Legislative Summary **LS-638E**

BILL C-25: TRUTH IN SENTENCING ACT

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LEGISLATIVE HISTORY OF BILL C-25

HOUSE OF COMMONS		SENATE	
Bill Stage	**Date**	**Bill Stage**	**Date**
First Reading:	27 March 2009	First Reading:	**9 June 2009**
Second Reading:	20 April 2009	Second Reading:	**16 June 2009**
Committee Report:	**2 June 2009**	Committee Report:	**8 October 2009**
Report Stage:	**5 June 2009**	Report Stage:	
Third Reading:	**8 June 2009**	Third Reading:	**21 October 2009**

Royal Assent: **22 October 2009**

Statutes of Canada **2009, c. 29**

N.B. Any substantive changes in this Legislative Summary that have been made since the preceding issue are indicated in **bold print.**

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BILL C-25: TRUTH IN SENTENCING ACT*

BACKGROUND

A. Purpose of the Bill and Principal Amendments to the Legislation

Bill C-25, An Act to amend the Criminal Code (limiting credit for time spent in pre-sentencing custody) (short title: Truth in Sentencing Act) was introduced by the Minister of Justice and Attorney General of Canada, the Honourable Robert Nicholson, and received first reading in the House of Commons on 27 March 2009.

The bill amends the *Criminal Code* (the Code) to limit the credit a judge may allow for any time spent in pre-sentencing custody in order to reduce the punishment to be imposed at sentencing, commonly called "credit for time served."(1) There are three scenarios:

- In general, a judge may allow a maximum credit of one day for each day spent in pre-sentencing custody ("custody" in the bill) (clause 3 of the bill, new section 719(3) of the Code). **On 8 October 2009, the Standing Senate Committee on Legal and Constitutional Affairs proposed to amend the bill to allow a maximum credit of one and one-half days for each day spent in pre-sentencing custody. However, the Senate defeated the amendment on 20 October 2009.**

- However, if, and only if, the circumstances justify it, a judge may allow a maximum credit of one and one-half days for each day spent in pre-sentencing custody (clause 3 of the bill, new section 719(3.1) of the Code). **On 8 October 2009, the Standing Senate Committee on Legal and Constitutional Affairs proposed to amend the bill to allow a maximum credit of two days for each day spent in pre-sentencing custody. However, the Senate defeated the amendment on 20 October 2009.**

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* Notice: For clarity of exposition, the legislative proposals set out in the bill described in this Legislative Summary are stated as if they had already been adopted or were in force. It is important to note, however, that bills may be amended during their consideration by the House of Commons and Senate, and have no force or effect unless and until they are passed by both houses of Parliament, receive Royal Assent, and come into force.

(1) In this document, "pre-sentencing custody" refers to detention before and during trial. This should not be confused with "preventive detention," which is a sentence, and therefore theoretically can be imposed only after conviction, in particular in the case of dangerous offenders. For a more detailed discussion of these terms, see Marie-Luce Garceau, "La détention provisoire au Québec : une pratique judiciaire courante," *Criminologie*, Vol. 23, No. 1, 1990, pp. 117–134.

- If the person's criminal record or breach of conditions of release on bail was the reason for the pre-sentencing custody,(2) a judge may not allow more than one day's credit for each day spent in pre-sentencing custody (clause 3 of the bill, new section 719(3.1) of the Code). **On 8 October 2009, the Standing Senate Committee on Legal and Constitutional Affairs proposed to amend the bill to allow a maximum credit of one and one-half days for each day spent in pre-sentencing custody. However, the Senate defeated the amendment on 20 October 2009.**

The bill is the result of an agreement reached at the federal/provincial/territorial meetings of ministers of Justice held in 2006 and 2007. At those meetings, the ministers had agreed to limit, in sentencing, the credit allowed for pre-sentencing custody and had proposed rules similar to the ones set out in the bill: a maximum credit of one and one-half days against sentence for each day spent in pre-sentencing custody, and of one day for each day spent in pre-sentencing custody in cases where the accused was detained because of a criminal record or a breach of bail conditions.

B. Current Credit for Pre-sentencing Custody

Section 719(3) of the Code provides that, in determining a sentence, a court may take into consideration time spent in pre-sentencing custody. Thus, the court is not required to do so.

The widespread practice of counting time spent in pre-sentencing custody as double time(3) derives from decisions of the courts. The courts have held that this practice is common, but not automatic.(4)

In the opinion of the Supreme Court of Canada, courts must reduce sentences to take into account pre-sentencing custody, unless they justify not doing so.(5) However, the Supreme Court declined to set a rigid mathematical formula for the reduction. In the Court's opinion, the judge must determine the appropriate sentence, because the judge is in the best position to carefully consider all factors, including whether credit should be allowed for time spent in pre-sentencing custody. It is therefore always a matter of discretion to be exercised on a case-by-case basis.

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(2) In this document, the term "release on bail" includes release on a summons, an appearance notice, an undertaking, a promise to appear and a recognizance (new section 719(3.1) of the Code, which refers to sections 524(4) and 524(8) of the Code).

(3) Some courts have counted time spent in pre-sentencing custody as triple time.

(4) See *R.* v. *Dadgar*, REJB 2004-61549 (Que. C.A.).

(5) *R.* v. *Wust*, [2000] 1 S.C.R. 455, para. 44.

In 2005, the Manitoba Court of Appeal cautioned trial courts against the danger of automatically allowing double or triple credit without taking the specific circumstances of the case into consideration.(6) In that case, the Court of Appeal upheld the decision of the trial judge to allow credit of one and one-half days for each day in pre-sentencing custody.

Where a minimum term of imprisonment is provided in legislation, a judge may allow a credit for time spent in pre-sentencing custody, even if the effect appears to be to reduce the sentence to below the minimum set in the law.(7) However, the Supreme Court has held that an offender who deserves imprisonment for two years or more cannot be given a conditional sentence because of credit allowed for time spent in pre-sentencing custody.(8)

It is important to note that a sentence reduction for pre-sentencing custody can also influence where an offender is incarcerated after conviction.(9) It may be that credit granted to compensate for time spent in pre-sentencing custody would mean that an individual would serve a sentence in a provincial or territorial correctional institution (sentence of less than two years) rather than a federal institution (sentence of two years or more).(10)

Part of the courts' justification for crediting two days for each day spent in pre-sentencing custody is the fact that time spent in pre-sentencing custody does not count in calculating eligibility for parole.(11) As well, the credit provides some compensation for the stricter and harsher conditions in pre-sentencing custody that result from the high level of security, overcrowding problems and the fact that there are no training and treatment programs in many institutions.

On the other hand, the courts have specified situations where two-for-one credit should not apply:

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(6) In *R.* v. *Roulette et al.*, 2005 CAMB 149.

(7) *R.* v. *Wust*. See also *R.* v. *Arrance*, [2000] 1 S.C.R. 488, and *R.* v. *Arthurs*, [2000] 1 S.C.R. 481.

(8) *R.* v. *Fice*, [2005] 1 S.C.R. 742.

(9) It should be noted that the provincial and territorial correctional services are generally responsible for people in pre-sentencing custody.

(10) The Correctional Service Canada (federal level) administers sentences of two years or more, while the provincial and territorial correctional services are responsible for administering sentences of imprisonment for less than two years.

(11) The parole eligibility date is calculated from the date of sentencing (s. 719(1) of the Code), except for life sentences, for which the date is calculated from the date when the person was arrested or taken into custody (s. 746 of the Code). Correctional services and parole boards are not authorized to reduce the time that must be served before being eligible for parole by taking time served in pre-sentencing custody into account.

- the accused has been convicted of a violent offence and shows little hope of rehabilitation;(12)
- the accused has had full access during pre-sentencing custody to educational, vocational and rehabilitation programs;(13)
- the evidence shows that the accused will likely not be granted parole.(14)

C. Statistical Portrait of the Use of Pre-sentencing Custody

A review of the statistical data from adult correctional services in Canada indicates that the use of pre-sentencing custody increased substantially between 1996–1997 and 2005–2006.(15) On average, the number of adults in pre-sentencing custody in provincial and territorial institutions on a given day in 2005–2006 was higher than the number of adults incarcerated after conviction, the proportions being about 53% and 47%,(16) respectively, while the proportions had been 30% and 70% in 1996–1997.(17)

The length of time spent in pre-sentencing custody also rose during that period. In 1996–1997, 62% of people in pre-sentencing custody were incarcerated for one week or less,(18) compared to 54% in 2005–2006. In addition, the proportion of adults who spent three months or more in pre-sentencing custody rose from 4% to 7% over the same period.(19)

For provincial and territorial correctional services, that increase can result in a significant growth in costs associated with transportation and security – since inmates have to appear in court and must be tightly supervised – as well as a rise in overcrowding problems.

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(12) *R.* v. *M. (C.A.)*, [1996] 1 S.C.R. 500, paras. 95–96.

(13) *R.* v. *Wust*, para. 455.

(14) *R.* v. *Mills*, (1999) 133 C.C.C. (3d) 451, para. 48 (B.C.C.A.).

(15) Rebecca Kong and Valerie Peters, "Remand in adult corrections and sentencing patterns," *Juristat*, Vol. 28, No. 9, October 2008, Statistics Canada, Catalogue No. 85-002-X, http://www.statcan.gc.ca/pub/85-002-x/2008009/article/10706-eng.pdf.

(16) Ibid.

(17) Ibid.

(18) The shortest period of detention used for statistical purposes is one week or less, which means that a reduction in the proportion of people incarcerated for a week or less leads to an increase in the proportion of people incarcerated for longer periods, and thus in the length of periods in custody.

(19) Ibid.

DESCRIPTION AND ANALYSIS

A. Judicial Release (Clause 2)

At the bail hearing, a judge may order that an accused who has a criminal record be placed in pre-sentencing custody.[20] Clause 2 of the bill provides that the judge must then state that reason in the record. This provides the judge who later sentences the person with the reason for the pre-sentencing custody order, and (under clause 3 of the bill) prevents the judge from allowing more than one day's credit for one day in pre-sentencing custody.

B. Credit for Pre-sentencing Custody Provided in the Bill

1. Limits on Credit for Pre-sentencing Custody (Clause 3)

Clause 3 of the bill restricts judicial discretion by setting maximum limits on credit for pre-sentencing custody. A judge who sentences someone after conviction still has the discretion to allow or deny credit for pre-sentencing custody and to determine how much credit will be allowed, without exceeding the maximum set by the bill.

In general, the bill changes the two days for one currently credited to one day for one, that is, it limits the credit for pre-sentencing custody to a maximum of one day for each day spent in pre-sentencing custody (new section 719(3) of the Code). That maximum applies to all cases in which the accused was in pre-sentencing custody because of his or her criminal record[21] or breach of conditions of release on bail, including the commission of a criminal offence (new sections 719(3) and 719(3.1) of the Code).

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(20) Section 515(10) of the Code sets out the circumstances that may justify pre-sentencing custody, including that the judge believes that the person is a danger to himself or herself or others, that the person may attempt to evade justice by failing to attend in court on the date set for the next appearance, or that it is desirable in order to maintain public confidence in the administration of justice. The burden of proof is ordinarily on the Crown proscecutor, which must satisfy the judge that the accused should not be released on bail. The criteria for making the decision include previous convictions, the accused's previous experience in detention, the seriousness of the offence, the type of victim involved and whether an arrest warrant was issued.

(21) The bill uses the term "previous conviction" but does not define it or limit it to certain offences (new sections 515(9.1) and 719(3.1) of the Code).

The bill also provides for more credit to be given – a maximum of one and one-half days for each day spent in pre-sentencing custody – but only "if the circumstances justify it" (new section 719(3.1) of the Code). However, it gives no examples of the kind of circumstances in question.

By reducing the credit allowable for pre-sentencing custody, the bill will probably result in the imposition of longer sentences.

2. Mandatory Reasons and Statement of Reasons in the Record (Clause 3)

Clause 3 of the bill provides that a judge who decides to allow credit for pre-sentencing custody must give reasons for the decision and state those reasons in the record (new section 719(3.2) of the Code). Other matters that the judge must state include the amount of time credited (e.g., one day for one day credit), the sentence actually imposed and the term of imprisonment that would have been imposed if credit had not been given for pre-sentencing custody (new section 719(3.3) of the Code).

Although studies tend to show that judges commonly give two days' credit for each day of pre-sentencing custody, judges currently have complete discretion as to whether to grant any credit and as to the amount of time to be allowed, taking the circumstances of each case into consideration. At present, however, there are no data concerning how judges apply credits for pre-sentencing custody to the sentences they impose. We do not know how common the practice is, or what the total length of sentences of incarceration imposed is. In addition, official sentencing statistics do not reflect time served in pre-sentencing custody, and this may give the impression that total sentences imposed at sentencing are less harsh than they are in reality. This means that the statistics do not give a true picture of the total sentence, and in some cases this may contribute to the idea some people have that the justice system is too soft on offenders found guilty of violent crimes. This incomplete picture of the sentences imposed by the courts may also undermine public confidence in the administration of justice.

The requirement that the judge state the amount of time credited and the term of imprisonment that would have been imposed had the individual not been incarcerated during the judicial proceedings may show that a fair and appropriate sentence for the offence was imposed by the judge. The requirement that the judge justify allowing credit of more than one day for one day in pre-sentencing custody may provide a more accurate picture of how the sentence fits the crime.

3. Application of the New Rules (Clause 5)

As a final point, it is important to note that the new rules governing credit for pre-sentencing custody will apply only to persons charged after the bill comes into force.

COMMENTARY

A national justice survey commissioned by the Department of Justice in 2007[(22)] shows that the Canadian public generally approves of reducing sentences to compensate for time spent in pre-sentencing custody where the accused is convicted of a less serious crime. However, public support declines significantly when it comes to serious crimes. A little more than three quarters of respondents (77%) were of the opinion that credit for time in pre-sentencing custody should be allowed in cases of non-violent offences, but more than half (58.8%) believed that no credit should be allowed for persons convicted of serious violent offences.[(23)]

Some people, including the ministers of Justice, believe it is necessary to change current practice in relation to credit for pre-sentencing custody. Some have argued that the two-day ratio, which seems to be the general rule, is too generous, because the formula may be applied without verifying in each case the presumption that conditions are harsher in pre-sentencing custody than in regular detention.[(24)]

In the government's opinion, some lawyers deliberately delay proceedings so their clients will be given the two-for-one credit, and thus shorter terms of imprisonment automatically. Accordingly, the government believes that if the bill is enacted it will unclog the courts. University of Ottawa criminologist Ronald Melchers has responded that there is no research to prove either that this is common practice among defence counsel or that enactment of the bill could result in unclogging the courts.[(25)]

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(22) The national justice survey was conducted by telephone and 4,502 Canadians aged 18 and over responded. Jeff Latimer and Norm Desjardins, *The 2007 National Justice Survey: Tackling Crime and Public Confidence*, Department of Justice Canada, June 2007.

(23) Ibid.

(24) Paul Barclay, "Truth in sentencing: Toward an Increased Honesty in Sentencing," *The Advocate*, Vol. 66, September 2008, pp. 731–744.

(25) Radio-Canada and Presse canadienne, "Abolir le temps compté en double," 25 March 2009.

By limiting judges' discretion, the bill could reduce disparities between sentences for similar crimes. The new measure would also mean that the public could be informed of the reasons for reducing a sentence by more than one day for each day in pre-sentencing custody. This greater transparency in sentencing could increase public confidence in the administration of justice.

It is also important to note that, as a rule, pre-sentencing custody is a last resort to be used only in exceptional cases and in moderation. In many cases, an individual in pre-sentencing custody is being held in custody even before being convicted. On this point, the Canadian Committee on Corrections(26) and the Law Reform Commission of Canada(27) stressed that pre-sentencing custody should be used only where it is determined to be essential in order to protect society.

(26) Canadian Committee on Corrections, *Report of the Canadian Committee on Corrections – Towards Unity: Criminal Justice and Corrections*, Ottawa, 1969.

(27) Law Reform Commission of Canada, *Compelling Appearance, Interim Release and Pre-Trial Detention*, Working Paper No. 57, Ottawa, 1988.