Criminal Law

SCC decision in R. v. Steele: another threshold gone

By Jacob Stilman

Recently I commented on the case of Raymond Caissie, who was charged in British Columbia with the murder of a 17-year-old not long after he had completed a 22-year sentence for a violent rape/abduction. This tragic case had spawned calls by politicians for the permanent incarceration of our worst offenders in order to protect the public against such events in the future.

In fact, such a mechanism already exists under our laws in the form of the dangerous offender provisions, which can operate to impose a permanent penal quarantine against offenders in the appropriate circumstances, even when the offender presents with few criminal antecedents. However, this scenario ought to be reserved for offenders who are demonstrably at the extreme end of the violence spectrum, and is premised on there being a very high legal threshold before such a sentence could be imposed.

The reality is that the threshold for indeterminate incarceration is surprisingly low. One need not be Clifford Olson, Paul Bernardo or Raymond Caissie to qualify for a dangerous offender designation. And by virtue of a recent Supreme Court decision, the bar has been set that much lower.

The case of *R. v. Steele* 2014 SCC 61 (CanLII) has defined what constitutes a Serious Personal Injury Offence at a much lower standard than what some courts had previously determined. In this case, the accused robbed a drug store by merely stating to the clerk that he had a gun. There was no evidence that he was actually armed, and no physical violence occurred during the course of the robbery. At issue was whether this offence satisfied the legal criteria of Serious Personal Injury Offence (SPIO), a necessary pre-condition in order for the Crown proceed with a dangerous offender application.

At trial, and upon appeal to the Manitoba Court of Appeal, both lower courts had determined that the threshold had not been met to commence dangerous offender proceedings because the robbery offence had not been “qualitatively” violent. They had ruled that the definition of SPIO required something more than a mere threat of violence and that a demonstration of some degree of significant physical harm and violence needed to be made out.

The Supreme Court, in its recent unanimous decision, found otherwise. Applying current rules of statutory interpretation, which require judges to apply a plain and contextual meaning to the language that is harmonious to the overall purpose of the legislation, our highest court has definitively done away with the notion that a qualitatively distinct level of horror or violence must be present in order to constitute an SPIO.

The implication of this decision is this: it is now much easier for the Crown to meet the threshold criteria to institute dangerous offender proceedings. And once the statutory triggering conditions have been satisfied, a finding that the person satisfies the definition of dangerous offender may be almost inevitable. Any offender with a significant criminal record for offences of violence, such as robbery, assault, weapons or sexual assault, is likely to meet the criteria.

This is true even where the actual facts underlying the individual offences which comprise the record fall at the lower end of the spectrum of severity. Moreover, while indefinite incarceration is not mandatory due to the availability of a long-term supervision order – which can see an offender released back into the community under very stringent probationary oversight – there is a presumption that an offender who is found to be a dangerous offender will be subject to an indefinite term of incarceration and thus never be released.

The concern is that the decision of R. v. Steele raises is another incremental turn of the screw towards a Canadian equivalent of a “three strikes and you’re out” sentencing regime. If Serious Personal Injury Offences no longer require the court to engage a qualitative evaluative process, but are rather assessed almost purely quantitatively, more and more low-grade offenders who have acquired lengthy, but “non-severe” records, will satisfy the dangerous offender criteria.

Fortunately, there remain many procedural and practical safeguards in place that will continue to serve as impediments to the overuse by the Crown on these provisions. Not least of these is that a dangerous offender application is extremely time consuming and expensive, requiring extensive review by court-appointed psychiatrists, counter-opinions by defence experts, as well as the review of the entire court and police records of an accused. If nothing else, budgetary constraints will serve to curtail prosecutorial exuberance.

Nonetheless, with the elimination of the need to establish a demonstrably elevated level of violence before embarking upon a dangerous offender application, we are likely to see many more offenders placed in jeopardy of indeterminate jail sentences, and we are inviting over-reliance on incarceration.