UNIFORM LAW CONFERENCE OF CANADA

CRIMINAL SECTION

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

Ottawa, Ontario

August 9-13, 2009

UNIFORM LAW CONFERENCE OF CANADA

CONTRIBUTORS: THOMAS BURNS, MICHEL DENIS, ALLAN MANSON, RANDALL RICHMOND, KUSHAM SHARMA, AND ERIN WINOCUR

OUTLINE

1. INTRODUCTION

[1] At the 2008 Uniform Law Conference of Canada, the Criminal Section passed the following resolution:

> That the mandate be given to a working group of the Criminal Section of the Uniform Law Conference of Canada to 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, and that the working group report to the Conference in 2009.

[2] A working group was formed with the following members:

(1) Thomas Burns (B.C.) Crown prosecutor
(2) Michel Denis (Québec) Public Prosecution Service of Canada

(3) Daniel Grégoire (Québec) Directeur des poursuites criminelles et pénales (Secretary)
(4) Catherine Kane (Ontario) Department of Justice Canada, Policy Section
(5) Luc Labonté (New Brunswick) Crown prosecutor
(6) Allan Manson (Ontario) Queen's University
(7) Denis Mondor (Québec) Quebec Bar Association
(8) Andy Rady (Ontario) Criminal Lawyers Association
(9) Randall Richmond (Québec) Directeur des poursuites criminelles et pénales (Chair)
(10) Kusham Sharma (Manitoba) Crown prosecutor
(11) Rick Stroppel Q.C. (Alberta), Criminal Trial Lawyers Association of Alberta
(12) Erin Winocur (Ontario) Crown prosecutor

[3] The working group met by teleconference on November 27th 2008, January 28th 2009, February 17th 2009, and March 11th 2009.

[4] The working group did not address the issue of whether or not credit for pre-sentence custody should be given. Indeed, none of the members of the working group contested the principle that some form of credit should be given for pre-sentence custody.

[5] Nor did the working group study the issues of how much credit should be granted for pre-sentence custody and whether a cap should be put on such credit. These issues were considered outside the ambit of the working group's mandate.

[6] The issue addressed by the working group was the impact of credit for pre-sentence custody on other measures related to sentencing.

[7] These concerns arise principally from the interaction of *Criminal Code* subsection 719(3) with other statutory provisions that denote a specific term of imprisonment as a threshold or ceiling for some consequence or process.

[8] *Criminal Code* subsection 719(3) states:

> **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.**

2. TERMINOLOGY

[9] The terminology used is not uniform across Canada. It is therefore necessary to premise this paper by establishing the terminology.

[10] The term **pre-sentence custody** (PSC), preferred by the Supreme Court of Canada in the case of *R. v. Mathieu*[1], is sometimes referred to as pre-sentencing custody[2], predisposition custody[3], pre-trial custody, time served in custody prior to sentencing[4], remand custody, preventive detention, or dead time[5]. The French equivalents are *détention présentencielle*, *détention préventive*, and *temps mort*. All of these terms indicate the time an offender spends in jail before his sentence is pronounced.

[11] **Credit for pre-sentence custody** (*crédit pour détention présentencielle*), also referred to as pre-sentence credit or credit for time served[6], is the reduction of a prison term granted by the sentencing judge by virtue of *Criminal Code* s. 719(3) in order to compensate for time spent in custody by the offender before the passing of the sentence.

[12] The term **enhanced credit** (*la prise en compte accrue de la détention présentencielle*[7]) is sometimes used to indicate credit for pre-sentence custody at a rate greater than one-for-one[8], and sometimes used to indicate credit "at more than the two-for-one rate"[9].

[13] The **sentence determined <u>before</u> credit is given for PSC** is the amount of custodial detention determined by the sentencing judge to be an appropriate punishment for the offence and the offender, but <u>before</u> he deducts an amount in order to compensate for the pre-sentence custody of the offender. In *R. v. Fice*[10], Bastarache J. referred to this as "the total punishment".

[14] The **sentence determined <u>after</u> credit is given for PSC** is the amount of custodial detention ordered by the sentencing judge <u>after</u> he deducts an amount in order to compensate for the pre-sentence custody of the offender. Presently, this is the sentence written on the warrant of committal.[11] It is also referred to as "the sentence imposed"[12] and sometimes referred to as "the pronounced sentence".

3. SENTENCING MEASURES IMPACTED BY PRE-SENTENCE CUSTODY

[15] The working group identified eight measures related to sentencing that are impacted by the giving of credit for pre-sentence custody: minimum sentences, conditional

sentences, probation orders, delayed parole, long-term offenders, the type of correctional facility, deportation, and parole eligibility for murder and high treason.

3.1 MINIMUM SENTENCES

[16] There are many offences in the Criminal Code that incur a mandatory minimum sentence. Before 1970, a minimum sentence had to begin on the day it was pronounced and credit for pre-sentence custody could not reduce it to less than the statutory minimum. When Parliament enacted the *Bail Reform Act*[13], it added to the *Criminal Code* the forerunner of s. 719(3) thereby enabling sentencing courts to take into account any time spent in custody by the person as a result of the offence. Many Canadian courts nonetheless continued to apply the former rule and refused to let credit for pre-sentence custody bring the pronounced sentence to less than the statutory minimum. These decisions were based on the courts' interpretation of s. 719(1) which provides that:

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

[17] There were contradictory decisions on this issue until the Supreme Court of Canada's decision in *R. v. Wust*[14] which clearly stated that minimum sentences do not preclude sentencing courts from applying *Criminal Code* s. 719(3) and that credit for pre-sentence custody may be granted even if it reduces a sentence to less than the statutory minimum.

[18] In order to arrive at this conclusion, the Supreme Court sought out the intention of Parliament. This involved two facets. On the one hand, the Supreme Court sought out the intention of Parliament at the time it enacted the *Bail Reform Act* of 1970. The Court pointed out that:

> (…) During the second reading of what was then Bill C-218, *An Act to amend the provisions of the Criminal Code relating to the release from custody of accused persons before trial or pending appeal*, Justice Minister John Turner described Parliament's intention regarding what is now s. 719(3):
>
> > Generally speaking, the courts in deciding what sentence to impose on a person convicted of an offence take into account the time he has spent in custody awaiting trial. However, under the present *Criminal Code*, a sentence commences only when it is imposed, and the court's hands are tied in those cases where a minimum term of imprisonment must be imposed. In such cases, therefore, the court is bound to impose not less than the minimum

> sentence even though the convicted person may have been in custody awaiting trial for a period in excess of the minimum sentence. The new version of the bill would permit the court, in a proper case, to take this time into account in imposing sentence.
>
> (*House of Commons Debates*, 3rd Sess., 28th Parl., Vol. 3, February 5, 1971, at p. 3118.)[15]

[19] The Supreme Court also sought whether Parliament had wished to exclude from this general rule the specific minimum sentence which was the object of the appeal in *Wust*, to wit the minimum sentence of four years' imprisonment for robbery using a firearm under s. 344(a) of the *Criminal Code*. The Court noted that Section 344(*a*) is one of several amendments to the *Code* prescribing mandatory minimum punishments for firearms-related offences, arising from the enactment of the *Firearms Act*, S.C. 1995, c. 39. The *Firearms Act* amendments to the *Code* did not provide for any changes to the sentencing provisions in s. 719 of the *Code*, which are of general application.

> (…) [W]hen Parliament enacted s. 344(a) as part of the *Firearms Act* in 1995, Parliament did not also modify s. 719(3), to exempt this new minimum sentence from its application, any more than it modified the applicability of the provisions of the *Corrections and Conditional Release Act* to mandatory minimum sentences. For the courts to exempt s. 344(a) from the application of s. 719(3), enacted specifically to apply to mandatory minimum sentences, would therefore defeat the intention of Parliament.[16]

[20] Consequently, it is clear that the Supreme Court of Canada based its decision in *Wust* on what it considered to be the intention of Parliament.

[21] The correctness of this interpretation has not been challenged by the working group. Indeed, it has probably helped to save many minimum sentences from being struck down as unconstitutional on the grounds that they constitute cruel and unusual punishment in violation of s. 12 of the *Canadian Charter of Rights and Freedoms*. (This was the case in *Wust*. Another example is the case of *R. v. Morrisey*[17] where the four-year minimum sentence for criminal negligence causing death with a firearm was upheld, in part because of the interpretation given to minimum sentences in *Wust*.)

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

3.2 CONDITIONAL SENTENCES

[22] Section 742.1 of the *Criminal Code* allows for imprisonment to be served in the community if certain prerequisites are met, one of which is that the sentence is of less than two years.

[23] The question arose as to whether this provision can apply if the sentence is of two years or more before credit is granted for pre-sentence custody and reduced to less than two years as a result of the credit.

[24] The Supreme Court of Canada settled the issue in *R. v. Fice*[18], deciding on a majority (Fish and Deschamps JJ. dissenting) that the sentence to be considered in determining eligibility is the sentence as determined by the court before credit is granted for pre-sentence custody, what Bastarache J. labelled "the total punishment".

[25] There are two distinct perspectives on the issue. The first view: *Fice* should be reversed so as to make more offenders eligible for conditional sentence consideration. The second view is that *Fice* is correct. In order to give meaningful effect to the limitations Parliament placed on conditional sentences, as well as to discourage persons from electing to serve their sentence prior to findings of guilt, PSC must not be used to reduce the sentence below two years in order to make a conditional sentence available.

View #1: When determining eligibility for a conditional sentence, the applicable criteria should be the sentence determined after credit is given for pre-sentence custody.

[26] Aside from the logic in the dissenting opinion of Fish J. in *R. v. Fice*, here is why the majority opinion of Bastarache J. is considered by some to be wrong.

[27] In *R. v. Proulx*[19], the Supreme Court of Canada [per Lamer C.J.C.] said:

> By passing the *Act to amend the Criminal Code (sentencing) and other Acts in consequence thereof*, S.C. 1995, c. 22 ("Bill C-41"), Parliament has sent a clear message to all Canadian judges that too many people are being sent to prison. In an attempt to remedy the problem of overincarceration, Parliament has introduced a new form of sentence, the conditional sentence of imprisonment.

[28] If this is the rationale behind conditional sentences, then one can easily argue that interpretations of the conditional sentence regime ought to conform with this rationale.

[29] In fact, the S.C.C. did exactly the same thing in *R. v. D.(C.)*[20], dealing with the Youth Criminal Justice Act and the interpretation of "violent offence". Bastarache J., for the majority, said:

> (…) it would appear that the *YCJA*, which departs from the *YOA*'s discretionary approach to custodial dispositions and instead provides for clear conditions that must be satisfied before a custodial disposition can even be considered as an option, was designed, in part, to send a clearer message to those involved in the youth criminal justice system about restricting the use of custody for young offenders: see also Bala, *Youth Criminal Justice Law*, at p. 447. This conclusion is supported by comments made by the then Minister of Justice and Attorney General of Canada, Anne McLellan, when the *YCJA* was introduced for its second reading in Parliament.[21]
>
> (…)
>
> Since it appears that it was Parliament's intent in enacting the *YCJA* to reduce over-reliance on custody for young offenders, it follows that the term "violent offence", which is one of the gateways to custody, should be narrowly interpreted.[22]

[30] In other words, the threshold to custody under the YCJA should be narrow to be consistent with, and enhance the likelihood of achieving, the objective of limiting incarceration. Similarly, if conditional sentences exist as an alternative to incarceration, then the elements of the conditional regime ought to be interpreted so as to enhance the likelihood of reducing incarceration. That is, the threshold for qualifying for a community-based sentence ought to be broad, not narrow–the reverse of the "violent offence" threshold for custody under the YCJA.

View #2: When determining eligibility for a conditional sentence, the applicable criteria should be the sentence determined <u>before</u> credit is given for pre-sentence custody.

[31] The other view is that the interpretation of Parliament's intent, be it broad or narrow, must be within the boundaries of the legislation itself. Section 742.1 contains limitations on which cases are eligible for conditional sentences. Therefore, it is clear that Parliament did not intend for all offenders to be eligible for conditional sentence. Rather

only a select group of offenders who would otherwise go to jail were to be eligible to serve their sentences in the community.

- The offence cannot be
    - a serious personal injury offence as defined in s.752,
    - a terrorism or a criminal organization offence prosecuted by way of indictment for which the maximum term of imprisonment is 10 years or more, or
    - an offence punishable by a minimum term of imprisonment.
- The court must impose a sentence of less than two years in custody and be satisfied that the service of the sentence in the community would not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing set out in sections 718 and 718.2.

[32] Parliament chose to limit conditional sentences to offenders who might otherwise have served custodial sentences less than two years. This is one of the ways that Parliament chose to identify those cases, which are appropriate for conditional sentences. This limitation speaks directly to the seriousness of the offence. The fact that a person has spent time in pre-trial custody does not alter the seriousness of the offence; therefore it should not alter the eligibility for a conditional sentence. To permit consideration of PSC when assessing eligibility for conditional sentences is to enable people to use PSC to obtain conditional sentences in circumstances where it would have otherwise been statutorily prohibited. This would enable PSC to be a sort of back door to a conditional sentence in circumstances where Parliament has closed the front door.

[33] If PSC were to be considered in determining eligibility for a conditional sentence, this would create a unique incentive to serve PSC. This incentive would lead to yet further increases in the ever increasing remand population. This raises several concerns:

- The debate around how much credit to give for PSC includes consideration of the particularly troubling nature of PSC: the lack of access to rehabilitative programming, training and other resources as well as overcrowding. We should be looking at ways to reduce the remand population.
- The prospect that PSC may render an offence eligible for a conditional sentence has implications for the bail process potentially creating a class of offenders eligible for bail that refuse to accept it. Is a person who has a bail they are able to meet, but chooses not to meet it experiencing the same deprivation of liberty as the person who is denied bail?

3.3 PROBATION ORDERS

[34] *Criminal Code* paragraph 731(1)(b) allows a probation order to be added to a sentence of imprisonment as long as that sentence does not exceed two years.

[35] The impact of credit for pre-sentence custody on probation orders was not an issue prior to *R. v. Fice*. It was generally accepted that a probation order could be added to a sentence of two years imprisonment, regardless of what the sentence would have been but for the credit given for pre-sentence custody.

[36] However, the Supreme Court's decision in *Fice* gave birth to the obvious question: if eligibility for a sentencing measure with a time threshold is to be determined before credit is given for pre-sentence custody, as in *Fice*, then shouldn't courts be precluded from adding probation orders to sentences that would have exceeded two years but for the credit given for pre-sentence custody?

[37] After a number of decisions on both sides of the argument by trial courts and appeal courts, the Supreme Court of Canada finally settled the debate in *R. v. Mathieu*[23] by deciding that the threshold test for probation orders is to be applied after credit is given for pre-sentence custody.

[38] Writing for the Court, Fish J. declared that *Fice* had been an exception to the general rule that a sentence commences when it is imposed (*Criminal Code* s. 719(1)). Consequently, credit given for pre-sentence custody is not part of the sentence and is not to be considered in the two-year ceiling for probation orders.

3.4 DELAYED PAROLE

[39] Section 743.6 of the *Criminal Code* provides for delayed parole orders by judges who impose sentences. Conditions for imposing such orders vary. However, in all cases there is a two-year threshold: only sentences of two years or more are eligible for a delayed parole order.

[40] Subsection 743.6(1) allows this order for offences in Schedules I or II of the *Corrections and Conditional Release Act* when prosecuted by indictment and if the court is satisfied that circumstances warrant it.

[41] Subsection 743.6(1.1) allows the order for criminal organization offences other than 467.11, 467.12, or 467.13 regardless of circumstances.

[42] Subsection 743.6(1.2) 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.

[43] The impact of credit for pre-sentence detention on delayed parole became an issue in 2007 when the Québec Court of Appeal quashed a delayed parole order in *R. v. Monière*[24] because the sentencing court had given credit for pre-sentence detention, reducing what would otherwise have been a penitentiary sentence to one of less than two years.

[44] This decision was appealed by the Crown to the Supreme Court of Canada and heard at the same time as *R. v. Mathieu* and two other appeals involving probation. The Crown's appeal in *Monière* was dismissed. The Supreme Court of Canada's decision in the *Monière* appeal is included in the decision reported as *R. v. Mathieu*.[25]

[45] Two aspects of the Supreme Court's decision are considered problematic: the deduction of pre-sentence custody before the determination of whether the two-year threshold is met and the obligation to meet the threshold on individual counts.

1. Threshold attainment determined after deduction for pre-sentence custody

[46] The first aspect of *R. v. Mathieu* dealing with delayed parole has to do with the determination of whether the two-year threshold for eligibility is met.

[47] In *R. v. Mathieu*, the Supreme Court of Canada decided that 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.

[48] The criticism is that, in cases where the accused are detained while awaiting trial, the *Mathieu* decision creates an incentive to prolong the procedures and accumulate pre-sentence detention, thereby bringing the eventual sentence down below the two-year threshold and evading the delayed parole provision.

[49] These cases are not unusual because the reverse onus provision of *Criminal Code* s. 515(6)a)ii) results in pre-trial custody for most criminal organization offenders.

[50] This, of course, adds to the other incentive to delay and prolong court procedures provided by double credit for pre-sentence custody, which already benefits many criminal organization offenders who would otherwise serve up to two-thirds of their sentence.

[51] Consequently, many criminal organization offenders now have two incentives to delay and prolong court procedures. Cases that would otherwise be settled wind up at trial. Because criminal organization trials are usually very lengthy, this results in overcrowded court dockets (which, in turn, often make judges put pressure on the Crown to settle—at least that is the perception).

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

[52] The second aspect of the *Mathieu* decision with regard to delayed parole is the Supreme Court's statement that the two-year threshold has to be met for the individual sentence on each count. If consecutive sentences are imposed, the combined sentence is not the time frame to be considered.

[53] For example, even though the total sentence may be 46 months (3 years and 10 months), delayed parole will not be possible if this sentence is the combined effect of two consecutive sentences of 23 months, because each one is less than two years.

[54] If the offender spent 20 months in pre-trial custody, for which he was given double credit, he would evade delayed parole even though the total sentence given him adds up to 86 months (7 years and 2 months).

[55] Consequently, from now on, only the most extreme cases (the highest sentences) will be eligible for delayed parole.

[56] A more vivid example of this occurred in the case of *R. v. Martinez*[26]. The offender Martinez pleaded 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.

[57] However, because of *Criminal Code* section 467.14, 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. Consequently, the joint submission was for 4½ years for

conspiracy and trafficking in cocaine and 4½ years consecutive for the criminal organization offence.

[58] Martinez had spent 33 months in pre-sentence detention, for which the court gave him double credit. When divided up between the counts and subtracted, this credit left Martinez with a sentence of 21 months for conspiracy and trafficking in cocaine and 21 months consecutive for the criminal organization offence.

[59] By bringing the individual sentences down below the two-year threshold of s. 743.6, the credit for pre-sentence detention made a delayed parole order impossible. As was written by Cournoyer J.:

> In the case of Mr. Martinez, a delayed parole order is not possible because of the interpretation adopted by the Supreme Court in *R. v. Mathieu*.

[60] Consequently, in this case, a nine-year sentence was not long enough to warrant a delayed parole order. This leads one to seriously question whether the Supreme Court's decision in *R. v. Mathieu* with regards to delayed parole is truly a reflection of Parliament's intention.

3. The problem: not seeking Parliament's intention

[61] When it adopted the anti-gang legislation of 1997 and 2001, Parliament had as its objective the protection of society from organized crime through stiffer penalties (such as mandatory consecutive sentences for gang charges and delayed parole) and increased pre-trial and pre-sentence detention (by reversing the onus on show cause hearings).

[62] Parliament could not have desired the creation of an incentive to delay trials or to prolong trials for the purposes of evading delayed parole.

[63] It did not abrogate section 139 of the Parole Act which says that for the purposes of the *Criminal Code*, consecutive sentences should be added together and treated as one.

[64] It is therefore logical to conclude that the true intent of Parliament was to create mandatory delayed parole for organized crime sentences as a whole (predicate and gang offence) independently of any efforts by accused to delay his trial or sentence.

[65] The criticism of the *Mathieu* decision is that the Supreme Court of Canada did not seek out the true intention of Parliament in adopting *Cr. c.* subsection 743.6(1.2). It did not individualize its interpretation of *Cr. c.* subsection 743.6(1.2) and consider it in the light of its adoption as part of a strategy to fight organized crime. Nor did it consider the fact that, in the vast majority of criminal organization cases, consecutives sentences are imposed because a criminal organization charge has been added to a substantive (or predicate) offence.

[66] A legislative amendment would enable Parliament to clarify its true intention with regard to the criminal organization legislation.

3.5 LONG-TERM OFFENDERS

[67] The possible effect of credit for pre-sentence custody on long-term offender (LTO) designations arises from *Criminal Code* s. 753.1(3)(a) which provides:

> **(…) if the court finds an offender to be a long-term offender, it shall**
>
> **(a) impose a sentence for the offence for which the offender has been convicted, which must be a minimum punishment of imprisonment for a term of two years (…)**

[68] Three appellate decisions have considered the effect of credit for pre-sentence custody on LTO availability under s. 753.1(3)(a). All three decisions characterize the LTO provision as a minimum mandatory sentence that follows an LTO determination. They hold that an LTO sentence is lawful as long as the credit for pre-sentence custody and the actual custody sentence in combination amount to two years imprisonment or more. *R. v. Hall*[27] illustrates this best. Hall did 30 months pre-sentence custody. The trial judge gave 60 months credit for time served, imposed no further custody and placed Hall on probation for three years. The Ontario Court of Appeal found the sentence unfit. It accepted the 60 month credit, imposed no further custody, declared Hall a long-term offender and placed him on an eight year supervision order. The Court ruled that the credit for time served satisfied the minimum two year sentence under s. 753.1(3)(a):

> I accept that given the long period of pre-sentence custody, it would not have been appropriate to impose a further period of incarceration in excess of two years. This does not, however, mean that a long-term offender designation could not have been made. Pre-trial incarceration may be taken into account where a statute imposes a minimum penalty: *R. v. Wust* (2000), 143 C.C.C. (3d) 129 (S.C.C.); *R.*

> *v. McDonald* (1998), 127 C.C.C. (3d) 57 (Ont. C.A.). The same reasoning applies to the requirement in the long-term offender provisions that the court impose a sentence of at least two years. Having regard to pre-sentence incarceration in calculating the length of the sentence imposed for the purposes of the long-term offender provisions upholds Parliament's intention that the long-term offender status should be available only for persons who commit offences that warrant sentences of two years or more, and at the same time preserves the court's discretion under s. 719(3) of the Criminal Code to take into account pre-sentence incarceration: *R. v. Wust*, supra, at p. 136. If the sentence imposed by a trial judge, having regard to the credit that the trial judge gives for pre-sentence incarceration, is the equivalent of a sentence of two years or more, the first pre-condition to the finding that an offender is a long-term offender is met.[28]

[69] Similar results were reached in *R. v. W.(H.P.)*[29] and *R. v. Quinto*,[30].

[70] Consequently, credit for pre-sentence custody has not, as yet, impeded the designation of LTOs and there is no incentive created to accumulate PSC in order to evade an LTO designation. Therefore, the working group does not consider the present state of judicial interpretation to be problematic.

[71] However, we are advised that officials at the Correction Service of Canada (who are the ones that manage LTOs) are of the opinion that this interpretation creates practical difficulties. They point out that long-term offender orders make it necessary for them to do detailed planning and intense supervision. Their ability to adequately plan a supervision program and prepare an offender for entry into the program can be compromised by limited or non-existent contact with the offender before commencement of the supervision period. An offender on remand (detained while awaiting trial or sentence) or sentenced to a period of custody of less than two years followed by a long-term supervision order is in provincial custody. This, they maintain, adversely affects the ability of the Correction Service of Canada to assess the offender, develop a supervision plan, and ensure a smooth transition from custody to the community.

[72] Defence counsel and prosecutors do not share the concerns of correction officials. The offender generally wants the shortest custodial sentence possible and is less concerned about the duration of a supervisory term such as a long-term offender order. He will usually prefer lengthy intense supervision over a shorter global sentence that includes a longer custody component. As for the prosecutor, he usually wants a "long string" on the offender. Frequently a shorter term of incarceration followed by an LTO designation places a "longer

string" on the offender than a pure custodial sentence. This gives the prosecutor the control and oversight he seeks.

3.6 CORRECTIONAL FACILITIES

[73] *Criminal Code* section 743.1 states that a person who is sentenced to imprisonment for two years or more, including a combination of sentences that, in the aggregate, is of two years or more, shall serve the sentence in a penitentiary. As a general rule, this leaves other sentences of imprisonment to be served in provincial prisons.

[74] This section has always been applied in relation to the net sentence after deduction of credit for pre-sentence custody. To the best of our knowledge, this interpretation of section 743.1 has not been challenged.

[75] There are major impacts from such an interpretation, both for governmental authorities who pay for the correctional facilities and for the offenders who may be exposed to significantly different conditions. *Criminal Code* section 743.1 states that a sentence of imprisonment shall be served in accordance with the enactments and rules that govern the institution to which the person is sentenced. The delays calculated for release on parole will also vary as the offenders will be subject to either federal or provincial laws and parole boards in accordance with the institution to which they were sent.

[76] Practice shows that for various reasons, some offenders prefer to serve their sentences in federal penitentiaries and others prefer to serve them in provincial prisons.

[77] For example, some provinces (such as British Columbia, Alberta, and Manitoba) have no provincial parole boards and only release prisoners from provincial facilities when they have served two-thirds of their sentence. In these provinces, when the anticipated sentence is close to two-years imprisonment, some offenders will prefer being sent to a penitentiary where they can apply for parole after serving one third of their sentence.

[78] In other cases, however, there are factors that make offenders prefer provincial facilities. Being sent to a penitentiary may mean being sent far away from home. (Manitoba, for example, has no penitentiary for women. Consequently, women sentenced to more than two years are sent to Edmonton.) There may also be a preference for a provincial facility that offers a special program suited to the offender's particular problem (in Ontario, for example) or for provincial prisons in general because they offer the opportunity of early release through provincial parole boards (in Québec, for example).

[79] Consequently, some offenders and their counsel consciously calculate the credit to be granted for pre-sentence custody and delay entering guilty pleas for the purpose of reducing the sentence to less than two years so that it will be served in a provincial prison and be subject to provincial parole boards. This delay increases the remand population in provincial facilities as well as the number of cases on court dockets. There is an inevitable cost to this type of use of public resources.

3.7 DEPORTATION

[80] While it is not a sentencing measure provided for in the *Criminal Code*, deportation or expulsion from Canada is one of the most important potential effects of sentencing for non-Canadian citizens. This is due to section 36(1)a) of the *Immigration and Refugee Protection Act*, S.C. 2001, ch. 27 (the *IRPA*) which provides as follows:

> ***Serious criminality***
>
> ***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;*

Purpose of s. 36(1)a) of the *IRPA*

[81] The obvious goal of s. 36 is to insure that those who are not Canadian citizens be inadmissible to (or expelled from) Canada if they commit a serious criminal act punishable by ten years or more of imprisonment (the sentence imposed being irrelevant), or any offence if the sentence imposed is more than six months.

Strategy to by-pass the law

[82] In order to by-pass this mandatory section of the *IRPA*, some accused do not apply for interim release and, after a guilty plea is entered many months later, ask that a sentence of less that 6 months be imposed considering the time served in PSC.

[83] The perception is that, by doing so, the offenders have short-circuited the law and defeated its purpose. This begs the question: why lock the front door when the back one is wide open?

[84] In addition, an incentive has been created to accumulate PSC and to spend more time than necessary in remand custody even though the charges are not contested and the accused has every intention of pleading guilty. This needlessly adds cases to court dockets and drains public resources.

A possible solution

[85] In order to remedy this problem, the law could provide that the judge impose the sentence this way:

> "The sentence imposed is 15 months of jail. Taking into account the time served since your arrest, to wit 5 months, the period of imprisonment that remains to be served in custody from today is 5 months."

[86] But this solution might nonetheless require a modification of the IRPA in order to avoid the impact of Criminal Code subsection 719(1).

3.8 PAROLE ELIGIBILITY FOR MURDER OR HIGH TREASON

[87] The sentence for murder or high treason is a mandatory minimum of life imprisonment.[31] Pre-sentence custody cannot reduce the length of the sentence. However, pre-sentence custody does have an impact on when the offender will be eligible to apply for parole.

[88] *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. This contrasts with the general rule for parole eligibility which starts the calculation on the day the sentence is pronounced.

[89] In this case, there can be no doubt about the true intention of Parliament. It very clearly indicated the rule to apply for these specific offences. It pre-determined the exact formula for calculating the amount of credit to be granted for pre-sentence custody in these particular cases.

[90] Given the clearly expressed intention of Parliament, these provisions are not perceived as problematic.

4. ANALYSIS

[91] A summary of the eight measures related to sentencing that are impacted by the giving of credit for pre-sentence custody shows that in three cases the applicable criteria is the sentence determined **before** credit is given for pre-sentence custody and in five cases, the applicable criteria is the sentence determined **after** credit is given for pre-sentence custody. This is illustrated in the following table:

	APPLICABLE CRITERIA	
	SENTENCE DETERMINED **BEFORE** CREDIT IS GIVEN FOR PSC	SENTENCE DETERMINED **AFTER** CREDIT IS GIVEN FOR PSC
MINIMUM SENTENCES	√ *Wust*	
CONDITIONAL SENTENCES	√ *Fice*	
PROBATION ORDERS		√ *Mathieu*
DELAYED PAROLE		√ *Mathieu*
LONG-TERM OFFENDERS	√ *Hall*	
CORRECTIONAL FACILITIES		√ *Cr. c.* s. 719(1)
DEPORTATION		√ *Cr. c.* s. 719(1)
PAROLE FOR MURDER		√ *Cr. c.* s. 746

[92] This disparity has led to considerable criticism. Many have said that the interpretation of the law should be consistent and should reflect the true intentions of Parliament.

[93] One approach to these concerns is to recognize that they arise from the interaction of PSC with other statutory provisions that denote a specific term of imprisonment as a threshold or ceiling for some consequence or process.

[94] Accordingly, it might be useful to try to understand, for each provision, why there is a threshold or ceiling. Is it simply there as a limit based on duration because some limit is required or can it be argued that the limit is intended to reflect the gravity of the underlying

offence? The latter situation supports an argument that PSC should be ignored while the former suggests that the sentence as expressed by the warrant of committal (the "sentence imposed") is sufficient.

[95] Another approach is to ask whether the present applications of credit for pre-sentence custody are meeting the true intentions of Parliament. Many think that in some cases they are not.

[96] The present applications may be creating an incentive to delay procedures and accumulate pre-sentence custody. The growing practice of granting double credit or even enhanced credit may be accentuating the incentive.

[97] For example, in the case of *R. v. Sooch*[32], the Alberta Court of Appeal granted an appeal by the Crown after the sentencing judge had granted triple credit for 13 months of pre-sentence custody spent in protective custody. The Court of Appeal discovered during the hearing of the appeal that Sooch had never applied for bail, although bail was a viable possibility and he had been represented by counsel throughout. Indeed, he had well-established roots in the community, was living with his parents, had full-time employment and no criminal record. The sentencing judge had not inquired about the reasons why Sooch had not applied for bail. At the Court of Appeal, Martin A.J. wrote:

> Failure to consider the reason for predisposition custody may undermine the effective administration of criminal justice. For example, it may enable an accused to manipulate his predisposition custody to ensure that he serve only one third of his sentence, albeit in overcrowded conditions, whereas violent offenders are not typically granted release after serving only one third of their sentence.
>
> Similarly, banking time in this way may also be used as a means of escaping the deportation provisions of the ***Immigration and Refugee Protection Act***, S.C. 2001, c. 27, (the *Act*) that engage when a person, who is not a Canadian citizen, is sentenced to imprisonment for a term of at least two years. To illustrate, we note that the endorsement on the Information in this case, although referring to the predisposition custody and the credit given for it, records the sentence imposed as 60 days intermittent, to be followed by a term of probation for three years. The Certificate of Conviction, prepared pursuant to s. 570 of the *Criminal Code*, simply records that as the punishment imposed. Likewise, the recent decision of ***R. v. Mathieu***, [2008] S.C.J. No. 21, 2008 SCC 21, has effectively determined that the sentence imposed in this case was 60 days imprisonment, plus probation, not four years imprisonment. Thus, if the respondent was liable to deportation

because of this "serious criminality", he has been allowed to use his predisposition custody to skirt the automatic deportation provision of the *Act*, s. 64.

[98] If indeed the present applications are creating an incentive to delay procedures and accumulate pre-sentence custody, the result may be the circumventing of Parliament's objectives. It may also be causing a shift in the financial burden of housing prisoners from the federal government to the provinces, to the extent that prisoners who deserve a penitentiary sentence spend all of their detention time in provincial remand facilities and provincial prisons.

5. POSSIBLE SOLUTIONS

[99] Three possible solutions have been identified by the working group.

Option #1

[100] One option is to 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. Thresholds applications could then be based on that amount. In a second stage, the sentencing judge could determine the amount of credit granted for pre-sentence custody, subtract that amount from the first one, and declare what is to be the remainder of time to be served. This option would reverse *R. v. Monière* and make delayed parole possible for sentences reduced to less than two years because of PSC. It might also solve the problem surrounding deportation. However, it would reverse *R. v. Mathieu* and make it impossible to add a probation order to a sentence that would have been over two years but for PSC credit. Consequently, this is not an option favoured by the working group.

Option #2

[101] A second option would be to 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.

Option #3

[102] A third option is to modify *Criminal Code* 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.

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

[104] The advantage of this option is that it provides a clear rule, eliminates inconsistent or contradictory applications of the same legislation (subsection 719(3) of the *Criminal Code*), and limits any derogations to cases where Parliament's intent has been clearly expressed.

[105] That is why this third option best reflects the preference of the working group.

[106] Adoption of this type of legislation would have to be accompanied by a review of the eight measures identified in the paper, in order to determine whether to make a measure fall within the general rule or to exclude it by expressly providing otherwise.

[107] For example, the rule presently applied by the courts to **minimum sentences**, **conditional sentences**, and **long-term offenders** would not be changed by this new subsection. Likewise, the rule presently applied with respect to **parole eligibility for murder and high treason** would not change because of the clarity of *Criminal Code* section 746.

[108] However, in order to maintain the presently applied interpretations for **probation** orders, **delayed parole**, type of **correctional facility**, and **deportation**, it would be necessary for "a relevant enactment" to "otherwise provide". In other words, in order for there to be an exception to the general rule, Parliament would have to say it expressly.

[109] **Probation** may very well be a measure that Parliament wishes to exclude from the general rule in order to maintain the application decreed by the Supreme Court of Canada in *R. v. Mathieu*. This may also be the case for the type of **correctional facility** provided for by *Criminal Code* section 743.1.

[110] On the other hand, Parliament may decide that the present applications of **delayed parole** and **deportation** do not reflect Parliament's true intention for those measures and may therefore chose not to exempt them from the general rule.

6. CONCLUSION

[111] The working group identified eight measures related to sentencing that are impacted by the giving of credit for pre-sentence custody. The case law applying those measures has produced disparity and has led to considerable criticism. Many have said that the interpretation of the law should be consistent and should reflect the true intentions of Parliament. In addition, present interpretations may result in abuse by offenders trying to circumvent Parliament's intention by accumulating pre-sentence custody and avoiding measures that were meant for them. What is important is that Parliament's true intention for its legislation by applied. It is therefore suggested that legislative reform be proposed to insure that this objective is attained.

---

[1] 2008 CSC 21
[2] Bill C-25 (An Act to amend the Criminal Code (limiting credit for time spent in pre-sentencing custody)
[3] *R. c. Sooch* (2008), 234 C.C.C. (3d) 99 (Alberta Court of Appeal)
[4] Government of Canada, Department of Justice*: The Government of Canada introduces legislation restricting credit for time served*, March 27, 2009, http://www.justice.gc.ca/eng/news-nouv/nr-cp/2009/doc_32345.html
[5] This term probably originates from the fact that, except for murder charges, this time does not count toward statutory release or parole. However, to the extent that credit is given for it when the sentence is imposed, this time is not really "dead" at all.
[6] Government of Canada, Department of Justice*: The Government of Canada introduces legislation restricting credit for time served*, March 27, 2009, http://www.justice.gc.ca/eng/news-nouv/nr-cp/2009/doc_32345.html
[7] *R. v. Martinez*, Québec Superior Court no 500-01-005100-067, March 5, 2009, Cournoyer J.
[8] Government of Canada, Department of Justice*: The Government of Canada introduces legislation restricting credit for time served*, March 27, 2009, http://www.justice.gc.ca/eng/news-nouv/nr-cp/2009/doc_32345.html
[9] Allan Manson, *Pre-Sentence Custody and the Determination of a Sentence (Or How to Make a Mole Hill out of a Mountain)* (2004), 49 C.L.Q. 292, at 316.
[10][2005] 1 R.C.S. 742
[11]Section 3 of Bill C-25 (An Act to amend the Criminal Code (limiting credit for time spent in pre-sentencing custody)) proposes that the committal warrant should contain "the amount of time spent in custody, the term of imprisonment that would have been imposed before any credit was granted, the amount of time credited, if any, and the sentence imposed."
[12]*Ibid*.
[13]R.S.C. 1970 (2nd Supp.), c. 2
[14][2000] 1 S.C.R. 455
[15]*Ibid*. at para. 31
[16]*Ibid*. at para. 32
[17][2000] 2 S.C.R. 90
[18][2005] 1 R.C.S. 742
[19]2000 SCC 5, [2000] 1 S.C.R. 61
[20]2005 SCC 78, [2005] 3 SCR 668
[21]Par. 48
[22]Par. 49
[23]2008 SCC 21
[24]2007 QCCA 309
[25]2008 SCC 21.

[26]Québec Superior Court no 500-01-005100-067, March 5, 2009, Cournoyer J.
[27](2004), 186 C.C.C. (3d) 62 (OCA), (*sub nom R. v. M.B.H.*) 185 O.A.C. 319
[28]*Ibid*. at para. 62
[29](2001), 159 C.C.C., 3d 91 (ACA)
[30]2006 SKCA 1000
[31]*Criminal Code* ss. 47 (high treason) and 235 (murder)
[32]2008 ABCA 186