Bill C-25 The Truth in Sentencing Act: An Examination of the Implementation of Criminal Law by the Canadian Judiciary under Challenging Circumstances

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Abstract

In Canada, we regularly incarcerate accused persons while they are still legally innocent. By the turn of the century, the growing number of accused held in pre-sentence custody had become a concern for provincial/territorial governments, and, by extension, the federal government. In an effort to address the problem, Bill C-25 - 'The Truth in Sentencing Act' - was passed into law. Adopting a quantitative as well as qualitative methodology, this study uses a randomly selected sample of 110 cases to examine the implementation of Bill C-25 as a case study of how Canadian judges respond to legislation which likely created friction between the political and judicial social spheres. Analyses suggest that there is strong evidence to support the notion that judges did not fully implement the legislation as intended by the federal government. Instead, it appears that judges may have been motivated to resist the implementation of Bill C-25 in order to protect fundamental principles of justice that were ignored in the drafting of the new law.

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1. Introduction

1.1 The Wider Context: The Bail Process and its Impact on PSC in Canada

In order to understand pre-sentencing custody (PSC) and the concerns associated with it, it is helpful to understand the legal context for its use. In Canada, the issue of PSC arises within the broader process of bail. The Canadian criminal justice system (CCJS) operates under a simple principle defined in s. 11(d) of the Canadian Charter of Rights and Freedoms (henceforth, the Charter): individuals are to be presumed innocent until proven guilty in a fair hearing by an independent and impartial court. The average Canadian citizen is made aware of this fact simply by watching criminal law themed television programs. What is lesser known is that in Canada, we regularly incarcerate many accused persons long before they are proven guilty of any crime through the use of PSC (Doob & Webster, 2012). The population of PSC is largely made up of two distinct groups: those who are awaiting a formal bail hearing and those who have been formally detained as a result of a bail hearing that has already occurred[1] (Doob & Webster, 2012).

A bail hearing in Canada theoretically constitutes a brief appearance in front of a judge or a justice of the peace[2] to determine the short-term fate of those accused of criminal charges who have been detained by police (Trotter, 2010). The primary purpose of a bail hearing is to decide whether or not to release the accused on a promise to appear (i.e., to release an accused with the expectation that he/she will voluntarily attend future court dates). Accused persons may be refused release on a number of grounds which are detailed below. If the accused person is determined to present too great a risk to the safety and security of the community, he/she will be held in PSC until he/she is

[1] This latter group also includes individuals who have (formally or informally) consented to their own detention without requiring the judge to evaluate their eligibility for bail (Webster, 2009).

[2] In Ontario, a justice of the peace often presides over bail hearings. In other provinces and territories in Canada, a judge may perform this duty.

formally sentenced (Trotter, 2010). Individuals held in PSC are known colloquially as the 'remand population' in Canada. The name comes from the action taken by the courts to 'remand' an individual into custody rather than release him/her on bail. Note that prior to this determination hearing, all accused are held in PSC until a decision on their bail eligibility can be made. As outlined in s. 515(10) of the Criminal Code, formal detention of an accused before trial in PSC can only be justified on one or more of the following grounds:

A) Where the detention is necessary to ensure his/her attendance in court;

B) Where the detention is necessary for the protection or safety of the public including regard for all circumstances such as the substantial likelihood that the accused will commit a criminal offence or interfere with the administration of justice if released; and,

C) Where the detention is necessary to maintain confidence in the administration of justice, having regard to all the circumstances, including

    i) the strength of the prosecution's case,

    ii) the gravity of the offense,

    iii) the circumstances surrounding the offense including whether a firearm was used, and

    iv) the fact that the accused is liable upon conviction for a lengthy term of imprisonment or a minimum term of imprisonment of three years or more.

It is notable that the justifications that may be used to order the detention of an accused prior to trial have expanded considerably from the time that the Bail Reform Act became law in 1971 (Trotter, 2010). The Bail Reform Act focused on enhancing civil liberties and restraint in the use of PSC, but this intention has since been continually eroded through amendments (Doob & Webster, 2012). In fact, the sections in the *Criminal Code* relating to the bail process have been amended multiple times since its enactment in 1971 in ways that have the potential to make the usage of PSC

more common[3]. With few exceptions, principal amendments made to the Bail Reform Act have arguably made it more difficult to obtain bail and have often resulted in stricter release orders for the accused (Trotter, 2010). Moreover, from 1978 to 2007 the rate of sentenced prisoners in provincial and territorial prisons declined, whilst the rate of prisoners in PSC tripled from 12.6 per 100,000 to 39.1 per 100,000 residents (Webster, Doob & Myers, 2009). This illustrates the dramatic shift in the sub-populations of provincial/territorial prison systems that occurred during this time period.

1.2 A Serious Problem becomes Apparent

The tripling of the rate of prisoners held in PSC demonstrates a trend that has been concerning to the provinces and territories of Canada. This is concern is evidenced by the fact that then Ministers of Justice in attendance at federal/provincial/territorial (FTP) meetings have regularly noted high PSC rates as an important issue (Webster et al., 2009). Specifically, release statements following annual FTP meetings have noted the PSC population as an identified problem in 2005, 2007 and 2008 (Webster et al., 2009). In Graph 1.1 [see below] one notes that the rate of offenders held in PSC increased considerably from 1978 to 2009.

[3] Illustratively, in s. 510(10)(b) the regulations in both 1971 and 2016 allow that detention can be justified in circumstances in which the judge believes there is a substantial likelihood that the accused would commit a criminal offence. However, in 1971 this hypothetical offense was required to involve serious harm or an interference with the administration of justice. By 2016, this section has been amended such that committing *any* criminal offence is enough to warrant detention (Doob & Webster, 2012). Similarly, amendments to the absolute requirement that the prosecutor must prove the need for detention have suffered modifications that have increased the number of circumstances in which the onus is now placed on the accused to justify his/her own release (Doob & Webster, 2012). An accused must now demonstrate why his/her release is justified in cases where he/she had the charge laid against him/her whilst awaiting trial for another indictable offense, where he/she is not a citizen of Canada, or where he/she is charged with certain drug offenses. Since 2010, accused are also required to demonstrate why they should be released in cases in which the alleged offence involves organized crime, the sale or the use of firearms, or is a terrorism offense (Doob & Webster, 2012).

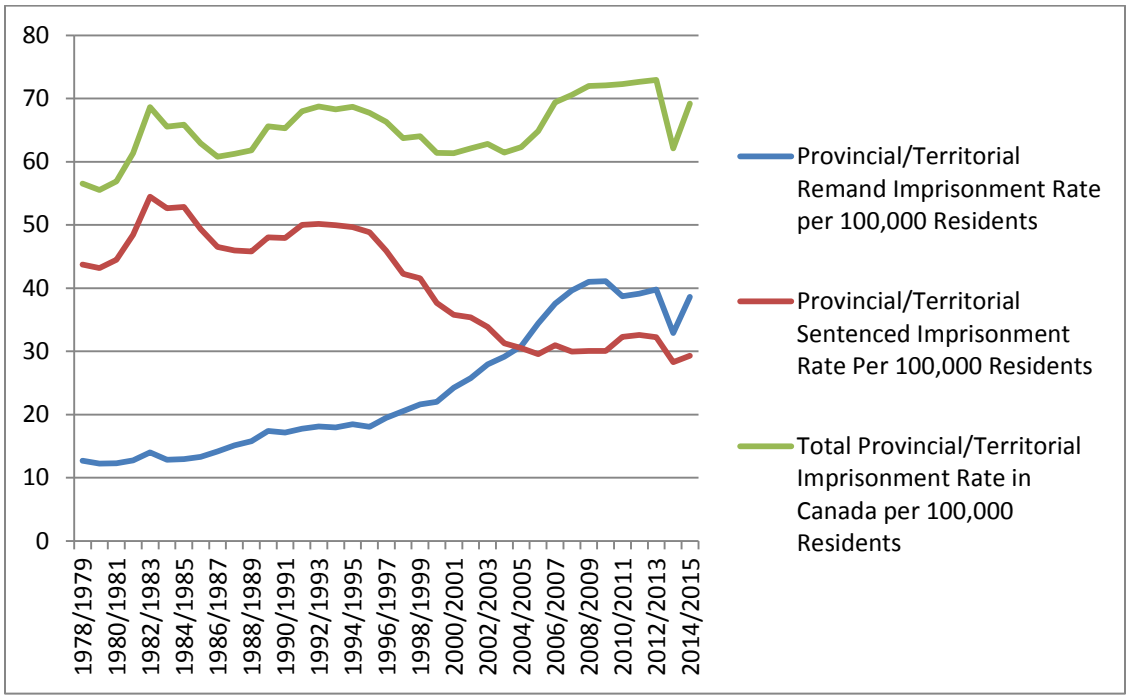

Figure 1.1: Provincial and Territorial Imprisonment Rates in Canada[4]

In Figure 1.2 [see below] the actual-in[5] counts of PSC prisoners in provincial/territorial prisons increased dramatically from 1978 to 2009, after which the rate appears to somewhat stabilize from 2009 to 2015. Notably, since 2004-2005 the actual-in counts of PSC prisoners in provincial/territorial prisons have been higher than those of sentenced prisoners. Further, the total actual-in count of accused/offenders for provincial/territorial prisons was 13,479 in 1978-79. Over three decades later in 2014-2015, this figure is 24,445. Intuitively**,** one would expect rising PSC populations have been accompanied by rising costs.

[4] Table actualized from data acquired through Statistics Canada (2015b). Incarceration rates are based on total actual-in counts as well as the population estimates provided by Statistics Canada. Data represent the total for all reporting jurisdictions. Data for a given year may be incomplete due to missing data for one or more jurisdictions. Comparison among years at the national level should be made with caution. Notably, the drop in incarceration rates of all types in 2013-2014 is largely explained by the lack of any data for Alberta in that year.

[5] Specifically, the total actual-in count in Figure 1.2 [see above] represents persons held in custody under sentence, remand or legal requirement and who were present at the time the count was taken.

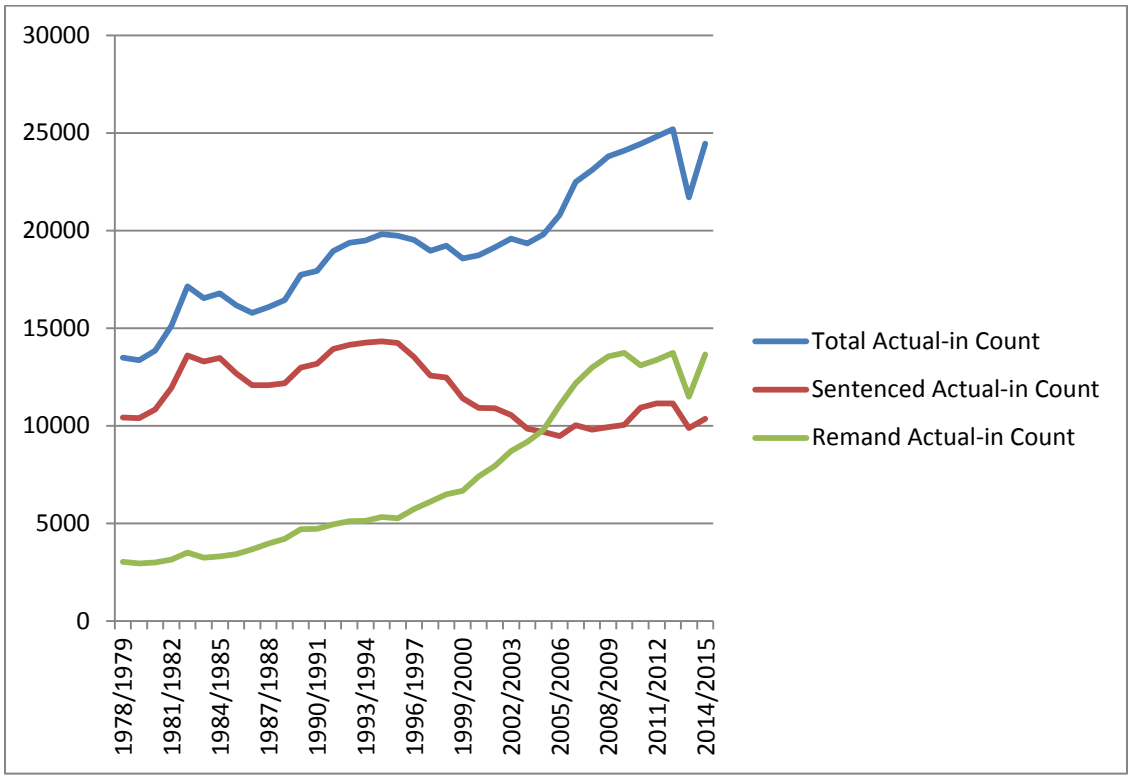

Figure 1.2: Provincial & Territorial Average Imprisonment, Actual-in Counts[6]

In fact, the increasing numbers of offenders serving time in PSC has potentially serious consequences for provincial/territorial governments in Canada. The consequences can be split into two groups: 1) those of an institutional nature; 2) those of an individual or personal nature.

1.3 Institutional Ramifications of High PSC Populations

At first glance, the most self-evident consequence of exploding PSC populations is likely to be financial in nature. In Canada, it falls to the provinces/territories to provide resources to imprison accused that are yet to be sentenced. Expenses associated with this task include providing healthcare, food, correctional staff and facilities. As a case in point, the Ministry of Community Safety and Correctional Services (MCSCS) in Ontario estimated the total costs for all correctional

[6] Table actualized from data acquired through Statistics Canada (2015b). Incarceration rates are based on total actual-in counts as well as the population estimates provided by Statistics Canada. Data represent the total for all reporting jurisdictions. Data for a given year may be incomplete due to missing data for one or more jurisdictions. Comparison among years at the national level should be made with caution. Notably, the drop in incarceration rates of all types in 2013-2014 is largely explained by the lack of any data for Alberta in that year.

services – including those spent on PSC – to be 809.5 million in 2014-2015, up 35 million from 2012-2013 (MCSCS, 2015a)[7]. Correctional services are therefore resource intensive and potentially represent a significant negative drain on provincial/territorial budgets. As the provinces/territories already face challenges funding healthcare, education and other social services for all citizens in their jurisdiction, one would think that the increasing cost of PSC would be a considerable economic concern[8].

Further, there are also numerous other institutional issues related to warehousing such large numbers of accused in PSC. Manson (2001) noted that many correctional institutions are experiencing overcrowding[9], limited recreation, and safety and security limitations due to housing many offenders of varying risk profiles within the same institution. These issues may expose jurisdictions to the risk of potential lawsuits related to health and safety from both offenders and staff. These sorts of deleterious conditions potentially place Canada in contravention of *United Nations (UN) standard minimum rules for the treatment of prisoners* which optimally require one prisoner per cell (United Nations, 1955). This requirement is just one of many conventions set out within the resolution.

[7] Also note that the Justice and Solicitor General business plan from Alberta projected the budget for corrections to grow by up to 2% between 2016 and 2019 (some proportion of which will be spent on PSC). Additionally, total salaries in 2014-2015 for correctional staff in Manitoba were 4% higher than in the estimated budget for 2014-2015 despite only a small increase (from 2,370 to 2,387) in the average daily adult custody population.

[8] However, the population of Canada also rose from approximately 24 million in 1978 to nearly 36 million in 2015 (Statistics Canada, 2015c). Consequently, although the absolute number of accused/offenders in provincial/territorial prisons has increased, the overall rate of imprisonment has changed little – despite minor fluctuations up and down – in nearly 40 years. In 1978-79 the provincial/territorial imprisonment rate was reported as 80.44 per 100,000 adults compared to 85.46 per 100,000 adults in 2014-2015 (Statistics Canada, 2015b). What has changed however is the proportion of offenders that are held in PSC. This proportion rose steadily relative to those held in sentenced custody for three decades until 2009. As seen in Figure 1.2 [see above], these proportions appear to have remained more stable since this time. Thus, when presenting the increasing costs of PSC as a potential topic of concern that might motivate provincial/territorial governments to address PSC, one must acknowledge that the overall rate of provincial/territorial imprisonment has remained relatively stable and the population (i.e., the tax base) has been growing at the same time as the absolute costs for provinces/territories.

[9] Anecdotally, a number of cases read for this study made reference to overcrowding and poor access to recreational facilities.

Less obviously, there is arguably a thorny ethical issue that relates to holding large numbers of persons in PSC facilities. It is important to recall that the accused persons being held in PSC remain ***legally innocent*** as they have yet to be ***proven guilty***. By extension, the striking number of people held under these circumstances could theoretically undermine confidence in the justice system as the legal principle requiring the presumption of innocence might be seen to be eroded.

The ethics of this problem become more problematic when one acknowledges the disproportionate number of indigenous adults imprisoned in Canada. In 2013-2014, Statistics Canada released a report that showed that indigenous adults represented 26% of total custodial admissions – which include both admissions to PSC and to sentenced custody in provincial/territorial prisons – whilst making up only 3% of the Canadian adult population (Statistics Canada, 2015a). Further, Roberts & Doob (1997) found that, at the time, some minorities in Canada were more likely than other groups to be detained in PSC after a bail hearing. These statistics might expose the CCJS to criticism regarding potentially discriminatory policies that have resulted in the over-incarceration of indigenous adults in both PSC and sentenced custody. Similar concerns were raised in the 1995 report of the Commission on Systemic Racism in the Ontario Criminal Justice System (Gittens & Cole, 1995).

1.3.1 Individual Ramifications of High PSC Populations

In addition to institutional level concerns, numerous challenges have been identified that relate specifically to accused persons held in PSC. Manson (2001), for example, identified the personal and legal difficulties with which accused persons struggle whilst held in PSC. For instance, they are likely to experience difficulty in preparing an adequate legal defense. In particular, the fact that it is more difficult to meet with a lawyer, acquire supportive character witnesses, and demonstrate good behaviour in the community prior to sentencing combine to create

circumstances in which those held in PSC are significantly disadvantaged relative to those who are released prior to sentencing (Manson, 2001; Trotter 2010).

Further, with respect to additional legal consequences, Kellough & Wortley (2002) concluded that Crowns were more likely to drop all charges for those accused who were released on bail (Kellough & Wortley, 2002). When an accused was released on bail, he/she was less likely to plead guilty to any of the charges and this made circumstances more difficult for the Crown. In contrast, when an accused was held in PSC, it was more common for the Crown to only withdraw some of the charges in exchange for a guilty plea (Kellough & Wortley, 2002). Therefore, accused who were released and resisted all charges stood a greater chance of seeing all charges dropped. Further, when an accused was held in PSC, he/she stood a chance of increasing his/her time spent in custody (Kellough & Wortley, 2002).

Not surprisingly, numerous scholars have also noted significant familial, vocational and health-related costs associated with being held in PSC. Those costs included the potential of being cut off from family and friends, the financial costs from the loss of work, and the impact on mental and emotional wellbeing from the loss of reputation and self-esteem (Manns, 2005; Manson, 2001; Manson, 2005; Trotter, 2010). Potential difficulties have also been noted in relation to dealing with the stigma of having been held in prison, even if eventually determined to be innocent (Manson, 2001).

In particular, overcrowding in PSC has been documented to led to the addition off 1-2 additional inmates in cells designed to accommodate a single individual (Manson, 2001). Anecdotally, in sentencing decisions consulted for this study, defense lawyers frequently noted that overcrowding would produce circumstances in which an accused would sleep on a cot with his/her head next to the toilet. Additionally, defense counsel noted a lack of access to programming and

education due to lockdowns and lack of resources. This anecdotal reference to harsh conditions is corroborated (at least in Ottawa, Ontario) by the report by the MCSCS on the Ottawa Correctional Detention Centre (MCSCS, 2015b). Further, an accused faces a considerable degree of uncertainty with respect to how long he/she will have to remain in PSC, further adding to his/her stress level.

1.3.2 The Perceived Source of the PSC Problem

Within the context of the above costs and ethical concerns, it is not surprising that provinces and territories have been particularly motivated to address the issue of the large numbers of accused persons being held in PSC. However, in order to accomplish this task, it has been necessary for provinces and territories, and, by extension, the federal government, to determine why the proportion of accused persons being held in PSC has risen relative to sentenced offenders. While most studies (Deshman & Myers, 2014; Doob & Webster, 2012; Webster, 2007) suggest a host of interacting legislative, procedural, cultural and administrative factors, the prior federal government under Harper[10] was considerably more simplistic in identifying the source of the problem.

Specifically, then Minister of Justice, the Honourable Rob Nicholson (henceforth, the then Minister), expressed in the House of Commons (henceforth, the House) that offenders abusing the credit granting system for time spent in PSC was widely viewed as a factor that contributed to increasing PSC populations (HOCD, 2009a). In effect, a major government official had discovered a scapegoat for the problem.

According to the then Minister's theory, accused who were awaiting a bail hearing or those who had already received a bail hearing and been detained were the source of the problem. The then Minister asserted that accused persons were abusing the CCJS by taking advantage of the credit commonly granted for time spent in PSC. As recounted in the case of *R. v. Wust* (2000), those who serve time in PSC have typically been granted two days credit for each day spent in PSC –

[10] The 'Harper Government' will henceforth refer to the Conservative Party of Canada, as led by Stephen Harper, the governing party of the federal government of Canada from 2006 to 2015.

colloquially expressed as 2:1 credit[11]. The then Minister, along with others, including a significant number of criminal justice officials in various provinces and territories, believed that these accused were deliberately delaying their cases in order to increase the time that they spent in PSC, thereby increasing the duration of time for which they would receive 2:1 credit (which was erroneously perceived to be a 'bonus' or unfair advantage of accused persons in PSC).

As a case in point, the then Minister expressed openly to the House that provincial and territorial Attorneys General from across Canada had told him that one of the main reasons for the clogged Canadian court system was because 2:1 credit removed the incentive for accused to move cases forward (HOCD, 2009a). In this instance, the then Minister suggested that there was a bigger problem than simply one of abuse by some offenders. In fact, the then Minister's comments suggested that the 2:1 credit itself was a flawed measure in need of correction.

1.3.4 The Proposed Solution

In order to deal with this perceived problem, the Harper Government introduced new legislation that would constrict the discretion[12] that judges previously had to grant credit. Specifically, Bill C-25 - 'The Truth in Sentencing Act' - would limit the amount of credit a judge may grant for time spent in PSC to a maximum of 1:1 (Casavant & Valiquet, 2009). Effectively, the Harper Government moved to eliminate the 2:1 credit, which, whilst not required by Canadian law, had been commonly established as the appropriate ratio in the case of *R. v. Wust* (2000). The purpose of these proposed changes was to eliminate the incentive to remain in PSC in order to take advantage of the 2:1 ratio. One Conservative Party of Canada (CPC) Parliamentarian - James Bezan

[11] Credit can be defined as the amount of time (in days) that can be applied to reduce an offender's custodial sentence. It is given to account for time spent incarcerated prior to an official determination of sentence (Manson, 2001).

[12] In the case of judges, discretion refers to the amount of freedom that a judge has to construct a particular decision. As a concrete example of recent limitations placed on judicial discretion, an offence with a mandatory minimum penalty of two years of imprisonment restricts a judge's freedom to determine the offender's sanction. Despite potentially determining that -given the degree of culpability of the offender and the seriousness of the offence - the offender deserves a shorter sentence, the judge is obligated by law to hand down a sentence of at least two years in prison.

- stated that Bill C-25 was a great move by the then Minister of Justice because it would expedite the processing of cases and stop those lawyers and offenders who had been 'playing games' within the system to lengthen PSC stays as long as possible in order to receive 2:1 credit (HOCD, 2009a). Comments such as this one articulate the belief held by some within the CPC that Bill C-25 would effectively address the PSC population problem.

Surprisingly, in a review of the debates from committee hearings, debates in the House, and debates in the Senate at the time Bill C-25 was deliberated, there were few, if any comments from members of the Harper Government that reflected a concern with the ethical and fiscal consequences associated with maintaining a large PSC population. The focus of Harper Government representatives when discussing PSC, almost without exception, was on the perception that the rising population of PSC was made up of – and by extension caused by – accused who were purposely delaying the resolution of their cases to obtain what was perceived by Harper Government members to be a discounted sentence via 2:1 credit.

1.4 A Ticking Time Bomb?

In opposition to the views presented by members of the Harper Government, a number of academics, members of Parliament from other parties and legal experts expressed grave concerns regarding the potential impact of Bill C-25. In terms of repercussions on infrastructure, one popular interpretation was that by reducing credit for time spent in PSC, Bill C-25 would lead to longer custodial sentences, resulting in a significant rise in the Canadian prison population. This anticipated result could be perceived as a serious concern for two reasons. First, as aforementioned, imprisonment is a prohibitively expensive solution to crime. Second, Canada has been historically concerned with its high imprisonment rate as compared to those of other western democracies (Webster & Doob, 2007).

In order to illustrate how Bill C-25 could increase the prison population, Professor Tony Doob from the Center of Criminology & Sociolegal Studies at the University of Toronto provided a mathematical example to the Standing Committee on Justice and Human Rights (SCJHR). It demonstrated that because of fundamental mechanisms within the CCJS, any offender who received only the 1:1 credit mandated by Bill C-25 would end up serving a longer sentence of imprisonment than an identical hypothetical offender who was not held in PSC before sentencing (SCJHR, 2009b). Thus, if Bill C-25 was implemented as intended by Parliament, identical hypothetical offenders would necessarily receive disparate sentences, varied in length solely by the issue of whether or not he/she had been held in PSC. Those who had been held in PSC would serve longer sentences of imprisonment, increasing the overall prison population. Corroborating this concern, it is notable that the legislative summary for Bill C-25 acknowledged this possibility when stating that reducing credit would likely result in the imposition of longer sentences for offenders (Casavant & Valiquet, 2009).

Similarly, a number of the witnesses appearing before the SCJHR corroborated Professor Doob's concerns regarding the increased sentence lengths that Bill C-25 might cause. Ms. Dayanoosh Youssefi, from the Law Union of Ontario, urged the committee not to allow the public's lack of understanding of the CCJS to require the implementation of a simpler system that would result in discrimination at sentencing due to the longer sentences imposed (SCJHR, 2009b). Mr. Matthew MacGarvey – also from the Law Union of Ontario - echoed this sentiment by commenting that if Bill C-25 was implemented as written, those serving time in PSC would serve disparately lengthier prison sentences than equivalent sentenced individuals. As such, he explained that the mathematical soundness of the 2:1 credit principle as a general rule was justified compensation for time spent in PSC (SCJHR, 2009b).

1.5 An Unexpected Outcome

Bill C-25 officially came into force on February 22nd, 2010, reducing that the long-standing common credit ratio of 2:1 to 1:1 for time spent in PSC. Despite predictions that Bill C-25 would result in longer custodial sentences for accused held in PSC and ultimately found guilty, the data from Figure 1.3 [see below] suggests that in the 5 years since Bill C-25 came into force, Canada's provincial/territorial imprisonment rates have not shifted dramatically (Statistics Canada, 2015b). As the vast majority of Canada's prisoners are sentenced to serve custodial sanctions of less than two years[13] any increase in imprisonment rates would be expected to be most visible at the provincial/territorial level rather than within the federal inmate population[14]. As such, this thesis has focused on provincial/territorial impacts, where such impacts might be more apparent. Specifically, after an increase between 2003-2004 and 2008-2009, the provincial/territorial imprisonment rate over the past half-decade between 2009-2010 and 2014-2015 appears to have decreased. This is the opposite of what many experts had predicted, further, it is the opposite of what one would have expected to happen, given the introduction of Bill C-25. As can been seen in Figure 1.3 [see below], the total provincial imprisonment rate was 72.1 per 100,000 in 2009-2010 and 69.2 in 2014-2015.

[13] Sentences of two years less a day are under provincial/territorial jurisdiction, and are to be served in provincial/territorial institutions.

[14] Sentences of two years or more are under federal jurisdiction, and are to be served in federal institutions.

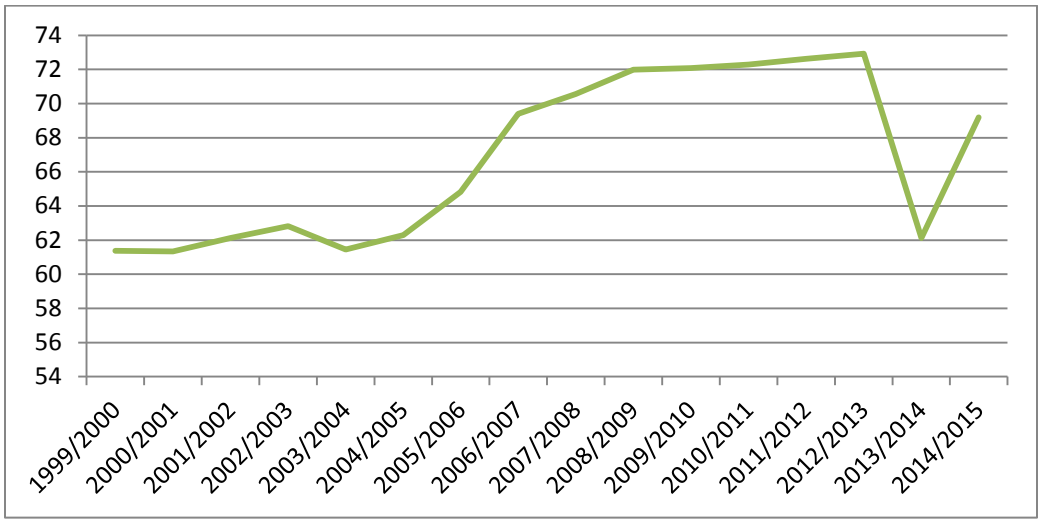

Figure 1.3: Provincial/Territorial Imprisonment Rate in Canada per 100,000 Residents[15]

The aforementioned data raise a compelling question. If Bill C-25 has come into force and offenders are now receiving only 1:1 credit for their time spent in PSC, why haven't provincial/territorial rates of incarceration jumped significantly as predicted? If Bill C-25 was working as the Harper Government intended, one would expect to see the rate of incarceration climbing. Although this appears to happen to a small degree by 2012-2013, the divergence is not nearly as traumatic as what would be expected.

One possible explanation for this unanticipated result may be rooted in the Canadian judiciary. Specifically, one might ask whether judges implemented Bill C-25 as intended by the Harper Government. This question is particularly pertinent, given the aforementioned context in which legal experts and scholars scathingly declared Bill C-25 would legislate unfairness across similar offenders. It certainly appears to be at least plausible that judges may be reluctant to implement the new legislation.

[15] Table actualized from data acquired through Statistics Canada (2015b). Incarceration rates are based on total actual-in counts as well as the population estimates provided by Statistics Canada. Data represent the total for all reporting jurisdictions. Data for a given year may be incomplete due to missing data for one or more jurisdictions. Comparison among years at the national level should be made with caution. Notably, the drop in incarceration rates of all types in 2013-2014 is largely explained by the lack of any data for Alberta in that year.

Further, during the time that the Harper Government was in power from 2006-2015, resistance from the judiciary to criminal justice policy imposed by Parliament was not uncommon. In fact, on numerous occasions over the past decade, the Canadian judiciary has taken issue with new criminal justice laws brought in by this government. This is particularly true in circumstances in which the legislation was seen as challenging or undermining fundamental principles of the CCJS. Indeed, as we have seen on multiple occasions, Canadian judges have sparred with the Harper Government in both the lower courts and in the Supreme Court of Canada (S.C.C.). This state of affairs is problematic because it has the potential to undermine confidence in the criminal justice system (Tonry, 2009). Notable cases in which arguably antagonistic sentencing decisions have been made on Harper Government policy include *R. v. Nur* (2015), *R. v. Cloud* (2014) and *R. v. Michael* (2014). Hence, it would not be surprising to see that the judiciary also resisted Bill C-25 for similar reasons. In other words, Bill C-25 could be ripe terrain for conflict between the CCJS and political spheres.

More generally, it has been noted that in countries with common-law traditions such as Canada or the United Kingdom (U.K.), legislation which attempts to remove or significantly limit judicial discretion is often hotly contested and even over-turned in some cases (Freiberg, 2000). As Bill C-25 acts precisely to impose controls on judges at sentencing that restrict their discretion to determine the appropriate amount of credit for an offender who has spent time in PSC, it would seem that this legislation merits additional scholarly attention. This dissertation proposes to examine the impact of Bill C-25 on judicial compliance. Specifically, this research will evaluate the degree to which judges complied with the new restrictions on the ratio of credit. As part of this examination, this study proposes to identify the various factors which judges use to justify the amount of credit given for time spent in PSC as well as any potential change over time in their decision-making processes.

1.6 The Journey to Understanding

Chapter 1 presents the theoretical framework within which one might understand the friction which may develop between the judicial and political spheres. A review of examples of friction from other jurisdictions is also provided. Chapter 2 examines Bill C-25 as the object of study. Specifically, the historical basis of credit for PSC is reviewed as well as its relationship to the fundamental principles of justice. Within this context, the new approach to credit for PSC from the Harper Government is presented, as a full breakdown of Bill C-25 is provided. Chapter 3 lays out the methodology of this study as well as its limitations. Chapter 4 presents a detailed analysis of how judges in Ontario responded to the changes required to credit for PSC by Bill C-25. Finally, Chapter 5 discusses the results of this study in the context of their relevance, value and limitations to the field of criminology as well as the inspiration that they provide for further research.

2. Chapter One: Resistance in Theory

2.1 Chapter Introduction

In order to understand why Bill C-25 might represent ripe terrain for judicial resistance, it is important to first understand the relationship between the political and criminal justice spheres. As part of this relationship, the recent history of struggles between political and criminal justice spheres over what constitutes good policy in Western democratic nations becomes relevant. It is precisely these struggles that illustrate the often competing needs of the political and criminal justice universes.

Further, in order to understand why Bill C-25 might not be well received within the criminal justice sphere in Canada, it helps to note examples of judicial resistance across multiple jurisdictions. In particular, knowledge of past efforts of resistance helps to identify and understand the underlying legal principles that formed the foundation of the legal reasoning used by those within the criminal justice sphere to reject new criminal justice legislation brought in from the political sphere.

2.2 The Legislative Balancing Act

As a general introduction, the crafting of criminal law that meets both the needs of the government whilst respecting the standards and principles of the criminal justice systems can be an arduous task. Legislation that affects how offenders are sentenced can involve particularly contentious debates among the principal actors of the justice system (i.e., lawyers and judges), victim advocacy groups and the government. The process could be described as a high-risk balancing act between achieving legitimate criminal law purposes through mechanisms that will be validated and upheld by the legal sphere and responding in a politically effective manner to issues of crime and punishment. Indeed, governments must balance the desire to produce criminal policy

which will be viewed favourably by the public (which seemingly seems to involve – most recently – a perception that the public desires increasingly harsh punishment) with the requirement to produce legislation that upholds the fundamental principles of justice. The maintenance of this equilibrium by politicians is critical to the development of effective and sound criminal justice policy.

In 1996, Canada legislated – for the first time – a statement of the principles and purposes of sentencing. This legislative effort enshrined in the *Criminal Code* that the fundamental principle of sentencing would be that of proportionality (s. 718.1). However, this process was little more than an exercise of rubber-stamping as proportionality was a concept that had been established as paramount in sentencing law for nearly 100 years (Webster & Doob, 2007).

As such, in Canada, legislation that impacts sentencing must adhere to certain prescribed values and norms in order to be accepted by the CCJS as valid criminal law. This includes the fact that sentences must ensure proportionality. This principle requires that a sentence be proportionate to the seriousness of the offence and the degree to which the offender is responsible for both his/her actions and the harm caused (*Criminal Code*, 718.1). As part of this calculation, sentencing is also an individualized process that is meant to incorporate an offender's specific circumstances and characteristics (Manson, 2001). As stated in *R. v. Wust* (2000), judges are seen to be best positioned to possess the most information about the offender, and as such have been given the authority to determine a proportionate sentence.

Within this context, the recent desire to punish offenders harshly in order to gain the favour of public opinion must therefore be balanced with the need to punish offenders reasonably in ways that avoid sentences that are grossly disproportionate to the crime committed. The need for proportionality is not simply a legal principle but also a moral one. In order to maintain its authority, the criminal law must be seen as just and fair by society, although what is seen as fair and

just may change in a cyclical fashion (Tonry, 2001a). Laws identified as unfair, discriminative, or unrestrained can have powerful counter effects as communities rise up against them. Perhaps the most powerful example is the civil rights movement of the 1960s in the United States in response to Jim Crow laws.

In fact, Niklas Luhmann describes the friction that can develop between distinct spheres in society. As part of his systems theory, the political and the criminal justice realms are conceived as separate social systems, each with its own distinctive identity (characterized, amongst other elements, by its particular norms, values and rules) (Luhmann, 2010; Viskovatoff, 1999). As such, any communication from another autonomous social sphere will be defined according to the principles and tenets of the receiving sphere (Luhmann, 2010; Viskovatoff, 1999). Further, the exchange must 'play by' the rules of the social system with which the other is communicating. It is precisely this dynamic which has the potential of leading to friction between the two social spheres. As a case in point, the government of the day can draft criminal justice policy and impose it on the CCJS. However, the newly drafted law must still fit within the required framework of rules/norms established by the CCJS in order to be accepted and ultimately implemented. When it does not meet this criterion, the judiciary maintains the power to reject the government's legislation, thus creating tension between them.

2.3 Losing Our Balance[16]

Luhmann's notion of the friction which may develop between autonomous social systems arguably takes on particular relevance for criminologists examining trends in punitiveness over the most recent decades in many western democratic nations. Despite the need of the criminal justice sphere to maintain proportionality[17] in sentencing and, by extension, the necessity for justice to be seen as being done fairly, these foundational principles of criminal law have seemingly been eroded by relatively recent criminal justice policy agendas in a number of English-speaking and western countries. Specifically, the scales have tilted heavily towards highly politicized 'tough on crime' responses to offenders which prioritize deterrence and incapacitation as the principal mechanisms through which to reduce criminal activity (Tonry, 2001a). Indeed, the harsher the sanction (typically expressed in the form of imprisonment), the greater the deterrent[18] value. Further, long prison sentences in which criminals are essentially warehoused removes the opportunity to commit further offences in the community for lengthy periods of time.

A cursory examination of incarceration rates in Canada's most comparable nations – the US and England/Wales – corroborates this shift toward increasing punitiveness (e.g., greater use of imprisonment; longer sentences) as the primordial response to crime and criminals (at least until

[16] This work focuses on one body of literature which examines the increase in punitiveness that has been witnessed in a number of Western democratic nations over the last several decades. However, interested readers may wish to consult the wider literature on the 'punitive turn' which discusses additional factors which may be important in understanding this social phenomenon. These scholars include: Alexander (2011), who discussed racial disparity and how this factor may have had an impact on imprisonment rates, with particular emphasis on those of the United States; Christie (2000), who presents his theory of how the United States' industrial imprisonment complex has been potentially driven by commercial and economic interests (e.g., prison guard and police officer unions, for profit prisons, and prison labour exploitation); Whitman (2005) who compares imprisonment rates in Europe to those in the United States and theorizes that the harsher sanctions delivered in the United States may be a result of complex social structures including non-hierarchical social systems present in the latter; and, Gottschalk (2011) who discusses multiple potential explanations for the rise in imprisonment in the United States and the validity of each in a scholarly analysis of proposed causes.

[17] Note that in the United States, proportionality is alluded to by the Eighth Amendment in stating that excessive bail and fines should not be required. Further, the Amendment states cruel and unusual punishments should not be inflicted. In the United Kingdom, the Criminal Justice Act of 2003 has s. 152(2), which requires that the court not prescribe a custodial sentence (i.e., a prison term) unless it is of the opinion that the offence was so serious that neither a fine alone nor a community sentence can be justified for the sentence.

[18] The general theory of deterrence is that the harsher a punishment becomes for a crime the more unlikely the public will be willing to commit the crime, thereby risking receipt of the punishment if caught.

very recently). As Figures 2.1 and 2.2 [see below] demonstrate, the incarceration rate in both the U.S. and the U.K. has risen dramatically over the past several decades. Further, these circumstances did not simply evolve by chance. Rather, a number of scholars now attribute this rise in incarceration – at least in part – to 'tough on crime' policy agendas of (irresponsible) politicians pandering to a political 'law and order' approach to offenders over this period of time (Hogeveen, 2005; Tonry, 1999, 2001b; Webster & Doob, 2007).

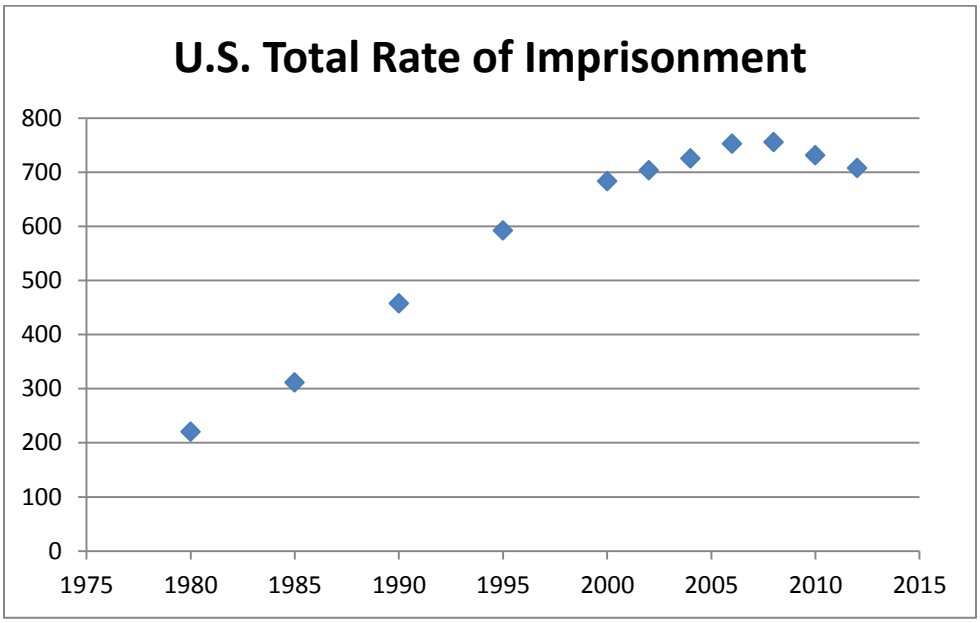

Figure 2.1: United States Total Imprisonment Rate per 100,000 Population[19]

[19] Table actualized from the world prison brief (WPB) (WPB, 2015a), a document produced by the international centre for prison studies. The quality of data depends upon information provided by reporting jurisdictions. For example, scholars Pastor and Maguire (2004) note that jail counts were largely unreliable in the United States prior to 1990. As such, comparisons between individual years at the national level should be made with caution. The data included in this table is meant to show a general trend in imprisonment rate only.

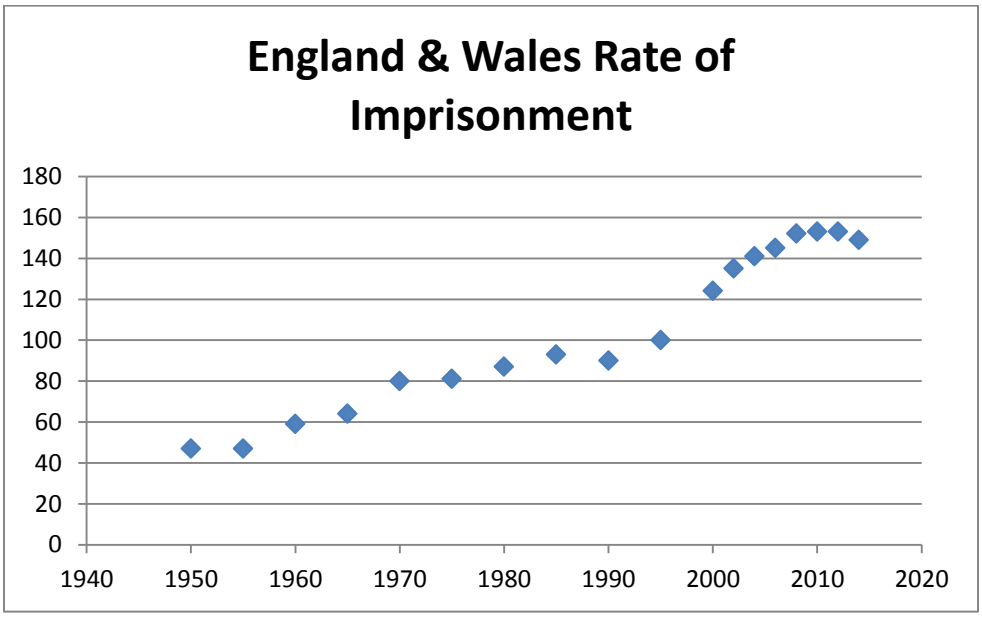

Figure 2.2: United Kingdom Total Imprisonment Rate per 100,000 Population[20]

2.4 So why are we pandering?

The question might be better understood if one first evaluates to what sentiment are politicians pandering. As one scholar explained, public polls in the U.K. have suggested for decades that sentences were too lenient (Zimring, Hawkins & Kamin, 2001). Political desire to respond to public dissatisfaction with sentencing has been noted as an influential factor that has shaped penal policy both in the U.K. and abroad (Zimring et al., 2001). More emphatically, Tonry (1999) noted that for decades, crime policy in the U.S. had been driven not by practical analysis of rational options, but rather by exaggerated fears and political opportunism. Thus, 'tough on crime' policies throughout recent history had arguably been created for political gain rather than to effectively achieve their professed goal of crime control (Mauer, 1999).

In simpler terms, politicians from both the U.K. and U.S. have recognized the potential to gain votes by appearing to be 'tough on crime'. Public pressure to treat criminals harshly has

[20] Table actualized from the world prison brief (WPB, 2015b), a document produced by the international centre for prison studies. The quality of data depends upon information provided by reporting jurisdictions. As such, comparisons between individual years at the national level should be made with caution. The data included in this table is meant to show a general trend in imprisonment rate only.

arguably existed since the beginning of recorded history. What had changed in recent decades for the U.K. and U.S. is that politicians became far more willing to exploit public sentiment for political gain. The benefits of such strategies are reflected in the knowledge that while crime rates in the U.S. have been decreasing for decades, coverage of crime in the media has risen dramatically, to the point where the adage 'if it bleeds it leads' has become a well-known colloquialism. The encouragement of fear of crime and, by extension, the need for ever harsher criminal justice policy had become a strategy to secure political gain (Mauer, 1999). Further examples of this behaviour are revealed in the recent history of the North American political landscape where it was commonplace for politicians to campaign aggressively on 'tough on crime' policy platforms. As Tonry (2009) has expressed, nobody who has lived in the United States in the past few decades could be unaware of politicians consistently promoting the passage of harsher sentencing laws as an effective means of winning elections.

Certainly within the U.S. and the U.K. over the past 30-40 years, politicians have engaged in a cycle of declaring themselves to be the 'toughest on crime' by setting higher and higher standards of harsh criminal policy. The practical effect became the escalation of increasingly punitive criminal justice legislation that has been difficult to reverse. Despite such escalation, Zimring et al. (2001) noted that most criminal laws were deliberately designed to be symbolic rather than substantive. This was because politicians wished to appear 'tough on crime' to attract votes but also remained aware of the significant financial resources required to incarcerate offenders more frequently and for longer periods of time (Zimring et al., 2001). However as Garland (2001) explained, despite the desire to produce legislation that is purely symbolic and lacking in substantive impact, the criminal law which is produced often has real social consequences.

2.4.1 Who are we pandering to?

If the argument is to be made that politicians had flocked toward 'tough on crime' policy agendas in order to obtain votes, it follows that other circumstances were likely also simultaneously emerging to encourage such strategic choices. One development was the increasing involvement of victims' advocacy groups in politics that encouraged harsher policies that responded to the needs of victims. As Zimring (2001) expressed, distrust in justice officials, combined with the logically flawed view that anything done to hurt offenders would help victims, had partly fueled this trend. One purpose of 'tough on crime' legislation had therefore been to symbolically denounce crime and criminals to satisfy not only the general public but also particular interest groups (Zimring, 2001).

As these interest groups became more organized and engaged in politics, the value of gaining their approval increased. Note that each group can become a source of not only votes, but also funding and volunteers to support a campaign. The actual practical effect of legislation to change the behaviour of 'cops, courts and corrections officials' had become secondary to appeasing the desires of these groups that could help politicians win elections (Zimring, 2001). In theory, political parties could have supported 'tough on crime' policy agendas in order to solicit votes from a subset of the population that responds to these issues by symbolically standing up for their views.

However, in order to solicit the support of advocacy groups, criminal justice policy needed to respond to both the emotional needs of the public mood as well as effectively resolve the actual problem of crime (Garland & Sparks, 2000). Criminal justice policy that disavowed the emotional appeal of punitive measures and attempted to delegate authority to professional expertise, gained little traction with governments immersed in the 'tough on crime' climate (Garland & Sparks, 2000). As Freiberg (2001) explains, politicians are particularly adept at sensing and amplifying the public mood surrounding particular policy measures. Freiberg noted that politicians had encouraged the notion that increased support for punitive measures was the appropriate response to crime

(Freiberg, 2001). In fact, this scholar argues that there are three essential pieces of any crime policy: the instrumental; the emotional; and, the production of social cohesion (Freiberg, 2001). The 'instrumental' describes the actual functioning of criminal justice policy to address crime, be it harsher sentencing or rehabilitative programming. The 'emotional' describes the policy's ability to appeal to public sentiments about what should be done about crime. The ability to 'produce social cohesion' describes the capacity of a policy to produce feelings of reparation and recovery after having appropriately dealt with the criminal issue (Freiberg, 2001). It is fair to presume from the frequency of their use in political campaigns that politicians believe 'tough on crime' policies appeal emotionally to how citizens believe society should deal with crime. As Garland (2001) explained, rational policies based on scientific evidence may be more instrumentally effective but they are sometimes less compelling or emotionally appealing to the public.

2.4.3 What happens when everybody is pandering?

However, as with any strategic competition, those who wish to be successful tend to emulate the choices of their toughest opponents. In fact, in what had become an identifiable trend from the early 1990s to at least the mid-2000s, there was a noticeable absence of disagreement between the main political spokespersons in the U.K. and the U.S. regarding how to talk about crime (Newburn & Jones, 2005). In fact, the bipartisan consensus in these nations seemed to be that a failure to talk 'tough on crime' would be political suicide (Newburn & Jones, 2005). This political tactic becomes problematic for a number of reasons. First, politicians now have little choice but to engage in 'tough on crime' rhetoric or risk losing elections. Second, the promises of these politicians need to grow in size and scope in order to 'out-duel' their opponents. The consequence of this scenario is that there exists strong potential for rapid growth in increasingly punitive criminal justice policy.

As a case in point, Zimring et al. (2001a) assert that one particularly harsh sentencing policy in California came into existence precisely because politicians were competing with each other to

be seen as the 'toughest on crime', and neither wanted to alter his/her position and risk losing political support. Policies such as three strikes law in California have been paraded before the public eye to win electoral support but were designed with little thought as to how they would be implemented in the context of a 'fair' legal system.

2.5 When Policy Loses Sight of its Principles, Friction becomes Predictable

For purposes of the current study, arguably the most significant repercussions of this recent 'tough on crime' movement – with its imposition of (in some cases, dramatically) harsher sanctions – are rooted in the erosion of a number of the fundamental principles of justice. Multiple scholars have noted that intentionally punitive policies are both unjust and unwise (Downes & Morgan, 2007; Gottschalk, 2006; Simon, 2007). As such, some 'tough on crime' policy agendas can be argued to offend several of the foundational norms and values governing criminal law. At some point, the criminal justice system cannot accept policy so disproportionate as to violate a fundamental sense of fairness. As an example, it would not be logical for the legal sphere to accept a mandatory 100 year sentence for shoplifting. Theoretically, there is a point at which most criminal justice systems will reject harsh policy based on their founding principles.

Given its centrality in the criminal law of many English-speaking nations, the violation of the principle of proportionality – namely the imposition of mandated (sometimes draconian) sentences dramatically harsher than what would be considered proportionate by most legal actors – would seem to be a ripe terrain for conflict between the political and criminal justice spheres. Indeed when the principal actors of the criminal process (i.e., judges, lawyers for defense and prosecution) feel that new legislation threatens their ability to arrive at a sentence which aligns with

fundamental principles of justice (not only proportionality but also parity[21], equality and fairness), it would not be surprising to witness the emergence of tension.

2.6 Righting the Scales: the Response of the Legal Sphere to Harsh Policy Agendas

The loss of balance and the tilting of criminal justice policy towards increasingly harsh measures arguably provides fertile ground for friction between those creating often disproportionately punitive legislation and those tasked with upholding it within a fair and just criminal law framework. Borrowing again from Luhmann, although politicians have the power to create policy based on the social norms and objectives of the current political climate, that policy must still be received by, and adhere to the rules of, the criminal justice system (Viskovatoff, 1999). If the policy cannot be reconciled within criminal justice principles, it is almost inevitable that it will be rejected by that system. Given the probable clash between these two social spheres, it would not be surprising to see this friction translate into resistance. And in fact, there is a growing body of criminological literature (Jones & Newburn, 2006; Merritt et al, 2006; Nagel & Schulhofer 1992; Tonry, 1996; Ulmer, Kurlychek & Kramer, 2007) on various forms of resistance by the judiciary (*sensu latu* – including not only judicial officials but also prosecutors) to these recent policies.

Resistance can arguably take a number of different forms. Broadly speaking, one might classify them in terms of the actions of legal actors either working within the criminal law or directly against it in order to resist changes enacted by elected officials which they are mandated to implement. Working within the law to resist criminal justice policies seen to offend fundamental principles of justice might be best described as circumvention. For the purpose of this thesis, circumvention will be defined as circumstances in which legal actors discover and utilize methods

[21] Parity is a principle of sentencing in Canadian law which denotes that similar offenders in similar circumstances should receive similar sentences. However, offenders are not required to receive identical sentences. Rather, of greater concern is that there is not unwarranted disparity – that is, there is not disparity among sentences that is not justified by the facts of the case (Manson, 2001).

to avoid or bypass implementing the law as it was written. This type of resistance would describe situations in which laws are not fully implemented - as intended by legislators - by actors within the justice system who have found ways to circumvent the government authority requiring them to do so. It may involve the creative interpretation of the criminal law or the manipulation of facts or procedures in ways that were unlikely to have been envisioned by the legislative body.

In Canada, working directly against the law involves the use of Charter or constitutional challenges. This option constitutes a legitimate tool that can be used to strike down a law. A Charter challenge refers to situations in which legal actors directly contest the law on the basis that it violates fundamental rights and freedoms endowed to all citizens as inalienable. If a law is found to be in violation of one of these inalienable rights, then the law must be struck down. In many western democratic nations, this legal procedure has been used to block the implementation of laws enacted that do not align with the central principles of their respective criminal laws. These actions represent the collective response of legal actors to resist the implementation of policy that could not be reconciled within the legal sphere as valid criminal law.

Illustrations of various forms of resistance to legislation which are seen to violate fundamental principles of justice have perhaps been best documented – at least within the English-speaking world - in the United States (Tonry, 2009). This phenomenon is likely not surprising given that the U.S. arguably has most strongly embraced and implemented the 'tough on crime' paradigm. Indeed, most criminologists have heard stories of grossly disproportionate sentences (e.g., life imprisonment for stealing a piece of pizza) within the American context (Tonry, 2006).

2.6.1 Resistance 'American Style': Three Strikes Legislation in California

Three strikes legislation in California is widely known to be highly controversial. In fact, according to Zimring (2001), the legislative passage through which its proposal travelled

maintained a conspicuous absence of any expert scrutiny from government specialists or scholars. The law was originally passed in response to public campaigns concerning several high profile murders committed by ex-felons who had been released from prison only to commit new serious offences (Brown & Jolivette 2005; Newburn, 2007). The legislation specifically targeted felony offenders. The *U.S. Code Title 18 – Crimes and Criminal Procedure* – classifies criminal offences as either felonies or misdemeanors, with a small percentage that can be tried as either. More serious offences are generally classified as felonies and carry penalties greater than those handed down for misdemeanors (U.S. Code Title 18). Three strikes laws in California stipulated that in cases in which an accused had a prior serious or violent felony conviction and was convicted again of a subsequent felony offence, the sentence would be automatically doubled (Chen, 2008). This is defined as a second strike. If an accused had two or more strikes, any subsequent felony conviction would result in a third strike and a sentence of 25 years to life in prison (Chen, 2008; Otero & LaBahn, 2004).

The law was controversial because any of roughly 500 different felony convictions could result in a second or third strike. The second and third strike convictions did not need to be serious or violent to trigger the provisions set out in the legislation (Chen, 2008; Otero & LaBahn, 2004). In other words, an offender could receive a lengthy prison sentence even for relatively minor felony crimes. Not surprisingly, a 25 year-to-life sentence for a modest crime was seen by many to offend the principle of fairness as it is grossly disproportionate to the severity of the crime. Within this context, three strikes legislation affected not only the repeat violent offenders that it intended as its target, but also a wide variety of offenders convicted of less serious subsequent offences. At the end of 2003, a total of 80,087 second strikers and 7,332 third strikers had been sentenced to custody by the California Department of Corrections and Rehabilitation (Otero & LaBahn, 2004).

In colloquial terms, harsh sentences are often associated with being 'tough on crime' which has become a popular phrase amongst politicians around the world who want to appear as champions of public safety. However, when California's politicians decided to draft legislation to implement this ideology of being 'tough on crime' with second and third strike offence provisions, they failed to recognize the policy as having the potential of being incongruent with the fundamental values of the justice system and its actors who would have to implement it. Perhaps predictably, considerable resistance arose.

This response was underlined by criminal justice statistics. Despite three strikes laws, the growth in California's prison population was considerably less than some forecasts predicted. Consistent with resistance, this restricted growth has been attributed to factors including the exercise of discretion by prosecutors and judges in the laws' use (Otero & LaBahn, 2004). Specifically, prosecutors and judges took full advantage of the discretion that they retained to dismiss some prior strike offences, precisely to avoid triggering a second or third strike prosecution (Brown & Jolivette, 2005). Furthermore prosecutors would, at times, charge cases as misdemeanors instead of felonies for particular offences (Ricciardulli, 2002). Misdemeanors carry a maximum sentence of one year of imprisonment and do not trigger second and third strike provisions (Brown & Jolivette, 2005; Ricciardulli, 2002). As such, this practice would allow judges and prosecutors to avoid the implementation of the law altogether with select offences. Although both forms of resistance were carried out within the law, the actions taken by judges and prosecutors could be perceived as a circumvention of the explicit intentions of the law makers who drafted the legislation.

2.6.2 Resistance 'American Style': Mandatory Minimum Sentences

Arguably a more widespread phenomenon of resistance can be found with mandatory minimum sentencing (MMS) provisions. Offences that require a MMS are those in which a judge is

bound by legislation, upon a conviction, to impose a minimum sanction as prescribed by law. Tonry explains that in a country with an independent judiciary, judges require the authority to determine the facts of a case and the appropriate resolution (Tonry, 2014). In circumstances in which the legislature directs a particular resolution, the institution of an independent judiciary is fundamentally undermined (Tonry, 2009). As Cano & Spohn (2012) explain, the significant problem with MMS provisions is that they preclude judges from making distinctions among offenders. Thus the same sentence is required for offenders who may be markedly dissimilar in their level of involvement in the offence and their potential for rehabilitation (Cano & Spohn, 2012). It is issues such as these that expose the rigidity and inflexibility of MMS provisions. Such laws tell the judges how they should sentence an offender regardless of the case-level circumstances (Tonry, 2009). Problematically, as the tendency of politicians over the past few decades has become to adopt a 'tough on crime' approach, the number of MMS has increased substantially (Tonry, 2009).

MMS provisions therefore allow judges less flexibility in arriving at a sentence that they feel is proportionate to the seriousness of the crime and the harm caused by the offender, a circumstance in which it might prove difficult to pass a fair sentence that is aligned with the fundamental principles of justice. Particularly, in cases in which judges and other legal actors do not feel that they can arrive at a fit sentence under such strict sentencing provisions, resistance to the imposition of such policies would not be unexpected. In fact, Tonry (2009) explained that there are two centuries of evidence that suggest MMS laws have produced circumvention by judges, juries, and prosecutors. Indeed, as the majority of MMS provisions enacted in recent decades have increased the level of punitiveness of the sanction - in some cases dramatically - it is not surprising that many of them have been perceived by legal actors (i.e., judges, lawyers for defense and prosecution) as violating the principle of proportionality.

There are multiple ways in which MMS provisions have been circumvented by legal actors. In cases in which practitioners have believed MMSs were too severe, prosecutors have regularly avoided charging individuals or agreed to dismiss charges in plea negotiations (Tonry, 2009). Illustratively, there exists a discretionary scheme of downward departure—a reduction in sentence in exchange for assistance given to the U.S. attorney in the prosecution of other matters—which allows judges in some jurisdictions within the U.S. to avoid the MMS (Cano & Spohn, 2012). The process requires a motion or request from the U.S. Attorney (the equivalent of the Crown attorney in Canada). If granted, the judge can determine the amount of sentence reduction and is no longer required to impose the MMS (Cano & Spohn, 2012). Further, Nagel and Schulhofer (1992) found that downward departures were often used to mitigate the sentences of sympathetic defendants. These scholars concluded that MMS laws may sometimes be circumvented when the U.S. Attorney prosecuting the case feels that it is justifiable based on offender characteristics (Nagel & Schulhofer, 1992). In demonstration of this form of resistance, Cano & Spohn reviewed data on 1515 cases of drug offenders from three Midwestern U.S. judicial districts. In 40.7% of cases, the offender received a substantial assistance departure (Canon & Spohn, 2012). Offenders were significantly more likely to receive a substantial assistance departure if they had attended or graduated from college, were a U.S. citizen, or were female (Canon & Spohn, 2012).

As another relevant example, the law in some U.S. states provides prosecutors with control over whether or not a MMS provision is applied (Ulmer et al., 2007). In this context, MMS laws can be understood to shift the burden of discretion away from judges and towards prosecutors (Ulmer et al., 2007). For instance, the prosecutor in Pennsylvania determines whether or not to charge an accused with an offense that is eligible for a MMS and then, furthermore, decides whether or not to move for the application of the MMS (Ulmer et al., 2007). In the case that the prosecutor does not move for the imposition of the MMS, the offender is sentenced under different

sentencing guidelines which are most often more lenient than MMSs (Ulmer et al., 2007). Importantly, Bjerk (2005) found that prosecutors used their charge reduction discretion to circumvent three strikes mandatories for some defendants.

In a similar study, qualitative research on the sentencing of serious violent offenders in Pennsylvania discovered a process aptly labelled as 'de-mandatorizing' which was used for cases eligible for a MMS as part of plea deals (Kramer & Ulmer, 2002). The infinitive to 'de-mandatorize' came from interviews and was widely used by judges and prosecutors in this state (Kramer & Ulmer, 2002) to signify that the prosecutor chose not to apply the mandatory minimum sanction in order to allow the offender to be sentenced under more lenient state guidelines (Kramer & Ulmer, 2002). In fact, prosecutors only applied the MMS provisions in 18.4% of all cases. However, they did pursue a MMS more frequently (in 29% of cases) with second and third strike offenders (Ulmer et al., 2007).

2.6.3 Resistance 'English Style': The Criminal Justice Act

Although the criminological literature on resistance would appear to focus on the United States - no doubt rooted in the draconian sanctions introduced in many U.S. states - friction between those creating criminal justice policy and those expected to implement it is clearly not restricted to this nation. Indeed, resistance seems to arise in other nations which have also experienced a hardening of responses to crime and criminals. As a case in point, one can turn to England as yet another of Canada's closest comparators.

In the early to mid-1990s within the U.K., there was a movement towards increasing populist punitive policies and increasing criticism of the leniency of judges (Bottoms, 1995; Newburn, 2007). In response, the government in 1991 introduced the *Criminal Justice Act.* This legislation included a wave of new measures suggesting that sentencing was too lenient and

mandatory sentences were necessary to remedy the situation (Ashworth, 2001; Hough & Roberts, 1999). The need to sustain public confidence in the administration of justice meant that public opinion played a significant role in the development of sentencing policy and practice (Hough & Roberts, 1999). This sort of politicization of criminal justice policy has been noted by academics as a powerful factor in the move towards harsher criminal justice policy (Beckett, 1997; Loader, 2006; Roberts, Stanlans, Indemaur, & Hough, 2003; Tonry, 2001a).

Within this context, Ashworth (2001) noted that there had been a number of relatively recent power struggles between the judiciary and Parliament regarding sentencing law. In fact, this scholar described the 1990s as a battleground between the government and senior judiciary in which the two vied for supremacy in sentencing. This friction emerged in response to the aforementioned 1991 *Criminal Justice Act* which represented a departure from the historically entrenched practice of allowing judges to control sentencing (Ashworth, 2001). The lord chief justice at the time – Lord Taylor – considered the new sentencing provisions as forcing justices into applying ill-fitting sentences that were too constricted (Wasik, 1997). In simpler terms, the new legislation impugned upon the traditional (some might say sacred) role of judges in the sentencing process. Further, it did so in a way that restricted judges' abilities to arrive at a fair and proportionate sentence. This disruption offends the fundamental principles of justice and as such resistance from the judiciary would not have been unexpected.

In fact, judges circumvented the law by reinterpreting its meaning in many cases to allow them to continue past practices rather than implementing the new requirements (Ashworth, 2001). As such, although the U.K. legal sphere did not reject the *Criminal Justice Act* entirely, it did find a way to reinterpret its meaning in a manner that was more consistent with the established rules and values of that system. Specifically, the then chief justice of the Court of Appeal reinterpreted the

1991 law which required that a sentence be aligned with the seriousness of the offence to mean that a sentence should be aligned with the punishment and deterrence that the seriousness of the offence requires, a reading in of the concept of deterrence which was not previously present, but was consistent with prior practices (Ashworth, 2001). This process of clever (re-)interpretation by which legal actors can mute the effects of legislation that they perceive to be unfit for use within the criminal justice sphere is yet another example of resistance within the law.

2.6.4 Resistance 'English Style': The Crime Sentences Bill

As a further case in point, 'The Crime Sentences' bill received its first reading in the U.K. House of Commons in 1996 (Windlesham, 2001). A noticeable similarity emerges with the U.S. narrative of 'tough on crime' policy when one notes the lack of opposition by the Labour Party - a state of affairs resulting from political tactics. In short, one scholar argues that the reason for the Labour Party's tacit acceptance of the bill was that the party did not want to be perceived as being 'soft on crime' (Windlesham, 2001). This political convergence of support for 'tough on crime' policy measures is another example of how criminal justice policy was pushed toward more punitive ends. However, as Newburn & Jones (2005) note, most of what has been borrowed by the U.K. from U.S. politics has merely been terminology and rhetoric rather than constraining punitive techniques of crime control.

Still, the 'Crime Sentences' bill did eventually develop MMS provisions for specific offences with second and third strike circumstances (Downes & Morgan, 2002a, 2002b). These sentencing provisions would have seemingly required harsher sentences for the affected offenders. They would also have constricted the judges' abilities to determine a fit sentence which might offend fundamental principles of justice. Instead, scholars conclude that these MMS laws were largely symbolic. As a case in point, by December of 2000 (a full year after a law was implemented to impose MMS provisions on convicted burglars), not a single three strikes sentence had been

passed on anyone convicted (Cavadino & Dignan, 2002). The use of such punitive sanctions as MMSs for second and third strike offenders seems to have been muted by both U.K. judiciary's interpretation of the laws and their unwillingness to impose overly harsh sentences.

2.6.5 Resistance 'Canadian Style'?

Particularly within the context of resistance to the implementation of particularly harsh criminal sanctions which may be seen as violating fundamental principles of justice, the Canadian case is less obvious. Several criminologists (Haggerty, 2001; Pratt, 2002; Roberts, Stalans, Indemaur & Hough, 2003) have simply assumed – given the numerous affinities that Canada shares with its two closest comparators (US and England/Wales) – that the former nation would also demonstrate the same commitment to the 'tough on crime' paradigm and its often accompanying imposition of potentially disproportionate sentences. However, certainly from a historical perspective, one would not necessarily associate the wider trend of 'increased punitiveness' with Canada. As shown in Figure 2.3 [see below], Canada has had relatively stable rates of imprisonment for over a half century.

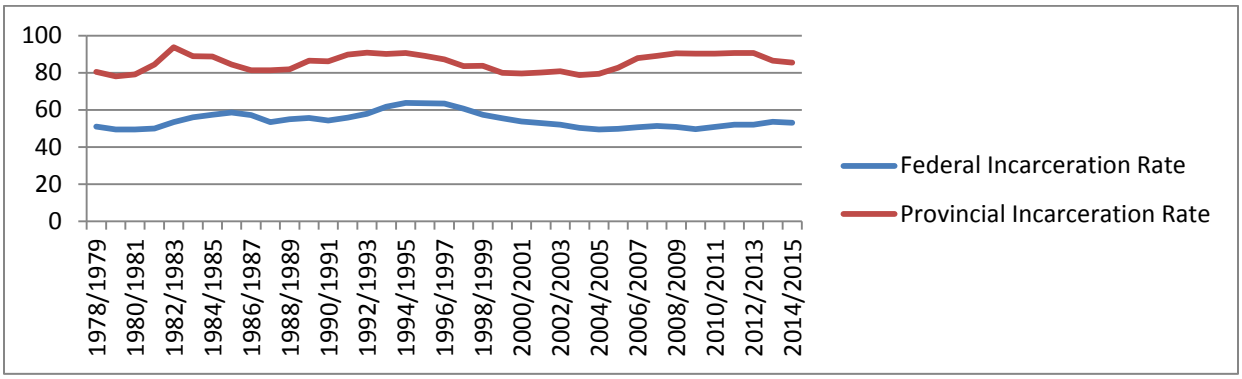

Figure 2.3: Canada's Federal & Provincial/Territorial Imprisonment Rate[22]

[22] Table actualized from data acquired through Statistics Canada (Statistics Canada; 2015b, 2015d). Incarceration rates are based on total actual-in counts as well as the population estimates provided by Statistics Canada. Data represent the total for all reporting jurisdictions. Data for a given year may be incomplete due to missing data for one or more jurisdictions. Comparison among years at the national level should be made with caution. Notably, the drop in the provincial incarceration rate in 2013-2014 is largely explained by the lack of any data for Alberta in that year.

Webster & Doob (2007, 2012) describe the picture of Canadian imprisonment rates (at least until very recently) as one of unending blandness, with rates having remained largely unchanged. Indeed, Canada's overall imprisonment rate has remained around 100 per 100,000 plus/minus 20 for over 50 years. This relative stability in the use of imprisonment suggests that Canada has somehow been able to contain the impact of the wider pressures toward the adoption of 'tough on crime' policy that have been responsible for the explosive growth in the U.S. use of imprisonment and the more recent increases in England/Wales. However, it is true that Canada's incarceration rate in 2013-2014 was 118 per 100,000 population (Statistics Canada, 2015a) which represents a mild increase towards the top of the range of the time period described by Webster & Doob (2007, 2012), but even this rate is within the normal range for the time period noted.

These statistics set Canada apart from its American and English counterparts. As Webster & Doob (2007) concluded, while Canada has not been immune to the pressures compelling countries toward ever harsher responses to crime (i.e., tougher policy, intensifying political rhetoric), it has largely been able to restrict or contain their impact. Having said this, it is notable that the Canadian criminal justice landscape changed significantly in 2006 with the rise to power of the CPC under the leadership of Stephen Harper. In contrast to almost 100 years of criminal law and policy, this government ushered into Canada a 'tough-on-crime' agenda that was characterized by a substantial hardening of responses to crime and criminals (Webster & Doob, 2015). As such, it would seem that in Canada the political rhetoric of the CPC has recently attempted to gain political advantage by leveraging the fact that for decades Canadians have expressed that sentencing for crime is too lenient (Webster & Doob, 2015).

Specifically, since 2006, Harper Government officials – particularly Ministers of Justice – have taken the position that those who commit crime are inherently 'bad' people and, as such, are

different in some substantive fashion from 'ordinary law abiding Canadians' (Webster & Doob, 2015). In fact, to borrow from Tonry, anyone who has lived in Canada in the past decade is well aware that Prime Minister Harper has campaigned heavily for 'tough on crime' policy. An even cursory review of the titles of many of the criminal justice bills passed under this Government makes the point: 'Safe Streets and Communities Act' (Barnett, 2011); 'Protecting Canadians by Ending Sentence Discounts for Multiple Murders Act' (MacKay, 2010a); and, 'Serious Time for the Most Serious Crime Act' (MacKay, 2010b). In fact, during his time as the Prime Minister of Canada (2006-2015), Harper's CPC Government has been noted as introducing unprecedentedly harsh criminal justice policy that has included measures to reduce judicial control over sentencing, emphasize greater use of imprisonment, and introduce a more punitive philosophy of corrections (Healy, 2013). Notably, virtually all of the pieces of crime legislation introduced by Stephen Harper's CPC are in the same direction: that is, increasing the severity of the sanction. Within this context, examples of this increasing severity can be found in the rash of mandatory minimums ushered in by the Harper Government and the increase of the maximum penalties for specific offences (Webster & Doob, 2015).

More specifically, from the time in which Stephen Harper took power, Canadians experienced a virtual tsunami of policies and practices connected to increased punitiveness (Webster & Doob, 2015). In addition, Canada witnessed the politicization of crime and a reduction of reliance on expert advice from those who would counter the suggestion that prison is an effective solution to crime (Webster & Doob, 2015). The Harper Government was quite simply not interested in hearing opinions of anyone who did not share their views. As argued by Webster & Doob (2015), the Harper Government introduced a completely different discourse regarding criminal justice values as its vision for Canada. This discourse represented a decisive shift away from the view that offenders were socially disadvantaged and in need of support (Webster & Doob, 2015). Further, it

represented a break with longstanding criminal justice values that acknowledge imprisonment as a tool that should only be used as a last resort and the reintegration of offenders as paramount. Instead, these scholars conclude that both in legislation passed and in policy statements made, Canada experienced a major shift towards a more punitive vision of criminal justice (Webster & Doob, 2015).

The question – within the current context – is whether this hardening of responses to crime and criminals translated into legislation that would be seen by the Canadian judiciary as violating fundamental principles of justice such as proportionality. Thus, it would not be implausible to imagine that given the emphasis the judiciary has placed on the importance of proportionality at sentencing, this body might enter into direct conflict with many of the (arguably disproportionate) punitive laws enacted by the Harper Government.

In fact, this possibility was explicitly recognized by one of the government's senior legal counsel responsible for sentencing policy. In this instance, David Daubney – a civil servant with over a decade of experience in sentencing policy for the Department of Justice (DOJ) – provided testimony to the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness (SCJHRPS, 2005)**.** Daubney testified that a recent crime bill (Bill C-215), which included provisions to create harsh mandatory minimum sentences for firearms related crimes, would likely be viewed as unconstitutional and contravening the principle of proportionality (SCJHRPS, 2005). In response, the honourable Vic Toews, CPC justice critic at the time, expressed annoyance with the DOJ which – in his opinion – continued to engage in a continued practice of "apologizing for criminals" (p17) and demonstrate its "astounding" concern with proportionate sanctions for offenders rather than for victims (SCJHRPS, 2005). This same critic later became the Minister of Justice after the 2006 general election.

Further, in dramatic contrast with past practices in the legislative process, the Harper Government explicitly ignored (or simply did not consult) subject matter specialists who have traditionally guided sentencing legislation and, as such, been particularly sensitive to potential conflicts with principles of justice (Webster & Doob, 2015). Indeed, rather than working collaboratively with the judicial sphere, the Harper Government seemingly drafted criminal justice policy built upon ideology and partisan politics rather than sound legal principle.

Within this context, it would not be surprising that any policy stemming from the 'tough on crime' agenda of the Harper Government that paid little regard to the defence of the principles of the CCJS might create friction between the Parliament of Canada (who writes the criminal law) and the actors within the justice system (who are mandated to implement it). More importantly for the purposes of the current study, it would not be unreasonable to imagine that – like its American and English counterparts - the Canadian judiciary (*sensu lato*) may demonstrate resistance to such laws. As Luhmann might predict, those tasked with implementing this type of punitive legislation may find circuitous ways to reconcile the irreconcilable, reaffirming their own social norms and values.

3. Chapter Two: Resistance in Action

3.1 The Case of Credit for Pre-Sentence Custody

Certainly if one were to look for a case in which the criminal justice social sphere may experience friction with the political social sphere, credit for PSC would be a reasonable place to start. Specifically, Bill C-25 – the 'Truth in Sentencing Act' – was introduced into the House on March 27th, 2009 (Casavant & Valiquet, 2009) by the then Minister of Justice and Attorney General of Canada, the Honourable Robert Nicholson and would appear to have ushered in significant tension – if not conflict – between these two social spheres. The reasons for this friction can be broadly split into two categories. First, Bill C-25 sought to eliminate a legal practice that was well entrenched within Canadian case-law. With Supreme Court imprimatur, the practice of granting 2:1 credit to offenders for time spent in PSC has been a longstanding tradition within the CCJS. Second, Bill C-25 was hotly contested within the Canadian House and the Senate. Additionally, it was strongly questioned by legal and academic experts within Parliamentary committee hearings. This combination of factors suggests it is at least plausible that Bill C-25 would not have been warmly received by the CCJS.

3.2 The Legal History of Granting Credit for Time Served in PSC

Section 721(3) of the *Criminal Code* provides that in determining the sentence to be imposed upon a convicted individual, a justice, provincial/territorial court judge, or judge may take into account any time spent in custody by the person as a result of the offence. In *R. v. Rezaie* (1996), Justice Laskin explained that although this section is not mandatory, a sentencing judge should ordinarily give credit for time spent in PSC. In fact, Justice Laskin went so far as to say that credit should not be denied without good reason. Specifically, the denial of credit would offend one's sense of fairness because incarceration is a denial of the accused's liberty. Laskin also

explained that PSC is even more onerous than sentenced custody because - other than for sentences of life imprisonment - parole eligibility and statutory release[23] do not take into account time spent in PSC. Thus, an offender gets no credit towards his/her release until he/she is sentenced. In addition to this cost, Justice Laskin reminded the court that local detention centres do not regularly provide educational, retraining or rehabilitation programs to accused in PSC. In fact, it is for these reasons that Justice Laskin noted that judges commonly refer to PSC as "dead time" and trial judges frequently give credit for double the time that the accused has served (Trotter, 2010).

In *R. v. Wust* (2000), an S.C.C. judgment, Justice Arbour emphasized that there was no advantage in detracting from the entrenched judicial discretion provided in 719(3) by requiring a mechanical formula to calculate credit for PSC. Rather, the goal of sentencing is to arrive at a just and fit sentence which is responsive to the facts and the circumstances of the individual offender and the particular offence. Justice Arbour also noted – with approval - that in the past, many judges have given 2:1 credit for time spent in PSC, although a different ratio could be used if need be. Justice Arbour further explained this often applied ratio of 2:1 credit reflects not only the harshness of detention due to a lack of programs but also that dead time is real time which is not taken into account by the *Corrections and Conditional Release Act* (CCRA) for the period of PSC. To conclude her argument, Justice Arbour opined that sentencing should thus not be determined by a rigid formula, but is best left to the sentencing judges, who remain in the ideal position to carefully weigh all of the factors which go toward the determination of an appropriate and fit sentence.

While the process for determining the appropriate 'compensation' for the often harsh conditions of PSC is arguably somewhat subjective, the situation is much more objective – one might say arithmetically based – when it comes to calculating the amount of extra credit which

[23] Statutory release is the legally mandated release of all prisoners at 2/3rds of their custodial sentence under the Corrections and Conditional Release Act, which is the federal legislation that determines corrections policy in Canada.

should be granted in order to compensate for the inability of the CCRA to take time in PSC into account when calculating statutory release/remission[24]. In fact, it is precisely this latter justification for enhanced credit for PSC which ensures the central principle of parity[25]. Borrowing from a hypothetical scenario presented to the SCJHR, this illustration makes the point.

A man named John Doe faced two scenarios. In scenario A, John Doe is sentenced immediately and receives an 18-month custodial sentence. Importantly, the rules of the CCRA allow John Doe to be eligible to apply for full parole (to be approved by the Parole Board of Canada) at 1/3rd of his sentence – or after 6 months in custody – and virtually guarantees that he will be released after 12 months in custody on remission credit, which is automatically granted and will have accrued to an amount allowing for release of the vast majority of offenders by the time they have served 2/3rds of sentence (SCJHR, 2009b). Even assuming that John Doe is released only at this 2/3rds point, he will have served a total of 12 months of his 18-month custody sentence.

In scenario B, John Doe is once again sentenced to 18 months. However, John Doe serves 6 months in a PSC facility before being sentenced. Using a simply 1:1 credit ratio, he is given a 12-month custody sentence (i.e. 18 month sentence – 6 months of PSC). Again in accordance with the CCRA, John Doe is eligible for full parole at 1/3rd of his sentence – or after 4 months in custody - and virtually guaranteed release on remission credit after 8 months in custody. Again, even assuming that John Doe is released only at this 2/3rds point, he will have served a total of 14 months in custody (6 months PSC and 8 months sentenced custody).

[24] Remission is defined under the former Prison Reformatories Act, and is available to provincial/territorial offenders serving sentences of two years less a day. This mechanism provides credit towards an offender's sentence that is roughly the equivalent of statutory release.

[25] Parity is a principle of sentencing in Canadian law which denotes that similar offenders in similar circumstances should receive similar sentences. However, offenders are not required to receive identical sentences. Rather, of greater concern is that there is not unwarranted disparity – that is, there is not disparity among sentences that is not justified by the facts of the case (Manson, 2001).

These two scenarios demonstrate a significant mathematical dilemma. By the fact of having served some time in PSC, the same offender would wait longer for both his first opportunity to receive full parole – 10 months vs. 6 months – and remission credit – 14 months versus 12 months. Clearly, the principle of parity would be violated. To remedy this lack of fairness, the sentencing judge will often give enhanced credit of 1.5:1 (or even 2:1) for time spent in PSC.

To illustrate, one can return to John Doe and scenario 2. John Doe continues to serve 6 months in PSC. However, instead of receiving credit for this time at a ratio of 1:1, he is granted credit at a ratio of 1.5:1 enhanced credit. As such, he is given a 9-month custody sentence (i.e. 18 month sentence – 9 months of PSC). By extension, John Doe is eligible for parole after serving 3 months of his sentence (1/3rd of 9 months = 3 months). Further, he would receive remission credit release by 6 months (2/3rd of 9 months = 6 months). Even assuming that John Doe is released only at this 2/3rds point, he will have served a total of 12 months in custody (6 months PSC and 6 months sentenced custody) – exactly the same amount of time as he would have served had he spent no time in PSC.

In sum, in order to treat those who spend time in PSC equally to those who are sentenced immediately, a credit ratio of 1.5:1 adequately compensates an accused person – who would be released on *remission credits*/*statutory release* - for the absence of mechanisms which would take PSC into account for purposes of release. This ratio would be appropriate for the vast majority of inmates. Indeed, academics provided evidence to the government that an estimated 99.8% of offenders automatically receive remission credit/statutory release at 2/3rd of their sentence (SCJHR, 2009b). However, it would not adequately compensate an individual released on full parole. Having said this, it has been demonstrated that offenders rarely receive parole at 1/3rd of the sentence in Canada (Doob, Webster & Manson, 2014).

One must also recall though that even a credit ratio of 1.5:1 will only adequately compensate accused persons in PSC for issues related to remission/statutory release. It does nothing to compensate for any of the harsh conditions experienced in PSC. It is within this context that the S.C.C. recognized the ratio of 2:1 to be appropriate, though not required. Indeed, sentencing judges are given full discretion at sentencing to determine it. The reasoning is that the judge at sentencing will have the most available and up-to-date knowledge about the conditions and unique experiences of the offender in PSC. As such, they are best positioned to have the most information regarding whether or not enhanced credit should be granted. Further, there have historically been no requirements on the part of the judge to justify the granting of credit and all offenders were eligible to receive credit. It might be suggested that explicit justification was not considered to be necessary because the rationale for granting credit has been entrenched in case-law for decades.

3.3 A New Approach to Granting Credit for Time Served in PSC

In contrast with this longstanding practice of granting a ratio of 2:1 for time spent in PSC, Bill C-25 proposed a significant reduction in this ratio. Specifically, this legislative proposal substantially limited judicial discretion in determining the appropriate credit for PSC in a number of important ways. The most relevant sections of the text of the bill as displayed on the Parliamentary website reads as follows below[26]:

[26] The full text of the act has been included in the appendix (see Appendix D).

57-58 ELIZABETH II

CHAPTER 29

An Act to amend the Criminal Code (limiting credit for time spent in pre-sentencing custody)

[*Assented to 22nd October, 2009*]

Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

SHORT TITLE

Short title

1. This Act may be cited as the *Truth in Sentencing Act*.

R.S., c. C-46

CRIMINAL CODE

2. Section 515 of the *Criminal Code* is amended by adding the following after subsection (9):

Written reasons

(9.1) Despite subsection (9), if the justice orders that the accused be detained in custody primarily because of a previous conviction of the accused, the justice shall state that reason, in writing, in the record.

1995, c. 22, s. 6

3. Subsection 719(3) of the Act is replaced by the following:

Determination of sentence

(3) In determining the sentence to be imposed on a person convicted of an offence, a court may take into account any time spent in custody by the person as a result of the offence but the court shall limit any credit for that time to a maximum of one day for each day spent in custody.

Exception

(3.1) Despite subsection (3), if the circumstances justify it, the maximum is one and one-half days for each day spent in custody unless the reason for detaining the person in custody was stated in the record under subsection 515(9.1) or the person was detained in custody under subsection 524(4) or (8).

Reasons

(3.2) The court shall give reasons for any credit granted and shall cause those reasons to be stated in the record.

Record of proceedings

(3.3) The court shall cause to be stated in the record and on the warrant of committal the offence, the amount of time spent in custody, the term of imprisonment that would have been imposed before any credit was granted, the amount of time credited, if any, and the sentence imposed.

Validity not affected

(3.4) Failure to comply with subsection (3.2) or (3.3) does not affect the validity of the sentence imposed by the court.

R.S., c. 27 (1st Supp.), s. 184(10); 1995, c. 22, s. 9

3.3.1 Bill C-25 'The Truth in Sentencing Act' in Four Parts

Obviously, this bill is focused exclusively on credit for time spent in PSC as defined as the amount of time (in days) that can be applied to reduce an offender's sentence. In general, the changes introduced by Bill C-25 could be summarized as creating more stringent guidelines regarding the amount of credit a judge can grant for time spent in PSC (Casavant & Valiquet,

2009). However, it would seem fair to divide this legislative proposal into four identifiable changes that the government intended to make through its implementation.

3.3.2 Bill C-25: Part 1 - Eliminating the 2:1 credit ratio

The first and most fundamental change imposed by Bill C-25 was the creation of a maximum ratio that judges would be permitted to apply when granting credit for time spent in PSC. There are two potential scenarios noted in the bill. In general, a judge may allow a maximum credit of one day for each day spent in PSC (Casavant & Valiquet, 2009). This clause sets out that the general expectation of the judiciary will be to grant only one day's credit for each day spent in PSC.

However, the language in the following line of the bill allows additional credit in some circumstances. The bill states that 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 PSC (Casavant & Valiquet, 2009). The bill does not clarify which circumstances would be considered to justify the maximum credit of one and one-half days for each day spent in PSC (Casavant & Valiquet, 2009). This matter has thus been left to the interpretation of the judiciary.

Having said this, comments made by the then Minister of Justice in the SCJHR provide some insight as to the circumstances which might justify additional credit. Specifically, the then Minister stated that the application of a 1.5:1 credit ratio should be considered in cases in which the conditions of detention are extremely poor or when a trial is delayed by factors not attributable to the accused (SCJHR, 2009a). Notably absent from the then Minister's remarks was the notion of additional credit for remission/statutory release. One might presume that this lack of reference reflected the fact that this justification would have been a circumstance that applied universally to the entire PSC population and, as such, would not fit within the notion of 'justifiable circumstances' (SCJHR, 2009a).

Further comments from the then Minister as well as then CPC Honourable Member Gord Brown provide insight into the Harper Government's expectations of how the judiciary should apply the new rules regarding credit for PSC. Arguably insinuating that the 1:1 ratio should be the norm, Brown criticised the practice of awarding double and triple credit for time spent in PSC precisely because it brings the CCJS into disrepute by creating the impression that offenders are not being sentenced harshly enough (HOCD, 2009b). He further stated that Canadians have told him that they want to see 'truth in sentencing' through the abolition of the practice of double credit for time spent in PSC (HOCD, 2009b). Additionally, then Justice Minster Rob Nicholson noted that the practice of awarding generous credit undermined the public's confidence in the administration of justice because the public does not understand how the final sentence encapsulates the seriousness of the crime (SCJHR, 2009a). As a result, the then Minister reiterated that the current practice of regularly awarding 2:1 credit ratios must be eliminated (SCJHR, 2009a).

In response to requests to amend the bill to increase the amount of credit available for time spent in PSC, Rob Moore, then an Honourable Member of the CPC, responded by saying that Bill C-25 was brought in so Canadians would be assured that offenders would serve each day for which they were sentenced (SCJHR, 2009c). The member continued by stating that the bill set the ratio for credit at 1:1 precisely to ensure that one day spent in custody would only count toward the reduction of one day of the final sentence (SCJHR, 2009c). In response to whether or not 1:1 credit was enough, then Honourable Member of the CPC Brent Rathgeber pointed out that the bill allowed some judicial discretion to increase the credit to 1.5:1 in exceptional circumstances (SCJHR, 2009c). One example provided that would be seen to justify enhanced credit was exceptional overcrowding (SCJHR, 2009c). Nonetheless, he reiterated that the purpose of the bill was to reduce the current practice of routinely awarding 2:1 credit to 1:1, arguably suggesting that the ratio of 1.5:1 should be used in only truly exceptional (and, as such, few) cases (SCJHR, 2009c).

Justifications rooted in remission/statutory release quite clearly were not to be considered within this 'exceptional' category.

3.3.3 Bill C-25: Part 2 & 3 - Targeting Specific Groups for Increased Punitiveness

In addition to the expectation that Bill C-25 would limit credit to a generally applied ratio of 1:1, the Harper Government used Bill C-25 to target two specific groups of offenders in a more punitive manner. Bill C-25 states that if the accused's criminal record or breach of conditions of release on bail was the reason for the PSC, a judge would be restricted to granting a maximum of one day's credit for each day spent in PSC (Casavant & Valiquet, 2009). Thus, in cases in which the primary reason for detention was an accused's criminal record or the result of a breach of conditions of release on bail, an accused could not receive more than one-to-one credit for each day spent in PSC regardless of particularly harsh conditions or other factors that might have justified additional credit (e.g., delays in the resolution of the case beyond the control of the accused).

In regards to the first restriction, a judge or justice of the peace may order at a bail hearing that an accused with a criminal record be formally detained and held in PSC until trial (Casavant & Valiquet, 2009). The intention of the bill is to restrict these aforementioned offenders from receiving credit above and beyond one day for each day spent in PSC. In order for this restriction to be in force, the presiding judge/justice of the peace at the bail hearing must state on the record that the existence of a criminal record was the reason for the accused's detention (Casavant & Valiquet, 2009). In so doing, the sentencing judge is bound to giving no more than one day's credit for each day spent in PSC (Casavant & Valiquet, 2009).

The second restriction comes into effect for those cases in which the accused has breached his/her conditions of release on bail, including the commission of a new criminal offence (Casavant & Valiquet, 2009). More specifically, Bill C-25 states that the restriction will be in place if the

accused was held in custody under subsection 524(4) or (8) of the *Criminal Code*. The combination of section 524(4) and (8) of the *Criminal Code* deals with cases in which the accused was released on bail and subsequently required to appear before the court again (524 (3), (a)(b)). In particular, this section of the *Criminal Code* includes cases in which the judge found that the accused either was about to contravene, or had already contravened his/her recognizance, or that there were reasonable grounds to believe that the accused had committed an indictable offence (524 (4), (a)(b)). The *Criminal Code* states that these accused persons will have such recognizance cancelled and be detained in PSC unless the accused can provide reasonable grounds as to why detention in PSC is not justified within the meaning of 515(10) of the *Criminal Code* (524 (4), (a)(b)). In summary, this restriction would apply to accused persons who were released on bail and subsequently violated the conditions of their bail, requiring them to be detained in PSC until their matter was resolved before the courts.

Regarding these provisions, then Justice Minister Nicholson purported that Bill C-25 would serve to incapacitate particular groups of offenders and uphold public confidence in the justice system. Nicholson stated his distaste for the practice of awarding generous credit because he believed that it erodes public confidence in the integrity of the CCJS by undermining the government's goal to enhance the safety and security of Canadians. It would appear that the restriction of 1:1 credit for PSC for these offenders (and the corresponding increased time spent in custody both pre and post-sentence) was meant as a strategy to keep violent and repeat offenders incarcerated for longer periods of time (HOCD, 2009a).

In further support of this interpretation, then Minister Nicholson stated that all too often there were situations in which violent offenders are released having served only a short prison term precisely because of the practice of granting generous credit for time spent in PSC (HOCD, 2009a).

Further reiterating this concern, then Honourable Member Real Menard from the Bloc Quebecois (BQ) questioned whether his peers wanted a CCJS in which leaders of criminal organizations received early release and did not have to serve their full sentence in prison because of enhanced credit granted for PSC (HOCD, 2009a).

These comments would seem to show the Harper Government's intention to punish these two groups of offenders more harshly, as well as their distaste for the former regime of 2:1 credit. One might even go as far as suggest that the intention of the Parliament was that these two provisions be interpreted widely – that is, to apply to all accused who have either breached a condition of bail or have a criminal record, independent of whether the violation of bail conditions or criminal record constituted the reason for the detention or not. This interpretation would appear to find at least partial support in the remarks of the then Honourable Member of the CPC Russ Hiebert. Specifically, he commented that upon taking office, the Government committed to making the streets safer and stopping crime and that this commitment included stopping courts from giving extra credit for PSC for persons having violated bail (HOCD, 2009a).

Indeed, the expectation of the Harper Government was seemingly that these two groups of offenders would be treated differently. Specifically, that is, these groups would be dealt with more harshly. To emphasize this point, the then Minister noted that when it comes to offenders who have violated bail or who have been denied bail because of their criminal record, they would be entitled only to credit at the 1:1 ratio without any exceptions (HOCD, 2009a). It was repeated for emphasis that no extra credit would be granted under any circumstances for repeat offenders and bail violators (HOCD, 2009a). These comments seem to imply that the Harper Government expected that there would be no room for compromise and that these targeted offenders would receive no reprieve in terms of extra credit, despite notable harsh conditions within detention centers. The then

Minister reaffirmed this intention by explaining that for those who have a record of violating bail or who, because of their criminal record, are not being granted bail, they will be treated differently in Bill C-25 (SCJHR, 2009a). In fact, the then Minister went so far as to explain that the discretion allowed within the bill will not be allowed for these offenders (SCJHR, 2009a).

To summarize, the comments of Harper Government representatives suggest that the CPC believed that Bill C-25 would effectively incapacitate bail violators and repeat offenders, which would - in turn - increase public confidence in the CCJS. A restricted credit ratio of 1:1 would guarantee longer sentences for these two groups of targeted offenders. The earlier noted arithmetic example shows this outcome to be a certainty. In effect, the additional layers of restrictions in the subtext of Bill C-25 represent explicit legislated inequity aimed at two particular groups of offenders – a fact that the Harper Government was not simply aware of, but championed.

3.3.4 Bill C-25: Part 4 - Transparency in Sentencing

In addition to new rules relating to the amount of credit that a judge can grant for time spent in PSC, Bill C-25 also required that judges note particular information on the record. Specifically, the judge is to record the amount of time credited, the sentence imposed and the term of imprisonment that would have been imposed had credit not been given (Casavant & Valiquet, 2009). The bill further required that judges give reasons when deciding to allow credit for time spent in PSC and state those reasons on the record (Casavant & Valiquet, 2009). This requirement forced judges to justify, in writing, their reasons for granting credit beyond a 1:1 ratio for time spent in PSC (Casavant & Valiquet, 2009). This process would make clear to the Canadian public why judges were granting credit.

Russ Hiebert, then Honourable Member for the CPC, noted that this requirement would "result in greater transparency and consistency and would improve public confidence in the

administration of justice" (HOCD, p1355, 2009a). In this ilk, the bill asserts that by limiting judges' discretion, the bill could serve to reduce disparities between sentences for similar crimes (Casavant & Valiquet, 2009). The new measures in the bill are intended to mean that the public will be informed of the reasons for reducing a sentence by more than a ratio of one day for each day served and that this greater transparency would increase public confidence in the administration of justice (Casavant & Valiquet, 2009).

As further evidence of this intention, the then Minister remarked that in many cases, the public sees credit given by the courts as a discounted sentence. The then Minister also lamented that judges were previously not required to explain their rationale for the decision to award this credit, leaving the public to believe that offenders are receiving more lenient sentences than they deserve (HOCD, 2009a). The expectation of the Harper Government was therefore that Bill C-25 would positively benefit the reputation of the CCJS by making a sometimes confusing process more transparent and understandable for the Canadian public.

3.4 The Criticism of the Experts

Given the significant changes put forward by Bill C-25, it is perhaps not surprising that this new legislative proposal received considerable criticism. In fact, the Harper Government was repeatedly reminded by multiple legal and academic experts in Parliamentary committee meetings as well as from the members of other parties in the House and the Senate of the numerous problems with Bill C-25. Particularly given the arithmetic reasoning behind the traditional 2:1 ratio, professors Tony Doob (SCJHR, 2009b) and Cheryl Webster in the Standing Senate Committee on Legal and Constitutional Affairs (SCLCA, 2009) gave testimony highlighting the violation of parity that would result from the proposed legislation. This demonstrated that accused held in PSC

required the benefit of enhanced credit simply to be made equal to identical others who were not held there[27].

In addition, expert testimony from the Criminal Lawyers' Association of Ontario (CLAO) attempted to undermine the validity of one of the principal arguments given by the Harper Government to justify the bill. Specifically, it was stated that the problem of purposeful delay by clients intending to benefit from 'bonus' credit for PSC does not, in fact, exist in reality (SCJHR, 2009b). This testimony conflicts with the perception held by the Harper Government that many offenders were abusing the historically entrenched 2:1 credit in the CCJS. In fact, the expert noted that as far as his Association was aware, there was no empirical evidence in support of that position (SCJHR, 2009b). On a more personal note, the witness affirmed that as a criminal defence lawyer who represents the accused and takes instructions from these people, such an assertion of abuse was simply untrue (SCJHR, 2009b).

One then Honourable Member of the New Democratic Party (NDP) – Bill Siksay – further noted a personal awareness of the abhorrent conditions present in detention centers in British Columbia which contravene international agreements and obligations (HOCD, 2009c). Specifically, he highlighted that the conditions in British Columbia PSC are unconscionable and go against everything to which Canada has committed in terms of international agreements to uphold a standard of one prisoner per cell (HOCD, 2009c). These comments demonstrate that other parties in the House were aware of the prison conditions that the 2:1 credit was partially intended to remedy. Rephrased, other parties in the House recognized the need for judges to have the discretion to be

[27] In defense of these criticisms, Rob Nicholson, then Minster of Justice and Attorney General of Canada, simply stated that the practice of awarding credit cannot rest on the foundation of statutory release and the parole system because this system has received strong impartial criticism and may therefore be significantly changed in the future (HOCD, 2009a). In other words, the Minister deflected legal concerns about the need for 2:1 credit for PSC in order to create equity for offenders by suggesting that the Harper Government had plans to dismantle the very architecture of the mechanisms in the provincial/territorial and federal correctional systems that were causing the inequity. Notably, these plans never came to fruition while the CPC was in power.

able to credit offenders who had spent time in PSC at a rate of 2:1 in order to ensure that they were treated equitably. These sentiments were echoed in the Senate in which the Honourable Serge Joyal noted that legal experts and case-law have long acknowledged that the accused experiences harsher conditions in PSC than in sentenced custody (DOS, 2009b).

In a similar vein, William Trudell, Chair of the Canadian Council of Criminal Defence Lawyers, added that in the Yukon, men and women are housed together in the same jail. As such, there is less access to programming and the library for women. Further, women in the Yukon have no access to bail beds because there is only one halfway house and they do not accept women, a circumstance that reduces the opportunity for women to receive bail (SCJHR, 2009b). In fact, the female inmates in these institutions receive only one hour outside of their dorm per day (SCJHR, 2009b). Particularly for those accused who are detained because of a criminal record or a breach of conditions, any compensation for these particularly harsh PSC conditions would be rendered impossible.

In the debates in the Senate, the honourable Senator Jerahmiel Grafstein went so far as to state that clearly everyone in attendance finds Bill C-25 to be defective (DOS, 2009b). The senator also called attention to the belief that public opinion supporting the bill was occurring without the public having precise knowledge on the subject (DOS, 2009b). Grafstein further questioned whether the Senate had given enough time for public opinion to cool and, by extension, allowed the Senate to present alternative proposals to the public on Bill C-25 (DOS, 2009b). In essence, these statements show that at least one member of the Senate believed Bill C-25 to be flawed.

Similarly, the Honourable Senator Mobina Jaffer expressed during Senate debates that Bill C-25 inappropriately implies that the judiciary is the problem (DOS, 2009a). Instead, Senator Jaffer explains, the judiciary is simply attempting to achieve the fundamental principle of sentencing

whereby similar matters are deal with similarly and should result in similar outcomes (DOS, 2009a). This member also continued by stating that this requirement is set out explicitly in the *Criminal Code* and that 2:1 credit for time spent in PSC is simply a judicial attempt to fulfill the mandate that they have been given. In fact she hypothesized that in the case that the discretion to grant 2:1 credit were removed, judges would simply find other (more circuitous) ways to maintain fairness (DOS, 2009a).

Again in the Senate, the Honourable Senator George Baker pointed out that every witness before the SCLCA – which included professors of law and authors of law as well as defense and Crown attorneys - testified that Bill C-25 was bad legislation. He also emphasized that it was highly significant that even the representative for the Crown Attorneys admitted that this bill was, in fact, a bad law (DOS, 2009a).

More specifically, this point was further developed in the Senate debates when the issue of potential legal challenges to the bill was addressed. Michael Spratt, a representative of the Criminal Lawyers Association, explained that there would likely be Charter challenges to Bill C-25 on the basis that sentences for similar accused would be disparate because of the lack of credit for time spent in PSC (DOS, 2009b). Again, Spratt reminded the Senate that Bill C-25 offends the principles enshrined in the Charter and felt that it would result in constitutional litigation. Similarly, Eric Gottardi, representing the Canadian Bar Association, stated that he felt the likelihood of constitutional challenges to Bill C-25 were quite high and that they could be numerous and varied (DOS, 2009b). He also further supported the evidence that accused persons experience harsher conditions in PSC than they would in prison, reminding the Senate of the further need for enhanced credit.

3.5 The Battleground of Friction:

Despite the litany of concerns raised surrounding Bill C-25, it was passed without amendment and enshrined into law after receiving Royal Assent on February 22nd, 2010. In doing so, the Harper Government arguably placed judges at a difficult crossroads of loyally implementing the will of Parliament whilst balancing concerns regarding the erosion of several fundamental principles of justice. With the expectation that they are to grant credit for PSC at a ratio of 1:1 for the vast majority of offenders and an explicit obligation to do so for those detained for either a criminal record or a breach of a bail condition, it would not be surprising to find that the Truth in Sentencing Act laid fertile terrain for friction between the political and judicial spheres. Indeed, these new legislative rules would appear to directly conflict with longstanding tradition and the well-established reasons in case law of granting 2:1 credit for PSC. In fact, one might suggest that this clash between the legislation imposed by elected officials and the judges who were tasked with implementing it was inevitable. Perhaps already anticipating this conflict, many of the criticisms of Bill C-25 raised during the Parliamentary legislative process already foresaw the strong potential of Charter challenges.

The purpose of this thesis is to explore Bill C-25 – the Truth in Sentencing Act – as a potential battleground between the political and judicial social spheres. Specifically, this dissertation will examine the responses of Canadian judges to the imposition of legislation which arguably limits their discretion in arriving at fair and just sentences. To this end, the focus will be on the extent to which the judiciary in Canada has merely accepted – or more likely – resisted the implementation of this legislation as it was intended by the government of the day and the shape that this resistance might take. The working hypothesis is that judges will find a way to circumvent the changes mandated in Bill C-25 in order to maintain longstanding practices of recognizing – and compensating for – not only the harsher conditions of PSC but also – and especially - lost parole

and remission/statutory release eligibility. The project will attempt to determine, with some degree of reliability, the average ratio of credit granted to offenders who spent time in PSC after Bill C-25 went into force in order to begin to paint a picture of how judges are applying credit for time spent in PSC now that the changes are in place. This description will also explore judicial responses in those cases in which accused persons have criminal records or breached a condition of bail.

4. Chapter Three: Methodology

4.1 Research Design

This project used a mixed-methods approach as a framework to explore judges' compliance with Bill C-25, and as a consequence, provide some insight into one of the ways in which this legislation has affected the CCJS. At the outset of the project, a pre-test/post-test evaluation was strongly considered as a potential research design. This approach would have allowed the comparison of the ratio of credit granted by judges for time spent in PSC both before and after the new legislation came into force. Anecdotally, a ratio of 2:1 was commonly thought to be the norm before Bill C-25 although ratios of 3:1 and even 4:1 were also believed to have been given occasionally (Bourgon & Grech, 2010; Manson, 2005). Bill C-25 placed new restrictions on judges that would allow them to grant a maximum ratio of 1.5:1. A pre-test/post-test design would have therefore facilitated a particularly useful comparison of pre and post legislation time periods which would highlight the degree of judicial compliance. While theoretically attractive, this research design was ultimately abandoned. The reasons for this decision were multiple.

Most notably, prior to Bill C-25, the granting of credit for time spent in PSC was not controversial and, as such, there would have been few reasons for a judge to write a formal sentencing report on this topic. Particularly, joint submissions at sentencing which dealt with credit for time spent in PSC would rarely, if ever, have been challenged by the judge and thus would not likely appear as written sentencing decisions in the pre-test period. In the post-test period, judges would presumably have had considerable motivation to write sentencing decisions regarding their interpretation of the new legislation and regulations for granting credit. It is likely that the sentencing decisions or, more specifically, the criminal cases from which formal reports were written, would not be comparable across the two time periods.

Additionally, it would have been difficult to determine when the pre-test and post-test time periods should begin. For example, although Bill C-25 came into force on February 22nd 2010, judges had been made aware of the likely changes for some time prior to this date. It would have been difficult – if not impossible – to determine a starting point that accurately reflected the moment in time when the practices of judges began to shift to the standard set by the new legislation. It is possible that even the basic re-education of judges on the topic of credit for time served provided through the Hansard law review could have influenced judicial behaviour long before the legislation came into force. As a case in point, in *R. v. Safarzadeh-Markhali* (2014), Justice Block referenced that on December 7th 2009 Justice Casey Hill, in his contribution to the April 2010 Law Society of Upper Canada "6 Minute Criminal Judge" educational program entitled 'Pre-Sentence Custody: A New Era', gave direction about how judges should grant credit after Bill C-25 came into force.

Finally, the requirement to explicitly state, on the record, the amount of credit being granted for time served was not mandated until after Bill C-25 came into force. The absence of this obligation during the pre-period would likely have rendered the calculation of the ratio of credit granted for time served more difficult in cases prior to February 22nd, 2010. Indeed, it is likely that a change occurred in the recording practices of cases in which credit was granted for time served after the legislation came into force. Judges would presumably have been considerably more likely to give their opinion on how the legislation should be interpreted post-Bill C-25 as it applies to time served because this latter time period involved the messy process of figuring out how the legislation should be applied in practice.

It is with all of these reservations in mind that it was determined that the project would focus on only the period of time after the legislation came into force. Specifically, a post-test only design

was adopted. This option provided several advantages. Most notably, Bill C-25 established within the *Criminal Code* the requirement that the following information be put on record by judges: the reasons for granting credit; the amount of time credited; the sentence actually imposed; and, the term of imprisonment that would have been imposed if credit had not been given for PSC (s. 719, 3.2 & 3.3). Thus, a specific and detailed statement of reasons for credit being granted would be more likely to provide insight into the mindset and logic underlying judges' decisions to grant credit. As such, they provide a rich layer of qualitative data for building a more informed analysis. In particular, these reasons, specific to the post-test period, would give a better understanding as to why and how judges were making their decisions to grant credit. Further, although the pre-test/post-test comparison of judicial practices proved infeasible, a comparison was still possible between the *intent* of the legislation and the *actual* practices of the judges in the post-period. This comparison mirrors the classic dichotomy characteristic of many law and society studies between the 'law on the books' and the 'law in action' (Galanter, 1974).

The start date for the post period was set as February 22nd, 2010 when the legislation came into force. This date was chosen in order to include all possible cases that may have been affected by the new legislation. The end date for the sample was deliberately chosen as April 11th, 2014 for several reasons[28]. Most importantly, this temporal delineation isolated a period of judicial interpretation and reaction before the existence of any S.C.C. guidance. Indeed, the courts were still in the process of deciding how to interpret Bill C-25 and determining how the legislation would be implemented. It is exactly this messy and challenging process that could potentially provide fertile

[28] It was on this date that the S.C.C. ruled on *R. v. Summers* (2014), in favour of the defendant. The ruling allowed judges across Canada to give the maximum 1.5:1 credit in any case in which the offender was likely to obtain statutory release/remission credit release at the two-thirds point of sentence. The impact of this ruling would give judges across Canada broad latitude to give the maximum credit of 1.5:1 to most offenders for time spent in PSC. As such, the cases decided before this ruling would likely not be comparable with those decided afterward. The Summers ruling marked a new era of judicial guidance in the post-period.

ground for the observation of judicial non-compliance – or more aptly, circumvention – and, as such, warranted focused study.

4.2 Population of Interest

The population of interest for this study was all sentencing decisions in criminal court from February 22nd, 2010 to April 11th, 2014 in which the accused spent time in PSC and, by extension, required the judge to consider whether – and how much – credit for time spent in PSC should be granted. It was decided early on that the study would focus on only one province. This option reflected the significant provincial/territorial variation in Canada in terms of criminal activity, police response, prosecutorial discretion and judicial sentencing decisions (Webster et al, 2009a) – all factors which would differentially affect the amount of credit granted for PSC. For example, police and prosecutors in some jurisdictions may have some level of variability in the rate at which they charge offenders with violations of bail conditions. This would affect the number of offenders who might be barred from receiving more than 1:1 credit.

Regarding judicial sentencing decisions, a quick pre-study also noted considerably different – although not officially statistically evaluated – general trends in the use of PSC prior to Bill C-25 by province. More importantly, the accompanying level of concern related to correctional resources expended varies considerably by province because of significantly diverse use of PSC. Simply as an illustration, the PSC rate for Manitoba was 69/100,000 in 2010 and stands in sharp contrast with that of 37/100,000 in Saskatchewan in the same year (Porter & Calverley, 2011). This is relevant because it indicates that it is at least possible that the pressure to use PSC rather than to release accused on bail may vary by province/territory. A variety of factors could influence the use of PSC which might include available resources or direction given to the courts from provincial justice officials. As such, there would have been significant limitations in the comparability of data from multiple provinces.

Most importantly, the decision to focus on only one province made it possible to evaluate enough cases to run meaningful statistical analyses on a group of cases that would be affected in relatively similar ways by the above variables. Further, it allowed the enrichment of the study with qualitative analyses. Focusing on just one province allowed sufficient time to read each case deeply and identify themes within the cases, a level of detail that allowed more intimate understanding of what was happening within the sample. This added considerable depth to the quantitative analyses. Additionally, as case-law at the appellate level is only binding for courts within the same province, focusing on just one province made it significantly easier to understand the impact of jurisprudence on the behaviour of judges – as opposed to having to guess what impact an appellate decision in Ontario might have on lower courts in Saskatchewan.

As a limiting factor, the main researcher was not proficient in French and, as such, sentencing decisions from Quebec would have been very difficult to include. Furthermore, the court system in Quebec is different in a number of ways which might affect the credit for PSC (e.g., a judge typically presides over bail hearings rather than a justice of the peace as is the practice in Ontario). This fact alone may arguably render Quebec incomparable with the circumstances in Ontario. In brief, it was decided that comparability across provinces would have been very difficult to achieve. A singular focus on just one province and its unique concerns allowed the project to provide a clearer picture of how Bill C-25 has impacted one region of Canada and, by extension, permitted a more in depth analysis than would have been possible otherwise.

The limitations of this choice to evaluate only one province are noted. Focusing only on one province rendered the study less generalizable to all of Canada. However, the purpose of this study was not to determine the average ratios of credit granted by judges and generalize those findings on a larger scale. Indeed, the project did not seek to systematically describe the ratios being given but rather to understand the rationale for which they had been given (at least in terms of the factors

which appear to impact the specific credit given). In this sense, the project sought to determine the degree of compliance of judges with the legislative requirements in a more focused context. Further, the desire was to understand how the often nuanced and complex decisions regarding sentencing priorities, principles and concerns would be handled by the judiciary. The focus on one particular province permitted the project to delve into the necessary level of detail to achieve this aim.

Ontario was chosen as the province of interest for several reasons. First, in the pre-screening phase, the data from Ontario regarding time served were particularly intriguing as there seemed to be a considerable degree of variability in how judges were granting credit following the coming into force of Bill C-25. This theoretically unexpected distribution of data warranted further exploration in order to discover what exactly was occurring in Ontario that seemed, at least on the surface, to be different from the majority of other provinces. Further, the population of Ontario is approximately 13.5 million, constituting roughly 39% of the population of Canada, and has been concerned with a rising PSC population over the past two decades (Webster et al, 2009). As such, data from this jurisdiction would constitute a valuable window into broader national trends because it represents such a large portion of criminal justice cases in Canada as well as potential concerns stemming from increasing numbers of accused persons in PSC.

The population of interest was further refined to include only adult criminal court cases. Indeed, youth court cases were discarded from the analysis precisely because the youth criminal justice system is operated under the authority of the Youth Criminal Justice Act (YCJA). Particularly given that there are substantial differences in the youth system in the areas often used as justification for enhanced credit (e.g., programming; educational resources; accommodations; food; and, access to services), youth cases in PSC would arguably be incomparable to those served in the facilities of the adult system.

Finally, criminal cases heard in the Ontario Court of Appeal were also not considered part of the population of interest for this study. This choice reflected an attempt to avoid any double-counting of cases that might be returned in a search which included both the original decision and a later appeal. Further, appeal decisions were also generally drafted as much shorter sentencing decisions which often did not include important details surrounding the amount of credit granted for time spent in PSC. Having said this, court of appeal decisions handed down during the study period which specifically addressed the issue of PSC were reviewed. In particular, special attention was given to those which may influence judicial decision making on PSC in the lower courts.

4.3 Data Sources

As a matter of practicality, electronic legal databases of criminal sentencing decisions were chosen as the data source for this research project. Interviews with judges were briefly considered but ultimately discarded as a source of information. The reasoning for this decision was twofold. First, it would be very difficult to obtain access to a sufficient number of judges in order to get a reasonable picture of their decisions relative to PSC. Second, it was thought unlikely that the judges would candidly discuss their personal position with regard to legislative policy that had not yet received guidance from higher courts. Traditionally, Canadian judges have been very reluctant to speak out about criminal justice legislation (Webster & Doob, 2007). Within this context, it would be particularly unlikely that they would confess any reservations about the new legislation or any intentions on their part to circumvent it. Although judges may still not be candid regarding potential circumvention efforts in their written sentencing decisions, the use of electronic databases would allow the project to obtain enough data to perform statistical analyses which may be able to shed valuable light on broad trends in determining credit for PSC.

Courtroom observation was also considered as a source of data for this study. However, the difficulty in acquiring a reasonable number of cases constituted a significant limitation.

Specifically, the focus of this study is on cases involving credit being granted for time served in PSC. As there exists no courtroom that deals with only these cases, one could observe multiple courtrooms on a daily basis and still fail to obtain information on enough cases meeting the required criterion. Indeed, such a practice would involve sitting in sentencing court and simply hoping to get lucky by happening to observe cases in which credit for time served not only was an issue, but was also explicitly discussed. Further, observations would be limited to the views of only a few specific judges in one or two courthouses within travelling distance. As courts have been shown to be somewhat localized in their sentencing behaviour (Leverick & Duff, 2002), it was deemed more valuable to choose an information source that allowed access to a broader range of Ontario courtrooms.

Courtroom transcripts would potentially have provided a wealth of information on the ways in which PSC is being considered and argued from which the study could have drawn. However, they also come with their own set of drawbacks. First and foremost, printed transcripts lack the digital functionality to carry out complex searches[29]. This computer function provides the ability to rapidly and accurately double-check, review or search specific topics or cases. Further – and perhaps more importantly – the cost of acquiring transcripts would have rendered them a prohibitive option. Traditional print sources from the law library at the University of Ottawa were also rejected for their lack of digital functionality. Although these sources contained a wealth of legal case-law, they are arguably even more selective and therefore less generalizable than the cases uploaded to QuickLaw and other online databases (McCormack et al., 2010).

Within this context, QuickLaw was chosen as the online database to be used as the data source for this project. It was chosen because it is free to access for all University of Ottawa

[29] It is acknowledged that current technology can render documents machine readable and as such, allow for computer-based coding analyses using ATLAS or NVivo. However, the author was untrained in the use of this software. Future research may benefit from applying this approach.

students. Further, it not only provides information on a broad range of cases, but is also equipped with adequate search functionality for the purposes of this project. Finally, it represents a platform with which the researcher was already familiar, requiring less training. The non-profit CanLII database was rejected due to the organization of the cases being much less efficient in terms of search parameters (e.g., those identifying cases involving the issue of PSC). Further, a free of charge database such as CanLII was not deemed to be as comprehensive as QuickLaw for the research project (McCormack et al., 2010). Quite simply, this latter electronic database was the only online legal database that provided access to a large number of sentencing quantums while also providing useful search parameters to quickly and efficiently select only particular cases of interest.

However, there are a number of limitations with using QuickLaw as the data source for this project. First, QuickLaw maintains a database of only those cases for which a written judgment is uploaded to the online system. Further, the criterion for uploading certain cases and not others is unknown. Second, it is, by no means, an exhaustive database of all criminal court cases processed in Ontario. It is reasonable to assume that the specific cases for which judges write sentencing decisions are presumably different from either more mundane cases passing through the courts or those resulting from a joint submission between the Crown and defense counsel on sentence – both of which generally have no written decision. This alone means that cases found on this database will only be representative of all criminal cases in Ontario to some incalculable degree. As such, the generalizability of any findings based on this data source is, for all intents and purposes, unknown.

In this vein, it should be rightly recognized that QuickLaw is an imperfect data source. Arguably, equally problematic is what is not contained in these written sentencing decisions. Specifically, it cannot be assumed that judges have not covertly found ways to circumvent the implementation of Bill C-25 which would not be identifiable through this data source. Using the example of an aggravated assault charge, the *Criminal Code* clearly gives a judge broad discretion

in determining the length of sentence that an offender should serve. Should a judge believe that an offender deserved more than 1.5:1 credit – let's say, 2:1 credit for each day spent in PSC as was the former general practice – it is entirely possible that the judge would simply reduce the sentence of the offender by a number of months from what he/she would have given prior to Bill C-25 coming into force and then grant a 1:1.5 credit for any time spent in PSC. The final sentence would be the same but the circumvention of the current legislation's limit of 1.5:1 credit would be undetectable. As such, one must also be cognizant that any analysis using QuickLaw will simply reflect the information that judges are willing to publicly put on the record as their official reasons for their actions but which may not reflect their true intentions. Further, the possibility of such hidden circumvention gives reason to doubt the validity of comments made by judges on the record in their sentencing decisions. This creates a limitation for the project in that it is not possible to be certain if judges' expressed opinions regarding Bill C-25 and credit for time spent in PSC reflect their true opinion.

4.4 Sampling Technique

This study employed probabilistic sampling techniques because they are considered to be the most powerful procedures in obtaining a representative sample (Neuman, 2009). Specifically, a systematic random sample was carried out. To this end, the population of all cases involving PSC identified in QuickLaw between February 22nd, 2010 and April 11th, 2014 was identified as being 739[30]. Constituting this study's sampling frame, these cases were ordered chronologically by the search function. A sample size of roughly 100 cases was considered desirable in order to achieve three aims: first, to ensure a reasonable level of representativeness relative to the population of 739 cases; second, to provide a manageable number of cases that would allow a more in-depth analysis

[30] This population was first identified on April, 11th 2014. It is notable that the size of this population as well as the order of the cases retrieved by the search for this study changed over time. Indeed, QuickLaw retroactively adds cases as they are submitted by judges. These additional cases were not included.

of each sentencing quantum on both a quantitative and qualitative level; and, third, to create a large enough sample to permit sub-group analyses. It was determined that an interval size of 6 would return an adequate number of cases for this purpose.

As such, the sampling process involved randomly selecting a number between one and six and then systematically selecting every 6th case from that point onward. Although all youth and appeal court decisions were excluded through search terms, several were, nonetheless, not adequately filtered. When such cases were randomly selected, they were simply discarded and the next case was selected in its place.

A similar process was used with those cases in which the sentence was handed down after February 22nd, 2010 but whose date on which the offender was charged occurred prior to this date. As the legislation was not retroactive, the judge would determine the sentence for these cases based on the previously existing practices. When this situation occurred, the 'ineligible' case was discarded and the case immediately following it would be chosen for inclusion. In the case that all five cases directly following the randomly selected, yet ineligible, case were also not eligible for inclusion in the sample, the process would then restart with the next systematically selected 6th case. The impact of this decision making process was that only a minimal number of cases selected within the first year after Bill C-25 came into force were eligible for inclusion. The fact that the final sample is consequently weighted with a greater number of cases from later dates was not seen as problematic because this description would be reflected in a study that used the full population as well. In other words, the sample remained representative of the population from which it was drawn. The final sample for this study consisted of 110 randomly selected cases.

A somewhat different situation arose with the existence of doubles and triples of many cases found in the sampling frame. In fact, in a QuickLaw return of ten cases per page, roughly one third

or more of the returned cases would be doubles or triples of previous cases. When a case was selected that had already been included in the sample, it was flagged and discarded from inclusion. However, this circumstance is still somewhat problematic from a probability perspective as random sampling is based on the principle that each case in the sampling frame has the same likelihood of being selected and included in the sample. However, with cases appearing multiple times, they would have a higher probability of being included than cases that only appeared once. This result is simply a limitation of QuickLaw that could not be avoided with any available search parameters. Having said this, it was somewhat mitigated by the fact that cases which appeared multiple times always did so in close, if not immediate, succession. This circumstance made it possible to avoid accidentally selecting the same case twice. It should also be noted that the cases which appeared multiple times did not appear, from a qualitative perspective, to be substantively different from those which only appeared once. Nonetheless, this occurrence is recognized as a limitation – albeit presumably of a minor nature – of the generalizability of the results of this study.

4.5 Data Collection

Prior to data collection, a significant amount of time and effort was spent reviewing the literature on sentencing practices to develop a deeper understanding of those variables which might have an impact on the decision-making process of judges when granting credit for time spent in PSC. This knowledge was further complemented by the researcher's good fortune of having been a teaching assistant in a University of Ottawa criminology course entirely focused on the subject of sentencing within the Canadian context. As a complement to this 'theoretical' process for identifying relevant predictors, the researcher also reviewed every selected case in great detail. Cases were read multiple times in order to get a qualitative sense of the data and to provide further insight into any additional factors which appeared to be important in the judges' decision making process.

Subsequently, ongoing meetings were held with the thesis supervisor to discuss the construction of a coding guide. This rough guide became an extensive list of variables that were chosen for inclusion in the data analysis and which were either informed by the criminological literature on the topic or emerged from multiple readings of the cases. The vast majority of these factors were uncomplicated and would simply be coded as being present or not present (ex. the presence or absence of a criminal record, or whether or not defense counsel mentions remission as a justification for credit for PSC). The coding guide simply described the definition of each variable and its corresponding response categories. As an example, the variable of 'defense silent' would refer to cases in which defense counsel chose not to speak to the issue of credit for time served at sentencing. The response categories would be dichotomous in nature (yes or no).

By the end of the deliberations, a list of 103 variables, with their corresponding preliminary response categories, had been created. Having said this, several additional variables were created during the process of analysis as unexpected trends in the data emerged. Most response categories were coded numerically so as to facilitate quantitative statistical analyses. However, numerous qualitative variables were also created to permit deeper insight and understanding of what might be inferred from the quantitative data (ex. themes used by judges to justify their determination of credit for PSC such as adhering to 1:1 credit being the will of Parliament, rejecting 1:1 credit because remission/statutory release must be taken into account, or following a particular thread of case-law in support of a particular argument - i.e. *R. v. Johnson* (2011), *R. v. Summers* (2013), or *R. v. Morris* (2011) – whilst ignoring or dismissing other case-law relevant to the issue of time served).

4.5.1 Dependent Variable

The dependent variable in this study is the ratio of credit granted by the judge for time spent in PSC. This variable was selected as the dependent variable because it was precisely this judicial practice that Bill C-25 was meant to affect. Under the new law, judges were constrained to give a

particular range of credit. In order to measure compliance with the new legislation, it was required that the study identify how judges were applying the new ratio standards in practice. This value was often stipulated explicitly by the judge in the sentencing decision. In other cases, it was calculated by dividing the number of days of credit granted by a judge by the number of days that an individual offender had spent in PSC. However, the process often produced seemingly odd ratios such as 1.06:1 or 1.46:1 which did not align with the new cap of 1.5:1 credit or the minimum credit ratio of 1:1. In some of these cases, one might assume that the judge's calculations were simply not exact, producing ratios such as 1.05:1 rather than the intended 1:1. While one might be tempted to consider these 'odd' numbers as meant to be 1:1 or 1.5:1, the decision was made to leave them as they were presented (or calculated). This conservative approach reflected the fact that at least in some cases, judges presented reasons which might be understood as justifications for these 'odd' ratios (e.g., compensation for the loss of remission at a rate of 1.5:1 reduced to approximately 1.4:1 due to negative behaviour in prison by the accused).

4.5.2 Independent Variables

A broad range of independent variables were included in this study. This option reflected the intent of ensuring, as much as possible, that no variable which could theoretically have an impact on the ratio of credit granted by judges for time spent in PSC was missed. Indeed, the goal was simply to be as inclusive as possible of all possible factors that might affect the ratio of credit.

The independent variables could be broadly categorized within the following classifications: legal justifications; jurisprudence; offender characteristics; and, legal actor behaviour. Legal justifications would include such factors as arguments in favour of enhanced credit ratios of 1.5:1 because of lost remission/statutory release eligibility or very poor PSC conditions. Jurisprudence constitutes any and all case-law cited by a judge in his/her reasoning for granting the specific credit ratio decided upon. Offender characteristics include such factors as: gender; mental health issues;

substance abuse issues; and good behaviour during time in PSC. Legal actor behaviour variables capture, among other actions, whether or not the Crown requested a ratio of 1:1 credit or the defense counsel requested enhanced credit of 1.5:1.

4.6 Data Analysis

A multi-method analysis was employed. On the one hand, a quantitative approach was used. To this end, statistical analyses were conducted. The quantitative data for this project were analyzed using the Statistical Package for the Social Sciences (SPSS, version 21). A variety of descriptive statistics and inferential tests were carried out. Initially, the dataset was examined using a number of descriptive statistics. Specifically, frequency distributions were reviewed for all of the variables, facilitating the identification of any missing data or unusual values (outliers) that might signify either errors in the data input process or variables which might require additional treatment. Subsequently, the dependent variable was then described using measures of central tendency and measures of dispersion in order to understand the general shape of its distribution and its defining characteristics.

To examine potential predictors of the dependent variable, various bivariate analyses were also conducted. Most frequently, contingency tables were used to examine possible correlations between various independent variables and the dependent variable as well as determine the direction of these relationships. To assess the statistical significance of any of the bivariate relationships discovered, a number of inferential tests were performed. In particular, chi-square values were calculated although analysis of variance and t-tests were run in some cases. The 0.05 alpha level was used as the benchmark for statistical significance (Neuman, 2009)[31].

[31] Statistical significance is concerned with the number of times a false positive can be discovered purely on account of chance (Neuman, 2009). Therefore, a 0.05 alpha level means that there is less than a 5% chance that the relationship discovered will have been erroneously found when one does not actually exist (Neuman, 2009).

To complete the quantitative analyses, multivariate analyses were also conducted. The variables included in these analyses constituted all statistically significant predictors of the amount of credit granted for time spent in PSC discovered at the bivariate level. Multiple regression analyses were used in order to determine the independent or unique impact of each of the relevant independent variables on the ratio of credit for PSC as well as identify the weight which each factor contributed to explaining the overall variance in the dependent variable.

On the other hand, a qualitative approach was also taken. Specifically, qualitative content analysis was used to identify the various themes which shed light on the actual decision making processes of the judges when determining the appropriate credit ratio for time spent in PSC. This process was done through a number of steps. First, the portion of each sentencing decision addressing the amount of credit for time spent in PSC was read several times for each case. Second, any reasons given by judges as to why they granted a particular ratio of credit for time spent in PSC were identified. Third, these individual justifications were subsequently organized thematically to provide richer and more detailed descriptions of the potential rationale(s) behind the attribution of credit for time spent in PSC. Fourth, statements made by judges were stored in separate word documents, categorized by theme, for later inclusion in the analyses and discussion sections of the thesis. In particular, three broad thematic categories were identified: arguments surrounding legal interpretation; legal justifications; and, personal beliefs or principles. These qualitative data provided a much richer, and more nuanced understanding of the quantitative patterns identified in the credit given for PSC.

4.7 Ethical Concerns:

My research did not require ethical approval from the University of Ottawa's Research Ethics Board. Indeed, the Research Ethics Board determined that there were no ethical

issues given that the data used in my study were publicly available. As such, my research method posed a low risk of causing harm to any offenders described in the sentencing decisions. Further, the coding process did not require the anonymizing of data as all of the cases are publicly posted on the QuickLaw database. Moreover, no personal information from these cases other than what was found on the record about the individuals were noted in the case summaries. Finally, all of the data for this study are analyzed and presented in aggregate form. The only reason that specific cases are ever mentioned is to contextualize the comments publicly made by justices. There could be some potential harm to the reputation of judges if the comments highlighted in this research were to be read and subsequently republished because of the particular stance that they took on the issue credit for PSC. However, these comments were made publicly and, as such, are subject to such scrutiny regardless. Nonetheless, individual names of judges were never presented.

5. Chapter Four: Analysis

5.1 Evidence of Potential Non-Compliance

As discussed in the literature review, the intention of the Harper Government was to bring an end to 2:1 credit. Specifically, the government's intention was to reduce credit to 1:1 (although it did acknowledge that 1.5:1 would still be permitted, albeit in only 'exceptional' cases). A review of comments made by judges in case-law and expert testimony at committee meetings revealed that judges would likely have significant motivation to resist this change as it challenged several fundamental principles of justice. Thus, there was adequate justification to suspect Bill C-25 would make fertile ground for judicial non-compliance – e.g., resistance. In order to measure judicial compliance, the ratios of credit granted by judges after February 22nd, 2010, when Bill C-25 came into force, were examined in detail using statistical analyses. First, the data are reviewed with a number of descriptive statistics.

Table 5.1: Frequency Distribution of Ratios of Credit

1:1	1.01-1.2:1	1.21-1.3:1	1.31-1.4:1	1.41-1.49:1	**1.5:1**	N
36	18	6	6	2	**42**	110

Table 5.1 [see above] breaks down the ratios of credit (in increments of .10) that were granted for time spent in PSC in 110 cases in this sample. Surprisingly, there was significant variability in the credit ratios, ranging from 1:1 to 1.5:1 – with numerous other ratios in between. This finding was unexpected. If judges were complying with the legislation, it would be expected that most offenders would receive 1:1 credit.

Through the use of these descriptive statistics, it was discovered that the median ratio of credit granted by judges is 1.25:1. That is, 50% of the ratios of credit granted by judges are above 1.25:1. This is perplexing because, given the expectations of the Harper Government, one would

have thought that the median value would be closer to 1:1. Perhaps more surprisingly, when examining the mean, it is discovered that the average ratio of credit granted by judges is also 1.25:1. The average ratio of credit is, in fact, considerably higher than 1:1. Again, this finding is strange, given the earlier comments of the then Minister of Justice regarding his expectations of a 1:1 ratio for most offenders.

In addition to these findings, the distribution of the data is clearly bimodal[32]. A closer inspection reveals that there are two modes regarding the ratio of credit granted in the 110 cases. These modes are the ratios of 1:1 and 1.5:1, granted in 36 and 42 cases respectively. In other words, 1.5:1 constitutes one of the two most common credit ratios handed down by judges. A total of 42 cases out of 110 (38%) received this ratio of credit for PSC. This finding is in direct contrast to what would be expected. As demonstrated earlier, the Harper Government clearly intended that judges were to use 1.5:1 credit only in special cases where circumstances justified it. Yet, analysis of the data appears to indicate that 1.5:1 credit was in fact being granted with some regularity. This result stands as a strong suggestion that judges may be resisting the intentions of the Harper Government to bring credit down to 1:1 for most offenders.

5.2 Alternative Explanations to Judicial Resistance

Although it would seem – at least at first glance - that judicial resistance to Bill C-25's new restrictions on the granting of credit for time spent in PSC represents a plausible theory as to why such variation exists in the ratios of credit granted by judges, rival plausible explanations must first be ruled out. In fact, there are numerous scholars in the field of Criminology who have noted that judges, at times, allow extra-legal[33] factors to impact their decision making (Baumer, 2013; Cano &

[32] In statistics, a bimodal distribution is a continuous probability distribution with two different modes. These appear as distinct peaks in the probability density function, as exemplified in Table 1.

[33] For the purpose of this study, extra-legal factors can be broadly defined as those which are not governed by laws. Within the current context, any factors related to the characteristics of the offence/offender or the processing of the case

Spohn, 2012; Freiburger, 2010; Nagel & Schulhofer, 1992; Spohn & Beichner, 2000). One might assume that this possibility extends to decisions surrounding credit for time served in PSC.

Within this context, a number of independent variables were examined in regards to whether they had an impact on the dependent variable - the ratio of credit granted for PSC. To this end, a series of bivariate analyses were conducted. If the independent variable under study was not found to be a statistical significant predictor, it was eliminated from subsequent analyses. Factors that did have an impact were retained and included as part of a multivariate analysis. Independent variables that represented potential rival plausible explanations to judicial resistance were broadly categorized as being of an individual/socio-demographic, (court) cultural, and criminological nature.

When examining the impact of independent variables on the ratio of credit granted, it was decided to code the dependent measure as a dichotomous variable. Specifically, the 2 response categories were determined to be 1.5:1 credit or less than 1.5:1. Categorizing the dependent variable in this manner purposely constitutes the most conservative measure possible. Indeed, anything less than 1.5:1 credit would be considered – for the purposes of these analyses – to be consistent with the Harper Government's expectations.[34] Having said this, each of the inferential tests (using the dichotomous form of the dependent variable) was re-run with the continuous form of this same measure.[35] This additional test was used to ensure that the findings were not dependent on the dichotomous categorization. Further, consistent findings across the two different inferential tests would seem to give additional confidence in the stability of the results.

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which do not fall within the scope of the law (e.g., type of offence, number of charges, gender) would be considered to be 'extra-legal' and, as such, should not be taken into account by judges when deciding upon the amount of credit to grant for time spent in PSC. These factors stand in contrast to those defined through case-law to be legally relevant factors (e.g., loss of remissions/parole eligibility, conditions in PSC facilities) to be considered by judges in their calculation.

[34] A categorical variable was abandoned simply because of this study's small sample size and the increased likelihood of having expected frequencies of less than 5 in the chi-square analyses.

[35] For the interested reader, these additional analyses can be found in Appendix A.

5.2.1 Alternative Explanations: Individual Characteristics[36]

First, indigenous status was considered as a factor that might negatively (or positively) impact the ratio of credit granted to an offender. As mentioned earlier, the indigenous population of Canada is considerably over-represented in the CCJS (Statistics Canada, 2015a). However, the Gladue principles, as referenced in the *Criminal Code*, require that sentencing judges take into account the particular circumstances of indigenous offenders when determining an appropriate sentence (s. 718.2(e)). Thus, it is reasonable to question whether or not indigenous offenders received more or less credit than other offenders. In Table 5.2 [see below], indigenous offenders did appear to get 1.5:1 credit less frequently than other offenders (16.7% vs. 40.8%). However, this result is not statistically significant (Fisher's Exact, p = 0.13). Further, an independent t-test was run to compare the mean ratio of credit received by indigenous offenders and non-indigenous offenders. Although indigenous offenders received slightly lower credit ratios on average than did non-indigenous offenders ($\bar{x}$ = 1.18:1 vs. $\bar{x}$ = 1.26:1), the difference was not statistically significant (t = 1.19; df = 108; p = 0.24) (see Appendix A, Table 5.3).

Table 5.2: Cross Tabulation of Indigenous Status and Credit Ratio

			Credit for presentence custody		
			<1.5 to 1	1.5 to 1	Total
Indigenous Status	No	Count	58	40	98
		% within Indigenous Status	59.2%	40.8%	100.0%
	Yes	Count	10	2	12
		% within Indigenous Status	83.3%	16.7%	100.0%
Total		Count	68	42	110
		% within Indigenous Status	61.8%	38.2%	100.0%

Second, it was examined whether offenders with mental or physical health issues (e.g., mental health[37], substance abuse[38]) were treated differently than other offenders. Table 5.4 [see

36 Gender was not considered as a variable due to the small number of cases (i.e., less than 7 cases).

37 Mental health issues included any mental health concerns indicated in the case summary for which an offender had either a diagnosis at the time or a history of in the past. It also included offenders who were noted as developmentally delayed.

38 Substance abuse issues included any type of substance abuse ongoing at the time, or noted as being something the offender was considered as having dealt with regularly over the course of his/her life history.

below] shows that offenders with mental or physical health issues were less likely than offenders without mental or physical health issues to receive 1.5:1 credit (23.1% vs. 51.7%). This finding was statistically significant (Fisher's Exact, p = 0.003). Although it is unclear why these offenders were treated differently, one hypothesis might be that offenders experiencing substance abuse or mental health issues were perceived by the judge as more at risk to reoffend than other offenders. Given this perception, judges might consider that longer prison terms - resulting in access to treatment facilities and programming - may benefit these types of offenders.

Table 5.4: Cross Tabulation of Mental or Physical Health Issues and Credit Ratio

			Credit for presentence custody		
			<1.5 to 1	1.5 to 1	Total
Mental or Physical Health Issues Present	No	Count	28	30	58
		% within Mental or Physical Health Issues Present	48.3%	51.7%	100.0%
	Yes	Count	40	12	52
		% within Mental or Physical Health Issues Present	76.9%	23.1%	100.0%
Total		Count	68	42	110
		% within Mental or Physical Health Issues Present	61.8%	38.2%	100.0%

To further substantiate these results, an independent t-test was run in Table 5.5 (see Appendix A) to compare the mean ratio of credit received by offenders who had mental or physical health issues and those who did not. On average, offenders with mental or physical health issues received less credit ($\bar{x}$ = 1.20:1) than those who did not ($\bar{x}$ = 1.30:1). This difference was also statistically significant (t = 2.53; df = 108; p<0.05).

5.3 Alternative Explanations to Judicial Resistance: (Court) Culture

Third, in previous studies, court culture[39] has been identified as a factor that impacts the ways in which courtrooms function and the decisions that the various criminal justice actors make within this context. Unfortunately, this theoretical construct has proven to be very difficult to

[39] Court culture might be broadly defined as shared informal attitudes, values, practices and relationships within a specific court (or perhaps, larger jurisdiction (e.g., all courts in Ottawa or Ontario)).

measure (Church, 1982; Church, Lee, Tan, Carlson & McConnel, 1978; Luskin & Luskin, 1986). One factor which may be correlated with a court's culture is the size of the court (Webster, 2007). In Table 5.6 [see below], courts were categorized into small, medium and large in terms of the number of cases received by each court[40]. Although it does appear that offenders processed in medium and large courthouses were more likely to receive 1.5:1 credit (50.0% for medium versus 43.1% for large and 22.9% for small courthouses), this finding was not quite statistically significant ($\chi 2 = 5.43$; df = 2; p = 0.07). Further, in Table 5.7 (see Appendix A) a one-way ANOVA was run to compare the mean ratio of credit received by offenders who were sentenced in small ($\bar{x}$ = 1.19:1), medium ($\bar{x}$ = 1.30:1) and large ($\bar{x}$ = 1.28:1) jurisdictions. The differences in the mean ratios of credit granted to offenders sentenced across these 3 court sizes were not statistically significant (F = 2.06; df = 2; p = 0.13).

Table 5.6: Cross Tabulation of Court Size and Credit Ratio

			Credit for presentence custody		
			<1.5 to 1	1.5 to 1	Total
Court Size	Small Jurisdictions	Count	27	8	35
		% within Court Size	77.1%	22.9%	100.0%
	Medium Jurisdictions	Count	12	12	24
		% within Court Size	50.0%	50.0%	100.0%
	Large Jurisdictions	Count	29	22	51
		% within Court Size	56.9%	43.1%	100.0%
Total		Count	68	42	110
		% within Court Size	61.8%	38.2%	100.0%

Fourth, it was investigated whether judges with multiple cases in this study's sample had any particular cumulative effect on the ratio of credit. Of the 110 cases in the sample, there were a total of 68 judges. In other words, at least some of the same judges presided over more than one case. Within this context, there was concern that a small number of judges with many cases might be driving the results found in the study. Indeed, while 43 judges (or 63% of all judges) presided

[40] The cut-offs for court size were based on the number of cases which entered the courts in the most recent year (i.e., cases received from Jan 2015 to Dec 2015). Less than 7,000 cases received were classified as small, 7,000 to 12,000 cases received were classified as medium, and more than 12,000 cases received were classified as large.

over only one case in the study sample, 25 judges (or 37% of all judges) presided over more than one case (i.e., they determined the credit ratio for time spent in PSC in 67 (61%) of the (110) cases). Notably, Justice Harris presided over 9 cases in the sample and consistently ruled that the offender would receive less than 1.5:1 credit.

However, Table 5.8 [see below] shows that there was no statistically significant difference found across these 2 groups (i.e., judges that presided over more than one case vs. judges that presided over only one case) in terms of the credit ratio given (Fisher's Exact, p = 0.69). Indeed, while judges who presided over only one case gave 1.5:1 credit 34.9% of the time, judges who presided over more than one case gave 1.5:1 credit 40.3% of the time. In Table 5.9 (see Appendix A), an independent t-test compared the mean ratio of credit granted by judges who presided over only one case ($\bar{x}$ = 1.24:1) and judges who presided over more than one case ($\bar{x}$ = 1.26:1). Despite Justice Harris (as a sort of outlier), the mean difference between these two groups was not statistically significant (t = -0.56, df = 108, p = 0.58). Additionally, in Table 5.10 (see Appendix A) an ANOVA was run to compare the mean ratio of credit granted by judges who presided over different numbers of cases. The independent variable was categorized by the number of cases over which each judge presided (i.e., 1, 2, 3, 4, and 9 cases). There was no statistically significant difference[41] between the mean ratio of credit received across these five groups (F = 1.30, df = 4, p = 0.27).

Table 5.8: Cross Tabulation of the Number of Cases per Judge and Credit Ratio

			Credit for presentence custody		
			<1.5 to 1	1.5 to 1	Total
Number of Cases	Judges who Presided over one Case	Count	28	15	43
		% within Number of Cases	65.1%	34.9%	100.0%
	Judges who Presided over more than one Case	Count	40	27	67
		% within Number of Cases	59.7%	40.3%	100.0%
Total		Count	68	42	110
		% within Number of Cases	61.8%	38.2%	100.0%

[41] It is noted that there may well have been a statistically significant result if cases presided over by Justice Harris were removed from the analysis.

5.4 Alternative Explanations to Judicial Resistance: Criminological Factors

Fifth, the variable of length of stay in remand (in days) was examined. This variable was considered because anecdotal evidence from the qualitative data suggested that it may be a factor that evokes sympathy from judges at sentencing. As a case in point, in *R. v. C.D.* (2014), Justice Hambly noted that two years and two months was a very long time to spend in a local detention facility awaiting trial as part of his reasoning for granting enhanced credit at the maximum 1.5:1 ratio.[42]

Thus, it was investigated whether offenders who served particularly long durations in PSC would receive increased credit from sentencing judges. In Table 5.11 [see below], the number of days spent in remand was collapsed into three categories (e.g., less than 9 months, 9 months to 18 months, and greater than 18 months). For three cases in the study's sample, the exact number of days in remand was unknown. The number of days spent in remand did not have a statistically significant impact on the amount of credit granted by judges ($\chi 2 = 2.69$; $df = 2$; $p = 0.26$).

However, longer remands were noted to receive higher ratios of credit (e.g., offenders who spent more than 18 months in PSC received 1.5:1 credit 48.4% of the time, versus 31.4% for offenders who spent less than 9 months and 31.7% who spent between 9 months and 18 months in PSC. In Table 5.12 (see Appendix A), an independent t-test was also run to compare the mean number of days spent in remand across the two credit ratio groups. Although the results show that offenders who received 1.5:1 credit served a greater number of days in remand on average (469 days) than those who received less than 1.5:1 credit (402 days), the result was not statistically significant ($t = -1.25$; $df = 105$; $p = 0.21$). Further, a Pearson's correlation matrix was created (see Appendix A) in order to compare how closely the number of days in remand and the raw credit

[42] Notably, the basis of this decision appeared to be unrelated to any particularly harsh conditions found in the remand centre. Rather, it simply was rooted in a lengthy stay. It is for this reason that this factor was considered to be 'extra-legal' in nature.

ratio granted varied together. There was no statistically significant correlation between the number of days that an offender spent in remand and the credit ratio granted (r = 0.12, p = 0.24).

Table 5.11: Cross Tabulation of Days in Remand and Credit Ratio

			Credit for presentence custody		
			<1.5 to 1	1.5 to 1	Total
Days in Remand	Less than 9 months	Count	24	11	35
		% within Days In Remand	68.6%	31.4%	100.0%
	9 months to 18 months	Count	28	13	41
		% within Days In Remand	68.3%	31.7%	100.0%
	More than 18 months	Count	16	15	31
		% within Days In Remand	51.6%	48.4%	100.0%
Total		Count	68	39	107
		% within Days In Remand	63.6%	36.4%	100.0%

Sixth, the number of charges of which an offender was found guilty at sentencing was considered in terms of its impact on the amount of credit which he/she received. This variable raised a reasonable question. Would offenders with large numbers of charges be seen as less worthy of credit above the standard 1:1 ratio? In Table 5.14 [see below], the number of charges did not affect the ratio of credit granted to offenders. Charge numbers were categorized into groups including those with 1-2, 3-5 and more than 5 charges. It appears that larger numbers of charges did not result in offenders being more likely to receive less than 1.5:1 credit (i.e., approximately 62% of offenders received less than 1.5:1 credit regardless of the number of charges) and lower numbers of charges did not result in leniency as approximately 38% of offenders received 1.5:1 credit in all categories of charge number. This result was not statistically significant ($\chi 2$ = 0.01; df = 2; p = 0.99).

In Table 5.15 (see Appendix A), an independent t-test was also run to compare the mean number of charges across the two credit ratio groups. Although the results suggested that offenders who received 1.5:1 credit had more charges on average ($\bar{x}$ = 7.57) than those who received less than 1.5:1 credit ($\bar{x}$ = 4.57), the result was not statistically significant (t = -1.27; df = 43.52; p = 0.21). In

Table 5.16 (see Appendix A) a one-way ANOVA was run as well to compare the mean ratio of credit received by offenders across the various categories of numbers of charges. There was no statistically significant difference between the mean ratios of credit granted across these groups ($F = 0.19$; $df = 2$; $p = 0.83$). Further, a Pearson's correlation matrix was created (see Appendix A, Table 5.17) in order to compare how closely the number of charges an offender was convicted of and the raw credit ratio granted varied together. There was no statistically significant correlation between the number of days that an offender spent in remand and the credit ratio granted ($r = 0.15$, $p = 0.13$).

Table 5.14: Cross Tabulation of Number of Charges and Credit Ratio

			Credit for presentence custody		
			>1.5 to 1	1.5 to 1	Total
Number of Current Charges	1-2 Charges	Count	22	14	36
		% within Number of Current Charges	61.1%	38.9%	100.0%
	3-5 Charges	Count	23	14	37
		% within Number of Current Charges	62.2%	37.8%	100.0%
	More than 5 Charges	Count	23	14	37
		% within Number of Current Charges	62.2%	37.8%	100.0%
Total		Count	68	42	110
		% within Number of Current Charges	61.8%	38.2%	100.0%

Seventh, it was considered whether an offender's criminal record type would impact the amount of credit that he/she received. Recall that the presence of a criminal record was specifically highlighted for different treatment in Bill C-25 (i.e. if an offender was detained due to his/her record, he or she was to receive a maximum of 1:1 credit). However, criminal record type investigates the extra-legal factor of whether or not the characteristics of a criminal record impacted the amount of credit granted to an offender, rather than just its presence or absence. As such, this variable considers the seriousness of the record that an offender has (i.e., minor, serious, or none

specified[43]). Logically, some criminal record types might be perceived as more negative than others by judges, and thus the accused might potentially be less likely to receive 1.5:1 credit. In Table 5.18 [see below], criminal record type did not have a statistically significant impact on the ratio of credit granted by judges ($\chi 2 = 2.82$; df = 2; p = 0.24)[44]. Specifically, offenders with minor criminal records received 1.5:1 credit 39.1% of the time, offenders with serious criminal records received 1.5:1 credit 30.8% of the time, and offenders with no criminal record or no type specified received 1.5:1 credit 48.6% of the time. Further, in Table 5.19 (see Appendix A) an ANOVA was used to compare the mean ratios of credit received across groups of offenders with varying criminal record types. The independent variable continued to be categorized as minor, serious, or no criminal record/no type specified. There was no statistically significant difference across the mean ratios of credit ($\bar{x}$ = 1.22:1 for minor record, $\bar{x}$ = 1.23:1 for serious record, and $\bar{x}$ = 1.31:1 for no record/none specified) granted to these groups (F = 1.57; df = 2; p = 0.21).

[43] In case law summaries QuickLaw tags whether or not the offender had a criminal record. When a criminal record is present, the record is frequently paired with a description of the criminal record (e.g., lengthy, related, lengthy & related, dated, dated & related). In some cases, no description or type is specified, including all cases in which the offender did not have a criminal record. Those that could be perceived as potentially more serious (e.g., lengthy, lengthy & related, related) were categorized as serious. Those that might be perceived as less serious (e.g., dated, minor), were categorized as minor. Where no type was specified or no criminal record was present, cases were categorized as such.

[44] Analyses were also run with non-specified/no criminal record cases removed. The result was still not statistically significant ($\chi 2 = 0.186$; df = 1; p = 0.66).

Table 5.18: Cross Tabulation of Criminal Record Type and Credit Ratio

			Credit for presentence custody		
			<1.5 to 1	1.5 to 1	Total
Criminal Record - Serious, Minor, or None/None Specified	Minor Record	Count	14	9	23
		% within Criminal Record - Serious, Minor, or None/None Specified	60.9%	39.1%	100.0%
	Serious Record	Count	36	16	52
		% within Criminal Record - Serious, Minor, or None/None Specified	69.2%	30.8%	100.0%
	No Criminal Record or None Specified	Count	18	17	35
		% within Criminal Record - Serious, Minor, or None/None Specified	51.4%	48.6%	100.0%
Total		Count	68	42	110
		% within Criminal Record - Serious, Minor, or None/None Specified	61.8%	38.2%	100.0%

Eighth, it was examined whether the seriousness of an offender's crime would impact a judge's impartiality and result in less lenient sentencing decisions in terms of credit granted for PSC. Cases were classified by the most serious charge for which the offender was found guilty. The seriousness of the offender's crimes was divided into two categories for the purpose of this analysis: offences against the person (e.g., assault, robbery) and other offences (e.g., theft under, breaking and entering). Table 5.20 [see below] shows that the direction of the data suggests that those charged with offences against the person received less credit than those charged with other offences. Specifically only 32.9% of offenders received 1.5:1 credit when their most serious charge for which they were convicted was an offence against the person (versus 47.5% receiving 1.5:1 credit of offenders who did not have an offence against the person as part of their charges for which they were convicted). However, there was no statistically significant relationship ($\chi 2 = 1.73$; $df = 1$; $p = 0.19$).

Further, in Table 5.21 (see Appendix A) an independent t-test was also run to compare the mean ratio of credit received across two groups of offenders. The groups were categorized as offenders whose most serious charge involved an offence against the person versus offenders those

whose most serious charge was another offence. The results show that offenders with a charge for an offence against a person received a lower mean ratio of credit ($\bar{x}$ = 1.22:1) than offenders whose most serious charge was another offence ($\bar{x}$ = 1.31:1), but this difference was not statistically significant (t = -1.85; df = 108; p = 0.07).

Table 5.20: Cross Tabulation of Seriousness of Charges and Credit Ratio

			Credit for presentence custody		
			<1.5 to 1	1.5 to 1	Total
Seriousness of Charges	Offences Against the Person	Count	47	23	70
		% within Seriousness of Charges	67.1%	32.9%	100.0%
	Other Offences	Count	21	19	40
		% within Seriousness of Charges	52.5%	47.5%	100.0%
Total		Count	68	42	110
		% within Seriousness of Charges	61.8%	38.2%	100.0%

In sum, other than mental & physical health issues, the data do not appear to support the assertion that the variability in the credit ratio granted in the 110 cases in this sample is affected by extra-legal factors. This is not entirely surprising because, as noted earlier, there are decades of case-law precedence that support the granting of credit for time spent in PSC. Further, the justifications for doing so are unrelated to the individual characteristics of the offender or the seriousness of his/her offences. The above analyses suggest that in the majority of circumstances, judges did not grant enhanced credit in a fashion that would be biased towards any particular type of offender or offence (or other extra-legal factors). Rather, it seems more plausible that when judges deviated from the Harper Government's expected standard ratio of 1:1 credit, they did so consciously and purposefully. What remains to be explored is why they have chosen to do so.

5.5 Evidence of Resistance: The Criminal Record

As noted above, Bill C-25 expressly stated that those offenders who are detained in PSC primarily because of their criminal record will not be entitled to credit for time spent in PSC greater than 1:1. As such, it was expected that criminal record would have a negative impact on the credit

ratio received by offenders[45]. In Table 5.22 [see below], this expectation is corroborated when one notes that offenders who had a criminal record received 1.5:1 credit only 32.5% of the time while a full 57.7% of those without a criminal record were granted enhanced credit. This finding was statistically significant ($\chi 2 = 4.28$; df = 1; $p<0.05$). Further, in Table 5.23 (see Appendix A) an independent t-test was also run to compare the mean ratio of credit across these two groups of offenders (i.e. those with criminal records and those without). On average, the group of offenders with criminal records received lower credit ratios ($\bar{x}$ = 1.22:1) than those without ($\bar{x}$ = 1.35:1). This result was also statistically significant (t = 2.90; df = 46.74; $p<0.01$).

However, what is surprising about this finding was that 32.5% of offenders with criminal records still received 1.5:1 credit despite Bill C-25 broadly disallowing these offenders from obtaining this benefit. The devil is, of course, in the details. To explain, in order to be barred from receiving any enhanced credit above the 1:1 ratio, a judge or justice of the peace must mark the box on his/her courtroom paperwork confirming that the offender was detained primarily because of his/her criminal record. Otherwise, an offender remains eligible to receive the maximum 1.5:1 ratio of credit. Thus, it is still legally possible for offenders with criminal records to receive 1.5:1 credit. However, to do so would arguably run counter to the intentions of the Harper Government. In fact, Parliament had justified this part of the Bill as a means of intentionally targeting repeat offenders to ensure that they would receive a ratio of credit no higher than 1:1 (HOCD, 2009a).

Analysis of the ratios of credit granted to offenders with criminal records suggests that in a large portion of cases, offenders with criminal records were not, in fact, restricted from receiving more than 1:1 credit. As such, many offenders who had a criminal record still obtained enhanced credit, something the Harper Government clearly did not intend. These cases seem to suggest

[45] Note that for one case in the study's sample, whether or not the offender had a criminal record was unknown.

potential circumvention of the spirit of Bill C-25 on the part of the judiciary. Simply put, if judges were staunchly complying with Bill C-25's intent to target offenders with criminal records, it is unlikely that there would be such large numbers of offenders with criminal records receiving 1.5:1 credit. Not only are these offenders receiving additional credit, but, in fact, almost a third – 32.5% – of them are receiving the maximum 1.5:1 enhanced credit, despite having criminal records.

Table 5.22: Cross Tabulation of Criminal Record and Credit Ratio

			Credit for presentence custody		
			<1.5 to 1	1.5 to 1	Total
Criminal Record	No	Count	11	15	26
		% within Criminal Record	42.3%	57.7%	100.0%
	Yes	Count	56	27	83
		% within Criminal Record	67.5%	32.5%	100.0%
Total		Count	67	42	109
		% within Criminal Record	61.5%	38.5%	100.0%

Having shown that those who possessed a criminal record were still able to receive enhanced credit of 1.5:1, recall that extra-legal factors such as the contents of the criminal record were also considered. It might have been expected that the offenders with the most serious types of criminal charges would be more likely to be the offenders who were detained because of their criminal record. As such, it would be expected that these offenders would be more likely to receive only 1:1 credit. Surprisingly, as noted earlier in this analysis, this does not appear to be the case.

Indeed, one may recall that Table 5.18 [see above] showed that even offenders with serious criminal record types did not receive significantly different ratios of credit for their time spent in PSC than those with only minor criminal record types. Further, the seriousness of an offender's charges in Table 5.20 [see above] also failed to register as having a statistically significant impact on the ratio of credit granted to offenders. If 'violent' or 'repeat' offenders were being consistently refused greater than 1:1 credit because of their criminal records (i.e., a legal factor prescribed to be taken into consideration when granting credit to offenders for time spent in PSC by Bill C-25), it would reasonably follow that those with the worst criminal records and those found guilty of the

most serious offences (i.e., extra-legal factors that would seemingly make it more likely said offenders would be affected by the newly prescribed legal factor) would be more likely to receive 1:1 credit than those with less serious criminal histories. Yet, as discussed above, this was not the case.

These findings are perplexing. The non-significance of the extra-legal factors related to criminal record and the seriousness of offence make the evidence for resistance more compelling because even the offenders who appeared to conform to the stereotype of 'violent' or 'repeat offenders' that Harper Government officials spoke of explicitly targeting appeared to be equally likely to receive 1.5:1 credit as offenders who might be perceived less negatively. These results appear to suggest that judges did not (at least not consistently) apply the new restrictions in Bill C-25 to offenders who would seemingly correspond to those targeted by the government.

5.6 Evidence of Resistance: The Treatment of Bail Violators

The second group of offenders targeted by Bill C-25 as those who were not intended to receive credit above a ratio of 1:1 for time spent in PSC were those identified as 'bail violators' – a term used by the then Minister of Justice, Rob Nicholson (HOCD, 2009a). It should be noted that while the then Minister's choice of words appears to indicate that all those who violate their bail conditions should receive no more than 1:1 credit for time spent in PSC, the actual legislation specifically excludes only those offenders who were released on conditions for a particular charge, and then subsequently violated those conditions, resulting in PSC before sentencing. Said differently, although the intention of the Harper Government was to target 'bail violators' as offenders who would receive only 1:1 credit, it would appear that the actual legislation left judges some degree of discretion to grant 1.5:1 to offenders with breaches of bail conditions amongst their charges, if they so desired, assuming that the offender was not explicitly detained because of them.

And in fact, in many cases in which an offender was convicted of current breaches of conditions as part of his/her charges, it would seem that sentencing judges perceived that the pathway to enhanced credit remained open. As evidence, Table 5.24 [see below] shows that a full 27.1% of offenders with one or more breaches received the maximum 1.5:1 credit. One might suggest that this finding is unlikely to have occurred in such large numbers (i.e., in 13 of the 41 cases in which 1.5:1 credit ratio was granted) under the new regime for granting credit if judges were wholly complying with the Harper Government's intentions with Bill C-25. It would appear that not all bail violators were being punished to the level of severity that the Harper Government had intended. In fact, one might – again – be tempted to characterize these results as evidence of resistance on the part of the judiciary.

Again, these findings are surprising. The impact of current breaches on the ratio of credit granted to offenders was expected to be considerable because of the rhetoric from Harper Government officials regarding the intention to treat these offenders differently. If judges were following the will of Parliament, it is arguably expected that these 'bail violators' who had a current breach as part of their charges would likely all receive a credit ratio of 1:1. Although the letter of the law did not require the imposition of a credit ratio of 1:1, the intention of Parliament was clearly to grant credit ratios of only 1:1 in circumstances in which offenders violated the terms of their bail conditions.

Having said this, one can see in Table 5.24 [see below] that, as expected, offenders with one or more breaches as part of their current charges were, in fact, less likely to receive 1.5:1 credit than those without any breaches (27.1% vs. 47.5%, respectively). This finding was statistically significant ($\chi 2 = 3.83$; df = 1; $p<0.05$). Curiously, in Table 5.25 (see Appendix A), an independent t-test showed that on average, offenders who received 1.5:1 credit had more breaches ($\bar{x}$ = 0.86)

than those who received less than 1.5:1 credit ($\bar{x}$ = 0.49). However, this result was not statistically significant (t = 1.69; df = 105; p = 0.10). Additionally, in Table 5.26 (see Appendix A), a Pearson's correlation matrix showed that there was no statistically significant relationship between current breaches and credit ratio when using the raw continuous data for each measure (r = -.19, p = 0.06). These results suggest that although judges were giving offenders with breaches less credit (on average) than those without, they were not apparently influenced by the *number* of current breaches in their determination of the ratio of credit.

Table 5.24: Cross Tabulation of Offenders with Current Breaches and Credit Ratio

			Credit for presentence custody		
			<1.5 to 1	1.5 to 1	Total
Current breaches	No breaches	Count	31	28	59
		% within current breaches	52.5%	47.5%	100.0%
	One or more	Count	35	13	48
		% within current breaches	72.9%	27.1%	100.0%
Total		Count	66	41	107
		% within current breaches	61.7%	38.3%	100.0%

In brief, not only is there considerable variability in the credit ratio given by judges for PSC, but the maximum credit legislatively permitted – 1.5:1 – appears to be attributed to cases which one would not have anticipated. Indeed, the Harper Government was clear that a maximum ratio of 1:1 credit was to be given to those with criminal records or bail violations. While the legislation – as written – provides the possibility for 1.5:1 credit even in these specific cases, this liberal interpretation was clearly not what was intended by the Harper Government when legislating Bill C-25.

5.7 Traditional Factors Noted in Case-Law to influence Credit: Loss of Remission

To further explore the possibility of resistance to the explicit intentions of Parliament, one might examine the motivation or impetus behind this seeming departure, particularly within the context of the fundamental principles of sentencing established by the CCJS. To this end, the

literature review for this study demonstrated that judges would have good reason to resist Bill C-25 due to the challenges that its implementation would cause in terms of friction with the legal sphere. Grounded in case-law, remission was a primary justification for granting the former 2:1 credit ratio. And, in fact, judges mentioned remission as justification for granting enhanced credit in many cases. In Table 5.27 [see below], one notes that in those cases in which the judge mentioned remission, 83.3% of offenders received 1.5:1 credit, as opposed to only 16.2% when the judge did not. This finding was statistically significant ($\chi 2 = 43.42$; df = 1; $p<0.01$). Further, in Table 5.28 (see Appendix A), an independent t-test was also run to compare the mean ratio of credit granted in cases in which the judge noted remission as a justification for credit to the mean ratio of credit granted in cases in which the judge did not mention remission as justification. On average, cases in which judges mentioned remission received higher credit ratios ($\bar{x}$ = 1.48:1) than cases in which judges did not mention remission ($\bar{x}$ = 1.15:1). This result was also statistically significant (t = -13.050, df; 105.41; $p<0.01$).

Notably, in comments addressing the issue of remission, the then Minister of Justice Rob Nicholson stated that those defending the current practice of granting credit for PSC explain that such credit compensates offenders for time served that does not count toward parole eligibility or statutory release. The then Minister followed these remarks by noting that the practice of awarding generous credit for PSC could not rest on the foundation of statutory release and parole because that entire mechanism was subject to strong impartial criticism and may be changed in the future (HOCD, 2009a).

Yet, statistical analysis appears to indicate that some judges believed that the absence of the benefits of remission/statutory release to offenders held in PSC was a logical and primary justification for granting credit beyond a 1:1 ratio. In other words, it would seem that remission was

a factor that judges continued to believe needed to be taken into account to treat offenders held in PSC fairly, despite the then Minister of Justice's explicit statement that it should not.

Table 5.27: Cross Tabulation of Judge uses Remission as Justification and Credit Ratio

			Credit for presentence custody		
			<1.5 to 1	1.5 to 1	Total
Does judge mention remission as justification	No, judge does not mention	Count	62	12	74
		% within Does judge mention remission as justification	83.8%	16.2%	100.0%
	Yes, judge mentions	Count	6	30	36
		% within Does judge mention remission as justification	16.7%	83.3%	100.0%
Total		Count	68	42	110
		% within Does judge mention remission as justification	61.8%	38.2%	100.0%

5.8 Factors Noted in Case-Law to influence Credit: Harsh Conditions

Similarly, harsh conditions are a significant factor traditionally recognized in the case-law as justification for granting enhanced credit above a 1:1 ratio. Perhaps not surprisingly, defense counsel brought up the issue of harsh conditions in a number of cases. In Table 5.29 [see below], one sees that when defense counsel mentioned harsh conditions, 57.9% of offenders received the maximum 1.5:1 credit versus only 27.8% of offenders when defense counsel were silent on the subject. These findings were statistically significant ($\chi 2 = 8.33$; df = 1; $p<0.01$). Further, in Table 5.30 (see Appendix A) an independent t-test was also run to compare the mean ratios of credit received by offenders in cases in which defence counsel noted harsh conditions as justification for enhanced credit to cases in which the defence counsel did not raise this issue. On average, offenders whose defence counsel raised the issue of harsh conditions received higher credit ratios ($\bar{x}$ = 1.37:1) than those who did not ($\bar{x}$ = 1.19:1). This result was statistically significant (t = -4.44; df = 88.46; $p<0.01$).

Table 5.29: Cross Tabulation of Defense notes Harsh Conditions as Justification and Credit Ratio

			Credit for presentence custody		
			<1.5 to 1	1.5 to 1	Total
Is defence noted as mentioning conditions	No	Count	52	20	72
		% within Is defence noted as mentioning conditions	72.2%	27.8%	100.0%
	Yes	Count	16	22	38
		% within Is defence noted as mentioning conditions	42.1%	57.9%	100.0%
Total		Count	68	42	110
		% within Is defence noted as mentioning conditions	61.8%	38.2%	100.0%

Symptomatic of these same concerns, judges also included harsh conditions as part of their justifications for granting enhanced credit in many cases. In Table 5.31 [see below], 64.9% of offenders received the maximum 1.5:1 credit ratio when the judge mentioned harsh conditions as justification for enhanced credit. In contrast, only 24.7% of offenders received 1.5:1 credit when the judge did not mention harsh conditions. These findings were statistically significant ($\chi 2 = 15.16$; df = 1; $p<0.01$). Further, in Table 5.32 (see Appendix A) an independent t-test was also run to compare the mean ratio of credit granted by judges in cases in which the judge noted harsh conditions as justification for enhanced credit to cases in which judges did not. On average, cases in which a judge included the issue of harsh conditions as part of his/her justification for enhanced credit received higher credit ratios of credit ($\bar{x}$ = 1.40:1) than those cases in which a judge did not ($\bar{x}$ = 1.18:1). This difference was statistically significant (t = -6.21; df = 94.98; $p<0.01$).

Table 5.31: Cross Tabulation of Judge notes Harsh Conditions as Justification and Credit Ratio

			Credit for presentence custody		
			<1.5 to 1	1.5 to 1	Total
Does judge mention conditions as justification	No, conditions not mentioned	Count	55	18	73
		% within Does judge mention conditions as justification	75.3%	24.7%	100.0%
	Yes, conditions mentioned	Count	13	24	37
		% within Does judge mention conditions as justification	35.1%	64.9%	100.0%
Total		Count	68	42	110
		% within Does judge mention conditions as justification	61.8%	38.2%	100.0%

Finally, one might wonder, given the similar results, whether the cases in which a judge mentioned conditions as justification for enhanced credit were the same cases in which defense counsel also raised the issue as justification. In Table 5.33 [see below], one notes that if a judge did not mention harsh conditions as justification, 84.9% of the time the defence counsel also did not raise the issue. Similarly, if a judge did mention harsh conditions as justification, 73.0% of the time the defence counsel mentioned them as well. These results demonstrate that although there is considerable overlap between these two variables, there was not complete overlap, justifying the inclusion of both variables. The finding was statistically significant (Fisher's Exact, $p < 0.001$).

Table 5.33: Cross Tabulation of Judge notes Harsh Conditions as Justification for Enhanced Credit & Defence Counsel notes Harsh Conditions as Justification for Enhanced Credit

			Is defence noted as mentioning conditions		
			No	Yes	Total
Does judge mention conditions as justification	No, conditions not mentioned	Count	62	11	73
		% within Does judge mention conditions as justification	84.9%	15.1%	100.0%
	Yes, conditions mentioned	Count	10	27	37
		% within Does judge mention conditions as justification	27.0%	73.0%	100.0%
Total		Count	72	38	110
		% within Does judge mention conditions as justification	65.5%	34.5%	100.0%

5.9 If Judges are Resisting, Why did so many still get 1:1 Credit?

What can be safely interpreted from the distribution of credit ratios in Table 5.1 [see above] is that judges in Canada did not simply abandon their former practice of granting enhanced credit for time spent in PSC after Bill C-25 came into force. In fact, as demonstrated above, there appears to be credible evidence to suggest that the full implementation of Bill C-25 may have been resisted by the judiciary to protect long-standing CCJS principles. This interpretation is emphasized by the point that even offenders specifically targeted by the legislation (e.g., those with criminal records and bail violations) still received 1.5:1 credit with substantial regularity.

At the same time, the fact still remains that in an equally large number of cases, offenders received the newly mandated 1:1 credit ratio for their time spent in PSC. To further explore this seemingly divided response to Bill C-25, qualitative analyses were conducted in order to help to shed light on such a peculiar distribution of data with respect to credit for time spent in PSC. Themes that emerged from judicial comments regarding the new legislation included those who reinterpreted the new rules to permit a wider use of enhanced credit and those who believed that the will of Parliament absolutely required the use of a 1:1 credit ratio.

5.9.1 Diverging Interpretations: The Rallying Cry Against Bill C-25

Perhaps in the first recognized 'reinterpretation' of Bill C-25, Justice Green - in *R. v. Johnson* (2011) - explained that based on comments made by David Daubney – then General Counsel to the Department of Justice – the loss of remission and delays in parole eligibility are quantitative disadvantages which will result in *all* cases requiring remedy from circumstances that justify credit in excess of a 1:1 ratio. Further, citing committee meetings discussing Bill C-25, Justice Green explained that when Daubney was asked why Bill C-25 proposed a credit ratio of 1:1, he replied that "The direction we had from our Minister and the government was to prepare a bill *based on one to one* with an opportunity to go up to 1.5 to 1 if the circumstances justify it" (SCJHR,

1555, 2009c, italics added). Additionally, Justice Green stated that Daubney noted that the Department of Justice deliberately avoided the use of the phrase 'in exceptional circumstances' because the circumstances justifying enhanced credit would be fairly common and, in some cases - such as the loss of remission - universal (SCJHR, 2009c). It was with this in mind that Justice Green granted 1.5:1 credit to Johnson (the offender whom Green was sentencing) and expressed that such enhanced credit would be justifiable in virtually all cases.

Following this line of thought, Justice Hryn in *R. v. Hagon* (2012) made note of the current debate in Ontario case-law regarding whether or not the loss of remission could be used as a valid argument to grant enhanced credit to an offender for time spent in PSC. He cited Justice Green's *R. v. Johnson* (2011) ruling granting 1.5:1 for remission as well as *R. v. Monje* (2011) in support. While he noted that other justices had decided in *R. v. Morris* (2011), *R. v. Abubeker* (2011), and *R. v. LaRochelle* (2011) to decline to follow *R. v. Johnson* (2011) and granted 1:1 credit, he found the logic of *R. v. Johnson* (2011) more compelling.

Specifically, Justice Hyrn cited four paragraphs from *R. v. Rezaie* (1997) in which Justice Laskin noted that credit for PSC was generally provided due to lack of programming, overcrowding, and the fact that PSC does not count towards parole eligibility. Further, Justice Hyrn, in deciding to grant 1.5:1 credit to the offender, noted that he followed the position presented in *R. v. R.H* (2011) in which the Justice took into account the severe conditions present in PSC facilities, the lack of programming in PSC to assist in rehabilitation, and the fact that time in PSC does not count towards parole eligibility.

5.9.2 Diverging Interpretations: Support for Parliament and Bill C-25

The above interpretations of Bill C-25 stand in stark contrast to interpretations made in *R. v. Morris* (2011) by Justice A.L. Harvison Young. Justice Young interpreted Bill C-25 and its

corresponding requirements differently than Justice Green. In his view, enhanced credit required exceptional circumstances. The argument made by Justice Young was that if commonly present factors such as the loss of remission had been intended to extend enhanced credit to all offenders – as was common in the previous tradition – then the need for an exceptional clause made little sense.

Further, in *R. v. Morris* (2011), Justice Young expressed that the purpose of a general rule requiring a maximum of 1:1 credit must logically exclude from consideration under s. 719(3.1) factors that would have applied to all accused who had been detained in PSC. Indeed, it would – according to this justice - make little sense to create a general standard of 1:1 that did not apply to any offenders. This interpretation was based on the concept that the language in a legal statute should have meaning. Essentially, it would be purposeless to create a general rule requiring 1:1 credit and then immediately void this standard by allowing enhanced credit of 1.5:1 for virtually all offenders based on circumstances universal to the prison population held in PSC. As such, Justice Young concludes that the clear intention of Parliament was for offenders to receive 1:1 credit (despite being ineligible for remission) and that Justice Green's interpretation in *R. v. Johnson* was incorrect.

Following this second line of thought, Justice MacDonnell in *R. v. Haly* (2012) explained that prior to the amendments of Bill C-25, it was customary to grant credit for PSC at a ratio of 2:1. Justice MacDonnell stated that this credit was granted to account for an offender's lack of parole eligibility and ability to earn remission. Subsequently, Justice MacDonnell noted that a debate has now arisen with respect to whether or not a sentencing court can continue to reflect that remission is a circumstance justifying credit to an offender. The authorities on this matter were said to be divided, but Justice MacDonnell ruled that he was persuaded by Justice Harvison Young in *R. v.*

Morris (2011) that it cannot do so. Specifically, he agreed that the attribution of credit for purposes of remission would go against the will of Parliament.

5.9.3 The Explanation:

Although there is further case-law on this debate that could be examined, additional presentation of these debates would simply reiterate the same two legal interpretations. These two diverging interpretations of Bill C-25 shed valuable light on the peculiar data distribution of credit for PSC in this study. Additional case-law from several justices would later add and reinforce each position. In simple terms, some judges opted to follow the logic put forward initially by Justice Young in *R. v. Morris* (2011) that remission should not be included as a circumstance that justifies enhanced credit because it would apply to all offenders and therefore render the newly expected norm of 1:1 credit meaningless as virtually all cases would require 1.5:1 credit.

In contrast, others adopted the arguments put forward by Justice Green in *R. v. Johnson* (2011) that remission was a valid circumstance for which granting 1.5:1 credit was justified. In summary, some judges appeared to believe that enhanced credit of 1.5:1 was necessary in order to maintain fairness based on the quantitative loss of remission explained by Justice Green. However, other judges believed that to interpret Bill C-25 in this manner was to ignore the clear intention of Parliament to require credit of 1:1 in most circumstances. As was made clear in the literature review, the Justice Minister for Canada at the time was quite explicit in expressing the expectations of the Harper Government. The clear intention was to reduce the credit granted for time spent in PSC to 1:1. The evidence that the data provided suggests that some judges willingly followed this requirement, and others broadly re-interpreted this intention.

5.9.4 The Will of Parliament, Quantified

Quantitatively, these two positions can be at least partially captured within this study's sample of cases using the variable 'Burden for 1.5:1 credit Requires Exceptional Circumstances'.

This independent variable is dichotomous in nature. Specifically, any time that a judge openly stated on the record that he/she believed granting 1.5:1 credit required exceptional circumstances – as interpreted by Justice Young in *R. v. Morris* (2011) – it would be coded as 'yes'. In these cases, normal circumstances commonplace to every offender held in PSC such as the loss of remission would not count towards enhanced credit. It follows that in cases in which the judge makes note of this factor, enhanced credit would be more difficult to obtain.

This variable is examined – to some extent - in Table 5.34 [see below]. Most notably, in cases that the judge stated that the burden to receive enhanced credit required exceptional circumstances, only 11.8% of cases received 1.5:1 credit. In contrast, when it was not stated, 43% received 1.5:1 credit. In other words, offenders were more likely to receive 1.5:1 credit when a judge did not believe (or at least explicitly state) such credit required exceptional circumstances. This finding is statistically significant ($\chi 2 = 4.70$; df = 1; $p<0.05$)[46].

This variable provides some – at least initial[47] - support that some judges interpreted Bill C-25 as requiring 1:1 credit in most circumstances, for most offenders. More importantly for the purposes of this study, these judges likely interpreted Bill C-25 as disallowing remission from being considered a valid reason for granting credit beyond 1:1 - an interpretation that, as demonstrated earlier, logically necessitates that an offender who spent time in PSC be treated more harshly (i.e., serve a longer sentence) than one who did not because parole ineligibility and statutory release are not taken into account during this (pre-sentence) period. This interpretation would violate the CCJS

[46] Notably though, an independent t-test in Table 5.35 (see Appendix A) compared the mean ratio of credit granted to offenders in cases in which a judge did and did not note that 1.5:1 credit required exceptional circumstances. Intriguingly, although offenders from cases in which a judge mentioned that 1.5:1 credit required exceptional circumstances received lower credit ratios on average ($\bar{x}$ = 1.20:1) than offenders from cases in which a judge did not state that exceptional circumstances were a requirement to receive 1.5:1 credit ($\bar{x}$ = 1.26:1), this result was not statistically significant (t = 1.31; df = 29.50; p = 0.20). This may be a result of credit being granted for issues other than remission (i.e., exceptional circumstances unique to the particular offender or his/her stay in remand). Importantly, the different – contradictory - inferential findings would appear to suggest that this variable may be somewhat problematic, particularly in terms of what precisely it is measuring.

[47] See footnote 41.

sentencing principle of parity. Further, given the importance of foundational principles of sentencing such as parity, it is not surprising that other judges disagreed with this interpretation. This is most clearly evidenced in Table 5.27 [see above], in which it is noted that there were 36 cases in which the presiding judge noted remission as justification for enhanced credit.

Table 5.34: Cross Tabulation of Judge Determined awarding 1.5:1 Credit Required Exceptional Circumstances and Credit Ratio

			Credit for presentence custody		
			<1.5 to 1	1.5 to 1	Total
Burden for 1.5 Credit Requires Exceptional Circumstances	Not Stated	Count	53	40	93
		% within Burden for 1.5 Credit Requires Exceptional Circumstances	57.0%	43.0%	100.0%
	Stated	Count	15	2	17
		% within Burden for 1.5 Credit Requires Exceptional Circumstances	88.2%	11.8%	100.0%
Total		Count	68	42	110
		% within Burden for 1.5 Credit Requires Exceptional Circumstances	61.8%	38.2%	100.0%

As anecdotal evidence for this position that exceptional circumstances were necessary to grant credit above 1:1, in some cases judges would specifically note that in order to provide enhanced credit, they required that the offender's time in remand include some exceptional circumstances of hardship, and that loss of remission would not be applicable to this because it was a circumstance common to all offenders (i.e., that a common circumstance cannot be considered exceptional). As a case in point, Justice Harris noted in *R. v. LarRochelle* (2011) that the clear intention of Parliament was that he not give enhanced credit for PSC other than in explicitly exceptional circumstances (45).

5.9.5 Shifting Legal Interpretations over Time

Coupled with this insight, qualitative analyses of the cases under study also suggested a slow shift towards increased support for enhanced credit over time. Specifically, the later a case was decided over the time frame of the sample, the more likely it seemed that a judge was inclined to

defend the granting of the maximum 1.5:1 credit. This suspicion could be quantitatively evaluated by using the variable of 'time'. Table 5.36 [see below] compares the dependent variable of credit ratio with the independent variable of time (in years). The years 2010 & 2014 do not include data for all months and thus were subsumed into the nearest year. From this table, one can see that as time passed, the amount of credit granted by judges increased. Specifically, in 2010/2011, 22.2% of cases received 1.5:1 credit. In 2012, this increased to 28.1%. In 2013/2014 the number of offenders receiving 1.5:1 credit jumped to 59.5%. This finding is statistically significant ($\chi 2 = 13.36$; df = 2; $p<0.01$). Additionally, in Table 5.37 (see Appendix A) an ANOVA was run to compare the mean ratio of credit granted in cases from the three separate time periods as categorized in the independent variable (i.e., 2010-2011, 2012, and 2013-2014). Cases in the 2013-2014 time period, on average, received higher credit ratios ($\bar{x}$ = 1.34:1) than cases in 2012 ($\bar{x}$ = 1.20:1) or 2010-2011 ($\bar{x}$ = 1.20:1). These differences were statistically significant (F = 5.75; df = 2; $p<0.01$).

Table 5.36: Cross Tabulation of Case by Year and Credit Ratio

			Credit for presentence custody		
			<1.5 to 1	1.5 to 1	Total
Year	2010&2011	Count	28	8	36
		% within Year	77.8%	22.2%	100.0%
	2012	Count	23	9	32
		% within Year	71.9%	28.1%	100.0%
	2013-2014	Count	17	25	42
		% within Year	40.5%	59.5%	100.0%
Total		Count	68	42	110
		% within Year	61.8%	38.2%	100.0%

5.10 It's really (R. v.) Summer(s) Time!

Perhaps even more importantly, the data in Table 5.36 [see above] indicates that the frequency with which a 1.5:1 ratio of credit was granted began to increase considerably in 2013, when it jumped from being granted in 22.2% of cases in 2010/2011 and 28.1% in 2012 to 59.5% in 2013/2014. Given that this large increase in credit after 2012 seems unlikely to have occurred purely by chance, plausible explanations were explored as to why the credit ratio granted by judges

increased so robustly in 2013/2014. One logical interpretation inferred from the qualitative analyses of the cases is that the direction of judgments on credit for time spent in PSC was altered by relevant case-law.

Specifically, judges began to refer to the case of *R. v. Summers* (2013). This case was released as a judgment from the Ontario Court of Appeal (ONCA) in Toronto on March 12th, 2013 by Justices Cronk, Pepall and Tulloch. In this judgment, the court supported the interpretation of 'exceptional circumstances' given by Justice Green in *R. v. Johnson* (2011) as related to the attribution of enhanced credit to compensate for the fact that time spent in PSC does not count towards parole eligibility/statutory release. In particular, this Court of Appeal judgement affirmed that Bill C-25 did not require exceptional circumstances in order to grant credit above and beyond a ratio of 1:1. Enhanced credit was therefore justified for Summers (the offender being sentenced in this case) on the basis of his good behaviour, early guilty plea, show of remorse and the likelihood of obtaining early parole. Further, this judgement by the ONCA confirmed that remission could be considered an acceptable justification for a judge to grant enhanced credit up to 1.5:1. Justice Cronk, on behalf of the ONCA, additionally explained that this interpretation of Bill C-25 did not mean that every offender would be entitled to enhanced credit on these bases, but that this matter would rest within the discretion of sentencing judges. This decision would be binding for all courts in Ontario.

Referring to Table 5.36 [see above], the dramatic increase in the percentage of offenders receiving 1.5:1 credit ratios between 2011/2012 and 2013/2014 for time spent in PSC coincides with the release of the binding Summers judgment. To further explore this potential explanatory factor, Table 5.38 [see below] displays the credit ratio granted before and after the Summers appeal judgment. In the period before the Summers ruling – henceforth known as the 'pre-Summers' (pre-

S) period –78.7% of offenders received less than 1:5:1 credit. In the period after the Summers ruling – henceforth known as 'post-Summers' (post-S) period – only 40.8% of offenders received less than 1.5:1 credit. In contrast, an offender was considerably more likely (in fact, more than twice as likely) to receive 1.5:1 credit in the post-S period. Specifically, the percentage of offenders receiving the maximum 1.5:1 credit in the pre-S period was 21.3%. This percentage increased in the post-S period to 59.2%. These findings are statistically significant ($\chi 2 = 14.95$; df = 1; $p<0.01$). More importantly, they suggest that the Summers ruling in the ONCA is a worthy point of investigation when considering those factors which may have contributed to the rise in credit for PSC in 2013/2014. Further, in Table 5.39 (see Appendix A) an independent t-test was also run to compare the mean ratio of credit granted prior to the judgement of *R. v. Summers* (2013) being released by the ONCA and post release. Cases prior to the judgement received, on average, a lower ratio of credit ($\bar{x}$ = 1.19:1) than cases after ($\bar{x}$ = 1.33:1). This finding is statistically significant (t = -3.54; df = 108; $p<0.01$).

Table 5.38: Cross Tabulation of R. v. Summers and Credit Ratio

			Credit for presentence custody		
			<1.5 to 1	1.5 to 1	Total
Pre and Post Summers	Pre-Summers Winning vs. Appeal	Count	48	13	61
		% within Pre and Post Summers	78.7%	21.3%	100.0%
	Post-Summers Winning vs. Appeal	Count	20	29	49
		% within Pre and Post Summers	40.8%	59.2%	100.0%
Total		Count	68	42	110
		% within Pre and Post Summers	61.8%	38.2%	100.0%

Thus, it appears that the *R. v. Summers* case sanctified the argument of remission as being one that can justify enhanced credit. The significance of this case is that it effectively settled the debate amongst lower court judges in Ontario. Those who were championing cases which resisted the implementation of Bill C-25 won the battle of legal interpretation against their peers who supported the will of Parliament. Resistance to giving less than 1.5:1 credit due to the need to

account for remission was now an officially acceptable (read: legally upheld) position. Not surprisingly, after the *R. v. Summers* ruling, credit increased significantly, which suggests that an increasing number of judges were accepting the importance of this precedent. Effectively, a window to resistance against Bill C-25 had been thrown open for legal actors to use.

5.11 Jumping Through the Open Window: Judges use Remission Justification

As the dust settles in the battle of legal interpretation, it becomes possible to quantify how judges adjusted their sentencing positions after *R. v. Summers* (2013) was decided in the ONCA. Specifically, we can see that judges' use of remission as an argument to justify enhanced credit increased after the Summers case. In Table 5.40 [see below], one notes – simply by eye-balling the data – that judges used the argument of remission only in 14 out of 61 cases during the pre-S period or 23% of the time. However, in Table 5.41 [see below] in the post-S period, this increased to 22 out of 49 cases or 45% of the time. The direction of this increase seems to demonstrate that a greater number of judges became comfortable using remission as a valid legal argument for granting enhanced credit after the Summers case. Additionally note that in Table 5.40 & Table 5.41, cases in which a judge mentioned remission as justification for enhanced credit received 1.5:1 credit 71.4% and 90.9% of the time, these results were both statistically significant (Fisher's Exact, $p<0.001$)[48].

Further, in Table 5.42 (see Appendix A) in the pre-S period, 71.4% of offenders received 1.5:1 credit when the judge mentioned remission as justification for enhanced credit. Comparatively, in the post-S period, 90.9% of offenders received 1.5:1 credit when the judge utilized remission as justification. Therefore, the direction of the data seems to suggest that judges

[48] Both results had the same level of statistical significance.

became more comfortable with granting 1.5:1 credit, as justified by remission, in the post-S period. However, these findings were not statistically significant (Fisher's Exact, p = 0.18)[49].

Table 5.40: Cross Tabulation of Judge uses Remission as Justification for Credit and Credit Ratio in the *Pre-Summers Period*

			Credit for presentence custody		
			<1.5 to 1	1.5 to 1	Total
Does judge mention remission as justification	No, judge does not mention	Count	44	3	47
		% within Does judge mention remission as justification	93.6%	6.4%	100.0%
	Yes, judge mentions	Count	4	10	14
		% within Does judge mention remission as justification	28.6%	71.4%	100.0%
Total		Count	48	13	61
		% within Does judge mention remission as justification	78.7%	21.3%	100.0%

a. Pre and Post Summers = Pre-Summers Winning vs. Appeal

Table 5.41: Cross Tabulation of Judge Uses Remission as Justification for Credit and Credit Ratio in the *Post-Summers Period*

			Credit for presentence custody		
			<1.5 to 1	1.5 to 1	Total
Does judge mention remission as justification	No, judge does not mention	Count	18	9	27
		% within Does judge mention remission as justification	66.7%	33.3%	100.0%
	Yes, judge mentions	Count	2	20	22
		% within Does judge mention remission as justification	9.1%	90.9%	100.0%
Total		Count	20	29	49
		% within Does judge mention remission as justification	40.8%	59.2%	100.0%

a. Pre and Post Summers = Post-Summers Winning vs. Appeal

5.12 Multivariate Analyses

As a final exploration of those factors which appear to impact the credit ratio given by judges for PSC, a multivariate analysis was conducted. This type of analysis permits the simultaneous examination of the predictive power of all variables found to be statistically significant at the bivariate level (Neuman, 2009). That is, multivariate analyses provide an

[49] It is likely that this lack of significance is a result of the small N (36) in this sub-group. With small sample sizes, the power of inferential tests is reduced.

assessment of the individual or unique contribution of each variable, controlling for the effects of all other variables in the model (Neuman, 2009). Indeed, while a particular measure may have a significant impact on the credit ratio given by a judge by itself, it may no longer be statistically significant once it is included with other factors. Further, multivariate analyses permit an examination of the weight or power of each variable in predicting the credit ratio given by the judge.

To this end, a regression analysis was carried out on the impact of the principal independent variables (at the bivariate level) on the dependent variable. Because the dependent measure – credit ratio – has been measured as a dichotomous variable (i.e. whether an offender received either 1.5:1 credit or less), a binary logistic regression was used[50]. Equally notable, the dependent variable in its original (continuous) form was shown, in Table 5.1 – to be bimodal in nature. As such, a linear regression model would be precluded because the distribution of the dependent variable would violate the assumption of linearity. The predictive variables entered in the logistic model included the following factors:

1) whether the offender had any mental or physical health issues;
2) whether the offender had a criminal record;
3) whether the offender had any current breaches;
4) whether harsh conditions experienced by the offender while in PSC were mentioned;
5) whether loss of remission/statutory release was taken into account.

Notably, several different variables were used in this study to measure the latter two factors. Specifically, the existence of harsh conditions was noted by both the judge as well as defence counsel. Both variables were shown to have a statistically significant impact on the credit ratio

[50] Note that because the dependent variable was dichotomous, a linear regression should not be used to predict the impact of independent variables (Wuensch, 2014).

given by the judge. More critically, these two variables were moderate to strongly correlated with each other ($r = 0.58$; $p<0.05$), indicating a non-trivial amount of multicollinearity.[51] As such, a composite variable was created which included any case in which either the judge or defence counsel mentioned harsh conditions. This option was adopted in order to avoid the inclusion of both measures in the regression model unnecessarily which would reduce the power of the test.

It is also important to note that there were also several measures of the issue of remission/statutory release which were found to be significant at the bivariate level. Specifically, the mention by the judge of either remission as a justification for enhanced credit (positively worded) or enhanced credit requiring exceptional circumstances (negatively worded) captured whether the judge likely took remission into account when determining credit for PSC. In addition, the Summers decision appears to also be a proxy for the consideration of remission as a justification for enhanced credit. Not surprisingly, all 3 variables were correlated with each other to varying degrees. However, the correlations were only weak to moderate in strength (i.e. the Summers decision was negatively correlated with the mention of remission: ($r = -0.28$) and positively correlated with the requirement of exceptional circumstances ($r = 0.23$) and these 2 latter variables were negatively correlated with each other ($r = -0.19$). It would seem that each variable was capturing somewhat different underlying constructs. In light of these findings, two decisions were made.

On the one hand, the measure of 'enhanced credit requiring exceptional circumstances' was dropped.[52] This option reflected the fact that this measure captured cases primarily before the *R. v. Summers* (2013) ruling in the ONCA (15/17 cases came prior). More importantly, it was possible

[51] And, in fact, when the 2 variables measuring harsh conditions are included in the binary regression equation (rather than the composite measure), the results are identical with the exception that only one of the measures of harsh conditions is found to be significant.

[52] Notably though, even when it was, in fact, included in the logistic regression model, no significant differences were noted in terms of the final results.

that this measure was actually capturing two different judicial realities, depending on the way in which the judge interpreted 'exceptional circumstances'. While some judges felt that this notion excluded the attribution of enhanced credit for the loss of remission/statutory release, other judges believed that this same loss could – and should – be considered to be an 'exceptional circumstance', justifying enhanced credit. As such, it may be somewhat problematic to use this variable as a measure of whether loss of remission/statutory release was being taken into account. In partial support of this concern, one might recall that in Appendix A, Table 17.1, an independent t-test was conducted with this variable (and the dependent variable of credit ratio). This inferential test revealed no statistically significant difference in the average credit ratio granted in cases in which judges made this statement versus cases in which judges did not ($\bar{x}$ = 1.26:1 vs. $\bar{x}$ = 1.20). This result raised the possibility – even at the bivariate level – that this variable may be somewhat imprecise (in terms of what it may actually be capturing).

On the other hand, the possibility of combining the other two variables (*R. v. Summers* & Judge Mentions Remission as Justification for Enhanced Credit) into a composite measure was rejected. This was decided because it was determined through a Pearson's (r) correlation matrix that they were not strongly correlated ($r = 0.23$, $p<0.05$), suggesting that they were likely largely measuring different theoretical constructs. In partial support of this concern, it is notable that when a composite measure of 'Summers' and 'judge mentions remission as justification' is used, the multivariate findings are not as strong as when the two independent variables for remission are entered separately into the equation. This result might reflect the fact that they are not (at least, not entirely) capturing the same underlying construct. This was likely due to the fact that prior to the *R. v. Summers* case becoming a binding judgment in Ontario (that is, after it was upheld in the ONCA), using this case as an argument to justify granting credit for lost remission/parole eligibility would have been less common, because the case would have been less well known to judges. As

such, both variables were included separately in the logistic regression equation. The binary logistic regression results are found in Table 5.43 [see below].

Table 5.43: Binary Logistic Regression for Credit Ratio and Significant Predictors

		B	S.E.	Wald	Df	Sig.	Exp(B)
Step 1[a]	Does accused have criminal record?	-.706	.738	.913	1	.339	.494
	Harsh Conditions were noted by Judge or Defense Counsel as justification for credit	1.773	.693	6.541	1	.011	5.889
	Does judge mention remission as justification	3.575	.760	22.128	1	.000	35.683
	Is there a current breach	-.748	.694	1.161	1	.281	.473
	Pre and Post Summers	2.135	.716	8.878	1	.003	8.453
	Mental or Physical Health Issues Present	-1.083	.676	2.570	1	.109	.338
	Constant	-2.390	.874	7.471	1	.006	.092

a. Variable(s) entered on step 1: Does accused have criminal record?, Harsh Conditions were noted by Judge or Defense Counsel as justification for credit, Does judge mention remission as justification, Is there a current breach, Pre and Post Summers, Mental or Physical Health Issues Present.

As one can see, although each of these factors were statistically significant at the bivariate level, the variables of mental/physical health of the offender ($p = 0.11$), criminal record ($p = 0.34$) and current breaches ($p = 0.28$) are no longer predictive in the context of the multivariate analysis. In contrast, a judge or defense counsel mentioning harsh conditions as justification for enhanced credit ($p<0.05$) and a case being held after *R. v. Summers* (2013) (i.e., after the time in which remission was affirmed as acceptable justification for enhanced credit) ($p = <0.01$) or a judge mentioning remission as justification for enhanced credit ($p<0.001$) are still statistically significant. Specifically, the odds of being given 1.5:1 credit ratio increased from the pre to the post-S periods by a factor of slightly more than 8 (8.45), controlling for the other variables in the model. Similarly, the mention of harsh conditions by the judge increased the odds of receiving 1.5:1 credit ratio by a factor of almost 6 (5.89). And finally, the odds of being given 1.5:1 credit for time spent in PSC is

35 (35.68) times higher when the judge specifically mentions remission as justification for enhanced credit than when he/she does not.[53]

These findings are particularly intriguing within the context of the current study. On the one hand, factors traditionally noted in case-law to be relevant as justifying enhanced credit for PSC (e.g., harsh conditions and compensation for loss of remission/statutory release) continue to be recognized by judges. This appears to be occurring despite the stated intentions of the Harper Government, particularly by then Justice Minister Rob Nicholson. Recall that the then Justice Minister had challenged the notion that remission/parole eligibility continue to be taken into consideration because the entirety of that mechanism had come under criticism and may change. Despite Bill C-25, and the Harper Government's intentions, it appears that past tradition has maintained its importance despite the new expectations of the Harper Government.

On the other hand, current breaches and criminal record, while controlling for the other factors, do not appear to affect the credit ratio granted by judges. This is intriguing given that Bill C-25 specifically targeted these offenders to receive 1:1 credit and rhetoric from Harper Government officials made it clear that the intention was to treat these offenders differently. Bill C-25 essentially attempted to re-formulate, or at least add to, the factors considered to be important when a judge decides to grant credit for time spent in PSC. It appears (or at least, the findings of this study suggest), for the moment, that judges are not adopting these newly anointed factors in their determination of credit for PSC. Instead, judges are seemingly maintaining the traditional reasons for granting credit (harsh conditions, lost remission/parole eligibility).

[53] Although the dependent measure has been categorized as a dichotomous variable for the purposes of this study (as the most conservative measure), it is also possible to use the raw (continuous) data of this variable. In this case, a linear regression model could be used. It is notable that the findings were the same, with the exception that criminal record was found to be a significant predictor. The concern, of course, with this type of multiple-regression is that the bimodal nature of the dependent variable in this study violates the assumption of linearity. As such, the model may become unstable. As well, criminal record as a predictor in the binary logistic model did not even approach statistical significance. Further, when the dichotomous variable is used in the same linear equation, the results are identical to the binary logistic model and criminal record is not found to be significant. For these reasons, these additional inferential tests were not seen to undermine the original findings.

More broadly, these two converging conclusions appear to suggest that judges are not wholly complying with the requirements of Bill C-25. Rather, there appears to be some level of resistance to the expectations of Parliament with regard to the new legislation. The findings, quite simply, do not seem to be in line with what would be expected if compliance were occurring. In any sensible analysis of the above data, judges do not seem to be fully complying with the spirit of Bill C-25. In simplistic terms, the amount of credit has not shifted down to a 1:1 ratio by any measure of descriptive statistics. In fact, on average, the amount of credit granted to offenders ($\bar{x}$ = 1.25) is half-way to the maximum that would be allowed under the new legislation. In more complex terms, the factors found to be significant predictors of an offender being granted enhanced credit – while controlling for the other variables in the multivariate equation – are not the new ones introduced by Bill C-25 but, rather the historically entrenched ones from prior to the new legislation.

Based on the case-law arguments in *R. v. Wust* (2000), *R. v. Rezaie* (1997), among others, it appears that a considerable number of judges have opted to protect and abide by the principles traditionally denoted as fundamental to sentencing in Canada rather than to fully implement legislation that would have necessarily required them to disregard such concerns. In particular, the principles of fairness and parity in sentencing appear, to some degree, to have been protected. These findings are consistent with what would be expected precisely because judges are required to operate within the rules and regulations of the legal sphere. Recall that a number of interveners in Parliament predicted just such a result if Bill C-25 was passed without amendment. It appears, given the findings of this study, that these interveners may have been correct in their assertions.

6. Chapter Five: Discussion

6.1 Non Compliance in Four Parts

The findings of this study suggest that Bill C-25 was not fully implemented by judges in Ontario. The evidence for this conclusion can be summarized in the evaluation of four government intentions with respect to the new legislation. As noted in prior chapters, the Harper Government made it clear that the main expectation of the Bill C-25 was to eliminate the common practice of judges granting 2:1 credit for time spent in PSC as well as to ensure most offenders received 1:1 credit for time spent in PSC. Further, Bill C-25 was meant to specifically target two groups of offenders – those detained in PSC because of their significant criminal history and those detained in PSC as a result of breaching their conditions after having been released. These subgroups of the PSC population were to be denied from receiving any credit beyond a 1:1 ratio. Finally, Bill C-25 required judges to explain the ratio of credit that they were giving in order to improve the transparency of the CCJS. This obligation was meant to ensure that judges would not be seen as giving discounted sentences. On the whole, an evaluation of the practices of judges after Bill C-25 went into force calls into question whether any of the Harper Government's intentions were wholly implemented. Evidence for this position is provided from quantitative analyses that are further enriched by qualitative data.

6.1.1 Part One: The Expected Shift from 2:1 down to 1:1 Credit

The results of quantitative analyses showed a bi-modal distribution of credit ratios for time spent in PSC. The two most common modes of credit ratio were 1:1 and 1.5:1. In fact, a full 38% were found to be receiving 1.5:1 credit during the study period. Further, descriptive statistics demonstrated that both the median and mean credit ratio ($\bar{x}$ = 1.25 and $\tilde{x}$ = 1.25 respectively) was far in excess of the 1:1 standard intended by the Harper Government. In other words, there appears to be little mathematical support to suggest that judges in Ontario conformed to the will of

Parliament and implemented a standard ratio of 1:1 for most offenders. In fact, it would not seem farfetched to propose that at least some judges intentionally resisted the spirit of the new law.

Equally notable, the multivariate analyses conducted in this study highlighted that the only three significant predictors of the credit ratio given by judges in the sample of 110 cases were related to the loss of remission/statutory release (as measured by the variables of 'judge mentions remission' and the 'Summers decision at the Ontario Court of Appeal') for time spent in remand as well as the harsh conditions experienced by the offender while in remand. Certainly in terms of the former, this finding is not particularly surprising. Indeed, even before Bill C-25 became law, David Daubney – a career civil servant with the department of justice – had warned Parliament that the circumstances which would justify 1.5:1 credit would be fairly common (SCJHR, 2009c). In particular, he noted that loss of remission and parole eligibility - a circumstance universal to offenders held in PSC - would justify enhanced credit (SCJHR, 2009c).

Intriguingly, as presented in earlier chapters, this logic was conspicuously absent from arguments in favour of the bill presented by the Harper Government and its Ministerial representatives. Specifically, the then Minister of Justice Rob Nicholson was of the opinion that credit for time spent in PSC could not depend on the argument of lost remission/parole eligibility because this system was subject to criticism and potential change (HOCD, 2009a). Even in terms of the latter predictor of credit ratio for PSC, harsh conditions - like loss of compensation for remission/statutory release - constitutes a long-standing, Supreme Court-recognized factor justifying enhanced credit. Within this context, one would be tempted to suggest that judges have not, in fact, abandoned the traditional justifications for giving credit beyond a 1:1 ratio.

As a practical contribution, this thesis provides evidence of resistance to inadequate criminal justice policy, as perceived by judges, in the Canadian context. Further, when placed in the context

of the Ontario PSC population from 2000-2015 [see Figure 6.1 below], it might be concluded that Bill C-25 did not effectively address the chief policy concern that was its focus. As noted in prior chapters, this focus was presumably the large population of prisoners held in PSC in Canada that has been the source of both financial and ethical concerns for provincial/territorial governments, and by extension, the federal government. Although Graph 5.1 displays that the total number of prisoners held in remand in Ontario decreased after 2009/2010 (at the end of which Bill C-25 came into force), the actual proportion of offenders held in remand custody relative to the total population has not decreased substantially (from 65% in 2009/2010 to 62% in 2014/2015) Indeed, there are still a greater number of prisoners in PSC custody than in sentenced custody on any given day in Ontario institutions. Further, this drop cannot be attributed solely to the contribution of Bill C-25. Rather, it is likely that part of this decline would be accounted for by wider criminal court reform occurring over the same period. Specifically, the Ministry of the Attorney General in Ontario – under the umbrella of its Justice on Target (JOT) initiative – introduced numerous strategies to increase case processing efficiency both in bail court as well as criminal courts generally (JOT, 2015a). Further, the Canadian Civil Liberties Association released a report in 2014 aimed at providing recommendations to address the problematic levels of offenders incarcerated in PSC (CCLA, 2014). These changes are likely responsible for at least some (if not most) of the decrease in the remand population over this same time period. Although this five-year trend should be interpreted with caution, it does not appear that Bill C-25 has substantially altered the proportions of offenders (remand & sentenced) serving time in Ontario institutions.

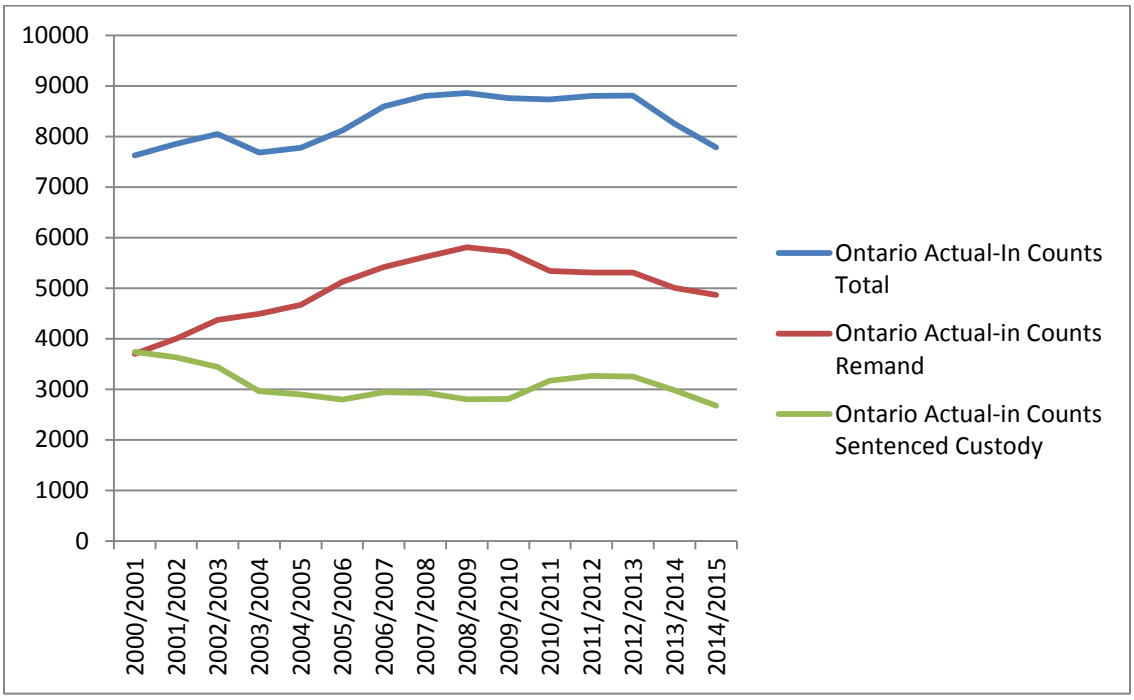

Figure 6.1: Sentenced, Remand and Total Imprisonment Actual-in Counts in Ontario[54]

6.1.2 Part Two & Three: The Offenders Targeted to Receive 1:1 Credit

In Chapter 4, analyses demonstrated that the offenders targeted by the Harper Government to receive a maximum of 1:1 credit still managed to exceed this ratio on a regular basis. It would seem – once again – that at least some judges intentionally resisted the spirit of the new law. Perhaps not surprisingly, the multivariate analyses carried out in this study also highlighted that both the offender's criminal record as well as any current breaches were not found to be significant predictors of the credit ratio given by judges in the sample of 110 cases. One would continue to be tempted to suggest that judges have not, in fact, implemented the new 'restricted' regime of Bill C-25. Rather, they appear to continue to employ the traditional rationales (with Supreme Court imprimatur) for giving credit beyond a 1:1 ratio.

It is likely within this same logic that one of the new legislative barriers to enhanced credit has very recently been called into question by the S.C.C. in the case of *R. v. Safarzadeh-Markhali*

[54] Table actualized from data provided by Statistics Canada (Statistics Canada, 2015b).

(2016). On April 15th 2016, the requirement that offenders detained in PSC as a consequence of their criminal record receive a maximum credit ratio of 1:1 was struck down because it was deemed to violate section 7 of the Charter. The basis for this ruling as presented by the court was that Bill C-25 cast too broad a net when determining which offenders should be subject to the additional punitive measures. As such, too many offenders who could not adequately be categorized as violent repeat offenders would be punished by the restrictions in Bill C-25, without justification.

6.1.3 Part Four: Truth in Sentencing, Clarity for Canadians

It would be considerably more contentious to suggest that the Harper Government failed to improve Canadians' understanding of credit for time spent in PSC with Bill C-25. The bill itself requires that judges present their reasoning for credit in all cases in which credit is granted above a ratio of 1:1. This requirement provides at least some explanation as to why offenders were receiving what might have been perceived as discounted sentences in the past.

However, at the same time, there has been considerable commentary within case-law that presents diverging interpretations of Bill C-25, rendering this legislation – if anything – more confusing. As cases in point, the S.C.C. has very recently ruled in *R. v. Summers* (2014) and in *R. v. Calvery* (2014) that well-behaved offenders should receive 1.5:1 credit in most circumstances. This decision was in direct conflict with the Harper Government's expectations and, more importantly, it was in direct contradiction with the arguments that were put forward by Parliament in order to justify a maximum of 1:1 credit as a standard rule. The debates surrounding these issues, which have appeared in the newspapers and within Parliament, would be anything but easy to understand for the average Canadian citizen.

These debates appear to have been created because the Harper Government largely ignored the traditional reasons for which 2:1 credit was granted for time spent in PSC. Further, there was no

attempt by the Parliament to educate the public about the justifications for which 2:1 credit had become a long-standing legal tradition. Instead, the government chose to target the issue of credit for PSC as the predominant explanation for high remand rates rather than address the multiple and complex sources to this problem. It is in this sense that credit for PSC became a scapegoat issue with respect to high remand rates across Canada. This decision was made despite the criticism of numerous experts (e.g., criminologists, lawyers representing various associations) who did not support the notion that 2:1 credit was the cause of the rising PSC population. It appears that Harper Government simply took advantage of how difficult 2:1 credit was to understand for the average citizen (rooted in the fact that a day in PSC is not really equal to a day in sentenced custody in terms of determining release) to justify a new and punitive law. Effectively, the political sphere left the judiciary in the difficult position of being forced to implement legislation that did not align with CCJS principles. As expected, the end result has been that the legislation has had to be (re)interpreted in a way that is more consistent with the requirements of the legal sphere, arguably muddying even further – and unnecessarily – the issue of credit for time spent in PSC for the general public.

Notably, the issue of transparency may also continue to be hampered by Bill C-25 in another way. Specifically, the cap of 1.5:1 credit required by the new legislation ignores the fact that 2:1 credit was commonly given in the past to compensate for not only the loss of remission/statutory release but also for harsh conditions experienced in PSC facilities. While judges have the ability (particularly with the recent SCC rulings mentioned above) to grant a credit ratio of 1.5:1 which has been mathematically demonstrated to adequately compensate for the former problem, judges continue to lack the ability or authority (at least in terms of being able to increase the credit ratio granted beyond 1.5:1) to compensate offenders for the latter problem related to PSC that has been established in case-law (e.g., harsh conditions, administrative delay, or lack of programming).

As captured by the independent variable associated with harsh conditions in this study, judges clearly still thought such conditions were an acceptable justification to support the granting of enhanced credit. This point remains true even in the context of the multivariate analyses. Yet, due to the issue of remission and parole ineligibility being affirmed as a justifiable reason to grant the maximum 1.5:1 credit ratio in *R. v. Summers* (2014), no room is leftover within the credit ratio to compensate an offender for these other issues, despite the fact that they are known to persist within PSC institutions. The question that arises from this circumstance, of course, is whether or not judges have covertly acted to remedy the problem.

As a plausible example of how such a problem might manifest a solution involving judicial circumvention (and thus driving the practice of 2:1 credit underground, away from the scrutiny and understanding of the Canadian public), judges may be covertly adjusting the length of the sentences to add up to the former standard of 2:1 credit. For example, let's say an offender was sentenced to 18 months less credit for 6 months at 1.5:1 – or 9 months, leaving him/her 9 months to serve. Under the old credit regime, this offender might have been sentenced to 18 months less credit for 6 months at 2:1 – or 12 months, leaving him/her 6 months to serve. In order to shift this sentence to that of the old regime, the judge need only reduce the sentence to 15 months.

More importantly, it is well within the purview of a sentencing judge to adjust the overall sentence length by such a moderate amount. Further, its detection would be difficult, if not impossible. From the perspective of transparency, such a tactic (if used by judges) would arguably push the practice of 2:1 credit further underground, where it would be all but impossible for the general public to understand. Indeed, the result would be the exact opposite of what the Harper Government had intended (i.e., the elimination of the confusion regarding credit for PSC). Within this context, it is arguable whether - by passing such a contentious piece of legislation and placing

the criminal justice and political spheres in such adversarial positions – greater confusion surrounding PSC has been the end result.

6.2 Luhman's Systems Theory: Coming Full Circle

In the introduction of this study, it was noted that Nicholas Luhmann's systems theory may have particular relevance to the topic of this thesis. Specifically, this theory has the ability to (at least partially) explain why the results found in the analyses were not surprising. Utilizing the constructs of systems theory discussed in Chapter 1, it is not difficult to imagine the CCJS and the Canadian political system as two distinct spheres capable of irritating one another. It is precisely this dynamic that has the potential to lead to friction. Although the Harper Government imposed considerable punitive policy upon the CCJS, that same policy needed to prescribe to the required standards of the CCJS or risk rejection (i.e., resistance) to its implementation by the judiciary.

Some of these standards are defined by the Charter, but, additionally, others are unique to the sacred doctrine of the CCJS itself, the *Criminal Code*. This is the case with the fundamental principle of sentencing, proportionality. Proportionality requires that a sentence be proportionate to the gravity of the offence committed and the degree of responsibility of the offender. Thus, a sentence that is overly harsh violates this fundamental principle. Although proportionality is not formally recognized in the Charter, some have argued that it has attained an equivalent level of legal status (Webster & Doob, 2016). Recall that MMS have been historically resisted by judges precisely because they can place a judge in circumstances in which he/she must prescribe a sentence that he/she believes to be disproportionate. As such, MMS could be arguably said to represent one example of criminal justice policy that has difficulty conforming to the rules of the legal sphere and thus has been resisted by judiciaries in various jurisdictions.

What can be understood from this framework is that the CCJS and the political spheres are separate entities. Each system has the power to challenge the boundaries of the other's domain. When leaders within the political sphere seek to impose policies upon the CCJS that are inconsistent with its founding principles, friction and resistance will likely result. In Canada, at least part of this resistance has seemingly been taken up by the judiciary. Indeed, judges would appear to be well placed within the CCJS to manage the length of sentences in a way that respects both the Charter and the fundamental principles of sentencing. Wherever this control over sentencing has been challenged, Canadian judges have fought to regain and maintain what was lost. As such, Canada has followed a pattern similar to others in many legal systems that follow common-law traditions whereby principle has won out over the harsher notions of the ruling government of the day (Brown & Pratt, 2005).

6.2.1 Luhmann's Theory in Action

Recall that over the past decade, repeated attempts have been made by Stephen Harper and the CPC to interfere with judicial authority and discretion. These attempts took the form of 'law and order' bills with titles implying their punitiveness, which were designed to constrict Canadian judges to harsher sentencing provisions that the government felt would be more appropriate in deterring crime (Healy, 2013; Webster & Doob, 2015). Bill C-25 represents yet another attempt by the Harper Government to constrict judges in order to punish offenders more harshly, and in the case of offenders who were detained as a result of current breaches to bail conditions or their criminal record, arguably, unfairly.

As was seen in the analyses of the credit ratios granted to offenders, the Harper Government appears to have been unable to prevent these offenders - perceived as unworthy - from receiving nothing more than 1:1 credit - a circumstance which, as discussed in prior chapters, would have guaranteed these offenders received necessarily disparate sentences compared with their identical

counterparts not held in PSC. Had this scenario occurred, it would have violated fundamental principles of justice, including parity. It appears, arguably, that judges responded to such concerns about fairness by continuing to grant ratios of credit above 1:1 on the basis of justifications that have long been entrenched in Canadian case-law, even to those that were perceived as unworthy by the Harper Government. As such, it would not be unfair to characterize this finding as a possible defense of the fundamental principles of justice by the Canadian judiciary (i.e., a circumstance in which protection of the fundamental principles of sentencing were arguably viewed by judges as trumping the desires of the Harper Government).

In fact, as Luhmann might have predicted (and in fact, as many experts did predict), Bill C-25 appears to have been a source of friction between the Harper Government and the judiciary. Further, it is arguably true that the response to Bill C-25 is only one of many responses in the Canadian context that might be considered to demonstrate a pattern of resistance to policies viewed as incommensurable with the fundamental principles of justice. Additionally, one might suggest that the defense of CCJS principles by legal actors partially explains why Canada has maintained relatively stable imprisonment rates for decades. As Webster and Doob (2007) argue, judges have seemingly acted as the guardians of sentencing balance within the CCJS for decades, ensuring that harsh policies and political rhetoric did not spiral towards ever increasing use of incarceration as has happened in the United States (and, to a lesser extent, England/Wales).

One contribution of this thesis is arguably that it presents tangible evidence that contributes to an explanation of why Canada's imprisonment rate has been kept low despite the political rhetoric to 'get tough on crime' that has dominated political debate about criminal justice in Canada for much of the past decade. This thesis contributes an examination of how resistance manifests itself within the CCJS whereby the judiciary constitutes a protective factor that has limited the reach

or expansion of overly punitive criminal justice policy - a finding that has been theorized in the work of Webster & Doob (2007).

6.3 Judicial Control over Sentencing in Canada

If the assertion that the Canadian judiciary can act as a means of resisting the political sphere's imposition of harsher sanctions upon offenders is to be compelling, one would expect to also find other evidence in support of such a position. On the one hand, such corroboration has been found in past research on the CCJS in other jurisdictions. Specifically, Chapters 1 and 2 presented a number of different examples of judicial resistance in the United States and the U.K..

On the other hand, in recent years, we have witnessed other examples of resistance by the Canadian judiciary against overly harsh criminal justice policies. This pushback has come in multiple forms. In some cases in which legislation seemed to violate fundamental rules of the legal sphere, the CCJS has sought to strike down the legislation outright via a Charter challenge (i.e., working against the law whereby the judiciary interprets a piece of criminal justice legislation to be *unfit* and moves to strike it down entirely). For the purpose of this thesis resistance *against the law* is defined as times when throughout history, the judiciary has interpreted legislation to be unfit because it threatened fundamental principles such as proportionality. When this principle (among others) is threatened, Charter challenges have been brought by accused in order to question the legitimacy of the law. In other cases in which legislation seemed to violate fundamental rules of the legal sphere, the CCJS has sought to resist it by working within the law. That is, judges have worked creatively to circumvent or mute the otherwise punitive effects of criminal justice policy that has been perceived to be unfairly harsh, but not unconstitutional.

By comparison, in the United States, California was seen to willingly pass and enact three strikes legislation. Further, California imprisoned considerable numbers of third-strike offenders for

life for relatively minor crimes. |This sort of escalation in the use of incarceration has not been seen in Canada. In the United States, the national incarceration rate has spiraled out of control to over 700 per 100,000 (WBP, 2015a). In Canada, it might be interpreted that judges have served to protect the CCJS from this sort of spiral. They have used their position to counter pressure to dramatically increase the use of incarceration as a tool of punishment, striking down legislation (or creatively resisting it) when it that appeared to be in conflict with established principles.

6.3.1 Canadian Resistance: Victim Surcharge Legislation

Interestingly, an example of both forms of resistance can be found in Canada in response to a single piece of legislation - Bill C-37. This law amended the *Criminal Code* to double the victim surcharge amounts and make them mandatory for all offenders convicted of a criminal offence (Dupuis, 2013). The reason for the bill presented by Robert Goguen, the then Parliamentary Secretary to the Minister of Justice from the CPC, was that offenders were not being held accountable for their actions and courts were able to waive the surcharge (HOCD, 2012). Effectively Bill C-37 removed judicial discretion with respect to the decision to impose (or not) victim surcharges. Indeed, the fines must now be imposed regardless of an offender's circumstances or ability to pay. The purpose of this legislation - as announced by the CPC - was to make offenders accountable for the actions and costs associated with harm to their victims (HOCD, 2012). The legislation as written was later criticized for being incongruent with the *Criminal Code*.

6.3.2 Victim Surcharge Legislation: Canadian Resistance *within* the law

In *R. v. Cloud* (2014), the honourable Justice Patrick Healy worked within the law to limit the effect of Bill C-37. Specifically, Healy articulated a gap that would allow him to neutralize its intended implementation effects. As noted by Justice Healy, it has been determined in case-law that a judge may impose a sanction of imprisonment and a term of probation, or a fine, but not both. The traditional rationale for allowing the victim surcharge to stand in cases in which a sentence of

imprisonment and probation has been levied is that the victim surcharge is not a fine but instead restitution. In contrast to this position, Justice Healy contended that the surcharge is not a form of direct compensation for actual loss to an identified person or entity and, as a consequence, has nothing to do with the concept of restitution as it is legally understood. Instead, based on a number of complex legal interpretations, Healy concluded that the victim surcharge is, in fact, an element of the sentence and must in fact be considered a mandatory penalty equivalent to a fine.

The articulation of the victim surcharge as a fine may seem unimportant but it is critical to the judgment that follows. Healy summarized that if the victim surcharge is rightly defined as a fine in criminal law then the victim surcharge legislation has mandated the inclusion of a fine in any sentence that includes both incarceration and probation. Formerly, case law would have forbidden a judge from imposing a fine when already imposing sanctions of imprisonment and probation. As noted above, the victim surcharge legislation requires mandatory fines upon conviction of $100 for a summary offense and $200 for an indictable offense. However, if a fine is imposed as part of the sanctions, the mandatory fine changes to 30% of the fine imposed at sentence. This creative interpretation of the victim surcharge law allowed Justice Healy to circumvent the impact of otherwise crushing mandatory victim surcharges to a more acceptable financial burden by simply imposing a nominal fine. Specifically, Healy imposed a fine of $5.00 on each of the accused's two charges which resulted in a victim surcharge of $1.50 per charge (thus avoiding what would have otherwise been a mandatory $400 victim surcharge).

6.3.3 Victim Surcharge Legislation: Canadian Resistance *against* the law

In an alternative example of judicial resistance to Bill C-37, Justice David Paciocco, in *R. v. Michael* (2014), argued that the imposition of a victim fine surcharge was unconstitutional because it violated sections 7 and 12 of the Charter. Section 7 of the Charter enshrines in law that everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except

in accordance with the principles of fundamental justice (CCRF, 1982). Section 12 states that everyone has the right not to be subjected to any cruel and unusual treatment or punishment (CCRF, 1982). In *R. v. Michael* (2014), the accused argued that the imposition of these fines constituted grossly disproportionate punishment both in his particular circumstances and in similar hypothetical cases. Justice Paciocco noted that the test for s. 12 of the Charter - one of gross disproportionality and not merely excessive punishment - had been met. In addition, Paciocco referenced the standard from *R. v. Miller* (1977) - which requires that a punishment be so excessive that it outrages the standards of decency – in further support of a Charter violation.

Note that while Justice Healy and Justice Paciocco used different approaches, they arguably both stand as effective examples of judicial resistance. Indeed, both judges attempted to disable legislation that they felt failed to align with the foundational principles of the CCJS. More broadly, while one accomplished this task by creatively interpreting the law and the other by nullifying it, both of them demonstrate the friction which can arise between the legal and political spheres in society as well as various ways in which judges defend their own rules and principles.

6.4 Canadian Resistance At the Highest Level

Importantly, resistance to criminal justice legislation from the political sphere has not been restricted to a few rebellious judges in the lower courts. In fact, even in the highest court in Canada - the S.C.C. - there is evidence of legal experts struggling to accept policy that does not align with fundamental principles of sentencing[55]. This is important because whilst lower court decisions may be considered by other judges presiding over similar cases, it is not mandatory that they be followed. S.C.C. decisions, however, must be followed by the lower courts and as such, play a substantial role in guiding the decision making behaviour of the judiciary.

[55] Examples include *R. v. Nur* (2015), *R. v. Summers* (2014), and *R. v. Safarzadeh-Markhali* (2016).

6.4.1 Resistance to Mandatory Minimum Sentences

Mandatory minimums are not simply a phenomenon in the U.S. criminal justice system. In the case of *R. v. Nur* (2015), the S.C.C. addressed the issue of MMSs imposed for a variety of firearm offenses. In the (lower court) case of *R v. Nur* (2011), the accused was charged with possession of a loaded firearm which, when prosecuted by way of indictment, carried a MMS of three years imprisonment for a first offense or five years imprisonment for a second or subsequent offense.

This case appeared before the S.C.C. as *R v. Nur*, (2015), on appeal from judgments made in the ONCA in which the MMSs were declared null and void under s. 52 of the Constitution Act, 1982, based on the fact that s. 95(2) (a) of the *Criminal Code* violated s. 12 of the Charter. The accused and his counsel remained steadfast in asserting that the MMS required by the above noted section of the *Criminal Code* was grossly disproportionate in some circumstances. These hypothetical circumstances include a situation in which a legal gun owner correctly separates his/her ammunition from an unloaded firearm but incorrectly stores the firearm in an unacceptable location. It is on this basis that a hypothetical offender could be faced with a grossly disproportionate sentence and thus the law was struck down under s. 12 of the Charter[56]. Notably, the dissenting justices from the Supreme Court expressed that no such hypothetical case has ever occurred and reminded those in favour of striking down the law that the purpose of the court was not to impede the legislative arm of government.

56 The S.C.C. in Canada is made up of several justices and some did not agree with the dismissal of the appeal. The dissenting judges suggested that the hypothetical licensing-type cases presented as part of the arguments were unrealistic as not a single case over the entire history of s. 95(2) of the Criminal Code had resulted in a MMS. Instead, these cases had always been dealt with by way of summary conviction which avoids the mandatory minimum. The dissenting justices in *R. v. Nur* (2015) further stated that it was Parliament's choice to enact mandatory minimums in s. 95 based on their valid objectives and it was not for the S.C.C. to frustrate the policy goals of elected representatives based on questionable logic. The dissenting judges also noted that the hypothetical scenario put forward by the majority stretches the boundaries of the realistic and that it was not a sound basis for rendering the aforementioned mandatory minimums null and void.

Symptomatically, Gourlay (2014) has noted the increasing use of hypothetical examples by the S.C.C. in order to enable the court to strike down mandatory minimum sentences. Further, this scholar`s work demonstrates the increasingly creative actions that judges in the S.C.C. have been willing to take in order to strike down laws perceived as unfair or irreconcilable with the fundamental principles of justice. In this context, the findings of this study become less surprising, perhaps even expected.

6.5 Walking back to 2:1 Credit: Reaffirming Entrenched Values

Even more relevant within the context of this thesis, the SCC has – very recently – been asked to address issues directly related to credit for time served in PSC. While completing this thesis, the S.C.C. has heard and ruled on the cases of *R. v. Carvery* (2014), *R. v. Summers* (2014), and *R. v. Safarzadeh-Markhali* (2016).

In *R. v. Summers* (2014), the S.C.C. recited the history of 2:1 credit, noting that there was both a recognized both quantitative rationale for granting credit (i.e., that statutory rules for parole eligibility and remission do not take into account time spent in PSC) and a qualitative rationale (i.e., that the conditions in detention centres tend to be harsher than those in sentenced custody). The court officially recognized that the loss of early release, taken alone, is a generally sufficient basis to award credit at a ratio of 1.5:1. Further, the court stated that the legislation should be interpreted in a manner that is consistent with the principles and purposes of sentencing in the *Criminal Code*. For emphasis, it was noted that a rule which results in longer sentences for offenders who spend time in PSC, compared to otherwise identical offenders who had not, is incompatible with the sentencing principles of parity and proportionality. This ruling appears to be an example of the highest court in Canada asserting the importance of protecting the fundamental principles of justice

- a judgement that at least partially supports an interpretation of the data for this thesis as resistance. In *R. v. Cavery* (2014), the S.C.C. simply reaffirmed the ruling made in *R. v. Summers* (2014).

In *R. v. Safarzadeh-Markhali* (2016), the S.C.C. went even further in its guidance for how Bill C-25 should be interpreted. Specifically, the court addressed the issue that enhanced credit was legislated by Bill C-25 as unavailable for an offender who was denied bail primarily due to his/her criminal record pursuant to s. 719(3.1) of the *Criminal Code*. In *R. v. Safarzadeh-Markhali* (2012), Justice Block ruled that the accused was detained primarily due to his criminal record and as such was ineligible to receive enhanced credit above the ratio of 1:1 for his time spent in PSC. However, Block also ruled that the restrictions to enhanced credit targeting specific groups of offenders were unconstitutional. In the 2016 ruling, the S.C.C. agreed with Justice Block. The court found that the denial of enhanced credit to offenders who are denied bail because of their criminal record was overbroad because it targeted people who had nothing to do with the legislative purpose of s. 719(3.1) of the *Criminal Code*. Further, the court remarked that the effect of s. 719(3.1) was to require offenders affected by it to serve longer sentences. As such, the court ruled that the fact that it did so in a way which affected far more offenders than should have been intended meant it did not conform to the fundamental principles of justice.

In effect, the judgment by the S.C.C. in *R. v. Safarzadeh-Markhali* (2016) supports another of the major findings of this thesis. It affirms that the highest court in Canada did not agree that the barriers to enhanced credit designed to target specific sub-groups of offenders were appropriate in all circumstances as they punished a broad group of accused more harshly than could be justified under the fundamental principles of justice. As such, this lends partial support to the finding that when judges in the sample for this thesis granted credit beyond 1:1 for offenders with criminal records and current breaches of bail conditions, they did so purposely. And potentially, they did so

in order to resist what might have been seen as overly broad and punitive criminal justice policy that could not be reconciled with the fundamental principles of the CCJS.

This result might have been expected. As the analysis of the data collected for this study demonstrated in the context of other independent variables, the presence of a criminal record became a non-significant factor in the prediction of an offender's credit ratio. As noted previously, it has not been uncommon to find that when the provisions of criminal laws are in conflict with established principles in a legal system, the latter appear to win out in jurisdictions with common law traditions (Brown & Pratt, 2005). The S.C.C. rulings of *R. v. Carvery* (2014), *R. v. Summers* (2014), *R. v. Nur* (2015), and *R. v. Safarzadeh-Markhali* (2016) and the recent lower court decisions in *R. v. Cloud* (2014) and *R. v. Michael* (2014) are simply more recent examples of this same phenomenon.

6.6 The Consistent Message of Resistance

Within this wider context, the findings of this thesis are not surprising. In fact, they appear to be consistent with the wider literature review on the subject of judicial resistance in Canada as well as corroborated by subsequent judicial rulings. Indeed, Bill C-25 would appear to be just another example of legislation within the political sphere which has created friction – and ultimately resistance – within the judicial sphere in Canada. Specifically, it would seem that this new law could not be reconciled with the fundamental principles of the CCJS, at least as it was intended to be implemented by the Harper Government. Simply put, if enhanced credit above 1:1 is not granted, then remission and lost parole eligibility cannot be accounted for. As can be seen from the S.C.C. ruling in *R. v. Summers* (2014), the judiciary believes it should be. If the ability to account for this is taken away, unfairness has simply been legislated. In the context that Parliament has provided (one in which it is very clear that Bill C-25 was to shift the normal ratio of credit for

time spent in PSC down to a 1:1 ratio), the fact that this simply is not occurring could, and perhaps should, be interpreted as resistance.

More broadly, this project arguably makes a contribution to the growing body of literature that has demonstrated a pattern of resistance to the overly punitive criminal justice policy developed in the political sphere without thought for the principles of the system within which it would need to be implemented. In the context of the various articles listed in Chapter 1 & 2, this study appears to fit seamlessly into the mold of resistance seen in past examples. Judges have utilized the same creative interpretation so often seen in other examples to avoid the implementation of other punitive legislation. In Canada, particularly over the past decade, the judiciary has become increasingly vocal in its resistance to legislation thought to be unfair (as evidenced by the above S.C.C. and lower-court decisions). This pattern of resistance appears to reinforce a theory that Webster & Doob (2009) have previously put forward in which they suggest Canada's incarceration rate has not seen the same escalation as in the U.K. and U.S. at least in part because of protective factors built into Canadian society, such as the fundamental principles upon which the CCJS is built.

6.7 Limitations & Future Research

A number of limitations were identified throughout the process of completing this research project. Perhaps most importantly, there may have been other rival plausible explanations that (may have partially) explained the ratio of credit that judges were granting. However, the data sources used for this study may simply have not permitted their examination. As an example, if judges had been interviewed, they may have been able to give a more candid explanation of how credit for time spent in PSC was being addressed by the judiciary (regardless of whether they had allowed such information to appear on the record or not). Further, court transcripts may have provided more details about each case, leading to a more nuanced understanding of the factors influencing the ratio

of credit granted by judges. Such details may have unearthed other rival plausible explanations to explore in an attempt to strengthen (or, ultimately, discredit) the findings of this research project. To this end, further research is needed, particularly that which would utilize different data sources.

While a singular focus on Ontario allowed the study to gain significant knowledge about how credit for time spent in PSC was dealt with in one Canadian province, the generalizability of this study's findings to other provinces and to Canada as a whole is limited. Recall that pre-study data appeared to demonstrate (in a very general way) that considerably less variability existed in the ratios of credit granted by judges in other provinces/territories (e.g., British Columbia & the Yukon had very uniform credit granting).

Ontario, on the other hand, was shown to have tremendous variability. As such, nothing can be said conclusively about these provinces and how their judges may have responded to the new legislation relative to Ontario because they may have responded more uniformly to the changes required. Further, provinces/territories which were already using a 1.5:1 ratio may not have been affected at all by Bill C-25 (e.g., the Yukon). Clearly, further research is needed. Ontario's variability would suggest that there would be more volatility in the findings related to the issue of credit for time spent in PSC in this province than in others. As such, these seemingly different legal environments might be difficult to compare.

Additionally, the case of *R v. Summers* (2013) in the ONCA would not have been binding for other provinces. As a result, the data for this project are potentially incomparable to other provinces because those other provinces would not have been bound to follow Ontario's case-law. As such, if resistance to Bill C-25 manifested itself in other provinces, it might have occurred at a different time, or in a different pattern than what occurred in Ontario. Further research is necessary in order to understand what may have occurred within other jurisdictions.

A final limitation was that the data from this study was drawn entirely from sentencing summaries. Recall from the methodology section that judgments are chosen to be written up as summaries on an ad-hoc basis by judges. As such, the case summaries contained in online databases such as QuickLaw have limited generalizability. There may have been something special about the cases chosen to be written up by judges with respect to credit for time spent in PSC. What makes these cases unique compared to other cases that were not chosen to be summarized by judges is impossible to know. Further research is needed (perhaps through interviews or court transcripts) in order to investigate potential differences and potentially other responses to Bill C-25.

As a final comment toward the direction of future research, one thing that was noticed in this research project is that judges frequently sentence offenders to familiar lengths of time. This interpretation is anecdotal of course, but judges often sentence offenders to terms such as 6, 12, 18, or 24 months. Perhaps comparing sentence lengths and seeing unfamiliar modes of sentence length - 15 months for example – might suggest something strange is occurring after the implementation of Bill C-25. It is possible the variance in sentence lengths could be examined in complex pre-post methodology to explore whether or not judges have attempted to recreate 2:1 credit by shortening an offender's sentence to adequately top up the 1.5:1 ratio of credit.

This suggestion is made because Bill C-25 may have created circumstances in which judges would feel compelled to manipulate other aspects of the system – such as the prescribed sentence – in order to recreate the same sentence lengths that were given in the past. Detection of this hypothetical covert circumvention is beyond the scope of this study, but it should be considered as a plausible scenario given the history of resistance presented within the context of the literature review from chapter one. This concern could be viewed as a contribution to ideas for future

research in sentencing. However, it is of course noted that such an analysis would likely prove difficult, if not impractical methodologically.

6.8 Conclusion:

To conclude, it would seem that it is at least reasonable to suggest that the findings of this study could be characterized as evidence of resistance to Bill C-25's intended implementation on the part of the judiciary. In whole, or in part, the judiciary does not appear to have implemented Bill C-25 as the Harper Government had intended. Instead, what appears to have happened (as is evident from the relevant judgements in the S.C.C.) is that judges have chosen to protect fundamental principles of justice such as parity and proportionality. This protection of principles has seemingly led to actions that could be characterized as resistance on the part of the judiciary. In both the highest court in Canada and at the lower court level, judges have circumvented the spirit of Bill C-25, rejecting validity as a piece of criminal justice legislation.

More broadly, this conclusion appears to be supported by commentary within the mainstream media regarding the judiciary's inevitable chipping away at the legacy of the Harper Government's tough on crime policy. Articles have regularly been published over the past few years by major news organizations describing the (re)interpretation of these policies. Perhaps not surprisingly, one of the most recent articles referenced Bill C-25 (Harris, 2016; Omand, 2016). Such a deconstructive response appears to have highlighted the role of the Canadian judiciary as an ever important bastion to the adoption of U.S. & U.K.-based harsher responses to crime and criminals. As some scholars have argued (Webster & Doob; 2007, 2009), Canada's ability to counter these wider factors has been one of the characteristics which have defined Canadians vis-à-vis our response to pressures to adopt the 'tough on crime' agenda made popular by our closest comparators. Despite the significant challenge to this defining feature by the Harper Government, it

would seem that Canada is well on its way to reaffirming the long-standing values of fairness, parity and justice within its criminal justice system.

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Appendix A: Additional Tables

Table 5.3: Independent T Test of Indigenous Status and Credit Ratio

	Aboriginal Status	N	Mean	Std. Deviation	Std. Error Mean
Credit Ratio	No	98	1.2628	.22516	.02274
	Yes	12	1.1817	.19913	.05748

		Levene's Test for Equality of Variances		t-test for Equality of Means						
									95% Confidence Interval of the Difference	
		F	Sig.	t	df	Sig. (2-tailed)	Mean Difference	Std. Error Difference	Lower	Upper
Credit Ratio	Equal variances assumed	3.353	.070	1.191	108	.236	.08109	.06809	-.05389	.21606
	Equal variances not assumed			1.312	14.673	.210	.08109	.06182	-.05093	.21311

Table 5.5: Independent T Test of Mental or Physical health Issues and Credit Ratio

	Mental or Physical Health Issues Present	N	Mean	Std. Deviation	Std. Error Mean
Credit Ratio	No	58	1.3036	.22233	.02919
	Yes	52	1.1985	.21251	.02947

		Levene's Test for Equality of Variances		t-test for Equality of Means						
									95% Confidence Interval of the Difference	
		F	Sig.	t	df	Sig. (2-tailed)	Mean Difference	Std. Error Difference	Lower	Upper
Credit Ratio	Equal variances assumed	.911	.342	2.529	108	.013	.10516	.04159	.02273	.18759
	Equal variances not assumed			2.535	107.544	.013	.10516	.04148	.02293	.18739

Table 5.7: ANOVA of Court Size & Credit Ratio

Credit Ratio

	N	Mean	Std. Deviation	Std. Error	95% Confidence Interval for Mean		Minimum	Maximum
					Lower Bound	Upper Bound		
Small Jurisdictions	35	1.1923	.20104	.03398	1.1232	1.2613	1.00	1.50
Medium Jurisdictions	24	1.2954	.23871	.04873	1.1946	1.3962	1.00	1.50
Large Jurisdictions	51	1.2767	.22532	.03155	1.2133	1.3400	1.00	1.50
Total	110	1.2539	.22307	.02127	1.2118	1.2961	1.00	1.50

Credit Ratio

	Sum of Squares	df	Mean Square	F	Sig.
Between Groups	.201	2	.100	2.055	.133
Within Groups	5.223	107	.049		
Total	5.424	109			

Table 5.9: Independent T Test of Number of Cases per Judge and Credit Ratio

	Number of Cases	N	Mean	Std. Deviation	Std. Error Mean
Credit Ratio	Number of Judges who had one Case	43	1.2391	.23311	.03555
	Number of Judges who Presided over more than one Case	67	1.2634	.21764	.02659

		Levene's Test for Equality of Variances		t-test for Equality of Means						
									95% Confidence Interval of the Difference	
		F	Sig.	t	df	Sig. (2-tailed)	Mean Difference	Std. Error Difference	Lower	Upper
Credit Ratio	Equal variances assumed	2.317	.131	-.557	108	.579	-.02436	.04373	-.11104	.06231
	Equal variances not assumed			-.549	85.172	.585	-.02436	.04439	-.11263	.06390

Table 5.10: ANOVA for Number of Cases per Judge and Credit Ratio

Credit Ratio

	N	Mean	Std. Deviation	Std. Error	95% Confidence Interval for Mean		Minimum	Maximum
					Lower Bound	Upper Bound		
Number of Judges who had one Case	43	1.2391	.23311	.03555	1.1673	1.3108	1.00	1.50
Sixteen Judges had two cases each	32	1.2550	.22118	.03910	1.1753	1.3347	1.00	1.50
Six Judges had three cases each	18	1.2778	.23151	.05457	1.1627	1.3929	1.00	1.50
Two Judges had four Cases each	8	1.3888	.20808	.07357	1.2148	1.5627	1.00	1.50
One judge had 9 Cases	9	1.1533	.13901	.04634	1.0465	1.2602	1.00	1.33
Total	110	1.2539	.22307	.02127	1.2118	1.2961	1.00	1.50

Credit Ratio

	Sum of Squares	df	Mean Square	F	Sig.
Between Groups	.256	4	.064	1.302	.274
Within Groups	5.168	105	.049		
Total	5.424	109			

Table 5.12: Independent T Test of Days in Remand and Credit Ratio

	Credit for presentence custody	N	Mean	Std. Deviation	Std. Error Mean
Number of Days on Remand	Less than 1.5 to 1	68	402.28	262.002	31.772
	1.5 to 1	39	468.59	267.133	42.776

		Levene's Test for Equality of Variances		t-test for Equality of Means						
		F	Sig.	t	df	Sig. (2-tailed)	Mean Difference	Std. Error Difference	95% Confidence Interval of the Difference	
									Lower	Upper
Number of Days on Remand	Equal variances assumed	.037	.849	-1.251	105	.214	-66.310	53.002	-171.404	38.784
	Equal variances not assumed			-1.244	78.026	.217	-66.310	53.284	-172.391	39.770

Table 5.13: Correlation Matrix of Days in Remand and Credit Ratio

		Credit Ratio	Number of Days on Remand
Credit Ratio	Pearson Correlation	1	.115
	Sig. (2-tailed)		.239
	N	110	107
Number of Days on Remand	Pearson Correlation	.115	1
	Sig. (2-tailed)	.239	
	N	107	107

Table 5.15: Independent T Test of Number of Charges and Credit Ratio

	Credit for presentence custody	N	Mean	Std. Deviation	Std. Error Mean
Number of Charges	Less than 1.5 to 1	68	4.57	3.343	.405
	1.5 to 1	42	7.57	15.030	2.319

		Levene's Test for Equality of Variances		t-test for Equality of Means						
									95% Confidence Interval of the Difference	
		F	Sig.	t	df	Sig. (2-tailed)	Mean Difference	Std. Error Difference	Lower	Upper
Number of Charges	Equal variances assumed	5.958	.016	-1.587	108	.116	-2.998	1.889	-6.743	.747
	Equal variances not assumed			-1.273	43.518	.210	-2.998	2.354	-7.744	1.749

Table 5.16: ANOVA of Number of Charges and Credit Ratio

Credit Ratio

	N	Mean	Std. Deviation	Std. Error	95% Confidence Interval for Mean		Minimum	Maximum
					Lower Bound	Upper Bound		
1-2 charges	36	1.2633	.22163	.03694	1.1883	1.3383	1.00	1.50
3-5 charges	37	1.2354	.23677	.03892	1.1565	1.3143	1.00	1.50
more than 5 charges	37	1.2632	.21523	.03538	1.1915	1.3350	1.00	1.50
Total	110	1.2539	.22307	.02127	1.2118	1.2961	1.00	1.50

Credit Ratio

	Sum of Squares	df	Mean Square	F	Sig.
Between Groups	.019	2	.010	.189	.828
Within Groups	5.405	107	.051		
Total	5.424	109			

Table 5.17: Correlation Matrix of Number of Charges and Credit Ratio

		Credit Ratio	Number of Charges
Credit Ratio	Pearson Correlation	1	.145
	Sig. (2-tailed)		.130
	N	110	110
Number of Charges	Pearson Correlation	.145	1
	Sig. (2-tailed)	.130	
	N	110	110

Table 5.19: ANOVA of Criminal Record Type and Credit Ratio

Credit Ratio

	N	Mean	Std. Deviation	Std. Error	95% Confidence Interval for Mean		Minimum	Maximum
					Lower Bound	Upper Bound		
Minor Record	23	1.2222	.23865	.04976	1.1190	1.3254	1.00	1.50
Serious Record	52	1.2312	.21823	.03026	1.1704	1.2919	1.00	1.50
No Criminal Record or None Specified	35	1.3086	.21609	.03653	1.2343	1.3828	1.00	1.50
Total	110	1.2539	.22307	.02127	1.2118	1.2961	1.00	1.50

Credit Ratio

	Sum of Squares	df	Mean Square	F	Sig.
Between Groups	.155	2	.077	1.570	.213
Within Groups	5.269	107	.049		
Total	5.424	109			

Table 5.21: Independent T Test of Seriousness of Charges and Credit Ratio

	`Seriousness of Charges (most serious charge)`	N	Mean	Std. Deviation	Std. Error Mean
Credit Ratio	Offences Against the Person	70	1.2244	.21884	.02616
	Other Offences	40	1.3055	.22374	.03538

		Levene's Test for Equality of Variances		t-test for Equality of Means						
									95% Confidence Interval of the Difference	
		F	Sig.	t	df	Sig. (2-tailed)	Mean Difference	Std. Error Difference	Lower	Upper
Credit Ratio	Equal variances assumed	.129	.720	-1.854	108	.066	-.08107	.04373	-.16775	.00561
	Equal variances not assumed			-1.843	79.811	.069	-.08107	.04400	-.16863	.00649

Table 5.23: Independent T Test of Criminal Record and Credit Ratio

	Does accused have criminal record?	N	Mean	Std. Deviation	Std. Error Mean
Credit Ratio	No	26	1.3542	.19751	.03873
	Yes	83	1.2212	.22325	.02451

		Levene's Test for Equality of Variances		t-test for Equality of Means						
									95% Confidence Interval of the Difference	
		F	Sig.	t	df	Sig. (2-tailed)	Mean Difference	Std. Error Difference	Lower	Upper
Credit Ratio	Equal variances assumed	4.686	.033	2.721	107	.008	.13303	.04888	.03612	.22993
	Equal variances not assumed			2.902	46.735	.006	.13303	.04584	.04080	.22525

Table 5.25: Independent T Test of Offenders with Current Breaches and Credit Ratio

	Credit for presentence custody	N	Mean	Std. Deviation	Std. Error Mean
Current Number of Breaches	Less than 1.5 to 1	66	.86	1.264	.156
	1.5 to 1	41	.49	.840	.131

		Levene's Test for Equality of Variances		t-test for Equality of Means						
									95% Confidence Interval of the Difference	
		F	Sig.	t	df	Sig. (2-tailed)	Mean Difference	Std. Error Difference	Lower	Upper
Current Number of Breaches	Equal variances assumed	.794	.375	1.686	105	.095	.376	.223	-.066	.818
	Equal variances not assumed			1.847	104.460	.068	.376	.203	-.028	.779

Table 5.26: Pearson Correlation of Offenders with Current Breaches and Credit Ratio

		Credit Ratio	Current Number of Breaches
Credit Ratio	Pearson Correlation	1	-.185
	Sig. (2-tailed)		.056
	N	110	107
Current Number of Breaches	Pearson Correlation	-.185	1
	Sig. (2-tailed)	.056	
	N	107	107

Table 5.28: Independent T Test of Judge uses Remission as Justification and Credit Ratio

	Does judge mention remission as justification	N	Mean	Std. Deviation	Std. Error Mean
Credit Ratio	No, judge does not mention	74	1.1459	.18824	.02188
	Yes, judge mentions	36	1.4758	.07595	.01266

		Levene's Test for Equality of Variances		t-test for Equality of Means						
									95% Confidence Interval of the Difference	
		F	Sig.	t	df	Sig. (2-tailed)	Mean Difference	Std. Error Difference	Lower	Upper
Credit Ratio	Equal variances assumed	45.022	.000	-10.103	108	.000	-.32989	.03265	-.39461	-.26517
	Equal variances not assumed			-13.050	105.411	.000	-.32989	.02528	-.38001	-.27977

Table 5.30: Independent T Test of Defense notes Harsh Conditions as Justification and Credit Ratio

	Is defence noted as mentioning conditions	N	Mean	Std. Deviation	Std. Error Mean
Credit Ratio	No	72	1.1936	.21998	.02592
	Yes	38	1.3682	.18237	.02958

		Levene's Test for Equality of Variances		t-test for Equality of Means						
									95% Confidence Interval of the Difference	
		F	Sig.	t	df	Sig. (2-tailed)	Mean Difference	Std. Error Difference	Lower	Upper
Credit Ratio	Equal variances assumed	8.198	.005	-4.188	108	.000	-.17455	.04168	-.25716	-.09193
	Equal variances not assumed			-4.437	88.459	.000	-.17455	.03934	-.25271	-.09638

Table 5.32: Independent T Test of Judge notes Harsh Conditions as Justification and Credit Ratio

	Does judge mention conditions as justification	N	Mean	Std. Deviation	Std. Error Mean
Credit Ratio	No, conditions not mentioned	73	1.1786	.21421	.02507
	Yes, conditions mentioned	37	1.4024	.15728	.02586

		Levene's Test for Equality of Variances		t-test for Equality of Means						
									95% Confidence Interval of the Difference	
		F	Sig.	t	df	Sig. (2-tailed)	Mean Difference	Std. Error Difference	Lower	Upper
Credit Ratio	Equal variances assumed	13.729	.000	-5.628	108	.000	-.22380	.03977	-.30263	-.14497
	Equal variances not assumed			-6.214	93.980	.000	-.22380	.03601	-.29531	-.15229

Table 5.35 Independent T Test of Judge Determined awarding 1.5:1 credit Required Exceptional Circumstances and Credit Ratio

	Burden for 1.5 Credit Requires Exceptional Circumstances	N	Mean	Std. Deviation	Std. Error Mean
Credit Ratio	Not Stated	93	1.2632	.23198	.02405
	Stated	17	1.2029	.16220	.03934

		Levene's Test for Equality of Variances		t-test for Equality of Means						
									95% Confidence Interval of the Difference	
		F	Sig.	t	df	Sig. (2-tailed)	Mean Difference	Std. Error Difference	Lower	Upper
Credit Ratio	Equal variances assumed	31.500	.000	1.025	108	.308	.06028	.05883	-.05632	.17689
	Equal variances not assumed			1.307	29.484	.201	.06028	.04611	-.03396	.15453

Table 5.37: ANOVA of Case by Year and Credit Ratio

Credit Ratio

	N	Mean	Std. Deviation	Std. Error	95% Confidence Interval for Mean		Minimum	Maximum
					Lower Bound	Upper Bound		
2010&2011	36	1.1975	.21004	.03501	1.1264	1.2686	1.00	1.50
2012	32	1.2019	.20954	.03704	1.1263	1.2774	1.00	1.50
2013-2014	42	1.3419	.22045	.03402	1.2732	1.4106	1.00	1.50
Total	110	1.2539	.22307	.02127	1.2118	1.2961	1.00	1.50

Credit Ratio

	Sum of Squares	df	Mean Square	F	Sig.
Between Groups	.526	2	.263	5.750	.004
Within Groups	4.898	107	.046		
Total	5.424	109			

Table 5.39: Independent T Test of R. v. Summers and Credit Ratio

	Pre and Post Summers	N	Mean	Std. Deviation	Std. Error Mean
Credit Ratio	Pre-Summers Winning vs. Appeal	61	1.1897	.20079	.02571
	Post-Summers Winning vs. Appeal	49	1.3339	.22546	.03221

		Levene's Test for Equality of Variances		t-test for Equality of Means						
									95% Confidence Interval of the Difference	
		F	Sig.	t	df	Sig. (2-tailed)	Mean Difference	Std. Error Difference	Lower	Upper
Credit Ratio	Equal variances assumed	2.309	.132	-3.544	108	.001	-.14421	.04069	-.22486	-.06355
	Equal variances not assumed			-3.499	97.111	.001	-.14421	.04121	-.22600	-.06241

Table 5.42: Cross Tabulation of R. v. Summers and Credit Ratio – In Cases where the Judge Noted Remission as Justification for Credit

			Credit for presentence custody		
			<1.5 to 1	1.5 to 1	Total
Pre and Post Summers	Pre-Summers Winning vs. Appeal	Count	4	10	14
		% within Pre and Post Summers	28.6%	71.4%	100.0%
	Post-Summers Winning vs. Appeal	Count	2	20	22
		% within Pre and Post Summers	9.1%	90.9%	100.0%
Total		Count	6	30	36
		% within Pre and Post Summers	16.7%	83.3%	100.0%

a. Does judge mention remission as justification = Yes, judge mentions

Chi-Square Tests[a]

	Value	df	Asymptotic Significance (2-sided)	Exact Sig. (2-sided)	Exact Sig. (1-sided)
Pearson Chi-Square	2.338[b]	1	.126		
Continuity Correction[c]	1.145	1	.285		
Likelihood Ratio	2.285	1	.131		
Fisher's Exact Test				.181	.143
Linear-by-Linear Association	2.273	1	.132		
N of Valid Cases	36				

a. Does judge mention remission as justification = Yes, judge mentions
b. 2 cells (50.0%) have expected count less than 5. The minimum expected count is 2.33.
c. Computed only for a 2x2 table

Appendix B: Ethics Approval

Good Afternoon,

I've CC'd my student e-mail on this request. My name is Benjamin Gallant and I'm a Master's student who is working towards finishing up a Master's in Criminology. Early on in my research process I received an e-mail from ethics confirming that my project would not have to clear any paperwork regarding ethics. I would like to receive this statement again in writing as significant time has passed and I've lost track of the e-mail although nothing regarding the project has changed.

Details:
-All data from secondary sources (Quick-Law Cases)
-This public data was reviewed in order to make both quantitative and qualitative judgments

There was no interaction with any human beings during the course of the research. All information used is publicly available. As such it has been confirmed to me previously that I do not require any additional paperwork to clear ethics.

Cheers,

Benjamin Gallant

From: Ethics [mailto:ethics@uottawa.ca]
Sent: Wednesday, November 11, 2015 9:20 AM
To: Gallant, Benjamin (PS/SP)
Subject: RE: Ethics Request

Good morning Benjamin,

My director Catherine was unable to find a copy of a correspondence with you in her emails, however, she has asked me to send you article 2.4 taken directly from the TCPS 2 (http://www.pre.ethics.gc.ca/eng/policy-politique/initiatives/tcps2-eptc2/chapter2-chapitre2/):

"Article 2.4 REB review is not required for research that relies exclusively on secondary use of anonymous information, or anonymous human biological materials, so long as the process of data linkage or recording or dissemination of results does not generate identifiable information."

If you have any questions, please do not hesitate to contact me.

Best regards,

Jasmine Sarazin-Bertschi
Coordonnatrice d'éthique / Ethics Coordinator
Bureau d'éthique et d'intégrité de la recherche / Office of Research Ethics and Integrity
Université d'Ottawa / University of Ottawa
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550 Cumberland (Pavillon Tabaret Hall), salle/Room 154
Ottawa, ON K1N 6N5

Good afternoon Benjamin,

Please see below for a more detailed explanation taken directly from Article 2.2 of the TCPS2 (http://www.pre.ethics.gc.ca/eng/policy-politique/initiatives/tcps2-eptc2/chapter2-chapitre2/):

Research Exempt from REB Review
Some research is exempt from REB review where protections are available by other means. This Policy allows the following exemptions from the requirement for REB review, as outlined below.
Article 2.2 Research that relies exclusively on publicly available information does not require REB review when:

a. the information is legally accessible to the public and appropriately protected by law; or
b. the information is publicly accessible and there is no reasonable expectation of privacy.

Application For the purposes of this Policy, publicly available information is any existing stored documentary material, records or publications, which may or may not include identifiable information. Some types of information are legally accessible to the public in a certain form and for a certain purpose, as specified by law or regulations: registries of deaths, court judgments, or public archives and publicly available statistics (e.g., Statistics Canada public use files), for example. In Canada, all publicly available archives (national, provincial or municipal) have policies governing access to their records. An archival record or database that is subject to restrictions, such as those under access to information and privacy legislation or contractual restrictions imposed by the donor of the records, may also be considered publicly available for the purposes of this Policy.

Research that relies exclusively on information that is publicly available, or made accessible through legislation or regulation, does not require REB review. Exemption from REB review for research involving information that is legally accessible to the public is based on the presence of a legally designated custodian/steward who protects its privacy and proprietary interests (e.g., an access to information and privacy coordinator or a guardian of Canadian census data).
REB review is also not required where research uses exclusively publicly available information that may contain identifiable information, and for which there is no reasonable expectation of privacy. For example, identifiable information may be disseminated in the public domain through print or electronic publications; film, audio or digital recordings; press accounts; official publications of private or public institutions; artistic installations, exhibitions or literary events freely open to the public; or publications accessible in public libraries. Research that is non-intrusive, and does not involve direct interaction between the researcher and individuals through the Internet, also does not require REB review. Cyber-material such as documents, records, performances, online archival materials or published third party interviews to which the public is given uncontrolled access on the Internet for which there is no expectation of privacy is considered to be publicly available information.

Exemption from REB review is based on the information being accessible in the public domain, and that the individuals to whom the information refers have no reasonable expectation of privacy. Information contained in publicly accessible material may, however, be subject to copyright and/or intellectual property rights protections or dissemination restrictions imposed by the legal entity controlling the information.

Cordially,

Jasmine Sarazin-Bertschi
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Appendix C: Coding Table

Independent Variables[57]	**Explanation of how the Independent Variable was Coded**[58]
Indigenous Status	This variable was coded as a simple dichotomous measure. 0 = Non-Indigenous 1 = Indigenous
Physical Health Issues	The presence of physical health issues included recent or past addiction to any substance. Further, it included the presence of disabilities or having been beaten up whilst in prison. This variable was coded as a simple dichotomous measure. 0 = No physical health issues 1 = Physical health issues were present
Mental Health Issues	The presence of any mental health related issues (either past history or present) was coded as a yes for this variable. This variable was coded as a simple dichotomous measure. 0 = No mental health issues 1 = Mental health issues were present
Court Size	The cut-offs for court size were based on the number of cases which entered the courts in the most recent year (i.e., cases received from Jan 2015 to December 2015). Less than 7,000 cases was classified as small, 7,000 cases to 12,000 cases was classified as medium, and more than 12,000 cases was classified as large. Small = 1 Medium = 2 Large = 3
Number of cases per judge	This variable was coded as a simple dichotomous measure. 1 = Judges who presided over only one case. 2 = Judges who presided over more than one case.
Days in remand	This continuous variable was coded into three temporal periods. Offenders with remands of less than 9 months, offenders with remands of 9 months to 18 months, and offenders with remands of over 18 months. 1 = Less than 9 months

[57] A number of other variables were examined that were not chosen for inclusion in the study. This includes 50 variables created related to case-law references. These were not included because the vast majority of cases were referenced too infrequently (less than 5 times) to be useful for any sort of statistical analyses. Other variables were not included based upon the same logic (i.e., they apply to only a small number of cases in the sample). The above chart is simply an explanation of how variables included in the study were coded.

[58] Note that in all instances of missing data some form of 99, 999, or 99999 was used to label particular data as missing in order for it to be removed from the analyses.

	2 = 9 months to 18 months 3 = Over 18 months
Number of Charges	This continuous variable was coded into three categories. Offenders with only 1-2 charges, offenders with 3-5 charges, and offenders with more than 5 charges. 1 = 1-2 charges 2 = 3-5 charges 3 = More than 5 charges
Criminal Record Type	A number of designations related to criminal record type are provided by QuickLaw (e.g., lengthy, related, dated). These tags were categorized into criminal record types of minor, serious, and no criminal record/no type specified. 1 = Minor (dated, minor, dated & related) 2 = Serious (lengthy, related, lengthy and related) 3 = No criminal record or no type of criminal record specified
Seriousness of Charges	Offenders' charges were classified into two categories. Offences against the person (e.g., robbery, assault) and other offences (e.g., vandalism, theft). The purpose was to capture violent interpersonal crime in the first category and other offences that might be perceived by judges as less serious in the second. 1 = Offences against the person 2 = Other offences
Criminal Record	This variable was coded as a simple dichotomous measure. 0 = No criminal record 1 = Criminal record
Current Breaches	This variable was coded as a simple dichotomous measure. 0 = No current breaches 1 = One or more current breaches
Judge mentions remission as justification for enhanced credit	This variable was coded as a simple dichotomous measure. 0 = Judge does not mention 1 = Yes judge mentions remission as part of justification for enhanced credit.
Defense notes harsh conditions as justification for enhanced credit.	This variable was coded as a simple dichotomous measure. 0 = Defense does not mention 1 = Yes defense mentions harsh conditions as part of justification for enhanced credit.
Judge notes harsh conditions as justification for enhanced credit.	This variable was coded as a simple dichotomous measure. 0 = Judge does not mention 1 = Yes judge mentions harsh conditions as part of justification for

	enhanced credit.
Judge determined awarding 1.5:1 credit requires exceptional circumstances	This variable was coded as a simple dichotomous measure. 0 = Judge does not mention 1 = Yes judge mentions that enhanced credit of 1.5:1 requires exceptional circumstances to be granted.
Case by Year	This variable was coded into categories. All cases from 2010 & 2011 made up category one. All cases from 2012 made up category 2. All cases form 2013 and 2014 made up category three. This was done in part because there were very few cases from 2010 and 2014. As such, those years were rolled into the next closest year. 1 = 2010 & 2011 2 = 2012 3 = 2013 & 2014
R. v. Summers (2013)	This variable was coded as a simple dichotomous measure. If a case was decided prior to the *R. v. Summers* (2013) ONCA decision it was coded as a prior. If a case was decided after the Summers case it was coded as post. 0 = Prior to Summers 1 = Post-Summers

Appendix D: Bill C-25 Full Text

57-58 ELIZABETH II

CHAPTER 29

An Act to amend the Criminal Code (limiting credit for time spent in pre-sentencing custody)

[*Assented to 22nd October, 2009*]

Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

SHORT TITLE

Short title

1. This Act may be cited as the *Truth in Sentencing Act*.

R.S., c. C-46

CRIMINAL CODE

2. Section 515 of the *Criminal Code* is amended by adding the following after subsection (9):

Written reasons

(9.1) Despite subsection (9), if the justice orders that the accused be detained in custody primarily because of a previous conviction of the accused, the justice shall state that reason, in writing, in the record.

1995, c. 22, s. 6

3. Subsection 719(3) of the Act is replaced by the following:

Determination of sentence

(3) In determining the sentence to be imposed on a person convicted of an offence, a court may take into account any time spent in custody by the person as a result of the offence but the court shall limit any credit for that time to a maximum of one day for each day spent in custody.

Exception

(3.1) Despite subsection (3), if the circumstances justify it, the maximum is one and one-half days for each day spent in custody unless the reason for detaining the person in custody was stated in the record under subsection 515(9.1) or the person was detained in custody

57-58 ELIZABETH II

CHAPITRE 29

Loi modifiant le Code criminel (restriction du temps alloué pour détention sous garde avant prononcé de la peine)

[*Sanctionnée le 22 octobre 2009*]

Sa Majesté, sur l'avis et avec le consentement du Sénat et de la Chambre des communes du Canada, édicte :

TITRE ABRÉGÉ

Titre abrégé

1. *Loi sur l'adéquation de la peine et du crime.*

L.R., ch. C-46

CODE CRIMINEL

2. L'article 515 du *Code criminel* est modifié par adjonction, après le paragraphe (9), de ce qui suit :

Motifs écrits

(9.1) Malgré le paragraphe (9), si le juge de paix ordonne la détention sous garde du prévenu en se fondant principalement sur toute condamnation antérieure, il est tenu d'inscrire ce motif au dossier de l'instance.

1995, ch. 22, art. 6

3. Le paragraphe 719(3) de la même loi est remplacé par ce qui suit :

Infliction de la peine

(3) Pour fixer la peine à infliger à une personne déclarée coupable d'une infraction, le tribunal peut prendre en compte toute période que la personne a passée sous garde par suite de l'infraction; il doit, le cas échéant, restreindre le temps alloué pour cette période à un maximum d'un jour pour chaque jour passé sous garde.

Exception

(3.1) Malgré le paragraphe (3), si les circonstances le justifient, le maximum est d'un jour et demi pour chaque jour passé sous garde, sauf dans le cas où la personne a été détenue pour le motif inscrit au dossier de l'instance en application du paragraphe 515(9.1) ou au titre de l'ordonnance rendue en

under subsection 524(4) or (8).

Reasons

(3.2) The court shall give reasons for any credit granted and shall cause those reasons to be stated in the record.

Record of proceedings

(3.3) The court shall cause to be stated in the record and on the warrant of committal the offence, the amount of time spent in custody, the term of imprisonment that would have been imposed before any credit was granted, the amount of time credited, if any, and the sentence imposed.

Validity not affected

(3.4) Failure to comply with subsection (3.2) or (3.3) does not affect the validity of the sentence imposed by the court.

R.S., c. 27 (1st Supp.), s. 184(10); 1995, c. 22, s. 9

4. Form 21 in Part XXVIII of the Act is replaced by the following:

FORM 21

(Sections 570 and 806)

WARRANT OF COMMITTAL ON CONVICTION

Canada,

Province of .....,

(*territorial division*).

To the peace officers in (*territorial division*) and to the keeper of (*prison*) at .....:

Whereas (*name*), in this Form called the offender, was, on the ..... day of ..... 20....., convicted by (*name of judge and court*) of having committed the following offence(s) and it was adjudged that the offender be sentenced as follows:

Offence	Sentence	Remarks
(*state offence of which offender was convicted*)	(*state term of imprisonment for the offence and, in case of imprisonment for default of*)	(*state the amount of time spent in custody before sentencing, the term of imprisonment*)

application des paragraphes 524(4) ou (8).

Motivation obligatoire

(3.2) Le tribunal motive toute décision d'allouer du temps pour la période passée sous garde et fait inscrire les motifs au dossier de l'instance.

Inscription obligatoire

(3.3) Il fait inscrire au dossier de l'instance et sur le mandat de dépôt l'infraction en cause, le temps passé sous garde, la période d'emprisonnement qui aurait été infligée n'eût été tout temps alloué, le temps alloué, le cas échéant, et la peine infligée.

Validité de la peine

(3.4) L'inobservation des paragraphes (3.2) ou (3.3) n'entache pas la validité de la peine infligée.

L.R., ch. 27 (1re suppl.), par. 184(10); 1995, ch. 22, art. 9

4. La formule 21, à la partie XXVIII de la même loi, est remplacée par ce qui suit :

FORMULE 21

(articles 570 et 806)

MANDAT DE DÉPÔT SUR DÉCLARATION DE CULPABILITÉ

Canada,

Province de .....,

(*circonscription territoriale*).

Aux agents de la paix de (*circonscription territoriale*) et au gardien de (*prison*) à ..... :

Attendu que (*nom*), ci-après appelé(e) le contrevenant, a, le ..... jour de ..... 20....., été déclaré(e) coupable par (*nom du juge et du tribunal*) des infractions ci-après et que les peines suivantes lui ont été infligées :

Infraction	Peine	Remarques
(*indiquer l'infraction dont le contrevenant a été déclaré coupable*)	(*indiquer la période d'emprisonnement devant être purgée pour l'infraction et, s'il*)	(*indiquer le temps que le contrevenant a passé sous garde avant le prononcé de la peine, la*)

payment of fine, so indicate together with the amount of it and applicable costs and whether payable immediately or within a time fixed)

that would have been imposed before any credit was granted under subsection 719(3) or (3.1), the amount of time credited, if any, and whether the sentence is consecutive or concurrent, and specify consecutive to or concurrent with what other sentence)

s'agit d'un emprisonnement pour défaut de paiement d'une amende, indiquer ce fait ainsi que le montant de l'amende et celui des frais applicables et leur délai d'exigibilité)

période d'emprisonnement qui lui aurait été infligée n'eût été tout temps alloué en application des paragraphes 719(3) ou (3.1), le temps alloué, le cas échéant, et si la peine doit être purgée concurremment ou consécutivement à une autre peine clairement désignée)

1.	1. .....
2.	2. .....
3.	3. .....
4.	4. .....

You are hereby commanded, in Her Majesty's name, to arrest the offender if it is necessary to do so in order to take the offender into custody, and to take and convey him or her safely to (*prison*) at ..... and deliver him or her to its keeper, who is hereby commanded to receive the accused into custody and to imprison him or her there for the term(s) of his or her imprisonment, unless, if a term of imprisonment was imposed only in default of payment of a fine or costs, those amounts and the costs and charges of the committal and of conveying the offender to that prison are paid sooner, and this is a sufficient warrant for so doing.

Dated this ..... day of ..... 20....., at .....

.....
Clerk of the Court, Justice,

Il vous est par les présentes ordonné, au nom de Sa Majesté, d'arrêter le contrevenant, si cela est nécessaire pour l'amener en détention, de le conduire sûrement à (*prison*), à ..... , et de l'y remettre au gardien à qui il est par les présentes ordonné de recevoir le contrevenant et de l'y incarcérer pour la durée de sa peine d'emprisonnement, sauf si celle-ci n'a été infligée que pour défaut de paiement de l'amende ou des frais et que ces sommes et les frais d'emprisonnement et de transport du contrevenant sont payés plus tôt. Les présentes sont, pour ce faire, un mandat suffisant.

Fait le ..... jour de ..... 20....., à .....

.....
Greffier du tribunal, Juge de paix,

Judge *or* Provincial Court Judge

Application — persons charged after coming into force

5. Subsections 719(3) to (3.4) of the Act, as enacted by section 3, apply only to persons charged after the day on which those subsections come into force.

COMING INTO FORCE

Order in council

6. This Act comes into force on a day to be fixed by order of the Governor in Council.

Published under authority of the Speaker of the House of Commons

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Juge *ou* Juge de la cour provinciale

Application : personnes inculpées après l'entrée en vigueur

5. Les paragraphes 719(3) à (3.4) de la même loi, édictés par l'article 3 de la présente loi, ne s'appliquent qu'à l'égard des personnes inculpées après leur entrée en vigueur.

ENTRÉE EN VIGUEUR

Décret

6. La présente loi entre en vigueur à la date fixée par décret.

Publié avec l'autorisation du président de la Chambre des communes

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