

# Playing Hardball with Repeat Offenders: Some Thoughts on the “Three-Strikes” Reverse Onus Dangerous Offender Law

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## I. INTRODUCTION

In late 2006 the federal government announced that it would strengthen the law’s ability to “protect Canadian families and children from known [serious offenders] who are at a high risk to re-offend”<sup>1</sup> by introducing a bill whose passage would make it easier for Crown attorneys to seek a dangerous offender (DO) designation. Anyone who is sentenced as a DO under the *Criminal Code*<sup>2</sup> must be incarcerated for an indeterminate period, but the state’s burden to prove dangerousness is notoriously high. The proposed law sought to circumvent this legal challenge by placing an onus on an offender who had committed three serious offences to prove on a balance of probabilities why he should not be designated a DO.<sup>3</sup> Bill C-27 died on the order paper when Parliament prorogued in spring 2007, but the law was reintroduced in the House of Commons in

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<sup>1</sup> Department of Justice Canada, *Dangerous and High-Risk Offender Reforms: Backgrounder* (17 October 2006) online: Department of Justice Canada <[http://www.canada-justice.ca/en/news/nr/2006/doc\\_31910.html](http://www.canada-justice.ca/en/news/nr/2006/doc_31910.html)> [Department of Justice Canada].

<sup>2</sup> *Criminal Code* R.S., 1985, c. C46.

<sup>3</sup> Canada, Bill C-27, *An Act to amend the Criminal Code (dangerous offenders and recognizance to keep the peace)*, 1<sup>st</sup> Sess., 39<sup>th</sup> Parl., 2006 [Bill C-27].

October 2007 as one component in an omnibus crime bill.<sup>4</sup> Bill C-2 received royal assent on February 28, 2008.<sup>5</sup>

The DO reform is colloquially referred to as a “three-strikes” law. IT is grounded on the premise that the commission of three serious offences is severe enough a circumstance to warrant an extenuating punishment. The government insists that the “three-strikes” reform targets only the most dangerous, high-risk, serious offenders. It also maintains that the DO designation would be applied only if an offender could not effectively dispose of his “three strikes” burden. Moreover, the government maintains that the reform complies with the *Canadian Charter of Rights and Freedoms*<sup>6</sup> and that it will enhance the law’s ability to protect Canadians from dangerous criminals.<sup>7</sup> There are, however, persuasive reasons to believe that the “three-strikes” reform would not only fail to pass constitutional muster, but that it will also do little to protect Canadians from violent crime any better than the prior DO law already did. In truth, the reform seems to disregard a rational, empirically based method of punishment.

The purpose of this article is thus fourfold. It will begin with a general description of the DO and long-term offender (LTO) regime.<sup>8</sup> A description and analysis of the provisions of the “three-strikes” reform will follow. Third, the constitutionality of the “three-strikes” law under the *Charter* will be assessed. The article will consider if the reform contravenes the presumption of innocence, if it could be labelled as an arbitrary sentencing mechanism and if it could impose a cruel and unusual form of treatment on an offender. Finally, the article will conclude with some thoughts on the policy implications of the reform.

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<sup>4</sup> Canada, Bill C-2, *An Act to amend the Criminal Code and to make consequential amendments to other Acts (Tackling Violent Crime Act)*, 2<sup>nd</sup> Sess., 39<sup>th</sup> Parl., 2007, (as passed by the House of Commons 28 November 2007) [Bill C-2]. Bill C-2 also incorporates a number of proposed reforms from the previous legislative session, including the strengthening of bail provisions, the strengthening of recognizances to keep the peace, strengthening the penalties for impaired drivers, raising the age of consent and reforming firearm offence penalties.

<sup>5</sup> *An Act to amend the Criminal Code and to make consequential amendments to other Acts*, S.C. 2008, c. 6 [Three Strikes].

<sup>6</sup> *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the *Canada Act 1982 (U.K.) 1982*, c. 11 [Charter]. See Preamble, *ibid*.

<sup>7</sup> Department of Justice Canada, *supra* note 1.

<sup>8</sup> The LTO provisions were created in 1997 to manage offenders who do not meet the requisite level of dangerousness for a DO label, but are still at a high risk to re-offend. See Part II.A.1.c, below.

## II. THE DANGEROUS OFFENDER AND LONG-TERM OFFENDER REGIME

### A. Background

The DO and LTO provisions are contained in Part XXIV of the *Criminal Code*. The primary purpose of the regime is to protect the public from offenders who have engaged in serious criminal activity and who could also be expected to engage in similar activity in the future.<sup>9</sup> Therefore, unlike most of the criminal law where punishment is meted out in response to criminal acts, the DO and LTO regime operates with a decidedly preventative purpose.<sup>10</sup>

Sociologically speaking “dangerous” is an amorphous concept, but in general it refers to a psychological state of being in which one is predisposed to engage in harmful acts.<sup>11</sup> Risk is connected to the concept of dangerousness and refers to the likelihood that a person will commit a future act. Thus, dangerousness combines the likelihood that a future harmful act will be committed with a perception of how serious that harm is considered to be.<sup>12</sup>

A historical account of Canada’s DO laws has been covered in considerable depth elsewhere,<sup>13</sup> but some points must be made in order to provide the necessary context for the discussion of the “three-strikes” reform.

#### *1. The Clinical, Justice and Community Protection Models of Crime Response*

The development of the DO and LTO regime can be best examined in light of three criminological models, as described by Professor Michael Petrunik<sup>14</sup>: the clinical model, the justice model and the community protection model.<sup>15</sup>

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<sup>9</sup> *R. v. Lyons* [1987] 2 S.C.R. 309 at para. 16 and 26 [Lyons]; see also *R. v. Johnson* [2003] 2 S.C.R. 357 at para. 19 [Johnson] and Public Safety Canada, *Dangerous Offender Designation*, online: Public Safety Canada <<http://www.publicsafety.gc.ca/prg/cor/tls/dod-en.asp>>.

<sup>10</sup> Preventive detention was found to be a constitutionally permissible forum of punishment under the *Charter* by the Supreme Court of Canada in *Lyons*, *ibid*.

<sup>11</sup> Michael Petrunik, *Models of Dangerousness: A Cross Jurisdictional Review of Dangerousness Legislation and Practice*. (Ottawa: Solicitor General Canada, 1994) at 4 [Petrunik, *Models*]. See also John Howard Society of Alberta, “Dangerous Offender Legislation around the World,” online: John Howard Society of Alberta <<http://www.johnhoward.ab.ca/PUB/C20.htm>> [John Howard Society] and John Pratt, “Dangerousness and Modern Society,” in Mark Brown & John Pratt, eds., *Dangerous Offenders: Punishment & Social Order* (London: Routledge, 2000).

<sup>12</sup> Michael Petrunik, “The Hare and the Tortoise: Dangerousness and Sex Offender Policy in the United States and Canada,” (2003) 45 Can. J. Crimin. & Crim. Jus. 43 at 45 [Petrunik, “Hare”].

<sup>13</sup> See Isabel Grant, “Dangerous Offenders, (1985) 9 Dal. L.J. 347 [Grant] and Petrunik, *Models*, *supra* note 11.

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**(a) The Clinical Model of the 1960s and 1970s**

Until the 1960s and early 1970s, it was generally understood that some sexual offenders possessed innate and untreatable “criminal psychopathic tendencies,” these being “disorder[s] of the individual capacity for empathy and moral judgment.”<sup>16</sup> When clinicians made a determination that an offender fit this mould, the judicial system subjugated the offender’s right to liberty and due process to the state’s duty to ensure public protection.<sup>17</sup> Preventive detention was also justified from a rehabilitative standpoint. It was assumed that “an indefinite sentence would motivate [an] offender to ‘change his ways’ because his release would depend on [that very transformation.]”<sup>18</sup> In 1948 Parliament enacted a “criminal sexual psychopath” law to provide for the indeterminate detention of individuals who “evidenced a lack of power to control [their] sexual impulses and who as a result [were] likely to attack or otherwise inflict injury, loss, pain or other evil on any person.”<sup>19</sup>

For non-sexual offenders, habitual offender legislation was enacted in 1947, which incidentally was of a “three-strikes” design.<sup>20</sup> It provided for the indeterminate detention of repeat offenders with “incurable criminal tendencies” who had been convicted at least three times of an indictable offence punishable by a sentence of greater than five years.<sup>21</sup> Dangerousness was not an element to be proven, but the Crown did “[have] to establish that the offender was leading a persistently criminal life and that such a sentence would be expedient for public protection.”<sup>22</sup> While the 1947 statute was not a direct application of the clinical model since it did not target sexual offenders, it did presume that some offenders possessed an incurable criminal personality.

**(b) The Justice Model of the 1970s**

The justice model “emphasizes the principles of due process, proportionality and equity” in the sentencing of offenders.<sup>23</sup> It gained favour in the late 1960s and 1970s for two main reasons. First, there were mounting calls from the legal

<sup>15</sup> Petrunik, “Hare”, *supra* note 12 at 45.

<sup>16</sup> Petrunik, *Models*, *supra* note 11 at 13.

<sup>17</sup> *Ibid.* at 16.

<sup>18</sup> Grant, *supra* note 13 at 348.

<sup>19</sup> Petrunik, *Models*, *supra* note 11 at 76.

<sup>20</sup> *An Act to Amend the Criminal Code*, S.C. 1947, c. 55.

<sup>21</sup> Grant, *supra* note 13 at 349.

<sup>22</sup> *Ibid.*

<sup>23</sup> Petrunik, *Models*, *supra* note 11 at 47.

community for sentences to be proportionate to the seriousness of an offence. Second, it was becoming increasingly evident that “clinicians [were unable to] diagnose disorders and assess risk accurately.”<sup>24</sup>

In 1962, the criminal sexual psychopath legislation was redrafted to apply to a broadened category of ‘dangerous sexual offenders.’<sup>25</sup> The law was beginning to shift its focus from concentrating on the psychiatric profile of an offender to examining the totality of the offender’s criminal conduct.<sup>26</sup> The law still came under criticism, however, because it failed to include dangerous non-sexual offenders within its ambit.

In 1977, acting on the recommendations of the Ouimet Report,<sup>27</sup> the habitual offender and dangerous sexual offender provisions were repealed by Parliament and replaced with the DO law.<sup>28</sup> The new law empowered a court to grant either a determinate or indeterminate detention to DOs. Additionally, the concept of dangerousness was given a much stronger empirical footing. A court was now required to give careful consideration to a number of interrelated factors including the offender’s prior record, his behaviour and conduct and an opinion from experts on the offender’s personality and disposition.

### (c) The Community Protection Model and its Impact on Recent Law Reform

Intense media coverage of high profile violent crimes in the United States and Canada throughout the 1980s and 1990s along with “the advocacy of the women’s movement, children’s safety advocates, and crime-victim advocacy groups [spawned the community justice model (CPM)].”<sup>29</sup> Public fear and anger inspired

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<sup>24</sup> *Ibid.* While not entirely error-free and free from criticism, risk assessment tools are now far more sophisticated from their initial forms, and are indeed critical to the smooth operation of the DO regime. See for e.g. Hanson, R. K., & D. Thornton, *Static 99: Improving the predictive accuracy of actuarial risk assessments for sex offenders*, (Ottawa: Public Works and Government Services Canada, 1999), Jeffery Abracen & Jan Looman, “Developments in the Assessment and Treatment of Sexual Offenders Looking Backward With a View to the Future,” (2005) 20 *Journal of Interpersonal Violence* 12 and Kirk Heilbrun *et al.*, “Dangerous Offender Statutes in the United States and Canada Implications for Risk Assessment,” (1999) 22 *Int’l J. L. & Psychiatry* 393.

<sup>25</sup> Petrunik, *Models*, *supra* note 11 at 77.

<sup>26</sup> See Petrunik, “Hare”, *supra* note 12 at 488 and Petrunik, *Models*, *supra* note 11 at 77-78.

<sup>27</sup> Canadian Committee on Corrections, *Toward Unity: The Report of the Canadian Committee on Corrections* (Ouimet Report), (Ottawa: Queen’s Printer, 1969).

<sup>28</sup> *Criminal Law Amendment Act 1977*, S.C. 1976-77, c. 53, s.14.

<sup>29</sup> Petrunik, *Models*, *supra* note 11 at 51. A number of high profile and particularly gruesome sex crimes that shocked the conscience of Canadians in the late 1980s/early 1990s inculcated a renewed sense of purpose for legislators who sought to toughen the law’s ability to mete out more severe punishments to sex offenders. The crimes of Joseph Fredericks (responsible for the violent rape and murder of 11 year old Christopher Stephenson in Ontario in 1988) and Paul Bernardo (who in conjunction with his wife Karla Homolka, brutally raped and murdered Leslie

by the perceived pervasiveness of violent crime rallied advocates to demand tougher legislative measures to deal with dangerous criminals, and especially dangerous sex offenders. Sexual and violent offenders were seen as presenting not only an urgent danger to public safety, even if the statistical probability of violent crime remained low,<sup>30</sup> but also as being beyond any point of rehabilitation. The resulting perception was that offenders were being released from prison, unmonitored, when they were still a threat to the public.<sup>31</sup>

While in the United States law reform progressed rapidly under the CPM, Canada's response has proceeded more cautiously.<sup>32</sup> In 1992, the federal *Corrections and Conditional Release Act (CCRA)*<sup>33</sup> was enacted, which *inter alia* restricted early parole eligibility for high-risk sexual and violent offenders.<sup>34</sup> In 1993 the CCRA was amended<sup>35</sup> to allow a court to issue a probation order that prohibited convicted sex offenders from frequenting a place where children under 14 were likely to be present.<sup>36</sup> Additionally the *Criminal Code* was amended to create an order or recognizance (peace bond), with a maximum period of 12 months, for persons considered to be at a high risk to commit sexual offences against children who were under the age of 14. The person may or may not have been convicted of an offence.<sup>37</sup>

Mahaffy in 1991 and Kristen French in 1992, also in Ontario), for instance, led many to call for tougher laws to manage dangerous criminals, especially dangerous sexual offenders. See Petrunik, "Hare", *supra* note 12.

<sup>30</sup> See note 188, below.

<sup>31</sup> Petrunik, *Models*, *supra* note 11 at 54-55.

<sup>32</sup> The response in the United States has ranged, for instance, from the creation of state and national sexual offenders registries, to involuntary civil commitment of "sexually violent" predators, to chemical castration, to mandatory notification to members of the community about the location of sex offenders, to ubiquitous "three-strikes" laws that seek to punish not only violent and sexual offenders, but also career non-violent criminals, with life imprisonment after the commission of three enumerated offences. See Petrunik, "Hare", *supra* note 12 at 48. See also Michael Petrunik, "Managing Unacceptable Risk: Sex Offenders, Community Response and Social Policy in the United States and Canada," (2002) 46 *International Journal of Offender Therapy and Comparative Criminology* 483.

<sup>33</sup> *Corrections and Conditional Release Act*, 1992, c. 20 [*Corrections*].

<sup>34</sup> *Ibid.* at Part II.

<sup>35</sup> These amendments were prompted by the Solicitor General of Canada, *April Report of Preliminary Recommendations by the Working Group on High Risk Offenders*, (Ottawa: Solicitor General of Canada, 1993).

<sup>36</sup> Petrunik, "Hare", *supra* note 12 at 54.

<sup>37</sup> *Ibid.* A recognizance to keep the peace is a preventive measure that has been part of the Canadian legal system since the late 19<sup>th</sup> century. It allows an information to be laid before a judge if there are reasonable grounds to believe that a particular offence will be committed. A defendant need not have committed an offence, but a "reasonable fear of serious and imminent

The DO law was revised again in 1997 in response to the recommendations of 1995 Federal/Provincial/Territorial Task Force on High Risk Offenders report.<sup>38</sup> Henceforth all offenders found to be dangerous were now required to be detained indeterminately.<sup>39</sup> The major change, however, was that the LTO provisions were created.<sup>40</sup> These provisions were designed to provide for a ten year community supervision order for a specific class of sex offenders who would not meet the DO criteria, but would still pose a substantial risk to public safety.<sup>41</sup> Finally, the peace bond provisions were amended to manage persons considered

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danger must be proved on a balance of probabilities." See Dominique Valiquet, *Bill-C27: An Act to Amend the Criminal Code (Dangerous Offenders and Recognizance to Keep the Peace)*, (Ottawa: Parliamentary Information and Research Service, Library of Parliament, 2007) at 10, online: Parliamentary Information and Research Service, Library of Parliament <[http://www.parl.gc.ca/common/bills\\_ls.asp?lang=E&ls=c27&source=library\\_prb&Parl=39&Se=s1](http://www.parl.gc.ca/common/bills_ls.asp?lang=E&ls=c27&source=library_prb&Parl=39&Se=s1)> [Valiquet].

<sup>38</sup> Federal/Provincial/Territorial Working Group on High-Risk Offenders, *Strategies for Managing High Risk Offenders* (Ottawa: Government of Canada, 1995). The federal government also created a National Flagging System (NFS) in response to the Report. At the time, high-risk offenders were able to move across provincial and territorial boundaries to avoid attracting a DO application because there was no system in place that Crown attorneys could check to see if the offender had been a concern elsewhere and no way that they could easily collect information on an offender from another jurisdiction.

Offenders are placed in the NFS system if their criminal record suggests they would be a reasonable prospect for a DO or LTO designation if they should re-offend. A provincial or territorial NFS coordinator makes the decision to flag the offender as a "person of special interest" on a central system. The system operates with the goal to increase the likelihood that more DO hearings for the most qualified offenders will be initiated. See Solicitor General of Canada, *infra* note 41 at 68 and Annie K. Yessine & James Bonta, "Tracking high-risk, violent offenders: an examination of the National Flagging System" (2006) 48 *Canadian Journal of Criminology and Criminal Justice* 573.

One study found that Crowns are still hesitant to initiate DO hearings even for flagged offenders. See James Bonta & Annie K. Yessine, *The National Flagging System: Identifying and Responding to High-Risk, Violent Offenders* (Ottawa: Public Safety and Emergency Preparedness Canada, 2005-04), online: Public Safety Canada <[http://ww2.pssp.gc.ca/publications/Corrections/flagging\\_system\\_e.asp](http://ww2.pssp.gc.ca/publications/Corrections/flagging_system_e.asp)>. The federal government has committed to strengthen this system through non-legislative means. See Department of Justice Canada, *supra* note 1. Federal and provincial sex offender registries are also in operation and allow authorities to track the locations of known sex offenders (see for e.g. *Sex Offender Information Registration Act*, S.C. 2004, c. 10). Only Alberta permits the public to access the profiles of offenders on-line. See Petrunik, "Hare", *supra* note 12.

<sup>39</sup> *An Act to amend the Criminal Code (high risk offenders), the Corrections and Conditional Release Act, the Criminal Records Act, the Prisons and Reformatory Act and the Department of the Solicitor General Act*, S.C. 1997, c. 17, s. 4.

<sup>40</sup> Section 753.1(1).

<sup>41</sup> Solicitor General of Canada, *High Risk Offenders: a Handbook for Criminal Justice Professionals*, (Ottawa: Queen's Printer, 2001) at 33 [Solicitor General of Canada].

to be at a high risk of committing a “serious personal injury offence” (SPIO), which is the underlying offence for which an offender must be convicted before a DO application may be initiated.<sup>42</sup>

**(d) The Community Protection Model and the “Three-Strikes” Reform**

The “three-strikes” reform represents a further step toward a legal paradigm that employs pre-emptive judicial measures to curtail the liberty of high-risk offenders. This style of reform is not itself illegitimate, since it is a perfectly reasonable policy decision on the part of the legislature to design laws that will more effectively protect the public from a particularly heinous subset of offenders. Whether the “three-strikes” law would be successful in protecting the public from DOs any more than the prior law already did, and in a manner that sufficiently balances the accused’s legal rights against the important goal of public safety is, however, an open question. Therefore, following an analysis which will demonstrate the *Charter* issues the reform poses, the article will comment on why the measure is unwarranted given and less invasive law enforcement tools available to the state for it to respond to high-risk, repeat offenders.

**B. The Dangerous Offender Designation**

According to the government, the DO designation protects Canadians from the most dangerous violent and sexual offenders in the country.<sup>43</sup> Before the “three-strikes” law came into effect, there were two distinct stages through which the Crown had to advance before a DO designation could have been conferred on an offender. It must be noted that this process is still relevant for those DO proceedings where the burden is not shifted to an offender to prove dangerousness.<sup>44</sup>

In the first stage, a court must be satisfied that an offender has been convicted of an underlying “SPIO.”<sup>45</sup> A SPIO is “punishable by at least 10 years in jail”<sup>46</sup> and “involves [the commission of] violence, the endangerment of the safety

<sup>42</sup> Section 810.2. SPIOs are discussed in more detail at Part II.B, below.

<sup>43</sup> Department of Justice Canada, *supra* note 1.

<sup>44</sup> Two separate “streams” of DO proceedings are now possible. See Part III.B.2, below, for more on this point.

<sup>45</sup> Section 752 of the *Criminal Code*; It must be understood, however, that the relative gravity or seriousness of an underlying SPIO is not at issue in a DO proceeding. An offender need only be convicted of a SPIO for a court to be satisfied that an SPIO has been committed. See *R. v. Currie* [1997] 2 S.C.R. 260 [*Currie*] and *R. v. Goforth*, [2005] S.J. No. 79, leave to appeal to S.C.C. refused, [2005] S.C.C.A. No. 456 [*Goforth*].

<sup>46</sup> While a SPIO is one that is punishable by at least ten years in jail a court is not required to impose a sentence of ten years.



or life of others, or the infliction or risk of infliction of severe psychological damage,” but does not carry “a minimum of life imprisonment.”<sup>47</sup> Examples of a SPIO could include aggravated assault<sup>48</sup>, assault causing bodily harm<sup>49</sup> and assault with a weapon.<sup>50</sup> Section 752 does not provide a finite list of offences, so whether a given offence is a SPIO is a decision that would rest with a court.<sup>51</sup> A specific list of sexual offences is provided, however, which includes sexual assault,<sup>52</sup> sexual assault with a weapon, threats to a third party or causing bodily harm<sup>53</sup> and aggravated sexual assault.<sup>54</sup>

Once a court is satisfied that an offender has been convicted of a SPIO, it must order an expert assessment of the offender, the results of which must be used as evidence during a DO proceeding.<sup>55</sup> Additionally, no application may be heard unless the provincial Attorney General has consented to the application.<sup>56</sup>

In the second stage, the Crown must establish beyond a reasonable doubt that an offender is “dangerous.”<sup>57</sup> The Crown must prove that an offender constitutes a threat to the life, safety or physical or mental well-being of other persons on the basis of evidence establishing a pattern of repetitive or aggressive behaviour, or any other form of behaviour on the part of the offender that demonstrates he shows a marked degree of indifference to his actions, or an

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<sup>47</sup> *R. v. H. (M.B.)* 186 C.C.C. (3d) 62 (Ont. C.A.) at para 12 [*H. (M.B.)*].

<sup>48</sup> Section 268.

<sup>49</sup> Section 267(b).

<sup>50</sup> Section 267(a) See also Solicitor General of Canada, *supra* note 41 at 141.

<sup>51</sup> See Valiquet, *supra* note 37 at note 1, Appendix.

<sup>52</sup> Section 271.

<sup>53</sup> Section 272.

<sup>54</sup> Section 273.

<sup>55</sup> Section 752.1(1). The expert assessment must be performed by a neutral, court appointed individual who “[would] review the offender’s mental health and psychological functioning.” In carrying out that task, the expert could “complete cognitive and memory testing to check for signs of physical damage to the brain and general psychological diagnostics to check for the presence of mental illness.” Additionally, “if the offender is being assessed as a sex offender, additional tests [could] be [performed] in an attempt to determine sexual preferences and deviant sexual activity.” The expert is encouraged to consult the expertise of “social workers, recreationists, psychologists, psychiatrists and occupational therapists.” See Solicitor General of Canada, *supra* note 41 at 5.

<sup>56</sup> Section 754(1)(a).

<sup>57</sup> *H. (M.B.)*, *supra* note 47 at para. 12. Additionally, a dangerous offender application “shall be heard and determined by the court without a jury,” see s. 754(2). The constitutionality of this provision was affirmed in *Lions*, *supra* note 9.

inability to restrain his actions.<sup>58</sup> In those cases where an offender has committed an enumerated sexual SPIO, the Crown must establish that the offender has shown a failure to control his sexual impulses and that there is a likelihood the offender will cause injury, pain or another evil to other persons through failure in the future to control his sexual impulses.<sup>59</sup>

For both non-sexual and sexual SPIOs, the Crown is required “to prove beyond a reasonable doubt that an offender’s pattern of conduct is substantially or pathologically intractable.”<sup>60</sup> Additionally, a record of prior convictions need not be present, but over ninety percent of DOs have at least one prior conviction.<sup>61</sup> “[E]vidence of character and repute” may also be admitted in this process.<sup>62</sup> Moreover, the Supreme Court of Canada and numerous provincial courts of appeal have affirmed that the Crown is not required to prove beyond a reasonable doubt that an offender will re-offend, since this would impose an impossible standard on the prosecution. Rather, the Crown must only demonstrate that there is the “likelihood” that offenders will recidivate.<sup>63</sup>

If the Crown has proved dangerousness beyond a reasonable doubt, a court must impose a sentence of detention in a penitentiary for an indeterminate period, with the caveat that a lesser sentence may be imposed if it can be demonstrated that society could be adequately protected by it in the circumstances.<sup>64</sup> The possibility of parole, however, exists after seven years of detention have elapsed.<sup>65</sup>

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<sup>58</sup> Section 753(1)(a).

<sup>59</sup> Section 753(1)(b). However, sections 753(1)(a) and (b) are cumulative and not exclusive provisions, and sexual offenders are not restricted to being found dangerous under s. 753(1)(b). Therefore, the sexual offences listed in s.752 are not meant to be exhaustive.

<sup>60</sup> *R. v. F.E.D.* [2007] O.J. No. 1278, (Ont. C.A.) at para. 46 [F.E.D.]. See also *R. v. B.R.B.* (2002), 174 B.C.A.C. 243; *R. v. A.P.A.* (2003), 184 B.C.A.C. 268; *R. v. Lemaigre* (2004), 189 C.C.C. (3d) 492 (Sask. C.A.); *R. v. J.J.M.* (2006), 208 C.C.C. (3d) 312 (N.B.C.A.); *R. v. D.B.B.* (2004), 62 W.C.B. (2d) 247 (Ont. S.C.J.); and *R. v. R.M.* (2005), 68 W.C.B. (2d) 78 (Ont. S.C.J.). s. 753(a)(i) and (ii) and/or s. 753(b).

<sup>61</sup> *R. v. Langevin*, (1984) 39 C.R. (3d) 333; *Lyons*, *supra* note 9. See also *Trevethan*, *infra* note 82.

<sup>62</sup> Section 757.

<sup>63</sup> See ss. 753(1)(a)(iii) and 753(1)(b), *Currie*, *supra* note 45 at para. 42 and *Goforth*, *supra* note 45 at para. 64. See also *R v. Blair*, (2002) 164 C.C.C. (3d) 453 (B.C.C.A) cited in *Valiquet*, *supra* note 37.

<sup>64</sup> Section 753(4.1).

<sup>65</sup> Section 761(1). In addition a DO is eligible for day parole after four years imprisonment; see *Corrections*, *supra* note 33 at section 119(1)(b)(i). Practically speaking, however, The National Parole Board (NPB) has the authority under section 761(1) of the *Criminal Code* and under the *Corrections and Conditional Release Act* to monitor paroled DOs for the rest of their lives. DOs

### C. The Long-Term Offender Designation and the Use of Judicial Discretion

The LTO provisions target offenders who have a high likelihood of re-offending, but do not meet the more stringent criteria for a DO designation.<sup>66</sup> LTOs can be more easily controlled in the community upon release, negating the need for a court to grant, or for the Crown to pursue, a DO designation. While the LTO offender provisions were originally contemplated to manage some sexual offenders who would not qualify for a DO designation, provincial courts of appeal have affirmed that the LTO designation can also apply to non-sexual offenders because the enumerated sexual offences are not exhaustive examples of offences that may activate the LTO provisions.<sup>67</sup>

A LTO application may proceed through one of two ways. In one possibility, if the Crown submits a stand-alone LTO application under section 753.1(1) of the *Criminal Code*, a court must first be satisfied that an offender has been convicted of an offence listed under section 753.1(2)(a). The Crown must then establish that it would be appropriate to “impose a sentence of imprisonment of two years or more for the offence for which [an offender] has been convicted.”<sup>68</sup> Additionally, the Crown must demonstrate that there is a substantial risk that the offender will re-offend.<sup>69</sup> As the provisions were originally contemplated, a court will be satisfied that this risk is present if the offender has been convicted for one of the enumerated sexual offences<sup>70</sup> and if the Crown proves that an offender has demonstrated a repetitive pattern of behaviour that shows a likelihood that the offender will cause death or other serious physical or psychological injury on another person, or has through his sexual conduct has demonstrated such a likelihood.<sup>71</sup>

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will stay in prison (or return to it) if the NPB deems they are not safe for release. See Solicitor General of Canada, *supra* note 41 at 96.

<sup>66</sup> Solicitor General of Canada, *supra* note 41 at 33.

<sup>67</sup> See *R. v. McLeod* (1999), 136 C.C.C. (3d) 492 (B.C.C.A.); *R. v. D.D.*, [2006] R.D.Q. no 4038 (QL); *R. v. Weasel* (2003), 181 C.C.C. (3d) 358 (Sask. C.A.).

<sup>68</sup> Section 753.1(1)(a). Additionally, the Attorney General must also consent to the application. See s. 754(1)(a) and (b).

<sup>69</sup> Section 753.1(1)(b).

<sup>70</sup> Section 753.1(2)(a) lists the following offences: section 151 (sexual interference), 152 (invitation to sexual touching) or 153 (sexual exploitation), subsection 163.1(2) (making child pornography), subsection 163.1(3) (distribution, etc., of child pornography), subsection 163.1(4) (possession of child pornography), subsection 163.1(4.1) (accessing child pornography), section 172.1 (luring a child), subsection 173(2) (exposure) or section 271 (sexual assault), 272 (sexual assault with a weapon) or 273 (aggravated sexual assault), or has engaged in serious conduct of a sexual nature in the commission of another offence of which the offender has been convicted.

<sup>71</sup> Section 753.1(2)(b)(i) and (ii).

Assuming the preceding conditions have been met, an offender will be declared a LTO and a court must impose a long-term supervision order (LTSO) on the offender for him to be monitored in the community for a maximum duration of ten years after he has completed serving the sentence of the underlying offence.<sup>72</sup> If the offender does not respect the conditions of the LTSO, he or she may be punished by a maximum of ten years' imprisonment.<sup>73</sup> In addition, when the LTSO expires, a court is still empowered to issue a peace bond under section 810.2 of the *Criminal Code* if continued monitoring is warranted.<sup>74</sup> If the court "does not find the offender to be a LTO, [it] must [still] impose a sentence for the offence for which the offender has been convicted."<sup>75</sup>

In the second possibility, a court may exercise its discretion to find an offender to be a LTO, within a DO proceeding. While the *Criminal Code* states that a court may treat a DO application as a LTO application only *after* it finds that an offender is not a DO<sup>76</sup>, this level of discretion has been expanded by the courts. According to the Supreme Court of Canada decision of *R. v. Johnson*,<sup>77</sup> a court always retains discretion to find an offender to be a LTO, or to impose a sentence for the underlying offence, before formally declaring an offender dangerous, even if the statutory criteria for dangerousness have been met. From the standpoint of judicial economy it is simply more efficient to give a court the discretion to fashion the most appropriate sentence at all points in a DO proceeding rather than separate the inquiry into distinct phases.

#### D. A Profile of Dangerous and Long-Term Offenders

Statistical studies of DOs and LTOs have revealed a number of common themes in the offenders' populations. One enquiry from 1996 found that the majority of DOs are sex offenders who exhibit an antisocial personality.<sup>78</sup> The study also found that "as a group, [DOs] appear to be relatively free from a major mental illness characterized by extreme moods and poor contact with reality."<sup>79</sup> Instead, DOs frequently display "[i]mpulsiveness, egocentrism, [a] lack of empathy and

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<sup>72</sup> Section 753.1(4).

<sup>73</sup> Section 134.1(1) and (2) of *Corrections*, *supra* note 33.

<sup>74</sup> See *R. v. Goodwin*, (2003) 168 C.C.C. (3d) (B.C.C.A.) cited in Valiquet, *supra* note 37 at 10.

<sup>75</sup> Section 753.1(6).

<sup>76</sup> Section 753(5)(a).

<sup>77</sup> *Johnson*, *supra* note 9.

<sup>78</sup> James Bonta, et al., *The Crown Files Research Project: a Study of Dangerous Offenders* (Ottawa: Solicitor General of Canada, 1996) at 16-17.

<sup>79</sup> *Ibid.* at 17.

thrill seeking [behaviour].”<sup>80</sup> DOs also demonstrate through their actions that they are consistently incapable of controlling their behaviour and that they show “a blatant disregard for the welfare of others.”<sup>81</sup>

A more recent and comprehensive report released in 2002 found that the majority of both DOs and LTOs had a current sexual offence, as well as previous sexual offences and that 93% of DOs had a prior conviction and 98% of LTOs had a prior conviction.<sup>82</sup> However, unlike the general inmate population where only a small percentage of offenders victimize children, large proportions of DO and LTO had victimized children. LTOs were also found to have an 8% lower risk of recidivism.

The most recent statistics released by the federal government shed yet more light on DOs and LTOs. As of April 8, 2007, there have been 427 DOs designated since 1978.<sup>83</sup> There are now 370 active DOs, of which 20 are being supported in the community having been released on parole and of which one has been deported.<sup>84</sup> Additionally, “approximately 80% of all DOs have at least one current conviction for a sexual offence.”<sup>85</sup> There are no female DOs, but “Aboriginal offenders accounted for 23% of [DOs] and 16.9% of the total federal offender population.”<sup>86</sup> Additionally, in the federal offender population, the proportion of “offenders incarcerated was about 11% greater for Aboriginal offenders (70.3%) than for non-Aboriginal offenders (59%).”<sup>87</sup> With respect to LTOs, “[t]here are currently 425 offenders with LTSOs. Of these, 71.4% are for a period of 10 years...and 318 (75%) have at least one current conviction for a sexual offence.”<sup>88</sup> There are four females with LTSOs.<sup>89</sup>

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<sup>80</sup> *Ibid.* at 16.

<sup>81</sup> *Ibid.*

<sup>82</sup> Trevethan, et al., *A Profile of Federal Offenders Designated as Dangerous Offenders or Serving Long-Term Supervision Orders* (Ottawa: Correctional Service of Canada, 2002), online: Correctional Service of Canada <[http://www.csc-scc.gc.ca/text/rsrch/reports/r125/r125\\_e.shtm](http://www.csc-scc.gc.ca/text/rsrch/reports/r125/r125_e.shtm)> [Trevethan].

<sup>83</sup> Public Safety and Emergency Preparedness Canada, *Corrections and Conditional Release Statistical Overview*, (Ottawa: Public Works and Government Services Canada, 2007) at 103.

<sup>84</sup> *Ibid.*

<sup>85</sup> *Ibid.*

<sup>86</sup> *Ibid.*

<sup>87</sup> *Ibid.* at 57. Moreover, “Aboriginal adults represent 2.7% of the Canadian adult population [but] Aboriginal offenders account for 17% of the [total] incarcerated population.”

<sup>88</sup> *Ibid.* at 105.

<sup>89</sup> *Ibid.*

### III. THE “THREE-STRIKES” REVERSE ONUS LAW

#### A. Summary

Bill C-2 amended section 752.1 of the *Criminal Code* by inserting the following provision before the previous section:

[i]f the prosecutor is of the opinion that an offence for which an offender is convicted is a serious personal injury offence that is a designated offence and that the offender was convicted previously at least twice of a designated offence and was sentenced to at least two years of imprisonment for each of those convictions, *the prosecutor shall advise the court, as soon as feasible after the finding of guilt and in any event before sentence is imposed, whether the prosecutor intends to make an application under subsection 752.1(1).*<sup>90</sup> (emphasis added)

This section lays the groundwork for the “three-strikes” reverse-onus provision. The Crown is required to advise a court whether or not it intends to submit a DO application, if it would be of the opinion that an offender has been convicted of three SPIOs that are “designated offences.” The Crown still retains discretion to decide if it will submit a DO application, but it is now compelled to state its intentions.

The new category of SPIOs that are “designated offences”<sup>91</sup> would appear to exist and operate in parallel to the definition of SPIO under section 752 of the *Criminal Code*. The category of “designated offences” includes two broad subcategories of offences; “primary designated offences” and a residual category into which a large number of other offences fall. The first of these categories, “primary designated offences,” includes the following list of offences:

(i) section 151 (sexual interference), (ii) section 152 (invitation to sexual touching), (iii) section 153 (sexual exploitation), (iv) section 155 (incest), (v) section 239 (attempt to commit murder), (vi) section 244 (discharging firearm with intent), (vii) section 267 (assault with weapon or causing bodily harm), (viii) section 268 (aggravated assault), (ix) section 271 (sexual assault), (x) section 272 (sexual assault with weapon, threats to third party or causing bodily harm), (xi) section 273 (aggravated sexual assault), and (xii) subsection 279(1) (kidnapping).

The residual category includes the following list of offences:

(i) section 81(1)(a) (using explosives), (ii) section 81(1)(b) (using explosives), (iii) section 85 (using firearm or imitation firearm in commission of offence), (iv) section 87 (pointing firearm), (v) section 153.1 (sexual exploitation of person with disability), (vi) section 163.1 (child pornography), (vii) section 170 (parent or guardian procuring sexual activity), (viii) section 171 (householder permitting sexual activity by or in presence of child), (ix) section 172.1 (luring child), (x) section 212(1)(i) (stupefying or overpowering for purpose of sexual intercourse), (xi) subsection 212(2.1) (aggravated offence in relation to living on avails of

<sup>90</sup> Three Strikes, *supra* note 5 at s. 752.01, cl. 41.

<sup>91</sup> *Ibid.* at cl. 40.

prostitution of person under eighteen), (xii) subsection 212(4) (prostitution of person under eighteen), (xiii) section 245 (administering noxious thing), (xiv) section 266 (assault), (xv) section 269 (unlawfully causing bodily harm), (xvi) section 269.1 (torture), (xvii) section 270(1)(a) (assaulting peace officer), (xviii) section 273.3 (removal of child from Canada), (xix) subsection 279(2) (forcible confinement), (xx) section 279.01 (trafficking in persons), (xxi) section 279.1 (hostage taking), (xxii) section 280 (abduction of person under age of sixteen), (xxiii) section 281 (abduction of person under age of fourteen), (xxiv) section 344 (robbery), and (xxv) section 348 (breaking and entering with intent, committing offence or breaking out),

Bill C-2 also made some changes to the manner in which judicial discretion is exercised. First, Bill C-2 removed a court's discretion under section 752.1 of the *Criminal Code* to order an expert assessment of an offender if it has reasonable grounds to believe that an offender who has been convicted of a SPIO could be found to be a DO or LTO offender. It is now required to do so under the new law.<sup>92</sup> Second, Bill C-2 removed a court's discretion to find an offender to be a DO if the criteria in section 753(1)(a) and/or (b) have been met, or if an offender could not dispose of his "three-strikes" burden. A court must now formally find an offender to be a DO when dangerousness has been established.<sup>93</sup> It may, however, still impose a lesser sentence in lieu of indeterminate detention if the circumstances warrant.

Finally, Bill C-2 inserted the "three-strikes" provision after section 753(1):

(if the court is satisfied that the offence for which the offender is convicted is a primary designated offence for which it would be appropriate to impose a sentence of imprisonment of two years or more and that the offender was convicted previously at least twice of a primary designated offence and was sentenced to at least two years of imprisonment for each of those convictions, the conditions in paragraph (1)(a) or (b), as the case may be, are presumed to have been met unless the contrary is proved on a balance of probabilities.<sup>94</sup> (emphasis added)

Therefore, only an offender who has been convicted of three SPIOs that are "primary designated offences" and for which he was sentenced to at least two years of imprisonment for the first two convictions, would the DO criteria be presumed met. An offender has the burden, on a balance of probabilities, to rebut this presumption.

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<sup>92</sup> *Ibid.* at s. 752.1(1), cl. 41.

<sup>93</sup> Before Bill C-2 became law, s. 753(1) of the *Criminal Code* read "[t]he court may, on application under this Part following the finding of an assessment report under subsection 752.1(2), find the offender to be a dangerous offender if it is satisfied [that the criteria in s. 753(1)(a) and/or (b) have been met Bill C-2 changed the phrase "the court may" to "the court shall." (emphasis added). See *ibid.* at s. 753(1), cl. 42(1).

<sup>94</sup> *Ibid.* at s. 753(1.1), cl. 42(2).

Once a court finds an offender to be a DO, in either a “three-strikes” or non-“three-strikes” situation, it is faced with three choices under the new law. It would either have to:

- (i) impose a sentence of detention in a penitentiary for an indeterminate period; [or]
- (ii) impose a sentence for the offence for which the offender has been convicted – which must be a minimum punishment of imprisonment for a term of two years – and order that the offender be subject to long-term supervision for a period that does not exceed 10 years; or
- (iii) impose a sentence for the offence for which the offender has been convicted.<sup>95</sup>

These three choices, however, are qualified by a subsequent provision. Section 753 (4.1) under clause 42(2) of Bill C-2 stipulates that a court must:

impose a sentence of detention in a penitentiary for an indeterminate period unless it is satisfied by the evidence adduced during the hearing of the application that there is a reasonable expectation that a lesser measure under paragraph (4)(b) or (c) will adequately protect the public against the commission by the offender of murder or a serious personal injury offence.

Therefore, an indeterminate sentence is a rebuttable sentence for an offender who has been found to be a DO. A court could substitute an indeterminate sentence only if it would be presented with evidence which would convince it that a lesser sentence would adequately protect the public. Neither the Crown nor the defence would bear a formal onus in that respect.<sup>96</sup> Rather, the presentation of evidence is a factor that the sentencing judge would weigh when deciding to exercise his discretion.<sup>97</sup> Practically speaking, however, the task would fall to the defence to adduce evidence that a lesser sentence would be more appropriate in the circumstances.

It is also important to note that under the former section 752 of the *Criminal Code*, an offender would have committed a SPIO only if he committed an offence for which he could have been punished by a period of imprisonment of ten years or more. Many “designated offences” under the new law, however, carry a maximum period of imprisonment of less than ten years. It would therefore appear that the subcategory of “primary designated offences” is the category of chief importance under the new law for the following reason.

As noted, Bill C-2 amends section 752.1(1) of the *Criminal Code* to require a court to order an expert assessment of an offender if it is satisfied that an offender has been convicted of a SPIO. The provision was not amended with the wording to order a court to do so if an offender has been convicted of a SPIO that is a

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<sup>95</sup> *Ibid.* at s. 753(4), cl. 42(4).

<sup>96</sup> *F.E.D.*, *supra* note 60 at para. 49 and *Johnson*, *supra* note 9. *Accord R. v. Wormell* (2005), 198 C.C.C. (3d) 252 (B.C.C.A.) leave to appeal to S.C.C. refused [2005] S.C.C.A. No. 371.

<sup>97</sup> *Ibid.*



“designated offence.” Bill C-2 keeps in place the term SPIO as it was precisely defined in section 752 of the *Criminal Code* prior to the enactment of the “three-strikes” law. Thus, for those offenders who are convicted of “designated offences” that are not punishable by a period of imprisonment of up to at least ten years, the only possible means through which they could qualify as DOs under the new law would be if they were captured by the “three-strikes” provision. This in itself is impossible since the ‘primary designated offences’ and ‘designated offences’ categories do not overlap. Hence, the Crown would be unable to successfully initiate a DO proceeding if an offender has committed any number of “designated offences” that are not “primary designated offences,” if those designated offences carried a maximum sentence punishable by a period of imprisonment of less than ten years.<sup>98</sup>

Finally, Bill C-2 creates a provision that would empower the Crown to submit a new DO application for a DO who during his parole was subsequently convicted of a SPIO, and/or if he was in breach of a condition of a LTSO.<sup>99</sup>

## B. Analysis

### 1. Judicial Discretion

There are a number of important implications the reform brings about for the DO and LTO regime. First, it appears that Parliament is attempting to circumscribe judicial discretion to the greatest extent possible. Most significantly, a court would be required to formally label an offender a DO if the Crown proved beyond a reasonable doubt that the criteria in section 753(1)(a) and (b) of the *Criminal Code* were met in a non “three-strikes” scenario, or if an accused had not successfully disposed of his “three-strikes” burden.<sup>100</sup> As noted, however, Bill C-2 gives a court residual discretion to confer a more lenient sentence.<sup>101</sup> Thus, the restrictive language of the law could be viewed as an attempt to appear to encourage the use of the DO designation (a politically popular position) without making any real change in a court’s ability to hand down lesser sentences.<sup>102</sup>

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<sup>98</sup> For example, section 172 of the *Criminal Code* prohibits one from luring a child using a computer, which carries a maximum sentence of five years imprisonment.

<sup>99</sup> Three Strikes, *supra* note 5 at s. 753.01(1), cl. 43.

<sup>100</sup> See Part III.A, above.

<sup>101</sup> This codification of residual discretion conforms to the decision of *R. v. Johnson*, *supra* note 9. The decision caused much confusion in its wake by making it unclear exactly under what circumstances a lesser sentence could be conferred on an offender when dangerousness was proven. See *Debates of the Senate*, 144 (27 February 2008) at 1440 (Hon. Terry Stratton).

<sup>102</sup> Canadian Criminal Justice Association, “Brief to the Standing Committee on Justice, Human Rights, House of Commons, 39th Parliament, 1st Session, On Amendments to the Criminal

Nevertheless, Bill C-2 made a subtle change to how this judicial discretion operates. In *Johnson*, a court was afforded broad discretion to reserve declaring an offender a DO until all the evidence had been examined, even if the statutory criteria for dangerousness have been met. During this inquiry a court may, for instance, decide a LTO designation would adequately protect the public given the unique circumstances of the case. Or it may decide that neither designation would be warranted, as a sentence for the underlying offence would suffice. Bill C-2, however, only gives a court the discretion to impose a LTSO on an offender who has already been found to be a DO, or a sentence for the underlying offence, both in lieu of an indeterminate sentence. The new law *would not* give a court discretion to designate an offender a LTO *instead* of a DO, or to give *neither* designation (i.e. to merely impose a sentence for the underlying offence). The new law simply makes an indeterminate prison term one of three possible sentences for an offender who has met the statutory criteria for dangerousness. The DO label would stick no matter what the sentence.

By contrast, the predecessor to Bill C-2, Bill C-27, would have created the following provision:

[when the statutory criteria for dangerousness is met, a] court shall not find the offender to be a dangerous offender if it is satisfied by the evidence adduced during the hearing of an application under that subsection that a lesser sentence – *either a finding that the offender is a long-term offender or a sentence for the offence for which the offender has been convicted* – would adequately protect the public. Neither the prosecutor nor the offender has the onus of proof in this matter.<sup>103</sup> (emphasis added)

Bill C-2 eliminated the possibility, for which Bill C-27 provided, for a court to exercise its discretion to find an offender to be a LTO instead of a DO when the statutory criteria for dangerousness are met. The law now only gives a court the authority to dispense a lighter sentence of imprisonment. An offender will technically remain a DO. This restrictive structure arguably betrays the Supreme Court of Canada's holding in *R. v. Johnson* because it introduces an undue degree of rigidity into the sentencing process. As the Court noted, the DO and LTO provisions are substantially integrated procedurally.<sup>104</sup> If a court were to exercise its discretion and impose a LTSO in lieu of an indeterminate sentence, it is difficult to conceive why a DO label would be the most appropriate designation. The LTO label was designed to apply to precisely that category of offenders. Thus in substance, the DO would be a LTO.

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Code of Canada (Dangerous Offenders and Recognizance to keep the peace) Bill C-27" (Paper presented to the Standing Committee on Justice, Human rights, House of Commons, 39<sup>th</sup> Parliament, 1<sup>st</sup> Session, March 2007), online: Canadian Criminal Justice Association <<http://www.ccja-acjp.ca/en/c27en.html>>.

<sup>103</sup> Bill C-27, *supra* note 3 at cl. 3(2).

<sup>104</sup> *Johnson*, *supra* note 9 at para. 38.

On the face of it, little has changed substantively. When the statutory criteria for dangerousness have been met, a court would still have the authority to hand out a more lenient period of imprisonment, as it does now. A court would simply be unable to designate an offender anything else but dangerous. Labels, however, do matter. A DO designation carries a heavy stigma. Upon being designated a DO, the self-image of an offender may change as a result of the DO label, and “[he or she] may adopt the external perception of himself associated with the [DO] designation. The effect of this [development] may be to make the offender even more dangerous and less responsive to treatment.”<sup>105</sup> Parliament should thus tread carefully with semantics. Given the parallel operation of the LTO and DO provisions, if a court determines the lesser of two sentences is warranted in a case, then logically the lesser label should be applied. The DO label should be reserved for only the most exceptionally dangerous criminal; after all, this is the manner in which that label was designed to be applied following the 1997 amendments.

## *2. The Creation of Two Types of Dangerous Offender Proceedings*

It is also apparent that Bill C-2 has created two separate “streams” of DO and LTO proceedings. The first “stream” resembles prior procedures. In those instances where two or less SPIOs have been committed, the Crown would have complete autonomy in deciding whether or not to bring a DO application. The Crown would also be required to prove dangerousness beyond a reasonable doubt.

The “three-strikes” reverse onus provision is the second “stream.” The new law compels the Crown to advise the court if it intends to seek a DO application if an offender is convicted of three SPIOs that are “designated offences.” This change sends a clear legislative intention to the Crown that when certain SPIOs have been committed three times, their character and frequency of commission warrant special attention, which would force the prosecution to deliberate carefully on whether or not it will apply for a DO label. Once that decision is made, the offender would then bear the onus to disprove dangerousness.

With the general framework of the DO and LTO regime and the “three-strikes” changes now in mind, the constitutionality of the law under the *Charter* shall be examined.

## **IV. THE “THREE-STRIKES” REVERSE ONUS LAW AND THE *CHARTER***

There are three possible routes through which one could challenge the constitutionality of the “three-strikes” law. First, the law could be challenged on

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<sup>105</sup> Christopher Webster, et al., *Constructing Dangerousness: Scientific, Legal and Policy Implications*, (Toronto: Centre of Criminology, University of Toronto, 1985) at 143 [Webster].

the grounds that it violates the presumption of innocence. Second, the law could be challenged on the basis that it arbitrarily targets some offenders for a DO designation. Third, one could argue that the law is a cruel and unusual form of treatment.

## A. The “Three-Strikes” Reform and the Presumption of Innocence

### 1. Reverse Onus Clauses

A reverse onus clause contains “[a] presumption [that enables, or requires] a trier of fact to reach a conclusion about a particular fact either where there is no evidence about that fact, or where a legal rule states that the fact may, or must be inferred from other facts.”<sup>106</sup> Mandatory presumptions contain a required inference or presumptive element because “[u]pon demonstration of a predicate or basic fact, the trier [of fact] is required to draw the conclusion that the presumed fact also exists. Proof of fact A, therefore, warrants the inference that fact B has also been proven to the degree of satisfaction demanded by [a] court.”<sup>107</sup>

Mandatory presumptions can be classified as rebuttable or irrebuttable. In rebuttable mandatory presumptions:

[an] accused may be required merely to raise a reasonable doubt as to...[the] existence [of the presumed fact]. [He] may also have an evidentiary burden to adduce sufficient evidence to bring into question the truth of the presumed fact. [Finally], the accused may have a legal or persuasive burden to prove on a balance of probabilities the non-existence of the presumed fact.<sup>108</sup>

If the burden is persuasive and proof on a balance of probabilities has been satisfied, “the required inference need no longer be drawn, and the issues [may be] decided by the trier of fact based on the natural weight of the evidence and the normal allocation of burdens.”<sup>109</sup> Ordinarily, for such an “inference to accord with the reasonable doubt standard, the proof of the basic fact should lead to the conclusion, beyond a reasonable doubt, that the presumed fact also exists.”<sup>110</sup> However, when the burden is shifted to an offender in the form of a mandatory persuasive burden, there exists the possibility that an offender may be held

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<sup>106</sup> Hamish Stewart, *et al.*, *Evidence: A Canadian Casebook*, 2<sup>nd</sup> Ed. (Toronto: Emond Montgomery Publications, 2006) at 1005 [Stewart].

<sup>107</sup> Byron Sheldrick, “Shifting Burdens and the Required Inferences: the Constitutionality of Reverse Onus Clauses,” (1986) 44 U.T. Fac. L. Rev. 180 at 182-183 [Sheldrick].

<sup>108</sup> Stewart, *supra* note 106.

<sup>109</sup> Sheldrick, *supra* note 107 at 183.

<sup>110</sup> *Ibid.*

culpable in spite of the fact that there exists a reasonable doubt as to the offender's level of culpability. This is so because the evidence adduced may be insufficient to persuade the trier of fact on a balance of probabilities.<sup>111</sup>

Hence, the reverse-onus "twist may doom the ["three-strikes"] legislation to an early death in the courts."<sup>112</sup> The new law places a mandatory persuasive burden on an offender to prove on a balance of probabilities that he does not meet the dangerousness criteria in section 753(1) of the *Criminal Code*. If an offender could not successfully dispose of the burden, he could nonetheless still be designated dangerous despite the existence of a reasonable doubt.

### *2. The Operation of the Presumption of Innocence during Sentencing*

The Supreme Court of Canada has ruled extensively on the constitutionality of reverse-onus clauses.<sup>113</sup> In the benchmark case *R v. Oakes*, the Court held that section 11(d) of the *Charter* requires that the Crown must prove the guilt of a person charged with an offence on the criminal standard of proof beyond a reasonable doubt. The Court stated that the use of the civil standard of proof does not relieve the Crown of this constitutional duty to prove guilt because "[i]f an accused [failed to disprove] on a balance of probabilities an essential element of an offence, it would be [still] possible for a conviction to occur despite the existence of a reasonable doubt."<sup>114</sup> Thus, a reverse-onus clause that requires the accused to prove or disprove some fact to avoid conviction on the balance of probabilities relieves the Crown of its constitutional duty to prove the guilt of the accused beyond a reasonable doubt and violates section 11(d) of the *Charter*. Since the "three-strikes" reverse-onus operates during sentencing, it could not be impugned by section 11(d) of the *Charter*.<sup>115</sup>

### *3. The Operation of the Presumption of Innocence as a Broad Legal Standard under Section 7 of the Charter*

The presumption of innocence could also be considered in light of the substantive rights and values embodied in section 7 of the *Charter*. Section 7 of the *Charter* states that:

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<sup>111</sup> *Ibid.*

<sup>112</sup> Professor David Paciocco, Professor of Law, University of Ottawa, cited in Kirk Makin "Critics blast three-strikes laws" *The Globe and Mail* (18 October 2006) [Makin].

<sup>113</sup> See generally *R. v. Whyte* [1988] 2 S.C.R. 3; *R. v. Chaulk* [1990] 3 S.C.R. 1303; *R. v. Downey* [1992] 2 S.C.R. 10 [Downey]; *R. v. Stone* [1999] 2 S.C.R. 290. See also P.W. Hogg, *Constitutional Law of Canada*, Looseleaf ed. (Toronto: Carswell, 1997) at 48-15 to 48-18.3 [Hogg].

<sup>114</sup> *R. v. Oakes*, [1986] 1 SCR 103, at para. 57 [Oakes].

<sup>115</sup> Lyons, *supra* note 9 at para. 74.

[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

The Supreme Court of Canada noted in *Reference re Motor Vehicle Act (British Columbia)* S 94(2) that "[s]ections 8 to 14 [of the Charter] address specific deprivations of the 'right' to life, liberty and security of the person in breach of principles of fundamental justice, and as such, [are] violations of [section] 7. They are therefore illustrative of the meaning, in criminal or penal law, of 'principles of fundamental justice'."<sup>116</sup> The Court in *Oakes* similarly held that "[a]lthough protected expressly in section 11(d) of the Charter, the presumption of innocence is referable and integral to the general protection of life, liberty and security of the person contained in [section] 7 of the Charter."<sup>117</sup> In that respect, it is clear that:

[t]he principles of fundamental justice are to be found in the basic tenets and principles not only of our judicial process but also of the other components of our legal system. These principles are not limited to procedural guarantees, although many are of that nature.<sup>118</sup>

Therefore, the presumption of innocence must be viewed not only in the procedural sense as it is articulated in section 11(d) of the Charter, but also through a substantive lens, for it to concord with fundamental notions of judicial fairness.

When the principles of fundamental justice are engaged, the operation of the presumption of innocence extends beyond the period in which guilt or innocence is directly in question. Indeed, it could be said that:

the presumption of innocence [should be viewed as] an animating principle throughout the criminal justice process. The fact that it comes to be applied in its strict evidentiary sense at trial pursuant to s. 11(d) of the Charter, in no way diminishes the broader principle of fundamental justice that the starting point for any proposed deprivation of life, liberty or security of the person of anyone charged with or suspected of an offence must be that the person is innocent.<sup>119</sup>

Therefore, when viewed through section 7 of the Charter, the presumption of innocence could be regarded as a broad legal standard that operates on a spectrum throughout the entire trial process. The intensity of that standard, and how it is defined, will vary according to the particular stage in which an offender finds himself during a trial.<sup>120</sup>

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<sup>116</sup> *R. v. Pearson*, [1992] 3 S.C.R. 665 at para. 28 [*Pearson*].

<sup>117</sup> *Oakes*, *supra* note 114 at para. 29.

<sup>118</sup> *Reference re Motor Vehicle Act (British Columbia)* S 94(2), [1985] 2 S.C.R. 486 [*Motor Vehicle Act*] at page 487.

<sup>119</sup> *Pearson*, *supra* note 116 at para. 31.

<sup>120</sup> For instance, the Supreme Court of Canada has held that the presumption of innocence is an implicit guarantee which is embedded in an offender's s. 11(e) Charter right "not to be denied reasonable bail without just cause," but the strength of that right is circumscribed by the special

The presumption of innocence operates as a distinct principle of fundamental justice, and therefore most intensely, when guilt or innocence is directly in question because it is the stage at which the Crown must demonstrate beyond a reasonable doubt that an accused should be held legally culpable. However, once guilt is proved, the state must still demonstrate to the trier of law to what degree an offender should be held culpable. Therefore, it is during sentencing that “[t]he interaction of section 7 and section 11(d) of the *Charter* is [illustrated to its full effect].”<sup>121</sup>

The Supreme Court of Canada held in *R. v. Gardiner* that in any situation where aggravating facts are relied upon by the Crown, they must be established beyond a reasonable doubt. If the facts are contested, the issue should be resolved by ordinary legal principles governing criminal proceedings, including resolving relevant doubt in favour of the offender.<sup>122</sup> The Court further noted that “the facts which justify the sanction are no less important than the facts which justify the conviction; both should be subject to the same burden of proof. Crime and punishment are inextricably linked.”<sup>123</sup> It additionally held that “both the informality of the sentencing procedure as to the admissibility of evidence and the wide discretion given to the trial judge in imposing sentences are factors [which militate] in favour of the retention of the criminal standard of proof beyond a reasonable doubt at sentencing.”<sup>124</sup> In coming to this conclusion, “[t]he Court cited with approval at p. 415 the following passage from J. A. Olah, ‘Sentencing: The Last Frontier of the Criminal Law.’”<sup>125</sup>

[B]ecause the sentencing process poses the ultimate jeopardy to an individual enmeshed in the criminal process, it is just and reasonable that he be granted the protection of the reasonable doubt rule at this vital juncture of the process.<sup>126</sup>

Even though *Gardiner* was a pre-*Charter* case, the Court in *Pearson* reaffirmed the *Gardiner* principle. It held that “the problem [*Gardiner*] confronted can be readily restated in light of sections 7 and 11(d) of the *Charter*. While the

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purpose of a bail hearing, which exists to combat pre-trial recidivism. Courts have upheld reverse onus clauses under the *Charter* because courts by concluding that an accused who poses little threat of recidivism until trial is able to prove as much without considerable difficulty. See generally *Pearson*, *supra* note 116; *R. v. Morales*, [1992] 3 S.C.R. 711; *R. v. Hall*, [2002] 3 S.C.R. 309.

<sup>121</sup> *Pearson*, *supra* note 116 at para. 36.

<sup>122</sup> *R. v. Gardiner*, [1982] 2 S.C.R. 368 at page 415 [*Gardiner*].

<sup>123</sup> *Ibid.*

<sup>124</sup> *Ibid.*

<sup>125</sup> *Pearson*, *supra* note 116 at para. 36.

<sup>126</sup> A. Olah, “Sentencing: The Last Frontier of the Criminal Law” (1980), 16 C.R. (3d) 97, at 121 cited in *Gardiner*, *supra* note 122 at page 415.

presumption of innocence as specifically articulated in section 11(d) may not cover the question of the standard of proof of contested aggravating facts at sentencing, the broader substantive principle [of the presumption of innocence] in [section] 7 almost certainly would.<sup>127</sup>

Therefore, the intensity at which the presumption of innocence operates during sentencing can be articulated as a distinct principle of fundamental justice. It is a principle of fundamental justice during sentencing that “the Crown must assume the burden of demonstrating beyond a reasonable doubt that there are aggravating circumstances in the commission of the offence that warrant a more severe penalty.”<sup>128</sup> (the “*Gardiner* principle”)

The Supreme Court of Canada in *R. v. D.B.* confirmed that the *Gardiner* Principle is embedded in section 7 of the *Charter*.<sup>129</sup> In this case, the Court was presented with an analogous provision to that which exists in the “three-strikes” law. At issue was the constitutionality of a provision in the *Youth Criminal Justice Act*,<sup>130</sup> (YCJA) which “requires that a young person found guilty of manslaughter receive an adult sentence unless the youth...discharges [an] onus to satisfy the court that a youth sentence would be sufficient to hold him or her accountable.”<sup>131</sup>

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<sup>127</sup> *Pearson*, *supra* note 116 at para. 37.

<sup>128</sup> *R. v. D.B.* 79 O.R. (3d) (Ont. C.A.) at para. 63, leave to appeal to S.C.C. granted, [2006] S.C.C.A. No. 195 [D.B. Ont]; See *Reference re: Bill C-7 respecting the criminal justice system for young persons*, [2003] Q.J. No. 2850 (Q. C.A.) [Quebec Reference].

<sup>129</sup> *R. v. D.B.* 2008 SCC 25 [D.B.]

<sup>130</sup> *Youth Criminal Justice Act*, S.C. 2002, c.1 [YCJA].

<sup>131</sup> *D.B. Ont*, *supra* note 128 at para. 1; Section 72 of the YCJA reads in full:

(1) In making its decision on an application heard in accordance with section 71, the youth justice court shall consider the seriousness and circumstances of the offence, and the age, maturity, character, background and previous record of the young person and any other factors that the court considers relevant, and

(a) if it is of the opinion that a youth sentence imposed in accordance with the purpose and principles set out in subparagraph 3(1)(b)(ii) and section 38 would have sufficient length to hold the young person accountable for his or her offending behaviour, it shall order that the young person is not liable to an adult sentence and that a youth sentence must be imposed; and

(b) if it is of the opinion that a youth sentence imposed in accordance with the purpose and principles set out in subparagraph 3(1)(b)(ii) and section 38 would not have sufficient length to hold the young person accountable for his or her offending behaviour, it shall order that an adult sentence be imposed.

(2) *The onus of satisfying the youth justice court as to the matters referred to in subsection (1) is with the applicant [emphasis added].*



In the majority decision written by Abella J., The Court found that the YCJA provision places a persuasive burden on the accused, by effectively requiring him to “prove the absence of aggravating factors in order to justify a youth sentence.”<sup>132</sup> It held that the provision forces a young person to “satisfy the court of the factors justifying a youth sentence, whereas it is normally the Crown who is required [under the YCJA] to satisfy the court of any factors justifying a more severe sentence.”<sup>133</sup> Thus, “an adult sentence is presumed [appropriate] unless the young person can satisfy the court otherwise.”<sup>134</sup> Hence, the YCJA provision violates the *Gardiner* principle because it “constitutes a burden that young offenders, rather than the Crown, must bear if they are to avoid the much more serious potential consequences of an adult sentence.”<sup>135</sup>

The dissent, in a decision written by Rothstein J., in contrast held that the YCJA presumption did not constitute a persuasive burden, for two main reasons. First, the dissent rejected the notion that the onus in section 72 of the YCJA contains a requirement of proof. It noted that section 72 of the YCJA does not require a youth to adduce evidence, “such that a failing to do so automatically leads to the imposition of an adult sentence.”<sup>136</sup> It held that even in the situation where a youth would refuse to advance evidence in his favour, the language of the YCJA still obliges a court to obtain all relevant factual information before it may render a decision on whether or not to impose an adult sentence.<sup>137</sup> In essence, the dissent contends that young offenders are “given the opportunity to apply for youth sentences and thereby set in motion the determination by the youth justice court of the appropriate sentence in the circumstances.”<sup>138</sup> Second, the dissent held that section 72 does not “remove the onus on the party bringing forward contested facts to prove those facts.”<sup>139</sup> It held that the Crown must still prove any aggravating factors it wishes to rely upon when it persuades a court that an adult sentence is appropriate.<sup>140</sup>

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<sup>132</sup> *D.B.*, *supra* note 129 at para. 78

<sup>133</sup> *Ibid.* at para. 81

<sup>134</sup> *D.B. Ont.*, *supra* note 128 at para. 38.

<sup>135</sup> *Ibid.* at para. 68.

<sup>136</sup> *D.B.*, *supra* note 129 at para. 163

<sup>137</sup> *Ibid.*

<sup>138</sup> *Ibid.* at 162.

<sup>139</sup> *R. v. K.D.T.*, [2006] B.C.J. No. 253 (Alta. C.A.) at para. 62 cited in *ibid.* at para. 166.

<sup>140</sup> *D.B.*, *supra* note 129 at para. 166.

Nevertheless, both the majority and dissent were in agreement on the point that the existence of the *Gardiner* principle is a settled matter of law.<sup>141</sup> The Ontario Court of Appeal in *R. v. D.B.* cogently stated “[t]he essence of [the *Gardiner* principle] is that the Crown bears the burden of justifying why a more serious penalty is necessary. That is but an adaptation to the context of the sentencing process of the presumption of innocence.”<sup>142</sup> The “three-strikes” law assumes, without requiring any degree of proof by the Crown, that the commission of a third SPIO that is a “primary designated offence” is a sufficiently important circumstance to presume dangerousness. In fact, the recidivist history of an offender is an important element, but albeit only one, that could persuade a court to designate an offender a DO.<sup>143</sup> Therefore, an offender would be given a significant burden of persuasion that would require him to adduce evidence of factual matters that are not otherwise on the record and on which the offender would wish to rely to demonstrate that a DO label, and the accompanying indeterminate sentence, would not be warranted in the circumstances.

Even if one were to accept the Supreme Court’s dissent’s reasoning in *R. v. D.B.*, it is doubtful that it could be applied to uphold the constitutionality of the “three-strikes” law. The “three-strikes” provision unambiguously places a persuasive burden on an offender to rebut the presumption of dangerousness on a balance of probabilities. Moreover, unlike the contentious *YCJA* provision, it is unquestionable that if an offender could not rebut the presumption of dangerousness, a court is not *required* to obtain access to all evidence before imposing an indeterminate sentence. A court must impose an indeterminate sentence unless it would be convinced by any evidence which *may* be presented that a more lenient sentence would be appropriate in the circumstances. If said evidence could not persuade a court, or if it would not be presented at all, a court would be required to impose the presumptive indeterminate sentence. A court is not expected to make requests for said evidence as it presumably would be in youth court.

The importance of having the *Gardiner* principle operate during a DO proceeding becomes even more evident when it is understood that prior to the enactment of the “three-strikes” law, the Crown was required to prove beyond a reasonable doubt very specific elements, that were not already on the record, before “dangerousness” could have been inferred.<sup>144</sup> The “three-strikes” law

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<sup>141</sup> *Ibid.* at paras. 78 and 139.

<sup>142</sup> *D.B. Ont.*, *supra* note 128 at para. 66; See *Pearson*, *supra* note 116 and *Gardiner*, *supra* note 122; See also *R. v. Noble*, [1997] 1 S.C.R. 874.

<sup>143</sup> See Part IV.C, below and see Part II.C, above.

<sup>144</sup> See Part II.B, above.

eliminates the protection the *Gardiner* principle once provided to an offender during a DO proceeding because the Crown can now seek to have a DO designation imposed “without discharging any burden of persuasion.”<sup>145</sup>

Additionally, in a similar vein to the unconstitutional status of reverse-onus clauses under section 11(d) of the *Charter*, the “three-strikes” reverse-onus clause is not made constitutional by affording an offender the opportunity to disprove the presumption on the civil standard of proof. The Crown would still be relieved of its constitutional duty to prove all elements to the criminal standard of proof beyond a reasonable doubt. A court could conceivably not be convinced on a balance of probabilities that an offender has disproved his dangerousness, but could still be left with a reasonable doubt in that regard.

## B. The “Three Strikes” Reverse Onus Law as an Arbitrary Sentencing Instrument under Section 7 of the *Charter*

The Supreme Court of Canada in *Lyons* held that an indeterminate detention that is ordered under the DO regime does not violate section 9 of the *Charter*, which proscribes arbitrary detention or imprisonment, because ample discretionary safeguards are present in the regime.<sup>146</sup> Since a court under the new law retains full discretion to order a lesser sentence if an offender could not dispose of his “three-strikes” burden, it would be unlikely that an imprisonment resulting from a “three-strikes” presumption could qualify as arbitrary imprisonment under section 9 of the *Charter*. Therefore, in challenging the constitutionality of the law, it would be more sensible to concentrate one’s attention on the arbitrariness of the distinctions made by the reverse onus itself instead of on the possible arbitrariness of the detention resulting from the “three-strikes” presumption. Accordingly, a challenge to the “three-strikes” law based on any arbitrary classifications it would make are best pursued through section 7 of the *Charter*, where the doctrine of arbitrariness is more broad in scope than that in section 9.

Under section 7 of the *Charter*, a criminal law that is arbitrary will deprive one of life, liberty or security of the person in a manner that is not in accordance with the principles of fundamental justice.<sup>147</sup> In order to avoid the arbitrary limitation of a citizen’s right to life, liberty or security of the person when the state is meting out punishment within “a fair and just penal system, there should be a

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<sup>145</sup> *D.B. Ont.*, *supra* note 128 at para. 67.

<sup>146</sup> *Lyons*, *supra* note 9 at para. 64. One of the most important safeguards is that under the law at the time of *Lyons*, the Crown bore the burden of proof on a criminal standard.

<sup>147</sup> *R. v. Malmo-Levine*; *R. v. Caine*, [2003] 3 S.C.R. 571 [*Malmo-Levine*] at para 135; See also *R. v. Morgentaler*, [1988] 1 S.C.R. 30; *R. v. Arkel*, [1990] 2 S.C.R. 695 [*Arkel*]; *Rodriguez v. British Columbia (Attorney General)* [1993] 3 S.C.R. 519 [*Rodriguez*].

general correlation between the imposition of harsh penalties and the seriousness of the offence.”<sup>148</sup>

The Supreme Court of Canada in *Chaoulli v. Quebec* held that a law will be arbitrary under section 7 of the *Charter*, and hence “manifestly unfair,” where it bears no real relation to the goal it advances.<sup>149</sup> The Court stated that in such cases, “[t]he more serious the impingement on the person’s liberty and security, the more clear must be the connection [between the law’s objective and effect].”<sup>150</sup> Moreover, arbitrariness is closely related to the doctrine of overbreadth because a law that is overbroad “uses means that [go] further than necessary to accomplish the law’s purpose.”<sup>151</sup>

In one sense, the “three-strikes” law’s narrow focus on the recidivist history of an offender makes an arbitrary distinction because the law’s design bears no relation to, or is inconsistent with, the objective that lies behind the DO regime, which is to protect the safety of the public by ensnaring Canada’s most dangerous criminals.<sup>152</sup> The “three-strikes” presumption casts too wide a net in the offender population. If the “three-strikes” law is arbitrary because it presumes an unsuitable number of offenders to be dangerous, it will necessarily be overbroad because its means would have gone further than necessary to accomplish the important goal of public safety.

The new law would be arbitrary because it attempts to impose an artificial boundary in the DO and LTO regime by *prima facie* disqualifying an offender for a LTO designation, and for a sentence that corresponds to the third underlying offence. The presumption would increase the odds that these two classes of offenders would be categorized under the DO heading, the members of whom neither would ordinarily automatically qualify as DOs. There is thus a continuum of criminal seriousness in the DO and LTO regime that oscillates between exceptionally serious punishments (the DO classification), very serious

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<sup>148</sup> Arkell, *ibid.* at para. 6.

<sup>149</sup> *Chaoulli v. Quebec (Attorney General)*, [2005] 1 S.C.R. 791 [*Chaoulli*].

<sup>150</sup> *Ibid.* at 131. The two opinions differed on one important point. The opinion of McLachlin C.J., Major J. and Bastarache J. posited that if the means used to implement a law’s objectives are “unnecessary,” they will not pass constitutional muster. The opinion of Binnie, LeBel and Fish JJ. held that “to substitute the term ‘unnecessary’ for ‘inconsistent’...substantively alter[s] the meaning of the term ‘arbitrary.’” The court noted that “[i]nconsistent’ means that the law logically contradicts its objectives, whereas ‘unnecessary’ simply means that the objective could be met by other means.” From that analytical perspective, it is apparent that “[i]f the latter [word] is a much more broad term that involves a [significant] policy choice.” *Ibid.* at paras. 132 and 233.

<sup>151</sup> Hogg, *supra* note 113 at 44-44. See *R. v. Heywood* [1994] 3 S.C.R. 761 [*Heywood*] and *R. v. Demers* [2004] 2 S.C.R. 489.

<sup>152</sup> *Chaoulli*, *supra* note 149 at paras. 130 and 233.

punishments (the LTO classification) and serious punishments (a conventional sentence that corresponds to the offence for which the offender was originally convicted). The “three-strikes” reform creates a revised point on the spectrum that presumptively groups a large sample of offenders from across the continuum under the DO banner. The law therefore extends itself more than is necessary and is overbroad.

The possibility that the “three-strikes” law would capture an over-inclusive class of offenders is deftly illustrated by examining the specific offences listed under the “primary designated offence” category. Six of the “primary designated offences” overlap up exactly with *Criminal Code* offences that are listed under the current LTO provisions, a conviction of any of which provides a basis to initiate a stand-alone LTO proceeding: section 151 (sexual interference), 152 (invitation to sexual touching) or 153 (sexual exploitation), section 271 (sexual assault), 272 (sexual assault with a weapon) or 273 (aggravated sexual assault). What is more, as a prerequisite to a LTO designation, these offences must merit a period of imprisonment of two years or more.<sup>153</sup> Incidentally, the “primary designated offences” must also carry the same period of imprisonment.

Clearly, Parliament has previously made a distinct policy choice that some serious repeat sexual offenders can often be better managed through the LTO provisions. However, when the “three-strikes” presumption becomes operational, all offenders convicted of one or more of these offences three times, and where each offence merits a period of imprisonment of two years or more, could be rebuttably deemed DOs.

Under the prior law, it is true that an offender could have conceivably merited a DO label for the ‘primary designated offences’ that warranted a period of imprisonment of two years or more (since the SPIO definition requires sentences to be punishable by a period of imprisonment of ten years or more),<sup>154</sup> but the Crown would still have had to have proven dangerousness. The “three-strikes” reform eliminates this challenge to establishing dangerousness, and circumvents the applicability of the LTO provisions in the process, by simply deeming these offenders dangerous if the offender meets the bare recidivist criteria. Therefore, sexual offenders who commit three “primary designated offences” would be declared DOs but they would also *prima facie* meet the criteria for a LTO designation. These offenders could conceivably only pose a “substantial” risk and not a “dangerous” risk to the public. A clear conflict between the DO and LTO provisions would erupt, which is presumptively resolved against the offender. Moreover, since sexual offenders make up the

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<sup>153</sup> Section 753.1(1)(a).

<sup>154</sup> The ‘primary designated offences’ are all punishable by maximum sentences equal to or greater than ten years in the *Criminal Code*.

greatest majority of both DOs and LTOs, this would be the most likely category of offenders affected by the over-inclusive application of the law.

In effect, the new law has considerably downgraded the level of risk that is required for dangerousness. A situation might arise in which an individual who has engaged in serious but not exceptionally dangerous acts would become the subject of a DO proceeding. It is also troubling to note that in those instances where an offender could not successfully dispose of his burden, but where a court would decide in its discretion to impose a lesser sentence (such as a LTSO), that offender would still be branded with a DO label.<sup>155</sup> Thus for those offenders who became subject to a “three-strikes” hearing, a court could be shackled into labeling an offender dangerous even if it believed he should be placed in the LTO category.

In a second sense, another additional arbitrary distinction would be created with the simultaneous operation of two separate DO “streams” in the *Criminal Code*. In those cases where the Crown would be seeking a DO designation for offenders who have committed only two SPIOs that also happen to be “primary designated offences,” or two SPIOs that are not “primary designated offences,” the prosecution would be required to prove dangerousness beyond a reasonable doubt.

In DO proceedings where an offender would have committed three “primary designated offences,” however, the burden would automatically shift to the offender to disprove his dangerousness. One might reasonably ask why the commission of one extra offence would make it necessary to reverse the burden. Are these offenders objectively more dangerous than those who have committed only one or two offences? The fact that Parliament has left the current “stream” in place would seem to implicitly suggest that it concedes that some offenders would qualify for a DO designation even if they had not committed three ‘primary designated offences.’

Therefore, in addition to creating an arbitrary distinction between offenders by grouping an over-inclusive class of offenders under the DO provisions, the “three-strikes” burden also creates an arbitrary distinction between two separate categories of DOs. It is not clear why the public would be adequately protected by keeping the burden on the Crown to prove dangerousness if only two offences have been committed, but it would not be as adequately protected if the burden remained on the Crown when three offences had been committed.

The “three-strikes” provision thus makes arbitrary distinctions between offenders because it does not carefully target the most appropriate candidates for a DO designation. The “three-strikes” law renders inert the goal of the DO provisions, which is “to segregate a *small group* of highly dangerous criminals

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<sup>155</sup> See Part III.B.1, above.

posing threats to the physical or mental well-being of their victims.”<sup>156</sup> (emphasis added) The presumption clearly “could lead to results...which would defy both rationality and fairness.”<sup>157</sup>

### C. The “Three Strikes” Reverse Onus as a Cruel and Unusual Form of Treatment

It is also plausible that the “three-strikes” law could constitute a “cruel and unusual treatment or punishment” under section 12 of the *Charter*. Unquestionably, the reverse onus itself cannot be said to comprise a *punishment* within the meaning section 12, since it is merely a mechanism through which a punishment - an indeterminate sentence - may be conferred on an offender. However, the reverse onus may be classified as a cruel and unusual *treatment*.<sup>158</sup> The Supreme Court of Canada in *Rodriguez v. British Columbia* has ruled that in order for a law to be considered a “treatment,” “[t]here must be [an] active state process in operation, involving an exercise of state control over the individual.”<sup>159</sup> Under the new law there is undoubtedly an “active state process” at play since a “three-strikes” offender would have to rebut the presumption of dangerousness if he were to avoid an indeterminate detention.

In *R. v. Malmo-Levine* the Supreme Court of Canada held that a law will be disproportionate under section 7 of the *Charter* if it does not pursue a “legitimate state interest” and if the measures it takes are “grossly disproportionate” to that state interest.<sup>160</sup> The Court, however, noted that in cases where the constitutionality of a treatment or punishment is at issue, “[it] should be approached in light of section 12 of the *Charter*, which guarantees “[e]veryone...the right not to be subjected to cruel and unusual [treatment or] punishment,” because section 12 of the *Charter* “[is a] specific illustration of the principles of fundamental justice in section 7.”<sup>161</sup> Moreover, the Court observed that in both of sections 7 and 12 of the *Charter* the constitutional standard of proof remains one of “gross proportionality” because to find a differentiated standard between the two provisions “would render incoherent the scheme of interconnected ‘legal rights’ set out in sections 7 to 14 of the *Charter* by

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<sup>156</sup> *Lyons*, *supra* note 9 at para. 62.

<sup>157</sup> *Oakes*, *supra* note 114 at para. 78.

<sup>158</sup> See Hogg, *supra* note 113 at 50.2

<sup>159</sup> *Rodriguez*, *supra* note 147 at page 612.

<sup>160</sup> *Malmo-Levine*, *supra* note 147 at para. 142.

<sup>161</sup> *Ibid.* at para. 159.

attributing contradictory standards to sections 12 and 7 in relation to the same subject matter.”<sup>162</sup>

The Supreme Court has outlined a two step process when assessing whether a treatment or punishment is “grossly disproportional.”<sup>163</sup> As a general matter, section 12 covers treatment or punishment that is more than merely excessive. A treatment or punishment must be “so unfit” that that it “offends all standards of decency.”<sup>164</sup> In reviewing the purpose of the treatment or punishment, a court must first “consider [a number of contextual factors including] the gravity of the offence, the personal characteristics of the offender and the particular circumstances of the case in order to determine what range of sentences would have been appropriate to punish, rehabilitate or deter this particular offender or to protect the public from this particular offender.”<sup>165</sup> A court must also consider the effect of the sentence actually imposed, “which is often a composite of many factors and is not limited to the quantum or duration of the sentence but includes its nature and the conditions under which it is applied.”<sup>166</sup> If the challenged provision fails the test at this stage, it will be violation of section 12 and will left to section for section 1 for justifiability.<sup>167</sup> If it passes that stage, a court must then consider the validity of the provision by making reference to “reasonable hypotheticals.”<sup>168</sup> In other words, a court must imagine a hypothetical case for which the impugned law could lead “with certainty” to a grossly disproportionate treatment or punishment.<sup>169</sup> It is important to note that at this stage it would not matter if the minimum sentence would or would not be appropriate for the individual offender who is before the court.<sup>170</sup> If a convincing reasonable hypothetical could be imagined, the provision could not be saved.<sup>171</sup>

Would it be a cruel and unusual treatment to compel a three time repeat offender to disprove his dangerousness? The Supreme Court of Canada in *Lyons* held that DO law does not violate section 12 of the *Charter* because:

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<sup>162</sup> *Ibid.* at para. 160.

<sup>163</sup> [1987] 1 S.C.R. 1045 [*Smith*].

<sup>164</sup> *Ibid.* at paras. 54-55.

<sup>165</sup> *Ibid.* at para. 56.

<sup>166</sup> *Ibid.* at para. 57.

<sup>167</sup> For example, deterrence would be a component to be considered at the section 1 justificatory stage. See *Smith*, *supra* note 163 at para. 56.

<sup>168</sup> *R. v. Goltz* [1991] 3 S.C.R. 485 and *R. v. Morrissey* [2000] 2 S.C.R. 90.

<sup>169</sup> *Smith*, *supra* note 163 at para. 67 as mentioned in *Hogg*, *supra* note 113 at 50.4.

<sup>170</sup> *Ibid.*

<sup>171</sup> *Ibid.*



the group to whom the legislation applies has been functionally defined so as to ensure that persons within the group evince the characteristics that render such detention necessary... [i]t would be difficult to imagine a better tailored set of criteria that could effectively accomplish the purposes sought to be attained. (emphasis added)<sup>172</sup>

The “three-strikes” reform changes the analytical dynamic because the law would evince the character of a mandatory indeterminate sentence. It must be stated, however, that the reform would not be a true mandatory sentence because a court would retain residual discretion to confer a lesser sentence on an offender if a court could be convinced that a determinate sentence could ensure public safety.

Generally speaking, “mandatory...sentences are inconsistent with the fundamental principle of sentencing that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of [an individual] offender.”<sup>173</sup> The courts, however, have adopted a very deferential attitude towards Parliament when mandatory sentences have been disputed under the *Charter*, making the test of “gross disproportionality” under section 12 a very onerous one to meet.<sup>174</sup> Nonetheless, there are a number of compelling reasons to believe why the “three-strikes” law could still face a vigorous challenge under section 12.

The tenets of the “three-strikes” presumption come into a fundamental disagreement with the criteria for dangerousness in the *Criminal Code*. The Court in *Lyons* held that the *Criminal Code* carefully ensures that:

the offence for which the person has been convicted is not an isolated occurrence, but is part of a pattern of behaviour which has involved violence, aggressive or brutal conduct, or a failure to control sexual impulses.<sup>175</sup>

The “three-strikes” law disregards this nuanced level of analysis because it elevates the importance of an offender’s recidivism to the exclusion of all other factors. A recidivist history is not, however, a determinative factor of dangerousness. It is a very important one, but a court must ordinarily take into

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<sup>172</sup> *Lyons*, *supra* note 9 at paras. 44-45. Moreover, in ruling on the constitutionality of indeterminate detention, the court ruled that the availability of parole truly accommodates and tailors the sentence to fit the circumstances of the individual offender because it serves as the sole mechanism for terminating his detention, and for rendering it certain. See para. 48.

<sup>173</sup> Wade Riordan Raaflaub, *Mandatory Minimum Sentences*, (Ottawa: Parliamentary Information and Research Service, Library of Parliament, 2006) at 1, online: Parliamentary Information and Research Service, Library of Parliament <<http://www.parl.gc.ca/information/library/PRBpubs/prb0553-e.htm>>. See also s. 718.1 of the *Criminal Code*. See also note 164, above.

<sup>174</sup> See *Smith*, *supra* note 163 and *Hogg*, *supra* note 113 at 50-4 to 50-10. See also Kent Roach, “Searching for Smith: the Constitutionality of Mandatory Sentences” (2001) 39 *Osgoode Hall L.J.* 367.

<sup>175</sup> *Lyons*, *supra* note 9 at para. 4. See also s. 753(1)(a) and (b) of the *Criminal Code*.

account a range of interacting factors prescribed the *Criminal Code*, each of which examines the pattern of criminality on the part of the offender and evaluates the probability that the offender would engage in similar behaviour in the future. An accused is not subject to a DO proceeding “because of his past criminality, or because of fears or suspicions about his criminal proclivities...in order to determine whether society would be better off if he [or she] were incarcerated indefinitely.”<sup>176</sup> Instead, “an accused who has committed a [SPIO] is subjected to a procedure [which] is aimed at determining the appropriate penalty that should be inflicted upon him *in the circumstances*.”<sup>177</sup> (emphasis added)

Thus, when proving dangerousness the state is ordinarily bound to present evidence beyond that which establishes that an offender is a recidivist.<sup>178</sup> While recidivism can be a significant element in the DO calculus, it is not determinative of dangerousness. Indeed, there are some instances in which offenders have been declared dangerous who did not have an extensive criminal history.<sup>179</sup> The DO inquiry must delve deeply into the nature and circumstances surrounding the offender’s criminal propensities. The “three-strikes” law would subject recidivists to a DO hearing without requiring the state to examine the full context in which their crimes occurred. It is that context, however, which provides critically important information that allows the law to distinguish “dangerous” behaviour from behaviour that does not reach that high threshold.

One might well question whether the reform’s emphasis on recidivism is not particularly worrisome since Parliament has merely focused its attention on one aspect of an offender’s behaviour that it considers worthy of special attention. It is true that the “grossly disproportionate” standard is not intended to “hold Parliament to a standard so exacting... as to require punishments to be perfectly suited to accommodate the moral nuances of every crime and every offender.”<sup>180</sup> Nonetheless, the “three-strikes” presumption is “a type of ‘automatic sentencing’ that violates the fundamental sentencing principle that [a] sentence must be tailored to [an] individual offender.”<sup>181</sup> The requirement that criminal

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<sup>176</sup> Lyons, *supra* note 9 at para. 24.

<sup>177</sup> *Ibid.*

<sup>178</sup> See Part II.B, above.

<sup>179</sup> 7% of DOs do not have multiple convictions. See Part II.D, above.

<sup>180</sup> Lyons, *supra* note 9 at para. 56.

<sup>181</sup> Cristin Schmitz, “Members poised to kill Bill,” *The Lawyers Weekly* (10 November 2006), online: <http://www.lawyersweekly.ca/index.php?section=article&articleid=377>.

punishments must possess a certain degree of proportionality is a critical element that is woven into sentencing provisions in the *Criminal Code*.<sup>182</sup>

It is indeed questionable if presence of three SPIO convictions, without regard to other factors, is a sound basis to infer ongoing future dangerousness. Clearly for some offenders it could be, but in others it will not.<sup>183</sup> The commission of four or five offences could conceivably be the point at which dangerousness could be properly inferred.

As far as “reasonable hypotheticals” are concerned, there may be some instances in which offenders affected by the “three-strikes” law would have committed three SPIOs that were far removed from each other in time. Conversely, the circumstances of an offender’s three offences might in an ordinary DO proceeding, where the burden of proof is on the Crown, be revealed to not reach the requisite level of dangerousness. In both these scenarios, the DO designation would not accurately represent the present level of dangerousness of an offender. The presumption, therefore, would not be a valid one and non-dangerous offenders would be put through the arduous task of having to disprove a negative, i.e. that they are not dangerous. However, it must be stated that these reasonable hypotheticals do not demonstrate with certainty that a grossly disproportionate treatment would occur. At best, they only demonstrate a potential for such treatment. For that reason, a court might be very hesitant to wade into those murky constitutional waters.<sup>184</sup>

Consequently, in a similar sense to the discussion on arbitrariness, the “three-strikes” presumption might create a “grossly disproportionate” form of treatment because it would label an over-inclusive class of offenders as DOs. The presumption does not carefully account for the individualized context of an offender’s criminal patterns in order to determine what range of sentences would have been appropriate to punish, rehabilitate or deter that particular offender or to protect the public from that particular offender.

It is important to note, however, that in the event an offender could not dispose of his burden, and could not also convince a court that a lesser sentence would be appropriate in the circumstances, it is doubtful the indeterminate detention could be challenged as a cruel and unusual *punishment*. At that point a court would have had the opportunity to review the evidence and could have exercised its discretion to impose a lesser sentence on the offender. Since the “three-strikes” DO would still be eligible for full parole within seven years, the detention would be compliant with *Lyons*.

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<sup>182</sup> Section 718.1 of the *Criminal Code*, for instance, states that “a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.”

<sup>183</sup> The possibility of false positives exists. See Part V.B.1, below.

<sup>184</sup> See note 168, above.

### D. The Discretionary Process in the “Three-Strikes” Reform

The discretionary process<sup>185</sup> that continues to exist under the new law might function to limit any *Charter* violations under section 1 of the *Charter*.<sup>186</sup>

The Supreme Court of Canada has held that violations of section 7 of the *Charter* can be justified only in circumstances arising out of “exceptional conditions, such as natural disasters, the outbreak of war, epidemics, and the like.”<sup>187</sup> While rates of serious crimes have increased somewhat from years past, the increase is a small one by any account and crime levels have not reached epidemic proportions by any reasonable standard.<sup>188</sup>

Even with that consideration in mind, however, the discretionary safeguards could mitigate a section 7 violation. Since the Crown retains full discretion under the new law to submit a DO application, it could conclude that the pursuit of a sentence for the third underlying offence would best serve the interests of justice. This decision would forestall the possibility that the “three-strikes” reverse onus would become operational. Moreover, a Crown retains discretion to decide whether to make an application for either a DO or a LTO proceeding. Thus, even in a situation where an offender would have committed three “primary designated offences,” if the expert assessment would adduce evidence that indicates that a LTO proceeding would be the most appropriate avenue to pursue in the

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<sup>185</sup> Bill C-2, *supra* note 4 at cl. 42(4).

<sup>186</sup> Section 1 of the *Charter* states that “[t]he *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”

<sup>187</sup> *Motor Vehicle Act*, *supra* note 118 at para. 103. See also *Heywood*, *supra* note 151.

<sup>188</sup> The national crime rate increased during the 1960s, 70s, and 80s, peaking in 1991. Crime rates then fell throughout the rest of the 1990s, dropping by about 30%, stabilizing somewhat in the early 2000s. The most recent crime statistics released by Statistics Canada in 2007 noted that the overall crime rate dropped 3% in 2006, on the heels of a 5% drop in 2005, with an overall rate decrease in each province and territory. While this drop can be attributed to declines in non-violent crimes and a drop in the homicide rate of 10% (following increases in the two previous years), national increases were seen in other serious violent crimes, similar to 2005. Attempted murders were up 3% from 2005 levels, aggravated assaults up 5%, assaults with a weapon or causing bodily harm up 4%, robberies up 6% (although robberies have been generally declining since the early 1990s) and kidnappings/forcible confinement up 12% (although rates of abductions of children and youth have been decreasing over the past 15 years). The sexual assault rate, however, dropped 7%, continuing a general decline since the early 1990s, making it the lowest rate in over 20 years. See Warren Silver, *Juristat, Canadian Centre for Justice Statistics, Crime Statistics in Canada, 2006*, vol. 27, no. 5, (Ottawa: Minister of Industry, 2007), online: Statistics Canada <<http://www.statcan.ca/english/freepub/85-002-XIE/85-002-XIE2007005.htm>>.

circumstances, the prosecution would be able to exercise that option under the new law.<sup>189</sup>

Nonetheless, given the ease with which an offender could be declared a DO under the “three-strikes” law, the Crown might be tempted to initiate a DO proceeding even in the presence of lukewarm evidence. Thus, the “three-strikes” provision could create the foundation where DO proceedings could proceed even “if there was the barest *prima facie* case.”<sup>190</sup> More importantly, however, an offender might not be able to successfully rebut the “three-strikes” presumption, but a court may nonetheless decide as a discretionary matter that an indeterminate sentence would not be warranted. An offender would nevertheless still be labeled as “dangerous” since a court could only impose a lesser sentence, not a lesser label, once the statutory criteria have been met. If one accepts the notion that an offender who receives a LTSO would in substance be best classified as a LTO, this labeling restriction would prevent a court from rectifying the arbitrariness of presuming a non-dangerous offender dangerous. On the other hand, if very favourable expert evidence for the offender is adduced, such evidence would provide a strong foundation for the accused to successfully dispose of the “three-strikes” burden.

It is an open question, however, if the arbitrary distinction made between the two categories of DOs could be convincingly defended. In one “stream,” a class of offenders would be required to disprove its dangerousness if three “primary designated offences” were committed. In the other “stream,” the Crown would have to prove dangerousness if less than three “primary designated offences” were committed. The absence of an emergency situation that would justify this arbitrary distribution of the burden of proof is not effectively counterbalanced by the discretionary provision.

Additionally, in the past when the Supreme Court of Canada has upheld reverse onus clauses under section 1 of the *Charter*, it has done so either because the burden was justified on compelling public policy grounds, or because the burden was not particularly onerous. The Court in *R. v. Keegstra*,<sup>191</sup> for example, upheld a reverse-onus provision in the hate propaganda offence in the *Criminal Code*,<sup>192</sup> which permitted an accused to use the defence that the statements made

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<sup>189</sup> The Court in *Lyons*, *supra* note 9 held that the current DO law does result in an arbitrary indeterminate detention because it would be the absence of discretion which would, in many cases, render arbitrary the law's application. The absence of any discretion would necessarily require the Crown to always proceed if there was the barest *prima facie* case. See para. 64.

<sup>190</sup> *Ibid.* The “three-strikes” law could also be under-inclusive in its application. It is possible that Crown attorneys could become over reliant on the “three-strikes” law and neglect to seek DO designations for first or second offenders.

<sup>191</sup> [1990] 3 S.C.R. 697 [*Keegstra*]. See Hogg, *supra* note 113 at 46-16 to 48-18.3.

<sup>192</sup> Section 319(2) states that:

were true, but which required an accused to prove that the statements were true. The Court held that there was a rational connection between the objectives advanced and the impugned provision because:

[t]he reverse onus...represents the only way in which the defence can be offered while still enabling Parliament to prohibit effectively hate-promoting expression through criminal legislation; to require that the state prove beyond a reasonable doubt the falsity of a statement would excuse much of the harmful expressive activity caught by s. 319(2) [of the *Criminal Code*] despite minimal proof as to its worth.<sup>193</sup>

The “three-strikes” reverse-onus is not analogous to this situation. If the objective of the DO designation is to protect the public from Canada’s most dangerous criminals, putting the onus on an offender to demonstrate why the designation should not be applied does little if anything to advance this objective. Arguably, it is the availability of a more serious outcome, that is, the DO designation, rather than the placement of the onus on the offender to escape that outcome, that serves this objective.<sup>194</sup>

Secondly, reverse onus burdens that imposed a mere evidentiary burden on the accused, i.e. those that required an offender to point to the existence of some evidence that could raise a reasonable doubt about the presumed fact, have been upheld under section 1 of the *Charter* because courts have held that the presumption could be rebutted with relative ease.<sup>195</sup> By contrast, the “three-strikes” burden is a significant burden of persuasion.

Finally, as noted earlier, the disproportionate effect of the law under section 12 of the *Charter* could be rendered immaterial since a court would be given the discretion review the imposition of an indeterminate detention. Nonetheless, the reform considerably distorts the goal of the DO regime, which is to identify only the most dangerous individuals who interact with the criminal justice system.

[e]very one who, by communicating statements, other than in private conversation, willfully promotes hatred against any identifiable group is guilty of

(a) an indictable offence and is liable to imprisonment for a term not exceeding two years;

or

(b) an offence punishable on summary conviction.

Under s. 319(3)(a):

[n]o person shall be convicted of an offence under subsection (2)...if he establishes that the statements communicated were true. (emphasis added)

<sup>193</sup> *Keegstra*, *supra* note 191 at para. 151.

<sup>194</sup> *D.B. Ont*, *supra* note 128 at para. 86. Incidentally, since the s.1 justificatory analysis is largely an inquiry into the proportionality of the law, many of the considerations discussed under the s. 12 analysis above will also figure into the s.1 discussion. Namely, the fact that the “three-strikes” law would be overbroad in its application would mitigate any chances that a court would find a rational connection between the objective of the dangerous offender designation and the “three-strikes” law.

<sup>195</sup> See *Downey*, *supra* note 113.

Indeed, many offenders who are not dangerous could be subject to the presumption and many would then be put through the daunting task of having to disprove their dangerousness. This point is a strong basis which could offset the cushioning impact of a court's residual discretion. Since a "three-strikes" offender would be left with a DO label even if a court would impose a lesser sentence, that aspect of the "treatment" of the "three-strikes" presumption could not be corrected.

## V. RATIONAL PUNISHMENT AND "THREE-STRIKES"

The preceding analysis demonstrates that the "three-strikes" reform raises some contentious *Charter* issues. There are other reasons, however, to believe that the reform would be not only an ineffective, but an unnecessary measure.

### A. Deterrence and "Three-Strikes"

It is a dubious contention that the "three-strikes" law would act as a deterrent. The internal logic of the current DO regime suggests that general deterrence is not a goal of its operation. The DO regime imposes indeterminate sentences on offenders because their pattern of criminal behaviour is unmanageable. It is thus questionable how the reform would entice potentially dangerous criminals to modify their conduct since dangerousness is implicitly considered to be an immutable characteristic. Indeed, "it would be odd if increased penalties for repeat offences should deter just those offenders who make a career of [serious] crime and who have ignored the already severe punishments for their prior convictions."<sup>196</sup> Indeterminate detention is effectively a last resort sentencing mechanism. The recourse to that extreme sentencing measure all but acknowledges the near futility of rehabilitating an offender.

In the United States, "three-strikes" laws have produced very little changes in crime rates.<sup>197</sup> Studies have shown that approximately "half of the United States

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<sup>196</sup> Markus Dirk Bubber, "Recidivist Statutes as Arrational Punishment" (1995) 43 *Buff. L. Rev.* 689 at 707.

<sup>197</sup> Makin, *supra* note 112. Insofar as "three-strikes" laws can be characterized as a mandatory sentence, studies have shown that mandatory sentences have not conclusively been found to lower crime rates. See Dale Parent, et al., *Key Legislative Issues in Criminal Justice: Mandatory Sentencing*, (Washington, D.C.: U.S. Department of Justice, 1997), online: National Criminal Justice Reference Service <<http://www.ncjrs.gov/txfiles/161839.txt>>; Department of Justice Canada, *Mandatory Sentences of Imprisonment in Common Law Jurisdictions: Some Representative Models*, (Ottawa: Department of Justice Canada, 2005), online: Department of Justice Canada <<http://www.canada.justice.gc.ca/en/ps/rs/rep/2005/r05-10/index.html>>; Thomas Gabor & Nicole Crutcher, *Mandatory Minimum Penalties: Their Effects on Crime, Sentencing Disparities, and*

jurisdictions that embraced three-strike laws over the past decade saw a decrease in crime rates, but the other half saw an increase.”<sup>198</sup> One study conducted by the Washington, D.C. based Justice Policy Institute found that in the states of “Florida and Georgia, whose [three]-strikes laws are targeted exclusively at people convicted of violent offences, [there was] a smaller decline in violent crime rates than their non-[three]-strike[s] neighbour Alabama.”<sup>199</sup> Additionally, Alabama’s drop in violent crime (42.9%) was higher than the decline in Florida (35.9%) or Georgia (36.6%) since the latter states inaugurated their three-strikes law in the late 1990s.<sup>200</sup> These statistics lend support to the argument that “the fluctuations [may] have no connection to the laws.”<sup>201</sup>

## B. Entrenching a Fear Based Community Protection Model

### 1. *The Necessity of “Three-Strikes”*

The “three-strikes” reform is an unsophisticated form of punishment which is meted out under the CPM. The government has affirmed that the law will help protect Canadians from the most dangerous and violent sexual predators in the country, and the arbitrariness analysis confirms that the legislature appears to have tweaked the DO regime to deal more harshly with some sexual offenders.

While Parliament’s responsibility to enact laws which protect the public from dangerous criminals is an important one and is not in question, the government has failed to demonstrate how the “three-strikes” reform could more precisely identify all of Canada’s most dangerous offenders. According to the government’s own estimation, the DO designation “reflect[s] [one of] the most severe sentences available in Canadian law.”<sup>202</sup> In light of the gravity of the punishment that accompanies a DO designation, “there is no need to be indiscriminate”<sup>203</sup> in seeking such a label. It behooves the state to demonstrably prove why an offender should have his liberty removed indefinitely. While it is

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*Justice System Expenditures*, (Ottawa: Department of Justice Canada, 2005) online: Department of Justice Canada <<http://www.justice.gc.ca/en/ps/rs/rep/2002/rr2002-1a.pdf>>.

<sup>198</sup> Makin, *supra* note 112. See generally Linda S. Beres & Thomas D. Griffith, “Do Three Strikes Laws Make Sense? An Analysis of California’s Attorney’s General Report,” (1998) 32 *Loy L.A. L. Rev.* 101; *Infra*, Lotke note 199.

<sup>199</sup> Eric Lotke, *et al.*, *3 Strikes & You’re Out* (Washington, D.C.: Judicial Policy Institute, 2004), online: Judicial Policy Institute <<http://www.justicepolicy.org/article.php?list=type&type=102>>, at 9 [Lotke].

<sup>200</sup> *Ibid.*

<sup>201</sup> Makin, *supra* note 112

<sup>202</sup> Department of Justice Canada, *supra* note 1.

<sup>203</sup> Smith, *supra* note 163 at para. 72.



true that only a small number of offenders are being declared dangerous each year because it is very challenging for the Crown to prove dangerousness, one might reasonably question if it is logical to conclude from the low incidence of successful DO applications whether a new law that would operate with the purpose to increase the number of DOs is in fact required.<sup>204</sup> The “three-strikes” burden effectively trivializes the highly exceptional nature of a DO label and the unusually severe punishment that accompanies it.

Indeed, the “three-strikes” reform is arguably an unnecessary measure given the current array of legal tools available to the courts and to law enforcement officials to manage serious, high-risk offenders.

The LTO designation, for instance, was created in recognition of the fact that some sexual offenders could be best controlled in the community after completing their initial period of incarceration for the offence for which they were convicted. There are compelling reasons that suggest the LTO provisions will continue to be an appropriate tool for controlling “less than dangerous” offenders.

The central problem with the “three-strikes” presumption is that it targets a large group of offenders for a DO designation without referring to the context in which the offenders committed their crimes. The presumption dodges the careful, nuanced attention that is ordinarily paid to an individual offender’s criminal history in a DO hearing. It is entirely possible that in some circumstances the Crown could successfully demonstrate that an offender who has committed three “primary designated offence” deserves a DO designation. The presumption that makes this circumstance a rebuttable fact, however, is not grounded on a firm empirical footing.

One Canadian study, for instance, which compared statistically similar Canadian offenders to offenders captured by California’s “three-strikes” law (high-risk violent and sexual offenders) found that 31% of the Canadian offenders did not go on to commit a fourth offence.<sup>205</sup> The “three-strikes” law could therefore create the situation where a high number of false positives could arise in the system. Instead of considering some sexual offenders as unmanageable lifelong threats, society would be better served by legislation and policies that consider the cost/benefit break point after which resources spent prosecuting lower-risk violent and sexual offenders under the “three-strikes” presumption would be better re-directed toward the management of these high-risk non-dangerous offenders and toward crime prevention and victim services.<sup>206</sup>

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<sup>204</sup> Grant, *supra* note 13 at 350.

<sup>205</sup> Grant N. Burt, *et al.*, “Three Strikes and You’re Out: An Investigation of False Positive Rates Using a Canadian Sample,” (2000) 64 *Federal Probation* 3.

<sup>206</sup> Andrew J. R. Harris & R. Karl Hanson, *Sex Offender Recidivism: a Simple Question* (Ottawa: Public Safety and Emergency Preparedness Canada, 2003-2004) at 12.

While there is limited statistical data that compares the DO and LTO population, results from a 2002 study conducted by the Correctional Research Service of Canada illustrates the fact that the LTO provisions operate with the goal of managing a subset offenders who do not pose an intractably dangerous threat to public safety.<sup>207</sup> The study found that DOs are at a 98% risk to re-offend, LTOs are at a 90% risk to re-offend and the general prison population is at 59% to re-offend. While 90% is still a very high figure, it is statistically significant and is “expected as the purpose of the DO and LTO legislation is to differentiate between those offenders who are at greater risk of re-offending from those who are less likely.”<sup>208</sup> While the study found that LTOs are more likely to offend against children, DOs were most likely to cause the highest degree of physical and psychological harm to their victims. This differentiation indicates that the regime is being used exactly as intended, by targeting only the most dangerous and high-risk offenders for the DO designation.

The government appears to be hinting that it considers some sex and violent offenders as unexceptionally “dangerous.” It is trite to state that the general public does not sympathize with sex or violent offenders. The harm they cause to their victims is an intense violation of one’s physical and psychological integrity that takes years or even a lifetime from which to recover. Nonetheless, on an objective analysis, many sex and violent offenders may not qualify for a DO label and the indeterminate detention which would accompany it.

As noted earlier, peace bonds provide authorities with the means to restrict the behaviour, conduct or movement of an individual if there is a reasonable fear that an offence will be committed. Bill C-2 extends the period of a peace bond in relation to a sexual offence against a person under the age of 14 years and peace bonds in relation to a SPIO from twelve months to two years.<sup>209</sup> It also gives courts the ability to severely curtail the freedom of movement of the targeted individuals much more than they are presently able to and also give them the authority to place the individual in a treatment programme.<sup>210</sup>

Peace bonds, however, have come under criticism for at times placing unrealistic conditions on individuals and the amendments would likely invite a similar response.<sup>211</sup> While these difficulties may be inevitable, the orders nonetheless serve as a far more reasonable alternative to using the “three-strikes” DO presumption to judicially manage a very broad class of high-risk offenders.

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<sup>207</sup> Trevethan, *supra* note 82.

<sup>208</sup> *Ibid.*

<sup>209</sup> Bill C-2, *supra* note 4 at cl. 5 and 6.

<sup>210</sup> *Ibid.*

<sup>211</sup> See John Howard Society, *supra* note 11 and P. Neuman, “Peace Bonds Preventive Justice or Preventing Justice?” (1994) 3 Dal. J. Leg. Stud. 189.

Peace bonds respond more proportionally to a high-risk threat posed by an offender, are much less invasive and expensive than imprisonment, and the use of the DO or LTO designation is not precluded if the control measures fail. Moreover, failure of the offender to abide by the conditions in a peace bond, or those in a LTSO, would only bolster empirical support for a future case that a DO is truly warranted in the circumstances.

## 2. “Three-Strikes” as a Reactionary Form of Punishment

At its base, the “three-strikes” law is a reform which appeals to certain segments of the population who view high-risk offenders “as [being] beyond redemption - as ‘three strike’ losers.”<sup>212</sup> One might argue that the legislature hopes to capitalize on the feelings of a frightened public, who view sexual and violent offenders as running amok and posing a pervasive threat to its safety, despite the existence of ample statistical evidence to the contrary.<sup>213</sup> To the extent that such laws appeal to the merciless feelings of “a fearful public or a cynical legislature,”<sup>214</sup> they violate a fundamental principle in Canadian criminal law that sentences may be retributive, but not vengeful in their purpose. The Supreme Court of Canada in *R. v. M.(C.A.)* commented that:

[r]etribution is an accepted, and indeed important, principle of sentencing in our criminal law. As an objective of sentencing, it represents nothing less than the hallowed principle that criminal punishment...should...be imposed to sanction the moral culpability of the offender. Retribution represents an important unifying principle of our penal law by offering an essential conceptual link between the attribution of criminal liability and the imposition of criminal sanctions.<sup>215</sup>

In that respect, the Court noted that there is an important difference between the concepts of retribution and vengeance, with the former sometimes being confused for the latter.

The Court noted that “[v]engeance...represents an uncalibrated act of harm upon another, frequently motivated by emotion and anger, as a reprisal for harm inflicted upon oneself [or another] by that person.” Retribution, on the other hand:

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<sup>212</sup> Ray Surette, “News from Nowhere, Policy to Follow: Media and the Social Construction of ‘Three Strikes and You’re Out,’” in David Shichor & Dale K. Sechrest, eds., *Three Strikes and You’re Out: Vengeance as Public Policy*, (Thousand Oaks, California: SAGE Publications, 1996) at 179 [Shichor]. See also Anthony N. Doob, “The political attractiveness of mandatory minimum sentences” (2001) 39 *Osgoode Hall L.J.* 287.

<sup>213</sup> See note 188, above.

<sup>214</sup> Malcolm M. Feely & Sam Kamin, “The Effect of ‘Three Strikes and You’re Out’ on the Courts: Looking Back to See the Future,” in Shichor, *supra* note 212 at 145.

<sup>215</sup> *R. v. M.(C.A.)* [1996] 1 S.C.R. 500 at page 500.

represents an objective, reasoned and measured determination of an appropriate punishment which properly reflects the moral culpability of the offender, having regard to the intentional risk-taking of the offender, the consequential harm caused by the offender, and the normative character of the offender's conduct. Furthermore, unlike vengeance, retribution incorporates a principle of restraint; retribution requires the imposition of a just and appropriate punishment, and nothing more.<sup>216</sup>

To the extent that an offender's recidivist history in itself is completely out of proportion to the need for a DO label and an indeterminate detention, the "three-strikes" reform is more vengeful in its purpose than it is retributive. The effect of the "three-strikes" presumption is to capture a large category of repeat offenders within its scope, especially sex offenders, among whom only a small minority may actually warrant the stigma of the DO designation.<sup>217</sup> The presumption therefore fails to isolate only the most exceptionally dangerous people the law is designed to meticulously identify. The reform aims to inflict punishment on an offender not on any logical analysis, but rather on a reactionary and wholesale desire to appear "tough on crime."

Retribution is also linked to the concept of denunciation of criminal conduct.<sup>218</sup> When denouncing criminal behaviour, however, a measure of restraint must be employed because the law must take care to give each offender a sentence based on "what he or she deserves."<sup>219</sup> A "just deserts" theory of punishment requires that an offender be punished only on the basis of his "wrong voluntary conduct or...bad character."<sup>220</sup> In that respect, a "just deserts" punishment traditionally looks to the past conduct of offenders rather than focussing on the offender's future predilection for causing harm.

The Supreme Court of Canada in *Lyons* affirmed that the DO regime was not unconstitutional under section 12 of the *Charter* simply because the regime is "not entirely reactive or based on a 'just deserts' rationale."<sup>221</sup> The Court affirmed that it is not "objectionable that [an] offender's designation as dangerous or the subsequent indeterminate sentence is based, in part, on a conclusion that the past violent, anti-social behaviour of the offender will likely continue in the future. Such considerations in fact play a very significant role in a rational system of sentencing in which the respective importance of prevention, deterrence and

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<sup>216</sup> *Ibid.* at para. 80.

<sup>217</sup> Webster, *supra* note 105.

<sup>218</sup> Section 718(a).

<sup>219</sup> Don E. Scheid, "Constructing a Theory of Punishment, Desert, and the Distribution of Punishments" (1997), 10 Can. J.L. & Juris. 441 at 464.

<sup>220</sup> *Ibid.*

<sup>221</sup> *Lyons*, *supra* note 9 at para. 26.

retribution will vary according to the nature of the crime and the circumstances of the offender.<sup>222</sup>

Fundamentally,

[r]etribution is a species of objectivism in ethics that asserts that there is such a thing as desert and that the presence of such a (real) moral quality in a person justifies punishment of that person. What a populace may think or feel about vengeance on an offender is one thing; what treatment an offender deserves is another. And it is only this last notion that is relevant to retributionism.<sup>223</sup>

The “three-strikes” reform fails to comport with this aspect of Court’s holding because it does not adequately consider the offender’s wrongdoing in its entire context. The presumption utilises an unempirical approach in distributing criminal punishment.

### C. Aboriginal Offenders and “Three-Strikes”

It is not insignificant to note that the “three-strikes” law would disproportionately affect Aboriginal offenders more than any other class of offenders, however unintentional the impact might be. Aboriginal Canadians represent not only a substantial proportion of the general prisoner population in Canada; they are also overrepresented in the DO category.<sup>224</sup> One analysis prepared by the Strategic Policy Division of the Correctional Service of Canada in 2006, for instance, concluded that “Aboriginal offenders have a higher rate of conviction for assault, [sexual] or related offences and the [“three-strikes” law] could potentially have a disproportionately higher impact on this group of offenders.”<sup>225</sup>

Additionally, s. 718.2(e) of the *Criminal Code* provides that:

all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

Placing Aboriginal offenders through the arduous procedure in which they would have to disprove their dangerousness would only serve to aggravate the fundamentally misbalanced position of Aboriginals in the Canadian justice system. Insofar as the “three-strikes” reform could be regarded as a type of mandatory sentence, the new law would prevent a court from applying the Aboriginal *Criminal Code* provision until *after* the Aboriginal offender would have

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<sup>222</sup> *Ibid.*

<sup>223</sup> Michael Moore, *Law and Psychiatry: Rethinking the Relationship*, (London: Cambridge U. Press, 1984) at 235 cited in Mark Carter, “Retributive Sentencing and the *Charter*: The Implications of *Sauvé v. Canada*” (2006) 10 Can. Crim. L. Rev. 43 at 47.

<sup>224</sup> See Part II.D, above.

<sup>225</sup> Correctional Service of Canada, *Platform Issues: an Analysis*, Strategic Policy Division (2006) [unpublished, obtained under a request made under the *Access to Information Act*] at 6.

unsuccessfully disposed of his burden. In the circumstances of Aboriginal offenders, it is especially important to ensure a trial judge retains discretion to craft an appropriate sentence *at each point* in the sentencing process. The “three strikes” law diminishes the ability of a court to consider the special circumstances of Aboriginal offenders during the sentencing process by reserving his discretion to an afterthought in the “three-strikes” hearing.

#### D. Alternative Measures to a “Three-Strikes” Presumption

There are important alternative measures Parliament could undertake to strengthen the ability of the DO and LTO regime to protect Canadians from high-risk repeat offenders, which would be far less severe and controversial than a “three-strikes” reverse onus burden.

A new DO application cannot currently be brought if a LTO offender has violated a condition of his LTSO, an act “which demonstrates that he [or she] cannot be controlled in the community.”<sup>226</sup> The only way a new DO application can be brought is if the offender commits a new SPIO.<sup>227</sup> Bill C-2 only partially closed this loophole. Section 753.01 empowers the Crown to petition a court to have a previously convicted DO offender assessed for a new indeterminate period of detention or a new LTSO if he was later convicted of a SPIO or if he breached the terms of a LTSO. However, this provision would apply only to those DOs who have been released into the community with or without a LTSO. This provision is deficient because DOs are rarely released from indeterminate detention.<sup>228</sup> Therefore, it will only apply to a very small percentage of DOs and is unlikely to be invoked often. Crowns would still be unable to bring a DO for LTOs who have breached the terms of their LTSO unless they committed a new SPIO. While it is important to closely monitor released DOs, offenders who straddle the line between the LTO and the DO provisions are no less worthy of the law’s attention. A reform that would completely close this loophole would send a signal to offenders that LTO designations would represent a probationary period of sorts, the violation of which would almost certainly lead to a DO designation. Crowns would also be provided with assurances that when they seek a LTO designation, they would not be making an irrevocable decision to not seek a DO designation. This type of reform would enable the justice system to provide

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<sup>226</sup> Michael Bryant, “You can run, but you cannot hide,” *The Globe and Mail* (6 March 2007) (QL) [Bryant].

<sup>227</sup> Section 763.3(1) of the *Criminal Code*, for instance, provides no basis on which Crowns could seek a DO application in the breach of a condition of LTSO. It merely makes the offender guilty of an indictable offence and liable to imprisonment for a maximum term of ten years.

<sup>228</sup> As of April 9, 2006, only 17 DOs were released out of a total DO population of 352. See Part II.D, above.

a “last chance” form of sentencing for those offenders who are on the precipice of being classified as either a DO or a LTO. A breach of a LTSO by a LTO might also tip the weight of the evidence in favour of a DO label. Courts should be provided with a more precise means to identify offenders who are truly dangerous.

Parliament should also amend the *Criminal Code* to clearly define which offences would always qualify as either SPIOs, in the case of DOs, and which offences would activate the LTO provisions. Section 752(a) of the *Criminal Code*, for instance, currently lists only a small number of specific sexual offences as SPIOs. Parliament should consider including a list of non-sexual serious offences, which could be partially drawn from the list of “designated offences” listed in Bill C-2, and list them directly in section 752. This change would provide clearer guidelines to Courts and judges about which offences activate the DO provisions. Moreover, the LTO provisions should be amended to include a list of non-sexual offences. While courts have read in non-sexual offences to the provisions, the law should be codified for clarification.

## VI. FINAL CONCLUSIONS

The CPM heavily informs the law and order debate in North America. Sexual offenders, in particular, are nearly universally reviled.<sup>229</sup> The central problem, of course, is that the fear generated by reports of violent crimes, especially ones that are sexual in nature, is usually out of proportion to the statistical reality of those crimes.<sup>230</sup> Therefore, the sense of vulnerability of victimization of ordinary individuals by violent crime is so great that all offenders, not just the exceptionally violent ones, are ultimately considered to be highly dangerous.<sup>231</sup>

The “three-strikes” reverse-onus law is a very controversial initiative. The government steadfastly insists that the law is constitutional and that it is also required to deal more effectively with serious crime. Parliament’s responsibility to protect Canadians from violent crime is not in doubt. There are, however, very strong arguments that could be propounded that would not support the government’s claim that this law is either a constitutional or needed response.

First, the government faces a strong *Charter* challenge to the law. A challenge based on section 12 of the *Charter*, and especially section 11(d), would be difficult and would likely turn to the government’s favour. A challenge based on section 7 of the *Charter*, however, is much more likely to be successful. It is a firmly

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<sup>229</sup> Petrunik, “Hare”, *supra* note 12 at 44.

<sup>230</sup> *Ibid.*

<sup>231</sup> *Ibid.*

established in the case law that as a principle of fundamental justice, the Crown must prove beyond a reasonable doubt aggravating facts that are contested during the sentencing process when a more serious sentence is sought. The “three-strikes” law threatens to impose the most severe punishment imaginable on an offender if he is unable to dispose of his burden. A court is unlikely to uphold the law because there is no empirical evidence which demonstrates the current provisions are failing to ensnare Canada’s most serious offenders. While it is indeed difficult for the Crown to prove dangerousness, this fact does not demonstrate that an insufficient number of offenders are in fact being declared dangerous. Quite to the contrary, the low numbers of offenders being declared dangerous arguably illustrates that the law is functioning well. The weight of evidence suggests that DOs possess highly unusual, uncontrollable criminal propensities and by any account are aberrations even within the general offender population.

Moreover, the law also arbitrarily imposes two separate burdens of proof on two different categories of offenders in a DO hearing. On the one hand, offenders who commit three “primary designated offences” would be required to disprove their dangerousness in a DO proceeding. On the other hand, the Crown would be required to prove dangerousness for offenders who would have committed only one or two offences. It is unclear why the public would not be adequately protected if the burden of proof remained on the Crown in the former scenario.

Furthermore, the DO label is a highly exceptional form of criminal punishment and it should be imposed with restraint. The designation is designed to target and label a very select and high-risk criminal offender. The “three-strikes” presumption is simply too harsh a legal tool to deal with serious crime that falls short of a “dangerousness” standard. There are more effective and appropriate legal means to deal with “less than dangerous” serious offenders.

In essence, the “three-strikes” reverse-onus law is a measure that betrays *Charter* principles and would likely do very little to protect Canadians from violent crime any more than the current DO law already does. The “three-strikes” reform seems to bear a remarkable resemblance to Canada’s first “three-strikes” habitual offender law. It is now coloured, however, with elements of the “criminal sexual psychopath” law, which assumed sexual offenders were intrinsically unmanageable. Those laws were eventually replaced with the current DO and LTO regime because they faced many of the same criticisms and contained similar deficiencies of the “three-strikes” reform. Like those laws, the “three-strikes” reform indiscriminately targets a broad class of sexual and violent offenders for indeterminate detention without requiring the Crown to provide reasoned, empirically based proof that would indicate the offenders are in fact “dangerous.”