CANADIAN ASSOCIATION OF CROWN COUNSEL COMMENT – Bill C-25

The CACC is comprised of organizations of Crown prosecutors and civil lawyers and notaries employed by the Crown in the federal government and each of the Provinces. These member organizations represent the front-line prosecutors in each province and with the Federal Prosecutions Service. The CACC represents the interests of prosecutors to their respective ministries of justice and to the justice system at large at the national level. As such we are happy to have been given the opportunity to address this Committee on the Amendments to the Criminal Code proposed in Bill C-25.

When the CACC makes comments on a proposed piece of legislation it does so from an apolitical, non-partisan perspective. As befits the quasi-judicial role of Crown attorneys in the criminal justice system, we do not comment on whether a particular proposed change to the law reflects good or bad policy, but strive to provide input on the likely systemic impact of the proposed change "on the ground" from the perspective of a front-line prosecutor. We are strongly of the view that this perspective is critical to your work in making effective criminal law.

In preparation for these submissions, each provincial and federal Crown attorneys association was canvassed regarding their views on the likely impact of the proposed changes to the Criminal Code contained in Bill C-25, which would statutorily fix the range of credit given for pre-trial custody in the sentencing of an accused.

Generally, it is recognized that the development of enhanced credit for pre-trial custody at the stage of sentencing developed from factors directly attributable to remand or pre-trial custody centers which are under-resourced. The principle of enhanced credit for pre-trial custody reflects that ordinarily accused persons in pre-trial custody may be held in custodial environments that cause undue hardship to inmates, and where rehabilitative programming is limited. The principle also recognizes that time spent in pre-trial detention does not apply to the calculation of an accused person's parole eligibility date. As a result the courts have developed an enhanced credit regime that assigns credit on ratios ranging from 1:1 to 3:1 on a case by case analysis.

Bill C-25 does not address any of these underlying reasons for enhanced credit for pre-trail custody.

We have tried to analyse and predict the impact of Bill C-25 on the following practical areas of day-to-day practice in Canadian criminal courts.

The Incentive to Plead Guilty

- **Bill C-25 would likely reduce the incentive for accused to attempt to build "credit" by delaying his or her trial.**
- **For those that intended to plead guilty (for example, those accused facing overwhelming cases for the prosecution) Bill C-25 may result in these guilty pleas occurring at an earlier stage of the proceedings**

The Frequency and Duration of Bail Hearings

- **Bill C-25 would likely increase the frequency and duration of judicial interim release (bail) hearings. There are two reasons for this:**

    - **The reduction in credit given for pre-trial custody would, generally, create a disincentive to consent to detention or otherwise waive the accused's right to a bail hearing.**

    - **Also, the new requirement in Bill C-25 that a judicial officer may note in his or her reasons on a bail application whether the reason for retaining the accused in custody was primarily because of a previous conviction. Where the reason for detaining an accused is because of a previous conviction, the accused will not be eligible on conviction to receive credit beyond 1-1. Therefore, in order to protect their client's interests, defence counsel would generally seek reasons at all bail hearings that would make the accused eligible for enhanced credit for pre-trial custody. Bill C-25 would result in this issue, one that bears directly on sentencing, to be fully litigated at the bail hearing stage.**

        - **This would require a substantial increase in the capacity of the bail courts and preparation time for counsel.**
        - **For those cases that do not proceed to trial or proceed to trial and acquittal, the time which the bail court engaged in the determination of this issue would represent a dead loss to the capacity of the justice system**
        - **It has been well recognized that our bail courts are already over-burdened and significant new resources would have to be added to the criminal justice system to support Bill C-25 in this respect**

The Impact on Plea Negotiations and the Trial Rate

As discussed, Bill C-25 will reduce the incentive for an accused to delay his or her trial date in order to build pre-trial "credit". All jurisdictions are of the view that the reduction of this incentive will accelerate the decision of the accused to either plead guilty or set an early trial date. Whether or not it will lead to more trials or guilty pleas is a matter of debate regionally and merits closer analysis.

In many jurisdictions there is concern, that Bill C-25, as with the other recent Criminal Code amendments which have enshrined new offences, new mandatory minimum sentences and new procedures for dangerous offender designations, will lead to a significantly increased trial rate and fewer guilty pleas.

Some jurisdictions are of the view that Bill C- 25 will lead to more guilty pleas, particularly in circumstances where the crown case against the accused is overwhelming, sooner in the trial process.

In jurisdictions that have workloads that are already over-capacity and where there is a significant delay between date of charge/detention and trial date, Bill C-25 may result in a necessary adjustment of sentencing incentives. In these overburdened jurisdictions, Crown prosecutors and pre-trial judges may well need to offer lower sentences to compensate for the reduction in credit for pre-trial credit in order to plea bargain cases out of the trial stream to create capacity for more serious cases.

In jurisdictions where in-custody matters are set for trial soon after charges are laid, Bill C-25 may result in more trials, as the incentive created by enhanced credit for pre-trial custody is reduced. While this may be a desirable outcome, the pressures on the Crown will be greatly enhanced to advance cases to trial sooner.

The Impact on Accused in the Far North

Many jurisdictions in Canada's far north face the challenge of having very limited criminal justice infrastructure and virtually no local remand facilities. For accused from these communities, detention awaiting trial occurs in urban centres hundreds of kilometres away from their communities in towns or cities where the dominant culture is completely different. In most cases, dues to the limited resources of the court and the infrequent sittings of the court, these accused will spend more time in pre-trial custody that those accused facing similar charges in southern Canada.

It is acknowledged that Bill C-25 would significantly reduce a Judicial or Quasi-judicial officials ability to adequately reflect these extreme circumstances in terms of enhanced pre-trial credit.

Victim’s Comprehension of Credit Given on Sentence for Pre-trial Custody

Bill C-25 would appear to foster a clearer public understanding of the sentencing regime. The public would enjoy a fulsome explanation of the impact of pre-trial custody on the ultimate sentence awarded in a proceeding and would promote greater transparency and comprehension by the public of the sentencing process.