PRE-SENTENCE CUSTODY AND THE DETERMINATION OF A SENTENCE: A FRAMEWORK FOR DISCUSSION

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Introduction:

Detention before trial has been a fact for centuries but the debate about its impact on the determination and imposition of a custodial sentence is a relatively recent addition to sentencing discourse in Canada. Now, we encounter various issues arising from a simple question:

> How should judges properly and fairly take pre-sentence custody [PSC][1] into account when determining and imposing sentence?

[1] While it may not be elegant, throughout I will use PSC for the phrase "pre-sentence custody" which is the central focus of this discussion paper. This was the nomenclature preferred by Arbour, J. in *R. v. Wust*, infra, note, 81.

Current judicial considerations of this question are a function of s.719(3), a provision which dates back only to 1972[2] and permits a sentencing judge to "take into account any time spent in custody by the person as a result of the offence". The PSC issue has become controversial over the past few years for a variety of reasons that combine issues of discretion and disparity, and fairness and frankness. For the sentencing process, these are important concerns. As well, one cannot discount the role of public perception. This can be distorted by media reports of short or non-custodial sentences which omit any reference to PSC. Another source of contention has been the calculation of credits and especially the use of enhanced credits, sometimes at the rate of "three-for-one" or more, to reflect judicial abhorrence of specific conditions of detention. Is this the proper role of the judiciary? How should the public respond this connection of sentencing with governmental neglect of its custodial responsibilities? While the PSC debate has exposed these larger issues, it has also generated technical questions involving mandatory minimum sentences, threshold requirements for certain sentences[3], and the place of confinement[4]. These need to be integrated into any comprehensive discussion of the PSC issue.

In this discussion paper, my objectives are straight-forward. First, I want to provide in Part I an account of the legal context. This will commence with an historical review of the PSC

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[2] See S.C. 1970-71-72, c.37, s.13. The larger piece of legislation was generally known at the time as the Bail Reform Act and was mostly concerned with revising the processes of determining pre-trial release and detention.

[3] For example, conditional sentences and long term offender designations: see ss. 742.1(a) and 753.1(3)(a).

[4] Currently, this is determined by ss.743.1(1) and (3) where the operative words are "a person who is sentenced....". Accordingly, the sentence imposed determines whether a person goes to the penitentiary or a provincial institution.

issue, including a survey of current judicial use and interpretation of the s.719(3) power. Finally, I will provide a brief and limited inquiry into how comparable jurisdictions are dealing with this issue. Next, in Part II, I will consider the implications for reform by delineating the potential questions, both large and small, and by discussing the range of available options for addressing these problems.

Part I: The Legal Context

1. History of the PSC Issue:

(a) Common Law: As a sentence, imprisonment is a relatively new innovation, arriving on the penal landscape after centuries of execution, mutilation, and banishment[5]. As a result, we see very little reference to imprisonment issues until the late 18th century and the case of *R. v. Wilkes*[6]. Even then, the question arose in the context of misdemeanours. This is the seminal case with respect to consecutive sentences[7], but it involves the question of when a sentence ought to commence. Wilkes was convicted of two offences, publishing a "seditious and scandalous" libel and publishing an "obscene and impious" libel[8]. The trial judge sentenced him to ten months on the first count and 12 months on the second count "to be computed from the

[5] See the discussion of the history of punishments in Manson, The Law of Sentencing (Toronto: Irwin, Law, 2001) at 8-24. In particular, see the remarks of Lamer, J. as he then was in *R. v Paul*,[1982] 1 SCR 621, 67 CCC(2d) 97, at SCR 635-642 in relation to the history of consecutive sentences discussed below.

[6] (1769), 2 ER 244, 4 Bro.P.C. 360(QB)

[7] See the discussion in *R. .v Paul*, supra, note 5, which makes it clear that Wilkes is the source of the basic rules, revised over time, now found in s.718.3(4).

[8] The latter work was a piece entitled "An Essay on Women".

determination of the first imprisonment". On review by Queen's Bench, the Court accepted that sentences of imprisonment usually commence when imposed, but also appreciated the trial judge's dilemma in dealing with multiple convictions. How does one properly account for the second conviction in a way that reflects the need for a cumulative punishment? A sentence of 12 months commencing immediately would not amply reflect the second conviction and a sentence of 22 months commencing immediately could produce unintended unfairness:

> But that might be attended with hardship and injustice to Mr. Wilkes, by being imprisoned a longer time than the Court meant, for the present offence; if by the grace of the Crown , or by any means, the ten months imprisonment should be pardoned, avoided, or shortened, Mr. Wilkes under a sentence of twenty two months would be confined...until the end of twenty two months..[9]

The right answer was to postpone the commencement of the second sentence until the first had expired. Queen's Bench, in approving this response, noted that "if there was any novelty in it, it was to be attributed to the accumulated guilt of its object."[10]

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[9] *Wilkes*, note 6, at 2 ER 248, 4 Brown at 366.

[10] Ibid.

While the *Wilkes* case provided support for the power to make a sentence commence in the future, our concern is about the power of a trial judge to look backwards to acknowledge PSC. The common law sheds little light on this question. There is evidence of the practise, for reasons of convenience, of dating both convictions and sentence registered by courts of Assize or Quarter Sessions as of the date when the sessions commenced[11]. Subject to this practise, courts accepted that sentences commenced when imposed and in the 20th century, the English Court of Appeal consistently held that the common law did not empower courts to "ante-date" a sentence[12]. In one of the rare Canadian efforts to trace the common law power to antedate a sentence, Bull, J.A. concluded that there was "no such power"[13].

(b) Canadian Legislative History: The statutory line is easy to trace but it is long and, at times, discontinuous. Right after Confederation, all criminal procedure statutes were consolidated in 1869[14], including most of the provisions dealing with punishment. Section 91 provided:

> Sec. 91. The period of imprisonment in pursuance of any sentence shall commence on and from the day of passing such sentence, but no time, during

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[11] See *Whitaker v. Whisby* (1852), 138 ER 817, 12 CB 44, a civil case in which the validity of a conveyance depended on the actual date of a conviction since after that time the convicted felon was dispossessed of his property and no longer had the power to convey. The Court concluded that. Although the conviction was dated as of the opening of sessions, this was a fiction which could be supplanted by proof of the actual date of conviction.

[12] *R. v. Crockett* (1920, 21 Cr. App. R. 164 (CA). In *R. v. Gilbert*, [1975] Crim. L. Rev. 179, the Court of Appeal not only confirmed this view of the common law but added that the statutory provision that a sentence commences when imposed "unless the court otherwise directs" empowers only consecutive sentences and not any kind of antedating. .

[13] In dissent in *R. .v Wells*, [1969] 4 CCC 25 (BCCA) discussed below.

[14] See An Act Respecting Procedure in Criminal Cases and Other Matters Relating to Criminal Law (1969), 32-33 Vict. c. 29.

> which the convict may be out on bail, shall be reckoned as part of the term of imprisonment.

The effect of this provision is clear with respect to which days formally count towards the service of a sentence of imprisonment, but it does not expressly deal with how a sentencing judge should respond to PSD. Another provision, section 92, addressed the situation of an offender sentenced for a felony while "under sentence for another crime". It authorized a consecutive sentence in the discretion of the court "to commence at the expiration of the imprisonment for which such person has been previously sentenced". In Taschereau's commentary, he observed that s.92 was taken from an English statute "which seem (sic) declaratory of the common law"[15]. In the 1892 Canadian Criminal Code, the commencement proposition was continued in

s. 955(7):

[15] See The Criminal Law Consolidation and Amendment Acts, with Notes, Commentaries, Precedents of Indictments, etc. by Henri Eleazear Taschereau (Toronto: Hunter, Rose & Co., 1875), at 416.. Specifically, he referred to R. .v Wilkes, discussed above and R. v. Williams, 1 Leach 536..

> The term of imprisonment, in pursuance of any sentence, shall, *unless otherwise directed in the sentence*, commence on and from the day of passing such sentence, but no time during which the convict is out on bail shall be reckoned as part of the term of imprisonment to which he is sentenced[16]. (italics added)

Another provision authorized cumulative sentences when more than one sentence was imposed by the same court or at the same sitting, or when a prisoner was already under sentence[17].

[16] See Criminal Code, 1892, 55-56 Vict., c. 29, s. 955(7).

[17] Ibid, s. 954.

The meaning of "*unless otherwise directed in the sentence*" is, at first blush, unclear. Did it create a power to antedate a sentence, whether to the date of conviction or even earlier to give effect to PSC, or did it apply only to consecutive sentences? The 1892 Code, viewed through the lens of the common law and the predecessor provision, already accommodated the consecutive sentence regime without the need for this added power. That is, there were two distinct situations when a consecutive sentence discretion was necessary: (1) multiple convictions at the same sitting or by the same judge; and (2) when a person about to be sentenced is already in prison serving s sentence previously imposed. Section 954 covered both of these. Accordingly, either the phrase was superfluous or it must have been intended to have another meaning, perhaps the power to antedate a sentence. The interpretive mystery was left unsolved when, in the Revised Statutes of 1906[18], this phrase was deleted, along with the stipulation that a sentence commenced when imposed. The identical provision was placed in both the Prisons and Reformatories Act[19] and Penitentiary Act[20] at the time of revision. These were repealed in 1950 and the stipulation was returned to the Code in a slightly different form, to read:

> 1054B. (1) Subject to any provision made by statute or to any order made by the court, all sentences shall commence from the date of sentence[21].

During the period from Confederation to 1955, courts seemed to agree about the

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[18] In RSC 1906, c.146, ss. 1051 to 1057 dealing with imprisonment which replicate most of the earlier provisions but not s.955(7): see W.J. Tremeear, Canada Criminal Law and Criminal Procedure, 2nd Ed. (Toronto: Canada Law Book, 1908) at 840-844.

[19] See Prisons and Reformatories Act, RSC 1906, c.148, s.3.

[20] Section 47(2) of the Penitentiary Act, SC 1906, c.147.

antedating issue. In *R. v. Patterson*[22], a 1946 case which dealt with the Prisons and Reformatories Act and Penitentiary Act provisions, the Ontario Court of Appeal reviewed a sentence of one year imposed on an offender already serving a sentencing of imprisonment. The Magistrate appeared to decided that both sentences of imprisonment should be concurrent and should commence on the same date. Accordingly, the second sentence was directed to commence a number of months earlier when the first sentence commenced. The Court of Appeal struck out this provision and ruled that the sentence would start when imposed. Robertson, CJO, for the Court, concluding that the Magistrate could not antedate a sentence to take into account time served while under another sentence, and added the observation:

> No doubt, a Magistrate, in determining what sentence of imprisonment should be imposed, may take into consideration the time, if any, that the prisoner has been ins custody between the date of conviction and the date of imposing sentence, or even the time that the prisoner has been under arrest under the charge on which he is convicted[23].

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[21] See SC 1950, c.11, s. 20.

[22] (1946), 87 CCC 86 (Ont.C.A.)

[23] Ibid, at 87.

Shortly after, the Ontario Court of Appeal was faced with a one year sentence for manslaughter which was directed to commence on the original date of arrest[24]. The Court found the sentence inadequate and in determining the fit sentence followed Patterson by noting that the "period which he was in custody pending his trial and conviction may be here reasonably taken into consideration" but that the sentence should commence on the date of sentencing[25]. After the relevant provisions were moved back to the Code in 1950, the Court of Appeal maintained the same position concluding that one could not glean any Parliamentary intention to expand the antedating power as a result of the statutory change.[26]

[24] See *R. v. Sloan*(1947), 87 CCC 198 (Ont.C.A.).

[25] Ibid, at 200-201.).

[26] See *R. v. Deschamps* (1951), 100 CCC 191 (Ont.C.A.); *R. v Wrixon and Carroll* (1959), 126 CCC 3321 (Man.C.A.

The 1955 major revision to the Code did little to change the basic approach to sentences and PSC[27]. The qualified stipulation that a sentence commences when imposed unless "a relevant enactment otherwise provides, or the court otherwise orders" was continued[28]. Starting in 1921, sentence appeals had been introduced into Canada by amendments to the Code[29] and specific provisions addressed the "time in custody issue" in the appellate context. The Code provided that time in custody pending appeal would not count towards a sentence but that this was "subject to any directions which the court appealed to may give to the contrary on any appeal"[30]. Thus, an appellate court could integrate time in custody into an order usually by antedating the order so that days served would be credited. This power was also continued in the 1955 revisions[31].

As of 1955, the statutory provisions were:

> (1) A sentence commences when it is imposed, except where a relevant enactment otherwise provides or the court otherwise orders
>
> (2) The time during which a convicted person
>
> (a) is at large on bail, or
>
> (b) is confined in a prison or other place of confinement, pending the determination of an appeal by that person,
>
> does not count as part of any term of imprisonment imposed pursuant to his conviction, but paragraph (b) is subject to any direction that the court appealed to may give.

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[27] See S.C. 1953-54, c 51, s. 624.

[28] Ibid, s.624(1).

[29] S.C. 1921, c.25, s. 22.

[30] See s.1054B (2), enacted by SC 1950, c. 11, s. 20.

[31] See s. 624(2) and (3).

> (3) Notwithstanding subsection (1), a term of imprisonment, whether imposed by a trial court or by the court appealed to, commences or shall be deemed to be resumed, as the case requires,
>
> (a) on the day on which the appeal is determined, where the convicted person is then in custody, and
>
> (b) on the day on which the convicted person is arrested, and taken into custody under the sentence, where he is not in custody,
>
> but paragraph (a) is subject to any directions that the court appealed to may give

In R. *v. Dean*[32], the Ontario Court of Appeal was clear that the new s.624 authorized the Court of Appeal to direct that time served in custody by a convicted person should count, but that a trial judge had no similar power in relation to PSC.

[32] (1957), 118 CCC 408 (Ont.C.A.)

However, in 1959[33], s.624 was amended by repealing subsections 2 and 3, and replacing them with streamlined provisions which removed the phrase "subject to any directions that the court appealed to may give". In the appellate context, all days in custody would automatically be credited because the a sentence either commenced or resumed when the offender entered "custody under the sentence". The new provisions read:

> (1) A sentence commences when it is imposed, except where a relevant enactment otherwise provides or the court otherwise orders
>
> (2) The time during which a convicted person is at large on bail does not count as part of any term of imprisonment imposed pursuant to conviction.
>
> (3) Notwithstanding subsection (1), a term of imprisonment, whether imposed by a trial court, or the court appealed to, commences or shall be deemed to be resumed, as the case requires, on the day on which the convicted person is arrested and taken into custody under the sentence.

[33] See SC 1959, c.41, s.28.

Since *Dean* had made the point that only appellate courts could antedate a sentence, the removal of the phrase "subject to any directions that the court appealed to may give" persuaded some commentators that the change was a consequence of this conclusion and was intended to extend the power to trial judges[34]. However, courts disagreed, except for the British Columbia Court of Appeal. In *R. v. Wells,* it split on this issue, with the majority concluding that a sentencing judge could order that a sentence could commence on the date of conviction[35]. On its face, the reasoning of the majority could have meant that antedating might extend back to the date of arrest, but Tysoe, JA made it clear that he did not consider the new power to go back prior to conviction[36]. In dissent, after a careful historical analysis, Bull, J.A. held that the earlier decisions which concluded that there was no power to antedate a sentence continued to be the correct legal position[37]. It seems that the objective of the dissenting view was accepted by Parliament since it produced an amendment in 1969[38] which removed the phrase *"or the court otherwise orders"* from s.624(1).

At the time the Revised Statutes of Canada 1970 were being prepared, the above discussion reflected the state of the statutory and interpretive law. With the exception of the British Columbia Court of Appeal, most courts had concluded that only appellate courts had

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[34] This was the gist of the annotation in Martin's Annual Criminal Code, 1960, referred to in *R. v . Clark and Siniaski*, [1967] 1 CCC 47 (Sask. M. Ct.)

[35] See *R. v. Wells*, [1969] 4 CCC 25 (BCCA) per Tysoe,JA with Branca JA concurring;.

[36] Ibid, at 33. See also the remarks of Dickson, JA (as he then was) in R. v Lapare, [1970] 1 CCC 320 (Man.C.A.)

[37] Ibid, at 42-43. See also *R. v. Perrault* (1963), 40 CR 89 (Que.C.A.); *R. v. Clark and Siniaski*, supra, note, 34.

[38] SC 1968-69, c.38, s.70.

power to antedate a sentence to reflect time in custody. Even British Columbia would restrict the sentencing judge's antedating power to the date of conviction, but the impact of this decision was already blunted by statutory amendment. In RSC 1970, the relevant provision read:

> 649(1) A sentence commences when it is imposed, unless a relevant enactment otherwise provides.

Accordingly, the effect of PSC was very circumscribed. It could be considered when determining the length of a custodial sentence or even whether there should be a period of custody rather than a suspended sentence. But there was no guarantee that this time would be taken into account nor any mechanism to do so in a uniform fashion.

(c) Bail Reform and Sentencing:

In the 1960's, a number of inquiries, both public[39] and academic[40], looked at the issue of bail and detention, all recommending substantial reform. The empirical work of Professor Friedland published in 1965 was extremely influential. He concluded that "custody is prejudicial to the outcome of the case" and that it "affects the accused's ability to engage counsel, hinders his attempt to present a proper defence, and increases the likelihood that; he will be sentenced to imprisonment"[41]. After documenting the substantial extent of detention before trial[42], he

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[39] See Report No.1, Royal Commission Inquiry into Civil Rights (Toronto, 1968), Vol.2, at 743-754 (commonly known as the "McRuer Report" after Chief Justice J.C. McRuer, its chair); also see Report of the Canadian Committee on Corrections, Toward Unity: Criminal Justice and Corrections (Ottawa: Queen's Printer, 1969) at 99-129 (commonly known as the Ouimet Report, after Roger Ouimet, its chair).

[40] M. Friedland, Detention Before Trial (Toronto: University of Toronto Press, 1965)

[41] Ibid, at 124.

considered its impact on sentencing. Here, he began by noting that over 90% of people remanded for a pre-sentence report were remanded in custody even though two-thirds of that group would not receive a custodial sentence[43]. Friedland expressed concern about the "punitive conditions[44]" of pre-trial detention[45]. The Ouimet Report published in 1969, another influential document of the period, described pre-trial detention conditions in dramatic terms:

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[42] He found that 66% of persons charged with indictable offences spent at least some time in pre-trial detention as did 22 % of persons charged with summary conviction offences: ibid, at 108.

[43] Ibid.

[44] Ibid, at 109.

[45] Which he descirbed as being characterized by "oppressive inactivity coupled with highly restrictive conditions": ibid. Here, speaking specifically of the Don Jail, he compared the situation to post-conviction imprisonment and recommended "special remand centres" to address this problem.

> Many of the institutions used to house those awaiting trial are old and poorly equipped. Sanitation and living conditions are primitive. Segregation is difficult, and security provisions designed to meet the requirements of the most difficult inmates must apply to all. This means that security in these institutions often exceeds that in institutions housing the convicted. Little is available in the way of program. Problems of segregation and classification make even work or recreational programs difficult to organize. Incarceration under such condition s can lead to confusion and resentment on the part of the accused[46]

Friedland, sharing these concerns, concluded:

> Because time spent in custody before trial necessarily has the effect of acting as punishment, the time so spent should be taken into account by the magistrate if the accused is convicted. Whether a legislative direction specifying that time spent in custody awaiting trial be taken into account would significantly affect the ultimate sentence is in many cases doubtful. It would appear that magistrates are of the opinion that they presently take time into account in their sentences. Nevertheless, the provision sis desirable for a number of reasons: it would give legislative approval to the practise and would permit the Courts openly to take this factor into account in their sentences; it would encourage those magistrates who presently do not take this time spent in custody into account to do so in the future; and it would counter the opinion, apparently widely held by convicted persons who have spent time in custody awaiting trial, that they were dealt with unfairly[47].

Moreover, if a statutory direction that required time in custody to be taken into account was not accepted as the right way to go, as an alternative he recommended reducing sentences "administratively" after sentence is imposed.

As is well known, these criticisms of the bail process resulted in the Bail Reform Act[48]. What is less well known is that the current statutory provision dealing with PSC, s. 719(3), had its roots in the same package. While s.624(2) was re-worded slightly and continued to prescribe

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[46] Supra, note 39, at 101.

[47] Supra, note 40 at 108-109.

[48] See SC 1970-71-72, c.37

that time on judicial interim release did not count, it was followed by a new s.624(2a):

> (2a) In determining the sentence to be imposed on a person convicted of an offence, a justice, magistrate or judge may take into any time spent in custody by the person as a result of the offence.

Of course, this discretionary language sounds a lot like the conclusion in Patterson, discussed above. Aside from the fundamental question of when credit for PSC could be properly denied, and the equally difficult issue of its relation to mandatory minimum sentences, sentencing judges were left with two hard questions:

> 1. Was credit for PSC to be calculated at the rate of one day for one day, or were other ratios permissible depending on the circumstances?
>
> 2. If the calculation could be different from day for day, what factors were relevant to making this determination?

2. Interpreting the new provisions:

Soon after its enactment, the statutory provision was applied and interpreted by various courts. One rule soon emerged, based on the fact that PSC did not attract remission. During the 1970's, both provincial and federal prisoners were eligible for a combination of earned[49] (discretionary) and statutory[50] (automatically credited) remission which could amount to approximately one-third[51] of a sentence. Accordingly, to compensate for the inability to accrue

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[49] At the time of the Bail Reform Act, this was three days per month: see s.24(1) of the Penitentiary Act, enacted by S.C. 1968-69, c.38, s.108.

[50] This was, at the time, a grant of one-quarter of the sentence: see s.22(1) of the Penitentiary Act, enacted by S.C. 1960-61, c.53.

[51] If one adds three days per month to one-quarter of a sentence, it will be just short of one-third of the sentence. For example, assume a six month sentence or 183 days. The statutory remission will be one-quarter or 46 days. But for each month served, the prisoner can earn an additional 3 days. Accordingly, after 4 months, this can amount to 12 days, for a total of 58

remission on this time, many judges started to give more than one-for-one credit for PSC. By the early 1980's Paul Nadin-Davis in his book “Sentencing in Canada” examined the statutory provision and observed:

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days, three days short of one-third.

> While the section is clearly permissive and not mandatory, it has been fairly agreed that credit against sentence should be given for more than that actually served pending time: the true rationale for this view is that time served pending trial dos not attract remission and is therefore equivalent to a longer term of post-sentenced custody[52].

During the same period, the first decade after the introduction of the new discretionary provision, another factor appeared in a few cases. Some sentencing judges began to consider the particular conditions of PSC. In support of credit at a rate greater than one-for-one, Clayton Ruby had written:

> Often, pre-trial custody takes place in abysmal overcrowded conditions, where no facilities for recreation or rehabilitation are available. Moreover, statutory remission and parole no not operate on such periods of custody.[53]

In *R. v. Regan et al*[54], the Alberta Court of Appeal dealt with a Crown appeal against a series of sentences imposed after pleas of guilty to two charges of assault causing bodily harm described as "savage beatings". The Court addressed the issue of PSC in the context of the sentencing judge's view that a two-for-one "rule of thumb" applied. In the course of raising the sentences, the Court rejected the "rule of thumb" and remarked:

> Each instance of sentencing has to be considered on its own merits, and, no doubt, in proper cases time already spent in custody, *and the circumstances thereof,* may be taken into account as provided by the Criminal Code. Beyond that, we do

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[52] See P. Nadin-Davis, Sentencing in Canada (Toronto: Carswell Co., 1982) at p. 155.

[53] C. Ruby, Sentencing, 2nd Ed. (Toronto: Butterworth's, 1980) at p.177.

[54](1975), 24 CCC(2d) 225 (Alta.C.A.)

not believe that any rule in this regards can be laid down.[55](italics added)

[55] Ibid, at 226.

This is clear authority for using the circumstances of confinement as a factor that informs the quantum of credit decision. Another example, was *R.. v. Saswirski* [56] where a police officer pleaded guilty to criminal negligence causing death after his girlfriend was killed while playing a dangerous game of Russian roulette. Although the appropriate sentence was considered to be 15 months, he was sentenced to 12 months, taking into account the one month of PSC served in solitary confinement due to the fact that he was a police officer. This amounted to a three-for one credit. This approach, taking into account the circumstances of custody, in this case segregation, was consistent with the concerns expressed by Professor Friedland and echoed in the Ouimet Report, discussed above.

[56] (1981), 6 WCB 344 (Ont.Co.Ct.)

Quickly, there seems to have been acceptance that credit should usually be more than one-for-one but the extent of the of the credit remained contentious. In particular, courts became very concerned not to endorse an arithmetical formula. Still, disagreement about the extent of PAS credit continued. In 1975, the Quebec Superior Court endorsed a multiplier of 1.5 to 1 in *R. v. Arrelano and Sanchez*[57]. In 1981, in the case of *R. v. Meilleur*[58], the Ontario Court of Appeal looked at a sentence of four years for manslaughter. The offender was 20 years old from a "deprived, low socio-economic home environment" with a prior record that disclosed a "pattern of escalating violence". The killing was the result of a kick to the deceased's head. Although the parties were drinking, the trial judge was satisfied that the jury acquitted of murder because they were not satisfied that the offender intended to kill. The offender had spent 14 months in custody pending trial. The judge remarked that fairness required that "a sentence should be reduced by almost three times the amount of time spent by a prisoner in custody prior to sentencing, since a prisoner may well spend only approximately one-third of a sentence in custody"[59]. He considered a sentence of seven and one-half years fit and reduced it by three and one-half years for the PSC. Accordingly, the offender was sentenced to four years. Martin,J.A. found the three-for-one credit to be an error and commented:

> Section 649(2.1) [now s.719(3)] of the Code provides that in determining the sentence to be imposed on a person convicted of an offence, the court may take into account any time spent in custody by the person as a result of the offence. It was accordingly, clearly appropriate for the learned trial judge to take into account the period of pre-trial custody in arriving at an appropriate sentence. We

[57] (1975), 30 CRNS 367 ((Que.S.C.).

[58] [1981] O.J. No 627 (Ont.C.A.) QL).

[59] Ibid, at paras 8-9

are all of the opinion, however, that he erred in applying a mathematical formula by multiplying the months spent in pre-trial custody by three....[60]

[60] Ibid, at para. 10.

The sentence was increased from four to six years to reflect the gravity of the offence. While the credit for PSC was not expressly quantified, the increased sentence reflects approximately a one-for-one credit. In 1983, a majority of the Manitoba Court of Appeal in the case of *R. v. Chiechie* held that the trial judge had erred in translating 10 months PSD into "the equivalent of 15 to 21 months or even more..."[61] Huband, J.A. in dissent attempted a careful examination of the issue and did not find any error in the sentencing judge's use of 15 to 21 months credit as the proper surrogate for 10 months PSC. He concluded that some degree of deference ought to have been given to the judge's decision. His analysis of recent cases led him to conclude that the "weight of judicial authority seems to be that pre-trial time should normally be considered, and while there is no hard and fast rule, it is usual to equate pre-trial time with a significantly longer sentence time"[62].

With respect to the remission and parole implications, it should be noted that for all prisoners earned remission of 15 days per month, that is a potential one-third of the sentence[63], was instituted in 1978[64] to replace the prior remission regime which mixed a discretionary element with a statutory grant. In theory, this remission was discretionary but it soon became clear that for penitentiary prisoners it would usually be granted in the absence of a disciplinary offence. Full parole eligibility was set at one-third of the sentence but it was rare for a prisoner

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[61] [1983] M.J. No.30 (Man.C.A.) (QL) at para. 7-8.

[62] Ibid, at para. 32.

[63] To see why this is one-third, assume a sentence of 45 days. After serving 30 days, the prisoner can earn 15 days and will be released because the time served (30 days0 and the remission earned (15 days) total the sentenced. 15 is one-third of 45.

[64] See Criminal Law Amendment Act, 1977, S.C. 1976-77, c.53, s.41, proclaimed in

to be released that early in a sentence[65]. With is in mind, one can make certain observations about PSC in the abstract:

1. Looking only at remission, it is clear that "X" days of PSC are the equivalent of "1.5 X" days served after sentencing.

2. Except for life sentences for murder[66], PSC does not count towards parole eligibility. That is, only time served after sentencing counts towards accumulating the one-third necessary to meet full parole eligibility, or the lesser thresholds for day parole eligibility.

3. Judges continued to accept that the conditions of confinement during PSC were part of the reason for a PSC credit.

All of this suggests that, in most cases, even a 1.5-to-one credit will not fully reflect the difference between PSC (or "dead time") and post-sentence incarceration.

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force July 1, 1978.

[65] For federal prisoners, the parole granting rate in 2001/2002 was 43% but, of all prisoners released from federal institutions, 63% went out on statutory release. That means that this segment either did not apply or was consistently denied parole: see National Parole Board, Performance Monitoring Report, 2001-2002 (published July, 2002) at p.27.

[66] See the current s. 746.

By the end of the 1980's, while some courts were starting to reveal a preference for a two-for-one credit, not every one agreed. In *R. v. Tallman*[67], a 1989 decision, four accused under the age of 20 were charged with murder in the course of a robbery but, after the demise of constructive murder, were convicted of manslaughter. Long periods of PSC from 16 to 21m months were relevant to the sentencing. Taking this into account, the judge sentenced two of the accused to six years imprisonment and the others to four and two and one-half years respectively. The Crown appealed the latter two sentences. In dealing with PSC, the Alberta Court of Appeal said:

> Except where the pre-trial custody has been so short as to have no significance in the sentence being imposed, courts in Alberta invariably take pre-trial custody into account. The difficulty which then is presented is to determine whether the time in pre-trial custody should be equated to custodial time after sentence has been passed, or whether it should be more. It is often said that pre-trial custody is "hard time" in that the time so served is not subject to the legislation governing parole and remission of sentence. From time to time arguments are addressed to the court urging that time in pre-trial custody should be considered as one and one half times or double, or even triple, time served as a result of sentence. This court has uniformly refused to prescribe any automatic formula leaving each case to the discretion of the sentencing judge in the light of the circumstances of the case.
>
> .....
>
> In my view the usual practice should be followed in this case and the credit against sentence should be somewhat more than the actual time in pre-trial custody[68].

While this Court was not prepared to endorse a two-for-one approach, this soon became recognized not as a mandated formula but certainly as the usual norm, subject to the exigencies

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[67] (1989), 48 CCC(3d) 81 (Alta.C.A.)

[68] Ibid, at 94-95.

of the individual case. The Crown appeal succeeded and the sentences were raised to eight years.

In *R. .v. Rezaie*[69], one of the most often cited cases on this topic, the accused had been sentenced to five years for sexual assault, forcible confinement, choking and threatening. He had spent 11 months in custody pending his sentencing, comprised of three distinct pockets of time. The sentencing judge refused to give any credit for PSC on the basis that it was due to the offender's own non-compliance with bail and his abuse of the process. On appeal to the Ontario Court of Appeal, Laskin,JA for a unanimous court examined s.721(3 [s.719(3)] and reasoned:

> Although this section is discretionary, not mandatory, in my view a sentencing judge should ordinarily give credit for pre-trial custody. At least a judge should not deny credit without good reason. To do so offends one's sense of fairness. Incarceration at any stage of the criminal process is a denial of an accused's liberty. Moreover, in two respects, pre-trial custody is even more onerous than post-sentencing custody. First, other than for a sentence of life imprisonment, legislative provisions for parole eligibility and statutory release do not take into account time spent in custody before trial (or before sentencing). Second, local detention centres ordinarily do not provide educational, retraining or rehabilitation programs to an accused in custody waiting trial. For these reasons, pre-trial custody is commonly referred to as "dead time", and trial judges, in deciding on an appropriate sentence, frequently give credit for double the time an accused has served.
>
> Still, this court and other provincial appellate courts have rejected a mathematical formula for crediting pre-trial custody, instead insisting that the amount of time to be credited should be determined on a case by case basis..... Although a fixed multiplier may be unwise, absent justification, sentencing judges should give some credit for time spent in custody before trial (and before sentencing)[70]

While the Court found that the trial judge erred in denying credit for PSC, it ultimately

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[69] (1996), 112 CCC(3d) 97 ; 31 OR(3d) 713 (Ont.C.A.)

[70] Ibid, at CCC 104-105.

concluded that a five year sentence was fit, given the aggravating features of the offence. But the analysis of PSC was significant and confirmed three important matters:

1. Credit for PSC should ordinarily be given unless there is a good reason to deny it;

2. Two-for-one credit is a frequently considered to be appropriate[71]; and

3. The credit continues to be premised on the remission/parole rationale combined with the traditional concern about the conditions of PSC, particularly the absence of "educational, retraining or rehabilitation" programmes[72].

3. PSC and Mandatory Minimum Sentences:

[71] See also *R. v. La Pierre* (1998), 123 CCC(3d) 332 (Que.C.A.) at 344-345;

[72] See also *R. v. Ponton*, [2001] BCJ No. 344 (BCCA) (QL) per lambert, JA at para. 7.

After *Rezaie*, the PSC issue became prominent again in the context of mandatory minimum sentences. The issue had been raised in the past with respect to short periods of incarceration arising from second or subsequent convictions for impaired driving and also the seven year minimum sentence for importing narcotics which existed until struck down by the Supreme Court in *R. .v. Smith*[73]. Most courts held that PSC could not reduce a sentence below the statutory minimum[74]. In 1996 amendments to the Code in respect of offences committed with firearms[75] established new mandatory minimum sentences of four years imprisonment. Soon, these offences and their mandatory sentences generated claims of "cruel and unusual punishment" in violation of s.12 of the Charter. Without delving into the arguments and the elements of the s.12 methodology, it is sufficient to note that the conceptual basis for a successful s.12 claim is "gross disproportionality"[76]. While different factual scenarios produced different bases to support a claim that four years was grossly disproportionate, the PSC situation was consistently troubling. Assume two young accused charged with robbery where one is released on judicial interim release while the other is detained. One year later, they are tried and convicted. If the offence has no real aggravating qualities, one can imagine a situation where a

[73] [1987] 1 S.C.R. 1045.

[74] See *R. v. Brown* (1976), 36 CRNS 246 (Ont.Co.Ct.); *R. v. Mitchell* (1990), 24 M.V.R. (2d) 174 (NBQB).

[75] See Firearms Act, SC 1995, c.39, ss141-150 making four years the mandated sentence for the following offences if a firearm was used: criminal negligence causing death (s. 220); manslaughter (s.236); attempted murder (s. 239): causing bodily harm with intent (s.244); sexual assault with a weapon (s.272); aggravated sexual assault (s.273); kidnapping (s.279); hostage-taking (s.279.1); robbery (s.344); extortion (s. 346).

[76] See *Smith*, supra, note 73; *R. v. Goltz* (1990), 52 C.C.C. (3d) 527 (S.C.C.); *R. v. Morrissey*, [2002] 2 S.C.R. 96.

judge would not want to impose a sentence greater that the statutory four years. What happens to the offender who has one year PSC? What about parity? Before jumping to any s.12 conclusions, it is necessary to determine whether the detained accused is precluded from receiving a sentence less than four years by simple application of s.719(3).

This issue came before the Ontario Court of Appeal in *R. v. McDonald*[77] and was subjected to careful scrutiny by Rosenberg, J.A.. The offender was a 21 year old man who suffered from manic depression. . He had pleaded guilty to robbery with a firearm contrary to s. 344(a) of the Code. He was not on medication at the time of the offence and had spent six and one-half months in custody pending sentencing. Notwithstanding the PSC, the trial judge imposed the minimum sentence of four years. On appeal, it was argued both that s.719(3) permitted a reduction below four years to account for PSC and, alternatively, that four years violated s.12 because it did not take into account PSC. Looking at the history of the issue, and in particular the Bail Reform Act, including comments made at the time of its introduction by Minister of Justice Turner[78], Rosenberg,J.A. concluded that Parliament intended to permit a sentencing judge to use PSC even to the extent of reducing a minimum sentence:

> Even if s. 719(3) is ambiguous and it is uncertain whether it gives the judge a substantive power to take account of pre- sentence custody where the Code requires imposition of a minimum punishment, the rule stated in McIntosh requires the courts to give the provision the interpretation that favours the accused. Such an interpretation is also consistent with Parliament's evident intention[79].

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[77] (1998), 17 C.R. (5th)1 (Ont. C.A.); cf. *R. v. Lapierre* (1998), 123 C.C.C. (3d) 332 (Que. S.A.).

[78] Ibid, at 16, quoting the Minister making specific reference to a discretion to reduce a minimum sentence due to PSC.

[79] Ibid, at 17.

He also looked at s.344(a) and observed that it used the phrase “minimum punishment of imprisonment for a term of four years”. In addressing the question of whether PSC qualified as punishment, he held that “ to pretend that pre-sentence imprisonment does not occasion a severe deprivation and that it is not punitive would result in a triumph of form over substance” and that “Parliament has recognized this reality in enacting s. 719(3)”. Accordingly, the two provisions could be integrated and could co-exist even if the ultimate sentence was less than four years so long as trial judges ensured that the total punishment, including PSC, added up to at least four years. As a result, the appeal was allowed and the sentence reduced to two years. To reach that number, he applied the practise that “trial judges generally give double credit for pre-sentence custody”[80].

[80] Ibid, at 26 where he said:

> .....trial judges generally give double credit for pre-sentence custody. I see no reason to depart from this practice, where appropriate, in cases of minimum punishment, although the sentence imposed would be less than four years.

The same issue reached the Supreme Court of Canada in *R. v. Wust*[81]. The case involved a 22 year old man with an extensive record who was convicted of robbing a gas station along with two accomplices. Wust and another man were armed. They took $780 and struck the cashier several times in the head as well as threatening to kill him if he identified them to the police. After spending seven and one-half months in custody, he was convicted. The sentencing judge held that a fit sentence was four and one-half years. He gave one year credit for PSC and imposed a sentence of three and one-half years, less than the period mandated by s.344(a). The Court of Appeal held that s.344(a) did not permit a sentence of less than four years and raised the sentence to that level. Arbour,J. spoke for a unanimous Supreme Court on the issue which she described as deceptively simple. She concluded that s.719(3) could be reconciled with s.344(a) to permit taking into account PSC even if it meant imposing a sentence which, from the date of imposition, was less than the mandated four year minimum term of imprisonment.

In reaching this conclusion, Arbour, J. followed and accepted the analysis of Rosenberg,JA in *McDonald,* discussed above. She added some important observations which will inform the current debate. First, she accepted the traditional bases for recognizing PSC:

> In addition, and in contrast to statutory remission or parole, pre-sentence custody is time actually served in detention and often in harsher circumstances than the punishment will ultimately call for[82].

Secondly, with respect to the punitive nature of PSC even if that is not the immediate purpose of

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[81] [2001] 1 SCR 455

[82] Ibid, at para. 28.

detention, she observed:

> To maintain that pre-sentencing custody can never be deemed punishment following conviction because the legal system does not punish innocent people is an exercise in semantics that does not acknowledge the reality of pre-sentencing custody so carefully delineated by Laskin J.A., in Rezaie, supra, and by Gary Trotter in his text, The Law of Bail in Canada (1992), at p. 28:
>
> Remand prisoners, as they are sometimes called, often spend their time awaiting trial in detention centres or local jails that are ill-suited to lengthy stays. As the Ouimet Report stressed, such institutions may restrict liberty more than many institutions which house the convicted. Due to overcrowding, inmate turnover and the problems of effectively implementing programs and recreation activities, serving time in such institutions can be quite onerous.
>
> Therefore, while pre-trial detention is not intended as punishment when it is imposed, it is, in effect, deemed part of the punishment following the offender's conviction, by the operation of s. 719(3)[83].

Thirdly, in dealing with the vexing question of quantifying the credit, Arbour, J. commented:

> I see no advantage in detracting from the well-entrenched judicial discretion provided in s. 719(3) by endorsing a mechanical formula for crediting pre-sentencing custody. As we have re-affirmed in this decision, the goal of sentencing is to impose a just and fit sentence, responsive to the facts of the individual offender and the particular circumstances of the commission of the offence. I adopt the reasoning of Laskin J.A. in *Rezaie*.....
>
> In the past, many judges have given more or less two months credit for each month spent in pre-sentencing detention. This is entirely appropriate even though a different ratio could also be applied, for example if the accused has been detained prior to trial in an institution where he or she has had full access to educational, vocational and rehabilitation programs. The often applied ratio of 2:1 reflects not only the harshness of the detention due to the absence of programs, which may be more severe in some cases than in others, but reflects also the fact that none of the remission mechanisms contained in the Corrections and Conditional Release Act apply to that period of detention. "Dead time" is "real" time. The credit cannot and need not be determined by a rigid formula and is thus best left to the sentencing judge, who remains in the best position to carefully weigh all the factors which go toward the determination of the appropriate sentence, including the decision to credit the offender for any time spent in

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[83] Ibid, at para. 41.

pre-sentencing custody[84].

As result, the appeal was allowed and the original sentence of three and one-half years was reinstated. This meant essentially a two-for one credit.

The decision in *Wust* gives Supreme Court imprimatur to many of the methodological elements that have been employed by trial judges. Of particular importance is the recognition that two-for-one is the commonly used ration. As well, Arbour, J. explained that it reflects both of the traditional bases, lack of remission and harsh conditions, but that the latter might not apply in a particular case where an "accused has been detained prior to trial in an institution where he or she has had full access to educational, vocational and rehabilitation programs". Note that the emphasis for a reduction of credit is on the availability of programmes. Her earlier discussion of harsh conditions assumed a lack of programming and over-crowding but did not assume any especially harsh environmental conditions. Clearly, situations of deprivation, lack of hygiene and other potential examples of harshness or inordinately severe personal effects would exacerbate the conditions of PSC beyond what Arbour,J. assumed to be the norm and could justify an increase in PSC credit. This would arise on a case-specific basis and could move the ratio beyond the accepted two-for-one level.

4. Enhanced Credit:

[84] Ibid, at paras. 44-45.

The phrase "enhanced credit" has been used to refer to credit for PSC at more than the two-for-one rate. Since the decision in *Wust*, this issue has arisen in a small number of cases. Usually, an enhanced credit approximates three-for-one but it has even reached the level of four-for-one[85]. A sample of these cases is worth examining not simply to identify the factual triggers but, more importantly, to appreciate the sentencing judges' objectives and the legal implications of giving substantial credit for PSC.

R. v. Kravchov[86] is part of the line of cases spawned by the 2002 strike of provincial employees including jail guards in Ontario. In this case, the offender pleaded guilty to a number of counts of "possession over" in relation to stolen luxury automobiles. Kenkel,J. decided that, in light of Kravchov's record, the lowest sentence that could be imposed was two years less a day. However, this did not account for PSC which was seven months including two months during the strike. The trial judge surveyed previous decisions where enhanced credit had been given and observed that they "mostly related to the circumstances of detention and the effects of that detention on the particular accused"[87]. He summarized the kinds of factors that were relevant to enhanced credit for PSC:

- the effect of pre-trial custody on a particular prisoner due to age, infirmity, mental illness

- incarceration at a facility that houses primarily men where that has resulted in isolation of a female prisoner

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[85] See *R. v. Critton*, [2002] O.J. No. 2594 (Ont.Sup.Ct.) where Hill.J. gave 4:1 credit for the portion of PSC spent at Maplehurst Correctional Institution during the 2002 provincial employees strike.

[86] [2002] O.J. No. 2172 (Ont.Ct.J.)

[87] Ibid, at para. 12.

- lengthy pre-trial custody

- significant pre-trial custody where the accused has never been incarcerated before

- the unavailability of rehabilitative or education programs at the detention centre

- whether a jail is "overcrowded" and engaging in practices such as "triple bunking"

- the frequency of "lockdowns" and other measures denying the prisoner exercise and access to areas outside his or her cell

- waiver of a preliminary hearing along with conditions of detention

- the prevalence of disease and any other conditions which endanger the health of the prisoner

- custody during a public service strike where that labour disruption affected the care of the prisoners and prevented their transportation to court

- any unusual delays in the progress of the case attributable to the Crown.

In this case, the offender was confined at Metro West Detention Centre, a facility built in 1976 with a capacity for 412 males. In 2002, it held 542 men. Although the cells were designed for two person occupancy, three men were in each cell, with the third sleeping on a mattress on the floor. There were health concerns over infectious disease and just prior to the sentencing hearing 53 prisoners had tested positive for tuberculosis. Nursing staff was inadequate. Over the past few years, recreational and counselling jobs had been terminated and any programs available were run by volunteers. The incidence of violence had increased over the past year. The strike lasted eight weeks. During that time, prisoners were locked down 20 hours per day with little or no access to exercise. All programs were cancelled. As a result of living in dirty conditions at close quarters with two other men, Kravchov contracted a skin disease. Once the strike was over, he was treated and his skin had cleared up. Using the 1955 United Nations

Minimum Rules as a “benchmark” , Kenkel, J. ruled:

> The prisoners in pre-trial custody at the West Detention Centre now have few of the opportunities for rehabilitation and limited privileges that are available to those serving sentence. The reasons behind giving credit for pre-trial custody plainly apply to pre-trial detention there. With "triple bunking" and all of the other problems that go along with that level of overcrowding, enhanced credit for pre-trial custody may be given, particularly in cases such as this where an inmate has been detained for a lengthy period of time in pre-trial custody.
>
> Considering the general conditions of detention at the West Detention Centre and the length of time the accused has been incarcerated there I find there must be enhanced credit given towards his sentence. Whenthe extraordinary conditions of the strike period are considered, along with the unfortunate effects of the entire period of incarceration upon this particular accused, I find that further credit must be given[88].

In determining the extent of enhanced credit, he agreed that there is no “fixed ratio” but that it would vary with the “conditions of detention, the amount of time served by the accused in those conditions, and the effect of those conditions on the individual accused”[89]. Accordingly, after noting that an appropriate sentence would be 24 months, he sentenced the offender to one day in jail followed by two years probation. This constituted a PSC credit of slightly more than three-to-one.

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[88] Ibid, at paras. 49-50.

[89] Ibid, at para. 51.

In *R. v. Buggins*[90], a 40 year old aboriginal man pleaded guilty to a total of seven counts, including five break and enters into commercial premises, one failing to comply, and an assault on his spouse. There were no aggravating or mitigating factors in relation to the break-ins and they involved small amounts of cash or liquor. The domestic assault resulted in a scrape and was committed while the offender was sober. He had a lengthy record and a history of alcohol abuse. Prior to sentencing, the offender has spent nine weeks in PSC. Before determining the amount of PSC credit , Veit,J heard submissions on the current remission policies applicable in Alberta and federal institutions. Of course, other than a skeletal framework, this information would be speculative as it related to parole prospects. However, given the offender's record, including parole violations, the trial judge considered that he was not likely to get the benefit of early parole. Accordingly, she gave him an enhanced credit of 27 weeks for his nine weeks PSC. This brought the length of sentence down to 77 weeks and ultimately resulted in a conditional sentence[91]. One might question the use of parole prospects as a guide to whether a two-for- one PSC credit is sufficient. Generally, speaking this is not accepted as a proper sentencing consideration[92]. The point in using remission and parole as a basis for giving PSC credit is that it must be greater than one-for-one to compensate for the lack of eligibility. It is not a case of speculating about the particular offender's chances. Otherwise the worst parole candidates would get more credit for PSC than the best candidate simply because they can expect a longer custodial portion of the same sentence. The point is not to speculate about the actual duration of future

[90][2002] A.J. No. 96 (Alta.QB) (QL)

[91] Which was soon breached: see [2002] A.J. No. 275 (Alta.QB) (QL)

[92] See Allan Manson, The Law of Sentencing (Toronto: Irwin Law, 2001) at 115-116.

incarceration but to compensate for past incarceration in light of its conditions and effect. Nobody gets remission for PSC and nobody gets credit towards parole eligibility for this period. Thus, to compensate, credit must be more than one-for-one.

R. v. Critton[93] *is* an interesting case which involves not only the issue of enhanced credit but also distinctions between different periods which might qualify as PSC. Critton pleaded guilty to the 1971 hijacking of an airplane to Cuba. He was arrested 30 years later and returned to Canada for trial. His counsel argued that there were four relevant periods of time:

> 1) the 10 months of solitary confinement detention in Cuba
>
> (2) the 23 years away from North America spent by the offender in Cuba and Tanzania after release from La Cabana Prison
>
> (3) time spent in United States custody (September 8th to November 5th, 2001)
>
> (4) time spent in custody in Canada at the Maplehurst Correctional Institute (November 6th, 2001 to the present).

[93] Supra, note 85.

Although there was a dispute as to whether the first segment, custody in Cuba, was properly characterised as custody as a result of this offence rather than a form of immigration detention, Hill,J. gave the benefit of the doubt to the offender[94] and held that a 1:1 credit should be given. .

He rejected any claim based on the 23 years away from North America which he described as self-enforced exile. With respect to the post-arrest custody in the United States and at Maplehurst, Hill, J. gave a 2:1 credit except for the period of the jail guards strike for which he gave four-for-one PSC credit. In justifying the enhanced credit, he said that where "the sentencing court has evidence before it of abnormally harsh conditions of detention, account should be taken of such circumstances."[95] He recounted the prison conditions during this 55 day period:

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[94] He ruled (ibid, at para. 96) : I am in agreement with the submission of Crown counsel that the offender's incarceration in Cuba is not strictly, within the meaning of s. 719(3), "time spent in custody by the person as a result of the offence" or offences. The detention in Cuba was essentially immigration processing not criminal investigation or sanction relating to the hijacking-related offences. That said, however, it is unclear that the accused's detention was as a result of violating Cuba's sovereignty and accordingly there is an indirect connection sufficient to permit consideration of the Cuban incarceration as "relevant information" placed before the court (s. 726.1 of the Code) which may be considered in a fashion akin to the s. 719(3) regime.

[95] Ibid, at para. 102.

(1) prescription medicine or medication for emergencies unavailable at night

(2) chapel and church services halted

(3) not taken to court for preliminary inquiry

(4) not taken to court April 29th, 2002 to plead guilty during unlawful confinement to cell

(5) inability to consult with counsel April 10th to sign documents

(6) reduced telephone access

(7) cancelled visits and outdoor recreation time

(8) delayed mail delivery[96].

Even without the strike, many common conditions at Maplehurst disturbed the sentencing judge[97]. Ultimately, he characterized some of the circumstances a "flagrant abuse of government power,

contempt of court, and violation of civil rights"[98]. Although the Crown was seeking a 12 year term, Hill,J. sentenced Critton to three years imprisonment after giving a total of two years credit for PSC .

5. Commonwealth Jurisdictions:

Obviously, the question of PSC must have arisen in other jurisdictions and a survey of how they have dealt with the issue may inform the Canadian discussion. I have not included the

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[96] Ibid, at para. 104.

[97] He cited one instance of 6 days of confinement to cells without showers plus "frequent cell and strip searches during which the accused's letters, photographs, cosmetic and food purchases were destroyed": ibid.

[98] Ibid, at 105.

United States in this survey for a number of reasons, principally the variety and multiplicity of penal jurisdictions, and the dramatically different attitudes towards incarceration. At the federal level, however, it is worth noting that credit for PSC is mandatory and is deducted administratively from the sentence eventually imposed[99].

[99] 18 USC Sec. 3585 (a) stipulates that a sentence of imprisonment commences "on the date the defendant is received in custody...." and (b) provides:

> (b) Credit for Prior Custody: S defendant shall be given credit toward the service of a term of imprisonment for any time spent in official detention prior to the date the sentence commences.

In the United Kingdom, the applicable statutory regime was enacted in 2000, replacing the earlier scheme which had been in place since the Criminal Justice Act 1967[100] which provided for an administrative reduction for PSC and led to numerous complications especially in relation to multiple offence and cumulative sentence[101] . The new statute requires that "the court shall direct that the number of days for which the offender was remanded in custody in connection with the offence or a related offence shall count as time served as part of the offence"[102]. In other words, the sentencing judge announces that there were "X" days of PSC and this is credited towards the sentence imposed. This credit, however, is not absolute. The court can decide that it would be "just in all the circumstances" not make the direction[103]. As well, it can be circumscribed by rules made by the Secretary of State in relation to remand time that is "wholly or partly concurrent with a term of imprisonment"[104]. As far as the extent of credit, it is clearly intended to be day-for-day but the court maintains discretion to direct that it be less than the actual remand time[105]. Given this explicit power to make the credit less than the length of the remand in custody, it seems apparent that it was not intended to empower the sentencing judge to enhanced

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[100] See s.67(1) which, in its original form, provided that the "length of any sentence of imprisonment imposed on an offender by a court shall be treated as reduced by any period during which he was in custody by reason only of having been committed to custody by an order of a court made in connection with any proceedings relating to that sentence....".

[101] See, for example, *R. v. Governor of Brockhill Prison, Ex parte Evans*, [1997] 2 WLR 230 (Div.Ct.), [1996] E.W.J. No. 1459 (QL) re: concurrent sentences and *R. v. Secretary of State for the Home Dept. ex parte Naughton*, [1997] 1 WLR 118 re: consecutive sentences.

[102] See s. 87 (3), Powers of Criminal Courts (Sentencing) Act 2000 (U.K.2000, c.6)

[103] Ibid, as. 87(4)(b).

[104] Ibid, s. 87(4)(a).

[105] Ibid, s.87(6).

the credit. An interesting aspect of the legislation is that it requires that sentencing judges deal with these issues by making express directions "in open court" the extent of credit and the reasons if credit is denied or reduced.

The various Australian jurisdictions canvas most of the basic options that are available. Prior to the current set of statutory provisions, there are examples of a few Australian courts looking at the issue of PSC and concluding that a power to antedate the sentence would be preferable to requiring a sentencing judge to determine a PSC credit and discount the sentence accordingly[106]. As well, some judges observed that a two-for-one credit is appropriate to compensate for lost remission opportunities[107]. The following is a summary of the current statutory provisions, described in terms of the basic PSC concepts:

> Australian Capital Territory: The sentence commences when imposed "unless the court otherwise orders"[108] and PSC "shall be reckoned as a period of imprisonment already served under the sentence"[109]. This makes the credit mandatory and it is administratively deducted from the sentence. It appears to be a day-for-day scheme.

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[106] See *R. v. McHugh*, [1985] 1 NSWLR 558; *R. v. Reed*, [1992] 2 VR 484.

[107] See, for example, *R. v. Marshall*, [1993] 2 Qd R 307.

[108] ACT Crimes Act 1900, s.441A

[109] Ibid, s. 451(1)

Northern Territory : The sentencing court "shall have regard to.....time spent in custody by the offender for the offence before being sentenced"[110]. Accordingly, while PSC must be considered, it is part of a comprehensive list of relevant factors. This suggests that there may be some residual discretion around the PSC issue both with respect to granting credit and the extent of credit.

New South Wales: A sentencing court "must take into account ...any time for which the offender has been held in custody in relation to the offence..."[111] While the credit is virtually mandatory, it quantum is not addressed.

[110] NT Sentencing Act, 1995, s.5(2)(k)

[111] See s.24, NSW Crimes (Sentencing Procedure) Act 1999 No.92

Queensland: Sentences of imprisonment commence immediately "unless the court orders otherwise"[112]. This is followed by an optional approach to PSC. Section 158 provides that the court may order that "the term of imprisonment is to have effect on and from the day the offender was arrested"[113]. This express recognition of the power to antedate is followed by an obligation on the court to state the dates during which the offender was in custody, calculate the PSC credit, declare that time to be time "already served", note this declaration in the court records, and cause the corrections service to be apprised"[114]. Alternatively, under s. 161, "any time that the offender was held in custody in relation to proceedings for the offence and for no other reason must be taken to be imprisonment already served under the sentence unless the court otherwise orders. While this may seem to be a repetition of the s..158 power, that provision can apply to suspended and partly suspended sentences while s.161 cannot[115].

South Australia: This is another territory which provides an optional approach, although in more explicit form.. The court must specify the date upon which the sentence of imprisonment is to commence[116] and, where PSC is relevant, the Criminal Law (Sentencing) Act 1988 gives the court a choice:

(2) Where a defendant has been in custody in respect of an offence for which the defendant is subsequently sentenced to imprisonment, the court may:

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[112] See s.148, Penalties and Sanctions Act 1992

[113] Ibid, s. 158(1).

[114] Ibid, s. 158(2).

[115] Ibid, see s. 161(2).

[116] See s.30(1), Criminal Law (Sentencing) Act 1988

(a) make an appropriate reduction in the term of the sentence, having regard to the period for which the defendant has been in custody; or

(b) direct that the sentence be taken to have commenced on the day on which the defendant was taken into custody[117].

If no commencement date is declared, the Act deems the commencement to be the date upon which the offender was taken into custody[118].

Tasmania: The relevant provision states that a court sentencing an offender ti imprisonment for an offence:

(a) must take into account any period of time during which the offender was held in custody in relation to proceedings for, or arising from, that offence; and

[117] Section 30 (2), Criminal Law (Sentencing) Act 1988

[118] Ibid, s. 30(6).

(b) may order that the sentence of imprisonment is tot commence on a day earlier than the day on which it is imposed[119].

This is another mechanism that gives judges an option but without guidance as to which method is preferred in which situations, or any indication as to the extent of PSC credit. One wold assume that the antedating power could not be more than one-for-one but it could also be less.

Victoria: The Sentencing Act 1991 provides that a period of PSC "must, unless the sentencing court....otherwise orders, be reckoned as a period of imprisonment or detention already served under sentence"[120]. This provision ensures that, subject to the exercise of residual discretion, a prisoner will get one-for- one credit for PSC towards either a sentence of imprisonment or a "period of detention in an approved mental health service under a hospital security order".

[119] Section 16(1), Sentencing Act 1997 (No. 59 of 1997). The Court of Criminal Appeal of Tasmania has said that prior to the enactment of the current provision, it "was common practice both in this Court and at first instance to antedate sentences to take into account periods in custody..": see *R. v. Doyle*, No.CCA 88/1998, Judgment No. 157/1998 (QL) rendered December 15, 1998.

[120] See s. 18(1).

> Western Australia: Here, we find another optional mechanism that gives the sentencing judge discretion to take remand time into account[121] either by imposing a term reduced by that period[122] or "by ordering that the term it imposes is to bed taken to have begun on a specified day being the day when that custody began or on some later date that is not later than the date of sentence"[123]. Again, this seems to give substantial choice to the sentencing judge both as to the of PSC credit and the mechanism to achieve it. One can assume that there are specific situations within the sentencing structure which would make one option preferable in those circumstances.

What is clear from this survey of Australian jurisdictions[124] is that the various provisions make consideration of PSC virtually mandatory but still leave some discretion to sentencing judges, including providing optional mechanisms for taking it into account. The issue of the extent of PSC credit is not addressed in legislation except in the sense that some antedating powers imply a one-for-one credit, certainly no more, although sometimes permitting less.

New Zealand gives us a good example of how changing policies can be implemented by different legislative strategies. Prior to 1985, cases held that courts had no power to antedate a sentence but that they could take PSC into account in determining the length of a sentence of imprisonment[125]. The Criminal Justice Act 1985 changed this situation so that pre-sentence periods in a penal institution would be recorded and counted toward both parole and release

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[121] Section 87, Sentencing Act 1995 says "If when an offender is being sentenced to imprisonment....the court decides that that time should be taken into account..."

[122] Ibid, s. 87(c)

[123] Ibid, s.87(d).

[124] The Commonwealth legislation hs no comparable provision: see Halsbury's Laws of Australia, **http://www.butterworthsonline.com/lpBin20/lpext.dll/bw/L1/54/halsbury/1614b/17a69/17ab** at para. 130-17145.

[125] See, for example, *R. v. Jorgensen*, [1959] NZLR 740

dates[126]. An amendment in 1993 stipulated that recorded periods of PSC in penal institutions were not to be considered in determining the length of sentence[127]. Another amendment in 2002 moved the operative provisions into the Parole Act 2002. As a result, the only sentencing provision dealing with PSC now provides:

[126] See Criminal Justice Act 1985, ss.81(3) and (7).

[127] See s.81 as enacted by s.3, Criminal Justice Act 1993. Since this provision did not apply to detention in police cells, judges could take that time into account in determining the length of sentence.

> In determining the length of any sentence of imprisonment the court must not take into account any part of the period during which the offender was on pre-sentence detention as defined in s.91 of the Parole Act 2002[128].

The Parole Act 2002 provides that a sentence commences when imposed except as that statute elsewhere accommodates cumulative sentences[129]. Then, it provides that any time spent in pre-sentence detention counts towards the "non-parole period" of the sentence[130]. This means that PSC is recorded and counts towards parole eligibility[131]. Accordingly, the New Zealand system uses a mandatory day-for-day credit which is counted administratively both towards the sentence and parole eligibility.

6. Conclusion:

After examining the development of the PSC issue in Canada and elsewhere, there appear to be four distinct basic models which, with various qualifications, can be adopted legislatively to respond to the PSC question:

> 1. **Judicial reduction of sentence** : Like our current s.719(3), this model empowers a sentencing judge to take PSC into account by identifying it, and using its quantum to reduce the sentence actually imposed. In theory, this model can be discretionary or

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[128] See s.82, Sentencing Act 2002. The related sentencing provisions in the earlier Criminal Justice Acts 1985 and 1993 were repealed.

[129] See s. 76(1), Parole Act 2002

[130] Ibid, s. 90(1).

[131] The prisoner is eligible for parole after serving the non-parole period.

mandatory, both in terms of granting credit and determining the extent of credit.

2. **Judicial antedating of sentence**: This model permits a sentencing judge to take PSC into account by antedating the commencement of the sentence. That is, the judge would identify PSC, determine the appropriate credit, and then backdate the sentence accordingly to give effect to this credit.

3. **Statutory antedating of sentence**: Here, the statute requires the sentencing judge to quantify PSC and the commencement of sentence is the date produced by counting backwards by this number of days, or a multiple of this number.

4. **Administrative reduction of sentence**: Here, the judge imposes the appropriate sentence and, if it is a custodial term, upon receipt into a correctional institution, an official would administratively give credit towards that sentence for PSC, or perhaps even a multiple of it.

PART TWO:
PROBLEMS and OPTIONS FOR REFORM

Having discussed the history and current interpretive jurisprudence of s. 719(3) and the PSC issue, as well taking a brief look at other jurisdictions, it should be clear that sentences must, to some extent, reflect PSC. After the Supreme Court decision in *Wust*[132], it is arguably even a principle of fundamental justice that an offender not be deprived of at least some credit for periods served in custody as a result of the offence unless compelling reasons support the denial. *Wust* adopted the approach in *Rezaie* where Laskin, J.A. held that credit for PSC should normally be granted and could only be denied "for good reason"[133]. Moreover, the Supreme Court has accepted that PSC is a form of punishment[134]. On that basis, it is easy to contemplate how the principles of fairness, proportionality and parity can be integrated into an amalgam principle that

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[132] Supra, note 81. At para. 8, Arbour,J. quoted from the BCCA decision in *R. .v Mills* (1999), 133 CCC(3d) 451, where that Curt reversed its earlier position in *Wus*t and held:

> ....incarceration, whether before or after disposition, is a serious deprivation of liberty, and being forced to ignore it as part of sentencing is inherently unjust. Moreover, not taking time in custody into account can lead to unjust discrepancies between similarly situated offenders....

[133] Supra, note 69.

[134] Supra, note 81, at para.41.

would fit within s. 7 of the Charter. However, this only means that, in most cases, credit for PSC should be given. It still leaves unanswered the ancillary issues, particularly the extent of credit and the mechanical question of how best to give it effect.

One can describe s.719(3) as a statutory recognition of the sentencing judge's power to take PSC into account whether it results in a reduction of a sentence of imprisonment, or a decision to impose a community sanction. This model fits the category called "judicial reduction of sentence". It is consistent with what most courts in Canada have been advocating since the 1947 decision in *Patterson*[135]. It is clear, however, that this approach to PSC, as it is now structured, can present some problems: How much credit? On what bases? Will the public, victims or other officials misperceive the actual sentence? How does the credit interact with other Code provisions? In Part 2, I will consider these problems, their comparative significance and tractability, and examine available reform options.

1. Potential PSC Problems:

(a) **Frankness vs. Mis-communication**:

[135] Supra, note 22.

The expressive function of sentencing starts with the participants, who need to know in clear terms the sanction that was imposed and the reasons for it. This extends to the public who, regardless of any special interest in a particular case, ought to have confidence in the administration of justice generally. The public is entitled to know something about sentences imposed and why judges impose them. But public understanding comes in different shapes and sizes. For example, look at the case of *Kravchov*[136], discussed above. One can imagine the reaction of a member of the public or a victim of one of the thefts who heard that the offender was sentenced to only one day in jail. The full story carries a very different message about proportionality and desert. The trial judge said that "given the previous conviction...the lowest possible sentence upon plea wold be one of two years less a day"[137]. This demonstrates the importance of a full explanation in open court of the appropriate sentence, prior to an explanation of the PSC issue. However, a full explanation does not guarantee full or accurate reporting by the media. This is another important layer which needs to be examined whenever public attitudes enter a debate.

(**b) Accurate Information and Penal Requirements**:

Aside from these manifestations of the expressive role of sentencing, accurate information is essential for a number of more immediate purposes. I am using accurate information to refer to the need to know (a) what the appropriate sentence was before PSC credit; (b) the extent of the PSC credit and how it was determined; and (c) the actual sentence imposed. One could also argue that an articulation of the specific amount of PSC, as compared to just

[136] Supra, note 86.

[137] Ibid, at para. 4.

credit for PSC, would be helpful. This would make the issue easier to understand and provide another check against miscalculation. On the other hand, there may be situations where the actual total of days is difficult to determine with precision due to the intersection of any number of factors like periods of release, new charges, or new sentences. In many cases the ultimate sentence will be rounded off into blocks of time (years, months, weeks) that subsumes the precise number of PSC days.

Accurate information, in the sense defined above, is required to ensure that the following processes or decisions are carried out properly, in accordance with the prevailing legal framework:

> -all correctional administrative steps including placement according to the proper locus of confinement[138], and the determination of the dates for parole eligibility, statutory release and warrant expiry

[138] I am referring to the issue of penitentiary or provincial incarceration as determined by s.743.1.

-applying the "totality principle" in cases of cumulative sentencing[139]; and

-in situations of future sentencing, precluding erroneous assumptions which may arise if participants only see the reduced sentence without any information, or accurate information, about PSC and the actual credit[140];

These are potentially important situations, and bad communication can lead to conflicts and poor decisions. However, they can all be remedied by ensuring that the sentencing decision is clearly articulated and properly conveyed to those who need to know the true elements. This requires explicit statutory directions that delineate functions and the development of proper forms.

(c) Sentencing Thresholds, Caps and PSC:

Some sentences in the Code have technical requirements in the forms of thresholds or caps that restrict their applicability. Two important examples are conditional sentences and long-term offender designations. In these cases, the relevance of PSC to the availability of the sentence can be a stumbling block.

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[139] For example, assume that Kravchov was sentenced to one month instead of one day. Also assume that he appeared one week later before another judge and pleaded guilty to another six counts of "theft over". While it might be easy to argue that the new sentences should be consecutive, to properly quantify the new total term it is surely relevant to know that the subsisting term was the equivalent of two years punishment.

[140] One might wrongly assume that a prior offence was not grave if only the actual sentence after PSC credit is known without the judge's view of the appropriate sentence.

Section 742.1 of the Criminal Code is the basic conditional sentence provision and subsection (a) limits this kind of order to a situation where the court "imposes a sentence of imprisonment of less than two years". This has led to the methodological notion that the sentencing judge must conclude that the appropriate sentence would be between probation and a penitentiary sentence[141]. But how should this play out in practise? Does one consider the appropriate sentence for the offence, or that sentence as reduced after giving credit for PSC? Given the underlying Parliamentary concern to use conditional sentences to reduce the use of imprisonment, and the statutory requirement that the ultimate decision to order service in the community must be consistent with the purpose and principles of sentencing, one can argue that courts should be flexible in addressing the two year cap. There are various examples of flexibility in passing this hurdle unrelated to PSC. In one of the companion cases decided at the same time as *Proulx,* the Supreme Court concluded that a two year penitentiary term imposed prior to the enactment of the conditional sentence regime did not preclude an appellate court from considering a conditional sentence[142]. More recently, in *R. v. Hamilton* [143], the trial judge carefully analysed the framework and relevant principles for sentencing two African-Canadian women convicted as cocaine couriers. Hill,J. asked whether, looking at the various mitigating factors, a conditional sentence came within an "established plausible range"[144] even though the

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[141] See *R. v. Proulx* (2000), 30CR (5th) 1 (SCC).

[142] See R .v. *Bunn* (2000), 30 CR (5th) 86 (SCC) at p5 where Lamer, CJC in upholding a conditional sentence imposed by the Manitoba Court of Appeal after September 3, 1996. He held that the offender was "entitled to the benefit of the change in law".

[143] (2003), 8 CR (6th) 215 (Ont.S.C.)

[144] Ibid, at 269-70.

Ontario Court of Appeal had held that general deterrence required a penitentiary sentence for couriers[145].

[145] See *R. v. Cunningham* (1996), 104 CCC(3d) 542 (Ont.CA).

Specifically with respect to PSC, there is a live debate amongst appellate courts. The Alberta Court of Appeal has given "implicit approval" to the use of PSC to move a sentence under the penitentiary range for conditional sentence consideration[146]. The contrary view has been held by the Saskatchewan Court of Appeal[147]. The Ontario Court of Appeal has not

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[146] This was the phrase used by Johnstone,J, in *R v. La*, [2003] A.J. No. 526 (QB)[QL] interpreting *R. v. McClelland* (2001), 281 AR 378 (Alta.CA). After discussing the issue, Johnstone,J. concluded (at para.75) :

> In light of the Alberta Court of Appeal's implicit approval of the practice of crediting time served at the first stage, it appears that the law on this issue in Alberta is contrary to the law in Saskatchewan and that pre-trial custody should be taken into account at the first
> stage of the Proulx analysis.

She imposed a two year less a day conditional sentence for two counts of trafficking in cocaine and one count of possession of the proceeds of crime. For other examples, see *R. v. S.C.*, [2001] BCJ No. 2182 (BCProv.Ct.)[QL} where a two year less a day conditional sentence was imposed for kidnapping; *R. v. Browne*,[2000] OJ No. 5029 (Ont.S.C) [QL] where a one year conditional sentence was given on a manslaugher conviction with two years PSC.

[147] See *R. v. Runns* (2002), 165 CCC(3d) 217 (Sask.CA) at 222, following *R. v. Predenchuk* (2000), 199 Sask.R. 264 (Sask.CA).

definitively answered the question but has, in one case, commented that it would only be appropriate in "rare and exceptional cases"[148].

[148] *R.. v. Persaud* (2002), 159)AC 134 (Ont. CA)

The threshold for long-term offender designations raises other issues. The governing provisions[149] contemplate attaching the LTO supervision conditions to a sentence of at least two years. First, an LTO can only result if, amongst other pre-conditions, the judge is satisfied that "it would be appropriate to impose a sentence of imprisonment of two years or more for the offence for which the offender has been convicted". As a methodological hurdle, one might say that this should be treated flexibly, as with conditional sentences just to ensure that the offence is sufficiently grave to pass step on the way to an onerous sentence. If you accept that argument, you are then faced with s.753.1(3)(a) which, in the LTO order requires that "the sentence must be a minimum punishment of imprisonment for a term of two years". Does this mean at least two years or whatever is left when a sentence of at least two years is reduced to account for PSC ? One might refer to *MacDonald*[150] and *Wus*t[151] to argue the difference between punishment and sentence, but is the context the same. Here, the LTO is a new fallback position for dealing with offenders who either have not committed the offences which can trigger a dangerous offender application, or have been the subject of a dangerous offender application which has not to succeeded. The LTO alternative, where there is a "substantial risk that the offender will reoffend", serves to add a term of strict supervision for up to ten years to a sentence so long as it is a "minimum punishment for a term of two years". It is important to note that the supervision will be carried out by the federal authority of the Corrections Service Canada and National Parole Board. Surely, this contemplates a federal sentence, not a provincial one as a consequence of a

[149] Sections 753.1(1)(a) and (3)(a).

[150] Supra, note 77.

[151] Supra, note 81.

PSC credit. Regardless of your particular view of this situation, or the conditional sentence situation described above, they can easily be resolved simply by clarity in the language of the provision which established the cap or threshold.

(d) **Disparity vs. Discretion**:

Like some of the models used around the world, s.719(3) preserves judicial discretion. This is consistent with the individualized approach to sentencing methodology favoured in Canada[152]. Intrinsic diversity amongst offenders and the myriad ways in which offences can be committed will necessarily combine to produce disparate sentencing results. Disparity itself is not a problem; only unjustified disparity demands scrutiny. In the context of PSC, it is commonly accepted that two-for-one is the usual credit although we have seen various other ratios used, especially in the realm of what has been called "enhanced credit". Other than the latter category, one usually sees a more or less rough form of two-for-one applied in most cases. Rather than producing unjustified disparity, this approach makes sentences more commensurate, especially between co-accused.

Assume two people, Smith and Jones, charged on January 1, 2002, with robbery where, for arguments sake, a three to four year sentence would likely be imposed. Smith was released on judicial interim release almost immediately after arrest while Jones was detained and remained in custody until trial. On January 1, 2003, both men pleaded guilty and were sentenced. Jones had spent one year in custody. The judge sentenced Smith to four years in the penitentiary. For Jones, taking into account his PSC and using a two-for-one credit, she imposed a sentence of

[152] See Manson, supra, note 5, at 80-81.

two years. Here is how the relevant correctional dates[153] compare:

	Smith	Jones
Day parole eligibility[154] (DPED)	Oct.30/03	May 30/03
Full parole eligibility[155] (FPED)	April 30/04	August 30/03
Statutory release date[156] (SRD)	Aug.30/05	April30/04
Warrant expiry date (WED)	Dec.31/06	Dec.31/04

[153] Because the offence is robbery, there is no possibility of accelerated parole: see s. 125(1)(i), Corrections and Conditional Release Act (CCRA), SC 1992, c.20, as amended. I have also not taken into account leap years so the dates used may be off a day or two from the actual dates.

[154] See s. 119(1)(c), CCRA.

[155] See s.120(1), CCRA.

[156] See, s.127, CCRA.

It would be hard for Smith to argue unfairness. Although his SRD is August 30, 2005, he is eligible for full parole on April 30, 2004, the same time as Jones' SRD, but a look at current parole granting rates is revealing. The usually quoted statistic for the most recent year, 2001/02, is 43%[157] which suggests that almost half of full parole applicants receive a positive response. This is misleading. Of the 3,458 granting decisions in that year, 981 were "accelerated parole review"(APR) cases. This means they were prisoners serving first penitentiary sentences for non-scheduled offences, usually property crimes, who are placed in a fast track towards parole.. The granting rate for APR cases was 100%.[158]. If you remove these fast-tracked cases, the real granting rate for all other prisoners, which would include Smith and Jones, was only 23%[159]. Add to this the fact that 69% of released offenders in 2001/02 went out on Statutory Release, that is after two-thirds of their sentence without having applied for, or been granted, parole. This makes it apparent that parole is speculative for anyone other than an APR case. Moreover, Smith was at liberty while Jones has been incarcerated pending trial. There may be reasons why Smith would be a better parole candidate at least in the sense of being able to develop release plans and address Parole Board concerns about risk. In the end, using PSC as a fairness factor in determining Jones' sentence is not likely to generate a countervailing claim of unfairness by Smith. However, this still does not address the "enhanced credit" debate and the

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[157] See NPB Performance Monitoring Report, 2001-2002, supra, note 65, at 52.

[158] 979 granted out of 981 decisions: ibid, at 55.

[159] Ibid, Tables 51 and 52, at 54-55.

issue of disparity in that context.

(e) **Judges and Jail Conditions:**

Canadian jurisprudence has confirmed that one of the relevant bases for considering and granting credit for PSC is the potential harshness of remand confinement. In addition to the parole/remission eligibility issue, the usual harshness of remand incarceration has served to entrench two-for-one as the common ratio for PSC credit. Courts have recognized that, in some cases, incarceration in ameliorated conditions where there are satisfactory rehabilitation programmes, visiting regimes and conditions of confinement can rebut the norm of harshness resulting in a reduced PSC credit. Conversely, unacceptable physical conditions like over-crowding and the denial of essential serv ices and entitlements can become the basis for "enhanced credit". That is, the offender may receive more than two-for-one credit in recognition of especially harsh PSC conditions. Judges will take the opportunity not only to provide a full explanation in open court of the PSC calculation but also to explain how the conditions of confinement failed to meet proper standards either in general or in relation to the particular offender. *Kravchov*[160] provides a good example. While the point is not without controversy, the widely-reported granting of enhanced credit based on the unacceptable conditions of confinement during a jail guard strike highlighted an important issue. It is valuable for the public, the media and relevant officials to hear the views of judges on this issue. Criminal court judges are well-suited to consider the character of the deprivations of liberty which they

[160] Supra, note 85; see also *R. v. Critton*, supra, note 85; *R. v. Serniak*, [2002] OJ No. 5160 (Ont.S.C.) [QL}

effect, and to respond to unacceptable conditions.

Although the examples of enhanced credit are not common, neither are they rare. One complaint about PSC is that the variety of ratios applied by courts to determine the PSC credit turn sentencing into a lottery. In *Police Chief Magazine*, a recent article included this observation:

> The examples are endless and happening in each province across the country. Where will the judicial roulette wheel stop? Will we continue to see the credit ratio increase to the point where more and more violent offenders walk out of the courtroom door on the day of sentencing? Is justice being served?[161]

Hyperbole aside, this comment seems to be consistent with the views of a number of police organizations[162] who are concerned that the judiciary have embarked on a misconceived venture:

> ...it appears that the judiciary, under the guise of fairness, is using the dead-time credit process as their own protest against conditions in some remand facilities. Their protest, while well-intentioned, has the effect of putting serious offenders on the street. The target of their discontent should not be society generally, but the provincial governments and the funding of remand facilities[163].

Of course, most of the Ontario examples of enhanced credit relate to the jail guards' strike and the deplorable conditions of confinement which it produced, amounting in some cases to blatant neglect. But more to the point, while the author is correct that governments must take responsibility for jail conditions, participants in the criminal justice system cannot ignore unacceptable conditions of confinement when they encounter them. This is especially true of judges who are the instrumental human face of Canadian penal policy even if not its architects.

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[161] Inspector Gord Schumacher, Dead Time" And The Winner Is?, *Police Chief Magazine* (Summer 2003)16, at 17.

[162] Shumacher mentions the Canadian Association of Police Chiefs, the Manitoba Association of Chiefs of Police, and the Canadian Police Association: ibid, at 22.

2. **Policy Choices and Reform Options:**

[163] Ibid.

The discussions of other jurisdictions show that Canada is not alone in encountering difficulties as a result of PSC. However, these foreign examples also show that the best way to avoid the need for regular amendments is to answer some basic policy questions first, and then use clear language to give effect to those choices, including making functions clear and ensuring that steps are not taken for granted, whether they be judicial or administrative. This may result in more prolix statutes, but it can also result in fewer controversies and appeals. After the Supreme Court decision in *Wust*[164], some of the policy questions have been answered in a way that is likely beyond legislative intervention. Here, I would include the point that PSC is punishment and therefore it is fundamentally unfair to deny credit for PSC.

A. **Judicial reduction of sentence** : Our current s.719(3) is an example of this model which empowers a sentencing judge to take PSC into account by identifying it, and using its quantum to reduce a sentence of imprisonment, or move to a community-based option. The major advantage of this model is that it maintains two of the pillars of sentencing methodology, judicial discretion and individualization. Judges can examine both the nature of PSC, to ensure that it warrants credit, and the nature of confinement to determine how much credit. The ratio of credit is left to the judge although appellate courts have indicated that it should usually be two-for-one. This approach presents two disadvantages. The first is the inevitable issue of disparity which, even if justified, generates criticism when not carefully explained and understood. . The second is the problem of mis-communication which can be remedied.

B. **Judicial antedating of sentence**: This model would permit a sentencing judge to take PSC

[164] Supra, note 81.

into account by antedating the commencement of the sentence. While the antedating mechanism can incorporate differential levels of credit, in most examples of this model one usually sees backdating the sentence to the date of arrest. This ensures a one-for-one credit, which means a uniform response to PSC when recognized. However, in situations where the offender has been out of custody for periods of time or has been the subject of new charges or new sentences, the proper PSC credit may not be all the way back to the date of arrest, and a more careful inquiry would be necessary to determine the actual PSC attributable to the offence.

The major advantage of this model is its uniformity and predictability, while it still preserves the judicial function to determine whether or not to give credit for PSC. It also presents two major disadvantages. First, by not reducing the sentence, the warrant will be made out reflecting the full term. Accordingly, under s. 743.1, an offender will be incarcerated in a penitentiary if the warrant reads two years or more, regardless of the actual time the offender will be required to spend in that regime. For example, assume two offenders who receive a three year sentence and a sentence of 30 months, each with one year PSC. Under this model, both will go to he penitentiary. One will serve two more years and the other will serve 18 more months. Under Model A, both offenders would likely receive provincial sentences of one year and six months respectively, after taking into account 12 months of PSC. The situation is more dramatic when the appropriate sentence is a minimum penitentiary sentence. A PSC credit of six months will leave the offender with one year to serve before SRD but, more importantly, will make parole release almost impossible due to the preparation time-lines, even though he would be eligible two months after reception. Without embarking on a debate about comparative conditions of confinement, there are some strong reasons why most offenders, especially young persons and

first offenders, are better off in a provincial system, rather than the penitentiary: the institutions will likely be closer to one's home; the nature of offences for which offenders are incarcerated are, on the whole, less grave than those which produce penitentiary sentences; the penitentiary classification process, a pre-requisite to placement, is based on the application of the Custody Rating Scheme and usually requires a number of months in an assessment institution; and the preparation required for parole applications, other than accelerated release cases, is cumbersome and will make parole release at an early date illusory. It is disturbing to contemplate the prospect of young persons spending short periods in a penitentiary just to effect a simpler PSC credit.

Secondly, so long as the model contemplates a one-for-one credit, it denies the sentencing judge an opportunity to consider enhanced credits. As discussed above this is a potentially important role for judges in relation to the instrumentality of deprivations of liberty. Given the integral role played by the courts in depriving people of liberty, it is valuable to retain some mechanism to permit consideration of jail conditions even if only to the extent of remand facilities. Aside from habeas corpus jurisdiction which rests uniquely with superior court judges[165], another historical link between the justice system and conditions of confinement , especially remand issues, was performed by the Grand Jury. Until its abolition, the Grand Jury, as part of the assize responsibility as the Court of General Gaol Delivery, was supposed to inquire into the situation of remand prisoners to ensure that anyone committed for trial was tried at the next sessions[166]. Along with this obligation, the Grand Jury had the power to inspect public

[165] For a discussion of habeas corpus in relation to "significant deprivations" of a prisoner's residual liberty interest after confinement, see *R. v. Miller* , [1985] 2 SCR 613.

[166] See McRuer Report, supra, note 39, Vol.2, at 778-780.

institutions, including jails[167]. Grand Jury reports on the state of public institutions were not considered sufficiently important to warrant maintaining the Grand Jury[168]. However, during the 19th century the role of the Grand Jury was seen as valuable in documenting situations of neglect, deprivation and illegality[169], to the point that Peter Oliver, the noted penal historian, described Grand Jurors as "the most vociferous advocates of prisoners' rights in the nineteenth century"[170]. While times have changed in many respects, one continuing feature is the simple fact that prisoners are hidden from the public and from public scrutiny. In the rare occasions when a judge would be alerted to unsatisfactory jail conditions in the context of a PSC issue, one should not underestimate the value of external scrutiny by a pair of official and independent eyes. This function not only provides an important safeguard, especially in times of exceptional events like a strike, but also enhances respect for the judicial role by attempting to take some responsibility for the loss of liberty which it has effected.

C **Statutory antedating of sentence**: As described before, this model is just a mandatory version of Model B. The statute would require the sentencing judge to quantify PSC and the resulting commencement of sentence, by inquiring into account any other bases for confinement which would limit the PSC attributable to the offence. Since the mechanics are included in the enabling provision, this creates substantial predictability. The model also engages the two disadvantages discussed under Model B: placing more young persons and first offenders in the

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[167] Ibid.

[168] Ibid, at 778.

[169] See Peter Oliver, Terror to Evil-Doers: Prisons and Punishments in Nineteenth-Century Ontario (Toronto: University of Toronto Press, 1998) at 60-68.

penitentiary, and denying judges a role in relation to conditions of confinement. It also removes the judicial discretion, on an individualized basis, not to give credit for PSC.

D. **Administrative reduction of sentence**: Here, the judge imposes the appropriate sentence without regard to PSC. For terms of imprisonment, the statutory framework requires that, upon receipt into a correctional institution, an official would administratively give credit towards that sentence for PSC. While this would usually be day-for-day, in theory, the credit could be a multiple of the actual PSC amount. It is essential for this model that PSC be accurately recorded.

The advantages of this model are that the sentence is stated in open court as a function of all applicable principles and factors without reduction, thus precluding any mis-communication about quantum, proportionality, or parity. Moreover, the PSC credit will be uniform. However, the model has a number of disadvantages. First, there is the need to determine PSC in cases of multiple bases for confinement or periods out of custody. This function can be carried out by the judge, requiring both an inquiry and a formal statement and recording of PSC. Alternatively, it can be delegated to officials. In either case, it would be necessary to guarantee a mechanism to review and correct any alleged errors. Another disadvantage flows from uniformity. While desirable in some circumstances, a mandatory uniform credit denies to the sentencing judge the obligations and benefits of an individualized approach. There would be no room to consider conditions of confinement, especially an egregious example which might lead to an enhanced credit and a public judicial exhortation. By the same token, the judge would have no discretion to deny a PSC credit when particular circumstances presented compelling reasons not to do so. Also,

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[170] Ibid, at 61.

as discussed above, locus of confinement issues can arise when people with short sentences just over two years but with large PSC credits must be incarcerated in the penitentiary system.

3. **A Recommendation for Reform**:

(**a) Included Elements and Concerns Addressed**:

Some policy issues are controversial in the sense that reasonable people can hold different views. However, from the discussion above, and starting from those incidents of PSC which have been recognized by the Supreme Court of Canada[171], one can isolate aspects of the PSC debate around the current 719(3) which add to the virtues, values and functions of the sentencing process:

-contributing to fairness by recognizing that PSC is punishment worthy of credit;

-contributing to fairness and parity by recognizing PSC does not attract remission or count towards parole eligibility;

-maintaining an individualized approach to sentencing by giving discretion over PSC, both in respect to providing credit toward a term of imprisonment or as a factor in deciding whether to order custody or impose a community sanction;

-enhancing respect for the judiciary by empowering judges to consider conditions of remand confinement; and

-providing a potential degree of public scrutiny over exceptional conditions of confinement.

The criticisms about PSC can also be identified:

-mis-communication and public misunderstanding when full explanations are not provided about the appropriate sentence, and the reduction attributable to PSC;

-case-by-case disparity as to the ratio applied, especially in cases of enhance credit;

-problems arising from the relation of PSC to thresholds and caps; sm and

[171] See, in particular, *R. v. Wust*, supra, note 81 and the earlier discussions.

-problems in determining PSC time accurately.

In this paper, I have referred to other concerns[172] but these have been discounted and need not be addressed.

(b) **A Revised Statutory Provision**:

Step One:

Repeal section 719(3) and replace it with a provision something like the following:

> 1. Sentencing judges shall take into account pre-sentence custody when determining the appropriate sentence;
>
> 2. Pre-sentence custody may be a factor in determining whether to impose custody or a community sentence;
>
> 3. When imposing a sentence of imprisonment for an offence, the sentencing judge shall determine the appropriate sentence as determined by the applicable purposes, principles and objectives of sentencing, and, if the offender has spent time in pre-sentence custody (PSC) solely by reason of this offence, shall:
>
> > (i) determine the amount of PSC attributable to this offence, in days or months;
> >
> > (ii) subject to subsection 4, reduce the appropriate sentence by twice the amount of PSC to constitute the actual sentence imposed; and
> >
> > (iii) announce in open court both the appropriate sentence and the actual sentence imposed.
>
> 4. Subsection 3(ii) applies unless the sentencing judge decides that:
>
> > (i) there are compelling reasons to deny the offender any credit for PSC; or
> >
> > (ii) upon being advised of the relevant conditions of confinement, and being satisfied that the conditions are a marked departure from the norm for PSC, the

[172] Principally, the premature release of "dangerous" persons, and feelings of disparate treatment by co-accused.

amount of credit for PSC should be more or less than twice the amount of PSC, b ut in no circumstances should it be less than 1.5 times or more than three times the actual PSC.

5. For the purpose of subsection 3(i), PSC less than three months shall be calculated in days, but PSC more than three months shall be determined in months, rounded to the nearest month.

6. (i) The form for the warrant of committal or order (as the case may be) shall require the court to indicate the following:

-PSC relevant to the offence;
-the appropriate sentence;
-and the actual sentence actually imposed

(ii) A copy of this form shall be given to the offender, and if the offender is to be imprisoned, shall bed delivered along with the offender to the proper prison, penitentiary, or other facility.

Step 2:

Survey the Criminal Code and identify any thresholds or caps that limit the availability of a sentence, and integrate PSC into that framework. For example, for conditional sentences, one would add "after taking PSC into account" to s.742.1(a). Similarly, for the LTO provisions, one would add "after taking PSC into account" to s.753.1(3)(a).

(c) Conclusion:

This model for reform starts with the identification of policy issues and the resolution of those issues. Much of this has already been done by the Supreme Court. The process of extending these choices into a statutory framework requires the recognition of potential pitfalls, and an effort to eliminate or at least reduce them. The model recommended above emanates from an analysis of choices and pitfalls as set out in the discussion paper. A different view of these choices might produce a different recommended model. However, the key to dealing with the PSC issue is the need to take a comprehensive approach which makes these policy choices clear. Then, the translation into a statutory model must ensure that the elements of a sentence are always expressed openly in court, properly recorded, and that other consequential functions are

performed according to a delineated framework.