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Judicial Review Hearings:A Reprieve from Breach Charges for Indigenous Offenders in the Yukon?

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INTRODUCTION

Upon Bill -75[1] receiving royal assent on July 21, 2019, the government published a press release stating "These comprehensive legislative changes mark an important milestone in strengthening, transforming and modernizing our criminal justice system. Together, these comprehensive changes will help bring about a much needed culture shift in the way our criminal justice system operates."[2]

It may be too soon to assess whether or not the changes to the Criminal Justice System through this new Bill will help or hinder the administration of justice across the country; however, Indigenous offenders in the North perhaps stand to be the greatest beneficiary of the new laws that address Administration of Justice Offences (AOJO).

Through one of the new provisions, police and Crown prosecutors have greater discretion to divert offenders to a Judicial Review Hearing to deal with Administration of Justice Offences. Indigenous offenders in the Yukon may finally be able to find their way out of unnecessary lengthy involvements in the Criminal Justice System and long criminal records.

ADMINISTRATION OF JUSTICE OFFENCES

The Administration of Justice Offences made out in the Criminal Code range from a simple breach of a court order to more serious offences of escaping lawful custody. The AOJO that this paper is concerned with fall under Sections 145 and 733 of the Criminal Code.

[1] Government Bill (House of Commons) C-75 (42-1)

[2] Government of Canada. Government of Canada Announces Criminal Code Reforms to Modernize the Criminal Justice System and Reduce Delays.

Specifically, sections 145(2)(a)(b), 145(3), 145(5), 145(5.1), and 733.1(1) that state the following, respectively;

s.145(2)(a)(b) ”Every one who, being at large on his undertaking or recognizance given to or entered into before a justice or judge, fails, without lawful excuse, the proof of which lies on him, to attend court in accordance with the undertaking or recognizance, or (b) having appeared before a court, justice or judge, fails, without lawful excuse, the proof of which lies on him, to attend court as thereafter required by the court, justice or judge, (…) is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years or is guilty of an offence punishable on summary conviction.”[3]

s.145.(3) “Every person who is at large on a n undertaking or recognizance given to or entered into before a justice or judge and is bound to comply with a condition of that undertaking or recognizance, and every person who is bound to comply with a direction under subsection 515(12) or 522(2.1) or an order under subsection 516(2), and who fails without lawful excuse, the proof of which lies on them, to comply with the condition, directions or order is guilty of (a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or (b) an offence punishable on summary conviction.

s.145(5) “Every person who is named in an appearance notice or promise to appear, or in a recognizance entered into before an officer in charge or another peace officer, that has been confirmed by a justice under section 508 and who fails, without lawful excuse, the proof of which lies on the person, to appear at the time and place stated therein, if any, for the purposes of the identification of criminals act, or to attend court in accordance therewith, is guilty of

[3] Martin et al., 284-285.

(a)an indictable offence and is liable to imprisonment for a term not exceeding two years; or (b) an offence punishable on summary conviction."

s.145(5.1) "Every person who, without lawful excuse, the proof of which lies on the person, fails to comply with any condition of an undertaking entered into pursuant to subsection 499(2) or 503(2.1) (a) is guilty of an indictable offence and is liable to imprisonment for a term not exceeding two years; or (b) is guilty of an offence punishable on summary conviction."

s.733.1(1) "An offender who is bound by a probation order and who, without reasonable excuse, fails or refuses to comply with that order is guilty of (a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or (b) an offence punishable on summary conviction and is liable to imprisonment for a term not exceeding eighteen months, or to a fine not exceeding two thousand dollars, or both."[4]

These offences are criminal by way of their inclusion in the Criminal Code of Canada and can fetch lengthy jail sentences and/or fines as noted above. However, recent data[5] suggests that Canadians would like to see these types of offences dealt with outside of court and furthermore, people in the focus groups suggested that a criminal charge for breaching conditions such as drinking alcohol or missing a curfew is unreasonable as the offences themselves don't meet a criminal standard.

[4] Ibid., 1546

[5] Department of Justice. Research at a Glance. Administration of Justice Offences.

CHARGING PRACTICES BY POLICE OF AOJO

Police have a wide range of discretion when deciding whether or not to charge an offender with an AOJO. Not all breaches are black and white and nor do they require a staunch, by the book response by police officers, and yet the "the share of Yukon's 'other' Criminal Code violations to all violations has been the highest in the country in each of the last ten years with the exception of 2018."[6] This is a trend that should have been addressed years ago.

Police objectives in the Yukon in 2019-2020 were focused on, among other priorities, visibility and approachableness to the public, member training, finding members that are a good fit for the communities, and using a trauma-informed response to support, respect, culturally sensitive and unbiased responses.[7] Missing from their objectives were any type of restorative or diversion options for Indigenous offenders who represent the greatest number of offenders in the Yukon Criminal Justice System and the greatest number of offenders to receive AOJO charges.

In 2020-2021, the Yukon RCMP expanded on the previous year's objectives and priorities by adding the need to increase the use of restorative justice practices in the Yukon. Specifically, their aims were to assist the Yukon Government in their commitment to increasing restorative justice practices by 5%, work with First Nation community Justice workers, and most importantly as it relates to AOJO, that the RCMP explore appropriate diversion options in all communities prior to charging.[8]

[6] Government of Yukon. Police-reported Crime Statistics in Yukon, 4.
[7] Yukon's Policing Priorities (2019-2020). Government of Yukon.
[8] Yukon's Policing Priorities (2020-2021). Government of Yukon.

Deciding to lay a charge of an AOJO against an offender is clearly a subjective decision that can give conflicting messages to offenders about what is and is not acceptable when not complying with conditions of court orders. In one Yukon jurisdiction there may be a police officer that is more lenient and prefers to give a warning prior to breaching an offender and in another community, officers may breach an offender for any and all non-compliance of their court order(s). 70% to 90% of offenders in the Yukon are First Nation,[9] and most of the communities in the Yukon are predominantly made up of First Nations/Indigenous populations that include Indigenous offenders[10], and as such it is this later population that faces the inequity of discretionary police charging practices of AOJO.

This brings disparity to the courts who then must decide what is a just and fair response to the breach. In any given day, Yukon Judge's may see one case where an offender is charged with multiple breaches from a court order or orders and in the following case, have an offender before them that has had multiple breaches but where the prosecution advises that the police officer declined to lay a charge because of the offenders circumstances or other reasons. What is further frustrating to offenders and the community is that these breach offences can be identical (i.e. consuming alcohol or failing to abide by their curfew) in law though certainly the circumstances surrounding the alleged breach can vary.

Through Bill C-75, the police continue to have the authority for discretionary charging practices related to AOJO but it now legitimizes their actions when choosing not to charge an offender with an AOJO and instead issuing a Judicial Review Hearing notice, perhaps resulting in more equity in AOJO outcomes. Furthermore, it sends the message that police *should* be

[9] Government of Canada, Office of the Auditor General of Canada. Corrections in Yukon.
[10] Ibid, para 82.

considering a Judicial Review Hearing for all AOJO that meet the criteria as set out in the new section. Moreover, it supports the policing objectives in the Yukon and will be a welcome reprieve by Indigenous offenders in the Yukon who bear the brunt of inconsistent charging practices by police and inconsistent sentencing decisions related to AOJO. Of the 8,754 criminal incidents reported by Yukon police in 2018, almost 30% were "other criminal code offences" that include AOJO. Approximately a quarter of the AOJO charges were reported outside the capital city of Whitehorse and were in predominantly First Nation communities.[11]

In 2018, the number of breach charges *laid* by police in the Yukon under ss.145(2), 145(3), 145(4), 145(5.1), and 733.1(1) totaled 1,184 and in 2019 the number of charges climbed to 1,207.[12] Broken down, all the ss.145 offences combined accounted for 832 in 2018 and 895 in 2019 and the s.733.1(1) offence accounted for 352 in 2018 and 312 in 2019. These numbers are astounding considering the entire population of the Yukon is approximately 41,000 people. 70% to 90% of Yukon offenders are identified as Indigenous and to put it in perspective, almost every person that comes into contact with the Yukon Criminal Justice System is going to be Indigenous and as such almost every AOJO charge is laid against an Indigenous person.

There is no readily available data on the actual number of Indigenous offenders that come into contact with the Yukon Criminal Justice System through police related AOJO charges. The number of breach charge statistics[13] are the total number of breach charges laid by police in the Yukon in 2018 and 2019 and can encompass multiple breach charges for a single

[11] Government of Yukon. Police-reported Crime Statistics in Yukon, 7.
[12] Gorczyca, Justin. Re: Statistics. Received by LS, 9 Jun. 2020.
[13] Ibid.

offender. Moreover, they can include multiple breach charges on multiple files for one offender, making it difficult to discern how many individual offenders, both Indigenous and non-Indigenous, in a given year, are actually being charged with AOJO and entering the Yukon Criminal Justice System. This is data that may be helpful in the future in determining the demographics of police charging of AOJO in relation to Indigenous offenders and how many of these charges are now being diverted to Judicial Review Hearings versus a laying of a charge.

AOJO AND THE COURTS

A 2018 report by the Macdonald-Laurier Institute once again ranked the Yukon as having the worst Criminal Justice System in Canada with failing or low grades for support for victims and public safety receiving a grade of F (fail).[14] Breach of probation [s.733.1(1)] and failure to comply offences (s.145's) received grades of D and C, respectively.

The crime rate in the Yukon Territory in 2018 was third highest in the country and police reported 8,754 criminal incidents during that year and of those, 741 were classified as AOJO, accounting for 29.3% of all "other criminal offences" in the Territory.[15]

AOJO amount to an unacceptable and disproportionate number of the offenses that come before the Canadian courts every year in comparison to other Criminal Code offenses. Statistics Canada reported in 2013/2014 that AOJO accounted for one-third of all the adult criminal cases before the courts. Furthermore, they found that in the Yukon, approximately half of all the completed adult criminal cases involved an AOJO.[16]

[14] Perrin and Auda Report Card on the Criminal Justice System #2.
[15] Government of Yukon. Police-reported Crime Statistics in Yukon.
[16] Burczycka and Munch. Trends in Offences Against the Administration of Justice.

In 2018, the Yukon had a total of 567 *court files* with charges related to AOJO, specifically, ss.145(2)(3)(4)(5)(5.1) and/or 733.1(1) with that number dropping slightly in 2019 to a total of 506 court files with these same Criminal Code offences.[17] Of AOJO files before the Yukon courts in 2018, it's reported that 637 cases were initiated with 573 being cleared with the median case processing time of 68 days.[18] This is the longest processing time reported in the last ten years and in 2018, approximately 21% of these cases were dealt with between 6 and 12 months.[19]

There is no doubt that Indigenous people make up a disproportionate number of those that come into contact with the Criminal Justice System (CJS) and have continued to be overrepresented in spite of law reform, new case law, and alternative justice programs that would see some Indigenous offenders diverted out of the formal court setting. "In 2016/2017, Indigenous adults accounted for 30% of provincial/territorial custody admissions, 27% of federal custody admissions, and 27% of the federal in-custody population, while representing 4.1% of the Canadian adult population."[20] These numbers remain alarming and the statistics in the Yukon are even more concerning.

Indigenous people are also overrepresented in the Yukon related to all custody matters and those that come into contact with the Criminal Justice System. While there is no data available for the number of Indigenous offenders that were remanded or sentenced to custody time specifically for AOJO, the Whitehorse Correctional Centre reported that from April 1,

[17] Gorczyca, Justin. Re: Statistics. Received by LS, 9 Jun. 2020.
[18] Statistics Canada. Court Workload Indicators, Adult Criminal Courts, by Cases Initiated, Cases Completed, Completion Rate and Case Processing Time.
[19] Statistics Canada. Court workload indicators, adult criminal courts, by caseload and age of cases.
[20] Department of Justice. Understanding the Overrepresentation of Indigenous People in the Criminal Justice System.

2018 to March 31, 2019 there were 424 admissions with 66% of those admissions self-identifying as First Nations.[21] We can safely extrapolate based on previous data submitted, that at least some if not most of the Indigenous offenders admitted to the Whitehorse Correctional Centre in 2018, under a remand warrant or warrant for committal were a result of a court file with a substantive offence along with an AOJO or one or more AOJO charges standing alone.

PUBLIC PROSECUTION SERVICE & AOJO

The Crown Prosecutors act as quasi-judicial officers of the court and while their role is to seek justice on behalf of the public, and though they are not for or against any accused person, they wield great discretionary power on how to proceed in each of the cases that comes before them. These decisions are made subjectively and can result in an accused person facing jail time just by the prosecutor proceeding by indictment rather than by summary conviction. In some cases, the law is clear whereby certain offences in the Criminal Code are indictable by law and the prosecutors have no choice but to proceed that way. With hybrid offences, there is the advantage of the Crown to proceed by indictment, later to change the election to summary should a plea deal be worked out. This certainly puts the Crown at an advantage at the starting gate.

It is encouraging however to see the Public Prosecution Service of Canada (PPSC) taking proactive steps to train their prosecutors and outline in the PPSC desk manual the suggested course of action(s) that should be taken when making a determination of whether or not an offender should be diverted to a Judicial Review Hearing rather than proceeding with any AOJO charges. In situations in which the police lay a charge rather than issuing an appearance

[21] Government of Yukon. Whitehorse Correctional Centre Admissions Statistics.

notice for the Judicial Review Hearing the final determination for prosecution lies with the PPSC and even in cases where the police chose to issue an appearance notice for a Judicial Review Hearing, the Crown can move forward with a charge if they deem it to be more appropriate in the case before them.

"The fact that police have laid a charge for an administration of justice offence rather than issue an appearance notice may be a relevant factor to the exercise of Crown discretion, but is not determinative. It may be necessary to inquire of the police why an administration of justice offence was laid rather than a referral by police to a judicial referral hearing in the first instance. This further information may provide greater context for the Crown when exercising its discretion under the decision to prosecute test and deciding whether to continue the prosecution or seek a judicial referral hearing."[22]

There are many factors for prosecutors to consider when deciding to proceed by way of a Judicial Review Hearing or not to but most importantly, the main objective should remain to divert any offenders but specifically Indigenous offenders in the Yukon out of the formal court process. Only laying breach charges in the rarest of occasions where for example a complainant has been affected by the breach (i.e. a breach of a no contact order that could have hurt the complainant psychologically) should the laying of a charge be the result.

ISSUES RELATED TO JUDICIAL REVIEW HEARINGS

On its face, the new regime of Judicial Review Hearings appears to be the more appropriate and fair way to deal with AOJO for Indigenous offenders, and all offenders for that

[22] Department of Justice. 3.20 Judicial Referral Hearings (2).

matter. In the past, conditions put on accused persons trying to secure bail or those attached to probation orders were unrealistic such as requiring an alcoholic not to drink, and in some cases, one could count the hours before an accused was likely to breach those conditions, resulting in another criminal charge. But like every new change in large organizations like the Criminal Justice System, there are bound to be issues that have been overlooked or challenges to its fairness and effectiveness.

From a Crown, court, and police perspective, having a precise record of all offences committed by an offender becomes important when determining, for example, whether an offender will comply with future court orders if they are charged with new criminal offences. It would be helpful for police, prosecutors, and the courts to have accurate data on offender compliance or non-compliance as the case may be. A police officer would be unlikely to release an offender on a Promise to Appear (PTA) if their record showed eight failures to attend court after being issued a PTA. A Judge or Justice of the Peace may decide not to dismiss a breach in court under a Judicial Review Hearing if they are given an accurate account of previous failure to follow court orders. Or a Crown Prosecutor may not consider a probation order if an offender previously failed to follow numerous conditions on it or failed to follow any previous probation orders as their effectiveness in addressing the s.718 principles of sentencing would be devoid of any significant impact to the offender, such as rehabilitation, along with not offering any justice to the victim.

If as the new rules suggest, a Judicial Review Hearing could result in a dismissal of the breach and no documentation of it on the offender's criminal record, other jurisdictions may find themselves at a disadvantage. Smaller geographical areas such as the Yukon become very familiar with repeat offenders and the charges most likely to bring them in front of the court

and whether or not an offender is likely to comply with a court order. However, if that offender travels to another area and finds themselves with a criminal charge, the police, court, and Crown in these areas will be at a disadvantage as to whether an accused is capable of complying with release conditions or the terms set out in a probation order as offender criminal records may not be reflective of their entire criminal history.

Furthermore, accused persons may find themselves unable to receive the benefit of a Judicial Review Hearing if the complainant alleges emotional harm, physical harm, property damage, or economic loss.[23] Emotional harm is a relative concept that would be difficult to measure or even establish. At this point the offender either has to take the witness stand at the hearing to rebuke the allegations of complainant harm after a breach that would clearly violate his/her Section 13 rights or remain silent unable to make full answer and defence to the allegation until such time as the breach charge was officially laid where then the Crown is obligated to make out the breach (with the exception of s.145(5.1) that forces a reverse onus situation).

In many criminal cases the accused is able to "lump" multiple offences together and gains the advantage of totality. With multiple breach charges on a file along with a substantive charge, accused persons were able to negotiate a global sentence that would generally see breaches served concurrently with the substantive sentence. While clearly it is not in the best interest to have breach charges as a way to negotiate global sentences for breach charges, it is just another aspect of the changes that will affect the way accused persons have historically "worked" the system.

[23] Department of Justice. 3.20 Judicial Referral Hearings (2).

Lastly, offenders do not have the benefit of Section 11(d) of the Charter that states "Any person *charged* with an offence has the right: 4. to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal."[24] In theory there is no guilt decided at the Judicial Review Hearing; however, the very essence of deciding "what course of action to take" with the accused person in front of them assumes that the judge or justice is weighing the evidence in favor of, or against the accused, which could be construed as deciding guilt or innocence even though on the court record it would not be recorded as such.

CONCLUSION

"Throughout the criminal justice process, from arrest to sentencing, AOJOs affect profoundly the efficient functioning of Canada's justice system. AOJOs represent about one-in-ten incidents reported by the police, while four-in-ten cases in adult criminal courts include at least one AOJO, most of which result in a guilty verdict and a jail sentence. AOJOs have contributed to an increase in pre-trial detention, and also to the overrepresentation of Indigenous persons and of individuals from vulnerable populations in the criminal justice system."[25]

While much in this paper addresses offenders generally and did not always speak directly to the AOJO issues that may affect just Indigenous offenders, it stands to reason that based on the data that was able to be collected, that it is all relevant to Indigenous offenders in the Yukon. As stated earlier between 70% and 90% of all offenders in the Yukon are First

[24] Government of Canada, Department of Justice. Charterpedia
[25] Government of Canada, Department of Justice. Overview of Bill C-75

Nations.[26] Direct access to Correctional settings and court venues by the author provides first hand knowledge of the issues facing Indigenous offenders in the Yukon with AOJO charges along with a plethora of other legal issues in spite of a lack of reporting on Indigenous offenders by the various stakeholders in the Yukon.

What remains to be seen is if these new laws will do as they are expected to do and provide more efficient functioning within the Criminal Justice System and divert most offenders out of the formal setting for AOJO, recognizing that this is especially important for Indigenous offenders in the Yukon.

The Yukon is home to 14 Indigenous First Nations; Carcross/Tagish First Nation, Champagne and Aishihik First Nations, First Nation of Na-Cho Nyäk Dun, Kluane First Nation, Kwanlin Dün First Nation, Liard First Nation, Little Salmon/Carmacks First Nation, Ross River Dena Council, Selkirk First Nation, Ta'an Kwäch'än Council, Tr'ondëk Hwëch'in, Teslin Tlingit Council, Vuntut Gwitchin First Nation, and White River First Nation. While working within the Justice system in the Yukon, I witnessed members of every Yukon First Nation community interact with the criminal justice system. What was most evident to me was the revolving door that many of these offenders went through and, in many cases, for no other reason other than a simple breach charge or other administration of justice charge. Now, with this new legislation, there is an opportunity to divert offenders away from the justice system, and give them other opportunities to stay out of the system.

[26] Government of Canada, Office of the Auditor General of Canada. Corrections in Yukon.

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