Legislative Summary LS-472E

BILL C-14: AN ACT TO AMEND THE CRIMINAL CODE AND OTHER ACTS

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LEGISLATIVE HISTORY OF BILL C-14

HOUSE OF COMMONS		SENATE	
Bill Stage	**Date**	**Bill Stage**	**Date**
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Second Reading:	12 February 2004	Second Reading:	25 February 2004
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Report Stage:	12 February 2004	Report Stage:	
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Statutes of Canada 2004, c. 12

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

Legislative history by Peter Niemczak

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TABLE OF CONTENTS

Page

BACKGROUND 1

DESCRIPTION AND ANALYSIS 2

A. Use of Force on Aircraft 2

B. Warrant Applications for Weapons Search and Seizure 3

C. Intercepting Private Communications 4

D. Traps Likely to Cause Bodily Harm or Death 5

E. Civil Enforcement of Restitution Orders 6

F. Technical Amendments 6

COMMENTARY 8

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BILL C-14: AN ACT TO AMEND THE CRIMINAL CODE AND OTHER ACTS*

Bill C-14 was introduced in the House of Commons on 12 February 2004 by the Honourable Irwin Cotler, Minister of Justice and Attorney General of Canada. The bill, which is the former Bill C-32,(1) was deemed to have passed all stages in the House and was referred to the Senate the same day.

Bill C-14 proposes a variety of unrelated amendments to the *Criminal Code*. The bill amplifies certain offences, carves out exemptions to others, enhances the civil enforcement of restitution orders, and brings search and seizure provisions in line with a recent appellate court decision. In addition, Bill C-14 contains a handful of technical amendments to the *Criminal Code* and other related acts.

BACKGROUND

Bill C-14 makes important alterations to a number of existing offences. For example, the bill clarifies the authority to use reasonable force to prevent criminal activity on board an aircraft in flight that could endanger persons or property. According to the former Minister of Justice, the new provisions do not change the rules regarding the use of force but are intended to ensure their application to situations arising "outside Canadian airspace."(2)

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

(1) By a motion adopted on 10 February 2004, the House of Commons provided for the reintroduction in the 3rd session of government bills that had not received royal assent during the previous session and that died on the *Order Paper* when Parliament was prorogued on 12 November 2003. The bills could be reinstated at the same legislative stage that they had reached when the 2nd session was prorogued. Bill C-14 is the reinstated version of Bill C-32, which died on the *Order Paper*.

(2) House of Commons, *Debates*, 28 April 2003, p. 5435, referring to Bill C-32.

Bill C-14 will also carve out an exemption to existing laws forbidding the interception of private communications, in order to allow information technology managers to use "reasonable" measures to protect against data theft and the intentional transmission of computer viruses. To facilitate the use of intrusion detection systems to protect against cyber attacks, the bill also allows for the disclosure of private communications intercepted by such systems, where it is necessary for the protection of computer networks and the data they contain.

At present, setting a trap with intent to cause bodily harm or death to persons is an indictable offence under the *Criminal Code*. Amendments to section 247 impose harsher penalties where the offence is committed in furtherance of another indictable offence and/or where death or bodily harm ensues. During debate at second reading of the former bill, the then Minister of Justice explained that these amendments were intended to respond to a "significant" increase in the use of such traps in the production of illicit drugs, and to the concerns of emergency workers and law enforcement personnel whose safety has been compromised as a result.[(3)]

Bill C-14 also contains amendments affecting procedural matters as well as the enforceability of certain judicial orders that may be made at the time of sentencing. In response to the Ontario Court of Appeal decision in *R.* v. *Hurrell*, the bill amends the warrant application provisions for search and seizure of weapons, to clarify that such applications must be made, upon oath, by a peace officer alleging "reasonable grounds" to believe that the person possesses such a weapon or device and that such possession is not desirable in the interests of the safety of that person, or anyone else.[(4)] Additional amendments in the bill allow for civil enforcement of all restitution orders, including those imposed as part of a probation order or conditional sentence.

DESCRIPTION AND ANALYSIS

A. Use of Force on Aircraft

Clause 1 makes technical amendments to the definition of "flight" for the purposes of existing *Criminal Code* provisions, and to make clear that it applies to new

(3) House of Commons, *Debates*, 28 April 2003, p. 5434.

(4) *R.* v. *Hurrell* (2002), 60 O.R. (3d) 161.

section 27.1, as enacted by Clause 2. Section 27.1 explicitly recognizes that a person on board any aircraft in flight in Canadian airspace, or on board a Canadian-registered aircraft in flight outside Canadian airspace, is justified in using "as much force as is reasonably necessary" to prevent the commission of an offence, where he or she believes "on reasonable grounds" that such an offence would be likely to cause immediate and serious injury to the aircraft or to any person or property on board. It should be noted that existing section 27 already provides a general authority for the use of such force "as is reasonably necessary" to prevent the commission of certain offences, where there is a likelihood of immediate and serious injury to persons or property.(5) The Department of Justice describes Clause 2 as a clarification of the law as it applies to Canadian aircraft in flight outside Canadian airspace, as well as a means of ensuring full effect to the *Tokyo Convention on Offences and Certain Other Acts Committed On Board Aircraft*.(6)

B. Warrant Applications for Weapons Search and Seizure

At present, section 117.04(1) authorizes a justice to issue a warrant to search for and seize weapons, ammunition, explosives and related licences, upon application by a peace officer, where there are reasonable grounds to believe that the possession of such items by a particular person is "not desirable in the interests of the safety of the person, or of any other person." In response to a legal challenge to the judicial powers exercised under section 117.04(1), the Ontario Court of Appeal found the law violates section 8 of the *Canadian Charter of Rights and Freedoms* because it does not require the peace officer to have reasonable grounds to believe that any weapons are likely to be found on the person or premises named in the warrant, nor does it require the issuing justice to agree such grounds exist.(7) Consequently, the Court declared section 117.04(1) to be of no force or effect, but suspended the declaration for six months "to give Parliament the opportunity to bring the legislation into conformity with its constitutional obligations." The Court also advised that any warrants issued in the interim

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(5) Section 27 authorizes the use of force to prevent the commission of those offences for which a person "might be arrested without warrant" (in other words, indictable or hybrid offences). See section 494(1)(a) of the *Criminal Code* and section 34(1)(a) of the *Interpretation Act*.

(6) Article 3 of the 1963 Tokyo Convention obliges each contracting state to "take such measures as may be necessary to establish its jurisdiction as the State of registration over offences committed on board aircraft registered in such State."

(7) *R.* v. *Hurrell* (2002), 60 O.R. (3d) 161.

should comply with the spirit of the Charter, by requiring that the justice be "satisfied by information on oath that there are reasonable grounds to believe" that the person possesses such a weapon or device "in a building, receptacle or place" and that such possession is not desirable in the interests of the safety of the person or anyone else. Clause 3 amends section 117.04(1) to address the shortcomings identified by the Ontario Court of Appeal.

C. Intercepting Private Communications

At present, section 184(1) of the *Criminal Code* makes it an indictable offence to "wilfully" intercept a private communication "by means of any electro-magnetic, acoustic, mechanical or other device." However, section 184(2) lists a number of exceptions or circumstances under which the same conduct will be legal. They include interceptions made with the consent of the originator or intended recipient, those made by peace officers in accordance with a judicial authorization or in urgent circumstances to prevent serious harm, and those undertaken by service providers and other identified personnel, for purposes of quality control or to prevent unauthorized use or interference with frequencies or transmissions. Clause 4 of the bill adds a new category of exemption to cover computer systems managers who intercept a private communication "originating from, directed to or transmitting through" their system, for quality of service purposes or to protect against offences under section 342.1(1) (unauthorized use of computer) or section 430(1.1) (mischief in relation to data). The "quality of service" of the computer system relates to performance factors such as the responsiveness and capacity of the system, and issues relating to the integrity and availability of the system and data.

Clause 4 also limits the use or retention of any such intercepted private communication to those circumstances where it is necessary "to identify, isolate or prevent harm" to the system or where it is to be disclosed under the authority of section 193(2). At present, section 193(1) makes it an offence to disclose any private communication intercepted "by means of any electro-magnetic, acoustic, mechanical or other device" except as authorized. Clause 5 amends section 193(2) to allow disclosure of communications intercepted by computer systems managers, where it is "necessarily incidental" to the management or protection of the system. Section 193(2) already permits disclosure for the purpose of law enforcement and clause 4 extends the provision to computer managers.

During second reading debate in the House of Commons on the former bill, then Justice Minister Martin Cauchon explained that these amendments were necessary "to permit the use of systems capable of detecting intrusions that could harm computers or the valuable and often sensitive data they contain." As mentioned previously, intrusion detection systems have been developed in order to allow the kind of defensive monitoring that is necessary to ensure the security of sensitive data that are maintained in many computer systems.

D. Traps Likely to Cause Bodily Harm or Death

At present, it is an indictable offence under section 247 of the *Criminal Code*, punishable by up to five years' imprisonment, to set a trap or device "with intent to cause death or bodily harm to persons" where such an outcome is "likely." Clause 6 of the bill redrafts section 247(1) and replaces section 247(2), to increase the maximum available penalty to ten years' imprisonment where the offence causes bodily harm, and adds, among others, section 247(5), to increase the maximum penalty to life imprisonment for the same offence causing death.

In recognition of the fact that such traps or devices may be used to facilitate or hide other criminal activity, section 247(3) provides a maximum penalty of ten years for setting such traps, where the offence is committed "in a place kept or used for the purpose of committing another indictable offence." Section 247(4) also increases the maximum available penalty in such circumstances to fourteen years' imprisonment where the offence causes bodily harm.

These amendments are intended to respond to concerns raised by law enforcement agencies and firefighters associations, who have reported "a significant increase in the use of traps by criminals in order to protect their drug production activities."(8) According to the former Minister of Justice, "[t]he placing of traps has become a serious problem associated with criminal activities, particularly those of organized crime, and we must create a specific offence and impose a commensurate sentence in order to adequately punish those who use these lethal traps."(9)

It is important to note that the safety of firefighters and other emergency personnel has been a matter of ongoing concern to Parliament. In fact, the House of Commons considered a number of related private members' motions and bills during previous sessions of

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(8) House of Commons, *Debates*, 28 April 2003, p. 5434, referring to Bill C-32.

(9) *Ibid.*, p. 5435.

the 37th Parliament. In 2002, private member's Bill C-337 proposed amendments to section 231(4) of the *Criminal Code* that would deem the murder of a firefighter, acting in the course of his duties, to be first-degree murder, much the same as is now the case for police and prison guards.(10) Several months earlier, a private member's motion had called for that very amendment, in addition to recommending changes to the arson provisions of the *Criminal Code* to specifically address the death or injury of a firefighter who responds to a fire or explosion that is deliberately set.(11) Another private member's bill (Bill C-269) proposed similar amendments to the murder and arson provisions of the *Criminal Code*, as well as amendments to section 268 (aggravated assault). The subject matter of that bill was referred to the House Committee on Justice and Human Rights on 13 May 2003.(12) The sponsor of Bill C-269 suggested at that time that Bill C-32 had rendered the aggravated assault provisions of his bill unnecessary.

E. Civil Enforcement of Restitution Orders

At present, section 741(1) of the *Criminal Code* allows restitution orders made at the time of sentencing to be filed and entered as a judgment in civil court, if the amount is not paid to the intended recipient "forthwith." This judgment then becomes "enforceable against the offender in the same manner as if it were a judgment rendered against the offender in that court in civil proceedings." Clause 13 amends section 741(1) to expand the list of circumstances under which such action may be taken, to include restitution amounts ordered as a condition of probation (section 732.1), or as part of a conditional sentence order (section 742.3), where the offender fails to pay "without delay" and the time period has elapsed.

F. Technical Amendments

As mentioned above, Bill C-14 contains a number of technical amendments, several of which are complementary or consequential to other recently enacted *Criminal Code* revisions. For example, clause 7 amends section 462.43(1)(c) to correct a reference to managers

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(10) Bill C-337 was introduced on 11 December 2002 by Paul Forseth, M.P. (New Westminster–Coquitlam–Burnaby).

(11) Moved by Gurmant Grewal, M.P. (Surrey Central) on 14 March 2002, M-376 was debated and subsequently dropped from the *Order Paper* on the same day.

(12) Bill C-269 was introduced on 28 October 2002, by David Pratt, M.P. (Nepean–Carleton). Mr. Pratt proposed the same amendments during the 1st session of the 37th Parliament, in the form of Bill C-419.

appointed to deal with property seized or restrained as proceeds of crime.[13] Similarly, clause 8 amends the French version of section 462.47 to remove a reference to "enterprise crime offence," a definition that was repealed in 2001.[14]

Clauses 9 and 10 modify recent amendments, to clarify that persons charged with an offence under *Criminal Code* section 469 (exclusive jurisdiction of superior court) retain the right to a preliminary inquiry.[15] Clauses 11, 12, and 14 through 16 insert more precise terminology into the English versions of sections 729(1)(b), 732.2(1)(c), 742.2, 742.6, and 742.7, by referring to a conditional sentence as an "order" of the court.

Clause 17 amends form 46 to make the wording of a Probation Order more precise. As a result, the "accused" is now called the offender and the words "hereinafter" and "forthwith" are removed and replaced by more modern terminology. In addition, three new clauses are added to form 46 to accommodate Probation Orders where the offender is subject to a conditional, concurrent, or intermittent sentence order.

Clause 19 amends the English version of the *Canada Evidence Act*, to ensure a narrow application of recent anti-terrorism legislation. Part 3 of the 2001 legislation contained special provisions intended to prevent the disclosure of information in legal proceedings that would "encroach on a specified public interest or be injurious to international relations or national defence or security."[16] Clause 19 makes clear that the provision is intended to prevent the disclosure of information relating to "national" security, as opposed to security in general. In addition, clause 18 repeals section 37.21 of the *Canada Evidence Act*, so that the courts will no longer be obliged to hear and decide such matters "in private."

Clause 20 amendments to the *Financial Administration Act* are consequential to the previously mentioned new provisions that allow computer systems managers to intercept private communications for quality control purposes or to protect against offences relating to the misuse of computers or data. Specifically, section 161(1) gives public sector managers administrative authority for interceptions made in compliance with the new *Criminal Code*

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(13) The *Criminal Code*, Part XII.2 – Proceeds of Crime provisions were revamped substantially in S.C. 2001, c. 32.

(14) *Ibid.*, s. 12.

(15) The law respecting preliminary inquiries was substantially altered last year by *An Act to amend the Criminal Code and to amend other Acts*, S.C. 2002, c. 13.

(16) See the "Summary" accompanying the *Anti-Terrorism Act*, S.C. 2001, c. 41.

provisions. In addition, section 161(2) makes "the appropriate Minister" responsible for ensuring that "only data that is essential to identify, isolate or prevent harm to the computer system will be used or retained."

Clause 21 amends the English definition of "special operational information" as contained in the *Security of Information Act*, to confirm that the identity of past confidential sources will be protected.

Clauses 22 and 23 address technical matters arising out of the division of former bills C-15 and C-10.(17)

Finally, clause 24 provides that Clause 17 (Form 46 – Probation Order) will come into force by order of the Governor in Council.

COMMENTARY

During debate at second reading of Bill C-14's predecessor (Bill C-32), the then Minister of Justice advised that the bill contained "key proposals to ensure that sufficient protection is in place to address new and emerging forms of threat" while proposing "a small number of clarification amendments to ensure an efficient and proper application of our criminal law."(18) Comments by government and opposition members alike suggested that the bill enjoyed broad-based multi-party support, with only a few notes of caution or concern expressed about the use of intrusion detection systems in the management of computer systems and the consequential impact that might have on the privacy rights of individuals.

The House Committee on Justice and Human Rights heard from two witnesses in its study of Bill C-32. A representative of the International Association of Fire Fighters testified that the organization was extremely pleased with the amendments to the *Criminal Code* concerning the setting of traps.

The then Privacy Commissioner of Canada took issue with one aspect of the provisions in the bill designed to protect managers of computer systems from committing a criminal offence when conducting legitimate intrusion detection to protect the integrity of their

(17) On 3 October 2001, the *Criminal Law Amendment Act, 2001* (Bill C-15), 1st session, 37th Parliament, was divided into Bill C-15A and Bill C-15B. The subject matter of the latter bill was then carried over to the 2nd session of the 37th Parliament, as Bill C-10, and subdivided once again into Bill C-10A (firearms) and Bill C-10B (cruelty to animals).

(18) House of Commons, *Debates*, 28 April 2003, p. 5434.

systems. The Commissioner opposed permitting a private communication that had been intercepted lawfully to be disclosed in the course of a civil or criminal proceeding, or for the purposes of any criminal investigation (a provision that already applies in other circumstances in which private communications have been lawfully intercepted). A member of the Committee subsequently proposed an amendment to delete the provision.

Speaking to that issue, a government official responded that accepting the amendment would mean that a manager operating a computer intrusion detection system who discovered an e-mail attachment containing child pornography, or evidence of a murder plot, could not notify the police, or use the material to discipline the employee. The official pointed out that the existing policy had been in the *Criminal Code* for 25 years.

The amendment was defeated.