The Legislative Intention

Howard Buckman, Sheldon Price, and Michael Vineberg *

The 1961 House of Commons Debates on amendments to the Criminal Code reflect the unique position of the habitual criminal. As the Archambault Commission noted "the purpose of the prison is neither punitive nor reformative but primarily segregation from society".[1] The penal system must balance the need for segregation with the realization that judges will not impose preventive detention should such terms be inordinately arduous.

Parliament added section 575B to the Criminal Code in 1947 to provide stringent sanctions on habitual offenders. This section empowered the court to impose an indeterminate sentence upon the habitual offender to be served concurrently with the sentence related to the committed offence. Provision was made for periodic review by the Minister of Justice who was granted authority to release prisoners no longer constituting a threat to society.

The Hansard reports indicate that this measure was directed at the incorrigeable criminal. Mr. Jaenick (Kinderslay) commented:

> A habitual criminal — I might call him an incurable criminal — should be put in a place of safety so that he will not be able to do any more damage. I would consider an incurable criminal on a par with a mentally incompetent person.[2]

Several opposition members expressed concern regarding the indeterminate length of the sentence and the pessimistic flavor of the legislation. Mr. Diefenbaker noted:

> I agree with the honourable member for Broadview (Mr. Church) that what we are doing here is bringing in punitive legislation against the habitual offender without having given him an adequate opportunity of rehabilitation after discharge from a penal institution... I do feel that more attention should be given to rehabilitation.[3]

The legislative interest is expressed by the statements of the Minister of Justice, Mr. Ilsley. Recognizing the extreme character of the legislation, he contended that slight reformative potential existed

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* Of the Junior Board of Editors, McGill Law Journal.

[1] Royal Commission to Investigate the Penal System of Canada, 1938, p. 223.

[2] House of Common Debates, June 26, 1947. Hansard # 5030.

[3] *Ibid.*, # 5063.

for this class of criminals and held out the olive branch of periodic review by the Minister. Mr. Ilsley cogently expressed the legislative intent and his exasperation with the problem in the following passages:

> What is contemplated under the section is that habitual offenders would be placed under preventive detention for an indeterminate sentence, but that their conduct will be reviewed by the Minister of Justice. The Minister must keep in touch with that man's conduct and provision is made therefore in that section. He must review at least every three years... The sentence is not a life sentence, necessarily. It contemplates release if a man reforms.[4]
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> ...The important thing after all, is the protection of society and I cannot work up very great feelings of righteous indignation in favour of the suggestion that we are unjust in the law to men who have been guilty of serious crimes three times, as shown by their convictions and who have committed a fourth crime and having been found by judge and jury to be leading persistently criminal lives this is what they are punished for and not for any crime they have not committed. They are not punished in anticipation but for what they have done and this is a form of punishment which is necessary for the protection of society.[5]

The Progressive Conservative government sponsored a series of amendments to the provisions regarding habitual criminals. Application to have a person declared an habitual criminal could be made at any time up to three months following the imposition of sentence rather than at trial. While previously a sentence of indeterminate length was added to the sentence relating to the offence, a second amendment provided that only a sentence of indeterminate length be imposed upon the habitual criminal.

The category of the habitual criminal previously encompassed the sexual psychopath whose presence not only endangered society, but also added to the spread of his criminal disease. Following the recommendations of the McRuer Commission,[6] specific legislation was introduced to deal with the sexual offender. While the "normal" habitual offender must have been sentenced three times for periods of a minimum of 5 years, no such prerequisite need exist before the court may declare a prisoner to be a habitual sexual offender.

The large number of amendments and the presence of a depleted opposition produced insipid debate in the House. Considerable attention was focused on the problem of the depraved sexual offender and the possibility of reformation. Only a handful of M.P.'s commented upon the legislation concerning the general category of habitual offenders.

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[4] *Ibid.*, # 5056.

[5] *Ibid.*, # 5061.

[6] Royal Commission on the Criminal Law Relating to Criminal Sexual Psychopaths, 1958.

Miss LaMarsh recognized the severity of the legislation but stated that her experience as a criminal lawyer attested to the criminals' fear of these provisions. The preventive aspect of indeterminate incarceration should not be disregarded:

> In my experience with habitual criminals or those who characterize themselves as professional thieves or professional robbers — and there are, shockingly enough, in Canada those who pride themselves on this title — they are afraid of what they call "the bitch". As they collect a record of convictions they come terrifyingly close to the point where a crown attorney may lay this charge. Within the brief span of my eleven years in practice, most of which has been in criminal law, I found that nothing deterred or frightened a professional criminal with a record as much as the possibility of a charge of being an habitual criminal.[7]

Mr. Baldwin and Mr. Roberge expressed their approval of clause 39 which provided for annual submission of all habitual criminal cases by the Minister of Justice whose functions are exercised by the Parole Board. While Mr. Regnier contended that the sentencing judge should also determine whether a sentence of indeterminate length be imposed, the Minister of Justice defended the amendment enabling a hearing subsequent to the conviction. Mr. Fulton stated:

> We had thought rather that the opposite principle should govern on the grounds that where a jury had also heard and disposed of a case — the application would not arise unless the accused had been convicted of that specific charge — it would then be undesirable to have the same court which had convicted on the specific charge deal with the application to have him declared a dangerous offender or habitual criminal.[8]

The criminal law, motivated by sentiments of pessimism and insensitivity, has imposed stringent penal sanctions upon the habitual criminal. Punitive or reformative goals have been subordinated to the requirement of segregation. While annual review offers a ray of hope, the character of indeterminacy of sentencing has caused judges to hesitate before applying the provisions of s. 575B.

The Hon. Mr. Fulton, looking over this problem, explained the nature and purpose of the 1961 amendments in the following way:

> The basic reason underlying this change was that some two years previously, we had established the National Parole Board. This Board was given the responsibility for reviewing the sentences of all those confined in federal penitentiaries, and to determine whether, even before the expiry of sentence, it was in the interests of the convicted person and of society that he be liberated on parole to spend the balance of his sentence under some degree of supervision but otherwise as a useful and productive member of society. Many persons found to be habitual criminals are not dangerous offenders. Previously, the indeterminate sentence was added to the sentence imposed

[7] House of Commons Debates, June 19, 1961. Hansard ‡6543.
[8] *Ibid*, ‡6565.

for the committed offence. This fixed sentence was removed in the 1961 amendments. It might well be that, especially under improved programs of penology, they would be qualified for release on parole some considerable time prior to the expiry of that sentence. It is true that the Parole Board has the discretion to grant parole at any period within the term of the sentence; nevertheless there are certain basic guide rules which they have to work out and apply in order to bring some system into their handling of cases and, generally speaking, the guide rule is that parole is not normally given before one-third of the sentence has been served.

It was accordingly our view that since in many cases what is required in the case of habitual criminals is not punishment but rather preventive detention and the greatest need is rehabilitation, we should make the sentence indeterminate. This leaves the Parole Board entirely free to determine at what point in the course of serving his sentence as an habitual offender, an individual has benefitted by the rehabilitative process to the point where he should be liberated. This process can now be carried out free of the inhibitions and restrictions which would otherwise be applicable if a determinate sentence were imposed.[9]

[9] From a letter addressed to the authors in January, 1967.