementation Problems

The proper use of DO laws has also been questionable from the beginning. Despite thousands of offenders being potentially eligible under Habitual and Dangerous Sexual Offender legislation in the 1960-1970s, the laws were only put to use a few hundred times before they were replaced (Petrunik, 1982, p.245). Similarly, considering that the DO provisions have been in effect since 1977, there have not been a large number of offenders designated. There are clearly a larger number of violent and sexual offenders who fit provisions in the legislation than are initiated for designation. This could indicate unfair practices of singling out only certain offenders over other equally worthy offenders, lack of communication between justice professionals, or problems with the law's application by Crown counsel (Bonta et al., 1998; Petrunik, 1994). Bonta and Yessine drew similar conclusions in 2005 and 2006 for their research on the NFS. In 2005, they compared the profiles of 256 flagged offenders with 97 known high-risk violent offenders, and found that the NFS successfully identified offenders who fit the profile of DOs and LTOs, but that Crown Counsel may be reluctant to initiate applications of flagged offenders upon re-offence. In 2006, the research included 256 flagged offenders, 64 offenders designated as DOs, and 33 detention failures, offenders who had been detained until expiration of their sentence and had recidivated violently upon release. The authors found that most DO and

LTO applications were successful once initiated, but the authors could not figure out why proceedings were not initiated against a large number of flagged offenders were not initiated after they committed further violent and sexual offences. Some suggestions for this failure of progression included that Crown counsel may have been focusing more on sexual offences, so that violent offences of a non-sexual nature may not have received adequate consideration, and many offences did not result in DO and LTO applications due to sentence negotiations, lack of communication and understanding between professionals involved, and possible weaknesses of some cases (Yessine & Bonta, 2006, pp.598-600).

The prosecutors in Bonta et al.'s research suggested that approvals for DO applications could be provided by a lower, non-political official such as the provincial Assistant Deputy Attorney General for the Criminal Law Division, or another senior official (Bonta et al., 1996). They had reservations about a political entity making the decision to proceed with an application, as this individual might be influenced by interest groups, media or the public, and such an important decision may not be appropriately made if the Attorney General does not have a legal background (Bonta et al., 1996).

Bonta et al.'s research also identified that prosecutors had constant problems obtaining the necessary information required for a DO application. For example, destruction of dated police records, missing information on CPIC, and the unavailability of transcripts were among the top problems (Bonta et al., 1996, p.36). Another large problem is that DO applications normally require three times more work (or more) than regular criminal sentencings, but Crowns are generally not provided with workload adjustments. Similarly, Crown prosecutors are generally handed the responsibility of flagging offenders. These Crowns are overwhelmed with large numbers of cases, and may not be the best equipped to

diligently manage this procedure. There is limited time for a thorough investigation, and not very much time to spare. Increased cooperation is clearly needed by many different areas of the justice system to coordinate access to police files, court documents, correctional and psychological records.

Regional Disparity

Disparity between jurisdictions in the use of DO provisions was first cited by the Ouimet Report (Canadian Committee on Corrections, 1969), and has since also been found by several researchers. For example, Bonta et al. (1996) found that Canadian provinces did not differ in the types of offenders and offences being targeted for DO applications, but provincial variation in the use of applications was found. They hypothesized that the differences in application between jurisdictions could be due to procedural or organizational differences. While Ontario had the largest number of total DOs and British Columbia had the largest number of DOs per capita, Quebec only had one DO. The disparity would suggest that some provinces may be dealing with certain types of individuals differently, for example, they might be civilly committing appropriate individuals through provincial mental health legislation, while other provinces are proceeding with DO applications (p.18).

In 2002, Trevethan, Crutcher and Moore found jurisdictional differences in the distribution of DOs and LTOs. Quebec and the prairie regions had larger proportions of LTOs than DOs, while the reverse was true for Ontario and the pacific regions. Recent statistics from Correctional Services Canada (2009) show similar provincial differences in the use of DO designations and LTOs (see Table 1 below). Ontario and British Columbia have a large lead in total DO designations, while Quebec leads in total LTO use. Further, the total number of LTOs triples the number of DO designations for Quebec.

Table 1: Use of Dangerous Offender Designations and Long-Term Supervision Orders by Province from Correctional Service Canada (2009)

Province/ Territory	Total # of DO designations (1978-April 2009)	Total # of LTSOs (1997-April 2009)
Alberta	38	45
British Columbia	105	91
Manitoba	9	26
New Brunswick	8	8
Newfoundland & Labrador	11	5
Nova Scotia	17	13
Northwest Territories	5	3
Nunavut	0	5
Ontario	199	156
Prince Edward Island	0	2
Quebec	55	168
Saskatchewan	40	49
Yukon	1	6
TOTALS	488	577

Source: Public Safety Canada Portfolio Corrections Statistics Committee, 2009

Some researchers have suggested that variances in some jurisdictions may occur due to a lack of communication between members of the justice system (Yessine & Bonta, 2006, p.600).

There is little information available on how offenders in each jurisdiction are chosen for flagging, but it has been suggested that Crown prosecutors in certain provinces may be more reluctant to flag individuals and initiate applications (Bonta et al., 1998; Petrunik, 1994).

Conclusion

Through a review of the historical development and an examination of current laws, it is understandable that DO and LTO provisions are considered to be among the most complex provisions in the *Criminal Code*, and are under constant scrutiny and review due to the high political and public interest surrounding these cases. The following section will briefly examine research related to dangerousness for a few broad categories of offender

populations; adding yet another layer to this review of dangerous and high-risk offender legislation.

PART 3: APPLICATION TO OFFENDER POPULATIONS

This section aims to explore the types of offenders who are found dangerous, and what is known about the risk factors of such individuals. A brief examination of risk assessment research is appropriate, as DO application outcomes rely quite heavily on the evaluation of risk, including the use of risk assessment instruments (Eaves et al., 2000). This overview will be supported by research found from within the literature. A discussion of levels of dangerousness and the use of indeterminate sentencing for violent and sexual offenders, young offenders, mentally disordered offenders and female offenders will be presented.

Sexual and Violent Offenders

Since the creation of DO and LTO laws, the majority of designated individuals have been sex offenders (Bonta, Zinger, Harris & Carriere, 1998; Motiuk & Seguin, 1992; Petrunik, 1994; Public Safety and Emergency Preparedness Canada, 2009; Trevethan et al., 2002; Weinrath, 2004). Whether violent or sexual, researchers found that 70% of DO cases showed evidence of brutality, and about 20% of those cases showed extreme violence (Bonta et al., 1996). Despite criticisms from the 1969 Ouimet Report that the legislation failed to target non-sexual offenders (Canadian Committee on Corrections), present DO legislation still appears to favour designating sex offenders (Bonta et al., 1996; Jakimiec et al.,

1986; Pepino, 1993). Research has also found that sexual offenders (as opposed to violent, non-sexual offenders) are more likely to be flagged in the NFS and prompt a DO application (Bonta, Harris, Zinger & Carrier, 1996; Bonta & Yessine, 2005). It appears that despite the passage of years and efforts to focus upon violent, non-sexual offenders, sex offences and offenders are still targeted by Crown attorneys and courts. Research involving Crown interviews suggests that this may be due to differing interpretation of provisions. Bonta et al. (1996) found that 87% of Crown attorneys stated that DO applications are initiated by sexual offences.

To the public, all sex offenders are equally dangerous. In reality, sex offenders vary widely in their recidivism (Hanson, Morton, & Harris, 2003). Meta-analyses and follow-up study research shows sexual and violent recidivism to range from 13% to 30% for sex offenders (Ackerley, Soothill & Francis, 1998; Cann, Calshaw & Friendship, 2004; Grubin, 1998; Soothill & Gibbens, 1978). There is also a widespread assumption that sex offenders are specialists (that is, they only commit crimes of a sexual nature) (Simon, 1997, 2000), when studies show that sexual offender recidivism is more general in nature (Hanson & Bussiere, 1998; Hanson & Morton-Bourgon, 2004; Lussier, LeBlanc & Proulx, 2005; Mercado & Ogloff; Miethe, Loson & Mitchell, 2006; Sample & Bray, 2003; Simon, 2000; Smallbone & Wortley, 2004). However, the nature of the sexual offence may be important regarding the type and prevalence of recidivism.

Pedophiles are the sex offenders most hated by communities. To Durkheim, these public sentiments stem from the idea that the more sacred the victim, the more profane the assault and offender (1965). Even within the prison population, child sex offenders are abused and universally hated (Kleinhans, 2002, p.242). Although pedophilic sex offenders are generally

widely feared, the literature shows that a sub-type of these sexual offenders, incest offenders, are at a low risk to reoffend after conviction (Furr, 1993; Marshall & Anderson, 1996; McGrath, 1991; Quinsey, 1986). These offenders are also seen as less risky to society because the perception is that they limit their victims to family members (non-stranger attacks). However, certain risk factors, such as pedophiles having young male victims, substantially increase the risk for sexual recidivism (to be discussed further in the “Risk Factors” section below). Research has also found that child molesters are more specialized in their crimes than rapists (where the victim is an adult) (Lussier, LeBlanc & Proulx, 2005; Miethe, Olson & Mitchell, 2006), in that rapists are more likely than child molesters to recidivate with a non-sexual, violent offence (Hanson & Bussiere, 1998).

Instruments

Offenders are assessed for risk and dangerousness using risk assessment instruments that have shown high reliability in predicting violent, sexual and general recidivism. (Although risk assessment instruments play an important role in the DO designation process, a full review and comparison of risk-assessment instruments is beyond the scope and purpose of this paper.) For some examples of studies on the validity of risk assessment instruments, please see Abracen & Looman, 2005; Andrews & Bonta, 2003; Craig, Browne & Stringer, 2003; Craig, Browne, Stringer & Beech, 2005; Glover, Nicholson, Hemmati, Bernfeld & Quinsey, 2002).

While there is widespread consensus that general re-offending may be predicted (Andrews & Bonta, 2003; Gendreau, Little & Goggin, 1996), there is disagreement about violence prediction (Cocozza & Steadman, 1978; Monahan, 1981) and the value of tools meant to predict general recidivism with violent and sexual offenders (Glover, Nicholson, Hemmati,

Bernfeld & Quinsey, 2002; Rice & Harris, 1997). Some studies have found specific risk assessments to be superior in predicting sexual and violent recidivism (Bartosh, Garby, Lewis & Gray, 2003; Hanson, Morton & Harris, 2003; Hanson & Thornton, 2000; Quinsey, Harris, Rice & Cormier, 1998); however, dangerousness is still thought to be difficult to predict (Cobley, 2000). Although a number of sexual recidivism risk factors have been identified, Hanson and Morton-Bourgon (2007) have found the relationships between any single risk factor and recidivism is small, and no single measure or tool has been established as most accurate above the rest (also, Hanson, Morton & Harris, 2003; Hanson & Morton-Bourgon, 2009). Although actuarial assessments have been shown to provide the best predictions for violent and sexual recidivism (Hanson & Morton-Bourgon, 2007 & 2009; Hanson, Morton & Harris, 2003), research has shown that they are not routinely used by clinicians (Hilton, Harris, Rawson & Beach, 2005). In the last few years, several researchers have alternately found that actuarial assessment instruments are generally poor for prediction of sexual recidivism (Hart, Michie & Cooke, 2007; La Fond, 2005); however, actuarial measures are still widely accepted as the best predictors of recidivism.

Risk Factors

Craig and colleagues (2003) reviewed 12 of the most widely used assessments for sexual offenders and found that while predictive accuracy was limited, dynamic risk factors (which may change over time) and deviant sexual interests were best indicative of sexual recidivism. Hostility has been identified by several researchers as a risk factor for violent sexual recidivists (Firestone, Nunes, Moulden, Broom & Bradford, 2005; Hanson & Morton, 2003; Hudson, Wales, Bakker & Ward, 2002; Quinsey, Khanna & Malcolm, 1998; Thornton, 2002), as well as preference for children (Bonta et al., 1996). Sexual recidivists also tend to be

single and young (Hanson, 2001). Other risk factors include: prior criminality, prior sexual offences, prior juvenile sex offences, psychopathy, age and time spent in custody, paraphilias, poor social skills, male victims, two or more victims in index offence, stranger victims, unemployment, substance abuse, negative social influence, impulsivity, and treatment failures (Craig, Browne & Stringer, 2003; Hanson & Bussiere, 1998; Hanson & Harris, 2000; Hanson, Morton & Harris, 2003; Langstrom & Grann, 2000; McCann & Lussier, 2008).

Many factors may be problematic (such as psychopathy and impulsivity), as definition and meaning can vary across experts. For example, there is apparently no reliable measure for impairment in self control (Mercado, Bornstein & Schopp, 2006); and although it can be reliably measured using the PCL-R (Hare's Revised Psychopathy Checklist, 1991), academics find the term 'psychopathy' vague in meaning, and misused in interpretation to offenders (Kittrie, 1971; Abracen & Looman, 2005). This may be especially troubling in conjunction with research that shows Crown attorneys are especially influenced in their decision to initiate DO application by a label of psychopathy or diagnosis of antisocial personality disorder (Bonta et al., 1996). Risk assessment instruments might also not be applicable to different types of offenders such as youth, mentally disordered and female offenders, which will be discussed in the following sections.

Young Offenders

It is generally thought that sexual offending is a stable trait within individuals, so that juvenile sex offenders are likely to continue this behaviour into adulthood. However, similarly to adults, it has been shown that young sexual offenders have higher rates of general recidivism than sexual recidivism (Caldwell, 2002 and 2007; McCann & Lussier,

2008; Worling & Curwen, 2000; Zimring, 2004; Zimring, Piquero & Jennings, 2007).

Zimring, Piquero & Jennings' (2007) research on youth sex offender recidivism in Racine, Wisconsin also suggests that most youth offenders who commit sexual offences do not continue to offend sexually into adulthood.

Research has shown that risk factors for juvenile sex offenders (under the age of 18) may be different from adult offenders (Miner, 2002). However, recent research suggests that most risk factors for adolescent sex offenders are quite similar to those found in adults (McCann & Lussier, 2008). Some youth-specific factors for sexual recidivism include: number of victims, stranger victims, public location, and multiple offences (Langstroem, 2002). Miner (2002) also found that younger victims, female victims, younger age at first offence, and impulsivity increased juveniles' risk for sexual recidivism. Unlike adult males, juveniles demonstrated decreased risk of recidivism with male victims, sexual abuse victimization history, and paraphilias (Miner, 2002). Overall, young offenders appear to pose less risk to future sexual recidivism than their adult counterparts (Soothill, Harman, Francis, & Kirby, 2005). In fact, Rasmussen (1999) found that only about 10-15% of adolescent sex offenders continued to sexually reoffend. Due to the fact that risk factors differ between adult and youth offenders, risk assessments developed and tested on adults may not be appropriate for juveniles. The research signals an obvious impairment in knowledge on youth risk factors and a need to develop tools specifically for young persons (McCann & Lussier, 2008; Miner, 2002; Worling, 2010). There are only a handful of assessment tools designed specifically to measure sexual recidivism for youth, and there are noted difficulties regarding the predictive accuracy of assessments on youth sexual re-offending in general (Caldwell, Ziemke & Vitacco, 2008; Viljoen, Elkovitch, Scalora & Ullman, 2009).

There are no DO provisions in the *Youth Criminal Justice Act*, and there is an understandable reluctance for courts to label young people for life. Youth are generally spared exceedingly harsh sentences and labels such as DO and LTO; however, there are cases where courts have made an exception. The youngest Canadian to be designated as a DO was Thomas Lyons in 1987. A month after his sixteenth birthday, Lyons broke into a residence with a firearm and committed a sexual assault. He was diagnosed as a sociopathic personality with no conscience, and the court, while recognizing his young age, nevertheless declared him dangerous (*R. v. Lyons*, 1987).

In 1999, 17 year-old Adam Laboucan received DO status for raping a 3 month-old infant he was babysitting. Evidence at the hearing exposed Laboucan's fantasies of murder and his urges to consume his own flesh, plus his previous murder of a three year-old child by drowning when he was only 11. The court was not satisfied that Laboucan could be successfully treated, or that his risk against children and himself could be managed in the community (*R. v. Laboucan*, 2002).

Although it is rare for youth offenders to be declared DOs and LTOs, there is evidence that laws are getting harsher for youth. Young offenders may be included in sex offender registries if they are found guilty of sexual offences and receive an adult sentence. A recent federal bill called 'Sebastien's Law' (*Protecting the Public from Violent Young Offenders Act*) proposes to change the *Youth Criminal Justice Act* to enhance the protection of society from violent and mentally ill young offenders (Stone, 2010). Named after Quebec teen, Sebastien Lacasse, who was beaten to death by other teens, the bill aims for the increased use of pre-trial detention for violent and repeat crime, requirements for Crown counsel to seek adult

sentences for serious crimes, and it would give judges the discretion to publish the names of dangerous young offenders.

Mentally Ill Offenders

To the general public, mentally disordered offenders appear particularly dangerous and unpredictable. However, as a risk factor used to predict future violence, mental illness is weak (Bonta, Law, & Hanson, 1998). Further, predictions of future dangerousness are generally not reliable for mentally ill offenders (Brooks, 1994).

As previously mentioned, Canada's DO and LTO laws are not linked to mental abnormality, personality disorders, or criminal responsibility. Research has also shown that the initiation of DO and LTO applications do not appear to be related to mental health characteristics (Bonta & Yessine, 2005). Further, as a group, DOs are relatively free from major mental illnesses, suggesting that violent mentally ill offenders are being dealt with under civil commitment procedures (Bonta et al., 1996, p.17). In fact, Bonta and colleagues (1996) state that a diagnosis of severe mental disorder may work against a DO application, as it is highly possible that such offenders have been found unfit to stand trial or not criminally responsible on account of a mental disorder for their offences (p.44).

Joseph Fredericks exemplifies a case where one of Canada's violent and sexual offenders escaped DO designation, and indeed the criminal justice system, for over two decades due to mental illness. Fredericks was an offender who committed a multitude of violent and sexual crimes beginning in childhood, but remained civilly committed on account of diagnoses of psychopathy, pedophilia and sexual sadism. After one sexual assault of a ten year-old boy in 1983, Fredericks came under the criminal justice system for the first time. Unaware of his

extensive history of assaults while in psychiatric care, the Crown did not pursue a DO application, and Fredericks was sentenced to twenty-two months of incarceration with two years probation (Petrunik & Weisman, 2005). Fredericks would go on to commit further violent offences, including the murder of Christopher Stephenson (as previously discussed).

Female Offenders

It is widely accepted that within the context of the justice system, female offenders pose little risk, except in exceptional cases. In comparison to males, serious violence is rare, and rarer still are female sexual offenders. There have only been two females designated as a DO since 1977 (Yeager, 2000). There are currently no female DOs in the offender population in Canada (Public Safety and Emergency Preparedness Canada, 2009), and there remain very few LTOs and offenders serving LTSOs.

Canada's first female DO, Marlene Moore, was designated and sentenced to a term of definite incarceration for six months. Moore was incarcerated at age 13, and had a history of abuse, violence, substance abuse and self-mutilation (Kershaw with Lasovich, 1991). She took her own life while incarcerated. Canada's only other female DO, Alberta's Lisa Neve, was designated in 1994. The judge determined that she showed a pattern of dangerous behaviour, and was not a good candidate for treatment due to her psychopathy. Although Neve had a violent history including cutting a victim's neck with an exacto knife and threatening to kill a lawyer and his children, women's and aboriginal groups such as the Elizabeth Fry Society of Canada attempted to intervene on the DO finding, and lobbied for an appeal (Canadian Association of Elizabeth Fry Societies, 1999; Yeager, 2000). At the appeal in 1999, the designation was reversed. Among the reasons that contributed to the conclusion that Neve's circumstances did not justify the original finding were that the

predicate offence of robbery and previous offences were not of an extremely violent nature, and that psychiatric evidence for the assessment was based at least in part on Neve's personal diary entries. One of Canada's most recent potential female DO candidates is Ontario's Michelle Erstikaitis. Erstikaitis has already been designated a LTO and labeled a psychopath, and has been asking for DO status (Small, 2010). Erstikaitis's criminality includes armed assault, threatening, and arson.

While not designated as a DO, Karla Homolka is probably Canada's most well-known and publicly perceived high-risk female offender. After committing multiple sexual assaults and murders alongside then husband Paul Bernardo, she was handed a 12-year sentence for manslaughter. In 2005, amidst the outrage regarding her impending release, Ontario's Attorney General pushed to expand the DO category to catch offenders who may not have been found dangerous when first incarcerated (Kilty & Frigon, 2007). Most recently, in 2010, federal political parties joined together for quick passage of a portion of Bill C-23 so that Homolka would not be able to apply for a pardon (Bryden, 2010). The bill declares that anyone who has been convicted of a SPIO must wait ten years after being released from prison (instead of the previous five years) to apply for a pardon. This portion of Bill C-23 was passed just before Homolka would have been eligible, and little time was afforded to consider the consequences of these changes to the legislation. The second half of the bill, which will be considered in the Fall of 2010, would ban anyone who has committed three indictable offences from pardon eligibility. It is not known if Homolka was planning on applying for a pardon for her crimes.

While there may be a shift in the criminal justice systems' increased willingness to incarcerate more women in recent years (Chesney-Lind & Pasko, 2004), including an increase in the use

of death penalties for women in the U.S. (Morgan, 2000; Streib, 2000), it is unlikely that there will be many females declared as DOs in the near or far future.

Conclusion

There have been many problems with DO legislation from its inception, according to critics. Esses and Webster (1988) reported that offenders with successful DO status had visible distinguishing characteristics, so that an offender's personal appearance affected the court's decision. Research has shown that some offenders committing less than serious offences have been found dangerous (Jakimiec, Porporino, Addario & Webster, 1986; Trevethan et al., 2002). This has also been supported in the review of dangerous female offenders.

Clinicians are inclined to over-predict dangerousness (Menzies & Webster, 1995). A good clinician should incorporate actuarial measures and clinical knowledge in their DO or LTO assessment (Coles & Grant, 1999, p.18). Above all, the expert's qualifications should be "above dispute"; the assessment must be "thorough and comprehensive", and opinions must be "justifiable, unbiased and non-prejudicial" (Coles & Grant, 1999, p.19). Many researchers warn of the reliance placed on inaccurate assessments of dangerousness and risk in general when utilized for such important decisions as an individual's freedom (Zedner, 2006). As psychology and psychiatry are probabilistic sciences, and identified risk factors are based on group characteristics, little can be stated with absolute certainty in relation to an individual offender's risk (Coles & Grant, 1999).

Through this brief examination of offenders, dangerousness and recidivistic factors, it is evident that recidivism varies greatly, and prediction is far from a perfect science. Although patterns for subgroups and specific risk factors have been identified, there is still much

research to be done for different types of offenders and recidivism. Nevertheless, the current instruments used to measure offender recidivism are the best predictors we have, and will continue to be used for such important decisions as DO and LTO designation.

The final portion of this paper will focus on possible future directions for legislation and research; based on the available literature. The discussion will focus on changes in types of offenders, practices, and the evolution of law for dangerous and high-risk offenders that could occur in the near future.

PART 4: FUTURE DIRECTIONS

Recommendations and Research

Criminologists and researchers have offered advice for future research and revisions to legislation. The literature has identified the need for increased research for the following areas in relation to high-risk individuals: major admitting offence, offence history, psychiatric history, substance abuse presence, sexual and physical abuse childhood history, exposure to violence, race and ethnicity, physical appearance, social class, and family background (Petrunik, 1994; Wormith & Ruhl, 1987). To improve our understanding of court processes and flagging systems, more research needs to be conducted directly on standards and practices impacting DO and LTO hearings, such as the use of applications in plea bargaining, jurisdictional policy differences, and characteristics which lead to offender flagging (Petrunik, 2004; Yessine & Bonta, 2006).

With regard to risk assessment instruments and risk criteria, there is still much research that needs to occur to enhance confidence in prediction. For example, while static factors are well known within the literature (such as prior offence history, age, and relationship to victim), dynamic factors are less well known and deserve much consideration and research (Hanson, Morton, & Harris, 2003). The goal of such research should be the production of widely accepted standardized risk assessment instruments for different types of offender populations (Hoge, 2002). We should also shift our research focus to include interventions, as opposed to research on risk factors and prediction alone (Dahabieh, 2008). For example, we need to know more about *how* to reduce risk in communities by focusing on dynamic risk factors (such as community support, housing and employment).

Main recommendations for improvements from researchers include (but are not limited to): the development of detailed guidelines to assist professionals with potentially dangerous offenders (Bonta & Yessine, 2005; Bonta, Zinger et al., 1998; Hanson & Morton-Bourgon, 2005; Yessine & Bonta, 2006), the implementation of specialized training programs for Crown counsel on flagging systems (Petrunik, 2003), increasing police resources and Crown counsel preparation time to facilitate improved DO investigations (Bonta et al., 1996), and the review and development of communication practices between justice system professionals involved in the National Flagging System (Bonta & Yessine, 2005).

Another suggestion that was included in the Stephenson Inquest in 1993, is to provide for DO and LTO implementation after an offender has served a fixed sentence (Petrunik, 2004). However, Mercado (2006) pointed out that there have since been no signs of Canada planning for this type of legislation. Further, there are several unique characteristics to Canadian legislation that would make post-sentence detention difficult to enforce. Unlike the

United States, detention via civil commitment would be inappropriate due to federally enforced criminal law and provincially/territorially enforced civil law. Also, Canadian DO and LTO legislation allows for the inclusion of offenders who do not suffer from a mental abnormality or personality disorder, and is not tied to criminal responsibility; which appears necessary for countries enforcing detainment after sentence expiry date (Petrunik, 2004). Thus, it is highly unlikely that post-sentence detainment would be found constitutional in Canada.

Treatment and Alternatives

Throughout Canadian history the attempts to reduce the sexual and violent recidivism of individuals has been achieved using medications, therapies, penalty of death, cognitive programs, surgery, technology, incarceration, and supervision. It is worthwhile to note some of the recent developments apart from DO and LTO designation. Moderately promising results have been found in research on cognitive-behavioural strategies (Hall, 1995; Marshall & Barrett, 1990; Stalans, 2004) and pharmacological treatments for sex offenders (Hall, 1995).

The United States first authorized and mandated the use of chemical castration for sexual offenders released into the community in 1996 (Myer & Cole, 1997). Although not mandatory in Canada, the option of chemical castration is often provided to offenders if they wish to remain among the public. These methods are not without side effects, especially with long-term use (Meyer III & Cole, 1997). More research needs to be done in the areas of recidivism effects, the effects of medication with long-term use, and to develop medications with less harmful effects. There has also been increasingly widespread usage of electronic monitoring in Canada (Bottos, 2007). While these devices have been in place since the 1980s,

results on effectiveness have been mixed, and more Canadian research is needed. Another community intervention is Canada's Circles of Support and Accountability program, which aims to reduce the sexual recidivism of high-risk sex offenders utilizing community volunteer and professional support. The success of the program has been noted (Wilson, McWhinnie, Picheca, Prinzo & Cortoni, 2007; Wilson, Cortoni & Vermani, 2007), and its use has spread to other countries. There are currently about 100 circles in Canada today (Petrunik, 2007).

The Future of DOs

Yessine and Bonta (2006) argued that history has shown a push toward increasingly lengthy terms of indeterminate incarceration and periods of community surveillance (p.578); which was previously hinted at by other researchers (Jakimiec et al., 1986). Statistics show that the yearly DO population had been increasing as time passed since its inception, but may be stabilizing in recent years (Public Safety and Emergency Preparedness Canada, 2009, p.107; Trevethan et al., 2002, p.15). After reviewing the dangerous and high-risk offender literature and legislation in different countries, Mercado (2006) suggested that there was evidence of increasing focus on detainment rather than on rehabilitation or reintegration (p.13). The recent legislative developments explored in this paper involving sexual and violent offenders confirm that harsher measures are being proposed in Canada. This is also evidenced by the increased volume of DO, LTO and s.810 orders in recent years (Petrunik, 2003; Trevethan et al., 2002). Repercussions of the increases in these types of sentences and orders will be seen by increased strains on justice system resources in the coming years.

There are signs that DO legislation may be expanding to other populations of dangerous individuals than violent sexual offenders. For example, although impaired driving was not

outlined or focused upon in legislation (Bottoms, 1977), these types of offenders have recently been included as DO applicants. Even though there has yet to be a successful designation for a chronic drunk driver, there have been several efforts. In January of 2006, Canada's first attempted DO designation of an individual for impaired driving occurred in the case of Raymond Charles Yellowknee of Alberta (MADD Canada, 2007). Yellowknee, who had previous drunk driving convictions, had most recently killed a mother and her three daughters. In a more recent case from 2009, a Quebec Crown applied for DO status for Roger Walsh, who had 18 previous convictions for drunk driving, and 114 other convictions for various assaults, threats, and thefts (Banerjee, 2009). The offence that prompted the hearing was Walsh's killing of a mother bound to a wheelchair. The judge denied the DO designation, but in an unprecedented move Walsh received a life sentence, the longest sentence to date for an impaired driving offence and arguably comparable to a DO sentence.

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