

**THE DANGEROUS OFFENDER AND LONG-TERM  
OFFENDER REGIME**

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## THE DANGEROUS OFFENDER AND LONG-TERM OFFENDER REGIME

### PURPOSE OF THE REGIME

The provisions applicable to offenders presenting a high risk of recidivism are set out in Part XXIV of the *Criminal Code*<sup>(1)</sup> (the Code). It is important to note that these rules apply at the sentencing stage.

The primary objective of this regime is thus to protect the public from offenders who have committed “serious personal injury offences”<sup>(2)</sup> (dangerous offenders<sup>(3)</sup> or long-term offenders<sup>(4)</sup>) or an offence of a sexual nature<sup>(5)</sup> (long-term offenders) and continue to pose a threat to society.<sup>(6)</sup> A very high proportion of these criminals have committed sexual offences.<sup>(7)</sup>

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(1) R.S. 1985, c. C-46 (s. 752 ff).

(2) S. 752 of the Code reads:

“Serious personal injury offence” means

(a) an indictable offence, other than high treason, treason, first degree murder or second degree murder, involving:

(i) the use or attempted use of violence against another person, or

(ii) conduct endangering or likely to endanger the life or safety of another person or inflicting or likely to inflict severe psychological damage on another person, and for which the offender may be sentenced to imprisonment for ten years or more, or

(b) an offence or attempt to commit an offence mentioned in section 271 (sexual assault), 272 (sexual assault with a weapon, threats to a third party or causing bodily harm) or 273 (aggravated sexual assault).

(3) Subsection 753(1) of the Code.

(4) Paragraph 753.1(1)(a) of the Code. See *R. v. Weasel*, (2001) 181 C.C.C. (3d) 358 (C.A. Sask).

(5) It must be one of the sexual offences listed in paragraph 753.1(2)(a) of the Code – that is, an offence under 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 serious conduct of a sexual nature in the commission of another offence.

(6) Subsection 753(1) of the Code (dangerous offenders) ff. 753.1(1)(b) (long-term offenders). See *R. v. Lyons*, [1987] 2 S.C.R. 309, 350; *R. v. Johnson*, [2003] 2 S.C.R. 357, par. 2.

(7) Indeed, in roughly 82% and 76.5% of cases, respectively, the offence that gave rise to the dangerous offender or long-term offender designation (“the underlying offence”) was of a sexual nature (Public Safety and Emergency Preparedness Canada, *Corrections and Conditional Release Statistical Overview*, December 2005, pp. 103 and 105). In the general prison population, roughly one of out eight sentences (12.5%) is for a sexual offence (Shelly Trevethan, Nicole Crutcher and John-Patrick Moore, *A Profile of Federal Offenders Designated as Dangerous Offenders or Serving Long-Term Supervision Orders*, Research Branch, Correctional Service of Canada, December 2002, p. 22). As regards the database containing information on sexual offenders, see the *Sex Offender Information Registration Act*, S.C. 2004, c. 10 (came into force on 15 December 2004) and s. 490.011 ff of the Code.

Within this very limited group, dangerous offenders are, by definition, considered as being at higher risk than long-term offenders and, unlike the situation for the latter,<sup>(8)</sup> there is no possible treatment that could control this risk in the community.<sup>(9)</sup> Thus, a long-term offender could, after being sentenced to a term of imprisonment of two years or more,<sup>(10)</sup> be released under the conditions of a long-term supervision order;<sup>(11)</sup> by contrast, a dangerous offender will have to serve a prison sentence of indeterminate length.<sup>(12)</sup>

## BACKGROUND

In response to the recommendations made in 1938 by the Archambault Commission,<sup>(13)</sup> the first habitual offenders act was adopted in Canada in 1947.<sup>(14)</sup> An “habitual offender” was a person who had been convicted of three criminal offences. An offender of this type, and, later on, an offender who was a “criminal sexual psychopath,”<sup>(15)</sup> could be imprisoned indefinitely. The rules were criticized, however, for applying to non-dangerous offenders as well<sup>(16)</sup> and for requiring recidivism as an eligibility condition.<sup>(17)</sup>

Feeling that the applicable regime did not adequately protect the public, the *Criminal Law Amendment Act, 1977*<sup>(18)</sup> started from scratch and enacted the current rules on

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(8) Paragraph 753.1(1)(c) of the Code.

(9) Subsection 753(1) of the Code. See *R. v. Ménard*, REJB 2002-35993 (C.A. Qué).

(10) Subsection 753.1(3) of the Code.

(11) Of a maximum duration of 10 years (*ibid.*).

(12) Subsection 753(4) of the Code. We are talking then about “preventive detention.”

(13) Royal Commission to Investigate the Penal System of Canada, *Report of the Royal Commission to Investigate the Penal System of Canada*, Ottawa, 1938.

(14) *Act to amend the Criminal Code* S.C. 1947, c. 55. It was inspired by an act in the United Kingdom, the *Prevention of Crime Act, 1908* (8 Edw. 7, ch. 59).

(15) That is, a person incapable of controlling his sexual impulses (*Act to amend the Criminal Code*, S.C. 1948, c. 39, s. 43). Subsequent amendments would replace this expression by the term “dangerous sexual offenders” (*An Act to amend the Criminal Code*, S.C. 1960-61, c. 43, s. 32).

(16) For example, offenders convicted of property offences.

(17) See, for example, Committee on Corrections, *Report of the Canadian Committee on Corrections: Toward Unity: Criminal Justice and Corrections* (Ouimet Report), Ottawa, 1969.

(18) S.C. 1976-77, c. 53 (came into force on 15 October 1977).

dangerous offenders. In 1997, the long-term offender category was introduced in order to monitor these offenders in the community on a long term-basis because, even though they present a risk of recidivism, they cannot be qualified as dangerous offenders.<sup>(19)</sup>

## PROVISIONS OF THE *CRIMINAL CODE*

### A. The Dangerous Offender Application: When to Present It

A Crown attorney may present a *dangerous* offender application after an offender has been found guilty of a serious personal injury offence, but before sentencing.<sup>(20)</sup> However, if there is new evidence, the application can be made up to six months after sentencing.<sup>(21)</sup>

The initial *long-term* offender application must be submitted before sentencing.<sup>(22)</sup> It cannot therefore be submitted once the offender has begun serving his or her sentence. However, a long-term offender application that has been converted from a dangerous offender application<sup>(23)</sup> may be submitted after sentencing.<sup>(24)</sup>

### B. Procedural Safeguards

The Crown attorney must obtain the consent of the province's attorney general and give the offender seven clear days' notice before the date of the application hearing.<sup>(25)</sup> The notice must contain the grounds for making the application.

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(19) *An Act to amend the Criminal Code (high-risk offenders)*, S.C. 1997, c. 17 (came into force 1 August 1997). This act also introduced other amendments, such as extending a dangerous offender's period of ineligibility for parole (from three to seven years) and creating the recognizance to keep the peace for individuals likely to commit serious personal injury offences (s. 810.2 of the Code). We should also note that, in 1995, a national system to detect high-risk offenders was created.

(20) Subsection 753(2) of the Code.

(21) Paragraph 753(2)(b), ss. 753(3) and 753(4.1) of the Code. The Crown attorney will also have to inform the offender of the possible intention to submit an application (par. 753(2)(a) of the Code).

(22) *R. v. Whittaker*, 2005 CarswellAlta 595 (ABPC).

(23) Paragraph 753(5)(a) of the Code.

(24) In that case, the initial prison sentence stands (ss. 753.1(3.1) of the Code).

(25) Paragraphs 754(1)(a) and (b) of the Code.

### C. Offender Assessment

Before a Crown prosecutor submits a dangerous offender or long-term offender application, experts in corrections and mental health must assess the offender's behaviour in order to establish a psychological diagnosis.<sup>(26)</sup> In the case of a sexual offender, the sexual preferences and deviances will also be assessed. The assessment, which lasts a maximum of 60 days, is based on reasonable criteria for dangerousness<sup>(27)</sup> and on the possibility of supervising the offender in the community. The assessment report will be entered into evidence and the experts will be able to testify in court.

### D. Evidence

Depending on whether it is a dangerous offender application or a long-term offender application, the prosecution will have to prove, beyond any reasonable doubt, very specific elements.<sup>(28)</sup> It will also have to convince a judge sitting without a jury<sup>(29)</sup> that the offender presents a high risk of recidivism.

In the case of a dangerous offender, the judge will first of all have to be convinced that the underlying offence constitutes a serious personal injury offence.<sup>(30)</sup> Then it will have to be shown that the offender represents a danger to society. To do that, the prosecution will have to prove that the offender demonstrates a marked indifference to the consequences of his actions,<sup>(31)</sup> that his or her behaviour is so brutal that it cannot be controlled<sup>(32)</sup> or, again, that the

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(26) Section 752.1 of the Code. See Solicitor General of Canada, *High-Risk Offenders: A Handbook for Criminal Justice Professionals*, May 2001 ([http://ww2.psepc-sppcc.gc.ca/publications/corrections/200105\\_Handbook\\_e.asp](http://ww2.psepc-sppcc.gc.ca/publications/corrections/200105_Handbook_e.asp)).

(27) For example: preference for children; criminal social environment; mental problems; antisocial tendencies (characterized by impulsiveness, egocentricity, thrill-seeking, inability to control one's actions, as well as a criminal propensity and flagrant indifference to the welfare of others). See James Bonta, Andrew Harris (Solicitor General of Canada) and Ivan Zinger, Debbie Carrière (Carleton University), *The Crown Files Research Project: A Study of Dangerous Offenders*, May 1996 ([http://ww2.psepc-sppcc.gc.ca/publications/corrections/199601\\_e.asp](http://ww2.psepc-sppcc.gc.ca/publications/corrections/199601_e.asp)).

(28) *R. v. B. (R.B.)*, (2002) 174 B.C.A.C. 243. It is worth pointing out that, before considering designating an offender a dangerous offender, the judge must determine whether a designation as a long-term offender would be more appropriate (*R. v. Johnson*, [2003] 2 S.C.R. 357, par. 40).

(29) Subsection 754(2) of the Code.

(30) Paragraphs 753(1)(a) and (b) of the Code.

(31) Subparagraph 753(1)(a)(ii) of the Code.

(32) Subparagraph 753(1)(a)(iii) of the Code.

offender is incapable of controlling his or her actions or sexual impulses and will in all probability<sup>(33)</sup> cause death or other serious injury if he or she is not put in preventive detention.<sup>(34)</sup>

In the case of a long-term offender, the underlying offence must, first of all, be a serious personal injury offence or a sexual offence covered by paragraph 753.1(2)(a) of the Code. The judge will then have to be convinced that there is reason to impose a prison sentence of two years or more, that the offender presents a high risk of recidivism and that there is a real possibility of managing that risk within the community.<sup>(35)</sup>

In both cases, evidence concerning the offender's morality or reputation is admissible in court.<sup>(36)</sup> And while prior convictions are not essential to decide that the dangerous offender or long-time offender designation is warranted,<sup>(37)</sup> most of these offenders have a criminal record.<sup>(38)</sup> The prosecution may also enter into evidence behaviour that did not result in a charge.<sup>(39)</sup> The judge will also examine the offender's previous behaviour to help evaluate the potential dangerousness.<sup>(40)</sup> In order to determine whether the risk can be controlled within the community, the court will consider, among other things, the offender's age, character, family or community support, and the circumstances of the offence.<sup>(41)</sup>

## E. Sentencing

Since 1997, a dangerous offender designation has automatically resulted in an indeterminate prison sentence in a penitentiary.<sup>(42)</sup> Thus, no statutory release date is set.<sup>(43)</sup>

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(33) See *R. v. Currie*, [1997] 2 S.C.R. 260, par. 42.

(34) Subparagraph 753(1)(a)(i) ff. 753(1)(b) of the Code.

(35) Subsection 753.1(1) of the Code.

(36) Section 757 of the Code.

(37) *R. v. Langevin*, (1984) 39 C.R. (3d) 333; Solicitor General of Canada (2001).

(38) Ninety-three percent of dangerous offenders and ninety-eight percent of long-term offenders have at least one prior conviction as an adult (*Trevethan et al.* (2002), p. 21).

(39) *R. v. Neve*, (1999) 137 C.C.C. (3d) 97 (C.A. Alta).

(40) See *R. v. Ménard*, REJB 2002-35993 (C.A. Que).

(41) *R. v. Blair*, (2002) 164 C.C.C. (3d) 453 (C.A. BC).

(42) Subsection 753(4) of the Code. A large number of dangerous offenders have been incarcerated for over 20 years [Solicitor General of Canada (2001)].

(43) See s. 127 of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20.



However, a dangerous offender is eligible for day parole after four years' imprisonment<sup>(44)</sup> and for ordinary parole after seven years.<sup>(45)</sup> Dangerous offenders who are paroled are monitored for the rest of their lives.<sup>(46)</sup> If they continue to present an unacceptable risk for society, they will stay in prison for life.<sup>(47)</sup>

In the case of long-term offenders, a prison sentence of two years or more will be followed by a long-term supervision order (LTSO), of a maximum duration of 10 years, in order to ensure the offender is monitored in the community.<sup>(48)</sup> It is important to note that a long-term offender remains eligible for parole. The LTSO does not take effect until the expiration date of the warrant of committal.<sup>(49)</sup>

While the order is in effect, the long-term offender will have to respect the conditions imposed by the National Parole Board (NPB).<sup>(50)</sup> Failure to observe the conditions of an LTSO is punishable by a maximum of 10 years' imprisonment.<sup>(51)</sup> As a preventive measure,

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(44) Paragraph 119(1)(b) of the *Corrections and Conditional Release Act*. In day parole, the offender must return to the correctional institutional or community residential facility each night.

(45) After that, the Parole Board will have to assess the offender's file every two years (ss. 761(1) of the Code). In May 2005, out of a total of 336 active dangerous offenders, 17 benefited from some form of parole (Public Safety and Emergency Preparedness Canada, *Dangerous Offender Designation*, [http://www.psepc-sppcc.gc.ca/prg/cor/tls/dod-en.asp?lang\\_update=1](http://www.psepc-sppcc.gc.ca/prg/cor/tls/dod-en.asp?lang_update=1)).

(46) Solicitor General of Canada (2001).

(47) See ss. 101 and 102 of the *Corrections and Conditional Release Act* and Charles B. Davison, "The Next Step after *Johnson*: The Royal Prerogative of Mercy and Dangerous Offenders," (2003) 13 C.R. (6<sup>th</sup>) 227.

(48) Subsection 753.1(3) of the Code. The average length of the prison sentences imposed is a little more than four and a half years (Trevethan *et al.* (2002), p. 24). In 70.7% of cases, the court imposed a monitoring period of 10 years (Public Safety and Emergency Preparedness Canada (2005), p. 105). The LTSO extends the period of monitoring in the community, because research shows that the recidivism period is longer in the case of sexual offenders (Trevethan (2002), p. 4); see Public Safety and Emergency Preparedness Canada, *Sex offender recidivism*, Research summary, Vol. 9, No. 4, July 2004, [http://www.psepc-sppcc.gc.ca/res/cor/sum/cprs200407\\_1-en.asp?lang\\_update=1](http://www.psepc-sppcc.gc.ca/res/cor/sum/cprs200407_1-en.asp?lang_update=1).

(49) Subsection 753.2(1) of the Code. As well, the period required to review an application for pardon (three or five years) will not begin until the LTSO expires (s. 4 and 4.01 of the *Criminal Records Act*, R.S. 1985, c. C-47).

(50) Subsections 134.1(1) and (2) of the *Corrections and Conditional Release Act*. For example: abstain from consuming intoxicating substances; not possess a firearm; participate in a program for sexual offenders or a 90-day residency condition (*Normandin v. Canada (Attorney General)*, 2005 FCA 345). The offender or the NPB can ask the court to reduce the supervision period or cancel the order (ss. 753.2(3) of the Code).

(51) Subsection 753.3(1) of the Code. The prison sentence will be served in a penitentiary, even if it is a sentence of less than two years (par. 743.1(3.1) of the Code). As of 10 April 2005, 12 long-term offenders (out of a total of 105 long-term offenders subject to an LTSO, which represents a little over 11%) had been declared guilty of a new offence while they were being supervised under the LTSO (Public Safety and Emergency Preparedness Canada (2005), p. 106). In those cases, the LTSO was suspended until the offender had finished serving the new sentence (ss. 753.4(1) of the Code).

the NPB may even, in order to prevent a potential violation of the LTSO or to protect society, order the offender's imprisonment for a maximum period of 90 days.<sup>(52)</sup>

The Code allows an appeal of the dangerous offender or long-term offender designation.<sup>(53)</sup> The length of the supervision period imposed on the long-term offender under an LTSO may also be appealed.

## PROFILE OF OFFENDERS

### A. A Limited Group

Between 1978 and April 2005, a total of 384 criminals were designated dangerous offenders.<sup>(54)</sup> In May 2005, there were 319 in the prison population.<sup>(55)</sup> While, on average, 14 people a year are designated dangerous offenders, that number has generally increased in recent years, rising from 8 (1978 to 1987) to 22 offenders a year (1995 to 2004).<sup>(56)</sup> According to data collected in April 2005, there were no women in this group, while the Aboriginal population accounted for 20.3% of dangerous offenders.<sup>(57)</sup>

From 1 August 1997 to 10 April 2005, 311 criminals were designated long-term offenders, an average of some 39 a year.<sup>(58)</sup> As of the later date, there were four women in this group. It is worth noting that, according to the 2001 data, the number of long-term offenders has increased continuously since the new provisions came into force in 1997.<sup>(59)</sup>

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(52) Paragraph 135.1(1)(c) and ss. 135.1(2) of the *Corrections and Conditional Release Act*.

(53) Section 759 of the Code.

(54) Public Safety and Emergency Preparedness Canada (2005), pp. 103 and 104. A large number of criminals were designated dangerous offenders in Ontario (161) and British Columbia (86). Then come Alberta (31), Quebec (30) and Saskatchewan (29).

(55) Public Safety and Emergency Preparedness Canada, *Dangerous Offender Designation*.

(56) Public Safety and Emergency Preparedness Canada (2005), p. 103. The lowest number of persons designated dangerous offenders was (3) and the highest in 2001 (29).

(57) *Ibid.*

(58) *Ibid.*, p. 105. The majority were designated long-term offenders in Ontario (81), Quebec (79) or British Columbia (56).

(59) Trevethan *et al.* (2002), p. 15.

## B. The Offences

Many dangerous offenders and long-term offenders are habitual criminals. At the time they were designated, 45% of dangerous offenders and 26% of long-term offenders had 15 or more previous convictions on their adult record.<sup>(60)</sup> And this cycle of criminality often began at a young age, the average age on first conviction being 22 (dangerous offender) and 25 (long-term offender).<sup>(61)</sup> However, the average age at the time of designation was around 40.<sup>(62)</sup>

When the underlying offence is not a sexual offence<sup>(63)</sup> – typically sexual assault or an act of pedophilia – it is still serious<sup>(64)</sup> and involves violence and coercion,<sup>(65)</sup> typically armed assault<sup>(66)</sup> or kidnapping or forcible confinement.

## C. Victims and the Risk of Recidivism

When they had previous offences, most of the dangerous offenders and long-term offenders had three or more victims.<sup>(67)</sup> Female victims predominate.<sup>(68)</sup> Studies show that the majority of dangerous offenders (49%) and long-term offenders (61%) had victimized children.<sup>(69)</sup> As the factor most predictive of sex offence recidivism is a preference for children,<sup>(70)</sup> it is not surprising to learn that 98% of dangerous offenders and 90% of long-term offenders are classified as at high risk to re-offend.

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(60) *Ibid.*, p. 21.

(61) *Ibid.*, p. 27. Moreover, according to a 1996 study, 75% of dangerous offenders had a juvenile record and 96.6% showed evidence of forcible sexual activity before the age of 16. What is more, many dangerous offenders admitted committing numerous sexual offences for which they were not charged, an average of 27 (Bonta *et al.* (1996)).

(62) Trevethan *et al.* (2002), pp. 19 and 27.

(63) In other words, in 18% (dangerous offenders) and 23.55% (long-term offenders) of cases (Public Safety and Emergency Preparedness Canada (2005), pp. 103 and 105).

(64) Trevethan *et al.* (2002), p. 66. The dangerous offenders caused physical injury and serious psychological damage in 31% and 88% of cases, respectively. The percentages are 9% and 89% in the case of long-term offenders.

(65) *Ibid.*, pp. 23, 26 and 60.

(66) Forty percent of dangerous offenders used a weapon while committing the underlying offence (*Ibid.*, p. 26).

(67) *Ibid.*, p. 25. In other words, 80% of dangerous offenders and 75% of long-term offenders.

(68) *Ibid.*, p. 26.

(69) *Ibid.*, p. 25. Few offenders in the general prison population have victimized children.

(70) Bonta *et al.* (1996).