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LEGISLATIVE SUMMARY



Bill C-10:

An Act to enact the Justice for Victims of Terrorism Act and to amend the State Immunity Act, the Criminal Code, the Controlled Drugs and Substances Act, the Corrections and Conditional Release Act, the Youth Criminal Justice Act, the Immigration and Refugee Protection Act and other Acts

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Laura Barnett

Tanya Dupuis

Cynthia Kirkby

Robin MacKay

Julia Nicol

Legal and Legislative Affairs Division

Julie Béchard

Social Affairs Division

Parliamentary Information and Research Service

Legislative Summary of Bill C-10

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

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1 INTRODUCTION

On 20 September 2011, the Minister of Justice introduced Bill C-10, An Act to enact the Justice for Victims of Terrorism Act and to amend the State Immunity Act, the Criminal Code, the Controlled Drugs and Substances Act, the Corrections and Conditional Release Act, the Youth Criminal Justice Act, the Immigration and Refugee Protection Act and other Acts (short title: Safe Streets and Communities Act), in the House of Commons and it was given first reading. The bill groups together nine bills that had been dealt with separately during the 3rd Session of the 40th Parliament.

Part 1 of Bill C-10 creates a new Act, the Justice for Victims of Terrorism Act, to introduce a specific cause of action for victims of terrorism, allowing them to sue for loss or damage as a result of actions punishable under the *Criminal Code*. This part also amends the *State Immunity Act* to lift state immunity where a state has supported terrorist activities (state immunity being the general rule that prevents other states from being sued in Canada's domestic courts). However, only states included in a list to be established by the Governor in Council may have their immunity lifted and be sued.

Part 2 of Bill C-10 amends the *Criminal Code* to impose new mandatory minimum sentences for certain sexual offences committed against young people as well as to increase existing mandatory penalties. It creates the offences of making sexually explicit material available to a child and of agreeing or arranging to commit a sexual offence against a child. The bill also expands the list of specified conditions that may be added to prohibition and recognizance orders. These conditions would include prohibitions concerning contact with a person under the age of 16 and use of the Internet or other digital network; the list of enumerated offences that may give rise to such orders and prohibitions would also be expanded.

This part also amends the *Controlled Drugs and Substances Act* (CDSA) to provide for mandatory minimum sentences of imprisonment for certain drug crimes. Currently, there are no mandatory minimum penalties under the CDSA. The bill contains an exception that would allow courts not to impose a mandatory sentence if an offender successfully completes a Drug Treatment Court program or a treatment program which, as set out in section 720(2) of the *Criminal Code*, is approved by a province and is under the supervision of a court.

Finally, Part 2 amends the *Criminal Code* to restrict the availability of conditional sentences for certain offences. It would eliminate the reference in the conditional sentencing part of the *Criminal Code* to serious personal injury offences. It would also restrict the availability of conditional sentences for all offences for which the maximum term of imprisonment is 14 years or life and for specified offences, prosecuted by way of indictment, for which the maximum term of imprisonment is 10 years.

Part 3 amends the *Corrections and Conditional Release Act* to increase the accountability of federal offenders and tighten the rules governing conditional release, while promoting the interests and the role of victims in the correctional process.

This part and the schedule to the bill amend the *Criminal Records Act* to substitute the term “record suspension” for the term “pardon.” These amendments extend the ineligibility periods for applications for a record suspension to five years for all summary conviction offences and to 10 years for all indictable offences. They make individuals convicted of sexual offences against minors (with certain exceptions) and those who have been convicted of more than three indictable offences with sentences of two or more years’ imprisonment, ineligible for a record suspension.

Finally, Part 3 also amends the *International Transfer of Offenders Act* to ensure that the purpose of the Act specifically refers to public safety, to add new factors to be considered by the Minister of Public Safety in deciding whether to approve the transfer of a Canadian offender back to Canada, and to make the Minister’s consideration of all listed factors discretionary rather than mandatory.

Part 4 amends the *Youth Criminal Justice Act* in a number of ways, including to emphasize the importance of protecting society and to facilitate the detention of young persons who reoffend or who pose a threat to public safety.

Part 5 amends the *Immigration and Refugee Protection Act* to attempt to preclude situations in which foreign nationals might be exploited or become victims of human trafficking in this country. These amendments give immigration officers discretion to refuse to authorize a foreign national to work in Canada if, in their opinion, the foreign national is at risk of being a victim of exploitation or abuse.

This legislative summary looks at these aspects of Bill C-10. While it follows the bill’s order of presentation, it is not divided according to the five-part structure of the bill. Rather, it contains nine parts (in addition to this introduction) that reflect the nine related bills introduced during the 3rd session of the 40th Parliament.

2 ENACTMENT OF THE JUSTICE FOR VICTIMS OF
TERRORISM ACT AND AMENDMENTS TO THE
STATE IMMUNITY ACT
[BILL C-10, PART 1, CLAUSES 2–9 (FORMER BILL S-7)]

2.1 BACKGROUND

Part 1 of Bill C-10 creates a cause of action (i.e., grounds to sue) that allows victims of terrorism to sue individuals, organizations and terrorist entities for loss or damage suffered as a result of acts or omissions that are punishable under Part II.1 of the *Criminal Code*¹ (the part of the Code dealing with terrorism offences) and that have been committed by these individuals, organizations or entities. It also allows victims of terrorism to sue foreign states that have supported terrorist entities which have committed such acts, in certain circumstances. The victim’s loss or damage can have occurred inside or outside Canada but must have occurred on or after 1 January 1985. If the loss or damage occurs outside Canada, there must be a “real and substantial” connection to this country. **Bill C-10 as amended by the House of Commons Standing Committee on Justice and Human Rights would also allow the suit to proceed in the Canadian courts without establishing a “real and substantial connection” (as that term is understood in the case law), where the plaintiff is a Canadian citizen or a permanent resident.**

Part 1 of Bill C-10 also amends the *State Immunity Act*² to create a new exception to state immunity, the general rule that prevents states from being sued in Canada’s domestic courts. However, the new exception serves to remove state immunity only when the state in question has been placed on a list established by Cabinet on the basis that there are reasonable grounds to believe that it has supported or currently supports terrorism.

Part 1 of Bill C-10 is almost identical to the previous Bill S-7 as amended at third reading. Bill S-7 was introduced in the Senate on 21 April 2010 by the Leader of the Government in the Senate, the Honourable Marjory LeBreton, but it did not become law before Parliament was dissolved in March 2011 for the general election. Bill S-7 was identical to Bill C-35, which was introduced during the 2nd Session of the 40th Parliament on 2 June 2009, by the former Minister of Public Safety, the Honourable Peter Van Loan.³ It was also similar to a number of private members’ bills and senators’ public bills that had been introduced in Parliament since 2005.⁴ The primary difference between the previous private members’ bills and senators’ public bills and Part 1 of Bill C-10 is that the former bills sought to include the cause of action in the *Criminal Code*, whereas Bill C-10 creates a free-standing civil cause of action.

2.1.1 LAWSUITS AGAINST FOREIGN STATES

One of the most significant features of Part 1 of Bill C-10 is the ability it gives victims of terrorist acts to sue, in Canada’s domestic courts, foreign states that support terrorism.⁵ Most states do not recognize sponsoring or supporting terrorism as an exception to the general state immunity principle.⁶

Customary international law historically gave states, their agents and instrumentalities complete immunity from being sued in the domestic courts of other states. This principle arose out of another international law principle – the sovereign equality of states. As stated by law professor John Currie, “[i]f all states are equal in international law, so the theory goes, no one state should be able to subject another to the process of its courts.”⁷

Section 3(1) of the *State Immunity Act* demonstrates Canada’s acceptance of this general rule. It states: “Except as provided by this Act, a foreign state is immune from the jurisdiction of any court in Canada.” A foreign state is defined, in section 2 of the *State Immunity Act*, to include sovereigns or other heads of foreign states when acting in their public capacity, as well as governments, departments or agencies of that state. It also includes heads of political subdivisions, such as provinces, when acting in their public capacity, and political subdivision governments, departments and agencies. Having said this, exceptions to the general rule of complete immunity have evolved in customary international law over time. Parliament has acknowledged this evolution by codifying the most common exceptions to the general rule of state immunity in the *State Immunity Act* as it currently stands. These exceptions include:

- proceedings where the state waives its immunity by initiating or intervening in proceedings in a Canadian court, apart from proceedings or interventions initiated by the state for the purpose of asserting its immunity (section 4);
- proceedings related to the commercial activities of the foreign state (section 5);
- proceedings related to death, personal or bodily injury, or damage to or loss of property, that occur in Canada (section 6);
- proceedings related to ships and cargo owned by a foreign state if the ship is used or intended for commercial activity (section 7); and
- proceedings related to an interest of a foreign state in property in Canada arising by way of gift or succession (section 8).

In each of these situations, Canadian courts have civil jurisdiction over foreign states, their agents and their instrumentalities. Part 1 of Bill C-10 seeks to add a new exception for state support of terrorism.

2.1.2 VICTIMS OF TERRORIST ATTACKS, AND CIVIL SUITS

Victims of terrorist attacks have been pushing for legislation similar to Part 1 of Bill C-10 for a number of years. The Canadian Coalition Against Terror (C-CAT), which is a coalition of victims and others interested in counterterrorism, has been particularly influential in the proposal of similar bills over the past six years.⁸ The first proposed bills were introduced in 2005 by Senator David Tkachuk in the Senate, and by Stockwell Day, MP, who was in opposition at the time, in the House of Commons.

Proponents of such legislation argue that it is necessary to fight terrorism financing effectively, as criminal provisions against terrorism financing have not resulted in any convictions. Public exposure of such activities through court proceedings is seen as an important deterrent. It is also contended that there are benefits in using civil

proceedings, where the standard of proof is lower, when criminal prosecutions are unsuccessful or as a catalyst for later criminal proceedings.⁹ Finally, it has been argued that the opportunity to sue would empower victims by providing official recognition of their experiences and suffering. In the cases where victims are able to recover the amounts granted by the courts, it would also provide compensation.¹⁰

One point of clarification is important at the outset. A number of articles discussing an earlier almost identical bill on this topic, Bill C-35, have said that it is not currently possible to sue an individual or a non-state organization without this bill.¹¹ However, victims can theoretically already seek damages from non-state actors for their support of terrorist activities or organizations. The benefit of the proposed bill is its apparent goal of seeking to make the law clearer and easier to understand, by introducing a specific cause of action rather than requiring victims to rely on the general law of civil responsibility or tort law in each province.¹²

With the amendments adopted by the House of Commons Standing Committee on Justice and Human Rights, plaintiffs will also be able to make their case before Canadian courts more easily than they would under the general principles of civil liability or tort law. One amendment creates a presumption of causation (i.e., a presumption that the defendant caused the damage) if certain conditions are met.

As noted above, a second amendment addresses when it is appropriate for a Canadian court to hear a case under the new cause of action. In addition to the commonly used requirement of a “real and substantial connection” between the action and Canada, which existed in the original Bill C-10, the amendment permits the case to be heard in Canadian courts if the plaintiff is a Canadian citizen or permanent resident.

Though rare, there appear to have been some suits against individual and non-state organizations for terrorism activities in the past. In July 2008, the Lebanese Canadian Bank was sued by four Canadian-Israeli dual citizens who were in Israel during the 2006 hostilities between Israel and Hezbollah. They alleged that the bank provided banking and financing services to Hezbollah. However, the lawsuit was discontinued 5 November 2009 according to court records.¹³

There seem to have been no final judgments for terrorism-related civil suits in Canada to date. Victims of terrorist acts have won such lawsuits in other common law jurisdictions by relying on torts such as battery and intentional infliction of harm. A recent example outside Canada is the case in Northern Ireland where several individual defendants, as well as the Real IRA (a paramilitary organization that split from the Provisional Irish Republican Army in 1997), were found liable for loss and damages suffered by victims of the 1998 Omagh bombing and their relatives. That judgment awarded more than £1.6 million to 12 individuals.¹⁴

2.1.3 CONSTITUTIONALITY

Generally, civil lawsuits that allow victims to recover damages for harm suffered or loss inflicted as a result of someone else’s tortious conduct are considered matters of

provincial jurisdiction under section 92(13) of the *Constitution Act, 1867*,¹⁵ which gives provincial legislatures the power to legislate regarding “property and civil rights in the province.” As stated by Canadian legal expert Peter Hogg:

The federal Parliament has no independent power to create civil remedies akin to its power over criminal law. This means that if the pith and substance of federal law is the creation of a new civil cause of action, the law will be invalid as coming within the provincial head of power “property and civil rights in the province” (section 92(13)).¹⁶

Having said this, it has been argued successfully in the past that Parliament can establish provisions related to civil redress if such provisions are established within the context of a broader regulatory or administrative scheme which is itself within Parliament’s legislative jurisdiction under section 91 of the *Constitution Act, 1867*.¹⁷

It is possible, then, that the civil right of action set out in the Justice for Victims of Terrorism Act (JVTA) could be viewed as having been enacted in the broader legislative context of the amendments to the *State Immunity Act* included in Part 1 of Bill C-10, and which appear to be within Parliament’s jurisdiction under its power to legislate with respect to foreign affairs and international trade.¹⁸ This argument might have greater force, however, if the JVTA were creating a right of action against foreign states only, rather than against foreign states, individual persons, organizations and listed entities. As stated previously in this section of this legislative summary, victims already have the ability to sue persons, organizations and listed entities for tortious conduct that has caused them injury or harm under ordinary provincial tort law or civil responsibility principles.

Alternatively, it might be possible to view the JVTA as functionally connected to Parliament’s power to legislate in relation to criminal law (section 91(27) of the *Constitution Act, 1867*) because the civil remedy is available only if plaintiffs can show that they have suffered loss or damage as a result of “an act or omission that is, or had it been committed in Canada would be, punishable under Part II.1 of the *Criminal Code*” (clause 4 of the JVTA). Whether the courts would uphold the statute on this basis is, however, open to question, given that it does not appear that securing a criminal conviction under Part II.1 of the Code is a precondition to initiating a civil action under the JVTA.¹⁹ Many civil suits relate to *Criminal Code* offences, such as assault, but that is not sufficient to justify federal jurisdiction and those suits are governed by provincial laws.

The national concern branch of the federal government’s power to legislate on matters involving peace, order and good government provides another possible head of power under which Parliament might be authorized to enact the JVTA.²⁰ The preamble of the JVTA states that “terrorism is a matter of national concern,” which could be an indication that this power is being relied upon.

2.1.4 TERRORISM BUT NOT TORTURE

One of the most common criticisms made regarding the earlier Bill C-35 was that it included terrorism offences but not torture, genocide, war crimes or crimes against humanity. Some lawyers and commentators argued when Bill C-35 was being

considered that there was no justification or rational basis to allow suits for terrorism but not for those other crimes.²¹ A bill put forward by the Honourable Irwin Cotler – Bill C-483: An Act to amend the State Immunity Act (genocide, crimes against humanity, war crimes or torture), which was first introduced in the House of Commons during the 2nd Session of the 40th Parliament on 29 November 2009, and was re-introduced in the House of Commons on 3 March 2010, at the beginning of 3rd Session of the 40th Parliament – also proposed to allow states to be sued civilly when their agents commit torture, genocide, war crimes and crimes against humanity as these terms are defined under Canadian law.²² That bill did not become law before Parliament was dissolved in March 2011 for the general election.

The United States has legislation that lifts immunity for “an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources,” thus including both terrorist acts and torture.²³ Some countries in Europe, such as Italy, are also lifting immunity for torture, which has permitted suits against Germany for its actions during World War II.²⁴ However, in December 2008, Germany brought a suit before the International Court of Justice against Italy for failing to respect its immunity.²⁵ The hearing of this case was held in September 2011 and the court is now preparing the judgment.²⁶

Private members’ bills addressing torture, but not terrorism, have also been introduced in the House of Lords and the House of Commons in the United Kingdom in recent years, with a bill currently before the House of Lords.²⁷

2.1.5 DIPLOMATIC RELATIONS

Several commentators who expressed their views regarding Bill C-35 said that the bill could create various diplomatic challenges. This may also be true of Part 1 of Bill C-10. Concerns have been raised about the foreign relations implications of listing a country, of assisting in identifying assets and the possibility of retaliation. For example, Afghanistan and Pakistan are commonly seen as “incubators” of terrorism, but their listing could be problematic from a diplomatic perspective as the Canadian government seeks to support the governments of those countries.²⁸

2.1.6 LISTING OF COUNTRIES

Previous private members’ bills and senators’ public bills did not include a government-established list of countries for which state immunity may be lifted.²⁹ Another bill proposed by the Honourable Irwin Cotler – Bill C-408, which was first introduced in the House of Commons during the 2nd Session of the 40th Parliament, two days after the introduction of Bill C-35, and was then re-introduced in the House of Commons on 3 March 2010, at the beginning of 3rd Session of the 40th Parliament – suggests eliminating the list and, instead, allowing any country with which Canada does not have an extradition treaty to be sued. According to its proponents, this proposal would create a less politicized process than would the requirement that a country could be sued only if it were on a government-established list, and it would still prevent baseless claims.³⁰ Countries with which Canada has extradition treaties are presumed to respect the rule of law and be democratic, and as such, it is assumed that claims could be made directly in those countries, rather than in the Canadian

courts.³¹ However, other commentators have suggested that listing is a good compromise given the potentially negative foreign relations implications of such suits. Listing allows the government to retain some control of Canada's relations with other nations.³²

2.1.7 THE U.S. EXPERIENCE

The only country with similar legislation to Part 1 of Bill C-10 appears to be the United States, which has enacted the *Antiterrorism and Effective Death Penalty Act of 1996* and has amended its *Foreign State Immunity Act* to provide for an exception similar to the one proposed in Part 1 of Bill C-10. That legislation has been in place for more than a decade. Only listed countries can be sued, with currently listed countries being Cuba, Iran, Syria and Sudan.³³ North Korea, Iraq and Libya were originally listed but have since been delisted.³⁴

A common problem identified by the Congressional Research Service has been the refusal of defendants to recognize the jurisdiction of the American courts. Defendants do not appear and default judgments are rendered, which the debtor countries then ignore and refuse to pay.³⁵

Recovery has been a major problem, given the limited assets of listed countries being held in the United States and the executive branch's resistance to allowing frozen assets to be used for this purpose. As Congress attempted to create avenues for recovery, the executive would resist such efforts over concerns about retaliatory measures, losing leverage over the countries concerned, and potentially violating international law on state immunity. For example, the 1981 Algiers Accord that resulted in the release of American embassy staff who were held hostage by Iran barred the hostages from initiating civil suits. However, Congress sought to provide a right of action to those hostages through various proposed laws, which the executive resisted, because of the international implications if such an Accord were to be violated.³⁶

Changing circumstances in Iraq also created a difficult situation for the Bush Administration. Under Saddam Hussein, Iraq was a listed state that could be sued. A number of such suits were successful, and the plaintiffs sought recovery by seizing certain Iraqi assets. However, after the invasion of Iraq, according to the Congressional Research Service, the American government no longer had an interest in allowing such assets to be taken, as they wanted them to be used for the benefit of the Iraqi people in rebuilding the country. Iraq was retroactively delisted and many plaintiffs were unable to recover the money granted to them in judgments.³⁷

With limited seizable assets in Canada, victims will find themselves competing for the few, if any, assets available for recovery. Furthermore, the concerns outlined above with respect to retaliation appear to have come true in the American situation, as equivalent measures have been introduced in Cuba and Iran in response.

The U.S. experience demonstrates the many challenges in making such a legislative scheme effective in meeting the needs of victims and acting as a

deterrent. Some question whether the risk of a future lawsuit will have any impact on terrorists' behaviour when they are willing to kill to meet their objectives.³⁸ The refusal of defendants to engage in the process is also a significant barrier. Finally, with likely fewer assets available for seizure in Canada than in the United States, recovery will be even more challenging in this country.³⁹

2.2 DESCRIPTION AND ANALYSIS

Part 1 of Bill C-10 contains nine clauses. Clause 2 of the bill enacts the Justice for Victims of Terrorism Act and clauses 3 to 9 amend the *State Immunity Act*.⁴⁰ The JVTA includes a preamble and four sections.

2.2.1 JUSTICE FOR VICTIMS OF TERRORISM ACT (CLAUSE 2 OF BILL C-10)

2.2.1.1 PREAMBLE

The preamble of the Justice for Victims of Terrorism Act provides some insight into the motivating factors behind Part 1 of Bill C-10, the objectives it is designed to serve and the context within which it is to be interpreted and applied if adopted by Parliament. In particular, the preamble:

- recognizes the nature of the threat terrorism poses to national security and to Canadians and people everywhere;
- describes a related United Nations Security Council Resolution and refers to commitments Canada has made internationally by ratifying the United Nations Convention regarding combatting and suppressing terrorism;
- acknowledges the injuries and deaths experienced by victims of terrorist attacks;
- expresses the fact that terrorists need financial and material support in order to perform acts of terror;
- asserts that certain states that support terrorism should not benefit from state immunity; and
- states that the primary purposes behind allowing plaintiffs to sue terrorists and their supporters are to impair the functioning of terrorist groups and to deter and prevent terrorist conduct.

2.2.1.2 TITLE AND INTERPRETATION (SECTIONS 1 AND 2 OF THE JVTA)

Section 1 of the JVTA provides the short title for the new Act introduced by Part 1 of Bill C-10: the Justice for Victims of Terrorism Act.

Section 2 defines three terms that are used throughout the JVTA. All three terms are defined in relation to definitions that are contained in other statutes. Section 2 of the JVTA defines "foreign state" as having the same meaning as in section 2 of the *State Immunity Act*. As stated above, this means that a foreign state includes sovereigns or other heads of state when acting in their public capacity, as well

as governments, departments or agencies of the state, the heads of political subdivisions of the state, such as provinces, when acting in their public capacity, and political subdivision governments, departments and agencies.

Similarly, “listed entity” is defined as having the same meaning as in section 83.01(1) of the *Criminal Code*, which defines it as “an entity on a list established by the Governor in Council under section 83.05.” Sections 83.05 to 83.07 of the *Criminal Code* set out the process for listing entities and the criteria of which the Governor in Council must be satisfied before an entity can be listed.⁴¹

Finally, “person” is defined in section 2 as including an organization as that term is defined in section 2 of the *Criminal Code*. Section 2 of the Code states that an “organization” means:

- (a) a public body, body corporate, society, company, firm, partnership, trade union or municipality, or
- (b) an association of persons that
 - (i) is created for a common purpose,
 - (ii) has an operational structure, and
 - (iii) holds itself out to the public as an association of persons.

By incorporating the definitions contained in other statutes by reference, Bill C-10 defines the three terms contained in section 2 of the JVTAs (in particular, “foreign state” and “listed entity”) in a much broader and more detailed fashion than is immediately apparent from the words themselves.

2.2.1.3 PURPOSE (SECTION 3 OF THE JVTAs)

Section 3 states that the JVTAs’ purpose is to “deter terrorism by establishing a cause of action that allows victims of terrorism to sue perpetrators of terrorism and their supporters.”

2.2.1.4 CAUSE OF ACTION (SECTION 4 OF THE JVTAs)

Section 4 provides the parameters of the new cause of action created by Bill C-10. In many respects, the cause of action is broad in scope. For example, section 4(1) states that any person may bring such an action, regardless of whether the loss or damage he or she suffered occurred inside or outside Canada, as long as the act or omission that caused the loss or damage “is, or had it been committed in Canada would be, punishable under Part II.1 of the *Criminal Code*.” As stated previously, Part II.1 of the *Criminal Code* contains terrorism-related offences. Accordingly, in order to sue under the JVTAs, the plaintiff must have suffered loss or damage as a result of a defendant’s having committed one or more of the following acts or omissions (section numbers refer to the Code):

- wilfully and knowingly collecting or providing property for terrorist or certain other activities (section 83.02);

- intentionally providing or making property or services available for terrorist activities (section 83.03);
- using or possessing property for the purpose of facilitating or carrying out terrorist activities (section 83.04);
- knowingly dealing in property owned or controlled by a terrorist group, knowingly entering into or facilitating any transaction in respect of such property, or knowingly providing financial or other services in respect of such property (sections 83.08 and 83.12);
- failing to disclose the existence of property in his or her possession and control that the defendant knows is owned or controlled by or on behalf of a terrorist group to the Commissioner of the Royal Canadian Mounted Police or the Director of the Canadian Security Intelligence Service (sections 83.1 and 83.12);
- in the case of a financial institution, trust or loan company, credit association or other deposit-taking institution, or insurance company or securities dealer, failing to report that it is, or is not, in possession and control of property owned or controlled by a listed entity, and if it is in possession of such property, failing to report details regarding such property (sections 83.11 and 83.12);
- knowingly participating in the activity of a terrorist group (section 83.18);
- knowingly facilitating a terrorist activity (section 83.19);
- committing an indictable offence for the benefit of, at the direction of or in association with a terrorist group (section 83.2);
- directly or indirectly instructing a person to carry out an activity for the benefit of, at the direction of or in association with a terrorist group (section 83.21);
- directly or indirectly instructing a person to carry out a terrorist activity (section 83.22);
- knowingly harbouring a person whom he or she knows has carried out or is likely to carry out a terrorist activity, in order to enable the person or to facilitate the ability of the person to do so (section 83.23); or
- committing a hoax regarding terrorist activity (section 83.231).

Given that section 4 creates a civil cause of action, presumably the standard of proof that would be used to determine that the defendant committed one or more of the acts or omissions outlined above, as well as the standard that would be used to demonstrate that the act or omission in question caused harm to the plaintiff, would be the “balance of probabilities” standard. That standard is generally used in civil litigation, rather than the higher, “beyond a reasonable doubt” standard used in criminal law. The lower standard of proof would serve to broaden the scope of the cause of action outlined in the JVTA, by increasing the likelihood of a successful claim.

The time limit applicable to bringing this cause of action also appears to be quite broad. Section 4(1) is retrospective in scope: it allows victims who have suffered loss or damage as a result of terrorist acts or omissions to bring an action against the perpetrators of such acts or omissions as long as they were committed on or after 1 January 1985 (it is more common for legislation to apply only to actions committed

on or after the date when it is enacted). The JVTA is likely designed to operate retrospectively so that families of the victims of the bombing of Air India Flight 182, which occurred on 23 June 1985, can potentially benefit from this new cause of action.

In addition, section 4(3) of the JVTA states that any “limitation or prescription period” for bringing an action described in section 4(1) does not start running until section 4 comes into force. Section 4(3) also suspends the running of the limitation or prescription period during such time as the person who suffered the loss or damage is incapable of commencing an action because of a physical, mental or psychological condition, or is unable to determine the identity of the person, listed entity or foreign state that engaged in the conduct resulting in the damage to him or her. Finally, section 4(1) specifies that the cause of action may be brought in “any court of competent jurisdiction,” which appears to give the victim a choice of forum, as long as the court in question has jurisdiction over the forum and subject matter in question, as well as the authority to make the order sought.⁴²

Although the cause of action itself, the time limit for bringing such an action and the forum for bringing the action all serve to broaden the scope of this new cause of action, other parts of section 4 impose restrictions or limits on how this cause of action may be used, particularly in relation to foreign states. For example, although section 4(1)(a) allows victims of terrorist acts to sue persons, organizations and listed entities who have caused them loss or damage by committing any act or omission punishable under Part II.1 of the *Criminal Code*, foreign states may be sued only if they did something to benefit the person, organization, or listed entity that actually caused the harm in question. As such, it appears that the cause of action does not cover situations where a state was involved directly.

Section 4(1)(b) provides that if foreign states, persons, organizations or listed entities did not themselves commit the act that caused the harm, but merely did something to benefit the listed entity which committed that act, they will be found liable only if they committed one or more of the following acts (section numbers refer to the *Criminal Code*):

- wilfully and knowingly collecting or providing property for terrorist or certain other activities (section 83.02);
- intentionally providing or making property or services available for terrorist activities (section 83.03);
- using or possessing property for the purpose of facilitating or carrying out terrorist activities (section 83.04);
- knowingly participating in the activity of a terrorist group (section 83.18);
- knowingly facilitating a terrorist activity (section 83.19);
- committing an indictable offence for the benefit of, at the direction of or in association with a terrorist group (section 83.2);
- directly or indirectly instructing a person to carry out an activity for the benefit of, at the direction of or in association with a terrorist group (section 83.21);

- directly or indirectly instructing a person to carry out a terrorist activity (section 83.22);
- knowingly harbouring a person whom he or she knows has carried out or is likely to carry out a terrorist activity, in order to enable the person or to facilitate the ability of the person to do so (section 83.23).

In addition, section 4(2) of the JVTAs provides that courts may hear and determine the cause of action referred to in section 4(1) if the action “has a real and substantial connection to Canada” (i.e., the victim is Canadian, the defendant is Canadian, the harm occurred in Canada or on a vessel or aircraft in Canada, and so forth).⁴³

On 5 October 2010, the Special Senate Committee on Anti-terrorism reported observations on Bill S-7 back to the Senate, suggesting that the government consider amending the bill to state that Canadian citizenship or permanent residence would be enough to demonstrate such a connection, **as those factors would not necessarily establish a “real and substantial connection to Canada” on their own based on current case law. Though this suggestion was not in the original text of Bill C-10, it is reflected in amendments made by the House of Commons Standing Committee on Justice and Human Rights. The Committee also added section 4(2.1) to the JVTAs. That section creates a presumption that the defendant committed the act or omission that resulted in the loss or damage to the plaintiff (i.e., a presumption of causation) if two conditions are met:**

- **a listed entity contributed to the loss or damage by committing an act or omission that, if committed in Canada, would be punishable under part II.1 of the *Criminal Code*; and**
- **the defendant committed an act or omission that, if committed in Canada, would be punishable under sections 83.02 to 83.04 and 83.18 to 83.23 of the *Criminal Code* for the benefit of or in relation to the listed entity.**⁴⁴

Section 4(4) of the JVTAs says that courts may refuse to hear a claim made under section 4(1) in cases where the claim has been made against a foreign state, the loss or damage to the plaintiff occurred in that state, and the plaintiff did not give the foreign state “a reasonable opportunity to submit the dispute to arbitration in accordance with accepted international rules of arbitration.”⁴⁵ In its observations on Bill S-7, the Special Senate Committee on Anti-terrorism said that an amendment to the bill might be necessary to ensure that this clause would not impede litigation unduly. No such change was made in Bill C-10.

Finally, while section 4(5) of the JVTAs states that courts of competent jurisdiction in Canada must recognize judgments of foreign courts made in favour of plaintiffs who have suffered loss or damage of the type described in section 4(1), courts will do so only if the foreign judgment meets the requisite criteria under Canadian law for the recognition of such judgments.⁴⁶ In the case of a suit launched by a plaintiff against a foreign state, recognition of a foreign judgment made against the state in question is further restricted. Section 4(5) specifies that, for a foreign judgment made against a foreign state to be recognized in Canada, the foreign state must be on the list

established by Cabinet under section 6.1(2) of the *State Immunity Act*. (That section is added by clause 5 of Bill C-10; see below.)

Although the JVTA itself does not explicitly state that only foreign states on the list established by Cabinet under new section 6.1(2) of the *State Immunity Act* may be sued using the cause of action described in section 4(1) of the JVTA, the practical effect of the amendments introduced to the *State Immunity Act* is that only listed foreign states may be sued. This is because the amendments to the *State Immunity Act* create an exception to state immunity only for listed states that support terrorism. Further details on the listing process will be provided below.

2.2.2 AMENDMENTS TO THE *STATE IMMUNITY ACT* (CLAUSES 3–9 OF BILL C-10)

2.2.2.1 CIRCUMSTANCES IN WHICH A FOREIGN STATE WILL BE CONSIDERED A SUPPORTER OF TERRORISM AND MAY BE SUED UNDER THE PROPOSED ACT (CLAUSES 4–6 OF BILL C-10)

Clauses 3 to 9 of Bill C-10 amend the *State Immunity Act* to create another exception to the general rule that immunizes foreign states from suits in Canada's domestic courts, as that rule is expressed in section 3(1) of the Act.⁴⁷ These amendments are necessary in order to make the right of action described in section 4(1) of the JVTA meaningful. Clause 3 is a housekeeping amendment that introduces a new heading, "Definitions and Interpretation," before section 2 of the *State Immunity Act*.

Clause 4 of Bill C-10 adds a new section 2.1 to the *State Immunity Act*. The new section 2.1 indicates that a foreign state supports terrorism if it commits an act described in section 4(1)(b) of the JVTA. In other words, foreign states are considered to support terrorism, and can be sued for supporting terrorism, only if they engage in conduct that supports the activities of listed entities as outlined in sections 83.02 to 83.04 or 83.18 to 83.23 of the *Criminal Code*.

Clause 5 of Bill C-10 adds a new section 6.1 to the *State Immunity Act*. New section 6.1 provides that, for a foreign state to be sued under section 4(1) of the JVTA, the act that the state committed in support of terrorism must have been committed on or after 1 January 1985 (new section 6.1(1) of the Act). The date chosen mirrors the date found in clause 4(1) of the JVTA. As noted above, this date was likely chosen to allow families of victims of the Air India bombing to sue foreign states (provided that the victims' families can demonstrate that a foreign state committed an act on or after 1 January 1985 in support of the listed entity which committed that bombing).⁴⁸

In addition, before a foreign state can be sued using section 4(1) of the JVTA, the state in question must have been listed by Cabinet (new section 6.1(1)). New sections 6.1(2) to 6.1(10) of the *State Immunity Act* set out the procedure for listing foreign states. The process is very similar to that described in sections 83.05 to 83.07 of the *Criminal Code* for the listing of terrorist entities. The Minister of Foreign Affairs recommends listing, after consulting the Minister of Public Safety, and Cabinet decides whether or not to list. The basis for listing a foreign state is that there are

reasonable grounds to believe that the state in question supported or supports terrorism, as defined in new section 2.1 of the Act (new section 6.1(2)).

The Special Senate Committee on Anti-terrorism recommended, in its observations on Bill S-7, that the criteria for listing be made by regulation to ensure their robustness and public availability. The Committee also suggested that public consultation be part of the listing process. At third reading of Bill S-7, the Senate amended section 6.1(2) to clarify that a name may be added to the list “at any time,” provided that the requirements for listing are met. The Senate also amended the bill to add a new section 6.1(3) to the *State Immunity Act* requiring the government to establish the list within six months from the day the section comes into force. These amendments are included in Bill C-10.

The Minister of Foreign Affairs, in consultation with the Minister of Public Safety, is required to review the list of foreign states every two years to determine whether reasonable grounds to keep the state on the list remain, and then makes a recommendation to Cabinet about whether the entity should be retained on the list (new section 6.1(7)). The Minister must complete a review as soon as feasible, but in no more than 120 days after commencing it, and must publish a notice in the *Canada Gazette* without delay once the review has been completed (new section 6.1(9)). The Senate amended Bill S-7 at third reading to require that the two-year review include consideration of whether new countries should be added to the list and to clarify that a review does not affect the validity of the list (new sections 6.1(7)(b) and 6.1(8)). These amendments are included in Bill C-10.

Foreign states may not challenge or make submissions with respect to the listing decision prior to its being made. They can, however, apply in writing to the Minister of Foreign Affairs to be removed from the list once they have been added to it. In such cases, the Minister of Foreign Affairs must, after consulting the Minister of Public Safety, decide whether there are reasonable grounds to recommend to Cabinet that the state in question be removed from the list (new section 6.1(4)). Once the Minister of Foreign Affairs has made a decision regarding the foreign state’s application for removal, he or she must notify the state without delay (new section 6.1(5)). A foreign state may not make another application to be removed from the list unless there has been a material change in its circumstances since the last time it applied for removal, or until the Minister has completed his or her most recent two-year review of the decision to recommend listing (new section 6.1(6)).

The Senate, at third reading, amended Bill S-7 by adding section 6.1(10), which provides a plaintiff with the right to continue an action, once proceedings have commenced, even if the state in question is removed from the list. This amendment is included in Bill C-10.

The most significant difference between the process for listing foreign states contained in new sections 6.1(2) to 6.1(10) of the *State Immunity Act* and the process for listing terrorist entities contained in sections 83.05 to 83.07 of the *Criminal Code* is that sections 6.1(2) to 6.1(10) of the *State Immunity Act* do not grant states an explicit statutory right to apply for judicial review of the Minister’s decision to recommend listing the state in question, or to recommend retaining the state in question on the

list established by Cabinet. Under section 83.05(5) of the *Criminal Code*, terrorist entities are explicitly granted this right.

Clause 6 of Bill C-10 repeals the existing section 11(3) of the *State Immunity Act* and replaces it with a new section 11(3). Section 11(1) of that Act restricts the type of relief (i.e., what a plaintiff may request as a result of his or her suit) that is available when an action is brought against a foreign state. The existing section 11(3) makes section 11(1) inapplicable to the *agencies* of a foreign state, meaning that all regular forms of relief are available to plaintiffs when they sue such agencies, but not if they sue the actual state. The new section 11(3) makes all forms of relief available to plaintiffs in an action against agencies of a foreign state, and also in an action against the foreign state itself when the action is brought in relation to support for terrorism.

2.2.2.2 ATTACHMENT, EXECUTION, ARREST, DETENTION, SEIZURE AND
FORFEITURE OF FOREIGN STATES' PROPERTY IN CANADA
(CLAUSES 7 AND 8 OF BILL C-10)

Clauses 7 and 8 of Bill C-10 amend the *State Immunity Act* to allow for attachment, execution, arrest, detention, seizure and forfeiture of property belonging to foreign states that is located in Canada, in certain circumstances. Clause 7 amends the existing section 12(1)(b) of the *State Immunity Act* to allow for the attachment, execution, arrest, detention, seizure and forfeiture of property belonging to foreign states and located in Canada when the state in question is on the list established by Cabinet under new section 6.1(2) of the Act, and the property in question “is used or intended to be used ... to support terrorism.” It also adds a new section 12(1)(d) to the Act. This section allows for the attachment, execution, arrest, detention, seizure and forfeiture of the property of a foreign state located in Canada if the foreign state is listed under new section 6.1(2) of the Act, and the attachment or execution is for the purposes of satisfying a court judgment rendered against that state in an action brought against it for supporting terrorism. Having said this, if the property of that state in Canada has cultural or historical value, then it cannot be attached or executed upon to satisfy such a judgment.

Clause 8 of the bill adds a new section 12.1 to the *State Immunity Act*. Section 12.1(1) provides that, in the event that a judgment is rendered against a listed foreign state for supporting terrorism, the Minister of Finance and the Minister of Foreign Affairs may, within the confines of their mandates, assist a judgment creditor in identifying and locating the property of the foreign state in Canada. With respect to the Minister of Finance, he or she may assist in locating and identifying the financial assets of the foreign state held within Canadian jurisdiction (new section 12.1(1)(a)), and with respect to the Minister of Foreign Affairs, he or she may assist in locating the property of the foreign state within Canada (new section 12.1(1)(b)).

However, it is important to note that this provision is permissive, rather than mandatory. The ministers may assist in identifying and locating the property of the listed foreign state, “to the extent that is reasonably practical,” unless “the Minister of Foreign Affairs believes that to do so would be injurious to Canada’s international relations or either Minister believes that to do so would be injurious to Canada’s other interests”

(new section 12.1(1)). In addition, if the information regarding the identity and location of such property was produced in or for a government institution, or was initially received by a government institution and obtained from that institution, the ministers must obtain the consent of the relevant government institution before releasing the information to judgment creditors (new section 12.1(2)). “Government institution” is defined in the new section 12.1(3) of the *State Immunity Act* as “any department, branch, office, board, agency, commission, corporation or other body for the administration or affairs of which a minister is accountable to Parliament.” The Special Senate Committee on Anti-terrorism recommended in its observations on Bill S-7 that more mandatory language should be used with respect to government assistance and suggested that another bill creating a fund for victims who are successful in court but unable to receive compensation should be proposed. This suggestion is not reflected in Bill C-10.

2.2.2.3 PENALTIES AGAINST FOREIGN STATES FOR FAILURE TO PRODUCE INFORMATION RELATING TO A CHARGE OF SUPPORTING TERRORISM (CLAUSE 9 OF BILL C-10)

In addition to Bill C-10’s other amendments to the *State Immunity Act*, clause 9 amends section 13(2) of that Act to allow Canadian courts to levy fines or penalties against listed foreign states for failure or refusal to produce documents or information in respect of actions brought against them for supporting terrorism. Provision of such documentation and information would assist Canadian courts in rendering judgments in lawsuits initiated against foreign states pursuant to section 4(1) of the JVT Act.

NOTES

1. *Criminal Code*, R.S.C. 1985, c. C-46.
2. *State Immunity Act*, R.S.C. 1985, c. S-18.
3. Second reading of Bill C-35 was initiated in the House of Commons, but not completed. The bill died on the *Order Paper* on 30 December 2009, when Parliament was prorogued, thereby ending the 2nd Session of the 40th Parliament.

4. From the 1st Session of the 38th Parliament, see bills C-367, C-394 and S-35, all entitled An Act to amend the State Immunity Act and the Criminal Code (terrorist activity); from the 1st Session of the 39th Parliament, see bills C-272 and C-346, both entitled An Act to amend the State Immunity Act and the Criminal Code (terrorist activity), and Bill S-218, An Act to amend the State Immunity Act and the Criminal Code (civil remedies for victims of terrorism); from the 2nd Session of the 39th Parliament, see bills C-272 and C-346, both entitled An Act to amend the State Immunity Act and the Criminal Code (terrorist activity), and Bill S-225, An Act to amend the State Immunity Act and the Criminal Code (deterring terrorism by providing a civil right of action against the perpetrators and sponsors of terrorism); and from the 2nd Session of the 40th Parliament, see bills C-408 and S-233, both entitled An Act to amend the State Immunity Act and the Criminal Code (deterring terrorism by providing a civil right of action against perpetrators and sponsors of terrorism); and from the 3rd Session of the 40th Parliament: see Bill C-408, entitled An Act to amend the State Immunity Act and the Criminal Code (deterring terrorism by providing a civil right of action against perpetrators and sponsors of terrorism). None of these bills received Royal Assent prior to the dissolution or prorogation of the particular Parliament or parliamentary session in which they were introduced. The texts of all these bills are available on the Parliament of Canada's [LEGISInfo](#) website.
5. Prior to the introduction of Bill C-10, victims of terrorist acts arguably had the capacity to sue individual terrorists, or terrorist entities or groups, for loss or damage suffered, using general Canadian civil responsibility or tort law principles. For more information on this topic, see section 2.1.2, "Victims of Terrorist Attacks, and Civil Suits," in this legislative summary.
6. This is perhaps because there is no clear international consensus regarding a definition of terrorism or terrorist activity.
7. John Currie, *Public International Law*, Irwin Law Inc., Toronto, 2001, p. 318.
8. For a full listing of previous bills, see endnote 4.
9. Canadian Coalition Against Terror, [A Legislative Proposal to deter terrorism by providing a civil right of action against the sponsors and perpetrators of terrorism](#), July 2011.
10. Prasanna Ranganathan, "Survivors of Torture, Victims of Law: Reforming State Immunity in Canada by Developing Exceptions for Terrorism and Torture," *Saskatchewan Law Review*, Vol. 71, 2008, pp. 343–389; Emily Senger, "Giving terror victims right to sue lauded: State Immunity Act; Craft law to avoid diplomatic spats, expert says," *National Post*, 2 June 2009, p. A5.
11. See, for example, Bruce Champion-Smith, "Make terrorists pay up, PM says," *The Toronto Star*, 1 June 2009, p. A01; Don Martin, "Great, now we can sue bin Laden, we just have to find him," *Ottawa Citizen*, 3 June 2009, p. A17; Senger (2009).
12. "[Target: terror cash: Families to ask Ottawa for right to sue terrorist backers](#)" (originally from the *National Post*, 15 April 2005, but currently found on Senator David Tkachuk's website). Note that the terms "tortious" or "tort law" are common law terms. In the civil law in Quebec, the same concept is generally referred to as the law of civil responsibility and the requirements to prove such a case are slightly different.
13. Stewart Bell, "Lebanese Canadian Bank sued for alleged Hezbollah connections," *National Post*, 7 July 2008; Sean Gordon, "[Lebanese Canadian Bank faces lawsuit](#)," *The Toronto Star*, 8 July 2008; *Yefet, Sappir, Shalmoni v. Lebanese Canadian Bank* (Qc. Sup. Ct.), Docket No. 500-17-043962-086.
14. See *Breslin and others v. Seamus McKenna and others*, [2009] NIQB 50.
15. *Constitution Act, 1867*, (UK), 30 & 31 Vict., c. 3.
16. Peter W. Hogg, *Constitutional Law of Canada*, Looseleaf, 5th ed., Vol. 1, Thomson Carswell, Scarborough, 2007, p. 18-13.

17. See *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 64. Also, more generally, see Hogg (2007), pp. 15-39–15-44, 18-16, 18-17 and 18-23–18-27.
18. The source of Parliament's power in the arena of foreign affairs and international relations is constitutionally complex. This is because when the *Constitution Act, 1867*, was enacted, Canada was a colony of the British Empire and Great Britain handled Canada's foreign affairs and international relations. However, according to constitutional scholars, Canada's power to make treaties and declare war is vested in the Queen by virtue of section 9 of the *Constitution Act, 1867* (the Royal Prerogative Power). In 1947, Great Britain delegated prerogative power over foreign affairs to the Governor General of Canada, who would exercise this power upon the advice of the Government of Canada (see Hogg [2007], p. 11-2; and *Letters Patent Constituting the Governor General of Canada, 1947*, R.S.C. 1985, Appendix II, No. 31). The *Statute of Westminster, 1931* (UK), 22 Geo. 5, c. 4, s. 3, also conferred on Canada the authority to make laws having extraterritorial operation.
19. See *R. v. Zelensky*, [1978] 2 S.C.R. 940, where the Supreme Court of Canada upheld a *Criminal Code* provision that authorized a court, upon convicting an accused of an indictable offence, to order the accused to pay compensation to the victim for loss or damage suffered as a result of the commission of the offence. In that case, the order for compensation was made as part of the sentencing process, not as the result of a separate civil action.
20. Section 91 of the *Constitution Act, 1867*, gives Parliament the power to “make laws for the peace, order, and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the legislatures of the provinces” This power is commonly referred to as the POGG power. There are three branches to the POGG power recognized in case law: the gap branch (the power to make laws on matters that are not enumerated in either section 91 [federal government power to legislate] or 92 [provincial government power to legislate]); the national concern branch (the power to make laws in relation to matters that go beyond local or provincial concerns or interests, and are, due to their inherent nature, concerns of the Dominion of Canada as a whole); and the emergency branch (the temporary and extraordinary need for national regulation of a particular subject matter). For further details regarding the POGG power, see Hogg (2007), pp. 17-1–17-32. Given the interprovincial, and indeed international, dimensions of terrorism, and the need for a unified national response to terrorist acts, it could be argued that Parliament has the necessary authority to create a statutory right of civil action against terrorists and those who support them under the national concern branch of the POGG power.
21. Stewart Bell, “Seeking Justice: Canadian victim of Hamas bombers may soon be able to sue rogue states,” *National Post*, 20 June 2009, p. A8; Canadian Centre for International Justice, “[Civil Litigation and the State Immunity Act](#),” n.d.; Canadian Centre for International Justice, “Justice for One, Justice for All: Victims of Torture Should be Entitled to the Same Justice as Victims of Terrorism,” News release, Ottawa, 2 June 2009; Ranganathan (2008).
22. The text of [Bill C-483](#) is available on the Parliament of Canada's LEGISInfo website.
23. United States, “Terrorism exception to the jurisdictional immunity of a foreign state,” [Foreign State Immunity Act](#), 28 U.S.C. 1605A(a)(1).
24. Canadian Centre for International Justice, “[Canada's State Immunity Act](#),” Backgrounder, 2 June 2009.
25. International Court of Justice, “[Germany institutes proceedings against Italy for failing to respect its jurisdictional immunity as a sovereign State](#),” News release, The Hague, 23 December 2008.

26. International Court of Justice, "[Jurisdictional Immunities of the State \(Germany v. Italy: Greece intervening\), Conclusion of the public hearings, Court to begin its deliberation](#)," News release, 16 September 2011.
27. See www.parliament.uk, [Torture \(Damages\) Bill \[HL\] 2010-11](#) for the bill currently before the House of Lords.
28. Senger (2009).
29. Gloria Galloway, "Lawsuits: Terror-victim law would only apply to listed countries. Victims would be allowed to sue countries Canada designated as terrorist supporters," *The Globe and Mail* [Toronto], 3 June 2009, p. A4; and Lee Berthiaume, "Terror State List Will Hurt Foreign Policy Goals: Experts," *Embassy* [Ottawa], 10 June 2009.
30. Andy Levy-Ajzenkopf, "Govt., opposition craft competing bills for terror victims," *The Canadian Jewish News* [North York], 11 June 2009; Hugo De Grandpré, "Ottawa veut permettre de poursuivre les terroristes," *La Presse* [Montréal], 3 June 2009, p. A12.
31. Berthiaume (2009).
32. Cristin Schmitz, "Should judges decide which states sponsor terror?," *Lawyers Weekly*, 19 June 2009.
33. U.S. Department of State, [State Sponsors of Terrorism](#).
34. Merle D. Kellerhals Jr., "[U.S. Removes North Korea from State Sponsors of Terrorism List](#)," U.S. Department of State, 14 October 2008; Donna Miles, "[U.S. Removes Iraq From List of State Sponsors of Terrorism](#)," U.S. Department of Defense, 22 October 2004; and U.S. Department of State, "[Chapter 3 – State Sponsors of Terrorism Overview](#)," in *Country Reports on Terrorism 2006*, 30 April 2007.
35. Jennifer K. Elsea, *CRS Report for Congress: Suits Against Terrorist States by Victims of Terrorism*, Order Code RL31258, Congressional Research Service, Washington, D.C., 8 August 2008.
36. *Ibid.*, pp. 27–32.
37. *Ibid.*, pp. 32–44.
38. Senger (2009); CBC News, "[Ottawa introduces bill allowing victims of terrorism to sue](#)," 2 June 2009. For more examples of successful suits, see Canadian Coalition Against Terror (July 2011).
39. Lloyd Brown-John, "How to sue a terrorist," *The Windsor Star*, 19 June 2009, p. A8; Bell (2009).
40. In this legislative summary, please note the distinction between clauses of Bill C-10 and sections of the Justice for Victims of Terrorism Act [JVTA]. The sections of the JVTA are all found in clause 2 of Bill C-10.

41. Under these provisions, the Minister of Public Safety recommends listing, based on criminal and security intelligence reports received from law enforcement and security agencies, and Cabinet decides whether or not to list. The basis for listing an entity is that there are reasonable grounds to believe that an entity, which may be an organization or an individual, has knowingly been involved in a terrorist activity or is knowingly assisting a terrorist group. The Minister of Public Safety is required to review the list of entities every two years to determine whether or not reasonable grounds to keep the entity on the list remain, and then makes a recommendation to Cabinet about whether or not the entity should be retained on the list. Entities may not challenge or make submissions with respect to the listing decision prior to its being made. They can, however, apply to the Minister to be removed from the list once they have been added to it, and, if their application is refused, apply to the Federal Court for judicial review of the Minister's decision. It is not a crime to be a listed entity in Canada. It can, however, have serious consequences, because listing means that the entity is automatically defined as a terrorist group, and those who associate with terrorist groups may be charged with terrorism-related offences under the *Criminal Code*. Currently, more than 40 entities are listed as terrorist entities under sections 83.05 to 83.07 of the *Criminal Code*. See Public Safety Canada, [Currently listed entities](#).
42. See *Mills v. The Queen*, [1986] 1 S.C.R. 863, para. 99. Presumably, all superior courts would have the necessary jurisdiction to render judgments in actions initiated under clause 4 of the JVTAs on the basis of their inherent jurisdiction to hear any matter that comes before them, unless a statute or rule limits that authority or grants exclusive jurisdiction to some other court or tribunal, in accordance with the doctrine of inherent jurisdiction (see *College Housing Co-operative Ltd. v. Baxter Student Housing Ltd.*, [1976] 2 S.C.R. 475). Statutory courts, such as provincial courts or the Federal Court, may also have the necessary jurisdiction to render judgment in such actions in circumstances where they have been granted such jurisdiction by statute. For example, section 3(1)(a) of the *Small Claims Act*, R.S.B.C. 1996, c. 430, gives the Provincial Court of British Columbia jurisdiction in a claim for debt or damages as long as “the amount claimed or the value of the personal property or services is equal to or less than an amount that is prescribed by regulation, excluding interest and costs,” with the maximum currently at \$25,000 under section 1 of the *Small Claims Court Monetary Limit Regulation*, B.C. Reg. 179/2005. Accordingly, a victim whose claim for damages was no more than \$25,000 could potentially initiate a civil action pursuant to section 4 of the JVTAs in that court. In the case of the Federal Court, section 22(1) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, gives the Federal Court “concurrent original jurisdiction, between subject and subject as well as otherwise, in all cases in which a claim for relief is made or a remedy is sought under or by virtue of Canadian maritime law or any other law of Canada relating to any matter coming within the class of subject of navigation and shipping, except to the extent that jurisdiction has been otherwise specially assigned.” Accordingly, if an act of terrorism occurred aboard a ship, for example, and the victim suffered loss or damage as a result of that action, he or she could potentially initiate a civil action pursuant to section 4 of the JVTAs in the Federal Court.

43. See *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 416. It is important to note, however, that section 4(2) of the JVTA is permissive and not mandatory. It merely states that a Canadian court may hear and determine the cause of action described in section 4(1) if there is a real and substantial connection to Canada. A court may still choose to decline jurisdiction on the basis of the doctrine of *forum non conveniens*. This term is used to describe the court's discretionary power to decline jurisdiction over a proceeding that may be more properly tried elsewhere (see *Amchem Products Incorporated v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897). Factors that a court may consider in deciding whether to decline jurisdiction over a proceeding include the location of the majority of the parties; the location of key witnesses and evidence; contractual provisions that specify applicable law or accord jurisdiction; the avoidance of a multiplicity of proceedings; the applicable law and its weight in comparison to the factual questions to be decided; geographical factors suggesting the natural forum; and whether declining jurisdiction would deprive the plaintiff of a legitimate juridical advantage available in the domestic court (see *Muscutt v. Courcelles* (2002), 213 D.L.R. (4th) 577 (Ont. C.A.), para. 41).
- 44. These offences are discussed in more detail earlier in section 2.2.1.4 of this paper.**
45. Section 4(4) of the JVTA does not specify which set of "accepted international rules of arbitration" would apply. Some examples of commonly used international rules of arbitration include the Rules of Arbitration of the International Chamber of Commerce (ICC [Rules of Arbitration](#)), the Rules of Arbitration of the United Nations Commission on International Trade Law ([UNCITRAL Arbitration Rules](#)), and the [Permanent Court of Arbitration Optional Rules for Arbitrating Disputes Between Two Parties of Which Only One Is a State](#).
46. Before a Canadian court will recognize a judgment made by a foreign court, it must determine that the foreign court had a real and substantial connection to the action or the parties. Other factors that the court may consider before recognizing a foreign judgment are attornment (agreement by the parties to transfer a right), agreement by the parties to submit to the jurisdiction of the foreign court, and residence and presence of the parties in the foreign jurisdiction (see *Beals v. Saldanha*, [2003] 3 S.C.R. 416, para. 37).
47. See the explanation of the general principle of state immunity and its exceptions as codified in the *State Immunity Act* in section 2.1, "Background," in this legislative summary.
48. It has been alleged that the perpetrators of the Air India bombing are or were members of Babbar Khalsa, which is on the list of terrorist entities established under sections 83.05 to 83.07 of the *Criminal Code*.

3 AMENDMENTS TO THE *CRIMINAL CODE*
 (SEXUAL OFFENCES AGAINST CHILDREN)
 [BILL C-10, PART 2, CLAUSES 10–31, 35–38,
 49 AND 51 (FORMERLY BILL C-54)]

3.1 BACKGROUND

Clauses 10–31, 35–38, and 49 of Bill C-10 amend the *Criminal Code* to increase or impose mandatory minimum penalties for certain sexual offences involving children. The bill also creates two new offences, namely that of making sexually explicit material available to a child and of agreeing or arranging to commit a sexual offence against a child. Finally, these clauses expand the list of specified conditions that may be added to prohibition and recognizance orders¹ to include prohibitions concerning contact with a person under the age of 16 and use of the Internet or other digital network. These clauses also expand the list of enumerated offences that may give rise to such orders and prohibitions.

Clauses 10–31 and 35–38 of Bill C-10 are almost identical to provisions in Bill C-54, An Act to amend the Criminal Code (sexual offences against children) (short title: Protecting Children from Sexual Predators Act), which was introduced and received first reading in the House of Commons on 4 November 2010. That bill passed second reading in the Senate but proceeded no further and died on the *Order Paper* when the 40th Parliament was dissolved on 26 March 2011.

Bill C-10 differs from its predecessor Bill C-54 in two instances: it increases the length of some penalties, including those related to some child pornography offences, and it contains additional consequential amendments, found in clause 49 (see section 3.2.6, “Consequential Amendments,” in this legislative summary).

3.1.1 THE CURRENT LAW

Part V of the *Criminal Code* is entitled “Sexual Offences, Public Morals and Disorderly Conduct.” This part of the Code contains a number of sexual offences, some of which may be committed against a person under the age of 16 years (the age of consent to sexual activity in Canada), and others where the relevant age is 18. Section 150.1 of the Code does set out some exceptions to the general rule regarding the age of consent. These exceptions apply in cases where the complainant consented to the activity that forms the subject matter of the charge if the accused is close in age to the complainant and is not in a position of trust or authority towards the complainant. Other exceptions may apply, such as the accused and complainant being common-law partners, but a necessary condition for all of these exceptions to apply is that the complainant consented to the activity that forms the subject matter of the charge.

Sexual offences that may be committed against someone under the age of 16 include sexual interference (section 151), invitation to sexual touching (section 152), bestiality (section 160(3)), parent or guardian procuring sexual activity (section 170(a)), householder permitting sexual activity (section 171(a)), luring a child

(section 172.1(1)(b)), indecent act (section 173(2)) and abduction of person under 16 (section 280). Sexual interference, invitation to sexual touching, parent or guardian procuring sexual activity, and householder permitting sexual activity all have mandatory minimum sentences when the offence is committed against someone under 16 years of age.

A number of sexual offences may be committed against someone under the age of 18, including sexual exploitation (section 153), child pornography (section 163.1), parent or guardian procuring sexual activity (section 170(b)), householder permitting sexual activity (section 171(b)), luring a child (section 172.1(1)(a)), living off the avails of a prostitute under the age of 18 years (section 212(2)), aggravated living off the avails of a prostitute under the age of 18 years (section 212(2.1)), and obtaining prostitution of person under the age of 18 years (section 212(4)). All of these offences, except for luring a child, have mandatory minimum penalties. Section 273.3 of the *Criminal Code* makes it an offence to remove a child from Canada who is under the age of either 16 or 18 for the purpose of committing one of the enumerated sexual offences.

Part VIII of the *Criminal Code* is entitled “Offences Against the Person and Reputation.” This part contains the offences of sexual assault (section 271), sexual assault with a weapon, threats to a third party or causing bodily harm (section 272), and aggravated sexual assault (section 273). None of these offences mentions the age of the victim. There are mandatory minimum penalties attached to section 272 and 273 offences if a firearm is used in the commission of the offence. If no firearm is used, upon conviction as an indictable offence, there are only maximum sentences of 10 years’ imprisonment (section 271), 14 years’ imprisonment (section 272), and life imprisonment (section 273).

When an offender is convicted of a specified sexual offence in respect of a person who is under the age of 16 years, the court that sentences the offender may impose an order of prohibition under section 161 of the Code. This order prohibits the offender from attending near certain public places and other facilities where persons under 16 years of age may be present, from obtaining employment or a voluntary position which may involve the offender’s being in a position of trust or authority over persons under 16 years of age, or from using a computer system for the purpose of communicating with a person under the age of 16 years. The order may be for life or some shorter period and its terms may be varied upon application of the offender or the prosecutor. Failure to comply with the order is a hybrid offence.²

Section 810.1 of the *Criminal Code* applies when there is a reasonable fear that another person will commit a specified sexual offence in respect of one or more persons who are under the age of 16 years. This section allows anyone to lay an information³ before a provincial court judge for the purpose of having the defendant enter into a recognizance,⁴ which may include conditions that the person not engage in activity that involves contact with persons under 16 years of age or that the defendant be prohibited from attending certain places where persons under 16 years of age are likely to be present. The judge will grant such an order where there are reasonable grounds to fear that the defendant will commit one of the specified sexual offences in respect of a person under 16 years of age. The maximum duration of the

order is 12 months, except if the defendant was previously convicted of a sexual offence in respect of a child under the age of 16 years, in which case the recognizance may be for a period of up to two years. Section 810.1(3.02) also provides a non-exhaustive list of conditions that may be imposed to secure the good conduct of the defendant.

3.1.2 CONDITIONAL SENTENCES AND PRINCIPLES OF SENTENCING

In the news release and the backgrounder that accompanied the introduction of Bill C-54, mention was made that the proposed legislation would establish mandatory prison sentences for seven existing *Criminal Code* offences and, as a result, conditional sentences would no longer be available for any of these offences.⁵

Conditional sentencing, introduced in September 1996, allows for sentences of imprisonment to be served in the community, rather than in a correctional facility. This is a midway point between incarceration and sanctions such as probation or fines. The primary goal of conditional sentencing is to reduce the reliance upon incarceration by providing the courts with an alternative sentencing mechanism.

The provisions governing conditional sentences are set out in sections 742 to 742.7 of the *Criminal Code*. Several criteria must be met before the sentencing judge may impose a conditional sentence, including that the offence in question not be punishable by a minimum term of imprisonment or be an offence or attempt to commit an offence mentioned in section 271 (sexual assault), 272 (sexual assault with a weapon, threats to a third party or causing bodily harm) or 273 (aggravated sexual assault). The sentencing judge must also have determined that the offence should be subject to a term of imprisonment of less than two years and be satisfied that serving the sentence in the community would not endanger the safety of the community.

Before imposing a conditional sentence, the sentencing judge must be satisfied that the conditional sentence would be consistent with the fundamental purpose and principles of sentencing set out in sections 718 to 718.2 of the *Criminal Code*. Among the objectives of sentencing are:

- the denunciation of unlawful conduct;
- the deterrence of the offender and others from committing offences;
- the separation of the offender from the community when necessary;
- the rehabilitation of the offender;
- the provision of reparation to victims or the community; and
- the promotion of a sense of responsibility in the offender, and acknowledgement of the harm done to victims and to the community.

The fundamental principle underlying sentencing, as set out in section 718.1 of the *Criminal Code*, is proportionality – the sentence imposed by the court must be proportionate to the gravity of the offence and the degree of responsibility of the offender. Among the other sentencing principles are that aggravating and mitigating

factors be taken into account, that there be similarity of sentences for similar offences, that the totality of consecutive sentences should not be unduly long or harsh, and that the least restrictive sanction short of incarceration should be resorted to whenever possible, with particular attention to the circumstances of Aboriginal offenders.

3.1.3 MANDATORY MINIMUM SENTENCES

Mandatory minimum sentences (MMSs) have been part of the *Criminal Code* since it was codified in 1892. At that time, there were six offences with these types of sentences for such things as committing frauds upon the government and corruption in municipal affairs.⁶ Since then, mandatory minimums have not evolved in any systematic fashion. Rather, each new MMS has responded to what was perceived at the time to be a serious issue of criminal law. Many of these sentences were introduced in 1995 with the enactment of a package of firearms-related legislation. Apart from life imprisonment for high treason and murder, the other main areas in which MMSs can be found are for sexual offences involving young people and impaired driving.

Today, there are approximately 40 criminal offences for which a minimum sentence must be imposed on conviction. The application of a mandatory minimum sentence may depend on factors other than just the type of offence that was committed, such as whether an offence is prosecuted by indictment or summarily, or whether it is a first, second or subsequent conviction for an offence. In the area of sexual offences, the imposition of a MMS may depend upon the age of the victim.

Those in favour of mandatory minimums say that they:

- act as a deterrent;
- prevent future crime by incapacitating the offender or removing the offender from society;
- serve an educational purpose by clearly communicating society's disapproval;
- reduce sentence disparity by giving clear guidelines to the judiciary so all offenders in all parts of Canada will receive at least a specified minimum time in prison; and
- respond to public concern that people should be held accountable for criminal convictions through imprisonment.

Those opposed to mandatory minimums say that they:

- have little or no deterrent effect, as deterrence arises from the fear of being caught, not from the length of sentence;
- are an inflexible penalty structure that limits judicial discretion, leading to sentences out of proportion to the blameworthiness of the individual offender or the seriousness of the offence;

- shift decisions on appropriate punishment from the judiciary to the prosecutor, who can determine whether to stay or withdraw a charge, or enter into plea negotiations to avoid an MMS;
- may compel someone who is not guilty of any offence to plead guilty to an offence that carries no mandatory minimum penalty to avoid a harsher sentence; and
- may increase costs, including the burden on prosecutorial resources (due to the decrease in guilty pleas by people facing mandatory imprisonment), and increase prison populations.

There has been little Canadian research on MMSs, including on how they are implemented or the level of public knowledge about them. Canada lacks a sentencing commission, such as that found in the United States, which can collect data on the length of sentences imposed, on sentencing changes over time, and on what, if any, effect the changes have had on the incidence of those crimes for which they are imposed.

Mandatory minimum sentences would appear to be inconsistent with the fundamental principle of sentencing set out in section 718.1 of the *Criminal Code* – namely, a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. The manner in which mandatory sentences have been used in Canada does not allow a judge to make any exception in an appropriate case. This does not necessarily mean, however, that a minimum sentence is unconstitutional. It may constitute cruel and unusual punishment, in violation of section 12 of the *Canadian Charter of Rights and Freedoms*,⁷ only if it is possible for the mandatory punishment, in a specific matter or a reasonable hypothetical case, to be “grossly disproportionate,” given the gravity of the offence or the personal circumstances of the offender.

The Supreme Court of Canada has, in some cases, struck down mandatory sentences that were considered too severe. One example is the case of *R. v. Smith*⁸ in which a mandatory seven-year term of imprisonment for importing narcotics was struck down as being disproportionate. The drug importing offence was found to have covered many substances of varying degrees of danger, totally disregarded the quantity imported, and treated as irrelevant the reason for importing and the existence of any previous convictions. In a more recent case, though, the Supreme Court has held that sentencing judges cannot override a clear statement of legislative intent and reduce a sentence below a statutory mandated minimum, absent exceptional circumstances.⁹ In this case, the Court said that for some “particularly egregious” forms of state misconduct, sentence reduction below a mandatory minimum may be appropriate under section 24(1) of the Charter, which states that anyone whose Charter rights have been violated may apply to the court for a remedy. In the usual case, however, the MMS set out by Parliament must be applied.

3.2 DESCRIPTION AND ANALYSIS

The following description highlights selected aspects of the clauses in Bill C-10 that relate to sexual offences against young persons. It does not review every clause.

3.2.1 INCREASED MANDATORY MINIMUM SENTENCES (CLAUSES 11, 12, 13, 17, 19, AND 20)

MMSs are already attached to a number of offences in the *Criminal Code* concerning sexual offences against children. These offences are sexual interference (section 151 of the Code), invitation to sexual touching (section 152), sexual exploitation (section 153), offences related to child pornography (section 163.1), parent or guardian procuring sexual activity (section 170), and householder permitting sexual activity (section 171). For each of these offences, the length of the existing MMS will be increased by Bill C-10.

Some of the increases in mandatory minimum sentences are summarized in Table 3-1.

Table 3-1 – Increased Mandatory Minimum Sentences (MMSs)

Offence	Criminal Code Section	On Summary Conviction		On Indictment	
		Current Penalty	Proposed Increased MMSs	Current Penalty	Proposed Increased MMSs
Sexual interference (hybrid offence)	151	MMS 14 days and max. 18 months	90 days	MMS 45 days and max. 10 years	1 year
Invitation to sexual touching (hybrid offence)	152	MMS 14 days and max. 18 months	90 days	MMS 45 days and max. 10 years	1 year
Sexual exploitation (hybrid offence)	153	MMS 14 days and max. 18 months	90 days	MMS 45 days and max. 10 years	1 year
Publishing of child pornography (hybrid offence)	163.1(2)	MMS 90 days and max. 18 months	MMS 6 months and max. 2 years less a day	MMS 1 year and max. 10 years	N/a
Distribution of child pornography (hybrid offence)	163.1(3)	MMS 90 days and max. 18 months	MMS 6 months and max. 2 years less a day	MMS 1 year and max. 10 years	N/a
Possession of child pornography (hybrid offence)	163.1(4)	MMS 14 days and max. 18 months	90 days	MMS 45 days and max. 5 years	6 months
Accessing child pornography (hybrid offence)	163.1(4.1)	MMS 14 days and max. 18 months	90 days	MMS 45 days and max. 5 years	6 months

MMSs will increase for two offences, but the punishment will depend on the age of the victim and not on an indictable/summary conviction division. Section 170 of the *Criminal Code* is the offence of parent or guardian procuring sexual activity. Currently, if the person procured is under the age of 16 years, the offender may be imprisoned for a maximum term of five years and a minimum term of six months. Clause 19 of Bill C-10 will increase the maximum sentence to 10 years and the minimum sentence to one year. If the person procured is 16 years of age or more but under the age of 18 years, the current penalty is a maximum of two years' imprisonment and a minimum of 45 days' imprisonment. Bill C-10 will increase these penalties to a maximum term of imprisonment of five years and a minimum term of imprisonment of six months.

The other offence whose MMS will be increased, and where the punishment depends on the age of the victim, is that found in section 171 of the *Criminal Code* – householder permitting sexual activity. Currently, if the person engaged in sexual activity is under the age of 16 years, the offender may be imprisoned for a term not exceeding five years and not less than six months. Clause 20 of Bill C-10 will not change this. If the person in question is 16 years of age or more but under the age of 18 years, the current penalty is a maximum of two years' imprisonment and a minimum of 45 days' imprisonment. Bill C-10 will continue the maximum penalty but increase the minimum penalty to a term of imprisonment of 90 days.

3.2.2 NEW MANDATORY MINIMUM SENTENCES (CLAUSES 14, 15, 22, 23, 25, 26, AND 27)

A number of offences in the *Criminal Code* address sexual misconduct, but not all discuss it in terms of the age of the victim, and some that do address the age of the victim do not impose an MMS. Bill C-10 will specify the age of the victim for a number of offences and specify that an MMS will apply when the victim of the offence is under either 18 or 16 years of age, depending upon the offence. Thus, there will be an MMS for incest with someone under 16 (section 155(2)), for bestiality in the presence of someone under 16 (section 160(3)), for using a means of telecommunication to lure a child under either 18 or 16 years of age (section 172.1), for exposure to a person under the age of 16 years (section 173(2)), for sexual assault against a person under 16 years of age (section 271), for sexual assault with a weapon against a person under 16 years of age (section 272), and for aggravated sexual assault against a person under 16 years of age (section 273).

The new mandatory minimum sentences are summarized in Table 3-2.

Table 3-2 – New Mandatory Minimum Sentences (MMS)

Offence	Criminal Code Section	Current Maximum Penalty		Proposed Mandatory Minimum Sentences	
		On Summary Conviction	On Indictment	On Summary Conviction	On Indictment
Incest against a person under 16 years of age (indictable offence)	155	N/a	14 years	N/a	5 years
Bestiality in the presence of a person under 16 years of age (hybrid offence)	160 (3)	6 months	10 years	6 months	1 year
Internet luring (hybrid offence)	172.1	18 months	10 years	90 days	1 year
Indecent act in the presence of a person under 16 years of age (hybrid offence)	173(2)	N/a	2 years	30 days	90 days
Sexual assault against a person under 16 years of age (hybrid offence)	271	18 months	10 years	90 days	1 year
Sexual assault with a weapon ^a against a person under 16 years of age (indictable offence)	272	N/a	14 years	N/a	5 years
Aggravated sexual assault against a person under 16 years of age (indictable offence)	273	N/a	Life imprisonment	N/a	5 years

Note: a. There is a mandatory prison sentence for this offence and a section 273 offence if a restricted or prohibited firearm is used in the commission of the offence or if any firearm is used in the commission of the offence in connection with organized crime (5 years for first offence; 7 years for second or subsequent offence). In any other case where a firearm is used in the commission of this offence and a section 273 offence, there is a mandatory minimum prison sentence of four years.

3.2.3 NEW OFFENCES (CLAUSES 21 AND 23)

Clause 21 of the bill will add section 171.1 to the *Criminal Code*. This section will make it an offence to provide sexually explicit material to a person who is under the age of 14, 16 or 18 for the purpose of facilitating the commission of a sexual offence against that young person. The different ages will apply to the facilitation of the following offences:

- Under 14 years of age – Facilitating the commission of abduction of a person under 14 (section 281)
- Under 16 years of age – Facilitating the commission of sexual interference (section 151), invitation to sexual touching (section 152), bestiality in the presence of a person under 16 years of age (section 160(3)), exposure to a

person under 16 years of age (section 173(2)), sexual assault (section 271), sexual assault with a weapon (section 272), aggravated sexual assault (section 273), or abduction of person under 16 (section 280)

- Under 18 years of age – Facilitating the commission of sexual exploitation (section 153(1)), incest (section 155), child pornography (section 163.1), parent or guardian procuring sexual activity (section 170), householder permitting sexual activity (section 171), or procuring (section 212(1), 212(2), 212(2.1), or 212(4))

This new hybrid offence will have a mandatory minimum prison sentence of 30 days' imprisonment on summary conviction and 90 days' imprisonment following conviction as an indictable offence. The maximum penalties will be six months' imprisonment following summary conviction and two years' imprisonment following conviction as an indictable offence. It will not be a defence to a charge under section 171.1 that the accused believed that the person in question was at least 18, 16 or 14 years of age, as the case may be, unless the accused took reasonable steps to ascertain the age of the person.

Clause 23 will add section 172.2 to the *Criminal Code*. This section will make it an offence to use any means of telecommunications, including a computer system, to agree or make arrangements with another person for the purpose of committing a sexual offence against a person who is under the age of 14, 16 or 18. The list of offences based on the age of the young person is the same as for proposed section 171.1.

This new hybrid offence will have a mandatory minimum prison sentence of 90 days' imprisonment on summary conviction and one years' imprisonment following conviction as an indictable offence. The maximum penalties will be 18 months' imprisonment following summary conviction and 10 years' imprisonment following conviction as an indictable offence. As with section 171.1, it will not be a defence to a charge under section 171.1 that the accused believed that the person in question was at least 18, 16 or 14 years of age, as the case may be, unless the accused took reasonable steps to ascertain the age of the person. In addition, it will not be a defence to a charge under section 172.2 that the person with whom the accused made an arrangement was a peace officer or was acting under the direction of a peace officer or, if such was the case, the young person in question did not, in fact, exist.

The proposed new offences are summarized in Table 3-3.

Table 3-3 – Proposed New Offences

Offence	Criminal Code Section	Proposed Maximum Penalty		Proposed Mandatory Minimum Sentences	
		On Summary Conviction	On Indictment	On Summary Conviction	On Indictment
Providing sexually explicit material to a child (hybrid offence)	171.1	6 months	2 years	30 days	90 days
Agreeing/making arrangements with another person, via telecommunication, to commit a sexual offence against a child (hybrid offence)	172.2	18 months	10 years	90 days	1 year

3.2.4 NEW CONDITIONS (CLAUSES 16 AND 37)

Section 161 of the *Criminal Code* permits the court to make an order prohibiting, among other things, an offender from using a computer system for the purpose of communicating with a person under 16 years of age. The order may be made where the offender is found guilty of a specified sexual offence and the complainant was under 16 years of age. Clause 16 of Bill C-10 will amend this part of section 161 so that the court sentencing the offender shall consider making and may make an order prohibiting the offender from having any unsupervised contact with a person under the age of 16 years or from having unsupervised use of the Internet or other digital network. Clause 16 also adds to the list of offences for which a conviction is a prerequisite for an order of prohibition. This list of offences includes the two new offences created by Bill C-10 (see section 3.2.3, “New Offences,” in this legislative summary).

Section 810.1 of the *Criminal Code* allows anyone to lay an information before a provincial court judge for the purpose of having the defendant enter into a recognizance, including conditions that the person not engage in activity that involves contact with persons under 16 years of age and prohibiting the defendant from attending certain places where persons under 16 years of age are likely to be present. The judge will grant such an order where there are reasonable grounds to fear that the defendant will commit one of the specified sexual offences in respect of a person under 16 years of age. Section 810.1(3.02) provides a non-exhaustive list of conditions that may be imposed to secure the good conduct of the defendant.

Clause 37 will expand the list of sexual offences that may be addressed by a section 810.1 order, including the two new offences created by Bill C-10 (see section 3.2.3, “New Offences,” in this legislative summary). It will also amend this section to allow judges to consider prohibiting suspected or convicted child sex offenders from having any unsupervised contact with a young person under the age of 16 years or from having any unsupervised use of the Internet.

3.2.5 ADDING NEW OFFENCES TO EXISTING PROVISIONS
(CLAUSES 10, 16, 18, 22, 28, 29, 30, 31, 35, 36 AND 37)

Bill C-10 will add the two new offences created by the bill (see section 3.2.3, “New Offences,” in this legislative summary) and, in some cases, existing *Criminal Code* offences to certain Code provisions in the following manner:

- Clause 10 will add the two new offences created by Bill C-10, along with luring a child (section 172.1), to the list of offences that, if committed outside Canada, are deemed to be committed in Canada if the person committing the offence is a Canadian citizen or permanent resident (section 7(4.1)).
- Clause 16 will add new offences to the list of those following conviction for which an order prohibiting an offender from attending public places where young people can be found may be granted (section 161).
- Clause 18 will add the new offence of agreeing or making an arrangement with a person, by means of telecommunication, to commit a sexual offence against a young person (section 172.2) to those for which an order of forfeiture may be made of any thing, other than real property, used in the commission of the offence (section 164.2).
- Clause 22 will add offences such as parent or guardian procuring sexual activity and householder permitting sexual activity to those that can be facilitated by luring a young person over the Internet (section 172.1).
- Clause 28 will add, among other things, the two new offences created by Bill C-10 to the section that allows for the exclusion of the public from court proceedings. If an accused is charged with one of the new offences and the prosecutor or the accused applies for an exclusion order, the judge shall, if no such order is made, state the reason for not making an order (section 486).
- Clause 29 will add, among other things, the two new offences created by Bill C-10 to the section which provides that, when an accused is charged with certain offences, the court may make an order directing that the identity of, or information that would identify, the complainant or another witness not be published, broadcasted or transmitted in any way (section 486.4).
- Clause 30 will add the two new offences created by Bill C-10 to the list of primary designated offences under the forensic DNA analysis section of the *Criminal Code* (sections 487.04 to 487.0911). This means that the taking of a bodily substance for forensic DNA analysis is obligatory (with certain exceptions).
- Clause 31 will add the two new offences created by Bill C-10 to the list of designated offences under the sex offender information section of the *Criminal Code* (sections 490.011 to 490.032). Upon application of the prosecutor, the court sentencing an offender for a designated offence shall make an order requiring the person to comply with the *Sex Offender Information Registration Act*¹⁰ (section 490.011).
- Clause 35 will add the new offence of agreement or arrangement – sexual offence against child (section 172.2) as well as procuring (section 212(1)) and living on the avails of prostitution of person under 18 (section 212(2)) to the list of

designated offences in the dangerous and long-term offenders section of the *Criminal Code* (sections 752 to 761). Conviction for a designated offence can lead to a designation as a dangerous or long-term offender (section 752).

- Clause 36 adds the new offences created by Bill C-10 and many other sexual offences in relation to young persons to the list of those that may indicate the offender will reoffend and, therefore, may be designated a long-term offender (section 753.1).
- Clause 37 will add the new offences, along with other offences committed against young persons, to those which can give rise to an order that the defendant enter into a recognizance to not engage in activity that involves contact with persons under 16 years of age or attending certain places where persons under 16 years of age are likely to be present (section 810.1).

3.2.6 CONSEQUENTIAL AMENDMENTS

Bill C-10 differs from its predecessor Bill C-54 in that clause 49 of the bill has added consequential amendments. These amendments to the *Criminal Records Act* will add the new offences created by Bill C-10 (sections 171.1 and 172.2 of the *Criminal Code*) to Schedule 1 of that Act. This will mean that a record suspension will not be granted to an offender who has been convicted of these offences, with some exceptions. There remains the possibility of obtaining a record suspension after a conviction for committing one of the new offences if the offender was less than five years older than the victim, the offender did not use, threaten to use or attempt to use violence, and the offender was not in a position of trust or authority towards the victim.

NOTES

1. An order of prohibition is set out in section 161 of the *Criminal Code*. This provision permits a court to make an order prohibiting an offender from attending near certain places where persons under 16 years of age may be present and from obtaining employment or a volunteer position which may involve the offender's being in a position of trust or authority over persons under 16 years of age. The order of prohibition may be made where the offender is found guilty of a specified sexual offence and the complainant was under 16 years of age.

A recognizance is set out in section 810.1 of the *Criminal Code*. This section allows anyone to lay an information before a provincial court judge for the purpose of having the defendant enter into a recognizance, including conditions that he or she not engage in activity that involves contact with persons under 16 years of age and prohibiting him or her from attending certain places where persons under 16 years of age are likely to be present. The informant must fear, on reasonable grounds, that the defendant will commit one of the specified sexual offences in respect of children under 16 years of age.

2. Many offences can be prosecuted either by summary conviction or indictment. The Crown chooses or elects the mode of prosecution. Such offences are referred to as "hybrid" or "Crown option" or "dual procedure" offences. Hybrid offences are considered indictable until the Crown makes its election.

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Summary conviction offences are considered to be less serious than indictable offences in the *Criminal Code*. The main difference between them is that the procedure for summary conviction offences is, as the name implies, more straightforward. Unless a different penalty is specified, summary conviction offences are punishable by a fine of up to \$5,000 or six months' imprisonment, or both penalties, whereas the penalty for an indictable offence can be up to life imprisonment. An individual is not always fingerprinted for a summary conviction offence, but will be for an indictable offence. No prosecution of a summary offence can be undertaken more than six months after the commission of the offence, except with the agreement of the prosecutor and the defendant, while there is no limitation period for indictable offences. For summary offences, the defendant cannot choose the type of trial: it takes place in summary conviction court, before a judge alone. For the majority of indictable offences, the defendant can choose the type of trial: judge with jury or judge alone. Another difference between the two types of offences is that the waiting period before eligibility for a pardon for a summary conviction offence is three years, while for an indictable offence it is five years.

3. "Laying an information" usually refers to the formal means of laying a charge against an offender. The *Criminal Code* requires that a charge be brought in writing and under oath before a Justice of the Peace. In this instance, the information is laid before a provincial court judge and does not contain a formal charge, merely a fear that the defendant will commit one of the specified sexual offences in respect of persons under 16 years of age.
4. A "recognizance" refers to an obligation entered into before a judge by which the defendant must keep the peace and be of good behaviour. Under section 810.1 of the *Criminal Code*, the judge may add conditions to the recognizance, such as prohibiting the defendant from engaging in any activity that involves contact with persons under the age of 16 years.
5. Department of Justice, "[Backgrounder: Protecting Children from Sexual Predators](#)," 4 November 2010.
6. Nicole Crutcher, "The Legislative History of Mandatory Minimum Penalties of Imprisonment in Canada," *Osgoode Hall Law Journal*, Vol. 39, 2001, p. 273.
7. Section 12 of the *Canadian Charter of Rights and Freedoms* states: "Everyone has the right not to be subjected to any cruel and unusual treatment or punishment."
8. *R. v. Smith*, [1987] 1 S.C.R. 1045.
9. *R. v. Nasogaluak*, [2010] 1 S.C.R. 206.
10. *Sex Offender Information Registration Act*, S.C. 2004, c. 10.

4 AMENDMENTS TO THE *CONTROLLED DRUGS AND SUBSTANCES ACT*
 [BILL C-10, PART 2, CLAUSES 32–33, 39–48 AND 50–51
 (FORMER BILL S-10)]

4.1 BACKGROUND

4.1.1 GENERAL

Clauses 32–33, 39–48, and 50-51 of Part 2 of Bill C-10 seek to amend the *Controlled Drugs and Substances Act*¹ (CDSA) to provide for minimum penalties for serious drug offences, such as dealing drugs for organized crime purposes or using a weapon or violence when involved in proscribed drug-related activities. Currently, there are no mandatory minimum penalties under the CDSA. These clauses also increase the maximum penalty for cannabis (marijuana) production and move certain substances from Schedule III of the Act to Schedule I.

The bill contains an exception that allows courts not to impose a mandatory sentence if an offender successfully completes a Drug Treatment Court (DTC) program or a treatment program which, as set out in section 720(2) of the *Criminal Code*, is approved by a province and is under the supervision of a court. These programs are designed to assist certain individuals who are charged with drug-related offences (should they meet certain eligibility criteria) to overcome their drug addictions and avoid future conflict with the law. The DTC program involves a mix of judicial supervision, social services support, incentives for refraining from drug use, and sanctions for failure to comply with the orders of the court.

Clauses 32–33, 39–48, and 50–51 of Bill C-10 are almost identical to provisions found in Bill S-10, An Act to amend the Controlled Drugs and Substances Act and to make related and consequential amendments to other Acts (short title: Penalties for Organized Drug Crime Act), which was introduced in the Senate on 5 May 2010 by the Leader of the Government in the Senate, the Honourable Marjory LeBreton. That bill was adopted by the Senate, with one amendment calling for a cost-benefit analysis of mandatory minimum sentences, but it died on the *Order Paper* when the 40th Parliament was dissolved on 26 March 2011.

A similar predecessor bill – Bill C-15 – was introduced during the 2nd Session of the 40th Parliament. Although Bill C-15 passed the House of Commons and the Senate, with certain amendments, it died on the *Order Paper* on 30 December 2009 when Parliament was prorogued, thereby ending the 2nd Session of the 40th Parliament. It is almost identical to Bill C-26, which received second reading during the 2nd Session of the 39th Parliament, but which died on the *Order Paper* when Parliament was dissolved on 7 September 2008.

4.1.2 DRUG USE IN CANADA

According to Health Canada data, drug use in Canada changes over time. This is shown through a comparison of results from the Canadian Addiction Survey (CAS) and the Canadian Alcohol and Drug Use Monitoring Survey (CADUMS) (see tables 4-1 and 4-2).

The Canadian Alcohol and Drug Use Monitoring Survey (CADUMS) is an on-going general population survey of alcohol and illicit drug use among Canadians aged 15 years and older that was launched in April 2008.² Derived from and similar to the Canadian Addiction Survey (CAS) of 2004,³ CADUMS was designed to provide detailed national and provincial estimates of alcohol- and drug-related behaviours and outcomes, as well as an examination of trends over time. The results for 2010 are based on telephone interviews with 13,615 respondents, across all 10 provinces.

Table 4-1 – Changes in Drug Use by People over the Age of 15, Canada, 2004–2010

	2004 CAS ^a Results	2008 CADUMS ^b Results	2009 CADUMS Results	2010 CADUMS Results
Number of respondents	13,909	16,640	13,082	13,615
Cannabis Use				
Cannabis – Past year (%)	14.1	11.4	10.6	10.7
Cannabis – Lifetime (%)	44.5	43.9	42.4	41.5
Cannabis – Age of initiation	18.8	18.4	18.7	18.4
Illicit Drug Use, Past Year (%)				
Cocaine/Crack	1.9	1.6	1.2	0.7
Speed	0.8	1.1	0.4	0.5 ^c
Hallucinogens (excluding salvia)	0.7	– ^d	0.7	0.9
Hallucinogens (including salvia)	–	2.1	0.9	1.1
Ecstasy	1.1	1.4	0.9	0.7
Any 6 drugs (hallucinogens excl. salvia) ^e	14.5	–	11.0	11.0
Any 5 drugs (hallucinogens excl. salvia) ^f	3.0	–	2.0	1.8
Any 6 drugs (hallucinogens incl. salvia) ^e	–	12.1	11.1	11.1
Any 5 drugs (hallucinogens incl. salvia) ^f	–	3.9	2.1	2.0
Pharmaceutical Use, Past Year (%)				
Pain relievers	–	21.6	19.2	20.6
Pain relievers to get high	–	0.3	0.4	0.2 ^c
Pain relievers to get high – among users	–	1.5	2.3	1.1 ^c
Stimulants	–	1.1	1.0	1.0
Stimulants to get high	–	0.3	0.1	S ^g
Stimulants to get high – among users	–	25.5	9.4	S
Sedatives	–	10.7	9.1	8.7
Sedatives to get high	–	0.2	0.2	0.1 ^c
Sedatives to get high – among users	–	1.4 ^c	1.7	0.5 ^c
Any pharmaceutical	–	28.4	25.0	26.0
Any pharmaceutical to get high	–	0.6	0.6	0.3 ^c
Any pharmaceutical to get high – among users	–	2.0	2.3	1.0 ^c
Drug-Related Harms, Past Year (%) ^h				
Any drug harm to self – of total population	2.8	2.7	–	2.1
Any drug harm to self among users of any 5 drugs ⁱ	36.7	37.5	–	36.4
Any drug harm to self among users of any drug ^j	17.5	21.7	–	17.0

LEGISLATIVE SUMMARY OF BILL C-10

- Notes:
- a. Canadian Addiction Survey
 - b. Canadian Alcohol and Drug Use Monitoring Survey
 - c. The estimate is qualified due to high sampling variability.
 - d. The symbol “–” means there are no comparable estimates.
 - e. Cannabis, cocaine/crack, speed, ecstasy, hallucinogens, heroin.
 - f. Cocaine/crack, speed, ecstasy, hallucinogens, heroin.
 - g. The symbol “S” means that the estimate is suppressed due to high sampling variability.
 - h. At least one of eight harms to physical health; friendships and social life; financial position; home life or marriage; work, studies, or employment opportunities; legal problems; difficulty learning; housing problems.
 - i. Among past year users any 5 drugs (cocaine, speed, hallucinogens, ecstasy, heroin). CADUMS 2010: hallucinogens include salvia.
 - j. Among past year users CAS (cannabis, cocaine, speed, hallucinogens, ecstasy, inhalants, heroin, steroids), CADUMS 2008 (cannabis, cocaine, speed, hallucinogens, ecstasy, inhalants, heroin, meth, pain killers to get high, stimulants to get high, sedatives to get high), CADUMS 2010 (cannabis, cocaine, speed, hallucinogens including salvia, ecstasy, inhalants, heroin, meth, pain killers to get high, stimulants to get high, sedatives to get high).

Source: Health Canada, “Table 3: Changes between CAS 2004, CADUMS 2008–2010, overall – Drugs,” [Canadian Alcohol and Drug Use Monitoring Survey](#).

Table 4-2 – Changes in Drug Use by Age, Canada, 2004–2010

	CAS ^a 2004 15–24	CADUMS ^b 2008 15–24	CADUMS 2009 15–24	CADUMS 2010 15–24	CAS 2004 25+	CADUMS 2008 25+	CADUMS 2009 25+	CADUMS 2010 25+
Number of respondents	2,085	1,443	955	3,989	11,519	15,197	12,079	9,626
Cannabis Use								
Cannabis – Past year (%)	37.0	32.7	26.3	25.1	10.0	7.3	7.6	7.9
Cannabis – Lifetime (%)	61.4	52.9	42.9	41.4	41.8	42.1	42.3	41.7
Age of initiation	15.6	15.5	15.6	15.7	19.7	19.2	19.3	18.9
Illicit Drug Use, Past Year (%)								
Cocaine/Crack	5.5	5.9	3.0 ^c	2.7	1.2	0.8	0.9	0.3 ^c
Speed	3.9	3.7	S ^d	1.9 ^c	0.2	0.6	S	S
Hallucinogens (excl. salvia)	3.5	– ^e	3.2 ^c	3.4	0.1	–	0.3	0.4 ^c
Hallucinogens (incl. salvia)	–	10.2	4.4	4.6	–	0.6	0.3	0.4 ^c
Ecstasy	4.4	6.5	3.6	3.8	0.5	0.4	0.4	S
Any 6 drugs (hallucinogens excl. salvia) ^f	37.9	–	27.3	25.9	10.3	–	7.9	8.1
Any 5 drugs (hallucinogens excl. salvia) ^g	11.3	–	5.5	7.0	1.5	–	1.3	0.8 ^c
Any 6 drugs (hallucinogens incl. salvia) ^f	–	34.0	27.5	26.1	–	7.9	7.9	8.2
Any 5 drugs (hallucinogens incl. salvia) ^g	–	15.4	6.3	7.9	–	1.7	1.3	0.8 ^c

LEGISLATIVE SUMMARY OF BILL C-10

	CAS ^a 2004 15–24	CADUMS ^b 2008 15–24	CADUMS 2009 15–24	CADUMS 2010 15–24	CAS 2004 25+	CADUMS 2008 25+	CADUMS 2009 25+	CADUMS 2010 25+
Pharmaceutical Use, Past Year (%)								
Pain relievers	–	17.7	14.6	18.2	–	22.4	20.2	21.0
Pain relievers to get high	–	0.9 ^c	1.2 ^c	S	–	0.2	0.3	S
Pain relievers to get high – among users	–	4.9	8.5	S	–	1.0	1.4	S
Stimulants	–	3.1	2.7 ^c	3.2	–	0.7	0.6	0.6 ^c
Stimulants to get high	–	1.2 ^c	S	S	–	0.1	S	S
Stimulants to get high – among users	–	38.3 ^c	S	S	–	14.7 ^c	S	S
Sedatives	–	5.5	4.0	3.5	–	11.7	10.1	9.7
Sedatives to get high	–	0.8 ^c	S	S	–	S	S	S
Sedatives to get high – among users	–	14.4 ^c	S	S	–	S	S	S
Any pharmaceutical	–	22.3	18.2	22.1	–	29.5	26.3	26.7
Any pharmaceutical to get high	–	2.1 ^c	1.7 ^c	0.8 ^c	–	0.3	0.3	S
Any pharmaceutical to get high – among users	–	9.4	9.5	3.8	–	0.9	1.3	S
Drug-Related Harms, Past Year (%) ^h								
Any drug harm to self – of total population	9.5	10.8	–	6.9	1.6	1.1	–	1.2 ^c
Any drug harm to self among users of any drugs ⁱ	42.1	42.0	–	41.6	28.7	29.5	–	26.6 ^c
Any drug harm to self among users of any drug ^j	24.0	31.5	–	24.7	12.7	13.5	–	12.2 ^c

- Notes:
- a. Canadian Addiction Survey
 - b. Canadian Alcohol and Drug Use Monitoring Survey
 - c. The estimate is qualified due to high sampling variability.
 - d. The symbol “S” means that the estimate is suppressed due to high sampling variability.
 - e. The symbol “–” means there are no comparable estimates.
 - f. Cannabis, cocaine/crack, speed, ecstasy, hallucinogens, heroin.
 - g. Cocaine/crack, speed, ecstasy, hallucinogens, heroin.
 - h. At least one of eight harms to physical health; friendships and social life; financial position; home life or marriage; work, studies, or employment opportunities; legal problems; difficulty learning; housing problems.

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- i. Among past year users any 5 drugs (cocaine, speed, hallucinogens, ecstasy, heroin). CADUMS 2010: hallucinogens include salvia.
- j. Among past year users CAS (cannabis, cocaine, speed, hallucinogens, ecstasy, inhalants, heroin, steroids), CADUMS 2008 (cannabis, cocaine, speed, hallucinogens, ecstasy, inhalants, heroin, meth, pain killers to get high, stimulants to get high, sedatives to get high), CADUMS 2010 (cannabis, cocaine, speed, hallucinogens including salvia, ecstasy, inhalants, heroin, meth, pain killers to get high, stimulants to get high, sedatives to get high).

Source: Health Canada, "Table 4: Changes between CAS 2004 and CADUMS 2008–2010 by age – Drugs," [Canadian Alcohol and Drug Use Monitoring Survey](#).

Health Canada has summarized the major findings from its latest survey of drug use by Canadians as follows:⁴

- Among Canadians 15 years and older, the prevalence of past-year cannabis use decreased from 14.1% in 2004 to 10.7% in 2010.
- The prevalence of past-year cannabis use decreased, among young people aged 15 to 24 years, from 37.0% in 2004 to 25.1% in 2010.
- Among Canadians 15 years and older, the prevalence of past-year cocaine or crack decreased from 1.9% in 2004 to 1.2% in 2010, while past-year use of hallucinogens (0.9%), ecstasy (0.7%) and speed (0.5%) is comparable to the rates of use reported in 2004.
- Among youth aged 15 to 24 years, past-year use of at least one of five illicit drugs (cocaine or crack, speed, hallucinogens, ecstasy, and heroin) decreased from 11.3% in 2004 to 7.0% in 2010.
- The rate of drug use by young people 15 to 24 years of age remains much higher than that reported by adults 25 years and older; it is three times higher for cannabis use (25.1% versus 7.9%), and almost nine times higher for past-year use of any drug excluding cannabis (7.9% versus 0.8%).
- The rates of psychoactive pharmaceutical use and abuse remains comparable to the rates reported in 2009: 26.0% of respondents aged 15 years and older indicated that they had used an opioid pain reliever, a stimulant, or a sedative or tranquilizer in the past year while 0.3% reported that they used any of these drugs to get high in the past year.

A number of caveats should be raised with the results of any survey of drug use. Reported drug usage rates are usually considered to be conservative estimates of the actual usage rates, as several factors lead to the under-reporting of drug use in general population surveys. Drug users may be under-sampled, and those who are sampled may not be willing to disclose what is a criminal act. Many younger people use cell phones only and so would not respond to a survey that uses randomly dialled numbers obtained from phone directories. In addition, high-risk groups such as the homeless are excluded from these surveys.

Since the publication of the CAS in 2005, some regions of Canada have reported on drug use rates. Yukon and the Northwest Territories, which were excluded from the CAS, have each reported on surveys of their populations. The Yukon Addictions Survey, released in June 2005, reported that illicit drug use in Yukon was generally similar to the rest of Canada except for cannabis use. Twenty-one percent of

Yukoners over the age of 15 reported using cannabis in the previous 12 months, compared to 14% of Canadians overall. During the previous 12 months, the rates of illicit drug use by Yukoners were 3% for cocaine, 1% for hallucinogenic drugs and 1% for ecstasy.⁵ The Northwest Territories reported a similar level of past-year cannabis use (20.7%). An estimated 2.7% of residents of the Northwest Territories 15 years of age and older reported using at least one of the following five drugs in the year preceding the survey: cocaine, hallucinogens, speed, ecstasy, or heroin.⁶

In 2007, l'Institut de la statistique du Québec released a study indicating that drug use among secondary school students had declined. The study indicated that in 2006, 30.2% of adolescents had consumed an illicit substance at least once in the previous year, while in 2000 the figure was 42.9%.⁷ Furthermore, the average age at which students started to experiment with drugs increased to 13.2 years from approximately 13 years of age in 2004.⁸

The Canadian Centre on Substance Abuse published *The Costs of Substance Abuse in Canada 2002*.⁹ This study estimated the impact in terms of death, illness and economic costs caused in whole or in part by the abuse of tobacco, alcohol and illegal drugs for the year 2002. In economic terms, abuse occurs when substance use imposes costs on society that exceed the costs to the user of obtaining the substance. These costs are designated as “social” costs. Measured in terms of the burden on services such as health care and law enforcement, and the loss of productivity in the workplace or at home resulting from premature death and disability, the overall cost of substance abuse in Canada in 2002 was estimated to be \$39.8 billion. This represents a cost of \$1,267 for every man, woman, and child in Canada. Tobacco accounted for about \$17 billion or 42.7% of that total estimate, alcohol accounted for about \$14.6 billion (36.6%) and illegal drugs for about \$8.2 billion (20.7%). Productivity losses amounted to \$24.3 billion or 61% of the total, while health care costs were \$8.8 billion (22.1%). The third highest contributor to total substance-related costs was law enforcement, with a cost of \$5.4 billion or 13.6% of the total.

In 2002, a total of 1,695 Canadians died as a result of illegal drug use, accounting for 0.8% of all deaths. This can be compared to 37,209 Canadians who died from tobacco use (16.6% of all deaths) and 4,258 from alcohol use (1.9% of all deaths). The leading causes of death linked to illegal drug use were overdose (958), drug-attributable suicide (295), drug-attributable hepatitis C infection (165), and HIV infection (87). Deaths linked to illegal drugs resulted in 62,110 potential years of life lost. Illegal drug-attributed illness accounted for 352,121 days of acute care in hospital.

The Canadian Centre on Substance Abuse (CCSA) has also published a document outlining the relationship between the perceived seriousness and the actual costs of substance abuse in Canada.¹⁰ The study found that, while the total social costs associated with alcohol are more than twice those for all other illicit drugs, the public consistently rated the overall seriousness of illicit drugs as higher in the Canadian Addiction Survey. The reasons for this misperception may relate to the fact that alcohol is a legal, socially accepted product that is regularly used by the vast majority of Canadians. While over 90% of Canadians have direct, personal experience with

alcohol, only 3% of CAS respondents reported past-year use of the five most popular illicit drugs, so perceptions of risk will likely be inflated for these substances due to the unfamiliarity factor. The CCSA also points to the police, concerned citizen groups, political leaders and policy makers as those involved in amplifying the perceptions of the risks associated with illicit drug abuse. One example of this is methamphetamine which, while a dangerous drug, is used much less frequently than alcohol, cannabis, and cocaine. This finding raises questions about the appropriateness of using a drug like methamphetamine as a primary driver for substance abuse policy.

4.1.3 CANADA'S DRUG STRATEGY

Canada's first federal drug strategy was introduced in 1987 under the title "National Drug Strategy." It acknowledged that substance abuse was primarily a health issue but continued the enforcement-based approach that Canada has adopted since enacting the *Opium Act* in 1908, which made it illegal to import, manufacture or sell opium. Efforts to control and regulate psychoactive substances have subsequently relied on legislation to ban the production, distribution and use of illicit drugs. The legislation used has included the *Opium and Drug Act*, the *Narcotic Control Act*, the *Food and Drug Act* and the current *Controlled Drugs and Substances Act*. In 1988, Parliament created the Canadian Centre on Substance Abuse as Canada's national non-government organization on addictions. Its primary responsibility is to provide objective information on addiction.

In 1992, Parliament approved Canada's Drug Strategy, a coordinated effort to reduce the harm caused by alcohol and other drugs. This strategy called for a balanced approach to reducing both the demand for drugs and their supply through such activities as control and enforcement, prevention, treatment and rehabilitation, and harm reduction. In 1997, the *Controlled Drugs and Substances Act* was introduced and remains the current legislation for controlling the use of illicit drugs. In 2001, the Auditor General published a report on the federal government's role in the area of illicit drugs.¹¹ The Auditor General noted that there was no comprehensive public reporting on illicit drugs. Until the government provided comprehensive public reporting at the national level, it would be impossible to measure the net effectiveness of Canada's Drug Strategy.

Canada's Drug Strategy was renewed in 2003. It was described as an initiative to reduce the harm associated with the use of narcotics and controlled substances and the abuse of alcohol and prescription drugs. The Strategy was said to address underlying factors associated with substance use and abuse. It included education, prevention and health promotion initiatives as well as enhanced enforcement measures. Part of the Strategy involved a commitment to report to Parliament and Canadians every two years on the Strategy's direction and progress.¹² Yet it was reported in a December 2006 article that no reports or evaluations of the renewed Strategy had been made available.¹³

On 4 October 2007, the Government of Canada introduced its National Anti-Drug Strategy. At that time, funding in the amount of approximately \$64 million was provided in three areas: prevention (\$10 million), treatment (\$32 million), and

enforcement (\$22 million). As a complement to drug prevention and treatment efforts, the Enforcement Action Plan is said to bolster law enforcement efforts and the capacity to combat effectively marijuana grow operations and synthetic drug production and distribution operations. One part of the plan is ensuring that strong and adequate penalties are in place for serious drug crimes.¹⁴

The goal of the National Anti-Drug Strategy (which has funding of \$578.5 million allocated from 2007–2008 to 2011–2012) is stated to be the reduction of the supply and demand for illicit drugs.¹⁵ The three key priorities of the Strategy are to prevent illicit drug use, treat illicit drug addiction, and combat illicit drug production and distribution. Where the destination of the funding for the National Anti-Drug Strategy is indicated, 22% of it is allocated to the Prevention Action Plan, 31% to the Treatment Action Plan and 47% to the Enforcement Action Plan. This latter figure includes \$67.7 million which will be released should clauses 32–33, 39–48, and 50–51 of Bill C-10 receive Royal Assent.¹⁶ These clauses are seen by the Government of Canada as part of its effort, under the National Anti-Drug Strategy, to combat illicit drug production and distribution. The proposed changes to the legislation are intended to help disrupt criminal enterprises by targeting drug suppliers.¹⁷

4.1.4 THE CURRENT LAW

The *Controlled Drugs and Substances Act* (CDSA) regulates certain types of drugs and associated substances. The drugs and substances are listed in Schedules I to VIII of the CDSA. There are currently no mandatory prison terms under the CDSA, but the most serious drug offences have a maximum penalty of life imprisonment. The offences in the Act include possession, “double doctoring,” trafficking, importing and exporting, and production of substances included in the schedules to the CDSA. The punishment for the offences will depend upon which schedule applies to the drug in question. Schedule I includes the drugs that are commonly thought of as the most “dangerous,” e.g., cocaine and methamphetamine. Schedule II lists cannabis and its derivatives, while Schedule III includes amphetamines and lysergic acid diethylamide (LSD). Schedule IV includes barbiturates.

The CDSA fulfills obligations under several international protocols and covers offences relating to property and the proceeds of drug offences. Three international conventions on illicit drugs cover cannabis, cocaine, heroin, other psychoactive substances and their precursors: the *Single Convention on Narcotic Drugs, 1961*,¹⁸ the *Convention on Psychotropic Substances, 1971*,¹⁹ and the *United Nations Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988* (Vienna Convention).²⁰ The Single Convention limits the production and trade in prohibited substances to the quantity needed to meet the medical and scientific needs of the state parties. Each state creates the necessary legislative and regulatory measures for establishing the controls within its own territory to fulfill the commitments of the Convention. Under the 1971 Convention, psychoactive substances (such as THC found in marijuana) are to be subjected to controls similar to those that apply under the 1961 Convention. Under the 1988 Convention, parties must take cooperative action to control the illicit cultivation, production and distribution of drugs of abuse.

Canada's drug laws do not prohibit all possession or use of illicit drugs.²¹ Thus, the *Narcotic Control Regulations*²² allow for the distribution of controlled drugs and substances by pharmacists, medical practitioners and hospitals and outline the records that must be kept to account for the distribution of these drugs. Pursuant to section 53(3) of the regulations, a medical practitioner may administer methadone, for example, if the practitioner has an exemption under section 56 of the CDSA with respect to methadone. Section 56 of the CDSA gives the power to the Minister of Health to exempt any person or controlled substance from the application of the CDSA if the exemption is necessary for a medical or scientific purpose or is otherwise in the public interest. The minister may also issue a licence to cultivate, gather or produce opium poppy or marijuana for scientific purposes.²³

In addition, the *Marihuana Medical Access Regulations*²⁴ allow for authorizations to possess marijuana to be issued to those persons who can prove a medical need for it. A holder of a personal-use production licence is also authorized to produce and keep marijuana for the medical purpose of the holder.²⁵ A specific limitation on the lawful source of supply of dried marijuana was declared invalid as contrary to section 7 of the *Canadian Charter of Rights and Freedoms* in 2008.²⁶ The one-grower-to-one-user ratio was held to unjustifiably limit the ability of authorized persons to access their marijuana for medical purposes. This decision was confirmed by the Federal Court of Appeal.²⁷ In response, the government published *Regulations Amending the Marihuana Medical Access Regulations* in the *Canada Gazette* on 27 May 2009.²⁸ These changes doubled the current ratio, making it one grower to two users. The explanation accompanying the amendments stated that a full review of the access to medical marijuana is required given that the program was never intended to facilitate the widespread, potentially large-scale production of marijuana for medical purposes.

Drug crimes include possession, trafficking, importing, exporting and production-related offences as set out in the CDSA. In 2010, there were almost 108,600 police-reported drug crimes in Canada, about half of which (52%) were for possession of cannabis.²⁹ Between 2009 and 2010, the rate of drug crime increased by 10%, continuing a general trend that began in the early 1990s. The rising trend in the rate of drug crime coincides with a decreasing trend in the overall crime rate.

According to an article in Statistics Canada's justice-related periodical, *Juristat*,³⁰ the increases in drug crime rates may be influenced by police practices that focus more law enforcement efforts on addressing this type of offence when time, resources and priorities permit. The overall increase in the rate of drug crime was driven by cannabis offences, which were up 13% between 2009 and 2010. The rate of cocaine offences fell for the third year in a row, down 5% from the year before.³¹

Statistics Canada has also presented information from the Adult Criminal Court Survey³² and the Youth Court Survey³³ on the decisions and sentencing outcomes for those charged with drug offences. Given that not all crimes come to the attention of police, the data likely under-represent the total number of drug offences that occur in Canada. The full extent of drug crime, therefore, is unknown. In 2006–2007, about half of all drug-related court cases were stayed, withdrawn, dismissed or discharged, due to resolution discussions, lack of evidence, or a referral to court-sponsored

diversion programs. If convicted, youth were most often sentenced to probation. Probation was also the most common sentence for adults convicted of drug possession; however, adults convicted of drug trafficking were more often sentenced to custody.³⁴

4.1.5 DRUG TREATMENT COURTS

4.1.5.1 THE CREATION OF THE DRUG TREATMENT COURTS IN CANADA

One part of the effort to break the cycle of drug use and criminal recidivism has been the creation of the Drug Treatment Courts (DTCs). The objective of Drug Treatment Courts is to reduce substance abuse, crime and recidivism through the rehabilitation of persons who commit crimes to support their substance dependency.³⁵ Canada's first Drug Treatment Court was established in Toronto, on 1 December 1998, as part of a four-year pilot project.³⁶ It was initiated by Justice Paul Bentley of the Ontario Court of Justice. According to Public Safety Canada, the Drug Treatment Court in Toronto was designed specifically to address the unique needs of non-violent offenders who abused cocaine or opiates.³⁷

In February 2001, the Department of Justice announced that the governments of Canada and British Columbia had reached an agreement to develop a new DTC in the city of Vancouver. The Vancouver pilot program would modify the Toronto model in order to meet the specific needs of the community and expand the scope of the drug treatment court models in Canada.³⁸ The goal was to build upon the experience gained in Toronto and establish a successful made-in-BC program.

As part of the renewal of Canada's Drug Strategy, the federal government made a further commitment to expand the use of drug treatment courts in Canada. In December 2004, a call was made for funding proposals. The proposal review committee included officials from the Department of Justice Canada, Health Canada and the Canadian Centre for Substance Abuse.³⁹ The review was also carried out by treatment experts in the field of addictions. Each proposal was further subjected to a comprehensive assessment based on objective criteria and the demonstrated need for a treatment court in that community.

In June 2005, the government of Canada announced that it would provide additional funding in order to establish four new drug treatment courts. It would give \$13.3 million over a period of four years.⁴⁰ As a result, there are now six federally funded DTCs in Canada. They are located in Toronto (December 1998), Vancouver (December 2001), Edmonton (December 2005), Winnipeg (January 2006), Ottawa (March 2006) and Regina (October 2006).⁴¹ It is recognized that each of the drug treatment courts is unique, having its own set of partners to reflect the community in which it operates. Furthermore, each program is designed to meet the multiple and highly complex needs of its community.

4.1.5.2 THE PURPOSE OF THE DRUG TREATMENT COURTS

One of the main goals of the Drug Treatment Court Program is to facilitate the treatment of drug offenders by providing an intensive, court-monitored alternative to

incarceration. It is said that drug treatment courts have a more humane approach to addressing minor drug crimes than incarceration.⁴² According to the Department of Justice, the DTCs take a comprehensive approach “intended to reduce the number of crimes committed to support drug dependence through judicial supervision, comprehensive substance abuse treatment, random and frequent drug testing, incentives and sanctions, clinical case management, and social services support.”⁴³

Another purpose of DTCs is to reduce the social and economic costs of illicit substance abuse. In 2005, then Minister of Health Ujjal Dosanjh said that the expansion of the DTCs underscored the government’s commitment to helping drug offenders overcome their addictions. He further stated that the benefits of these new courts would extend not only to participants but also to all Canadians by helping to reduce the staggering health, social and economic costs associated with substance abuse.⁴⁴

4.1.5.3 EVALUATION AND FUNDING OF THE DRUG TREATMENT COURTS

Funding is provided through the Drug Treatment Court Funding Program and is managed by the Department of Justice Canada, in partnership with Health Canada.⁴⁵ All of the treatment programs, “as a condition of their funding, are responsible for developing site-specific results-based evaluation/accountability frameworks, as well contributing to the national evaluation/accountability framework.”⁴⁶ The funding recipients are therefore required to complete reports of their activities annually.⁴⁷ The DTC Funding Program is responsible for collecting data on the effectiveness of the drug treatment courts and promoting and establishing standards that are consistent from region to region.⁴⁸ The compiled results are used to support annual reports to Parliament and the Canadian public.⁴⁹

It is said that the success of the DTCs can be measured not only in terms of dramatic reductions in criminal behaviour by those engaged in the program but also by a significant reduction in drug use.⁵⁰ The positive effects may not only have an impact on the criminal justice system, but may also spill over into the health system. Most of the participants in the drug treatment programs demonstrate a significant improvement in their physical and mental health. In August 2006, a meta-analytic examination of drug treatment courts was done by the Department of Justice Canada in order to determine whether or not the DTCs reduce recidivism. It was determined that the results provide clear support for the use of drug treatment courts as a method of reducing crime among offenders with substance abuse problems.⁵¹ The study, however, did not examine the cost-effectiveness of the program.

According to Health Canada, early evaluations of the Toronto DTC showed that there were high rates of retention of drug abusers and program participation. The ongoing evaluations have recognized this Canadian program as a promising form of drug intervention.⁵² The National Crime Prevention Centre has published some evaluations of DTCs. The evaluation of the Vancouver DTC concludes that, although many participants maintained patterns of criminal behaviour and substance use after the program, the data suggests that there is a modest but significant decrease in

drug use and drug-related crimes for those who complete the program. Only 14% of participants, however, completed the program. The evaluation concluded that, for the model to be successful, strategies are needed to encourage participants to complete the program.⁵³

4.1.5.4 THE DRUG TREATMENT COURT PROGRAM

Participation in the DTC program is voluntary. The accused who has been charged with a non-violent criminal offence or an offence under the *Controlled Drugs and Substances Act* must apply for admission into the program. Individuals who are charged with violent offences or have a history of violent offences generally do not qualify for the DTC program.⁵⁴

The participants in the DTC are most commonly charged with non-violent *Criminal Code* offences, such as theft, possession of stolen property, non-residential break and enter, mischief and communication for the purpose of prostitution. With respect to drug offences, the more frequent offences are those of simple possession, possession for the purpose of trafficking and trafficking (at the street level). The above-noted offences are generally known to be committed by individuals who are trying to feed an addiction.

An application form must be completed and then reviewed by the DTC team. The applicant's eligibility is determined by the Crown Attorney, who acts as the gatekeeper. The prosecutor has final discretion with respect to the nature of the offence and/or the applicant's criminal record.⁵⁵ Eligibility is determined on a case-by-case basis. Therefore, a criminal record will not necessarily keep an applicant from being considered for the program. Offenders who are gang members or who used a weapon in the commission of their offence may not be eligible for the DTC.⁵⁶

A common condition for admission into the DTC is a plea of guilt. The participant is assessed in order to create a treatment plan that is tailored to his or her specific needs. He or she will be stabilized and receive medical attention. If necessary, the methadone program will be administered. Drug treatment court staff will help ensure that the participant has safe housing, stable employment and/or an education. If required, job training will also be provided. The length of the program is approximately one year. As it is considered an outpatient program, the offender will be required to attend both individual and group counselling. Each participant is subject to random urine screening. The participant will be required to appear personally in court on a regular basis. It is expected that the participant will be honest and disclose any high-risk activities and information on whether or not he or she has relapsed. The judge will review his or her progress and can either impose sanctions or provide rewards.⁵⁷

As the program is designed to assist individuals who have severe and long-term addictions, a relapse will not necessarily lead to expulsion from the program. This being said, persistent non-compliance with the treatment program, such as the continued use of substances, could lead to the individual's removal from the program.

Once the participant has met the minimum participation requirement, he or she may apply for graduation. Participants who successfully graduate from the DTC may receive a non-custodial sentence. The sentence may include a period of probation, restitution and/or fines.⁵⁸

4.1.5.5 OTHER DRUG TREATMENT COURTS IN THE WORLD

Drug treatment courts also exist in the United States, the United Kingdom, Jamaica, Bermuda, Brazil, Ireland, Scotland and Australia. DTCs in the United States have been in existence since 1969. There are well over 1,000 drug treatment courts in that country, where follow-up studies indicate that only a very small percentage of program graduates reoffend.⁵⁹

4.1.5.6 WOMEN IN THE DRUG TREATMENT COURT PROGRAM

According to Public Safety Canada,⁶⁰ one of the lessons learned in the Toronto Drug Treatment Court project was that when planning the program, more attention needed to be given to women and young people under the age of 25. It was observed that a significant number of people in these groups would not return to the project after their initial assessment or would often drop out in the early stages of the program. It was further recommended that monitoring techniques be used to assess and address the needs of women.

Dawn Moore, a professor of criminology at Carleton University, is conducting a nationwide study of women in treatment programs. She is interested in knowing why there is such a high rate of females who drop out of the programs. She has observed that the programs are largely designed without accounting for the specific needs of women.⁶¹

4.1.6 THE ILLICIT DRUG SITUATION IN CANADA

Each year, the Royal Canadian Mounted Police (RCMP) publishes a report on the illicit drug situation in Canada. The latest report provides an overview of illicit drug activity, including trafficking, smuggling and production in Canada for 2009.⁶²

In its report, the RCMP states that, for the past five years, the Canadian illicit drug market has remained relatively stable. Cannabis continued to be the most commonly used illicit substance in Canada, with domestically produced marijuana providing a source of considerable profit for Canadian-based organized crime. Next to marijuana, cocaine generated the most revenue among illicit drugs.

Canada remained one of the primary global source countries for MDMA (ecstasy) and methamphetamine. Organized crime groups not only produced synthetic drugs for domestic markets, but also provided significant quantities for international markets such as the United States. The United States remained the predominant transit country for cocaine shipments, while African countries remained key transit points for hashish products destined for Canada.

Profits derived from the Canadian illicit drug market continue to drive most organized crime in the country. Organized crime groups continue to change and adapt production and distribution methods in response to law enforcement pressures and activities, and to meet domestic and international demand to ensure a continued supply of illegal drugs.

In its report, the RCMP supplied the data on drug seizures in Canada found in Table 4-3.

Table 4-3 – Drug Seizures in Canada, 2006–2008

Drug	2006	2007	2008	2009
Cocaine	2,676 kg	2,630 kg	2,263 kg	2,373kg
Hashish	27,730 kg	227 kg	899 kg	9,667 kg
Hashish oil	1,060 kg	115 kg	761 kg	241 kg
Heroin	93 kg	112 kg	102 kg	213 kg
Khat	13,917 kg	28,270 kg	22,710 kg	19,003 kg
Marihuana	1,749,057 plants/ 13,154 kg	1,878,178 plants/ 49,918 kg	1,828,861 plants/ 37,169 kg	1,845,734 plants/ 34,391 kg
MDMA (Ecstasy)	3,000,347 units	1,374,592 units	1,494,769 units	954,929 units
Methamphetamine	58,506 kg	170.50 kg/ 9,000 tablets	109 kg/ 52,142 tablets	79 kg/ 62,307 tablets
Opium	124 kg	148 kg	108 kg	338 kg Dode: 17 tonnes

Source: Royal Canadian Mounted Police, "[Appendix A: Canada Drug Seizure Data – Report on the Illicit Drug Situation in Canada, 2009.](#)" *Drug Situation Report 2009.*

4.2 DESCRIPTION AND ANALYSIS

The following discussion highlights selected aspects of Bill C-10 as they relate to the issue of illicit drugs. It does not review every clause.

4.2.1 MANDATORY MINIMUM SENTENCES (CLAUSES 39 TO 41)

Sections 5 to 7 of the CDSA deal with, respectively, the offences of trafficking in a controlled substance, importing and exporting such a substance, and the production of a controlled substance. Clauses 39 to 41 of Bill C-10 amend each of these sections.

The current section 5(3)(a) of the CDSA makes trafficking in a substance included in Schedule I or II an indictable offence. The maximum punishment for this offence is imprisonment for life. This measure reflects the seriousness with which these substances are viewed, particularly the opiates and coca and its derivatives found in Schedule I. One exception is found in section 5(4) of the Act and concerns trafficking in Schedule II substances, mainly cannabis and its derivatives. Should the amount trafficked not exceed the amounts set out in Schedule VII to the Act (3 kg of cannabis resin or cannabis [marijuana]), the maximum possible punishment is imprisonment for a term not exceeding five years less a day.

Clause 39 of Bill C-10 amends section 5(3)(a) of the CDSA to provide in certain circumstances for mandatory minimum terms of imprisonment for the offence of

trafficking in a substance included in Schedule I or in Schedule II if the amount of the Schedule II substance exceeds the amount for that substance set out in Schedule VII. There will be a minimum punishment of imprisonment for one year if certain aggravating factors apply: the offence was committed for a criminal organization, as that term is defined in section 467.1(1) of the *Criminal Code* (a group of three or more people whose purpose is to commit serious offences for material benefit); there was the use or threat of the use of violence in the commission of the offence; a weapon was carried, used or threatened to be used in the commission of the offence; or the offender had been convicted of a designated substance offence, or had served a term of imprisonment for such an offence, within the previous 10 years. A “designated substance offence” is defined in section 2 of the CDSA to mean any of the offences in sections 4 to 10 of the CDSA, except the offence of possession of a substance found in Schedule I, II, or III to the Act, as set out in section 4(1).

Clause 39 amends the CDSA to impose a minimum punishment of imprisonment for a term of two years if certain other aggravating factors apply, including that the offence was committed in or near a school, on or near school grounds, or in or near any other public place usually frequented by persons under the age of 18 years. Defining such places may prove to be difficult. The use of the terms “school ground, playground, public park or bathing area” in section 179(1)(b) as a restriction on the movements of those who may commit a sexual offence against a child was found to be overly broad and, therefore, a violation of section 7 of the *Canadian Charter of Rights and Freedoms*.⁶³ The minimum two-year punishment will also be imposed if the offender used the services of a person who is under 18 years of age, or involved such a person, in committing the offence or committed the offence in a prison, or on its grounds. The term “prison” is defined in section 2 of the *Criminal Code* to include a penitentiary, common jail, public or reformatory prison, lock-up, guardroom or other place in which persons who are charged with or convicted of offences are usually kept in custody.

New section 5(3)(a.1) of the CDSA re-enacts the current section 5(4) of the CDSA and imposes a maximum punishment of imprisonment for five years less a day if the trafficking offence is for a small amount of cannabis or its derivatives, as listed in Schedule II.

The current section 6(3)(a) of the CDSA makes the importing into Canada or exporting from Canada of a substance included in Schedule I or II of the Act or the possession of such a substance for the purpose of exporting it from Canada an indictable offence. The maximum punishment for this offence is imprisonment for life. Lesser maximum punishments apply if the offence is committed in relation to substances in the other schedules.

Clause 40 of Bill C-10 imposes a mandatory minimum punishment of imprisonment for one year if the offence is committed for the purpose of trafficking and the substance involved is included in Schedule I and is in an amount that does not exceed one kilogram, or is listed in Schedule II. The minimum punishment will also apply if the offender, while committing the offence, abused a position of trust or authority or had access to an area that is restricted to authorized persons (such as in an airport) and

used that access to commit the offence. As in clauses 2 and 4, the maximum punishment of imprisonment for life is retained. Under new section 6(3)(a.1), the mandatory minimum punishment increases to two years' imprisonment if the Schedule I substance that is trafficked is in an amount that exceeds one kilogram.

The current section 7(2)(a) of the CDSA makes the production of a substance included in Schedule I or II of the Act, other than cannabis (marijuana), an indictable offence with a maximum punishment of imprisonment for life. Section 7(2)(b) of the CDSA makes the production of cannabis (marijuana) an indictable offence with a maximum punishment of seven years' imprisonment.

Clause 41 of Bill C-10 imposes a mandatory minimum punishment of imprisonment for two years if the subject matter of the production offence is a substance included in Schedule I, with a maximum punishment of imprisonment for life. The mandatory minimum punishment is increased to three years if any of the health and safety factors listed in new section 7(3) apply. These health and safety factors are:

- the offender used real property that belongs to a third party to commit the offence;
- the production constituted a potential security, health or safety hazard to persons under the age of 18 years who were in the location where the offence was committed or in the immediate area;
- the production constituted a potential public safety hazard in a residential area; or
- the accused placed or set a trap that is likely to cause death or bodily harm to another person in the location where the offence was committed.

If the substance produced is one listed in Schedule II, other than cannabis (marijuana), new section 7(2)(a.1) imposes a mandatory minimum punishment of imprisonment for one year if the production is for the purpose of trafficking, or for a term of 18 months if the production is for the purpose of trafficking and any of the health and safety factors listed above apply. If the subject matter of the production offence is cannabis (marijuana), section 7(2)(b) will double the maximum possible term of imprisonment from 7 to 14 years.

Mandatory minimum punishments will also be introduced for the production of cannabis (marijuana), with their length depending upon the number of marijuana plants produced. The minimum penalty is six months where the number of plants produced is fewer than 201 and more than five and the production is for the purpose of trafficking, while the minimum penalty is nine months where the number of plants produced is fewer than 201 **and more than five**, the production is for the purpose of trafficking, and any of the health and safety factors also apply. If the number of plants produced is more than 200 and fewer than 501, the minimum term of imprisonment is one year, which increases to 18 months if any of the health and safety factors apply. The minimum term of imprisonment will be two years if the number of plants produced is more than 500, which will increase to three years if any of the health and safety factors apply. There is no mention of the production being for the purposes of trafficking when the number of plants is more than 200.

4.2.2 REPORT TO PARLIAMENT (CLAUSE 42)

Clause 42 of the bill adds sections 8 and 8.1 to the CDSA. New section 8 requires that, before a plea is entered, notice be given of the possible imposition of a minimum punishment. New section 8.1 requires that, within five years after the section comes into force, a comprehensive review of the CDSA will be undertaken by a committee designated by Parliament. This review is to include a cost-benefit analysis of mandatory minimum sentences. A report concerning the committee's review, including a statement of any changes the committee recommends, is to be submitted to Parliament within one year of its being undertaken.

4.2.3 DRUG TREATMENT COURTS AND TREATMENT PROGRAMS (CLAUSE 43)

Section 10 of the CDSA sets out the aggravating factors to be considered by a court imposing a sentence. Many of these factors have been included in the amended section 5 of the CDSA. The new wording of section 10(2) of the CDSA, as set out in clause 43(1) of Bill S-10, distinguishes between the aggravating factors that lead to the imposition of a mandatory minimum punishment and the aggravating factors that should be considered by a sentencing court when no minimum punishment is specified.

The key part of clause 43 is that a sentencing court may delay sentencing to enable the offender to participate in a Drug Treatment Court Program approved by the Attorney General of Canada or attend a treatment program under section 720(2) of the *Criminal Code*. If the offender successfully completes either of these programs, the court is not required to impose the minimum punishment for the offence for which the person was convicted.

The suspension of the imposition of a sentence while an addicted accused person takes an approved treatment program is intended to encourage the accused person to deal with the addiction that motivates his or her criminal behaviour. If the person successfully completes the program, the court normally imposes a suspended or reduced sentence. It should be kept in mind that the Drug Treatment Court Program operates (as of September 2011) in only six cities and so will not be available to large numbers of offenders. Because section 720(2) of the *Criminal Code* only came into force on 1 October 2008, it is difficult to determine at this stage what effect the treatment programs offered under that section will have on sentencing.

4.2.4 AMENDMENTS TO THE SCHEDULES OF THE CDSA (CLAUSES 44 TO 46)

The schedules to the CDSA are amended by Bill C-10. Clause 44 of the bill transfers items 1, 25, and 26 of Schedule III to become items 19, 20, and 21 of Schedule I. The first item encompasses the amphetamines, their salts, derivatives, isomers and analogues and salts of derivatives, isomers and analogues. Methamphetamine had earlier been transferred to Schedule I. The other two items transferred are flunitrazepam and any salts or derivatives thereof and 4-hydroxybutanoic acid (GHB) and any salt thereof. Flunitrazepam is a benzodiazepine (sedative) readily soluble in ethanol and also known as Rohypnol. Gamma-hydroxybutyrate (GHB) has sedative effects that are very similar to those of alcohol. Both of these substances are

commonly referred to as “date rape drugs.” The effect of this change will be to ensure that, when the offences addressed in the bill concern amphetamines or the date rape drugs, the mandatory minimum punishments will apply. Furthermore, possession of Schedule I substances in contravention of section 4 of the CDSA is more harshly punished than is possession of substances listed in the other schedules. Clauses 45 and 46 of the bill remove these three items from Schedule III.

4.2.5 RELATED AMENDMENT (CLAUSE 32)

A reverse onus is placed on an accused person to show cause why he or she should be released on bail under section 515(6)(d) of the *Criminal Code* if charged with certain offences under the CDSA. Clause 3211 of Bill C-10 will expand this section so that all of the newly amended sections 5 to 7 of the CDSA will be considered when eligibility for release on bail is being considered.

4.2.6 CONSEQUENTIAL AMENDMENTS (CLAUSES 32, 33, AND 50)

Clause 32 will clarify that any of the offences listed in sections 5 to 7 of the CDSA will lead to a firearm prohibition, unless the justice granting release on bail feels it is not required. The broader language in this section will take account of additions to the CDSA, such as the new section 7(3). Clause 50 does the same for the portion of the *National Defence Act* that deals with firearms prohibitions.

Clause 33 takes into account the fact that the current section 5(4) of the CDSA has been replaced by the new section 5(3)(a.1). New section 553(c)(xi) of the *Criminal Code* will mean that a provincial court judge has absolute jurisdiction to try an accused charged with trafficking in small amounts of substances included in Schedule II of the CDSA (cannabis and its derivatives).

NOTES

1. *Controlled Drugs and Substances Act*, S.C. 1996, c. 19.
2. Health Canada, [“Summary of Results For 2010,”](#) *Canadian Alcohol and Drug Use Monitoring Survey*.
3. Canadian Centre on Substance Abuse, [Canadian Addiction Survey \(CAS\)](#).
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5 AMENDMENTS TO THE *CRIMINAL CODE* (CONDITIONAL SENTENCING)
 [BILL C-10, PART 2, CLAUSES 34 AND 51
 (FORMERLY BILL C-16)]

5.1 BACKGROUND

5.1.1 GENERAL

Clause 34 of Bill C-10 amends section 742.1 of the *Criminal Code*, which deals with conditional sentencing, to eliminate the reference to serious personal injury offences. It also restricts the availability of conditional sentences for all offences for which the maximum term of imprisonment is 14 years or life and for specified offences, prosecuted by way of indictment, for which the maximum term of imprisonment is 10 years.

Clause 34 is almost identical to Bill C-16, An Act to amend the Criminal Code (alternative title: Ending House Arrest for Property and Other Serious Crimes by Serious and Violent Offenders Act), which was given first reading in the House of Commons on 22 April 2010. That bill passed second reading but proceeded no further and died on the *Order Paper* when the 40th Parliament was dissolved on 26 March 2011. Where clause 34 differs from Bill C-16 is in respect of the list of offences to which this part of Bill C-10 applies (see section 5.2, “Description and Analysis,” below).

Conditional sentencing, introduced in September 1996, allows for sentences of imprisonment to be served in the community, rather than in a correctional facility.¹ It is a midway point between incarceration and sanctions such as probation or fines. The conditional sentence was not introduced in isolation, but as part of a renewal of the sentencing provisions in the *Criminal Code*. These provisions included the fundamental purpose and principles of sentencing. The fundamental principle of sentencing is that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.² The renewed sentencing provisions set out further sentencing principles, including a list of aggravating and mitigating circumstances that should guide sentences imposed.³

The primary goal of conditional sentencing is to reduce the reliance upon incarceration by providing the courts with an alternative sentencing mechanism. In addition, the conditional sentence provides an opportunity to further incorporate restorative justice concepts into the sentencing process by encouraging those who have caused harm to acknowledge this fact and to make reparation.

At the time of their introduction, conditional sentences were generally seen as an appropriate mechanism to divert minor offences and offenders away from the prison system. Overuse of incarceration was recognized by many as problematic, while restorative justice concepts were seen as beneficial. In practice, however, conditional sentences are sometimes viewed in a negative light when used in cases of very serious crime.⁴

Concern has been expressed that some offenders are receiving conditional sentences of imprisonment for crimes of serious violence, sexual assault and related offences, driving offences involving death or serious bodily harm, and theft committed in the context of a breach of trust. While it may be beneficial to allow persons who are not dangerous to the community, who would otherwise be incarcerated, and who have not committed a serious or violent crime, to serve their sentence in the community, certain commentators have argued that sometimes the very nature of the offence and the offender require incarceration. It has been suggested that a refusal to incarcerate a serious offender can bring the entire conditional sentencing regime, and hence the criminal justice system, into disrepute. In other words, it is not the existence of conditional sentences that is problematic, but rather their use in cases that appear to justify incarceration.

5.1.2 THE LEGISLATIVE BASIS FOR CONDITIONAL SENTENCING

The provisions governing conditional sentences are set out in sections 742 to 742.7 of the *Criminal Code*. Several criteria must be met before the sentencing judge may impose a conditional sentence:

1. The offence for which the person has been convicted must not be a serious personal injury offence. A “serious personal injury offence” is defined in section 752 of the *Criminal Code* as:
 - (a) an indictable offence, other than high treason, treason, first degree murder or second degree murder, involving
 - (i) the use or attempted use of violence against another person, or
 - (ii) conduct endangering or likely to endanger the life or safety of another person or inflicting or likely to inflict severe psychological damage on another person,
 and for which the offender may be sentenced to imprisonment for ten years or more, or
 - (b) an offence or attempt to commit an offence mentioned in section 271 (sexual assault), 272 (sexual assault with a weapon, threats to a third party or causing bodily harm) or 273 (aggravated sexual assault);
2. The offence for which the person has been convicted must not be a terrorism offence.
3. The offence for which the person has been convicted must not be a criminal organization offence prosecuted by way of indictment for which the maximum term of imprisonment is 10 years or more.
4. The offence for which the person has been convicted must not be punishable by a minimum term of imprisonment.
5. The sentencing judge must have determined that the offence should be subject to a term of imprisonment of less than two years.
6. The sentencing judge must be satisfied that serving the sentence in the community would not endanger the safety of the community.

7. The sentencing judge must be satisfied that the conditional sentence would be consistent with the fundamental purpose and principles of sentencing set out in sections 718 to 718.2 of the *Criminal Code*.

Insofar as the final criterion is concerned, among the objectives of sentencing are:

- the denunciation of unlawful conduct;
- the deterrence of the offender and others from committing offences;
- the separation of the offender from the community when necessary;
- the rehabilitation of the offender;
- the provision of reparation to victims or the community; and
- the promotion of a sense of responsibility in the offender, and acknowledgement of the harm done to victims and to the community.

As mentioned above, the fundamental principle underlying sentencing is proportionality – the sentence imposed by the court must be proportionate to the gravity of the offence and the degree of responsibility of the offender. Among the other sentencing principles are that aggravating and mitigating factors be taken into account, that there be similarity of sentences for similar offences, that the totality of consecutive sentences should not be unduly long or harsh, and that the least restrictive sanction short of incarceration should be resorted to whenever possible.

In addition to meeting the criteria set out above, conditional sentences involve a number of compulsory conditions, as set out in section 742.3 of the *Criminal Code*. These conditions compel the offender to:

- keep the peace and be of good behaviour;
- appear before the court when required to do so;
- report to a supervisor as required;
- remain within the jurisdiction of the court, unless written permission to go outside that jurisdiction is obtained from the court or the supervisor; and
- notify the court or the supervisor in advance of any change of name or address, and promptly notify the court or the supervisor of any change of employment or occupation.

Furthermore, optional conditions are designed to respond to the circumstances of the individual offender. Such conditions may include an order that the offender abstain from the consumption of alcohol or drugs, abstain from owning, possessing or carrying a weapon, perform up to 240 hours of community service, attend a treatment program approved by the province, or any other reasonable condition that the court considers desirable for securing the good conduct of the offender and for preventing the offender's repetition of the same offence or commission of another offence. The court must ensure that the offender is given a copy of this order and an explanation of the procedure for changing the optional conditions and the consequences of breaching the conditions.

Section 742.6 of the *Criminal Code* sets out the procedure to be followed when one or more of the conditions of a conditional sentence is breached. According to that section, the allegation of the breach may be based upon documentary evidence. The allegation must be supported by a written report of the offender's supervisor including, where possible, signed witness statements. The offender must be given a copy of this report. If the court is satisfied that a breach of a condition has been proved on a balance of probabilities, the burden is then on the offender to show a reasonable excuse. Where the breach is made out, the court may take no action; change the optional conditions; suspend the conditional sentence for a period of time and require the offender to serve a portion of the sentence in custody and then resume the conditional sentence with or without changes to the optional conditions; or terminate the conditional sentence and require the offender to serve the balance of the sentence in custody.

5.1.3 SUSPENDED SENTENCES AND PROBATION ORDERS

As an alternative to imposing a conditional sentence, a court may suspend sentence and impose a probation order. Section 731 of the *Criminal Code* indicates that, where a person is convicted of an offence, a court may, having regard to the age and character of the offender, the nature of the offence, and the circumstances surrounding its commission, suspend the passing of sentence and direct that the offender be released on the conditions prescribed in a probation order. This possibility is open to the court only if no minimum punishment is prescribed by law.

The court has the power to revoke a suspended sentence where the offender is convicted of an offence while on probation. The court also has the option of directing the offender to comply with the conditions prescribed in a probation order, in addition to fining or sentencing the offender to imprisonment for a term not exceeding two years. The term of imprisonment may be a conditional one, in which case the probation order comes into force at the expiration of the conditional sentence. A court may also make a probation order where it discharges (either absolutely or conditionally) an accused under section 730(1). The maximum period of probation is three years.⁵

As with conditional sentences, there are mandatory and optional conditions for a probation order. Section 732.1 of the *Criminal Code* states that the mandatory conditions are that the offender keep the peace and be of good behaviour, appear before the court when required, notify the court or the probation officer in advance of any change of name or address, and promptly notify the court or the probation officer of any change of employment or occupation.

The optional conditions available to the court include a requirement that the offender report to a probation officer as required; abstain from alcohol or drugs; abstain from owning, possessing or carrying a weapon; participate actively in a treatment program, if the offender agrees; and comply with such other reasonable conditions as the court considers desirable for protecting society and for facilitating the offender's successful reintegration into the community. As is the case with conditional sentences, the court is required to furnish the offender with a copy of the probation order, an explanation of the consequences for breaching the order, and an explanation of the procedure for applying to vary the optional conditions.

Section 733.1 of the *Criminal Code* sets out the consequences of an offender failing to comply with the terms of a probation order, without reasonable excuse. Such a failure is either an indictable offence and makes the offender liable to imprisonment for a term not exceeding two years, or is a summary conviction offence and makes the offender liable to imprisonment for a term not exceeding 18 months or to a fine not exceeding \$2,000, or both.

5.1.4 COMPARISON OF CONDITIONAL SENTENCES, SUSPENDED SENTENCES AND PROBATION ORDERS

The provisions set out above demonstrate some important differences between conditional sentences, suspended sentences, and probation orders. Firstly, unlike the suspended sentence under section 731(1)(a) of the *Criminal Code*, a conditional sentence is actually a sentence of imprisonment. This sentence, however, is served in the community, rather than in a correctional facility.

Secondly, under section 742.3(2)(e) the court may order the offender to attend a treatment program as part of a conditional sentence. There is no statutory requirement for the offender's consent as there is under section 732.1(3)(g) for probation orders.

Thirdly, the wording of the residual clause in section 732.1(3)(h) dealing with optional conditions in probation orders states that one of those conditions' goals is to facilitate the offender's successful reintegration into the community. This is unlike the residual clause in section 742.3(2)(f) dealing with conditions of conditional sentences, which does not focus principally on the rehabilitation and reintegration of the offender and therefore authorizes the imposition of punitive conditions such as house arrest or strict curfews. This difference again emphasizes that conditional sentences are considered to be more punitive than probation orders.

Finally, the punishment for breaching the conditions of a conditional sentence range from the court taking no action to the offender being required to serve the remainder of his or her sentence in custody. By contrast, breach of a probation order is made its own offence, with imprisonment a possible punishment. The differing consequences for breach of a condition relate to the fact that breaches of conditional sentence orders need be proved only on a balance of probabilities while breaches of probation orders, since they constitute a new offence, must be proved beyond a reasonable doubt.

5.1.5 CONDITIONAL SENTENCING CASE LAW

The criticism directed at sentencing practices in Canada tends to focus on the nature of the offence. It is also important, however, to consider how the courts weigh the aggravating and mitigating factors relevant to the offender, and the circumstances surrounding the offence, in crafting an appropriate sentence. As noted above, the sentencing provisions of the *Criminal Code* place an emphasis on a "least restrictive measures" approach, directing the courts to use incarceration only where community sentencing alternatives are not adequate. Collectively, these principles allow for flexibility in the exercise of judicial discretion. Over time, the courts of appeal and the Supreme Court of Canada have attempted to provide more detailed guidance

as to how the various principles should be applied to categories of offences and offenders. It should be noted that most of the cases discussed below were decided prior to recent amendments to the conditional sentencing regime that broadened the number of offences for which a conditional sentence is not available.

5.1.5.1 *R. v. PROULX*

The most important case to consider conditional sentencing is the decision of the Supreme Court in *R. v. Proulx*.⁶ Here, the Court examined the issue of conditional sentences in a case that concerned a charge of dangerous driving causing death and bodily harm. Prior to this decision, judges had little guidance on when it was appropriate to impose a conditional sentence, outside of the criteria set out in the *Criminal Code*. The Supreme Court made it clear that a number of changes needed to be made to the way in which the sanction was used. But the judgment also consists of a strong endorsement of conditional sentencing. The Supreme Court set out a number of principles, which may be summarized as follows:

1. Unlike probation, which is primarily a rehabilitative sentencing tool, a conditional sentence is intended to address both punitive and rehabilitative objectives. Accordingly, conditional sentences should generally include punitive conditions that restrict the offender's liberty. Therefore, conditions such as house arrest or strict curfews should be the norm, not the exception.
2. There is a two-stage process involved in determining whether to impose a conditional sentence. At the first stage, the sentencing judge merely considers whether to exclude the two possibilities of a penitentiary term (incarceration for two years or more) or a probationary order as inappropriate, taking into consideration the fundamental purpose and principles of sentencing. At the second stage, having determined that the appropriate range of sentence is a term of imprisonment of less than two years, the judge should then consider whether it is appropriate for the offender to serve his or her sentence in the community.
3. "Safety of the community," which is one of the criteria to be considered by a sentencing judge, refers only to the threat posed by a specific offender and not to a broader risk of undermining respect for the law. It includes consideration of the risk of any criminal activity, including property offences. In considering the danger to the community, the judge must consider the risk of the offender reoffending and the gravity of the damage that could ensue. The risk should be assessed in light of the conditions that could be attached to the sentence. Thus, the danger that the offender might pose may be reduced to an acceptable level through the imposition of appropriate conditions.
4. A conditional sentence is available for all offences in which the statutory prerequisites are satisfied. There is no presumption that conditional sentences are inappropriate for specific offences. Nevertheless, the gravity of the offence is clearly relevant to determining whether a conditional sentence is appropriate in the circumstances.

5. There is also no presumption in favour of a conditional sentence if the prerequisites have been satisfied. Serious consideration, however, should be given to the imposition of a conditional sentence in all cases where these statutory prerequisites are satisfied.
6. A conditional sentence can provide a significant amount of denunciation, particularly when onerous conditions are imposed and the term of the sentence is longer than would have been imposed as a jail sentence. Generally, the more serious the offence, the longer and more onerous the conditional sentence should be.
7. A conditional sentence can also provide significant deterrence if sufficient punitive conditions are imposed, and judges should be wary of placing much weight on deterrence when choosing between a conditional sentence and incarceration.
8. When the objectives of rehabilitation, reparation and promotion of a sense of responsibility may realistically be achieved, a conditional sentence will likely be the appropriate sanction, subject to considerations of denunciation and deterrence.
9. While aggravating circumstances relating to the offence or the offender increase the need for denunciation and deterrence, a conditional sentence may be imposed even if such factors are present.
10. Neither party has the onus of establishing that the offender should or should not receive a conditional sentence. However, the offender will usually be best situated to convince the judge that such a sentence is appropriate. It will be in the offender's interest to make submissions and provide information establishing that a conditional sentence is appropriate.
11. The deference due to trial judges in imposing sentence generally applies to the decision whether or not to impose a conditional sentence. Although an appellate court might entertain a different opinion as to what objectives should be pursued and the best way to do so, that difference will generally not constitute an error of law justifying intervention.
12. Conditional sentencing was enacted both to reduce reliance on incarceration as a sanction and to increase the principles of restorative justice in sentencing.

The key result of the *Proulx* decision, therefore, is that there is no presumption against the use of a conditional sentence if the crime does not have a mandatory period of incarceration.

5.1.5.2 *R. v. WELLS*

Another key decision of the Supreme Court concerned the role conditional sentencing should play in relation to Aboriginal offenders. The case of *R. v. Wells*⁷ involved a sentence of 20 months' imprisonment imposed on an Aboriginal man convicted of sexual assault. In upholding this sentence as appropriate in the

circumstances, the Supreme Court found that the proper approach for considering a conditional sentence for an Aboriginal offender involves the following sequential considerations:

1. a preliminary consideration and exclusion of both a suspended sentence with probation and a penitentiary term of imprisonment as fit sentences;
2. assessment of the seriousness of the particular offence with regard to its gravity, which necessarily includes the harm done and the offender's degree of responsibility;
3. judicial notice of the "systemic or background factors that have contributed to the difficulties faced by aboriginal people in both the criminal justice system and throughout society at large"; and
4. an inquiry into the unique circumstances of the offender, including any evidence of community initiatives to use restorative justice principles in addressing particular social problems.

While no offence is presumptively excluded from the possibility of a conditional sentence, as a practical matter, and notwithstanding section 718.2(e), particularly violent and serious offences will result in imprisonment for Aboriginal offenders as often as for non-Aboriginal offenders. Although counsel and pre-sentence reports will be the primary source of information regarding the offender's circumstances, there is a positive duty on the sentencing judge to be fully informed.⁸ In this case, the sentencing judge did properly inform himself. The application of section 718.2(e) of the *Criminal Code* does not mean that Aboriginal offenders must always be sentenced in a manner that gives greatest weight to the principles of restorative justice and less weight to goals such as deterrence, denunciation, and separation. The offence in this case was a serious one, so the principles of denunciation and deterrence led to the imposition of a term of imprisonment.

5.1.5.3 OTHER RELEVANT CASES

Other cases have helped provide guidance to judges on whether it is appropriate to impose a conditional sentence rather than a term of incarceration. The case of *R. v. Knoblauch*⁹ determined that mentally ill offenders are not excluded from access to conditional sentences. The requirement that the offender spend the period of the conditional sentence in a secure psychiatric treatment unit reduced the risk to the community to a point that it was no greater than the risk that the accused would reoffend while incarcerated in a penal institution.

In the case of *R. v. Fice*,¹⁰ the Supreme Court ruled that a woman who attacked her mother with a baseball bat and strangled her with a telephone cord should have been sent to prison rather than allowed to serve her sentence in the community. In addition, the Court held that, when a sentencing judge considers the gravity of the offence and the moral blameworthiness of the offender and concludes that a sentence in the penitentiary range is warranted and that a conditional sentence is therefore unavailable, time spent in pre-sentence custody ought not to disturb this conclusion.

The case of *R. v. F.(G.C.)*¹¹ shows how the courts of appeal in Canada have developed guidelines for the use of conditional sentencing by the lower courts. The Ontario Court of Appeal pointed out that it had repeatedly indicated that a conditional sentence should rarely be imposed in cases involving the sexual assault of children, particularly where the accused was in a position of trust. Moreover, cases that involve multiple sexual activities over an extended period of time and escalating in obtrusiveness generally warrant a severe sentence.

The case of *R. v. Coffin*¹² furnishes an example of a court of appeal emphasizing different aspects of the sentencing principles in order to impose a sentence of imprisonment in place of a conditional sentence. The offender in this case had pleaded guilty to 15 charges of defrauding the Government of Canada. The appeal court found that the trial judge had not placed sufficient emphasis upon the principle that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender,¹³ the fact that an important objective of sentencing is that of denunciation and deterrence,¹⁴ and the principle that a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances.¹⁵ Generally, a term of imprisonment was the sentence in Canada for large, planned frauds that took place over extended periods of time.

5.1.6 CONDITIONAL SENTENCING DATA

Statistics Canada reports that conditional sentences still represent a small proportion of all sentences. While the tendency in recent years has been to use conditional sentences more frequently, there was a decline in their use in 2006 and 2007. In 2002–2003, conditional sentences accounted for 8.3% of the adult correctional population.¹⁶ In 2009, this figure had increased slightly to 8.4%.¹⁷ In 2009, of the 122,006 adult offenders being supervised in the community, the vast majority (82%) were on probation, 11% were on conditional sentences and 7% were on parole or statutory release.¹⁸

Canada's incarceration rate in 2008–2009 rose by 1% from the previous year, the fourth consecutive annual increase. The gain was driven largely by the growing number of adults being held in remand in provincial/territorial jails while awaiting trial or sentencing. Recent increases in the incarceration rate follow a period of relatively steady decline from 1996–1997 to 2004–2005. On any given day in 2008–2009, an average of 37,234 adults and 1,898 youths aged 12 to 17 years were in custody in Canada, for a total of 39,132 inmates – a rate of 117 people in custody for every 100,000 population. Canada's incarceration rate tends to be higher than those of most Western European countries, yet lower than that of the United States. For example, in 2008, Sweden had a rate of 74 people in custody per 100,000 population. By contrast, the rate in the United States for adults alone was 760. (The United States excludes youths from its rate.)¹⁹ Statistics Canada has indicated that the implementation of the conditional sentence in 1996 provided the courts with a community-based alternative to imprisonment, and had a direct impact on the decline in the number of sentenced prison admissions.²⁰

The imposition of conditional sentences should not only reduce the rate of incarceration, it should also reduce expenditures on the correctional system.

This is due to the fact that the average annual inmate cost for persons in provincial/territorial custody (including remand and other temporary detention) in 2005–2006 was \$52,195, and the average annual expenditure related to housing a federal inmate was \$94,900²¹ while the average annual cost of supervising an offender in the community (including conditional sentences, probation, bail supervision, fine option, and conditional release) in 2006–2007 was \$2,398.05.²² Unfortunately, no recent national statistics are publicly available on the proportion of orders breached or the nature of the judicial response to breaches. An earlier survey found that the successful completion rate of conditional sentence orders fell from 78% in 1997–1998 to 63% in 2000–2001. This failure rate was largely attributed to breaches of the increasing number of conditions placed upon offenders, rather than allegations of fresh offending.²³

A study of the trial courts in Ontario and Manitoba reveals an increase in the proportion of offenders being committed to custody and a corresponding decline in the proportion of offenders being permitted to continue serving their sentences in the community, following an unjustified breach of conditions. In 1997–1998, for example, 65% of offenders in Manitoba found to have breached their orders without reasonable excuse were subsequently committed to custody for some period of time; in 2000–2001, this proportion rose to 74%. In Ontario, the proportion rose from 42% to 50% over the same period. These data – the most recent breach statistics currently available – demonstrate a more rigorous judicial response to the breach of a conditional sentence order following the judgment of the Supreme Court in the *Proulx* case.²⁴

Due to the relatively recent introduction of conditional sentencing, few academic studies of its impact upon the criminal justice system have been completed. Furthermore, there is a dearth of sentencing statistics in Canada, with even the Adult Criminal Court Survey of Statistics Canada lacking important data. A 2004 study found that conditional sentencing has had a significant impact on the rates of admission to custody, which have declined by 13% since its introduction.²⁵ This represents a reduction of approximately 55,000 offenders who otherwise would have been admitted to custody. There has also been evidence of net-widening, however; between September 1996 (when conditional sentencing was introduced) and the end of March 2001, approximately 5,000 offenders who prior to 1996 would have received a non-custodial sanction were sentenced to a conditional sentence, which is a form of custody.²⁶

Another Statistics Canada study found that adult offenders who spent their sentence under supervision in the community were far less likely to become reinvolved with correctional authorities within 12 months of their release than those who were in a correctional institution.²⁷ The study found that in four provinces, 11% of people who were under community supervision became reinvolved with correctional authorities within 12 months of their release in 2003–2004. Among those in custody only, 30% were reinvolved – more than double the proportion of those under community supervision. The study did not, however, examine the relationship between prior criminal history and offender outcomes. Criminal history is often cited as a risk factor for repeated involvement in the criminal justice system. Furthermore, the fact that

an offender received a custodial sentence may indicate that a higher level of risk is associated with such a person than with an offender being supervised in the community.

Considerable variation in incarceration rates has been found between provinces. In some jurisdictions, net-widening was quite significant; in others, the opposite occurred.²⁸ In several provinces, the reduction in the number of admissions to custody exceeds by a considerable margin the number of conditional sentences imposed. Thus, there has been a general shift towards the greater use of alternatives to imprisonment, possibly as a result of the statutory reforms introduced in 1996.²⁹ One of these changes was the codification of the principle of restraint with respect to the use of imprisonment.

In a study that concentrated upon the victims of crime and their attitudes towards conditional sentencing, the benefits of conditional sentencing are said to be that:

- most rehabilitation programs can be more effectively implemented when the offender is in the community rather than in custody;
- prison is no more effective a deterrent than more severe intermediate punishments, such as enhanced probation or home confinement;
- keeping offenders in custody is significantly more expensive than supervising them in the community;
- the public has become more supportive of community-based sentencing, except for serious crimes of violence;
- widespread interest in restorative justice has sparked interest in community-based sanctions. Restorative justice initiatives seek to promote the interests of the victim at all stages of the criminal justice process, but particularly at the sentencing stage; and
- the virtues of community-based sanctions include the saving of valuable correctional resources and the ability of the offender to continue or seek employment and maintain ties with his or her family.³⁰

The study concluded that, while it was clear that there was an acceptance amongst victims of the *concept* of community-based sentencing, the acceptance does not extend to its use in the most serious crimes of violence.³¹ The seriousness of such offences appeared to warrant a custodial term, in the eyes of victims. Research on conditional sentencing suggests that only a small percentage of conditional sentences are imposed for the most serious crimes of violence. The authors of this study conclude that greater attention to the interests of victims in crafting conditional sentences could advance the restorative purposes of sentencing by providing reparation, acknowledgment of harm, and protection to crime victims. It could also help offenders understand the harms caused by their crimes and enhance the credibility of the conditional sentence as a meaningful alternative to imprisonment.

5.2 DESCRIPTION AND ANALYSIS

5.2.1 REPLACEMENT OF SECTION 742.1 OF THE *CRIMINAL CODE* (CLAUSE 34)

The replacement to section 742.1 of the *Criminal Code* eliminates the reference to serious personal injury offences, placing greater emphasis upon the maximum term of imprisonment applicable to *Criminal Code* offences. In addition to the existing provisions on minimum terms of imprisonment, lack of danger to the community, and terrorism and criminal organization offences, the new section further provides the following:

- A person convicted of an offence prosecuted by way of indictment for which the maximum term of imprisonment is 14 years or life is not eligible for a conditional sentence.
- A conditional sentence will not be available for certain offences, prosecuted by way of indictment, for which the maximum term of imprisonment is 10 years. These offences are those that result in bodily harm; involve the import, export, trafficking or production of drugs; or involve the use of a weapon.
- Conditional sentences will not be permissible for the following offences, when prosecuted by way of indictment:
 - prison breach (section 144)
 - criminal harassment (section 264)
 - sexual assault (section 271)
 - kidnapping (section 279)
 - trafficking in persons – material benefit (section 279.02)
 - abduction of person under the age of 14 years (section 281)
 - motor vehicle theft (section 333.1)
 - theft over \$5,000 (section 334(a))
 - breaking and entering a place other than a dwelling-house (section 348(1)(e))
 - being unlawfully in a dwelling-house (section 349)
 - arson for fraudulent purpose (section 435)

The list of offences found in clause 34 of Bill C-10 differs from that found in former Bill C-16 in a number of respects. The offence of luring a child has been removed, because clause 22 of Bill C-10 proposes a mandatory minimum sentence for this offence. Offences with mandatory minimum sentences are ineligible for conditional sentences. For this reason, this particular offence need not be included on the list of offences committed against persons under 14 years old for which the option of a conditional sentence has been removed. Two offences have been added to the list – abduction of person under 14 (section 281) and motor vehicle theft (section 333.1). One other offence has been removed – abduction of a person under 14 by a parent or legal guardian (section 283).

Clause 34 of Bill C-10 removes the “serious personal injury offence” aspect of section 742.1 from the conditional sentencing regime. It is this section that has ensured that a conditional sentence is not available upon conviction for sexual assault. This is, presumably, why the offence of sexual assault is included in new section 742.1(f) of the *Criminal Code*, since the maximum penalty for this offence is 10 years’ imprisonment and it would otherwise be amenable to a conditional sentence. This may also explain why the offence of criminal harassment is in the list of offences in proposed section 742.1(f). The definition of “serious personal injury offence” includes conduct “inflicting or likely to inflict severe psychological damage on another person.” The category of psychological damage is replaced in new section 742.1(e) with “bodily harm.” Yet, criminal harassment may inflict psychological damage only and so it would be amenable to a conditional sentence, unless it were included in the special list of offences in proposed section 742.1(f). The offence of uttering threats in section 264.1 of the *Criminal Code*, however, may also inflict severe psychological damage and yet a conditional sentence may still be imposed, even if clause 34 of Bill C-10 is adopted into law.

NOTES

1. Conditional sentences were introduced by Bill C-41, now S.C. 1995, c. 22, proclaimed in force on 3 September 1996, amending the *Criminal Code*. Amendments to the conditional sentencing regime were made by Bill C-51, An Act to amend the Criminal Code, the Controlled Drugs and Substances Act and the Corrections and Conditional Release Act, S.C. 1999, c. 5. The relevant part (clauses 39–42) came into force on 1 July 1999. Further amendments to the conditional sentencing regime were made by Bill C-9, An Act to amend the Criminal Code (Conditional Sentence of Imprisonment), S.C. 2007, c. 12. This bill came into force on 1 December 2007.
2. *Criminal Code*, s. 718.1.
3. This legislative summary is based, in part, on Robin MacKay, [Conditional Sentences](#), Publication no. 05-44E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 21 December 2005.
4. Alberta Justice and Attorney General, [The Conditional Sentence of Imprisonment: The Need for Amendment](#), 17 June 2003.
5. *Criminal Code*, s. 732.2(2)(b).
6. *R. v. Proulx*, [2000] 1 S.C.R. 61.
7. *R. v. Wells*, [2000] 1 S.C.R. 207.
8. Allan Manson, *The Law of Sentencing*, Irwin Law, Toronto, 2001, pp. 274–275.
9. *R. v. Knoblauch*, [2000] 2 S.C.R. 780.
10. *R. v. Fice*, [2005] 1 S.C.R. 742.
11. *R. v. F.(G.C.)*, (2004), 71 O.R. (3d) 771 (C.A.).
12. *R. v. Coffin*, (2006), 210 C.C.C. (3d) 227 (Q.C.A.).
13. *Criminal Code*, s. 718.1.
14. *Criminal Code*, ss. 718(a) and 718(b).
15. *Criminal Code*, s. 718.2(b).

16. Karen Beattie, "[Adult Correctional Services in Canada, 2003/04](#)," *Juristat*, Vol. 25, No. 8, 16 December 2005 (Text Table 1).
17. Statistics Canada, "[Adult correctional services, average counts of offenders, by province, territory, and federal programs](#)," 26 January 2011.
18. Ibid.
19. Statistics Canada, "[Adult and youth correctional services: Key indicators](#)," *The Daily*, 8 December 2009.
20. Statistics Canada, "[Adult correctional services](#)," *The Daily*, 16 December 2005.
21. Laura Landry and Maire Sinha, "[Adult Correctional Services in Canada, 2005/2006](#)," *Juristat*, Vol. 28, No. 6, 6 June 2008, p. 7. The federal average inmate expenditures include expenditures associated with the operations of the institution, including salaries. The average inmate expenditures for provincial/territorial corrections, on the other hand, reflect only operating expenditures associated with custodial services and exclude spending associated with operating the institution, such as salaries. The difference in inmate costs may also result from the higher levels of security required in the federal system as well as the higher costs of incarceration associated with federally sentenced female offenders. In addition, there may be an increased number of treatment programs available to offenders serving longer sentences associated with federal custody.
22. Canadian Centre for Justice Statistics, *Adult Correctional Services in Canada Survey, "Adult corrections operational expenditures, community supervision services, 2002/2003 to 2006/2007,"* prepared for the Library of Parliament, 8 July 2009.
23. Julian V. Roberts, "The Evolution of Conditional Sentencing: An Empirical Analysis," *Criminal Reports*, 6th Series, Vol. 3, 2002, pp. 267–83 (Table 7).
24. David M. Paciocco and Julian Roberts, *Sentencing in Cases of Impaired Driving Causing Bodily Harm or Impaired Driving Causing Death*, Canada Safety Council, Ottawa, 25 February 2005.
25. Julian V. Roberts and Thomas Gabor, "The Impact of Conditional Sentencing: Decarceration and Widening of the Net," *Canadian Criminal Law Review*, Vol. 8, 2004, pp. 33–49.
26. Ibid.
27. Statistics Canada, "[Outcomes of probation and conditional sentence supervision](#)," *The Daily*, 15 December 2006.
28. Roberts and Gabor (2004).
29. Roberts (2002).
30. Julian V. Roberts and Kent Roach, "Conditional Sentencing and the Perspectives of Crime Victims: A Socio-Legal Analysis," *Queen's Law Journal*, Vol. 30, 2005, pp. 560–600.
31. Ibid., p. 599.

6 AMENDMENTS TO THE *CORRECTIONS AND CONDITIONAL RELEASE ACT* [C-10, PART 3, CLAUSES 52–107 AND 147 (FORMERLY BILL C-39)]

6.1 BACKGROUND

The purpose of the amendments to the *Corrections and Conditional Release Act* proposed in Part 3 of Bill C-10 is to increase offenders' accountability, tighten the rules governing conditional release, and include the interests of victims in the correctional process.

Clauses 52–107 and 147 of Bill C-10 are similar to the provisions in Bill C-39, An Act to amend the Corrections and Conditional Release Act and to make consequential amendments to other Acts (short title: Ending Early Release for Criminals and Increasing Offender Accountability Act), which was introduced and received first reading in the House of Commons on 15 June 2010.¹ Bill C-39 was read a second time on 20 October 2010 and referred to the House of Commons Standing Committee on Public Safety and National Security for further study, but it died on the *Order Paper* when an election was called on 26 March 2011.

It should also be noted that accelerated parole reviews were abolished when Bill C-59, An Act to amend the Corrections and Conditional Release Act (accelerated parole review) and to make consequential amendments to other Acts (short title: Abolition of Early Parole Act),² received Royal Assent on 23 March 2011.

Bill C-10 is designed to increase offenders' accountability and tighten the rules governing the conditional release of federal offenders (that is, offenders sentenced to two years or more) by:

- stating that the active participation of offenders in attaining the objectives of their correctional plan and their progress will be considered in decisions regarding their conditional release or any other privilege (clause 55);
- expanding the categories of offenders subject to continued detention after their statutory release date when they have served two thirds of their sentence (e.g., offenders convicted of child pornography, luring a child, breaking and entering to steal a firearm, or aggravated assault of a peace officer) (clause 103);
- increasing the waiting period from six months to a year following the Parole Board of Canada's decision to refuse an application for day parole or full parole (clauses 78 and 79).

The bill seeks to increase public safety by:

- authorizing a peace officer to arrest without a warrant an offender who is on conditional release for a breach of conditions (clause 92);

- granting the Correctional Service of Canada permission to oblige an offender to wear a monitoring device as a condition of release, when release is subject to special conditions regarding restrictions on access to victims or geographical areas (clause 64); and
- increasing the number of reasons for the search of vehicles at a penitentiary to prevent the entry of contraband or the commission of an offence (clause 65).

Finally, the bill also focuses specifically on the interests of victims, by:

- expanding the definition of victim to anyone who has custody of or is responsible for a dependant of the main victim if the main victim is dead, ill or otherwise incapacitated (clause 52);
- allowing disclosure to a victim of the programs in which an offender has participated for the purpose of reintegration into society, the name and location of an institution to which an offender is transferred, and the reasons for the transfer (clause 57); and
- entrenching in the Act the right of victims to present a statement at parole hearings (clause 96).

A number of the sections in the bill make minor amendments to the *Corrections and Conditional Release Act* (CCRA), such as linguistic modifications or reformulations designed to clarify the legislative intent. Some sections are also designed to make the administration of sentences more effective, such as by increasing the maximum number of members that may sit on the Parole Board of Canada.

The CCRA required a parliamentary review of its operation and provisions five years after its coming into force,³ and in November 1998 the House of Commons Standing Committee on Justice and Human Rights tasked a subcommittee with this review. In May 2000, the subcommittee released its report, containing 53 recommendations.⁴ The government responded in November that same year.⁵ The government also conducted its own public consultation in 1998,⁶ culminating in a separate report on possible changes.⁷ As was mentioned previously, bills have been introduced to implement some of the recommendations in these reports, but all died on the *Order Paper*. As a result, the CCRA has been amended in only a few respects since its enactment in 1992.⁸

Finally, it should be noted that many of the bill's provisions are based on the recommendations formulated in the report entitled *A Roadmap to Strengthening Public Safety*,⁹ presented in October 2007 by the Correctional Service of Canada Review Panel in response to the mandate it received from the federal government on 20 April 2007, which was to review Correctional Service of Canada operations. Michael Jackson,¹⁰ a law professor at the University of British Columbia, and Graham Stewart, former Director General of the John Howard Society of Canada, severely criticized this report in a document entitled *A Flawed Compass: A Human Rights Analysis of the Roadmap to Strengthening Public Safety*,¹¹ which appeared in September 2009. Generally, the authors argue that the suggested transformation of the correctional system fails to respect human rights. They also feel that it is based not on empirically validated evidence but on ideological myths.

6.1.1 THE FEDERAL CORRECTIONAL SYSTEM AND
THE *CORRECTIONS AND CONDITIONAL RELEASE ACT*

In Canada, responsibility for corrections is divided between the federal and the provincial and territorial governments based on the sentence imposed by the court. Individuals sentenced to two years or more are the responsibility of the Correctional Service of Canada, while those sentenced to less than two years or to a conditional sentence or who are detained while awaiting trial are the responsibility of the provincial and territorial correctional systems.

The federal correctional system consists of the Correctional Service of Canada (CSC), the Parole Board of Canada (PBC)¹² and the Office of the Correctional Investigator (OCI). The CCRA, in force since 1992,¹³ forms the legislative basis of the CSC (Part I), PBC (Part II) and OCI (Part III). It sets out their respective responsibilities and the principles that must guide their actions, and provides the definitions and rules for applying conditions of release, as well as the security requirements for high-risk offenders. It also contains the rules designed to ensure the transparency of the correctional system and the participation of victims. The CCRA is complemented by the *Corrections and Conditional Release Regulations* (CCRR).¹⁴

The CSC is headed by the commissioner of the Correctional Service of Canada, who reports to the minister of Public Safety. The CSC is charged with incarcerating offenders and preparing them for eventual release into the community. In addition to enforcing sentences, the CSC is responsible for supervising offenders on conditional release in the community. To that end, it enters into contracts with numerous private-sector agencies that operate halfway houses.

Created in 1959,¹⁵ the PBC is an independent administrative tribunal with the exclusive authority to grant, refuse, cancel or revoke offenders' parole, that is, day parole and full parole. The PBC also makes decisions on the parole of offenders in provinces and territories without their own parole boards.¹⁶

The Correctional Investigator, whose position was created in 1973 but not formally provided for in legislation before the adoption of the CCRA in 1992, serves as ombudsman for offenders under federal responsibility. The OCI's primary function is to investigate complaints made by or on behalf of offenders and to follow up on them. The OCI also examines CSC policies and practices to identify systemic problems and their solutions, and makes recommendations to that end.

6.1.2 TYPES OF CONDITIONAL RELEASE

Under the terms of the CCRA, at any time after their admission to a penitentiary, offenders may be granted escorted temporary absences and, after the applicable eligibility date,¹⁷ unescorted temporary absences, work release, day parole, full parole and statutory release.¹⁸

6.1.2.1 TEMPORARY ABSENCES

A temporary absence is generally the first form of release that an inmate in the federal system may be granted. The purpose of this form of release is to integrate certain inmates temporarily into the community for very specific purposes.¹⁹ There are two types of temporary absences: escorted temporary absences (ETAs) and unescorted temporary absences (UTAs), both of which are forms of release into the community that generally last for a maximum of 15 days.

Inmates under federal responsibility may request an ETA at any time during their sentence. The power to grant this type of release lies with the institutional head, except in the case of individuals sentenced to imprisonment for life, where the institutional head must obtain the approval of the PBC.

For UTAs, the eligibility criteria vary depending on the nature and length of the sentence:

- Inmates serving their sentences in a maximum-security institution are not eligible.
- Other inmates,
 - if they have been sentenced to three years or more, become eligible for a UTA after having served one sixth of their sentence;
 - if they have been sentenced to less than three years, become eligible after having served six months of their sentence; and
 - if they have been sentenced to life or are serving an indeterminate sentence may not request a UTA until three years before their full parole eligibility date.

Depending on the circumstances under which the request is made, the power to authorize UTAs lies with the PBC, the commissioner of the CSC or the institutional head.

6.1.2.2 WORK RELEASE

Work release is a program of release that enables inmates to work in the community. The maximum length of a work release is 60 days. Inmates may generally request this type of release after serving six months or one sixth of their sentence, whichever is longer.

This type of release is granted by the institutional head. However, only inmates who do not present an undue risk of reoffending may participate in this kind of program, and only for the purpose of performing community service, such as work in a community centre, a hospital or a home for the aged.

6.1.2.3 DAY PAROLE

Day parole is a form of parole whose purpose is to prepare the inmate for full parole or statutory release. It is generally granted for a maximum of six months and provides offenders with an opportunity to participate in supervised activities in the community. The power to authorize day parole lies exclusively with the PBC.

This form of parole is more limited than full parole, given that, unless special authorization is given by the PBC, inmates on day parole must return to a correctional institution or halfway house every night.

Eligibility for this type of release also varies, depending on the length and type of sentence:

- Inmates serving life sentences may apply for day parole three years before the date on which they are eligible for full parole.
- Inmates sentenced to a term of three years or more are eligible for this type of release six months before the date on which they are eligible for full parole.
- Inmates serving a sentence of two to three years may apply for day parole after serving six months of their sentence.

6.1.2.4 FULL PAROLE

Full parole allows offenders to serve the rest of their sentence under supervision in the community. Because this is a form of parole, the power to grant it lies exclusively with the PBC. Inmates on full parole must report regularly to a parole supervisor and advise the parole supervisor of any major change in their personal or employment situation. Except for offenders sentenced to life imprisonment for murder, who must serve between 10 and 25 years of their sentence before applying,²⁰ a majority of offenders may apply for full parole after serving one third of their sentence (unless the judge had ordered, in imposing sentence, that a minimum of 10 years or one half of the sentence be served before the inmate might be granted this type of release).

6.1.2.5 STATUTORY RELEASE

Statutory release is a last resort. Unlike the other forms of conditional release, statutory release is automatically granted to most offenders after they have served two thirds of their sentence. Under statutory release, offenders may finish serving their sentence under supervision in the community, subject to strict conditions, as do inmates on parole.

Under the CCRA, most inmates under federal responsibility must be given statutory release if they have not been granted full parole; however, the Act stipulates that inmates serving a life sentence or an indeterminate sentence cannot be granted statutory release. As well, to protect public safety, the CSC may submit an offender's file to the PBC for analysis if the CSC considers that the offender is likely to commit an offence causing death or serious harm to another person, a sexual offence involving a child, or a serious drug offence before the expiration of his or her sentence.

Normally, a case is referred to the PBC six months before the planned statutory release date. The PBC can then authorize the inmate's statutory release, a "one-chance" statutory release (i.e., if the release is revoked for any reason, the offender will automatically serve the rest of the sentence in detention), attach residency requirements to the statutory release or decide, by means of an order, to keep the offender in detention until the end of the sentence. Any such order is

reviewed annually, at which time the PBC either confirms or cancels the order. If the order is cancelled, the inmate will receive statutory release, which may be accompanied by a requirement to reside in a community-based residential facility.

Detention is an instrument that serves the correctional system in its role of protecting the public, by making it possible to keep offenders deemed dangerous to society in detention until the end of their sentence.

In all cases and for all types of release, the CSC is responsible for the supervision of offenders in the community. The CSC's parole officers therefore have the power to return inmates on release to custody if they believe that the inmates present too high a risk to the community. Members of the PBC have the power to revoke the conditional release of offenders if they do not comply with requirements in their release plan.

6.2 DESCRIPTION AND ANALYSIS

The following description highlights selected aspects of the bill; it does not review every clause.

6.2.1 PART I – INSTITUTIONAL AND COMMUNITY CORRECTIONS

6.2.1.1 PURPOSE AND PRINCIPLES (CLAUSE 54)

Under section 3 of the CCRA, the purpose of the correctional system is to contribute to the maintenance of a just society by carrying out sentences through the safe and humane custody and supervision of offenders. The correctional system must also provide adequate programs in penitentiaries and in the community, since all rehabilitation must promote the reintegration of offenders into the community as law-abiding citizens.

Section 4 of the CCRA sets out the principles that guide the CSC in achieving its purpose, notably that the protection of society be the paramount consideration in the correctional system.

By proposing amendments to clause 54 of Bill C-10, Parliament wishes to emphasize the protection of society as the paramount consideration, placing this consideration on its own in new section 3.1.

Clause 54 of the bill also proposes adding the notions of the “nature and gravity of the offence” and the “degree of responsibility of the offender” to the requirement that the CSC be guided by the principle that the sentence be carried out having regard to all relevant available information.

The bill also proposes removing from current section 4(*d*) the principle that the CSC “use the least restrictive measures consistent with the protection of the public, staff members and offenders” and replace it with the principle that the measures “are limited to what is necessary and proportionate to attain the purposes of this Act” (new section 4(*c*)).

The bill also proposes removing from current section 4(e) the principle that “offenders retain the rights and privileges of all members of society, except those rights and privileges that are necessarily removed or restricted as a consequence of the sentence” and replacing it with the new principle of rights and privileges that are “lawfully” removed or restricted (new section 4(d)). This new concept is not explained in the bill. Moreover, the concept of “privileges” was not reintroduced into this provision of the CCRA.

Clarifications were also made to other principles that guide the CSC. For example, it is important to note that the concept of mental health has been added to the principles, which means that the CSC, in achieving its purpose, must be responsive in its policies, programs and practices to the special needs of persons requiring mental health care, among others. The CSC is facing an enormous challenge regarding the management of offenders with mental health issues. According to the Correctional Investigator of Canada, Howard Sapers, the incidence of mental health problems among federally sentenced offenders is as much as three times higher than it is in the general population. He also notes that, upon reception at a correctional facility, 10% of male offenders and more than 20% of female offenders suffer from serious mental health problems.²¹

6.2.1.2 CORRECTIONAL PLAN (CLAUSE 55)

Clause 55 modifies the CCRA to expressly provide for the concept of a “correctional plan.” This concept is not new; it is already provided for in section 102 of the regulations. The bill provides for the correctional plan to be more specific as regards the characteristics and objectives for offenders, in particular to ensure their rehabilitation and reintegration as law-abiding citizens.

To develop a correctional plan, the offender meets a correctional officer as soon as possible after his or her reception at the penitentiary. At that time, the offender is informed of the objectives concerning participation in programs and court-ordered obligations, in particular regarding restitution and compensation for victims and regarding child support.²² The correctional plan is aimed at fostering rehabilitation and reintegration into the community, and it sets out the administration’s expectations. It is expected that the offender will actively participate to fulfill the objectives of his or her correctional plan. To achieve this goal, clause 55 of the bill states that the commissioner of the CSC can “provide offenders with incentives to encourage them to make progress towards meeting the objectives of their correctional plans” and that the CSC “shall take into account the offender’s progress towards meeting the objectives of their correctional plan.”²³

As mentioned previously, the CSC must implement programs that promote the reintegration of offenders. However, problems of access were repeatedly raised by the Correctional Investigator and by several witnesses. These problems include insufficient programming, lack of space in the programs and the inability of the CSC to offer programs in a timely fashion (before the parole eligibility date).

6.2.1.3 VICTIMS OF CRIME

In order to give greater consideration to the victims of crime, the bill provides for their attendance at parole hearings and seeks to broaden the range of information that CSC and the PBC can disclose to them. While the former Federal Ombudsman for Victims of Crime Steve Sullivan considered these new procedures – which were also in the former Bill C-43 (2nd Session, 40th Parliament) – a good starting point, he still finds them insufficient. In his report entitled *Toward a Greater Respect for Victims in the Corrections and Conditional Release Act*, the ombudsman has stated, “While the Office of the Federal Ombudsman for Victims of Crime supported the Bill [C-43] as a step forward in responding to victims’ needs and concerns, there are a number of important issues that continue to remain unaddressed within it.” The ombudsman notes that the recommendations made in his report published in 2010 seek to better address victims’ needs and increase the effectiveness of the CCRA in their regard.²⁴

6.2.1.3.1 DEFINITIONS, DISCLOSURE OF INFORMATION TO VICTIMS, PAROLE BOARD OF CANADA HEARINGS AND VICTIM STATEMENTS (CLAUSES 52, 57, 96 AND 98)

Section 2(1) of the CCRA defines a “victim” as a person to whom harm was done or who suffered physical or emotional damage as a result of the commission of an offence. If the person dies or becomes ill or otherwise incapacitated, any of the following people may be considered a “victim”: the person’s spouse or the person with whom the deceased or incapacitated person was cohabitating for at least one year in a conjugal relationship, a relative or a dependant of the person, or anyone who in law or in fact had custody of or was responsible for the care or support of the person. The bill broadens the definition to include anyone who, in law or in fact, has custody of or who is responsible for the care and support of a dependant of the primary victim, if that person is deceased, ill or otherwise incapacitated.

Clause 57(1) amends section 26(1)(b)(ii) of the CCRA, which authorizes the CSC to disclose certain information to a victim. When the interest of a victim clearly outweighs an invasion of the offender’s privacy, the victim now has the right to know not only the location of the penitentiary in which the sentence is being served but also the name of the penitentiary, the reasons for the offender’s transfer to another penitentiary and the name and location of that penitentiary. To the extent possible, the victim is also entitled to be notified ahead of time of the offender’s transfer to a minimum security institution, the name and location of that institution and the reasons for the transfer. In addition, the victim may be notified of the offender’s participation in programs designed to meet his or her needs and to contribute to the reintegration of the offender into the community. The victim may also be informed of any serious disciplinary offences the offender has committed as well as the reasons for any temporary absence.

Under the CCRA, the PBC is required to hold a hearing in certain cases, such as at first reviews for regular day parole in the case of offenders serving more than two years, first reviews for full parole, reviews for continued detention rather than statutory release, and reviews following the suspension or termination of parole or statutory release.²⁵

Clause 96(2) of the bill amends the CCRA to allow victims to present statements at PBC hearings. If attending the hearing, a victim may comment on the harm or damage resulting from the offence and its continuing impact, including concerns for his or her safety and the possible release of the offender. Even if the victim does not attend, the PBC may authorize presentation of the statement in an alternative format. In either case, a transcript of the statement must be provided to the PBC prior to the hearing. Also authorized to present a statement are persons described in section 142(3) of the CCRA, who were harmed or suffered a loss due to an act of the offender in respect of which a complaint was made to the police or Crown attorney or an information laid under the *Criminal Code* (Code), citing the continuing impact of the offender's act, including any safety concerns and concerns regarding the offender's potential release.

Clause 98(2) of the bill amends section 142(1)(b) of the CCRA by providing for the notification of the victim if the offender waives the right to a hearing under section 140(1) and the offender's reason for doing so where applicable.

6.2.1.4 ADMINISTRATIVE SEGREGATION (CLAUSES 60 AND 61)

The purpose of administrative segregation is set out in section 31 of the CCRA: to keep an inmate from associating with the general inmate population. Clause 60 of the bill amends this provision, making the purpose of administrative segregation to maintain the security of the penitentiary or the safety of any person by not allowing an inmate to associate with other inmates.

Furthermore, clause 61 makes a change to the rights of inmates in administrative segregation by removing the reference to "privileges" from section 37.

6.2.1.5 RELEASE OF INMATES (CLAUSE 64)

Clause 64 adds a provision to the CCRA stating that the CSC may demand that an offender wear a monitoring device to monitor compliance with a condition of a temporary absence, work release, parole, statutory release or long-term supervision that restricts their access to a person or a specific region or requires the offender to remain within a geographical area. The offender is entitled to make representations in relation to the duration of the requirement.

6.2.1.6 SEARCH AND SEIZURE (CLAUSE 65)

Clause 65 of the bill amends section 61 of the CCRA to allow an institutional head to authorize, in writing, the search of vehicles at a penitentiary. The institutional head must have reasonable grounds to believe that there is a clear and substantial danger to the life or safety of persons or to the security of the penitentiary because evidence exists that there is contraband at the penitentiary or evidence of the planning or commission of a criminal offence. Authorization may also be given if it is necessary to search the vehicles in order to locate and seize the contraband or other evidence and avert the danger.

It should be noted that section 61 of the CCRA already provides that, in reasonable circumstances for security purposes, a staff member may, without individualized suspicion, conduct routine searches of vehicles at a penitentiary. In circumstances constituting an offence under section 45,²⁶ a staff member who believes on reasonable grounds that contraband²⁷ is located in a vehicle at a penitentiary may, with prior authorization from the institutional head, search the vehicle. Where the delay in obtaining the authorization would result in danger to human life or safety or the loss or destruction of the contraband, the staff member may search the vehicle without that prior authorization.

6.2.1.7 AUTHORITY TO MAKE REGULATIONS (CLAUSE 69)

The CCRA provides that the Governor in Council may make regulations. Clause 69 of the bill modifies section 96 of the CCRA to authorize the following:

- the Commissioner to, by directive, make rules regarding the consequences of tampering with or refusing to wear a monitoring device referred to in new section 57.1;
- with respect to publications, video and audio materials, films and computer programs, the institutional head or a staff member designated by him or her, to restrict or prohibit the removal from a penitentiary of these materials, in the prescribed circumstances;
- the Minister to make rules regarding the penitentiary industry, including establishing advisory boards and appointing members to these boards and determining their remuneration and reimbursement of travel expenses incurred in performing their duties;
- the CSC to pay transportation, funeral, cremation and burial expenses for a deceased inmate under approved circumstances;
- the Commissioner of the CSC to make rules regarding the security classifications and subclassifications of inmates;
- the institutional head or a staff member designated by him or her to monitor, intercept or prevent communications, in the prescribed circumstances, between an inmate and another person; and
- the Commissioner of the CSC to make rules regarding the circumstances in which the institutional head may authorize escorted temporary absences and work releases.

6.2.2 PART II – CONDITIONAL RELEASE, DETENTION AND LONG-TERM SUPERVISION

6.2.2.1 THE PAROLE BOARD OF CANADA

As previously mentioned, the PBC is an independent administrative tribunal that has authority to make parole decisions, based on hearings that it conducts or information provided by the CSC, or both.

The jurisdiction of the PBC is set out in section 107 of Part II of the CCRA. The PBC:

- may grant, cancel, revoke or terminate parole;
- may terminate, revoke or cancel statutory release;
- may also cancel or suspend parole, or terminate or revoke parole or statutory release;
- may also review and make decisions regarding cases referred to it under section 129;
- may also in certain cases authorize or cancel unescorted temporary absences;
- has jurisdiction with respect to offenders who, pursuant to section 743.1 of the Code, are sentenced for an offence under a provincial Act and are serving the sentence in a penitentiary; and
- has jurisdiction in respect of an offender serving a sentence in a provincial facility when the province in question does not have a provincial parole board.

6.2.2.1.1 PURPOSE OF CONDITIONAL RELEASES AND PRINCIPLES GUIDING THE PBC AND PROVINCIAL PAROLE BOARDS (CLAUSE 71)

The principles that guide the PBC (and the provincial parole boards in Ontario and Quebec) in achieving the purpose of conditional release, set out in section 101 of the CCRA, are amended by the bill to reflect the amendments made to the principles guiding the CSC set out in Part I of the Act. The bill amends the CCRA to ensure that, in determining cases, the protection of society is the paramount consideration for the PBC and the provincial boards and to ensure that the nature and gravity of the offence and the degree of responsibility of the offender are taken into consideration.

6.2.2.1.2 MEMBERSHIP (CLAUSE 73)

Clause 73 amends section 103 of the CCRA, increasing from 45 to 60 the maximum number of full-time members on the PBC (the maximum number of part-time members remains indeterminate). Clause 73 also states that “[t]he National Parole Board is continued as the Parole Board of Canada.”

6.2.2.1.3 MERGED SENTENCES, MULTIPLE SENTENCES AND ADDITIONAL SENTENCES (CLAUSES 75, 76, 94 AND 95)

Many federal offenders serve sentences for more than one offence. Some of those not serving a sentence are sentenced to multiple sentences on the same day; others, whose original sentence has not expired, are sentenced to additional sentences. This situation, which is far from unusual, complicates the calculation of sentences and therefore the eligibility dates for the various forms of conditional release.

Section 139(1) of the CCRA states that a person who receives an additional sentence before the original sentence has expired is deemed to have been sentenced to one sentence, which commences on the first day of the first of those sentences and ends on the expiration of the last sentence. The way in which the section is currently worded does not take into account persons not serving a sentence who are sentenced to multiple sentences on the same day.

Clause 94 of the bill replaces the heading “Multiple Sentences” with “Merged Sentences.” Clause 95 therefore amends section 139(1) by eliminating the notion of “additional sentences” so that the law clearly establishes that offenders who are not serving a sentence and who are sentenced on the same day to multiple sentences, like those who are subject to a sentence that has not expired and who receive an additional sentence, are deemed to have been sentenced to one sentence beginning on the first day of the first of those sentences to be served and ending on the last day of the last of them to be served.

Section 120.1 of the CCRA sets out the time at which offenders who receive an additional consecutive sentence before their original sentence has expired are eligible for full parole.

Clause 76 of the bill amends section 120.1 by adding to section 120.1(1) rules governing full parole eligibility for offenders not serving a sentence who receive more than one sentence on the same day. Under this section, offenders are not eligible for full parole until the day on which they have served a period equal to the total of the following: the period of ineligibility in respect of any portion of the sentence constituted under section 139(1) that is subject to an order under section 743.6 of the Code or the similar section of the *National Defence Act* (section 140.4),²⁸ and the period of ineligibility in respect of any other portion of the sentence. The new section takes into account current practice in the federal correctional system in determining the full parole ineligibility period for such offenders.

The same clause states the rules governing eligibility for full parole, which apply in particular to:

- offenders who are serving a sentence, or are serving a sentence that was constituted under section 139(1), and who receive an additional sentence or two or more additional sentences on the same day that are to be served consecutively to the sentence they are serving when the additional sentence is imposed;
- offenders who are serving a sentence, or are serving a sentence that was constituted under section 139(1), and who receive an additional sentence or two or more sentences that are to be served consecutively to a portion of the sentence they are serving when the additional sentence is imposed – or receive, on the same day, two or more additional sentences, including a sentence to be served concurrently with the sentence being served and one or more sentences to be served consecutively to the additional concurrent sentence;
- offenders who are serving a sentence, or are serving a sentence that was constituted under section 139(1), and who receive an additional sentence that is to be served concurrently with the sentence they are serving when the additional sentence is imposed; and
- offenders who are serving a life sentence or a sentence for an indeterminate period, and who receive a sentence for a determinate period – or receive, on the same day, two or more sentences for a determinate period.

Clause 75 amends the CCRA to specifically provide for the eligibility for parole of young persons who have received a specific sentence under the *Youth Criminal*

Justice Act pursuant to section 42(2)(n),(o),(q) or (r) and who are transferred to a provincial correctional facility for adults or a penitentiary under section 89, 92 or 93 of the Act.

6.2.2.1.4 PAROLE REVIEWS (CLAUSES 78 AND 79)

Clauses 78 and 79 increase the waiting time for new parole applications (day parole and full parole). When an application for day parole is denied or when parole is cancelled or terminated, no new application for day parole may be made until one year after the date of the PBC's decision, or until any earlier time that the regulations prescribe or the PBC determines.

Under clause 79(2) of the bill, if the PBC refuses to direct or grant full parole to the offender or cancels or terminates their parole, the offender must wait for one year after the date of refusal, cancellation or termination or for another shorter period prescribed by regulation or determined by the PBC.

The bill also provides that, for applications for day or full parole, an offender may not withdraw an application within 14 days before the beginning of the review unless the withdrawal is necessary and it was not possible to do so earlier due to circumstances beyond the offender's control.²⁹

6.2.2.2 STATUTORY RELEASE ELIGIBILITY DATE (CLAUSES 81 AND 82)

Subject to a contrary order following a detention review, there is a presumption that all offenders not serving life or indeterminate sentences are entitled, after serving two thirds of their sentence, to be released and remain at large until the expiration of their sentence, sometimes referred to as "warrant expiry" (section 127 of the CCRA). Clause 31 clarifies when an offender whose parole or statutory release has been revoked becomes eligible for statutory release. It is the day on which the offender has served either two thirds of the sentence remaining on the day the offender is recommitted to custody or, if an additional prison sentence is imposed after the offender is recommitted to custody, two thirds of the sentence starting on the date of recommitment and ending on expiration of the sentence, including the additional sentence.

Clause 81 also adds a section establishing the new statutory release date for offenders who receive an additional sentence while on release, and whose parole or statutory release is suspended rather than revoked. They are required to serve from the earlier of the day on which they are recommitted to custody as a result of suspension of their parole or statutory release and the day on which they are recommitted to custody as a result of the additional sentence:

- a) any time remaining before the statutory release date in respect of the sentence they are serving when the additional sentence is imposed; and
- b) two thirds of the period equal to the difference between the length of the sentence that includes the additional sentence and the length of the sentence that they are serving when the additional sentence is imposed.

Clause 82 adds a section regarding statutory release provisions for young people who are convicted and sentenced under sections 42(2)(n), (o), (q) or (r) of the *Youth Criminal Justice Act* and who are transferred to a penitentiary under sections 89(2), 92(2) or 93(2) of that Act. The new provision provides that these young people are entitled to statutory release on the day on which the custodial portion of their youth sentence would have expired.

6.2.2.3 DETENTION DURING PERIOD OF STATUTORY RELEASE (CLAUSES 84 AND 85)

Clause 84(1) requires that, more than six months before the day on which an offender serving two years or more that includes a sentence for a Schedule I or II offence is entitled to be released on statutory release, the CSC refer the case for detention to the PBC and provide the PBC with all relevant information in its possession if it deems that:

- the offender is serving a sentence that includes a sentence for a Schedule I offence that caused death or serious harm to another person, and there are reasonable grounds to believe that the offender will commit a similar offence before expiry of the full sentence;
- the offender is serving a sentence that includes a sentence for a Schedule I offence for a sexual offence involving a child, and there are reasonable grounds to believe that the offender will commit a similar offence or (under a new provision) an offence causing death or serious harm to another person before expiry of the full sentence; or
- the offender is serving a sentence that includes a sentence for an offence set out in Schedule II and there are reasonable grounds to believe that the offender will commit a serious drug offence before expiry of the full sentence.

Under the current Act, offenders for whom the PBC has prohibited release before their sentence expires may be granted an escorted temporary absence for medical reasons only. Clause 85 of the bill adds the possibility of such an absence for administrative reasons, including, for example, the transfer of the offender to another penitentiary.

6.2.2.4 CONDITIONS OF RELEASE (CLAUSE 86)

The PBC may impose special conditions on statutory release to protect society or facilitate the successful reintegration of the offender, including a residency condition by which the offender must live in a community-based residential or psychiatric facility.³⁰ Section 133(4.1) of the CCRA currently allows a residency condition only if it is believed that an offender may commit a Schedule I offence before the expiration of his or her sentence and so may present an undue risk to society. Clause 86 amends section 133(4.1) to allow a residency condition on the basis that the offender is likely to commit a criminal organization offence.³¹

6.2.2.5 SUSPENSION, TERMINATION, REVOCATION AND INOPERATIVENESS OF PAROLE, STATUTORY RELEASE OR LONG-TERM SUPERVISION AND POWER TO ARREST WITHOUT A WARRANT (CLAUSES 89 AND 92)

Clause 89 of the bill amends section 135 of the CCRA, governing the possible suspension, termination or revocation of an offender's parole or statutory release if he or she breaches a condition of parole, or commits another offence and receives an additional sentence. Clause 89(1) now provides for an automatic suspension where the offender receives an additional sentence, other than an intermittent sentence (under section 732 of the Code) or a conditional sentence being served in the community (under section 742.1 of the Code), which suspension takes effect the day the new sentence is imposed. The PBC, commissioner of the CSC or designate may issue a warrant to apprehend the offender whose parole or statutory release has been suspended and recommit him or her to incarceration until the suspension is cancelled, parole or statutory release is terminated or revoked, or the sentence expires. A warrant for the transfer of the offender to a federal penitentiary may also be issued, if the offender has been committed to another facility.

Clause 89 provides that a suspension due to an additional sentence be referred to the PBC within the prescribed period.³² Clause 89(4) provides that the PBC, on referral to it, may, at the request of an offender serving a sentence of two years or more, grant an adjournment. A member of the PBC or the person designated may also postpone the review if satisfied that the offender will, by reoffending before the expiration of their sentence, present an undue risk to society. The PBC can then terminate the release when the risk is due to circumstances beyond the offender's control and revoke it in any other case. If the Board is not satisfied that the risk to reoffend would present an undue risk to society, it may cancel the suspension. If the offender is no longer eligible for parole or statutory release, the PBC cancels the suspension or terminates or revokes the parole or statutory release.

As already occurs under the CCRA, the PBC may decide to cancel the suspension if it considers it necessary and reasonable and it can reprimand the offender, issue alternate release conditions or delay the cancellation for up to 30 days.

Clause 89(5) provides that if the PBC cancels the offender's suspension of parole, the date of eligibility for parole is determined under sections 119 to 120.3 of the CCRA. If that date is later than the cancellation date, the offender is granted day parole or full parole on the eligibility date, where applicable and subject to the new section 135(6.3). This section provides that the PBC may review the file before parole resumes and on the basis of new information, and may cancel or terminate parole. Under the new section 135(6.4), if the decision to cancel or terminate parole is made without a hearing, the PBC shall, within the period prescribed by the regulations, review and either confirm or cancel its decision.

Clause 92 adds the new section 137.1 to the CCRA to allow any peace officer to "arrest without warrant an offender who has committed a breach of a condition of their parole, statutory release or unescorted temporary absence, or whom the peace officer finds committing such a breach." However, officers may not arrest an offender without warrant if they believe on reasonable grounds that the public interest may be

satisfied without arresting the person, having regard to all the circumstances, including the need to establish the identity of the person or prevent the continuation or repetition of the breach, or if they have no reason to believe on reasonable grounds that, if they do not arrest the person, the person will fail to report to their parole supervisor.

6.2.2.6 ORGANIZATION OF THE PBC – APPEAL DIVISION (CLAUSES 100 AND 101)

Clause 100 makes an amendment to allow a number of part-time members and not more than six full-time members to be appointed to the Appeal Division of the PBC. The members are designated by the Governor in Council, on the recommendation of the Minister, from among the members appointed under section 103 of the CCRA.

Clause 101 adds section 154.1 to the CCRA, stating that members of the PBC are not competent or compellable witnesses in any civil proceeding relating to any matter coming to their knowledge in the course of their functions under the CCRA or any other federal Act. The objective is to allow board members to consider and comment on the relevance and reliability of information from witnesses without being concerned that they may later have to testify in proceedings between parties.

NOTES

1. [Bill C-39: An Act to amend the Corrections and Conditional Release Act and to make consequential amendments to other Acts](#), 3rd Session, 40th Parliament, 2010. Versions of a similar bill had been introduced previously but died on the *Order Paper* – Bill C-43: An Act to amend the Corrections and Conditional Release Act and the Criminal Code, 2nd Session, 40th Parliament, 2009 (received second reading and was referred to the House of Commons Standing Committee on Public Safety and National Security on 29 October 2009 and proceeded no further); Bill C-46: An Act to amend the Corrections and Conditional Release Act and the Criminal Code, 1st Session, 38th Parliament, 2005 (received first reading 20 April 2005 and proceeded no further); Bill C-19: An Act to amend the Corrections and Conditional Release Act and the Criminal Code, 3rd Session, 37th Parliament, 2004 (received first reading 13 February 2004 and referred 23 February 2004 to the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness, which held one meeting to study the bill on 11 May 2004); and Bill C-40: An Act to amend the Corrections and Conditional Release Act and the Criminal Code, 2nd Session, 37th Parliament, 2003 (received first reading 4 June 2003 and proceeded no further).
2. See Lyne Casavant and Dominique Valiquet, *Bill C-59: An Act to amend the Corrections and Conditional Release Act (accelerated parole review) and to make consequential amendments to other Acts*, Publication no. 40-3-C59-E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 11 February 2011.
3. CCRA, s. 233.
4. House of Commons, Subcommittee on Corrections and Conditional Release Act of the Standing Committee on Justice and Human Rights, [A Work in Progress: The Corrections and Conditional Release Act](#), Ottawa, May 2000.

5. Government of Canada, *Response to the Report of the Subcommittee on Corrections and Conditional Release Act of the Standing Committee on Justice and Human Rights: A Work in Progress: The Corrections and Conditional Release Act*, Ottawa, November 2000 (revised).
6. Solicitor General Canada, *Towards a Just, Peaceful and Safe Society: The Corrections and Conditional Release Act Five Years Later – Consultation Paper*, Ottawa, 1998.
7. Ibid.
8. For example, comprehensive amendments regarding sentence calculation were enacted in 1995 (S.C. 1995, c. 42) and certain parole eligibility dates were amended in 1997 (S.C. 1997, c. 17). The CCRA has also been amended as a consequence of the enactment of other legislation, such as the *Crimes Against Humanity and War Crimes Act*, S.C. 2000, c. 24, and the *Youth Criminal Justice Act*, S.C. 2002, c. 1.
9. Correctional Service of Canada Review Panel, [*A Roadmap to Strengthening Public Safety – Report of the Correctional Service of Canada Review Panel*](#), October 2007. The [executive summary of the report](#) can also be found on the Public Safety Canada website.
10. Mr. Jackson has taught and been an advocate of human rights for over 30 years. On 1 September 2009, the Office of the Correctional Investigator of Canada presented him with the Ed McIsaac Human Rights in Corrections Award in recognition of his lifelong commitment to improving the correctional system and protecting the human rights of the incarcerated.
11. Michael Jackson and Graham Stewart, [*A Flawed Compass: A Human Rights Analysis of the Roadmap to Strengthening Public Safety*](#), September 2009.
12. Formerly called the “National Parole Board,” and now known as the “Parole Board of Canada,” under clauses 73 and 160 of Bill C-10.
13. The *Corrections and Conditional Release Act* (S.C. 1992, c. 20), proclaimed 1 November 1992, replaced the *Penitentiary Act* and the *Parole Act*. A number of amendments have been made since its proclamation, including the addition of offences to its schedules.
14. *Corrections and Conditional Release Regulations*, SOR/92-620.
15. The PBC was created under the *Parole Act*, S.C. 1958, c. 38.
16. Only the provinces of Ontario and Quebec have their own parole boards with authority to release offenders serving sentences of less than two years’ imprisonment.
17. The parole eligibility date must not be confused with the actual release date. The decision to grant parole (whether day parole or full parole) is made by the Parole Board of Canada. Even when the offender’s case is considered a few days before the parole eligibility date, a decision to release the offender does not necessarily follow.
18. The eligibility for various forms of conditional release is shown in Appendix 6-A in this legislative summary.
19. There are several grounds for this type of release: medical reasons, facilitating the inmate’s contact with family, the inmate’s obtaining confirmation of planned employment as part of the release plan, and helping the inmate to fashion a personal development plan, to receive counselling or to have a chance to participate in community service.
20. Inmates sentenced to life imprisonment for first-degree murder are eligible for full parole after serving 25 years of their sentence, while those sentenced to life imprisonment for second-degree murder are eligible after serving 10 to 25 years of their sentence, depending on the court’s decision at the time of sentencing.
21. House of Commons, Standing Committee on Public Safety and National Security, *Evidence*, 2 June 2009, 0915 (Howard Sapers, Correctional Investigator of Canada).

22. The Office of the Federal Ombudsman for Victims of Crime responded favourably to the idea of including compensation or victim restitution in the correctional plan. Steve Sullivan, Federal Ombudsman for Victims of Crime, stated before the Standing Committee on Public Safety and National Security:
- That's really important, I think, because some judges look at restitution and say, "Well, this guy is going to jail. He doesn't have any money." We know that offenders make some money when they're in prison. We also know that victims actually appreciate, even if the total restitution isn't paid, that efforts are made by the offender. I think it actually has a benefit for the offender as well. It makes the crime real.
- House of Commons, Standing Committee on Public Safety and National Security, *Evidence*, 20 April 2010, 1610 (Steve Sullivan, Federal Ombudsman for Victims of Crime).
23. See new clauses 15.1 and 15.2 of the bill.
24. See Office of the Federal Ombudsman for Victims of Crime, [Toward a Greater Respect for Victims in the Corrections and Conditional Release Act](#), 2010.
25. CCRA, s. 140(1). The PBC has the discretion to hold a hearing if one is not mandatory (*ibid.*, s. 140(2)).
26. Pursuant to s. 45 of the CCRA:
- Every person commits a summary conviction offence who (a) is in possession of contraband beyond the visitor control point in a penitentiary; (b) is in possession of anything referred to in paragraph (b) or (c) of the definition "contraband" in section 2 before the visitor control point at a penitentiary; (c) delivers contraband to, or receives contraband from, an inmate; (d) without prior authorization, delivers jewellery to, or receives jewellery from, an inmate; or (e) trespasses at a penitentiary.
27. Within the meaning of s. 2 of the CCRA, contraband means:
- (a) an intoxicant, (b) a weapon or a component thereof, ammunition for a weapon, and anything that is designed to kill, injure or disable a person or that is altered so as to be capable of killing, injuring or disabling a person, when possessed without prior authorization, (c) an explosive or a bomb or a component thereof, (d) currency over any applicable prescribed limit, when possessed without prior authorization, and (e) any item not described in paragraphs (a) to (d) that could jeopardize the security of a penitentiary or the safety of persons, when that item is possessed without prior authorization.
28. Under sections 743.6 of the Code and 140.4 of the *National Defence Act*, the judge may delay an offender's date of eligibility for full parole if he or she is satisfied, based on the circumstances of the offence, and the character and circumstances of the offender, that the expression of society's denunciation of the offence or the objective of deterrence requires it. Offenders who are the subject of such orders are not eligible for full parole after having served a third of their sentence as are most federal offenders, but rather are eligible after having served the lesser of half of their sentence or 10 years. The judge may issue such an order only when the offender is sentenced to a term of two years or more on conviction for an offence set out in Schedule I or II to the Act that was prosecuted by indictment. The schedules to the CCRA set out offences causing bodily harm and serious drug offences.
29. Sections 122(6) and 123(7) of the CCRA, to be amended by clauses 27(2) and 28(2) of the bill.
30. CCRA, s. 133.

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31. Criminal organization offences are those under the *Criminal Code*, s. 467.11 (participation in activities of a criminal organization), s. 467.12 (commission of an offence for a criminal organization) and s. 467.13 (instructing the commission of an offence for a criminal organization).
32. The referral must be within 14 days of recommitment for offenders serving less than two years, and within 30 days of recommitment for all other offenders unless the PBC establishes a shorter period (CCRA, s. 135(3)). Subject to adjournments with the consent of the offender, the PBC must hold a hearing within 90 days of the referral, or 90 days of the offender's readmission to a correctional facility (CCRR, s. 163(3)).

APPENDIX 6-A – ELIGIBILITY FOR VARIOUS FORMS OF CONDITIONAL RELEASE

Table 6-A.1 – Eligibility for Various Forms of Conditional Release^a

	Unescorted Temporary Absence ^b (CCRA, s. 115; Code, s. 746.1)	Day Parole (CCRA, 119; Code, s. 746.1)	Full Parole (CCRA, s. 120)	Statutory Release (CCRA, s. 127)
1 st degree murder	22 years	22 years	25 years (Code, s. 745) ^c	N/A
2 nd degree murder	7 to 22 years	7 to 22 years	10 to 25 years (Code, s. 745) ^c	N/A
Other life sentence	4 years	Full parole – 6 months	7 years ^d	N/A
Dangerous offenders	4 years ^e	4 years	7 years (Code, s. 761)	N/A
Sentence of 2 years or more	1/6 of sentence (max.: 3.5 years) (min.: 6 months)	Full parole – 6 months (min.: 6 months)	1/3 of sentence (max.: 7 years)	2/3 of sentence
Exceptions (e.g., illness)	(CCRA, s. 115(2))	(CCRA, s. 121)	(CCRA, s. 121)	Detention (CCRA, s. 129 <i>et seq.</i>)
Delayed parole ^f			1/2 of sentence (max.: 10 years) (Code, s. 743.6)	

- Notes:
- a. In this table, CCRA means *Corrections and Conditional Release Act*, and Code means *Criminal Code*.
 - b. Eligibility for work release is identical (CCRA, section 18(2)).
 - c. Application for reduction of parole eligibility after 15 years served (Code, s. 745.6).
 - d. Less time in pre-trial detention (between arrest and conviction).
 - e. “Maximum security” offenders are not eligible for unescorted temporary absences (CCRA, section 115(3)).
 - f. This procedure covers offences set out in Schedule I (offences involving violence) and Schedule II (serious drug-related offences) of the CCRA and organized crime offences (Code, s. 743.6).

APPENDIX 6-B – SCHEDULES I AND II TO THE *CORRECTIONS AND
CONDITIONAL RELEASE ACT*

SCHEDULE I

(Subsections 107(1), 129(1) and (2), 130(3) and (4), 133(4.1) and (4.3), and 156(3))

1. An offence under any of the following provisions of the *Criminal Code*, that was prosecuted by way of indictment:

- (a) section 75 (piratical acts);
- (a.1) section 76 (hijacking);
- (a.2) section 77 (endangering safety of aircraft or airport);
- (a.3) section 78.1 (seizing control of ship or fixed platform);
- (a.4) paragraph 81(1)(a), (b) or (d) (use of explosives);
- (a.5) paragraph 81(2)(a) (causing injury with intent);
- (b) subsection 85(1) (using firearm in commission of offence);
- (b.1) subsection 85(2) (using imitation firearm in commission of offence);
- (c) subsection 86(1) (pointing a firearm);
- (d) section 144 (prison breach);
- (e) section 151 (sexual interference);
- (f) section 152 (invitation to sexual touching);
- (g) section 153 (sexual exploitation);
- (h) section 155 (incest);
- (i) section 159 (anal intercourse);
- (j) section 160 (bestiality, compelling, in presence of or by child);
- (k) section 170 (parent or guardian procuring sexual activity by child);
- (l) section 171 (householder permitting sexual activity by or in presence of child);
- (m) section 172 (corrupting children);
- (n) subsection 212(2) (living off the avails of prostitution by a child);
- (o) subsection 212(4) (obtaining sexual services of a child);
- (o.1) section 220 (causing death by criminal negligence);
- (o.2) section 221 (causing bodily harm by criminal negligence);
- (p) section 236 (manslaughter);
- (q) section 239 (attempt to commit murder);
- (r) section 244 (discharging firearm with intent);

- (s) section 246 (overcoming resistance to commission of offence);
- (s.1) subsections 249(3) and (4) (dangerous operation causing bodily harm and dangerous operation causing death);
- (s.2) subsections 255(2) and (3) (impaired driving causing bodily harm and impaired driving causing death);
- (s.3) section 264 (criminal harassment);
- (t) section 266 (assault);
- (u) section 267 (assault with a weapon or causing bodily harm);
- (v) section 268 (aggravated assault);
- (w) section 269 (unlawfully causing bodily harm);
- (x) section 270 (assaulting a peace officer);
- (y) section 271 (sexual assault);
- (z) section 272 (sexual assault with a weapon, threats to a third party or causing bodily harm);
- (z.1) section 273 (aggravated sexual assault);
- (z.2) section 279 (kidnapping);
- (z.21) section 279.1 (hostage taking);
- (z.3) section 344 (robbery);
- (z.31) subsection 430(2) (mischief that causes actual danger to life);
- (z.32) section 431 (attack on premises, residence or transport of internationally protected person);
- (z.33) section 431.1 (attack on premises, accommodation or transport of United Nations or associated personnel);
- (z.34) subsection 431.2(2) (explosive or other lethal device);
- (z.4) section 433 (arson – disregard for human life);
- (z.5) section 434.1 (arson – own property);
- (z.6) section 436 (arson by negligence); and
- (z.7) paragraph 465(1)(a) (conspiracy to commit murder).

2. An offence under any of the following provisions of the *Criminal Code*, as they read immediately before July 1, 1990, that was prosecuted by way of indictment:

- (a) section 433 (arson);
- (b) section 434 (setting fire to other substance); and
- (c) section 436 (setting fire by negligence).

3. An offence under any of the following provisions of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as they read immediately before January 4, 1983, that was prosecuted by way of indictment:

- (a) section 144 (rape);
- (b) section 145 (attempt to commit rape);

- (c) section 149 (indecent assault on female);
- (d) section 156 (indecent assault on male);
- (e) section 245 (common assault); and
- (f) section 246 (assault with intent).

4. An offence under any of the following provisions of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as they read immediately before January 1, 1988, that was prosecuted by way of indictment:

- (a) section 146 (sexual intercourse with a female under 14);
- (b) section 151 (seduction of a female between 16 and 18);
- (c) section 153 (sexual intercourse with step-daughter);
- (d) section 155 (buggery or bestiality);
- (e) section 157 (gross indecency);
- (f) section 166 (parent or guardian procuring defilement); and
- (g) section 167 (householder permitting defilement).

5. The offence of breaking and entering a place and committing an indictable offence therein, as provided for by paragraph 348(1)(b) of the *Criminal Code*, where the indictable offence is an offence set out in sections 1 to 4 of this Schedule and its commission:

- (a) is specified in the warrant of committal;
- (b) is specified in the Summons, Information or Indictment on which the conviction has been registered;
- (c) is found in the reasons for judgment of the trial judge; or
- (d) is found in a statement of facts admitted into evidence pursuant to section 655 of the *Criminal Code*.

6. An offence under any of the following provisions of the *Crimes Against Humanity and War Crimes Act*:

- (a) section 4 (genocide, etc., committed in Canada);
- (b) section 5 (breach of responsibility committed in Canada by military commanders or other superiors);
- (c) section 6 (genocide, etc., committed outside Canada); and
- (d) section 7 (breach of responsibility committed outside Canada by military commanders or other superiors).

SCHEDULE II

(Subsections 107(1), 129(1), (2) and (9), 130(3) and (4), and 156(3))

1. An offence under any of the following provisions of the *Narcotic Control Act*, as it read immediately before the day on which section 64 of the *Controlled Drugs and Substances Act* came into force, that was prosecuted by way of indictment:

- (a) section 4 (trafficking);
- (b) section 5 (importing and exporting);
- (c) section 6 (cultivation);
- (d) section 19.1 (possession of property obtained by certain offences); and
- (e) section 19.2 (laundering proceeds of certain offences).

2. An offence under any of the following provisions of the *Food and Drugs Act*, as it read immediately before the day on which section 64 of the *Controlled Drugs and Substances Act* came into force, that was prosecuted by way of indictment:

- (a) section 39 (trafficking in controlled drugs);
- (b) section 44.2 (possession of property obtained by trafficking in controlled drugs);
- (c) section 44.3 (laundering proceeds of trafficking in controlled drugs);
- (d) section 48 (trafficking in restricted drugs);
- (e) section 50.2 (possession of property obtained by trafficking in restricted drugs); and
- (f) section 50.3 (laundering proceeds of trafficking in restricted drugs).

3. An offence under any of the following provisions of the *Controlled Drugs and Substances Act* that was prosecuted by way of indictment:

- (a) section 5 (trafficking);
- (b) section 6 (importing and exporting);
- (c) section 7 (production); and
- (d) (e) [Repealed, 2001, c. 32, s. 57].

4. The offence of conspiring, as provided by paragraph 465(1)(c) of the *Criminal Code*, to commit any of the offences referred to in items 1 to 3 of this schedule.

7 AMENDMENTS TO THE *CRIMINAL RECORDS ACT*
(PARDONS)
[BILL C-10, PART 3, CLAUSES 108–134, 137–146,
148–165, AND THE SCHEDULE (FORMERLY BILL C-23B)]

7.1 BACKGROUND

Clauses 108–134, 137–146, and 148–165 of Part 3 of Bill C-10 amend the *Criminal Records Act*¹ to substitute the term “record suspension” for the term “pardon.” They extend the ineligibility periods for applications for a record suspension to five years for all summary conviction offences and to 10 years for all indictable offences. They also make individuals convicted of sexual offences against minors and those who have been convicted of more than three indictable offences punished by imprisonment for two years or more ineligible for a record suspension. These clauses also require the Parole Board of Canada (formerly known as the National Parole Board) to report to Parliament on an annual basis.

These clauses are substantially similar to those contained in Bill C-23B, An Act to amend the Criminal Records Act and to make consequential amendments to other Acts (short title: Eliminating Pardons for Serious Crimes Act), which was introduced and received first reading in the House of Commons on 11 May 2010. This bill passed second reading and was referred to the Standing Committee on Public Safety and National Security on 14 June 2010 under the number C-23, but on 17 June 2010, the following motion was adopted by the House of Commons:

That, notwithstanding any Standing Order or usual practice of the House, it be an instruction to the Standing Committee on Public Safety and National Security that it divide Bill C-23, An Act to amend the Criminal Records Act and to make consequential amendments to other Acts, into two bills, namely Bill C-23A, An Act to amend the Criminal Records Act, and Bill C-23B, An Act to amend the Criminal Records Act and to make consequential amendments to other Acts.²

The motion then set out the specific wording of Bill C-23A and the contents of Bill C-23B. Bill C-23A, An Act to amend the Criminal Records Act (short title: Limiting Pardons for Serious Crimes Act), was then unanimously deemed to have been reported from the committee without amendment, concurred in at report stage, and read a third time and passed. This bill was adopted by the Senate without amendment on 28 June 2010. It was given Royal Assent on 29 June 2010 and entered into force as S.C. 2010, c. 5. The remaining aspects of the original Bill C-23, called Bill C-23B, were referred to the House of Commons Standing Committee on Public Safety and National Security³ on 14 June 2010. The Committee held four meetings and heard from 13 witnesses on the bill. The bill died on the *Order Paper*, however, when Parliament was dissolved on 26 March 2011.

7.1.1 PARDONS LAW

In his remarks before the Standing Senate Committee on Legal and Constitutional Affairs, the head of the Parole Board of Canada stated that the pardons system has

a dual benefit: to assist the individual with a criminal record in moving forward in his or her rehabilitation, and to enhance the safety of communities by motivating the individual to remain crime-free and to maintain good conduct.⁴ A person may apply for a pardon if he or she was convicted of an offence under a federal Act or regulation. A person may apply even if he or she is not a Canadian citizen or a resident of Canada.⁵ A person may also apply if he or she was convicted in another country and transferred to Canada under the *International Transfer of Offenders Act*.⁶

Prior to the entry into force of Bill C-23A, a person could apply to the Parole Board of Canada for a pardon three years after the expiry of a sentence for a summary conviction offence and five years after the expiry of a sentence for an indictable offence, under the *Criminal Records Act*. These time periods also applied to service offences under the *National Defence Act*,⁷ with the amount of time that was required to elapse depending upon the punishment imposed for the offence. The following provisions continue to apply: A sentence is completed when a person has paid all fines, surcharges, costs, restitution and compensation orders in full; when that person has served all of his or her time, including parole or statutory release; and when that person has satisfied his or her probation order.⁸ Because their sentences never expire, those serving life or indeterminate sentences are not eligible for a pardon under the *Criminal Records Act*.

A person does not need to apply for a pardon if his or her criminal record consists only of absolute or conditional discharges. Absolute or conditional discharges handed down after 24 July 1992 will automatically be removed from the criminal records system one year (for absolute discharges) or three years (for conditional discharges) after the court decision. Discharges handed down prior to 24 July 1992 can be removed by contacting the Pardon and Purge Services of the Royal Canadian Mounted Police (RCMP).⁹

Before the adoption of Bill C-23A, the Parole Board of Canada could grant a pardon if it was satisfied that the applicant had, for an indictable offence, been of good conduct and had not been convicted of an offence under an Act of Parliament or a regulation made under an Act of Parliament.¹⁰ The Board defines “good conduct” as meaning behaviour that is consistent with and demonstrates a law-abiding lifestyle.¹¹ For the purpose of determining good conduct in decision-making, the Board will consider information about an incident that resulted in a charge that was subsequently withdrawn, stayed, or dismissed, or that resulted in a peace bond, in the use of alternative measures or in the acquittal of the applicant; any record of absolute or conditional discharges; information about convictions under provincial statutes; information provided by law enforcement agencies about suspected or alleged criminal behaviour; representations provided by, or on behalf of, the applicant; any information submitted to the board by others with knowledge of the case; and, with respect to applicants convicted of a sex offence prosecuted by way of indictment, any information received from law enforcement agencies further to enquiries made by the Board.¹² Under the previous pardons procedure, a pardon for a summary conviction offence had to be issued if the applicant had not been convicted of another offence during the three-year period.

If a pardon is refused, the applicant must wait one year before applying again. If a pardon is granted, the *Criminal Records Act* states that the conviction for which it has been granted “should no longer reflect adversely on the applicant’s character.”¹³ A pardon also requires that the record of conviction held in the federal database known as the Canadian Police Information Centre (CPIC) be kept separate and apart from other criminal records; in other words, a search for criminal records should not reveal one when a pardon has been granted. A pardon, however, does not erase a conviction. It does not allow a person to say that they do not have a criminal record but rather permits them to say that they have received a pardon for that record.

The *Canadian Human Rights Act*¹⁴ forbids discrimination based on a conviction for which a pardon has been granted. The prohibition against discrimination applies to the provision of services a person needs, accommodation or matters related to employment. The *Criminal Records Act* states that no employment application form within the federal public service may ask any question that would require an applicant to disclose a pardoned conviction. This restriction also applies to a Crown corporation, the Canadian Forces, or any federally regulated business.

There are limitations to the impact of a pardon, perhaps the most significant of which is that an exception is made in the case of certain sexual offences, when the offender’s name will be flagged in the CPIC database. Should this person apply to work or volunteer with children or other vulnerable persons, he or she will be asked to let a potential employer see his or her record. A pardon also does not cancel various prohibition orders, such as that forbidding the possession of firearms pursuant to sections 109 or 110 of the *Criminal Code*¹⁵ or a driving prohibition made pursuant to section 259 of the *Criminal Code*. Furthermore, a pardon does not cancel certain legal obligations, such as the requirement under various sections of the *Criminal Code* to register under the *Sex Offender Information Registration Act*.¹⁶

A pardon does not guarantee entry or visa privileges to another country, and if foreign authorities have information about a person’s criminal record in their databases, this information will not be removed by virtue of the granting of a pardon. In addition, Canadian courts and police services (other than the RCMP) are under provincial and municipal legislation and so are not legally obliged to keep records of convictions separate and apart from other criminal records. Finally, the name, date of birth, and last known address of a person who has received a pardon or a discharge may be disclosed to a police force if a fingerprint, identified as that of the person, is found at the scene of a crime during an investigation of the crime or during an attempt to identify a deceased person or a person suffering from amnesia.¹⁷

Pardons may be subject to revocation. A pardon may be revoked by the Parole Board of Canada if the person to whom it was granted is subsequently convicted of an offence punishable on summary conviction under an Act of Parliament or a regulation made under an Act of Parliament; on evidence establishing to the satisfaction of the Board that the person to whom it was granted is no longer of good conduct; or on evidence establishing to the satisfaction of the Board that the person to whom it was granted knowingly made a false or deceptive statement in relation to the application for the pardon, or knowingly concealed some material particular to that application.¹⁸ When determining whether to revoke a pardon where the individual

is subsequently convicted of an offence punishable on summary conviction under a federal Act or its regulations, the Board will consider all relevant information, including information that suggests a significant disregard for public safety and order and laws and regulations, or both, given the offender's criminal history; whether the offence is consistent with the offence for which the pardon was received; and the time period since the satisfaction of all sentences.¹⁹

A pardon ceases to have effect if the following conditions exist:

- (a) the person is subsequently convicted of
 - (i) an indictable offence under an Act of Parliament or a regulation made under an Act of Parliament,
 - (ii) an offence under the *Criminal Code*, except subsection 255(1) [impaired driving], or under the *Controlled Drugs and Substances Act*, the *Firearms Act*, Part III or IV of the *Food and Drugs Act* or the *Narcotic Control Act*, chapter N-1 of the Revised Statutes of Canada, 1985, that is punishable either on conviction on indictment or on summary conviction, or
 - (iii) a service offence referred to in paragraph 4(a) of the *Criminal Records Act* [an offence that is a service offence within the meaning of the *National Defence Act* for which the offender was punished by a fine of more than \$2,000, detention for more than six months, dismissal from Her Majesty's service, imprisonment for more than six months or a punishment that is greater than imprisonment for less than two years in the scale of punishments set out in subsection 139(1) of that Act]; or
- (b) the Board is convinced by new information that the person was not eligible for a pardon at the time it was granted or issued.²⁰

7.1.2 CLEMENCY LAW

Should a pardon not be obtained or be unavailable, the individual in question may choose to seek clemency. The royal prerogative of mercy originates in the ancient power vested in the British monarch who had the absolute right to exercise mercy on any subject. In Canada, similar powers of executive clemency have been vested in the Governor General who, as the Queen's representative, may exercise the royal prerogative of mercy. It is largely an unfettered discretionary power to apply exceptional remedies, under exceptional circumstances, in deserving cases.²¹

In practice, requests for executive clemency are processed under the Letters Patent constituting the Office of the Governor General of Canada only when it is not legally possible to proceed under the *Criminal Code*. Therefore, with a few exceptions, all clemency questions are forwarded to the federal Cabinet for a decision under the provisions of the *Criminal Code*, rather than to the Governor General of Canada.²²

Section 748 of the *Criminal Code* authorizes the Governor in Council to grant free or conditional pardons. A free pardon is a formal recognition that a person was erroneously convicted of an offence. Any consequences resulting from the conviction, such as fines, prohibitions or forfeitures will be cancelled upon the grant of a free pardon. In addition, any record of the conviction will be erased from the police and court records, and from any other official databanks. The sole criterion

upon which an application for a free pardon may be entertained is that of the innocence of the convicted person. In order for a free pardon to be considered, the applicant must have exhausted all appeal mechanisms available under the *Criminal Code*, or other pertinent legislation. In addition, the applicant must provide new evidence, which was not available to the courts at the time the conviction was registered, or at the time the appeal was processed, to clearly establish innocence.

A conditional pardon in advance of eligibility under the *Criminal Records Act* has the same meaning and effect as a pardon granted under the provisions of that Act. In order for a conditional pardon to be granted in advance of the eligibility under the *Criminal Records Act*, the applicant must be currently ineligible for a pardon under that statute. In addition, such a pardon may be considered only when there is evidence of good conduct, within the meaning of the *Criminal Records Act*, and consistent with the policies of the Parole Board of Canada in these matters. Finally, there must be substantial evidence of undue hardship, out of proportion to the nature of the offence and more severe than for other individuals in similar situations.

Section 748.1 of the *Criminal Code* allows the Governor in Council to order the remission, in whole or in part, of a fine or forfeiture under an Act of Parliament. A remission of a fine or forfeiture amounts to the erasing of all, or part of, the penalty imposed by the court. In order for such penalties to be remitted, there must exist substantial evidence of undue hardship, due to circumstances or factors unknown to the court that imposed the sanction, or which occurred subsequent to the imposition of the sanction by the court. In addition, consideration will be given to whether the grant of a remission would result in hardship to another person.

Section 749 of the *Criminal Code* states that Her Majesty's royal prerogative of mercy is not limited in any way. The royal prerogative of mercy is exercised according to general principles which are meant to provide for a fair and equitable process, while ensuring that it is granted only in very exceptional and truly deserving cases.

The role of the Parole Board of Canada in clemency cases is to review applications, conduct investigations at the direction of the Minister of Public Safety and Emergency Preparedness, and to make recommendations to the Minister regarding whether to grant the request for clemency. All of the remedies described above are subject to cancellation if the application was granted on the basis of information which is subsequently found to have been fraudulent. All remedies, with the exception of free pardons, may be cancelled if any condition under which they are granted is subsequently breached.²³

7.1.3 STATISTICS ON THE PARDON SYSTEM

The Criminal Records Information Management Services of the RCMP manages the information of roughly 2.8 million criminal records held in the central repository in Ottawa. This service analyzes, creates, and updates over 540,000 criminal records submitted by contributing law enforcement agencies each year.²⁴

Since 1970, more than 400,000 Canadians have received a pardon. Approximately 96% of all pardons remain in force. In 2009–2010, 24,139 pardons were granted, while in the last five years, 111,910 pardons have been granted.²⁵

In the 2009–2010 fiscal year, the Parole Board of Canada received 32,105 applications for a pardon. Over 7,000 of these were ineligible, incomplete or were withdrawn. The Board processed 24,559 applications. Ultimately, 7,887 pardons were issued for summary conviction offences, the vast majority of which were for drinking and driving, assault, theft, and drug-related crimes. The Board granted 16,247 pardons to individuals with criminal records for indictable offences. The vast majority of these offences were for drinking and driving, assault, theft, and drug-related crimes. The Board denied 425 applications for a pardon for indictable offences on the grounds that the applicants were found not to be of good conduct.²⁶

According to Parole Board of Canada information from June 2010, over the previous five years, 35.5% of the offences pardoned were for summary offence cases only (pardon issued), while 64.5% were for cases that had at least one indictable offence (pardon granted). In the last two years that “sexual offences” have been tracked as a separate category, 2.4% of all offences pardoned fit into this category, including offences such as sexual assault, sexual interference, rape, incest, child pornography, and gross indecency.²⁷

In 2009–2010, 37 requests for the royal prerogative of mercy were received and one was granted.²⁸

7.1.4 BILL C-23A

Bill C-23A amended provisions of the *Criminal Records Act* to place restrictions on an application for a pardon. Bill C-23A extended the waiting period before application may be made for a pardon to 10 years in the case of a serious personal injury offence within the meaning of section 752 of the *Criminal Code*,²⁹ including manslaughter, for which the applicant was sentenced to imprisonment for a period of two years or more, or an offence referred to in Schedule 1 of the bill that was prosecuted by indictment.³⁰ The waiting period was made five years in the case of any other offence prosecuted by indictment, an offence referred to in Schedule 1 of the bill that is punishable on summary conviction or a service offence within the meaning of the *National Defence Act* that meets a certain punishment threshold. The waiting period remained three years for offences not already mentioned that are punishable on summary conviction and service offences within the meaning of the *National Defence Act* that do not meet the punishment threshold.

The bill also added new criteria to the determination of whether a pardon should be granted. For all offences, during the applicable waiting period, the applicant must have been of good conduct and not have been convicted of an offence under an Act of Parliament.³¹

For serious personal injury offences (including manslaughter) where the applicant was sentenced to imprisonment for two years or more, Schedule 1 offences (prosecuted by indictment or summary conviction), other offences prosecuted

by indictment, and applicable service offences under the *National Defence Act*, the criteria to be applied by the Parole Board of Canada are that granting a pardon would provide a measurable benefit to the applicant, would sustain his or her rehabilitation in society as a law-abiding citizen, and would not bring the administration of justice into disrepute. The onus is on the applicant to satisfy the Board that a pardon would provide him or her with a measurable benefit and sustain his or her rehabilitation as a law-abiding citizen.

In determining whether the granting of a pardon would bring the administration of justice into disrepute, the Parole Board of Canada may consider the nature, gravity and duration of the offence, the circumstances surrounding the commission of the offence, any information relating to the applicant's criminal or service offence history, and any other factor that is prescribed by regulation.

Bill C-23A also renumbered the existing Schedule to the *Criminal Records Act* as Schedule 2. This schedule sets out the offences for which a notation may be made in the automated criminal conviction records retrieval system indicating that a pardon has been granted for certain sexual offences. This "flagging" of a record will enable searches to be carried out should someone apply to work with, or volunteer to work with, vulnerable persons. A new Schedule 1 was added to the *Criminal Records Act*, which set out offences involving sexual activity relating to a minor. These offences are referred to in the restrictions on applying for a pardon set out in section 4 of the Act.

The provisions of Bill C-23A are not retroactive. They were given Royal Assent on 29 June 2010 and took effect immediately as follows:

- new applications for pardons received on or after 29 June 2010 will be disposed of under the new measures; and
- applications for pardons received prior to 29 June 2010, and not disposed of, will be dealt with under the previous provisions of the *Criminal Records Act*.³²

7.2 DESCRIPTION AND ANALYSIS

The following description highlights selected aspects of Bill C-10 as it relates to pardons; it does not review every clause.

7.2.1 LONG TITLE OF THE *CRIMINAL RECORDS ACT* (CLAUSE 108)

The current long title of the *Criminal Records Act* is: An Act to provide for the relief of persons who have been convicted of offences and have subsequently rehabilitated themselves. Clause 108 changes this long title to the following: An Act to provide for the suspension of the records of persons who have been convicted of offences and have subsequently rehabilitated themselves. This new title refers to the suspension of records, rather than the "relief" of persons convicted of offences. Pardons will not be issued or granted under the *Criminal Records Act* in the future.

On 22 June 2010, the Minister of Public Safety explained the substitution of the term “record suspension” for “pardon” in the following terms during his testimony before the Senate Legal and Constitutional Affairs Committee:

[T]he issue of personal forgiveness is not something for the state to do on behalf of victims ... [T]hat is something victims do. The state has certain roles in assisting the rehabilitation of convicted individuals, and I believe the term “record suspension” more appropriately reflects the role of the state in that process.³³

7.2.2 DISCRETION OF THE PAROLE BOARD OF CANADA (CLAUSE 110)

The current wording of section 2.1 of the *Criminal Records Act* states that the Parole Board of Canada has exclusive jurisdiction to grant or refuse to grant or to revoke a pardon. Clause 110 will amend this section to specify that the Board will also have absolute discretion to order, refuse to order, or revoke a record suspension. This change in wording places a greater emphasis on the decision-making role of the Board and the fact that the grant of a record suspension is not automatic. The discretion as to whether a record suspension is merited rests with the Board.

7.2.3 RECORD SUSPENSIONS (CLAUSE 115)

Under section 4 of the *Criminal Records Act*, the current waiting period before an application for a pardon may be made is 10 years in the case of a serious personal injury offence within the meaning of section 752 of the *Criminal Code*, including manslaughter, for which the applicant was sentenced to imprisonment for a period of two years or more or an offence referred to in Schedule 1 of the bill that was prosecuted by indictment. The waiting period is five years in the case of any other offence prosecuted by indictment, an offence referred to in Schedule 1 of the *Criminal Records Act* that is punishable on summary conviction or a service offence within the meaning of the *National Defence Act* that meets a certain punishment threshold. The waiting period is three years for offences not already mentioned that are punishable on summary conviction and service offences within the meaning of the *National Defence Act* that do not meet the punishment threshold.

Clause 115 will create only two waiting periods. The period of ineligibility to apply for a record suspension will be 10 years in the case of an offence that is prosecuted by indictment or is a service offence within the meaning of the *National Defence Act* that meets a certain punishment threshold. The period of ineligibility to apply for a record suspension will be five years in the case of an offence that is punishable on summary conviction or is a service offence other than one that meets the punishment threshold.

Clause 115 will also make certain persons ineligible to apply for a record suspension. Those who have been convicted of an offence referred to in Schedule 1 (sexual offences in relation to minors), which was added to the *Criminal Records Act* by Bill C-23A, or of more than three offences, each of which either was prosecuted by indictment or is a service offence that is subject to a maximum punishment of imprisonment for life and for each of which the person was sentenced to imprisonment for two years or more, are not eligible to apply for a record suspension.

An exception to the ineligibility to apply for a record suspension is made in the case of persons who have been convicted of an offence referred to in Schedule 1 if the Board is satisfied that:

- the person was not in a position of trust or authority towards the victim of the offence and the victim was not in a relationship of dependency with him or her;
- the person did not use, threaten to use or attempt to use violence, intimidation or coercion in relation to the victim; and
- the person was less than five years older than the victim.

The onus of proving these conditions is on the applicant.

7.2.4 INQUIRIES (CLAUSE 117)

Under the current section 4.2 of the *Criminal Records Act*, when an application for a pardon is received, the Parole Board of Canada shall cause inquiries to be made to ascertain the conduct of the applicant since the date of the conviction and may, in the case of serious offences, cause inquiries to be made into whether granting the pardon would bring the administration of justice into disrepute. Clause 117 amends this section such that the Board, on receipt of an application for a record suspension, shall also cause inquiries to be made to ascertain whether the applicant is eligible to make the application. Once it is determined that the applicant is eligible, the Board will then inquire into the applicant's conduct since the date of the conviction. It remains an option for the Board to inquire into whether granting the pardon would bring the administration of justice into disrepute, but this will only be the case for indictable offences and serious service offences under the *National Defence Act*.

7.2.5 DISCLOSURE OF DECISIONS (CLAUSE 128)

Clause 128 adds section 9.01 to the *Criminal Records Act*. Under this new section, the Parole Board of Canada may disclose decisions that order or refuse to order record suspensions, though it may not disclose information that could reasonably be expected to identify an individual. Such disclosure is permitted if the individual authorizes the disclosure in writing.

7.2.6 REPORT TO PARLIAMENT (CLAUSE 130)

Clause 130 adds a requirement that the Parole Board of Canada submit to the Minister of Public Safety and Emergency Preparedness a report within three months of the end of each fiscal year. This report is to contain the following information:

- the number of applications for record suspensions made in respect of indictable, summary, and service offences;
- the number of record suspensions that the Board ordered or refused to order, in respect of each of these types of offences;
- the number of record suspensions ordered, categorized by the offence to which they relate and, if applicable, the province of residence of the applicant; and
- any other information required by the Minister.

The Minister is then to lay this report before each House of Parliament.

7.2.7 SCHEDULE 2 (CLAUSE 134)

Clause 134 replaces Schedule 2 to the *Criminal Records Act* with a new, much shorter, list of offences. These are the offences that will be “flagged” so that a search of these offences can be made, even if a record suspension has been ordered, should the person who committed the offence(s) apply to work with, or volunteer to work with, vulnerable persons. Many offences, such as against section 151 of the *Criminal Code* (sexual interference with a person under 16), are not found in the new Schedule 2. This offence, however, can be found in Schedule 1. By the terms of new section 4(2) of the *Criminal Records Act*, a person is ineligible to apply for a record suspension if he or she has been convicted of an offence referred to in Schedule 1. There will be no need to perform a vulnerable persons search of these Schedule 1 offences, therefore, since no record suspension can be ordered.

7.2.8 CONSEQUENTIAL AMENDMENTS (CLAUSES 137 TO 146 AND 148 TO 159)

Consequential amendments in Bill C-10 amend various statutes to change the reference to a “pardon” to that of a “record suspension,” although the term “pardon” will continue to be used to refer to a pardon granted under Her Majesty’s royal prerogative of mercy or under section 748 of the *Criminal Code*.

One example of a statute where both a pardon and a record suspension are referred to is the *Canadian Human Rights Act*, which is amended by clauses 137 through 139. Section 3 of this Act will be amended to say that the prohibited grounds of discrimination are, amongst others, conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered.

Another example of a statute where both a pardon and a record suspension are referred to is the *Criminal Code*, which is amended by clauses 141 through 146. Currently, under section 490.015(3) or section 490.026(4) of the *Criminal Code*, a person may apply for a termination order of an order or obligation to comply with the *Sex Offender Information Registration Act* if the person has received a pardon. As amended, a person would be able to apply for a termination order once they received a pardon or once a record suspension was ordered. Similar amendments are made to the *National Defence Act* in clauses 152 through 155 of the bill, which amend sections 227.03(3) and 227.12(4) of the *National Defence Act* so that members of the armed forces may apply for a termination of an order to comply with the sex offender registry once they receive a pardon or once a record suspension is ordered.

An example of a statute where a reference to a pardon is replaced with that of a record suspension is the *DNA Identification Act*,³⁴ which is amended by clause 148 of Bill C-10. Section 10(8) of this statute will be amended to state that the stored bodily substances of a person in respect of whom a record suspension is in effect shall be kept separate and apart from other stored bodily substances. No such bodily substance shall be used for forensic DNA analysis, nor shall the existence of such a bodily substance be communicated to any person. Similarly, section 36(3)(b) of the *Immigration and Refugee Protection Act*³⁵ is being amended by clause 149 of the bill

to state that inadmissibility to Canada may not be based on a conviction in respect of which a record suspension has been ordered, as opposed to a pardon having been granted. The implications of this in the immigration context are discussed further under Part V, with respect to former Bill C-56: An Act to amend the Immigration and Refugee Protection Act.

The *Youth Criminal Justice Act*³⁶ is amended by clauses 156 through 159 of Bill C-10. The current section 82(1)(d) of the Act states that, if a young person is found guilty of an offence, and a youth justice court directs under section 42(2)(b) that the young person be discharged absolutely, or the youth sentence has ceased to have effect, the young person is deemed not to have been found guilty or convicted of the offence except that the Parole Board of Canada or any provincial parole board may consider the finding of guilt in considering an application for conditional release or pardon. Clause 156 of the bill will amend this so that the finding of guilt can be considered by the Board or any provincial parole board in an application for conditional release or for a record suspension under the *Criminal Records Act*.

Section 119 of the *Youth Criminal Justice Act* concerns those persons who have access to the records of young persons. By the terms of section 119(1)(n)(iii), a member of a department or agency of a government in Canada, or of an organization that is an agent of, or under contract with, the department or agency, who is considering an application for conditional release or pardon made by the young person, whether as a young person or an adult, can have such access. Clause 157 of the bill will amend this section to change the reference to a pardon to a reference to a record suspension. Clause 158 of the bill makes a similar amendment to section 120(4)(c)(iii) of the Act when considering an application for a record suspension after the young person becomes an adult.

Section 128 of the *Youth Criminal Justice Act* concerns the effect of the end of the period of access to youth records. While such records can be purged, section 128(5) of the Act states that an entry that is contained in a system maintained by the RCMP to match crime scene information and that relates to an offence committed or alleged to have been committed by a young person shall be dealt with in the same manner as information that relates to an offence committed by an adult for which a pardon granted under the *Criminal Records Act* is in effect. Clause 159 of the bill will amend this section so that such a potential match shall be treated in the same manner as information that relates to an offence committed by an adult for which a record suspension ordered under the *Criminal Records Act* is in effect. Section 6.2 of the *Criminal Records Act* will state that the name, date of birth and last known address of a person whose record is suspended or who has received a discharge may be disclosed to a police force if a fingerprint, identified as that of the person, is found at the scene of a crime during an investigation of the crime or during an attempt to identify a deceased person or a person suffering from amnesia.

An additional consequential amendment, clause 151, adds sections 12 and 13 to the *Limiting Pardons for Serious Crimes Act*, the former Bill C-23A. These amendments specify that the *Criminal Records Act*, as it read immediately before the day on which

Bill C-23A came into force, applies to a pardon that was granted or issued before that day and that has not been revoked or ceased to have effect. That section is deemed to have come into force on 29 June 2010, which is the date on which Bill C-23A received Royal Assent.

7.2.9 TERMINOLOGY CHANGES (CLAUSE 160)

Clause 160 of Bill C-10 amends several statutes, including the *Access to Information Act*, the *Corrections and Conditional Release Act*, the *Criminal Code*, the *Criminal Records Act*, the *International Transfer of Offenders Act*, and the *Youth Criminal Justice Act*, by replacing references to the “National Parole Board” with references to the “Parole Board of Canada” in the specified provisions.

7.2.10 TRANSITIONAL PROVISIONS (CLAUSES 161–165)

These provisions will come into force on the day that Bill C-10 receives Royal Assent.³⁷ Clause 161 refers to new applications for a pardon for an offence that is referred to in the current *Criminal Records Act* and is committed before the day on which the new provisions of Bill C-10 come into force. This application will be dealt with under the terms of the amended *Criminal Records Act* and treated as though it were an application for a record suspension. Under clause 162, however, an application for a pardon that is made on or after the day on which Bill C-23A came into force and before the new provisions of Bill C-10 come into force shall be dealt with in accordance with the *Criminal Records Act* as it read when the Board received the application, if it has not been finally disposed of.

By the terms of clause 163, a reference to an application for a record suspension in the specified provisions of the *Criminal Code*, the *National Defence Act*, and the *Youth Criminal Justice Act* is deemed also to be a reference to an application for a pardon that has not been finally disposed of.

Clause 164 of the bill indicates that the current *Criminal Records Act* will apply to a pardon that was granted or issued after Bill C-23A came into force but before the day on which the new provisions of Bill C-10 come into force and that has not been revoked or ceased to have effect. Clause 165 states that a reference to a record suspension in the following statutes is deemed also to be a reference to a pardon that is granted or issued under the *Criminal Records Act*:

- the definition “conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered” in section 25 of the *Canadian Human Rights Act*;
- the definition “record suspension” in section 490.011(1) of the *Criminal Code* (the definitions section for the sex offender information part of the *Criminal Code*);
- section 10(8) of the *DNA Identification Act* (separate storage of bodily substances where there is a record suspension);

- section 36(3)(b) (inadmissibility to Canada cannot be based on an offence for which a record suspension has been ordered) and 53(f) (regulations may include provisions relating to the effect of a record suspension on the status of permanent residents and foreign nationals and removal orders made against them) of the *Immigration and Refugee Protection Act*;
- the definition “record suspension” in section 227 of the *National Defence Act* (the definitions section for the sex offender information part of the *National Defence Act*); and
- section 128(5) of the *Youth Criminal Justice Act* (information in purged youth records can be related to crime scene evidence, just as it can for adults for whom a record suspension has been ordered).

NOTES

1. [Criminal Records Act](#), R.S.C. 1985, c. C-47.
2. House of Commons, [Debates](#), 3rd Session, 40th Parliament, 17 June 2010, 1505.
3. The proceedings of the meetings may be found at House of Commons, Standing Committee on Public Safety and National Security, [Meetings](#), 3rd Session, 40th Parliament.
4. Senate, Standing Committee on Legal and Constitutional Affairs, [Evidence](#), 3rd Session, 40th Parliament, 22 June 2010 (Harvey Cenaiko, Chairperson, Parole Board of Canada).
5. Parole Board of Canada, [Pardons](#), *Fact Sheet*.
6. [International Transfer of Offenders Act](#), S.C. 2004, c. 21.
7. [National Defence Act](#), R.S.C. 1985, c. N-5.
8. Parole Board of Canada, [Pardons](#), *Fact Sheet*.
9. *Ibid.*
10. *Criminal Records Act*, s. 4.1 (as of 28 May 2010).
11. Parole Board of Canada, [Clemency and Pardons](#), Chapter 14, in *Policy Manual*.
12. *Ibid.*
13. *Criminal Records Act*, s. 5(a)(ii).
14. [Canadian Human Rights Act](#), R.S.C. 1985, c. H-6, s. 3(1).
15. [Criminal Code](#), R.S.C. 1985, c. C-46.
16. [Sex Offender Information Registration Act](#), S.C. 2004, c. 10.
17. *Criminal Records Act*, s. 6.2.
18. *Ibid.*, s. 7.
19. Parole Board of Canada, [Clemency and Pardons](#), Chapter 14, in *Policy Manual*.
20. *Criminal Records Act*, s. 7.2.

21. The power to grant either a free or conditional pardon or respite from the execution of sentence and to remit any fines, penalties, or forfeitures is vested in the Governor General by Part XII of the [Letters Patent Constituting the Office of Governor General of Canada](#), effective 1 October 1947. The Governor General, however, is not to pardon or reprieve any offender without first receiving the advice of at least one of his or her Ministers.
22. Parole Board of Canada, [“Clemency and Pardons,”](#) Chapter 14, in *Policy Manual*.
23. Ibid.
24. Royal Canadian Mounted Police, [“Canadian Criminal Real Time Identification Services,”](#) *Assistance to Law Enforcement*.
25. Parole Board of Canada, [“Parole, Pardons and Clemency,”](#) *PBC QuickStats*.
26. Senate, [Standing Committee on Legal and Constitutional Affairs](#) (22 June 2010) (Harvey Cenaiko, Chairperson, Parole Board of Canada).
27. “Pardons Outcomes,” information supplied to the Standing Senate Committee on Legal and Constitutional Affairs by Harvey Cenaiko, Chairperson, Parole Board of Canada, pursuant to his testimony before the committee on 22 June 2010.
28. Parole Board of Canada, [“Parole, Pardons and Clemency,”](#) *PBC QuickStats*.
29. A “serious personal injury offence” is defined in the *Criminal Code* as:
 - (a) an indictable offence, other than high treason, treason, first degree murder or second degree murder, involving
 - (i) the use or attempted use of violence against another person, or
 - (ii) conduct endangering or likely to endanger the life or safety of another person or inflicting or likely to inflict severe psychological damage on another person,
 and for which the offender may be sentenced to imprisonment for ten years or more, or
 - (b) an offence or attempt to commit an offence mentioned in section 271 (sexual assault), 272 (sexual assault with a weapon, threats to a third party or causing bodily harm) or 273 (aggravated sexual assault).
30. Schedule 1 offences are generally sexual offences involving young persons.
31. Under the previous version of the *Criminal Records Act*, the applicant must not have been convicted of an offence under an Act of Parliament or a regulation made under an Act of Parliament. In addition, under the current version of the *Criminal Records Act*, a pardon may be revoked by the Parole Board of Canada if the person to whom it is granted is subsequently convicted of an offence punishable on summary conviction under an Act of Parliament or a regulation made under an Act of Parliament, and a pardon ceases to have effect if the person is subsequently convicted of an indictable offence under an Act of Parliament or a regulation made under an Act of Parliament.
32. Public Safety Canada, Clause-By-Clause Review, Bill C-23A, June 2010.
33. Senate, [Standing Committee on Legal and Constitutional Affairs](#) (22 June 2010) (Honourable Vic Toews, Minister of Public Safety).
34. [DNA Identification Act](#), S.C. 1998, c. 37.
35. [Immigration and Refugee Protection Act](#), S.C. 2001, c. 27.
36. [Youth Criminal Justice Act](#), S.C. 2002, c. 1.
37. [Interpretation Act](#), R.S.C. 1985, c. I-21, s. 5(2).

8 AMENDMENTS TO THE *INTERNATIONAL TRANSFER OF OFFENDERS ACT*
 [BILL C-10, PART 3, CLAUSES 135–136
 (FORMERLY BILL C-5)]

8.1 BACKGROUND

Clauses 135 and 136 of Part 3 of Bill C-10 amend the purpose of the *International Transfer of Offenders Act*,¹ as well as the factors for the Minister's consideration in deciding whether to consent to an offender's transfer.

Clauses 135 and 136 are identical to clauses 2 and 3 of Bill C-5, An Act to amend the International Transfer of Offenders Act (short title: Keeping Canadians Safe [International Transfer of Offenders] Act), as originally introduced in the House of Commons on 18 March 2010 by the Minister of Public Safety, the Honourable Vic Toews.² Bill C-5 was referred to the House of Commons Standing Committee on Public Safety and National Security, where it was amended to, among other things, remove some of the new factors and keep the Minister's consideration of the remaining factors mandatory and more objective. Bill C-5 died on the *Order Paper* when Parliament was dissolved on 26 March 2011, and the Committee's amendments are not reflected in Bill C-10.³

A prior version of the bill, Bill C-59, received first reading during the 2nd Session of the 40th Parliament but died on the *Order Paper* when Parliament was prorogued on 30 December 2009.

8.1.1 LEGISLATIVE SCHEME

Canada has been a party to treaties relating to the transfer of offenders since 1978.⁴ These agreements “enable offenders to serve their sentence in their country of citizenship, to alleviate undue hardships borne by offenders and their families and facilitate their eventual reintegration into society.”⁵ The problems Canadians incarcerated in foreign countries can face are said to include “culture shock, isolation, language barriers, poor diets, inadequate medical care, disease and inability to contact friends and family.”⁶ The transfer program is said to ensure “that offenders are gradually returned to society and that they have the opportunity to participate in programming that targets the factors that may have led to their offence.”⁷

The *Transfer of Offenders Act*⁸ came into force in Canada in 1978, and was replaced by the *International Transfer of Offenders Act* [the Act] in 2004. The Act enables offenders to serve their sentences in the country of which they are citizens or nationals (section 3). Generally speaking, the principle of “dual criminality” applies, so that a transfer is not available unless the Canadian offender's conduct would have constituted a criminal offence in Canada as well (section 4(1)).⁹ A transfer can take place only with the consent of the offender, the foreign entity, and Canada (section 8(1)). It is the Minister, currently defined as the Minister of Public Safety and Emergency Preparedness, who decides whether to consent to the transfer into

Canada of a “Canadian offender” or the transfer out of Canada of a “foreign offender” (sections 2 and 10). In making that decision, the Minister is currently required to consider certain factors, such as whether a Canadian offender’s return to Canada would constitute a threat to the security of Canada, and whether that offender has social or family ties in Canada (section 10).

Once an offender is transferred, his or her sentence is administered in accordance with the laws of the receiving country.¹⁰ The Correctional Service of Canada notes that, “[w]ith very few exceptions, if offenders are not transferred, they will ultimately be deported to their country of citizenship, without correctional supervision/ jurisdiction and without the benefit of programming.”¹¹

8.1.2 STATISTICS

8.1.2.1 TRANSFERS TO CANADA

According to the 2009–2010 *International Transfers Annual Report*, the most recent annual report available on the Correctional Service of Canada website as of the date of writing, a total of 1,531 Canadian citizens were transferred to Canada pursuant to an agreement on the international transfer of offenders between 1978 and 31 March 2010. Of these, 1,203 (78.6%) were from the United States.¹² The other countries from which the most Canadians were repatriated are Mexico (61 offenders, or 3.98%), the United Kingdom (36 offenders, or 2.35%), Peru (33 offenders, or 2.16%), Trinidad and Tobago (22 offenders, or 1.44%), Japan (21 offenders, or 1.37%), Venezuela (19 offenders, or 1.24%), Thailand and Costa Rica (18 offenders, or 1.18%, each), Cuba (17 offenders, or 1.11%), and Panama (11 offenders, or 0.72%). Fewer than 10 offenders were repatriated from any other country.¹³

The number of offenders transferred to Canada in a fiscal year has ranged from a low of 7 in 1980–1981 to a high of 98 in 2003–2004.¹⁴

According to the annual report, as of January 2010, approximately 1,808 Canadian offenders were known to be incarcerated abroad, of whom 1,616 were eligible for transfer to Canada.¹⁵

8.1.2.2 TRANSFERS FROM CANADA

According to the 2009–2010 *International Transfers Annual Report*, a total of 127 offenders have been transferred out of Canada since 1978, pursuant to an agreement on the international transfer of offenders. Of these, 108 offenders (85.0%) were American citizens.¹⁶ Eight offenders (6.3%) were transferred to the Netherlands, 3 (2.4%) were transferred to the United Kingdom, and 3 (2.4%) were transferred to France. One offender (0.8%) was transferred to each of the following countries: Estonia, Ireland, Israel, Italy, and Poland. Ninety of the 127 transfers (70.9%) took place between 1978 and 1983. Since then, transfers from Canada have generally taken place at the rate of 1 or 2 offenders per year, although there were 3 transfers in 1990–1991 (all to the United States) and 4 in 2006–2007 (1 each to Estonia, France, Israel and Italy).¹⁷

According to the annual report, as of January 2010, there were 901 foreign national offenders under the jurisdiction of Correctional Service of Canada; 304 were eligible for transfer to their country of citizenship.¹⁸

8.1.2.3 APPLICATIONS AND DENIALS

According to the 2009–2010 *International Transfers Annual Report*, the International Transfers Unit of the Correctional Service of Canada received 1,290 new applications for transfer between 2005–2006 and 2009–2010. Of those, 229 applications (17.75%) resulted in a transfer, 65 offenders (6.03%) withdrew their applications, and 598 applications (46.35%) were denied.¹⁹

Of the 1,167 applications received during the last 10 fiscal years that resulted in a denial, the report notes that 87% were denied by the foreign country, based on factors such as “dual citizenship, law enforcement concerns, lack of a removal order (for deportation), unpaid restitution, [and] divergence of parole eligibility.”²⁰ The report further notes that, for the applications denied by Canada between 1 April 1999 and 31 March 2010, the majority were based on one or more of the following sections of the Act:

- section 10(2)(a), “whether, in the Minister’s opinion, the offender will, after the transfer, commit a terrorism offence or criminal organization offence within the meaning of section 2 of the *Criminal Code*” (35%);
- section 10(1)(a), “whether the offender’s return to Canada would constitute a threat to the security of Canada” (28%); and/or
- section 10(1)(b) of the Act, “whether the offender left or remained outside Canada with the intention of abandoning Canada as their place of permanent residence” (23%).²¹

8.1.3 JURISPRUDENCE

Since the Act came into force in 2004, at least 15 offenders have applied for judicial review of the Minister’s refusal to consent to a request for transfer made pursuant to it. Several of these cases also address the issue of whether the Act violates the mobility rights that section 6 of the *Canadian Charter of Rights and Freedoms* guarantees to Canadian citizens.²²

8.1.3.1 JUDICIAL REVIEW OF THE MINISTER’S REFUSAL TO CONSENT TO A TRANSFER

In *Kozarov v. Canada (Minister of Public Safety and Emergency Preparedness)*,²³ although the offender and the United States consented to the transfer back to Canada, the Minister denied Mr. Kozarov’s application on the grounds that he had spent the previous 10 years in the United States, the file information suggested he left Canada with no intention of returning, and the file information stated that there did not appear to be sufficient ties to Canada to warrant a transfer.²⁴ After stating that courts should not readily interfere with a discretionary decision of a minister,

Justice Harrington of the Federal Court held that the Minister's findings with respect to Mr. Kozarov were not unreasonable.²⁵ Mr. Kozarov's appeal of this decision was dismissed as he had already been deported to Canada.²⁶

The offender and the United States had also consented to a transfer to Canada in *Getkate v. Canada (Minister of Public Safety and Emergency Preparedness)*.²⁷ The Minister refused to consent because the offender's return to Canada would constitute a potential threat to the safety of Canadians and the security of Canada, and there was no evidence to suggest the offender's risk had been mitigated through treatment.²⁸ The Minister denied Mr. Getkate's second request for these same reasons and because there was evidence that the offender had abandoned Canada as his place of permanent residence.²⁹ On judicial review, Justice Kelen of the Federal Court stated that while the Minister's decision is discretionary and is entitled to the highest level of deference, the record clearly established that the decisions disregarded the evidence.³⁰ In particular, there was evidence that the offender had undertaken intensive treatment at his own expense,³¹ and "clear and unambiguous evidence," including from the Correctional Service of Canada, that Mr. Getkate never abandoned or intended to abandon Canada as his place of permanent residence.³² Finally, Justice Kelen noted that the use of the phrase "threat to the security of Canada" had traditionally been limited to threats of general terrorism and warfare against Canada, or threats to the security of Canadians *en masse*, and that if the phrase referred to the mere risk that the offender would reoffend, then such a consideration could be applied to every inmate seeking a transfer.³³ Since the reasons articulated by the Minister were "contrary to the evidence and to the assessment and recommendations by his own Department," Mr. Getkate's request for a transfer was referred back to the Minister for redetermination.³⁴

In *DiVito v. Canada (Minister of Public Safety and Emergency Preparedness)*,³⁵ the Minister refused a transfer request because "the offender has been identified as an organized crime member, convicted for an offence involving a significant quantity of drugs" and "[t]he nature of his offence and his affiliations suggest that the offender's return to Canada would constitute a potential threat to the safety of Canadians and the security of Canada."³⁶ On judicial review, Justice Harrington noted the existence of "information from the RCMP suggesting that Mr. DiVito was a member of traditional organized crime."³⁷ Although there was also conflicting evidence, namely that Mr. DiVito "did not constitute a threat to Canada's security," and although the report from the Correctional Service of Canada stated that "Mr. DiVito's transfer from the United States to Canada ... would be extremely beneficial,"³⁸ Justice Harrington held that the Minister's decision was reasonable.³⁹

Other recent judicial review decisions have also been divided between upholding the Minister's refusal to consent to a transfer⁴⁰ and sending the decision back to the Minister for redetermination because the Minister had made an error or had not provided sufficient reasons,⁴¹ in particular where the Minister had not followed the advice of Correctional Service of Canada.⁴²

8.1.3.2 CONSTITUTIONAL ARGUMENTS RELATING TO MOBILITY RIGHTS

An argument that has repeatedly been raised is that the Act infringes section 6(1) of the *Charter of Rights and Freedoms*, which provides that “[e]very citizen of Canada has the right to enter, remain in and leave Canada.”⁴³

The most frequently cited case for this argument is *Van Vlymen v. Canada (Solicitor General)*,⁴⁴ which predates the current Act. Mr. Van Vlymen’s application for transfer had been approved by the foreign entity, the United States, in January of 1991, but Canada only consented to the transfer in March of 2000, after Mr. Van Vlymen commenced legal proceedings.⁴⁵ Justice Russell of the Federal Court found that Canada had refused and/or delayed the transfer process, resulting in a denial of Mr. Van Vlymen’s rights under section 6 of the Charter between January 1991 and March 2000.⁴⁶ Justice Russell also held that Canada’s conduct represented “a clear breach of section 7 of the Charter [‘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’] and the common law duty to act fairly in processing [Mr. Van Vlymen’s] transfer application.”⁴⁷

Several subsequent Federal Court decisions have, however, distinguished this case and found that similarly challenged provisions in the current Act are not unconstitutional.⁴⁸

In *Kozarov*, for example, Justice Harrington rejected the constitutional argument, noting that Mr. Kozarov had the absolute mobility right, as a Canadian citizen, to return to Canada *once his sentence was served*, and that, if the Minister had consented to the transfer, Mr. Kozarov could not on his arrival have immediately asserted his mobility right to leave Canada.⁴⁹ Mobility rights were not the issue, he said; rather “the transfer of supervision of a prison sentence” was.⁵⁰ Justice Harrington distinguished the *Van Vlymen* case on the basis that the “driving force of that decision was the failure to decide within a reasonable time frame,” not the constitutionality of the legislative provisions themselves.⁵¹

Similarly, in *Getkate*, Justice Kelen stated that *Van Vlymen* was clearly “distinguishable on its facts,” and that “the decision in *Kozarov* provides better guidance with respect to the interplay between section 6 of the Charter and the provisions of the Act.”⁵² Justice Kelen concluded that Mr. Getkate’s right to enter and leave Canada was restricted while he was incarcerated either in the United States or in Canada, and that automatic consent would not respect Canada’s international treaty agreements, “which only allow transfers to provide for the better rehabilitation of the prisoner.”⁵³

Federal Court judges have rejected the constitutional argument in more recent cases as well,⁵⁴ and the Federal Court of Appeal also recently ruled that the challenged provisions are constitutional.⁵⁵

8.2 DESCRIPTION AND ANALYSIS

8.2.1 PURPOSE OF THE ACT (CLAUSE 135)

Currently, the purpose of the Act “is to contribute to the administration of justice and the rehabilitation of offenders and their reintegration into the community by enabling offenders to serve their sentences in the country of which they are citizens or nationals” (section 3). Clause 135 of Bill C-10 amends this by adding the following reference to public safety: “The purpose of this Act is to *enhance public safety and to* contribute to the administration of Justice and the rehabilitation of offenders and their reintegration into the community by enabling offenders to serve their sentences in the country of which they are citizens or nationals.” Some commentators, however, have questioned the rationale for this amendment, arguing that international transfers already enhance public security by helping to rehabilitate the worst offenders, who are likely to be deported back to the country after they complete their sentences.⁵⁶ Similarly, the term “administration of justice” in the purpose section has been judicially interpreted as being sufficiently broad to include public safety and security considerations.⁵⁷

8.2.2 FACTORS FOR THE MINISTER TO CONSIDER (CLAUSE 136)

In determining whether to consent to the transfer of a Canadian offender back to Canada, the Minister is currently required, under section 10(1) of the Act, to consider the following factors:

- (a) whether the offender’s return to Canada would constitute a threat to the security of Canada;
- (b) whether the offender left or remained outside Canada with the intention of abandoning Canada as their place of permanent residence;
- (c) whether the offender has social or family ties in Canada; and
- (d) whether the foreign entity or its prison system presents a serious threat to the offender’s security or human rights.

The Minister is also required, under section 10(2), to consider the following factors with respect to the transfer of both Canadian and foreign offenders:

- (a) whether, in the Minister’s opinion, the offender will, after the transfer, commit a terrorism offence or criminal organization offence within the meaning of section 2 of the *Criminal Code*; and
- (b) whether the offender was previously transferred under this Act or the *Transfer of Offenders Act*, chapter T-15 of the Revised Statutes of Canada, 1985.

Clause 136 of the bill makes the Minister’s consideration of all factors under section 10 of the Act discretionary (“the Minister may consider”), rather than mandatory (“the Minister shall consider”) as is currently the case.⁵⁸ As well, clause 136 amends sections 10(1)(a), (b), and (d) by adding “whether, *in the Minister’s opinion*” at the beginning of the section. This would appear to allow for a

subjective assessment by the Minister, should he or she choose to consider one of those factors.⁵⁹ Section 10(1)(c), “whether the offender has social or family ties in Canada,” is not amended in this way, so it would appear to be a more objective factor.⁶⁰

Finally, clause 136 adds to section 10(1) additional factors for the Minister to consider in determining whether to consent to the transfer of a Canadian offender:

- whether, in the Minister’s opinion, the offender’s return to Canada will endanger public safety, including
 - the safety of any person in Canada who is a victim, as defined in section 2(1) of the *Corrections and Conditional Release Act*, of an offence committed by the offender,
 - the safety of any member of the offender’s family, in the case of an offender who has been convicted of an offence against a family member, and
 - the safety of any child, in the case of an offender who has been convicted of a sexual offence involving a child;
- whether, in the Minister’s opinion, the offender is likely to continue to engage in criminal activity after the transfer;
- the offender’s health;
- whether the offender has refused to participate in a rehabilitation or reintegration program;
- whether the offender has accepted responsibility for the offence for which he or she has been convicted, including by acknowledging the harm done to victims and to the community;
- the manner in which the offender will be supervised, after the transfer, while he or she is serving his or her sentence;
- whether the offender has cooperated, or has undertaken to cooperate, with a law enforcement agency; and
- any other factor that the Minister considers relevant.

With respect to the factor about accepting responsibility for the offence, concern has been expressed that this could result in innocent individuals pleading guilty “in order to avoid remaining in a foreign jail.”⁶¹

NOTES

1. [International Transfer of Offenders Act](#), S.C. 2004, c. 21.
2. Clauses 1 and 4 contained the short title and the coming into force provision, respectively.
3. See Cynthia Kirkby, [Legislative Summary of Bill C-5: An Act to amend the International Transfer of Offenders Act](#), Publication no. 40-3-C5E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 30 March 2011.

4. For a list of these treaties, see Correctional Service of Canada, [International Transfer of Offenders – Agreements](#).
5. Correctional Service of Canada, [International Transfer Of Offenders](#).
6. Ibid.
7. Ibid.
8. *Transfer of Offenders Act*, R.S.C. 1985, c. T-15. The *Transfer of Offenders Act* came into force following a United Nations meeting at which member states agreed that the international transfer of offenders was desirable due to the increasing mobility of offenders and the need for countries to cooperate on criminal justice matters. The intent of the *Transfer of Offenders Act* was to authorize the implementation of treaties between Canada and other countries, including multilateral conventions, for the international transfer of offenders.
9. Section 4(3) of the *International Transfer of Offenders Act* sets out an exception for a Canadian offender who, at the time the offence was committed, was a child within the meaning of the *Youth Criminal Justice Act*, S.C. 2002, c. 1.
10. Correctional Service of Canada, [International Transfer Of Offenders](#). For further description and analysis of the Act, see Robin MacKay, [Legislative Summary of Bill C-15: International Transfer of Offenders Act](#), Publication no. LS-469E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 16 February 2004.
11. Correctional Service of Canada, [International Transfers: Annual Report 2009–2010](#), p. 4.
12. Ibid.
13. Ibid., “Annex ‘A’ – Transfers to Canada by Fiscal Year.”
14. Ibid.
15. Ibid., p. 6.
16. Ibid., p. 5.
17. Ibid., “Annex ‘B’ – Transfers from Canada by Fiscal Year.”
18. Ibid., p. 6.
19. Ibid., p. 10. The report notes that “[t]he remainder of the applications are still in process or have been closed for a variety of reasons (release from institution, ineligibility).”
20. Ibid., p. 11.
21. Ibid., p. 14.
22. *Canadian Charter of Rights and Freedoms*, Part I. of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [Charter], s. 6(1).
23. *Kozarov v. Canada (Minister of Public Safety & Emergency Preparedness)*, [2008] 2 F.C.R. 377, 2007 FC 866.
24. Ibid., para. 2.
25. Ibid., paras. 12 and 24.
26. *Kozarov v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FCA 185.
27. *Getkate v. Canada (Minister of Public Safety and Emergency Preparedness)*, [2009] 3 F.C.R. 26, 2008 FC 965.
28. Ibid., para. 6.
29. Ibid., para. 8.

30. Ibid., para. 33.
31. Ibid., para. 34.
32. Ibid., paras. 38–40.
33. Ibid., para. 41.
34. Ibid., paras. 44–45.
35. *DiVito v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FC 983.
36. Ibid., para. 1.
37. Ibid., para. 21.
38. Ibid., paras. 20, 22 and 23.
39. Ibid., para. 26.
40. *Grant v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2010 FC 958 (although an earlier decision with respect to the same offender had been sent back for redetermination on the basis that the Minister’s reasons were insufficient (*Grant v. Canada (Minister of Public Safety and Emergency Preparedness)*, [2010] F.C.J. No. 386 (QL)); *Holmes v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2011 FC 112; *Markevich v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2011 FC 113; *LeBon v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2011 FC 1018; *Tippett v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2011 FC 814.
41. *Dudas v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2010 FC 942; *Curtis v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2010 FC 943; *Downey v. Canada (Minister of Public Safety)*, 2011 FC 116; *Randhawa v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2011 FC 625; *Balili v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2011 FC 396.
42. *Grant v. Canada (Minister of Public Safety and Emergency Preparedness)*, [2010] F.C.J. No. 386 (QL); *Vatani v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2011 FC 114; *Singh v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2011 FC 115; *Yu v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2011 FC 819.
43. Charter, s. 6(1).
44. *Van Vlymen v. Canada (Solicitor General)*, [2005] 1 F.C.R. 617, 2004 FC 1054. Mr. Van Vlymen had already been transferred by the time the case was heard.
45. Ibid., para. 86.
46. Ibid., para. 115.
47. Ibid., para. 116.
48. Note that some cases have held that there is no mobility rights infringement, while others have held that there is an infringement but that it is “saved” under section 1 of the Charter, which provides as follows: “The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it *subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society*” [emphasis added].
49. *Kozarov*, para. 32 [emphasis added].
50. Ibid.
51. Ibid., paras. 35 and 36.

52. *Getkate*, para. 23.
53. *Ibid.*, paras. 28 and 29.
54. *DiVito v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FC 983, para. 13; *Holmes*, paras. 28 and 41; *Dudas*, para. 28; *Curtis*, para. 33.
55. *DiVito v. Canada (Public Safety and Emergency Preparedness)*, 2011 FCA 39, para. 68 (Justice Mainville, concurring, *prima facie* infringements that are reasonable limits on the mobility right) and para. 89 (Justice Nadon, Justice Trudel agreeing, no violation of section 6). It appears that a notice of application for leave to appeal to the Supreme Court of Canada has been filed (Supreme Court of Canada, SCC Case Information, [Docket 34128](#)). Based on the Federal Court of Appeal decision, the constitutional challenge was rejected in *Yu v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2011 FC 819, para. 10.
56. The Canadian Press, “Feds to make it harder for prisoners abroad to return to Canada,” *The Daily Gleaner* [Fredericton], 27 November 2009, p. A10, citing criminologist Neil Boyd; and Nathalie Des Rosiers, “[Benign amendments or undermining of the rule of law?](#),” Canadian Civil Liberties Association, 4 December 2009.
57. *Holmes*, para. 9. Justice Phelan stated in para. 10, however, that “[i]t is not for the Court to comment on proposed legislation even though it was raised by the parties.”
58. Nathalie Des Rosiers, general counsel for the Canadian Civil Liberties Association, expressed concern that under the amendments, the Minister would no longer be *required* to consider factors including whether the conditions of foreign detention present a serious threat to the offender’s security or human rights. (See Des Rosiers (2009).)
59. The phrase “in the Minister’s opinion,” as found in section 10(2)(a) of the Act, was considered in *Grant v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2010 FC 958, para. 37. It was held to “trump” or to “temper” aspects of the surrounding text.
60. Note also that the word “would” in section 10(1)(a) is amended to “will,” and the other existing factors are renumbered to accommodate the additional factors.
61. Des Rosiers (2009).

9 AMENDMENTS TO THE *YOUTH CRIMINAL JUSTICE ACT* [BILL C-10, PART 4, CLAUSES 167–204 (FORMER BILL C-4)]

9.1 BACKGROUND¹

9.1.1 PURPOSE AND PRINCIPAL AMENDMENTS

Clauses 167–204 of Part 4 of Bill C-10 are very similar to the provisions in Bill C-4, An Act to amend the Youth Criminal Justice Act and to make consequential and related amendments to other Acts (short title: Sébastien’s Law [Protecting the Public from Violent Young Offenders]), which was tabled in the House of Commons by the Minister of Justice and Attorney General of Canada, the Honourable Robert Nicholson, on 16 March 2010. Bill C-4 died on the *Order Paper* when Parliament was dissolved on 26 March 2011. The primary difference between Part 4 of Bill C-10 and Bill C-4 is that Bill C-10 would facilitate pre-sentencing detention in certain cases (clause 169).

The purpose of Part 4 of Bill C-10 is to amend certain provisions of the *Youth Criminal Justice Act*² (YCJA) to emphasize the importance of protecting society and to facilitate the detention of young persons³ who reoffend or who pose a threat to public safety. More particularly, the bill:

- establishes specific deterrence and denunciation as sentencing principles similar to the principles provided in the adult criminal justice system (clause 172);
- expands the case law definition of a violent offence to include reckless behaviour endangering public safety (clause 167);
- amends the rules for pre-sentencing detention (also called “pre-trial detention”) to facilitate the detention of young persons accused of crimes against property punishable by a maximum term of five years or more and those with a history of outstanding charges or findings of guilt (clause 169);
- authorizes the court to impose a prison sentence on a young person who has previously been subject to a number of extrajudicial sanctions (clause 173);
- requires the Crown to consider the possibility of seeking an adult sentence for young offenders 14 to 17 years of age convicted of murder, attempted murder, manslaughter or aggravated sexual assault (clauses 176 and 183);
- facilitates publication of the names of young offenders convicted of violent offences (clauses 185 and 189);
- requires police to keep a record of any extrajudicial measures imposed on young persons so that their criminal tendencies can be documented (clause 190); and
- prohibits the imprisonment of young persons in adult correctional facilities (clause 186).

Part 4 of Bill C-10 includes the essential aspects of the two features contained in the former bills C-4 and C-25:⁴ the addition of deterrence and denunciation as sentencing principles and, second, rules facilitating the pre-sentencing detention of young persons.

9.1.2 GENERAL BACKGROUND TO PROPOSED REFORM

Youth crime in general, and violent youth crime in particular, are a source of concern to many Canadians. According to some, these types of crime are on the rise, although the most recent statistics reported by police indicate that crime committed by individuals 12 to 17 years of age has declined. According to Statistics Canada figures, the overall youth crime rate fell by 7% in 2010 relative to 2009. As for violent crime, the statistics indicate a 3% drop from the previous year. Breaking those statistics down further, Statistics Canada explains,

There were 56 youth accused of homicide in 2010, 23 fewer than in 2009, resulting in a 29% drop in the rate. Declines were also seen in the rates of youth accused of motor vehicle thefts (-14%), serious assault (-12%) and break-ins (-10%). Robbery, up 2%, was one of the few crimes committed by youth to increase in 2010.⁵

The data generated by Statistics Canada's new Crime Severity Index (CSI)⁶ in 2010 show that the severity of all youth crimes combined has generally been declining since 2000. Much of this decrease is explained by a significant decline in the severity of non-violent crime. During the same period, violent youth crime severity increased by 5%, but between 2009 and 2010 the severity of violent youth crime decreased in all provinces and territories.

Table 9-1 shows the rate of violent and non-violent crimes committed by young persons from 2000 to 2010. Table 9-2 shows the youth crime severity index values for the same period.

Table 9-1 – Youth Accused of Police-Reported Crime, Canada, 2000–2010

Year	Total Crime (youth crime rate)			Violent Crime			Property Crime			Other <i>Criminal Code</i> Offences		
	Number	Rate ^a	Percentage Change from Previous Year	Number	Rate	Percentage Change from Previous Year	Number	Rate	Percentage Change from Previous Year	Number	Rate	Percentage Change from Previous Year
2000	171,148	6,914	7	48,130	1,944	13	96,760	3,909	4	26,258	1,061	11
2001	178,529	7,159	4	49,475	1,984	2	99,097	3,974	2	29,957	1,201	13
2002	175,537	6,945	-3	47,960	1,898	-4	98,021	3,878	-2	29,556	1,169	-3
2003	186,041	7,280	5	50,106	1,961	3	105,625	4,133	7	30,310	1,186	1
2004	179,670	6,959	-4	49,695	1,925	-2	99,601	3,858	-7	30,374	1,176	-1
2005	172,024	6,596	-5	49,430	1,895	-2	92,631	3,552	-8	29,963	1,149	-2
2006	178,839	6,812	3	51,452	1,960	3	94,835	3,612	2	32,552	1,240	8
2007	177,400	6,782	0	51,144	1,955	0	93,701	3,582	-1	32,555	1,245	0
2008	169,747	6,577	-3	49,130	1,903	-3	88,878	3,443	-4	31,739	1,230	-1
2009	167,103	6,593	0	48,030	1,895	0	88,309	3,484	1	30,764	1,214	-1
2010	152,700	6,147	-7	45,653	1,838	-3	78,366	3,155	-9	28,681	1,155	-5
Percentage change, 2000–2010	N/A ^b	-11	N/A	N/A	-5	N/A	N/A	-19	N/A	N/A	9	N/A

Notes a. Crime rates are based upon *Criminal Code* incidents (excluding traffic offences). The youth crime rate refers to the number of youth 12 to 17 years of age who were either charged (or recommended for charging) by police or diverted from the formal criminal justice system through the use of warnings, cautions, referrals to community programs, etc. Counts are based upon the most serious violation in the incident. One incident may involve multiple violations. Data for the youth crime rates of total, violent, property and other crime categories are available beginning in 1977. Rates are calculated on the basis of 100,000 youth population. Traffic

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offences set out in the *Criminal Code*, drug offences, other federal statute offences and provincial statute offences are not included. See Shannon Brennan and Mia Dauvergne, "[Police-reported crime statistics in Canada, 2010](#)," *Juristat*, Statistics Canada catalogue no. 85-002-X, 21 July 2011.

b. Not applicable.

Source: Statistics Canada, Canadian Centre for Justice Statistics, *Uniform Crime Reporting Survey*.

Table 9-2 – Police-Reported Youth Crime Severity Indexes, Canada, 2000–2010^a

Year	Youth Crime Severity Index		Youth Violent Crime Severity Index		Youth Non-Violent Crime Severity Index	
	Index ^b	Percentage Change from Previous Year	Index	Percentage Change from Previous Year	Index	Percentage Change from Previous Year
2000	103.5	4	89.3	7	114.4	3
2001	106.0	2	91.4	2	117.1	2
2002	101.1	-5	87.3	-5	111.7	-5
2003	106.0	5	92.6	6	116.2	4
2004	100.8	-5	87.8	-5	110.7	-5
2005	97.3	-4	94.1	7	99.8	-10
2006	100.0	3	100.0	6	100.0	0
2007	101.6	2	102.2	2	101.1	1
2008	96.2	-5	96.3	-6	96.1	-5
2009	96.6	0	97.8	2	95.8	0
2010	90.5	-6	93.7	-4	88.0	-8
Percent change 2000 to 2010	-13	N/A ^c	5	N/A	-23	N/A

Notes: a. Refers to the number of youth 12 to 17 years of age who were either charged (or recommended for charging) by police or diverted from the formal criminal justice system through the use of warnings, cautions, referrals to community programs, etc. Data on the youth crime severity indexes are available beginning in 1998.

b. The Crime Severity Index (CSI) is a tool used to measure crime trends. It allows Statistics Canada to assign a weight to each crime according to its seriousness, based on the sentences handed down by the criminal courts across Canada. To calculate this figure, Statistics Canada assigns to each crime a different weight derived from the average of the sentences handed down by the courts for that offence. The more serious offences are assigned heavier weights than less serious offences. Consequently, the more serious offences have a more significant impact on the CSI.

c. Not applicable.

Source: Statistics Canada, Canadian Centre for Justice Statistics, *Uniform Crime Reporting Survey*.

In attempts to address the concerns of Canadians and to react to youth crime, Parliament has, from time to time, proposed amendments to youth justice legislation (we will briefly describe the development of youth justice in the next section). A number of those amendments were motivated in part by violent incidents involving young persons that had made the headlines and contributed to increased feelings of insecurity among the public. Bill C-4 was similar in that regard. The first part of its short title – Sébastien’s Law – was chosen in memory of Sébastien Lacasse, who, in 2004, was chased down by a group of youths and killed on a Laval, Quebec, street by a 17-year-old.

In his speech in the House of Commons when Bill C-4 was introduced, the Minister of Justice emphasized that the bill would “make the protection of society a primary goal of our youth criminal justice system, and it will give Canadians greater confidence that violent and repeat young offenders will be held accountable.”⁷ The Minister noted a number of times that the proposed reform was based on the recommendations of the commission of inquiry chaired in Nova Scotia by the Honourable D. Merlin Nunn.⁸ The commission’s mandate was to examine the charges laid against AB, a 16-year-old teenage male responsible for the death of Theresa McEvoy in Halifax on 14 October 2004, and the reasons leading to his release two days before that tragic incident. AB, who was driving around in a stolen car at the time of the incident, had been released on 12 October 2004, even though 38 criminal charges had been laid against him.

Commissioner Nunn’s report, presented on 5 December 2006,⁹ contains 34 recommendations, of which 19 concern the need to simplify the administration of justice and improve accountability, six concern reinforcement of the YCJA, and nine relate to the prevention of youth crime. In general, Mr. Nunn found that the YCJA “provides an intelligent, modern, and advanced approach to dealing with youths involved in criminal activities.”¹⁰ In his view, Canada is now “far ahead of other countries in its treatment of youth in conflict with the law.”¹¹ He nevertheless felt that certain amendments to the YCJA were necessary “to give flexibility to the courts in dealing with repeat offenders, primarily by opening a door to pre-trial custody and enlarging the gateways to custody.”¹² Mr. Nunn’s recommendations specifically addressing the YCJA were as follows:

Recommendation 20: The Province should advocate that the federal government amend the “Declaration of Principle” in section 3 of the *Youth Criminal Justice Act* to add a clause indicating that protection of the public is one of the primary goals of the act.

Recommendation 21: The Province should advocate that the federal government amend the definition of “violent offence” in section 39(1)(a) of the *Youth Criminal Justice Act* to include conduct that endangers or is likely to endanger the life or safety of another person.

Recommendation 22: The Province should advocate that the federal government amend section 39(1)(c) of the *Youth Criminal Justice Act* so that the requirement for a demonstrated “pattern of findings of guilt” is changed to “a pattern of offences,” or similar wording, with the goal that both a young person’s prior findings of guilt and pending charges are to be considered when determining the appropriateness of pre-trial detention.

Recommendation 23: The Province should advocate that the federal government amend and simplify the statutory provisions relating to the pre-trial detention of young persons so that section 29 will stand on its own without interaction with other statutes or other provisions of the *Youth Criminal Justice Act*.

Recommendation 24: The Province should advocate that the federal government amend section 31(5)(a) of the *Youth Criminal Justice Act* so that if the designated “responsible person” is relieved of his or her obligations under a “responsible person undertaking” the young person’s undertaking

made under section 31(3)(b) nevertheless remains in full force and effect, particularly any requirement to keep the peace and be of good behaviour and other conditions imposed by a youth court judge.

Recommendation 25: The Province should advocate that the federal government amend section 31(6) of the *Youth Criminal Justice Act* to remove the requirement of a new bail hearing for the young person before being placed in pre-trial custody if the designated “responsible person” is relieved of his or her obligations under a “responsible person undertaking.”¹³

It will be seen in section 9.2, “Description and Analysis,” in this legislative summary how Part 4 of Bill C-10 provides for action on Recommendations 20 to 23 of the Nunn Report. However, the bill does not include provisions implementing Recommendations 24 and 25.

Starting in 2007, the federal Department of Justice undertook an exhaustive review and consultation process relating to the YCJA involving the provinces, territories, civil society and the public. The results of that consultation do not appear to have been published by the Department of Justice.

9.1.3 HISTORY OF YOUTH JUSTICE IN CANADA FROM 1908 TO THE PRESENT

9.1.3.1 FROM 1908 TO 1984

The approach to young offenders has evolved considerably since the *Juvenile Delinquents Act* (JDA), the first statute in Canada exclusively concerning young persons in conflict with the law, was passed in 1908.¹⁴ Under that Act, young people in conflict with the law were seen as not-yet-mature beings in need of “aid, encouragement, help and assistance.” According to the JDA, “every juvenile delinquent shall be treated not as a criminal, but as a misdirected and misguided child.”¹⁵ The response was therefore to protect the young offender by focusing on the factors that gave rise to the criminal behaviour rather than punishing the young person for the offence that brought him or her into contact with the justice system.

In the opinion of some, the involvement of the criminal justice system under the JDA resembled “more of a social welfare exercise than a judicial process.”¹⁶ This approach, on which there was general agreement until the 1960s, was strongly criticized by some who felt that the JDA gave too much arbitrary power to legal authorities in the name of the welfare of the child and too little attention to a fairer and more equitable system. Young offenders were given indeterminate sentences that bore no relation to the seriousness of the offences. Some also decried the inconsistencies in the treatment of young offenders from province to province and the fact that young offenders had no basic rights or recourse in criminal law procedure, such as the right to consult a lawyer or to appeal a decision.

The process of reforming the JDA took a long time. It began in 1961, when a committee in the Department of Justice was given the task of examining youth crime,¹⁷ and it ended in 1982 with the passage of the *Young Offenders Act*.

9.1.3.2 FROM 1984 TO 2003

When the *Young Offenders Act* (YOA) came into force in 1984,¹⁸ it marked the beginning of a new era in dealing with young people in conflict with the law.¹⁹ Compared to the JDA, it contained a much narrower definition of the term “young offender.” Under the 1908 Act, the range of offences for which a young person could be prosecuted was very broad. Anyone from 7 to 15 years of age was a “juvenile delinquent” if he or she had committed an offence contained in the *Criminal Code*²⁰ or in any federal or provincial Act or regulation or municipal by-law, or who was guilty of “sexual immorality or any similar form of vice.” Under the new YOA, a “young offender” was anyone from 12 to 17 years of age alleged to have committed an offence created by federal statutes or by regulations made thereunder (except Territorial ordinances). The new Act also set the threshold of criminal responsibility at 12, and standardized the age of criminal majority at 18 all across Canada.²¹ But, as in the 1908 Act, under the YOA a youth court could send cases to adult court if they involved young people aged 14 or older alleged to have committed a serious crime.

The YOA also moved away from the exclusively “protective” approach of the 1908 Act in favour of an approach that attempted to balance the protection of a young offender with accountability. The young person was still seen as not yet mature, but his or her responsibility in a given matter was recognized. A young offender was therefore no longer seen simply as the product of his or her environment, but also as an involved and accountable participant. This change in approach also gave rise to the establishment of fundamental procedural guarantees for young people in conflict with the law, such as the right to a lawyer and the right to appeal a decision.

From the time it took effect, the YOA was criticized for not setting out clear principles to guide those with the task of upholding the law. Some claimed that this gave rise to disparity and injustice across the country. Another criticism of the YOA was that it placed more value on reintegration into society and rehabilitation than on public protection, particularly in cases in which young offenders were charged with serious crimes.

In response to these criticisms, the YOA was amended in 1986, 1992 and 1995. The amendments toughened the Act for young people charged with serious crimes. Among the amendments were longer sentences for murder, and reversal of the onus of proof so that, in relevant cases, young offenders would have to prove that they should not be tried in adult court.²²

9.1.3.3 FROM 2003 TO THE PRESENT

The YCJA took effect in April 2003. Longer, more detailed and more complex than the Act that preceded it, the YCJA is an attempt to address the problems identified in the Act it replaced, such as over-reliance on court involvement and incarceration and too little consistency in the way the Act was enforced across the country. In addition to adding new sentences²³ and replacing trials in adult court with a system of adult sentences that can be imposed on young people over 14 years of age, it has a preamble and principles that are intended to provide clear direction to those with the responsibility of imposing penalties on young people convicted of criminal offences.

The preamble to the Act states that the youth criminal justice system should take the interests of victims into account, foster responsibility and ensure accountability through meaningful consequences and effective rehabilitation and reintegration through the elimination of the underlying causes of crime among young persons, and reduce over-reliance on incarceration for non-violent young persons. The YCJA also has a number of other underlying principles:

- The intent of the youth criminal justice system is to promote the long-term protection of the public.
- Young offenders should be held accountable for their behaviour by making them acknowledge the consequences of their offences and by encouraging them to repair the harm done to victims and the community.
- The parents of young offenders as well as the community as a whole should be, as appropriate, involved in the measures taken for the social integration of young offenders.
- The expectations of victims should be taken into consideration, and victims should suffer the minimum degree of inconvenience as a result of their involvement with the youth criminal justice system.
- Ethnic background, language and gender differences must be respected when deciding how to hold a young person accountable, while the overriding principle remains that a sentence must be proportionate to the seriousness of the offence and the degree of responsibility of the young person for that offence.²⁴

The YCJA also aims to provide justice more fairly and equitably through, for example, sentences that appreciably vary with the gravity of the offence. This means lighter penalties for those convicted of minor offences and more serious penalties for those convicted of serious offences.

The YCJA clearly establishes that a sentence must be “proportionate to the seriousness of the offence and the degree of responsibility of the young person for that offence.”²⁵ In this sense, the YCJA reaffirms the responsibility of young people in conflict with the law; it also sets accountability as an objective that must guide all sentences imposed by youth courts as well as measures taken outside the court process (extrajudicial measures).

9.1.3.4 THE *YOUTH CRIMINAL JUSTICE ACT* OF 2003²⁶

Most young people brought before the courts are charged with non-violent offences.²⁷ While the YOA provided for alternative measures to incarceration in such cases, these measures were rarely made available. In 1997, for example, they were used in only 25% of cases.²⁸ This is partially explained by the fact that the YOA was not clear enough in setting out the goals of extrajudicial measures, in describing the measures that were available and in establishing the cases in which their use was valid.

One of the objectives of the YCJA is to remedy the lack of sentencing guidelines in the YOA in order to have less court involvement for those who committed minor offences. Official crime statistics seem to show that the YCJA has met these

expectations. “[I]n 2008, 42% of youth accused were formally charged by police while the remaining 58% were diverted by other means.”²⁹ That year, the rate of charges laid against youth fell 4% from the previous year. According to the most recent statistics, 26% fewer cases were heard in youth court in 2006–2007 than in 2002–2003, the year before the YCJA came into effect. All provinces and territories saw their numbers drop: the largest reductions were in the Northwest Territories (52%), Newfoundland and Labrador (47%) and Yukon (45%).³⁰

Lastly, the YCJA also appears to have achieved expected results in reducing the use of incarceration for young offenders. Under the YOA, about 80% of all custodial sentences were for non-violent offences³¹ and Canada was known for having the highest rate of incarceration for young offenders between 12 and 17 of any Western country. In 2007–2008, non-violent offences were the cause of 43% of admissions to custody following conviction.³² Since the YCJA came into force, the youth incarceration rate has also decreased substantially. In 2008–2009, the average number of youth in detention following conviction had fallen 42% relative to 2003–2004, the year in which the YCJA came into force.³³ The decrease in incarceration rates was not followed by an increase in the youth crime rate; as shown in Table 9-1, the youth crime rate has generally dropped since the Act came into force.

Since the YCJA came into effect in April 2003, debate has centred on the treatment that young people in conflict with the law should receive. Some say the Act is too lenient in its provisions regarding repeat offenders and those who commit serious crimes. Others say the Act places greater emphasis on protection of the public than on the rehabilitation and social reintegration of young people. The challenge for lawmakers is to design an approach that allows serious matters involving young people to be dealt with in a way that protects the public and meets victims’ needs while still recognizing that young people do not have the same degree of responsibility as adults, given their age and level of maturity.

9.2 DESCRIPTION AND ANALYSIS

9.2.1 BASIC PRINCIPLES OF THE YCJA (CLAUSE 168)

In 2006, in his report for the public inquiry conducted in Nova Scotia, Commissioner Nunn recommended that protection of the public (in the short and long term) be included among the principles stated in section 3 of the YCJA to assist in solving the problem presented by the small number of dangerous offenders and reoffenders.³⁴ The YCJA expressly includes “long-term protection of the public” as a principle.³⁵ Clause 168 of the bill amends section 3(1)(a) of the YCJA, which will now refer to “protecting the public” (in the short and long terms), by holding young persons accountable, promoting their rehabilitation and reintegration and referring them to programs or agencies in the community to address the circumstances underlying their offending behaviour.

In the House of Commons Standing Committee on Justice and Human Rights, the French version of clause 168 was amended by changing the word

“encourager” to “favoriser” in section 3(1)(a)(ii). The Quebec Minister of Justice had asked for such a change to better reflect the equivalent to the English term that is used in the provision, “to promote,” and to be consistent with the translation of that word in other areas of the *Criminal Code*.

By amending section 3(1)(b) of the YCJA, clause 168 of the bill also provides that the youth criminal justice system is based on the principle of diminished moral blameworthiness or culpability of young persons. The Supreme Court of Canada has previously held that there is a rebuttable presumption of diminished blameworthiness or culpability in young persons by reason of the fact that they are more vulnerable, less mature and less able to exercise moral judgment.³⁶

9.2.2 DETENTION PRIOR TO SENTENCING (CLAUSE 169)

In general, the *Criminal Code* provisions concerning bail hearings apply to release and detention prior to sentencing.³⁷ The YCJA may, however, override those provisions by providing specific rules applying to young persons.³⁸

Under the current rules, youth court must direct the release of a young person, except where the prosecution can justify detaining that young person under section 515 of the *Criminal Code*.³⁹ In addition, section 29(2) of the YCJA (in reference to sections 39(1)(a) to (c), which concern imprisonment upon conviction) provides for a specific presumption in favour of releasing a young person until sentencing. However, in three specific cases that presumption does not apply, and the young person may be detained until sentencing:

- The young person has been charged with a violent offence.⁴⁰
- The young person has failed to comply with non-custodial sentences.
- The young person has committed an indictable offence for which an adult would be liable to imprisonment for a term of more than two years and has a history of findings of guilt.

The bill amends section 29(2) of the YCJA to provide, in that section alone, all reasons justifying the detention of young persons prior to sentencing and expands the possible justifications for doing so. By simplifying the pre-sentencing detention regime, the bill implements Recommendation 23 of the Nunn Commission.

Clause 169 of Bill C-10 provides that the pre-sentencing detention of young persons is prohibited, except where the young person is charged with a “serious offence” or where “they have a history that indicates a pattern of either outstanding charges or findings of guilt.” The former was included as a possible justification for pre-sentencing detention in Bill C-4, while the latter was not.

The new provision is also broader than the current one, which considers findings of guilt, but not outstanding charges. This amendment implements recommendation 22 of the Nunn Report (see section 9.1.2, “General Background to Proposed Reform,” in this legislative summary). In addition, Bill C-10 does not include the current

requirement that, to be ordered into pre-sentencing detention, the young person must have such a history or pattern and be charged with committing an indictable offence for which an adult would be liable for more than two years in prison.

To detain a young person prior to sentencing, clause 169 also requires that the judge or justice hearing the case be satisfied, on the balance of probabilities, that:

- there is a substantial likelihood that the young person will not appear in court⁴¹ (Bill C-4 included the same provision);
- detention is necessary for public safety, including the safety of any victim or witness, considering all of the circumstances, including whether there is a substantial likelihood that the young person will commit a serious offence if released (Bill C-4 included a narrower provision: whether there is a substantial likelihood the young person will commit a serious offence); or
- the young person has been charged with a serious offence and there are exceptional circumstances warranting detention and detention is necessary to maintain confidence in the administration of justice (no equivalent provision was included in Bill C-4, but a somewhat similar provision currently exists in relation to sentencing [not pre-sentencing detention] in section 39(1)(d)).

Finally, clause 169 requires the judge or justice to be satisfied that no set of conditions of release would, depending on the justification relied upon above:

- reduce the likelihood that the young person will not appear in court to a level below substantial (Bill C-4 included the same provision);
- offer adequate public protection (Bill C-4 included a narrower provision: whether there is a less-than-substantial likelihood that the young person would commit a serious offence if released); or
- maintain confidence in the administration of justice (no equivalent provision was included in Bill C-4).⁴²

Clause 167(3) of the bill defines “serious offence” as “an indictable offence under an Act of Parliament for which the maximum punishment is imprisonment for five years or more.” A large number of *Criminal Code* convictions are punishable by a maximum prison term of five years or more, such as child pornography, murder, impaired driving, assault, sexual assault,⁴³ theft over \$5,000, breaking and entering and fraud.

In addition, unlike the definition of “violent offence” established by the Supreme Court, which excluded offences solely against property,⁴⁴ the definition of “serious offence” in clause 167(3) includes offences against both property and the person. Consequently, the bill extends the potential application of pre-sentencing detention to young persons charged with offences against property that may result in maximum terms of imprisonment of at least five years.

To determine whether there is a substantial likelihood that the young person will not appear in court or will commit a serious offence, the court may, for example, consider prior convictions as well as outstanding charges against the young person. The bill

therefore appears to implement Recommendation 22 of the Nunn Commission, which suggested that courts be allowed to consider outstanding charges so that they can more easily detain, before sentencing, young persons charged with a series of offences committed in rapid succession.

Note, lastly, that the YCJA expressly provides that the court sentencing the young person must consider time served in detention prior to sentencing.⁴⁵ The court then has the discretion to decide on the credit that should be granted in computing the term of imprisonment.⁴⁶

9.2.3 SENTENCING PRINCIPLES: DENUNCIATION AND DETERRENCE (CLAUSE 172)

The purpose of sentencing under the YCJA is to hold a young person accountable for an offence through the imposition of just sanctions that have meaningful consequences promoting his or her rehabilitation and reintegration into society, thereby contributing to the long-term protection of the public.⁴⁷

In addition to the general principles stated in section 3 of the Act, section 38(2) states the principles that must guide a youth justice court in appropriate sentencing. For example, section 38(2) provides that the sentence imposed must be proportionate to the seriousness of the offence and to the degree of responsibility of the young person for that offence and afford the best chances for rehabilitation and reintegration into society. It must also be the least restrictive sentence that is capable of achieving the sentencing purpose and must in no case be greater than punishment appropriate for an adult.

In amending section 38(2) of the YCJA, clause 172 of the bill adds the following two objectives to these sentencing principles: “to denounce unlawful conduct” and “to deter the young person from committing offences.” These two principles are already included in the framework for sentencing adults.⁴⁸ Nonetheless, the deterrence principle is more general in the latter case, since the punishment may be used to deter the adult from committing a new offence and the public from committing this type of offence (specific deterrence vs. general deterrence). In its decision in *R. v. B.W.P.; R. v. B.V.N.*,⁴⁹ the *Supreme Court of Canada* held that deterrence does not constitute a sentencing principle for young offenders under the current regime of the YCJA. While deterrence had to be considered under the YOA,⁵⁰ the Court noted that the YCJA had introduced an entirely different and new sentencing regime.⁵¹

Like the former Bills C-4 and C-25 on the youth criminal justice system, which also provided for the principles of denunciation and deterrence, Part 4 of Bill C-10 makes those principles subject to the application of the fundamental principle of the proportional nature of the sentence to the seriousness of the offence and to the degree of responsibility of the young offender for the offence.⁵²

9.2.4 KEEPING A POLICE RECORD OF EXTRAJUDICIAL MEASURES (CLAUSE 190)

Sections 4 to 12 of the YCJA provide for measures that police officers and Crown prosecutors may take instead of instituting legal proceedings. For all offences, they

must first determine whether an extrajudicial measure will be sufficient to make the young person accountable and to ensure the long-term protection of the public. Whenever a young person has committed a non-violent offence and has not previously been convicted of an offence or had previously committed an offence for which an extrajudicial measure was used, the YCJA provides that police or the Crown should use extrajudicial measures, except in exceptional cases.⁵³

Police or Crown prosecutors wishing to use the available extrajudicial measures must, in all cases, have reasonable grounds to believe that the young person has committed an offence. They have full discretion in deciding which extrajudicial measure they deem to be appropriate in each case.⁵⁴ They may thus:

- take no measures (police);
- issue the young person a caution (police);
- issue the young person a formal warning (police and Crown);
- refer the young person to a program or agency in the community that may help him or her to stop offending (police); or
- refer the young person to a program of extrajudicial sanctions (police and Crown).

Currently, a police department conducting an investigation of a young person *may* establish a file that includes, among other things, measures taken with the young person, as well as police notes, victim statements, fingerprints and photographs.⁵⁵ Clause 190 of the bill *requires* the police force to keep a record of any extrajudicial measures taken to deal with the young person. If that person is convicted of the offence, the police force will then be required to forward the file to the Royal Canadian Mounted Police for the purpose of keeping criminal history files or records of the offenders.⁵⁶

9.2.5 CUSTODIAL SENTENCES SPECIFIC TO YOUNG PERSONS (COMMITTAL TO CUSTODY) (CLAUSE 173)

For all offences except murder, a court sentencing a young offender under the YCJA⁵⁷ must first consider the many options that do not involve custody.⁵⁸ Section 42 of the Act sets out a wide range of sentences such as a formal reprimand from the judge, community service, restitution, compensation, or placement in an intensive program of support and supervision.

The YCJA seeks to limit custody to cases of young offenders who are violent or who otherwise present a danger to the public. In sentencing a young person under section 39(1) of the YCJA, a court can currently choose incarceration only in the following four cases:

- the young person has committed a violent offence;⁵⁹
- the young person has failed to comply with two or more non-custodial sentences;

- the case is an exceptional one, where the aggravating circumstances warrant a custodial sentence;
- the young person has committed an indictable offence for which an adult would be liable to imprisonment for a term of more than two years and has several *findings of guilt* under the YCJA or YOA.

Clause 173 of the bill amends section 39(1) of the YCJA to add a fifth case in which a custodial sentence may be imposed:

- the young person has committed an indictable offence for which an adult would be liable to imprisonment for a term of more than two years and has had a number of *extrajudicial sanctions* under the YCJA or the YOA.⁶⁰

Extrajudicial sanctions differ from other types of extrajudicial measures – such as cautions, warnings and referrals by police officers – in that the young person must formally acknowledge responsibility for the offence.⁶¹ Under the current provisions of the YCJA, unlike failure to comply with the other types of judicial measures, failure to comply with an extrajudicial sanction may result in judicial proceedings, and the information that a young person has been subject to an extrajudicial sanction may be adduced in evidence in court to establish that person’s criminal conduct.⁶² However, an admission of guilt by a young person in order to receive an extrajudicial sanction is never admissible in evidence.⁶³

The YCJA does not currently define what constitutes a “violent offence.” However, as we have already mentioned, the Supreme Court of Canada defined it in 2005 as “an offence in the commission of which a young person causes, attempts to cause or threatens to cause bodily harm.”⁶⁴ However, this definition excluded offences during which bodily harm is only reasonably foreseeable.⁶⁵ Bill C-10 expands this definition by adding reckless behaviour that endangers the safety of the public. More specifically, clause 167(3) of the bill defines “violent offence” variously as:

- an offence causing bodily harm;
- an attempt or a threat to cause bodily harm; and
- an offence that endangers the life or safety of another person by creating a substantial likelihood of causing bodily harm.⁶⁶

Consequently, the bill also increases the opportunity for the court to impose a custodial sentence on a young person convicted of this kind of reckless offence.⁶⁷ This is consistent with Recommendation 21 of the Nunn Commission, which suggested including in the definition of “violent offence” behaviour that is likely to endanger the life or safety of another person.

9.2.6 APPLICATION OF ADULT SENTENCES TO YOUNG PERSONS
(CLAUSES 176 AND 183)

The YCJA precluded the possibility of referring young persons to adult courts. Since 2003, all proceedings involving young persons have been conducted in youth court, which may currently impose a sentence applicable to adults solely in the following cases:

- where a young person (aged 14 or older at the time of the offence) is found guilty of an offence for which an adult would be liable to imprisonment for a term of more than two years;⁶⁸
- where a young person (at least 14 years of age at the time of the offence, but the provinces may increase the age limit to 15 or 16)⁶⁹ is found guilty of murder, attempted murder, manslaughter, aggravated sexual assault or the third in a series of serious offences involving violence, there is a presumption that a conviction will bring with it an adult sentence, but the presumption may be rebutted if the court is persuaded that the length of a youth sentence would be sufficient to hold the young person accountable.⁷⁰

The courts have addressed this presumption, and in 2008, the Supreme Court of Canada⁷¹ rendered a decision in *R. v. D.B.* similar to those of the appellate courts of Quebec⁷² and Ontario,⁷³ finding that requiring young people to challenge the presumption that an adult sentence applies, rather than having the Crown attempt to prove that an adult sentence is justified, violates section 7 of the *Canadian Charter of Rights and Freedoms*.

Bill C-10 repeals this presumption.⁷⁴ As a result, a youth court may impose an adult sentence solely in the following case: where a young person (aged 14 or older at the time of the offence) is found guilty of an offence for which an adult would be liable to imprisonment for a term of more than two years.

In this case, then, under clause 176 of the bill,⁷⁵ the Crown prosecutor *may* ask a youth court to impose an adult sentence, and where the young person was at least 14 years of age at the time of the offence (although the provinces may increase the limit to 15 or 16) and the offence is a “serious violent offence,” the Crown prosecutor *will be required* to determine whether an application to impose an adult sentence should be filed; should the prosecutor decide not to file such an application, he or she *will be required* to inform the court of that fact.

According to clause 167(2) of the bill, a “serious violent offence” means murder, attempted murder, manslaughter or aggravated sexual assault. These are essentially designated offences which currently give rise to the presumption that the offender should be subject to an adult sentence.

According to the amendments proposed in Bill C-10, the onus of proof would lie with the Crown prosecutor who files an application to impose an adult sentence on a young person. To have an adult sentence imposed, the prosecutor will have to convince the youth court that:

- the presumption of diminished moral blameworthiness or culpability of the young person is rebutted; and
- a youth sentence would not be of sufficient length to hold the young person accountable for his or her offending behaviour (clause 183 of the bill).

The amendment in Bill C-4 explicitly stated that the court must be satisfied *beyond a reasonable doubt* that both of these criteria were met to impose an adult sentence. However, Bill C-10 does not state which standard of proof is to be used, leaving some uncertainty as to what standard the court is to apply in such circumstances.

Under the current rules of the YCJA, in its decision to impose an adult sentence, a youth court must consider the seriousness and circumstances of the offence, the age, maturity, character, background and previous record of the young person and any other factors it deems relevant.⁷⁶

9.2.7 PLACE OF DETENTION (CLAUSE 186)

Currently the youth court decides, after a hearing, on the appropriate place of detention. Section 76(2) of the YCJA provides for a presumption based on the age of the young person:

- If the young person is under the age of 18 years at the time that he or she is sentenced, the court shall order that he or she be placed in a youth custody facility.
- If the young person is 18 years or older at the time that he or she is sentenced, the court shall order that he or she serve the sentence in a provincial correctional facility for adults or, if the sentence is two years or more, in a federal penitentiary for adults.⁷⁷

However, the court may order that a young person under the age of 18 will serve his or her sentence in a correctional facility for adults if the Crown prosecutor proves, for example, that the young person is preventing or impeding the progress of other young persons confined at a place of detention and presents a threat to their safety.⁷⁸

Clause 186 of the bill replaces section 76(2) of the YCJA in order to remove the possibility that a young person under the age of 18 might serve his or her sentence at an adult correctional facility. The bill thus provides that young persons under the age of 18 will, in all cases, serve their sentences at a youth custody facility.

9.2.8 PUBLICATION OF THE NAMES OF YOUNG PERSONS
(CLAUSES 185 AND 189)

Since the JDA of 1908, the Canadian youth justice system has operated on the principle that publishing the identity of a young person would adversely affect his or her reintegration into society, would be prejudicial to him or her and, therefore, would compromise long-term public safety. The privacy principle is clearly stated in section 3(1)(b)(iii) of the YCJA.⁷⁹ The general rule therefore prohibits the publication of information revealing the identity of a young person.⁸⁰ However, the YCJA provides for certain exceptions to the ban on publication, in particular:

- where the young person has received an adult sentence, the information on the identity of that young person is automatically published;⁸¹ and
- where an application has been filed for a young person to be subject to an adult sentence for certain offences (murder, attempted murder, manslaughter, aggravated sexual assault or a third serious violent offence) and the court has dismissed that application and instead imposed a young offender sentence, there is a presumption that information on the young offender's identity will be published.⁸²

In the latter case, the young person may rebut the presumption by satisfying the youth court that there are grounds to ban publication. The court must then consider the public interest and the importance of the young person's rehabilitation.⁸³

The Supreme Court of Canada⁸⁴ and the Quebec Court of Appeal⁸⁵ have held that this presumption violates section 7 of the *Canadian Charter of Rights and Freedoms*. Clauses 185 and 189 of the bill therefore replace it with the possibility of publishing information on the identity of a young person where the court has dismissed an application that was filed to impose an adult sentence on a young person and has instead imposed a young offender sentence for a "violent offence" within the meaning of clause 167(3) of the bill.

For publication to be permitted in that case, the Crown prosecutor must satisfy the youth court that there is a substantial likelihood the young person may commit another "violent offence" and that it is necessary to lift the ban in order to protect the public from that risk. The youth court must then consider the basic principles stated in sections 3 and 38 of the YCJA.

Contrary to the current presumption, with regard to which the young person carries the onus of proof justifying non-publication, the bill provides that the burden is on the Crown prosecutor to convince the court to authorize publication. However, the new definition of "violent offence" includes many more types of criminal behaviour than the offences giving rise to the current publication presumption (i.e., murder, attempted murder, manslaughter, aggravated sexual assault or a third serious violent offence).

NOTES

1. Sections of this part of this legislative summary are drawn from the publication by Lyne Casavant, Robin Mackay and Dominique Valiquet, [Youth Justice Legislation in Canada](#), Publication no. 08-23E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, November 2008.
2. *Youth Criminal Justice Act*, S.C. 2002, c. 1.
3. Under the YCJA, “young person” means a person 12 to 17 years old who is suspected of having committed an offence created by federal Act or regulation.
4. Bill C-25: An Act to amend the Youth Criminal Justice Act, 2nd Session, 39th Parliament.
5. Shannon Brennan and Mia Dauvergne, “[Police-reported crime statistics in Canada, 2010](#),” *Juristat*, Statistics Canada catalogue no. 85-002-X, 21 July 2011, p. 20. It is important to emphasize that the violent crime rate now includes a number of offences that were not previously considered, and that the related data collated by Statistics Canada have been comparable only since 1998. The “violent crime” offence category has been revised to include a number of offences which were previously considered to be “Other Criminal Code” offences. Those offences include criminal harassment, sexual offences involving children, forcible confinement or kidnapping, extortion, uttering threats and threatening or harassing phone calls.
6. Brennan and Dauvergne (2011). The CSI allows Statistics Canada to track changes in the severity of police-reported crime from year to year. This tool, developed at the request of community police, makes it possible to determine whether crimes brought to the attention of police are more or less serious than before, and whether police-reported crime in a given city is more or less serious than in Canada overall. In addition, since the time spent on police investigations depends in part on the seriousness of the offences, the CSI also allows police forces to show that, even though the volume of crimes reported in one city might be lower than the volume in another, the police resources needed in the former may be higher in light of the severity of the crimes reported and the ensuing complexity of the investigations. Additional information on the CSI is available at Statistics Canada, [Measuring Crime in Canada: Introducing the Crime Severity Index and Improvements to the Uniform Crime Reporting Survey](#), Statistics Canada catalogue no. 85-004-X, 21 April 2009.
7. The Honourable Rob Nicholson, Speech in the House of Commons, *Debates*, 19 March 2010.
8. On 29 June 2005, Nova Scotia commissioned this public inquiry and named the Honourable D. Merlin Nunn commissioner for that purpose.
9. D. Merlin Nunn, [Spiralling Out of Control: Lessons Learned from a Boy in Trouble – Report of the Nunn Commission of Inquiry](#), December 2006 [Nunn Commission Report].
10. *Ibid.*, p. 238.
11. *Ibid.*
12. *Ibid.*, p. 230.
13. *Ibid.*, pp. 237–248.
14. *Juvenile Delinquents Act*, S.C. 1908, c. 40, repealed.
15. Department of Justice, [The Evolution of Juvenile Justice in Canada](#), International Cooperation Group, 2004.
16. *Ibid.*

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17. Department of Justice, Committee on Juvenile Delinquency, *Juvenile Delinquency in Canada*, Queen's Printer, Ottawa, 1965.
18. *Young Offenders Act*, R.S.C. 1985, c. Y-1, repealed.
19. The YOA was adopted in 1982, but did not come into force until 1984, as a way of addressing the concern to provide a sufficient transition between the two regimes.
20. *Criminal Code*, R.S.C. 1985, c. C-45.
21. The age of criminal majority under the JDA was set at 16. The provinces, however, could ask that it be raised to 17 or 18. As a result, Quebec and Manitoba set the age of criminal majority at 18, whereas Newfoundland and British Columbia set it at 17.
22. The 1992 amendments increased maximum terms for murder to five years. Other amendments, made in 1995, raised terms to 10 years for first-degree murder and to seven years for second-degree murder.
23. The YCJA incorporates the alternative measures provided for in the JDA and adds new ones under the heading of extrajudicial measures.
24. YCJA, ss. 3, 5 and 38.
25. YCJA, s. 38(2).
26. For detailed information on the impact of the YCJA on the youth justice system, see Nicholas Bala, Peter L. Carrington and Julian V. Roberts, "Evaluating the *Youth Criminal Justice Act* after Five Years: A Qualified Success," *Canadian Journal of Criminology and Criminal Justice*, Vol. 51, No. 2, April 2009.
27. See Department of Justice, "[Principal Charge in Majority of Cases in Youth Court \(Canada, 1998–99\)](#)," *YCJA Explained*.
28. It also provides that these measures are enforced by police (responsible for cautions and referrals) and by the Crown (responsible for warnings); Department of Justice, *A Youth Strategy for the Renewal of Youth Justice*, 1999.
29. Brennan and Dauvergne (2011), p. 18.
30. Complete data are available in Canadian Centre for Justice Statistics, *Youth Court Statistics, 2006–2007*, Statistics Canada catalogue no. 85-002-XIE, Vol. 28, No. 4, May 2008.
31. Department of Justice, "[Youth Sentencing](#)," *YCJA Explained*, May 2002.
32. Rebecca Kong, "Youth custody and community services in Canada, 2007–2008," *Juristat*, Statistics Canada catalogue no. 85-002-SX, Vol. 29, No. 2, May 2009, p. 7.
33. Statistics Canada, "Adult and youth correctional services: Key indicators," *The Daily*, 8 December 2009.
34. Nunn Commission Report, Recommendation 20.
35. See YCJA, ss. 3(1)(a) and 38(1).
36. See *R. v. D.B.*, [2008] 2 S.C.R. 3, paras. 41 and 45.
37. YCJA, s. 28.
38. For a detailed analysis of the conditional release system, see Nicholas Bala and Sanjeev Anand, *Youth Criminal Justice Law*, 2nd ed., Irwin Law, Toronto, 2009, p. 293 and following.
39. The reverse onus provisions in section 515(6) of the *Criminal Code* do not apply where the presumption referred to in section 29(2) of the YCJA applies (see Department of Justice, "[Pre-trial Detention](#)," *YCJA Explained*.)

40. Noting the absence of a legal definition, the Supreme Court of Canada defined “violent offence” as “an offence in the commission of which a young person causes, attempts to cause or threatens to cause bodily harm.” However, that definition excluded offences strictly against property (*R. v. C.D.*; *R. v. C.D.K.*, [2005] 3 S.C.R. 668, paras. 17, 51 and 52).
41. Compare para. 515(10)(a) of the *Criminal Code*.
42. Note that, in these provisions, while the English version of the bill requires a reduction “to a level below substantial,” the French only requires a reduction in the probability that the adolescent will not appear in court.
43. Common assault (*Criminal Code*, s. 265) and sexual assault (*Criminal Code*, s. 271) involve a broad range of behaviours.
44. See note 41.
45. YCJA, s. 38(3)(d).
46. See on this point *R. v. B. (T.)*, (2006) 206 C.C.C. (3d) 405 (C.A. Ont.).
47. YCJA, s. 38(1).
48. *Criminal Code*, ss. 718(a) and (b).
49. [2006] 1 S.C.R. 941, para. 4.
50. With less importance, however, than in the case of adult offenders (*R. v. M. (J.J.)*, [1993] 2 S.C.R. 421, 434).
51. *R. v. B.W.P.*; *R. v. B.V.N.*, paras. 4 and 21.
52. As is currently the case for the sentencing of adults (*Criminal Code*, s. 718.1).
53. YCJA, ss. 4(c) and (d).
54. Citizens committees (called youth justice committees) or advisory groups may make recommendations on extrajudicial measures (YCJA, ss. 18 and 19).
55. YCJA, s. 115(1). See Pierre Hamel, *Loi sur le système de justice pénale pour les adolescents*, Éditions Yvon Blais, Cowansville, 2009, p. 444.
56. YCJA, ss. 115(2) and (3).
57. Murder is the only offence for which the Act provides for mandatory custody (YCJA, s. 42).
58. YCJA, s. 39(2).
59. See note 41.
60. The extrajudicial sanctions set out in the YCJA are the equivalent of alternative measures in the YOA.
61. YCJA, s. 10(1)(e).
62. YCJA, ss. 9, 10 and 40(2)(d)(iv). See also Hamel (2009), pp. 35–45.
63. YCJA, s. 10(4).
64. *R. v. C.D.*; *R. v. C.D.K.*, [2005] 3 S.C.R. 668, para. 17.
65. *Ibid.*, paras. 76 and 77. In the Court’s view, the YCJA should be designed in part as follows:

... to reduce over-reliance on custody for young offenders, a narrow interpretation of the term “violent offence,” which acts as a gateway to custody, is to be preferred. However, a definition of “violent offence” that

includes offences where bodily harm is merely reasonably foreseeable is quite broad, since most *Criminal Code* offences may, at some point, lead to harm.

66. Section 2 of the *Criminal Code* defines “bodily harm” as “any hurt or injury that interferes with the person’s health or comfort and is more than just brief or minor.”
67. On recklessness, see *R. v. Hamilton*, [2005] 2 S.C.R. 432, paras. 27 and 28.
68. YCJA, s. 62.
69. YCJA, s. 61. Quebec set the age of presumption at 16 in March 2003 (Order 476-2003).
70. YCJA, ss. 62, 63 and 72.
71. [2008] 2 S.C.R. 3.
72. *Québec (Ministre de la Justice) c. Canada (Ministre de la Justice)*, [2003] R.J.Q. 1118 (*Renvoi relatif au projet de loi C-7 sur le système de justice pénale pour les adolescents*).
73. *R. v. B.(D.)*, (2006), 206 C.C.C. (3d) 289.
74. See, among others, clause 175 of the bill.
75. This clause also applies to an offence committed before the coming into force of the bill where no proceedings have been commenced at that time (see clause 195 of the bill).
76. YCJA, s. 72(1).
77. Section 76(9) of the YCJA establishes the principle that the young person may not remain in a youth custody facility after the age of 20.
78. Hamel (2009), p. 297.
79. See also the decision of the Supreme Court of Canada in *R. v. R.C.*, [2005] 3 S.C.R. 99.
80. YCJA, s. 110(1).
81. YCJA, s. 110(2)(a). See *R. v. D.B.*, [2008] 2 S.C.R. 3, para. 29.
82. YCJA, ss. 75 and 110(2)(b).
83. YCJA, s. 75(3).
84. *R. v. D.B.*, [2008] 2 S.C.R. 3, para. 87:

Losing the protection of a publication ban renders the sentence more severe. The onus should therefore be, as with the imposition of an adult sentence, on the Crown to justify the enhanced severity, rather than on the youth to justify retaining the protection to which he or she is otherwise presumed to be entitled.
85. *Québec (Ministre de la Justice) c. Canada (Ministre de la Justice)* (2003).

10 AMENDMENTS TO THE *IMMIGRATION AND REFUGEE PROTECTION ACT* (VULNERABLE FOREIGN WORKERS) [BILL C-10, PART 5, CLAUSES 205–208 (FORMERLY BILL C-56)]

10.1 BACKGROUND

Clauses 205–208 of Bill C-10 give immigration officers discretion to refuse to authorize foreign nationals to work in Canada if, in the opinion of the officers, the foreign nationals are at risk of being victims of exploitation or abuse.

Earlier versions of the bill were introduced on four occasions.

- The first was introduced in May 2007 during the 1st Session of the 39th Parliament as Bill C-57 and died on the *Order Paper* when Parliament was prorogued in September 2007.
- The second was introduced in the fall of 2007 during the 2nd Session of the 39th Parliament as Bill C-17 and was referred to the House of Commons Standing Committee on Citizenship and Immigration, which considered it on 30 January 2008 but did not report back to the House before the end of the session.
- The third was introduced in June 2009 during the 2nd Session of the 40th Parliament as Bill C-45 and died on the *Order Paper* at the end of the session in December 2009.
- The fourth was introduced in November 2010 during the 3rd Session of the 40th Parliament as Bill C-56 and died on the *Order Paper* at the dissolution of Parliament in March 2011.

The present Part 5 of Bill C-10 is identical in substance to the earlier versions.¹

10.1.1 TRAFFICKING IN PERSONS

10.1.1.1 PRESENT LEGISLATION

In Canada, the *Criminal Code* (the Code)² and the *Immigration and Refugee Protection Act* (IRPA)³ contain sections to combat and prevent trafficking in persons.

Sections 279.01 to 279.04 of the Code set out three prohibitions in relation to trafficking in persons.

- The first (section 279.01, and section 279.011 for persons under the age of 18 years) is a global prohibition on trafficking in persons, defined as recruiting, transporting, transferring, receiving, holding, concealing or harbouring a person or exercising control, direction or influence over the movements of a person, for the purpose of exploiting them.⁴ Key to this definition is the fact that trafficking in persons is considered a criminal offence even if it occurs entirely within the

country, without movement across an international border. Any action in which a person is moved or concealed and is forced to provide or offer to provide labour, a service, or an organ or tissue is prohibited.

- Section 279.02 prohibits a person from benefiting economically from trafficking and carries a maximum penalty of 10 years' imprisonment. It targets in particular those who harbour a trafficked person for remuneration.
- Section 279.03 outlaws the withholding or destroying of identity, immigration, or travel documents to facilitate trafficking in persons, and carries a maximum penalty of 5 years' imprisonment.

A number of generic provisions in the *Criminal Code* are also used to combat trafficking in persons by targeting specific forms of exploitation and abuse that are inherent in trafficking. These include fraudulent documentation-related offences; prostitution-related offences; causing physical harm; abduction and confinement; intimidation; conspiracy; and organized crime.

The IRPA also addresses cross-border trafficking in persons.

- Under section 118 of the IRPA, anyone who knowingly organizes one or more persons to come into Canada by means of abduction, fraud, deception, or the use or threat of force or coercion is guilty of human trafficking. This offence includes the recruitment, transportation, receipt, and harbouring of such persons, and the maximum sentence is life imprisonment.
- Section 117 of the IRPA deals with smuggling. It states that it is illegal to knowingly organize the entry into Canada of one or more persons who do not have a valid travel document. The maximum sentence for organizing the illegal entry of fewer than 10 people is 14 years' imprisonment, while that for organizing the illegal entry of 10 or more people is life imprisonment.
- Sections 122 and 123 create the additional offence of using travel documents to contravene the IRPA, as well as the selling or buying of such travel documents. The maximum sentence for these offences is 14 years' imprisonment.

10.1.1.2 CITIZENSHIP AND IMMIGRATION CANADA POLICY

In May 2006, the Department of Citizenship and Immigration announced a new policy to provide temporary resident permits specifically for trafficked persons. This policy was updated in June 2007.⁵ Working within the existing legislative framework, immigration officers now have the ability to issue to trafficked persons temporary resident permits lasting up to 180 days. Recipients of such permits are exempt from the processing fee usually charged, may request a work permit and are eligible to receive health service benefits under the Interim Federal Health Program.

This approach has the following objectives:

- to provide victims of trafficking in persons with time to consider their options (such as returning home or assisting in the investigation of the smugglers or traffickers or in criminal proceedings against them);
- to allow them to recover from physical or mental trauma;

- to allow them to escape the influence of the smugglers or traffickers;
- to facilitate their participation in an investigation or prosecution; and
- for any other purpose the officer may find relevant.

There is no obligation for the trafficked person to assist with an investigation in exchange for a temporary resident permit.

A trafficked person may also be granted a permit for a longer period or a subsequent temporary resident permit once an immigration officer examines the relevant factors, such as whether it is possible for the individual to return and re-establish a life – under reasonably safe conditions – in his or her country of origin or last permanent residence, and whether the individual is needed and willing to assist the authorities in an investigation or a prosecution. After a certain period, it may be possible for the trafficked person to obtain permanent resident status.

10.1.1.3 EFFORTS TO DEVELOP A FEDERAL STRATEGY

A significant component of the Canadian approach to trafficking in persons is the federal Interdepartmental Working Group on Trafficking in Persons, which is co-chaired by representatives from the departments of Justice and Public Safety and consists of a total of 17 federal departments and agencies. Its mission is to coordinate federal efforts to address trafficking in persons and to develop a federal strategy, in keeping with Canada's international commitments. The working group reviews existing laws, policies and programs that may have an impact on trafficking with a view to identifying best practices and areas for improvement.⁶

Since September 2005, the Royal Canadian Mounted Police has headed the Human Trafficking National Coordination Centre. The centre is housed at the Immigration and Passport Branch and its role is to provide assistance to field investigators and develop education and awareness campaigns. In March 2010, the centre published a study conducted between 2005 and 2009 in a report entitled *Human Trafficking in Canada*. One of the first comments in the report is that human trafficking is a growing sector of organized crime worldwide.⁷

10.1.1.4 PARLIAMENTARY WORK

Two parliamentary committees have examined the issue of trafficking in persons in Canada.

In December 2006, the Subcommittee on Solicitation Laws of the House of Commons Standing Committee on Justice and Human Rights released its report, entitled *The Challenge of Change: A Study of Canada's Criminal Prostitution Laws*.⁸ In this broad study of Canada's laws on prostitution, the subcommittee emphasized the fact that those who traffic in persons must be effectively prosecuted and that law enforcement officials must be provided with adequate resources and training, while victims must be provided with appropriate assistance and services.

In February 2007, the House of Commons Standing Committee on the Status of Women released its report, entitled *Turning Outrage Into Action to Address Trafficking for the Purpose of Sexual Exploitation in Canada*.⁹ This report highlighted the “three Ps” approach: protection of victims, prosecution of clients and traffickers, and prevention. The report’s recommendations focused on prevention measures, in particular the development of a strategy to address poverty (with particular emphasis on Aboriginal peoples), removing barriers to immigration, and raising the public’s awareness of the risks of being trafficked.

The committee also emphasized the importance of improving the protection of victims by providing them with support services and programs, including safe interim housing and access to counselling and legal advice, and by revising the temporary resident permit guidelines so that victims can apply for a work permit.

To coordinate Canada’s efforts, the committee proposed the creation of a Canadian Counter-Trafficking Office, through which stakeholders could share expertise and best practices to prevent trafficking, protect victims, and successfully prosecute those who exploit victims. The committee also proposed the establishment of a national rapporteur mandated to collect and analyze human trafficking data and report these annually to Parliament.

10.1.2 EXOTIC DANCER VISAS

When announcing – along with Joy Smith, Member of Parliament for Kildonan–St. Paul – the introduction of Bill C-56 on behalf of the Minister of Citizenship, Immigration and Multiculturalism, the Honourable Rona Ambrose, Minister of Public Works and Government Services Canada and Minister for the Status of Women, said that the bill should help to preclude situations in which women might be exploited or become victims of human trafficking:

This legislation will introduce important legislative changes to help close the doors to the dangerous victimization of girls and women, and we urge Parliament to join us in this serious matter and support the bill. As Canadians, we believe women in all communities should be treated with the full respect and dignity they deserve and oppose situations in which women and girls face violence, abuse or exploitation.¹⁰

These situations include the ones experienced by foreign exotic dancers, who may apply for temporary work permits to alleviate a temporary shortage in the Canadian labour market.¹¹ The terms on which exotic dancer visas are issued require that strip club owners have the job offer validated.¹² In 2009, for Canada as a whole, this occupational group had the eighth highest incidence of validated offers. The group had a total of 1,836; each validated job offer might cover more than one position.¹³ As well, starting 11 January 2011, every contract between an employer and an exotic dancer who comes to work temporarily in Canada must contain two new clauses confirming that transportation costs and health care insurance costs are the employer’s responsibility.¹⁴

Although foreign exotic dancers had traditionally come to Canada from the United States, by the late 1990s, many more were from Eastern Europe. It was at

that time that concerns about human trafficking began to emerge. For that reason, immigration officers working at foreign missions require applicants for exotic dancer visas to present a valid employment contract; they then verify that the employer is legitimate. The officers are trained to detect and screen out applicants who may be potential victims of human trafficking. They also apply health and safety criteria and ensure that arrangements have been made for the applicants to return to their country of origin once the visa has expired, as in the case of any other temporary worker.¹⁵

Between 2004 and 2007, the number of permits granted to foreign exotic dancers in Canada seems to have declined dramatically. According to information provided by the Department of Citizenship and Immigration, 342 work permits and work permit extensions were issued to foreign exotic dancers in 2004, but that number dropped to 17 in 2006¹⁶ and stood at six in 2010.¹⁷

10.2 DESCRIPTION AND ANALYSIS

10.2.1 PROTECTING FOREIGN NATIONALS FROM EXPLOITATION

Clauses 206 and 207 of the bill amend the IRPA to allow immigration officers to refuse to authorize foreign nationals to work in Canada if they believe them to be at risk of exploitation.

10.2.1.1 NEW DISCRETION AVAILABLE TO IMMIGRATION OFFICERS

Clause 206 of the bill adds a new provision to the IRPA. Section 30(1.1) states that an immigration officer “may” authorize a foreign national to come to work or study in Canada if the applicant meets the conditions set out in the regulations. This gives immigration officers discretion to refuse to authorize an applicant to work or study in Canada, even if the applicant meets the conditions set out in the regulations.

10.2.1.2 LIMITS ON THE DISCRETION: PUBLIC POLICY CONSIDERATIONS, TO BE DEFINED IN INSTRUCTIONS PUBLISHED IN THE *CANADA GAZETTE*

Clause 206 also adds sections 30(1.2) to 30(1.7) to the IRPA.

Section 30(1.2) states that an officer must refuse to authorize a foreign national to work in Canada if he or she believes that the public policy considerations, set out in instructions from the minister, justify such a refusal. This discretionary power is somewhat limited by section 30(1.3), which states that any refusal to give authorization to work in Canada requires the concurrence of a second officer.

Section 30(1.4) states that the minister’s instructions will set out what constitutes the public policy considerations and that they will aim to protect foreign nationals who are at risk of being subjected to humiliating or degrading treatment, particularly sexual exploitation.

Sections 30(1.5) to 30(1.7) state that the ministerial instructions will be published in the *Canada Gazette*. They will take effect on the day on which they are published (or

on any later specified date). Once they are in force, they will also apply to all applications for work permits made before that day and for which a final decision has not been made. The instructions will cease to have effect when a notice of revocation is published in the *Canada Gazette*.

10.2.1.3 ANNUAL REPORT TO PARLIAMENT

Clause 207 of the bill amends section 94(2) of the Act to require the minister of Citizenship, Immigration and Multiculturalism to include the ministerial instructions in the annual report to Parliament.

It is important to note that this is the only place in the IRPA where the ministerial instructions are referred to in this detailed manner. Although ministerial instructions on a variety of issues are referenced elsewhere, this is the only section to establish explicit and detailed requirements as to how those instructions must be published and included in the annual report. This amendment increases the accountability that comes with the implementation of the instructions and any potential refusal of temporary work permits based on an assessed risk of exploitation.

10.2.2 PUBLIC HEALTH

Clause 205 of the bill amends the objectives of the IRPA with respect to immigration by adding the word “public” to the reference to the protection of health and safety currently specified in section 3(1)(h) of the IRPA. The amended IRPA is intended to protect public health and safety and maintain the security of Canadian society in immigration matters.

Sections 31 and 33 of the *Immigration and Refugee Protection Regulations*¹⁸ already used that terminology to explain potential dangers to public health if a foreign national suffered from a communicable disease and to public safety if a foreign national’s health made the person likely to engage in violent behaviour, for example.

It is important to note that Part 5 of Bill C-10 amends only section 3(1), which deals with the objectives of the IRPA with respect to immigration. Section 3(2), concerning the Act’s objectives with respect to refugees, and which states that it aims to “protect the health and safety of Canadians,” remains unchanged.

10.2.3 CONSEQUENTIAL AMENDMENTS

Clauses 149 and 150 of Bill C-10 relate to consequential amendments to the IRPA due to amendments made to the *Criminal Records Act*.

- Section 36(3)(b) of the IRPA is amended to state that inadmissibility to Canada cannot be based on an offence for which a record suspension has been ordered.
- Section 53(f) of the IRPA is amended to state that regulations under the IRPA may include provisions relating to the effect of a record suspension on the status of permanent residents and foreign nationals and removal orders made against them.

As already noted in section 7, “Amendments to the *Criminal Records Act (Pardons)*,” in this legislative summary, Bill C-10 would amend the *Criminal Records Act* to increase the time that individuals who commit certain crimes would have to wait before being able to apply for a record suspension (formerly known as a pardon). The timelines proposed are 10 years for all indictable offences and five years for all summary offences.

In addition to its implications for Canadian citizens, this amendment would have a particular impact on permanent residents and foreign nationals who have committed crimes in Canada. Such individuals are subject to hearings regarding their admissibility to Canada which take place before the Immigration and Refugee Board of Canada, where they may be deemed inadmissible on the grounds of criminality (where a person has been convicted by way of indictment or has committed any two unrelated offences) or serious criminality (crimes that have a maximum term of 10 years’ imprisonment or more or for which the subject has received a sentence term of more than six months’ imprisonment).¹⁹ There is very little room for discretion at admissibility hearings – once the grounds for inadmissibility are documented, the tribunal must revoke permanent resident status and order the removal of the foreign national.²⁰ This means that the amendments to the *Criminal Records Act* contained in Bill C-10 will affect the ability of foreign nationals and permanent residents to obtain record suspensions. As a result, their ability to either stay in or re-enter the country could be hampered.

Foreign nationals with a criminal record who wish to enter Canada must apply from outside the country for rehabilitation (an evaluation of an individual’s criminal record to determine if that person still poses a threat to Canadian society).²¹ An individual with a background involving “serious criminality” must apply for rehabilitation to a Canadian visa office. This application can only be made if at least five years have elapsed since the completion of any sentence and the individual has not been convicted of an offence during that intervening period. Rehabilitation is currently dealt with by the IRPA regulations, which are likely to be modified by amendments made to section 53(f) of the IRPA contained in Bill C-10.

NOTES

1. This section of this legislative summary is based largely on the legislative summary of Bill C-45, the version that preceded Bill C-56. See Daphne Keevil Harrold, *Bill C-45: An Act to amend the Immigration and Refugee Protection Act*, Publication no. LS-657E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 25 August 2009.
2. [Criminal Code](#) [the Code], R.S.C. 1985, c. C-46.
3. [Immigration and Refugee Protection Act](#), S.C. 2001, c. 27.
4. Section 279.01(1) of the Code reads as follows:

Every person who recruits, transports, transfers, receives, holds, conceals or harbours a person, or exercises control, direction or influence over the movements of a person, for the purpose of exploiting them or facilitating their exploitation is guilty of an indictable offence and liable

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(a) to imprisonment for life if they kidnap, commit an aggravated assault or aggravated sexual assault against, or cause death to, the victim during the commission of the offence; or

(b) to imprisonment for a term of not more than fourteen years in any other case.

5. Citizenship and Immigration Canada, [IP1 – Temporary Resident Permits](#), Operational Manual (Inland Processing) IP 1, 19 June 2007, s. 16 and Appendices F–I.
6. More information on the [Interdepartmental Working Group on Trafficking in Persons](#) is available on the Justice Canada website.
7. “At any given time, a country can be a source, destination or transit country, or all three.” (Royal Canadian Mounted Police, Project Seclusion, [Human Trafficking in Canada](#), March 2010, p. 4).
8. House of Commons, Standing Committee on Justice and Human Rights, [The Challenge of Change: A Study of Canada’s Criminal Prostitution Laws](#), 1st Session, 39th Parliament, December 2006.
9. House of Commons, Standing Committee on the Status of Women, [Turning Outrage Into Action to Address Trafficking for the Purpose of Sexual Exploitation in Canada](#), 1st Session, 39th Parliament, February 2007.
10. Citizenship and Immigration Canada, [“Government of Canada introduces the Preventing Trafficking, Abuse and Exploitation of Vulnerable Immigrants Act,”](#) News release, 19 November 2010.
11. In a letter to the Standing Committee on Citizenship and Immigration dated 10 January 2008, the [Adult Entertainment Association](#) presented the following figures: about 23 million Canadians attend adult entertainment establishments every year; there are over 500 such establishments in Canada; and 40% of the association members hire foreign workers.
12. Audrey Macklin, “Dancing Across Borders: ‘Exotic Dancers,’ Trafficking, and Canadian Immigration Policy,” *International Migration Review*, Vol. 37, No. 2, 2003, p. 474; and James Gordon, “Number of Strippers Coming to Canada Drops Dramatically,” *National Post*, 26 May 2006, p. A6.
13. Human Resources and Skills Development Canada, [Temporary Foreign Worker Program, Labour Market Opinion \(LMO\) Statistics, Annual Statistics 2007–2010](#), 30 June 2011.
14. Human Resources and Skills Development Canada, [“Notice for employers hiring temporary foreign workers to work as exotic dancers in Canada,”](#) *Temporary Foreign Worker Program*, 1 December 2010.
15. Senate, Standing Committee on Legal and Constitutional Affairs, *Proceedings*, 1st Session, 38th Parliament, 23 November 2005, p. 25:54 (Carole Morency, Senior Counsel, Criminal Law Policy Section, Department of Justice Canada).
16. Information provided by the Department of Citizenship and Immigration (CIC) on 11 June 2007.
17. Information provided by the CIC on 4 July 2011.
18. [Immigration and Refugee Protection Regulations](#), SOR/2002-227.
19. *Immigration and Refugee Protection Act*, s. 36.

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20. However, a person who was a refugee claimant prior to becoming a permanent resident will not be automatically removed unless a “danger opinion” has been obtained from the Minister of Citizenship, Immigration and Multiculturalism. Such opinions are based on case-by-case analyses to which the subject has the right to respond, where the person may present evidence showing that she or he does not pose a threat to Canadian society.
21. *Immigration and Refugee Protection Regulations*, s. 18.