

UNIFORM LAW CONFERENCE OF CANADA

**TAKING INTO ACCOUNT  
PRE-SENTENCE CUSTODY  
AND THE AVAILABILITY OF  
CERTAIN SENTENCING MEASURES**

**August 12, 2009 - Ottawa, Ontario**

Presented by Randall Richmond

# Mandate:

...consider the matter of the taking into account of time spent in pre-sentence custody (subsection 719(3) of the *Criminal Code*) when imposing sentence and the availability of certain sentencing measures such as probation orders, conditional sentences, delay of parole and long-term offenders...

# 719(3)

**In determining the sentence to be imposed on a person convicted of an offence a court may take into account any time spent in custody by the person as a result of the offence.**

# Source of the problem:

Several statutory provisions require a specific term of imprisonment as a threshold or ceiling for some consequence or process.

## Example:

A conditional sentence is only possible for an imprisonment of less than 2 years.

# **SENTENCING MEASURES IMPACTED BY PRE-SENTENCE CUSTODY**

1. Minimum sentences
2. Conditional sentences
3. Probation orders
4. Delayed parole
5. Long-term offenders
6. Correctional facilities
7. Deportation
8. Parole eligibility for murder or high treason

# 1. MINIMUM SENTENCES

**719(1)** A sentence commences when it is imposed, except where a relevant enactment otherwise provides.

***R. c. Wust*** [2000] 1 S.C.R. 455

The minimum is respected even if credit for PSC reduces the pronounced sentence to less than the minimum.

The applicable criteria is therefore the sentence determined before credit is granted for PSC.

## 2. CONDITIONAL SENTENCES

### 742.1

A conditional sentence is only possible for an imprisonment of less than 2 years.

***R. v. Fice*** [2005] 1 SCR 742

The sentence to be considered in determining eligibility is the sentence as determined by the court before credit is granted for PSC.

**The applicable criteria is therefore the sentence determined before credit is granted for PSC.**

# 3. PROBATION ORDERS

**731(1)(b)** A probation order can be added to a sentence of imprisonment as long as that sentence does not exceed two years.

***R. c. Mathieu***, 2008 CSC 21

The threshold test for probation orders is to be applied after credit is given for pre-sentence custody.

**The applicable criteria is therefore the sentence determined after credit is granted for PSC.**

## 4. DELAYED PAROLE

**743.6** : Only sentences of two years or more are eligible.

**743.6(1.2)** [added in 2001] makes the order mandatory for offences under sections 467.11, 467.12, or 467.13 [the main criminal organization offences] unless the court is satisfied that the order is not necessary.

## 4. DELAYED PAROLE

*R. v. Monière*, 2007 QCCA 309

*R. v. Mathieu*, [2008] 1 S.C.R. 723

1. The determination of whether the two-year threshold is met must be made after the subtraction of credit for time served in pre-sentence custody.

The applicable criteria is therefore the sentence determined after credit is granted for PSC.

# 4. DELAYED PAROLE

*R. v. Monière*, 2007 QCCA 309

*R. v. Mathieu*, [2008] 1 S.C.R. 723

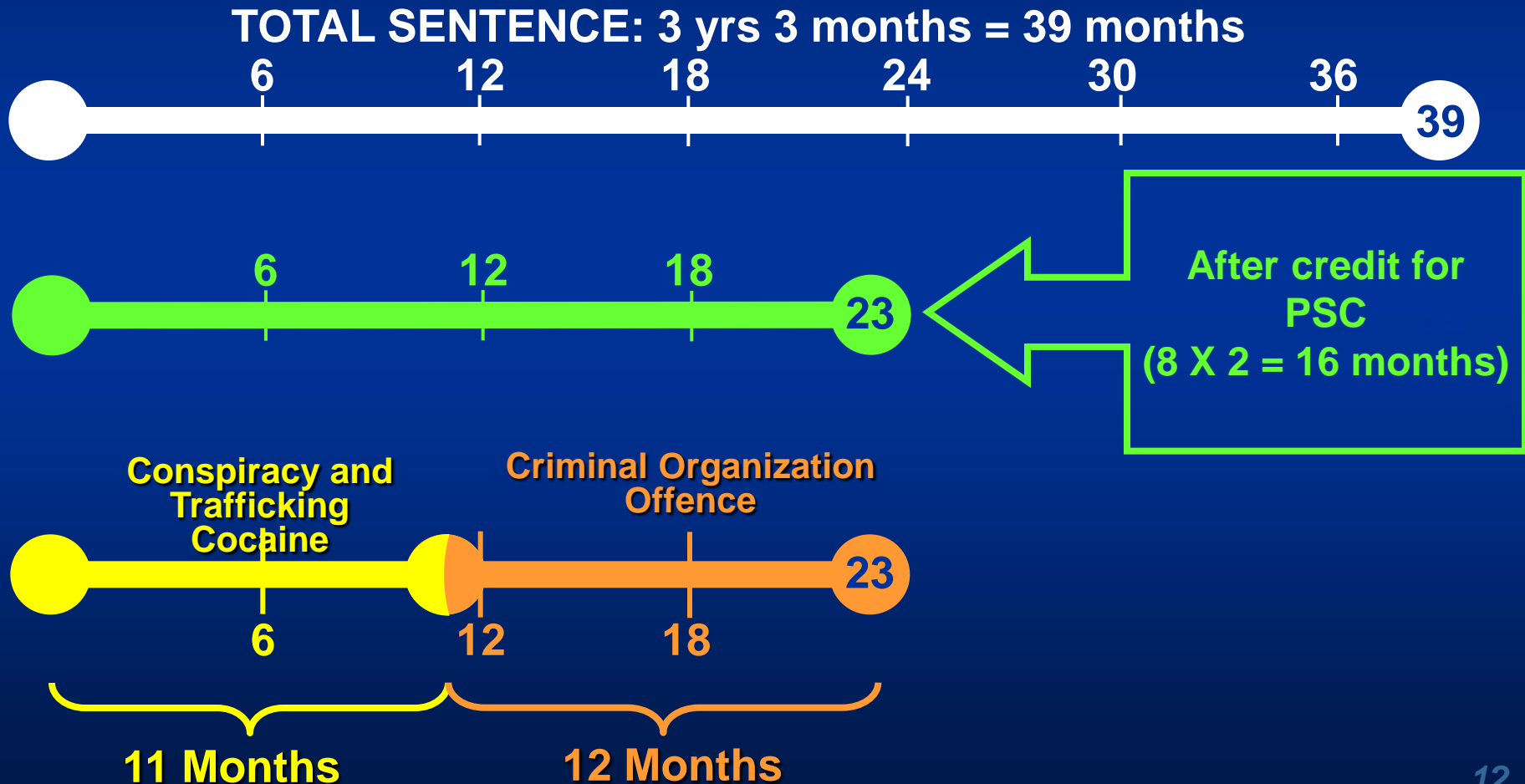
2. Threshold must be met for individual sentence on each count.

**Why is this a problem?**

Because **467.14** provides that the sentence for a criminal organization offence must be consecutive to that given for any other charge based on the same event or series of events.

# 4. DELAYED PAROLE

## Example: *Monière*



## 4. DELAYED PAROLE

### **Example: *R. c. Martinez*, 2009 QCCS 863**

(Quebec Superior Court, March 5, 2009, Cournoyer J.)

**He pled guilty to conspiracy, trafficking in cocaine, and committing an offence for a criminal organization.**

**The drug operation was described as "large scale and sophisticated".**

**The implication of Martinez in the cocaine distribution and in the money collection was described as "complete, total and unequivocal".**

**The parties therefore made a joint submission on sentence, which the court found reasonable, of 9 years total imprisonment.**

# 4. DELAYED PAROLE

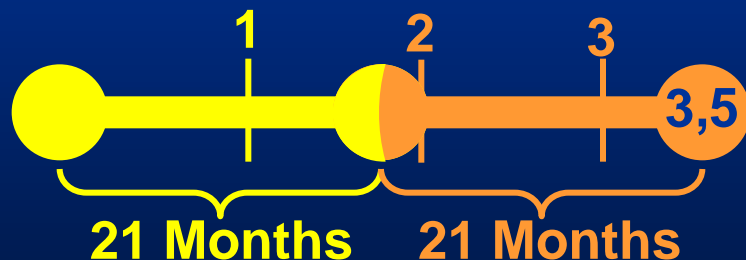
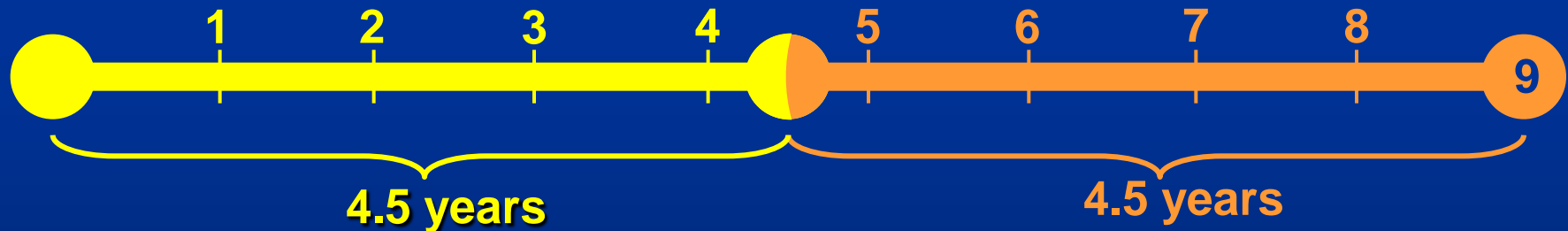
Example: *R. c. Martinez*, 2009 QCCS 863

TOTAL SENTENCE: 9 years



Conspiracy and Trafficking Cocaine

Criminal Organization Offence



After credit for PSC  
(33 X 2 = 66 months)

## 4. DELAYED PAROLE

The source of the problem?

In *R. vs. Mathieu* (Monière), the Supreme Court of Canada did not seek out Parliament's intention when it adopted paragraph 743.6(1.2).

## 5. LONG TERM OFFENDERS

**753.1(3)(a) :**

The sentence must be a minimum of two years imprisonment.

***R. vs. Hall***, (2004), 186 C.C.C. (3d) 62 (OCA)

The minimum is respected even if credit for PSC brings the sentence below 2 years.

The applicable criteria is therefore the sentence determined before credit is granted for PSC.

## 6. CORRECTIONAL FACILITIES

**743.1:** A person who is sentenced to imprisonment for two years or more shall serve the sentence in a penitentiary.

In practice, this is applied to the net sentence after deduction of PSC.

The applicable criteria is therefore the sentence determined after credit is granted for PSC.

## 7. DEPORTATION

**36(1)a)** of the *Immigration and Refugee Protection Act*, S.C. 2001, ch. 27

*36. (1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for  
(a) having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed;*

**In practice, this is applied to the net sentence after deduction of PSC.**

**The applicable criteria is therefore the sentence determined after credit is granted for PSC.**

## 7. DEPORTATION

**36(1)a)** of the *Immigration and Refugee Protection Act*, S.C. 2001, ch. 27

**The problem:**

**The present application is an encouragement to prolong pre-sentence custody.**

## 8. PAROLE ELIGIBILITY FOR MURDER OR HIGH TREASON

*Criminal Code* sections 745-746 give effective one-for-one credit to offenders who are given life sentences for murder or high treason, because the calculation of the delay before which they will be eligible to apply for parole starts on the day of their arrest.

The applicable criteria is therefore the sentence determined after credit is granted for PSC.

# ANALYSIS

Summary of the eight measures related to sentencing that are impacted by the giving of credit for pre-sentence custody:

In 3 cases the applicable criteria is the sentence determined before credit is given for pre-sentence custody.

In 5 cases, the applicable criteria is the sentence determined after credit is given for pre-sentence custody.

SENTENCING MEASURES ▼ ▼ ▼	APPLICABLE CRITERIAS	
	Sentence <u>before</u> Credit for PSC	Sentence <u>after</u> Credit for PSC
Minimal sentences	✓ <i>Wust</i>	
Conditional sentences	✓ <i>Fice</i>	
Probation orders		✓ <i>Mathieu</i>
Delayed parole		✓ <i>Mathieu (Monière)</i>
Long term offenders	✓ <i>Hall</i>	
Correctional facilities		✓ Cr.C. s. 719(1)
Deportation		✓ Cr.C. s. 719(1)
Parole eligibility for murder or high treason		✓ Cr.C. s. 746

# Criticism

**Lack of consistency**

**Parliament's true intention is not always respected.**

SENTENCING MEASURES ▼ ▼ ▼	APPLICABLE CRITERIAS	
	Sentence <u>before</u> Credit for PSC	Sentence <u>after</u> Credit for PSC
Minimal sentences	✓ <i>Wust</i>	
Conditional sentences	✓ <i>Fice</i>	
Probation orders		✓ <i>Mathieu</i>
<b>Delayed parole</b>		✓ <i>Mathieu (Monière)</i>
Long term offenders	✓ <i>Hall</i>	
Correctional facilities		✓ Cr.C. s. 719(1)
<b>Deportation</b>		✓ Cr.C. s. 719(1)
Parole eligibility for murder or high treason		✓ Cr.C. s. 746

# POSSIBLE SOLUTIONS

## Option # 1:

Define a sentence as the amount of time considered by the court to be the appropriate penalty before any credit is given for pre-sentence custody.

## Problem:

This option solves some problems but it creates new ones.

# POSSIBLE SOLUTIONS

## Option # 2:

Rewrite the legislative provisions that include a time threshold provision or ceiling in cases where the judicial interpretations do not correspond with Parliament's true intent.

## Problem:

This option does not solve the problem of inconsistency.

# POSSIBLE SOLUTIONS

## Option # 3:

Modify Cr. C. s. 719 by adding a subsection that says:

**When the availability of a sentencing measure or a sentencing consequence is dependent on the length of the custodial portion of that sentence, the applicable criteria is the length of custody deemed appropriate before credit is granted for pre-sentence custody, except where a relevant enactment otherwise provides.**

If this results in an application that is contrary to Parliament's intention for any particular measure, make the appropriate modification to the legislation that provides for that measure.

# CONCLUSION

**What matters is that Parliament's true intention be respected.**

UNIFORM LAW CONFERENCE OF CANADA

**TAKING INTO ACCOUNT  
PRE-SENTENCE CUSTODY  
AND THE AVAILABILITY OF  
CERTAIN SENTENCING MEASURES**

**August 12, 2009 - Ottawa, Ontario**

Presented by Randall Richmond