Criminal Law, Opinion - Featured

Dangerous offender provisions already provide public protection

By Jacob Stilman

The horrific case in British Columbia of 17-year-old Serena Vermeesch – Raymond Caissie, who had recently been released from prison after completing a 22-year sentence for a 1991 rape/abduction, is charged with her murder – has precipitated calls for additional measures for the protection for the public against high-risk offenders.

In the immediate aftermath of such a tragedy it is difficult for any commentator to be dispassionate as the pain and anguish being visited upon the victim's family and friends is unfathomable. As a lawyer, coming to the defence of a criminal justice system that has so obviously failed to protect an innocent young woman will appear insensitive and crass to many readers.

Nevertheless, certain right-wing voices have demonstrated they have no compunction about exploiting this tragedy for the purpose of advancing their tough-on-crime agenda. Predictably, they are sounding a false alarm about a problem that already has a legally entrenched solution. Therefore, being mindful of the pain the Vermeesch family must be experiencing, it is still necessary to remind the public that our laws in fact already provide for the indefinite detention of our worst offenders. We must not allow opportunistic and cynical politicians to continue to mislead us.

In the wake of this murder, the response of Minister of Justice Peter MacKay and that of Surrey mayor Dianne Watts, who is seeking the Conservative Party nomination for this riding, has been to call for revisions to our laws and to the parole system to deny any form of release to high-risk offenders.

MacKay is quoted as saying: "We are looking at ways in which we can toughen the parole provisions, but also we're looking at ways in which the very worst, those who are most violent, those who have committed offences, murder, in concert with other violent offences against the public and the individual, that they're never released."

Just how the parole system can be modified such that a prisoner, having served out the full term of his sentence, can still be incarcerated in perpetuity was not spelled out by our nation's chief prosecutor. Under the Corrections and Conditional Release Act, which governs parole and penal matters within the federal system, an offender who is deemed to be at high risk of reoffending will be denied release under mandatory supervision and can be made to serve out his entire warrant. Indeed this would seem to have been the case for Mr. Caissie, who served all 22 years of his sentence. Tacking on an indefinite term of incarceration after the completion of sentence offends fundamental principles of justice, even for our worst offenders. This is called arbitrary incarceration, and it runs counter to every principle we hold dear living in a democratic society governed by the rule of law.

But more significantly, MacKay's latest musings are demonstrative of a profound level of ignorance about the very laws for which he is responsible. Did he bother to read Part XXIV of the Criminal Code? If he had he would be relieved to know that such a mechanism already exists in the form of the provisions governing Dangerous Offenders. In light of this, his politically motivated call for new ways to keep the Raymond Caissies in jail permanently is utterly moot.

Without getting into the minutia of the dangerous-offender regime, these provisions apply to the case of the offender who is both incorrigible and at high risk of reoffending violently. A Dangerous Offender designation, which is made by a judge at the sentencing stage of a criminal proceeding, can be arrived at in several ways. An offender who commits a predicate offence, which includes virtually every enumerated offence of personal violence, sexual deviancy, firearms offences and the more loosely defined "serious personal injury offence," can trigger this extraordinary sentencing procedure. In the vast majority of cases the dangerous offender provisions will only be resorted to where the offender has already accumulated a significant criminal record of violent or sexual offences. This makes good sense, since the extreme measure of indefinite incarceration ought not be taken lightly.

However, the definitional sections of Dangerous Offender provisions, ss. c. 753(a)(iii) and 753(b) of the Code do not even require that the offender have a prior history of violent or sexual offences. Section 753(a)(iii) of the Code establishes that it is sufficient that the offender display "*any behaviour associated with the offence … that is of such a brutal nature as to compel the conclusion that the offender's behaviour in the future is unlikely to be inhibited by normal standards of behavioural restraint."* Under s. 753(b) the designation is available where the offender has committed a sexual assault offence and "*by his conduct in any sexual matter … has shown a failure to control his sexual impulses and a likelihood of causing injury, pain, or other evil to other persons through failure in the future to control his or her sexual impulses.*"

The takeaway from this is the following: in extreme cases of sexual violence there is already the option by the Crown to seek a Dangerous Offender designation, even where the offender has a limited prior criminal history, or none at all. Moreover, once such a designation is made by the court there is a presumption that the offender will be incarcerated "indefinitely," meaning that it is unlikely in the extreme that the person will be released until they are well past the stage of life where they constitute a threat to the public. Some offenders will never be released. While these particular provisions are rarely resorted to, it is important that the public understand they are available and have been for some time.

If reports about Caissie are accurate, it would seem that he would certainly have qualified as a Dangerous Offender based alone on the facts of his 1991 offence, at least under the present state of the legislation.

Thus, the minister of justice's lament as to there being no recourse but to "toughen up the laws" for extreme cases is, as so often has been the case with his other pronouncements, misguided and ill-informed. Our current laws clearly permit for the indeterminate incarceration of the Raymond Caissies of this world. While it is tragic that these provisions were not previously resorted to in his case, there is no justification for the creation of an arbitrary and ill-defined, and almost certainly unconstitutional, regime of after-the-fact punishment – no matter what the visceral appeal of such pronouncements.