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LEGISLATIVE SUMMARY



Bill C-39: An Act to amend the Criminal Code (unconstitutional provisions) and to make consequential amendments to other Acts

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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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Legislative Summary of Bill C-39
(Legislative Summary)

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LEGISLATIVE SUMMARY OF BILL C-39: AN ACT TO AMEND THE CRIMINAL CODE (UNCONSTITUTIONAL PROVISIONS) AND TO MAKE CONSEQUENTIAL AMENDMENTS TO OTHER ACTS

1 BACKGROUND

Bill C-39, An Act to amend the Criminal Code (unconstitutional provisions) and to make consequential amendments to other Acts, was introduced in the House of Commons by the Minister of Justice on 8 March 2017.¹

The bill amends the *Criminal Code*² (Code) to remove passages and repeal provisions that have been ruled unconstitutional by the Supreme Court of Canada, as well as a provision that has been ruled unconstitutional by four provincial courts of appeal. These provisions were found to be inconsistent with the *Canadian Charter of Rights and Freedoms* (Charter).³ In addition, the bill makes consequential amendments to the *Corrections and Conditional Release Act*⁴ and the *Youth Criminal Justice Act*.⁵

The *Criminal Code* provisions being repealed or amended by Bill C-39 are the following:

- anal intercourse (section 159), found unconstitutional in *R. v. C.M.*,⁶ 1995, and *R. c. Roy*,⁷ 1998;
- loitering (section 179(1)(b)), found unconstitutional in *R. v. Heywood*,⁸ 1994;
- spreading false news (section 181), found unconstitutional in *R. v. Zundel*,⁹ 1992;
- unlawful object murder (section 229(c)), which was found unconstitutional in *R. v. Martineau*,¹⁰ 1990;
- murder in the commission of offences (section 230), found unconstitutional in *R. v. Martineau*, 1990;
- impaired driving – presumption of accuracy and of identity of breath or blood samples (sections 258(1)(c) and 258(1)(d)), parts of which were found unconstitutional in *R. v. St-Onge Lamoureux*,¹¹ 2012;
- abortion (section 287), found unconstitutional in *R. v. Morgentaler*,¹² 1988; and
- credit for time spent in pre-sentence custody when determining a sentence (section 719(3.1)), part of which was found unconstitutional in *R. v. Safarzadeh-Markhali*,¹³ 2016.

This legislative step is necessary because it is not enough for the courts to declare a law to be inconsistent with the Charter for it to be removed from the statute books; amending or repealing a federal law can only be done through an Act of Parliament. One of the basic foundations of the rule of law is that the laws be “clear, publicized, [and] stable.”¹⁴ The general public should feel confident that the law as stated in the Code, whether online or in a printed version, is current, valid law. This, however, is not always the case. As one example, in 2016, Travis Vader was convicted of second degree murder based on a provision in the Code that had been struck down by the Supreme Court as a violation of the Charter in 1990.¹⁵

In the wake of the *Vader* case, the House of Commons Standing Committee on Justice and Human Rights wrote to the Minister of Justice, recommending that her department prioritize tabling a bill that would repeal “all provisions of the *Criminal Code* that have been found to be unconstitutional or inoperative.” The letter went on to state that “[s]uch legislation would avoid mistrials and appeals and reduce undue delays and costs. It would also increase public confidence in the criminal justice system.”¹⁶ In a response dated 17 January 2017, the Minister of Justice indicated that she had instructed departmental officials to conduct a review of unconstitutional provisions that remain in the Code. This review was being undertaken to ensure that the Code reflects the current state of the law and is consistent with the rule of law.¹⁷

The Government of Canada has indicated that Bill C-39 is one of a series of bills that will seek to update the *Criminal Code* to ensure that it shows the greatest possible respect for the Charter and is reflective of modern society and values.¹⁸ In her letter to the Committee, the Minister of Justice also indicated that other Code provisions that have been either “read down” (narrowed in their scope) or had text “read in” (expanding their scope) by the Supreme Court are currently being examined by officials of the Department of Justice.

2 DESCRIPTION AND ANALYSIS

Although some provisions of the *Criminal Code* are no longer in force because courts have found that they violate the Charter, the provisions themselves remain in the Code until they are amended or repealed by Parliament. Bill C-39 carries out this update to the Code, along with some consequential and coordinating amendments.

2.1 PROVISIONS OF THE *CRIMINAL CODE* TO BE REPEALED OR AMENDED

2.1.1 SECTION 159 (ANAL INTERCOURSE) (CLAUSES 1 TO 5, 11 TO 15, 17, 18 AND 21)

Section 159 of the *Criminal Code* currently makes it a hybrid offence¹⁹ to engage in anal intercourse unless one of two exceptions applies:

- the act is between a husband and wife (must be a heterosexual marriage); or
- the act is between two individuals aged 18 or older.

In addition, the participants must consent and the act must take place in private. The term “in private” is defined to exclude public places and anywhere where “more than two persons take part or are present.” Where consent is extorted by force, threat or fear of bodily harm, or obtained by false and fraudulent misrepresentation regarding the nature and quality of the act, or a participant cannot consent due to mental disability, the person is deemed not to have consented. Where the charge relates to an act where one of the parties involved is under the age of 18, the minor involved may be charged, as well as the adult. If both parties are minors, they may both be charged. The maximum punishment for an adult convicted of an offence under section 159 is 10 years’ imprisonment.

Section 159 of the Code has been found to be unconstitutional a number of times by appeal courts across Canada: Ontario (1995), Quebec (1998), British Columbia (2003) and Nova Scotia (2006). The Federal Court (1995) and the Alberta Court of Queen's Bench (2002) have reached similar conclusions.²⁰ The appeal court decisions are binding within the province where they were made but the trial-level decisions cannot bind other judges at the same level. None of the judgments are binding in other provinces or territories, though they may be persuasive (the B.C. and Nova Scotia cases rely on the earlier decisions from Ontario and Quebec, for example).

In 1995, the Court of Appeal for Ontario was the first appeal court in Canada to find section 159 of the Code to be unconstitutional.²¹ Two of the three judges who decided the case of *R. v. C.M.* concluded that section 159 discriminated based on age, a violation of section 15 of the Charter,²² a point the Crown conceded. The third judge, Justice Abella (now a Supreme Court justice), concluded that the provision discriminated primarily on the basis of sexual orientation, though age and marital status were also factors (all violations of section 15).

The Court found that the provision was not saved by section 1 of the Charter, which allows for reasonable limits on Charter rights where prescribed by law and demonstrably justified in a free and democratic society. The provision was thus found to be unconstitutional.

None of the cases mentioned were ever appealed to the Supreme Court for a definitive answer that would apply nationwide. Despite the findings of various courts that section 159 is not constitutional, individuals continue to be charged under that provision, including in jurisdictions where an appeal court has already ruled the provision to be unconstitutional. A total of 69 Canadians were charged in adult courts under the provision in 2014–2015, though none of those charges resulted in a conviction. The previous year, 98 charges were laid under the provision, leading to seven convictions.²³

Clause 4 of Bill C-39 repeals section 159 so that anal intercourse is treated the same way as other forms of sexual activity, with a uniform age of consent.²⁴ Non-consensual anal intercourse could still be the object of other charges, such as sexual assault (sections 271 to 273 of the Code). For more on the history of this provision, see the *Legislative Summary for Bill C-32: An Act related to the repeal of section 159 of the Criminal Code*.²⁵

In addition to repealing section 159 of the Code, Bill C-39, in clause 3, creates a new section 156, which deals with historical offences. It states:

No person shall be convicted of any sexual offence under this Act as it read from time to time before January 4, 1983 unless the conduct alleged would be an offence under this Act if it occurred on the day on which the charge was laid.

While charges of buggery (the name by which the offence of anal intercourse was previously known) may still be used to address historical cases of sexual assault or child sexual abuse – since individuals are charged based on the law at the time of the alleged offence – they may not be used against individuals involved in consensual sexual acts that are now legal.

The year specified in the clause is 1983, since the general sexual assault offences currently in the Code came into force that year. Previously, the Code had contained gender- and act-specific sexual offences. According to the Department of Justice, buggery and gross indecency are the main pre-1983 offences that can address certain types of historical cases, particularly those involving male victims.²⁶

Clauses 1, 2, 5, 11 to 15, 17, 18 and 21 of Bill C-39 remove references to the now-repealed section 159 from numerous sections of the *Criminal Code*.

2.1.2 SECTION 179(1)(B) (LOITERING) (CLAUSE 6)

Section 179 of the *Criminal Code* makes it a summary offence to commit vagrancy, which is defined as either:

- supporting oneself by gaming or crime and having no lawful means to maintain oneself (section 179(1)(a)); or
- loitering in or near a school ground, playground, public park or bathing area having been convicted of one of a list of offences of a sexual nature (most relating to minors) (section 179(1)(b)).

In 1994, in the case of *R. v. Heywood*, the Supreme Court struck down section 179(1)(b) of the Code. The Court concluded that the provision on loitering violated section 7 of the Charter²⁷ because it was overly broad, thus restricting liberty more than necessary. While the objective of the provision, to protect children from sexual offences, was found to be very important, the wording of the provision was found to be overly broad for four reasons:

- The geographic scope was too large, including parks and beaches where there were no children present.
- The prohibition was for life, with no review process.
- All individuals convicted of the listed offences were subject to the provision, regardless of whether they posed a danger to children.
- There was no notice given to the offender.

For the same reasons, the Court concluded that the provision could not be justified as minimally impairing the section 7 right so as to satisfy section 1 of the Charter and was unconstitutional.

Clause 6 of Bill C-39 repeals section 179(1)(b) of the *Criminal Code* to reflect the current state of the law in Canada.²⁸

2.1.3 SECTION 181 (SPREADING FALSE NEWS) (CLAUSE 7)

Section 181 of the *Criminal Code* makes it an indictable offence to wilfully publish a statement, tale or news one knows is false where it causes or is likely to cause injury or mischief to the public interest. The maximum penalty is two years' imprisonment. The section's origins are in British laws that sought to prevent "false statements which, in a society dominated by extremely powerful landowners, could threaten the security of the state."²⁹

In the 1992 case of *R. v. Zundel*, the appellant, Ernst Zundel, had been prosecuted for publishing pamphlets denying that the Holocaust had occurred. The Supreme Court held that section 181 of the Code, under which Mr. Zundel was charged, violated the right to freedom of expression protected in section 2 of the Charter.

The Court concluded that section 181 did not have an objective that justified overriding the Charter's section 2 protections of free speech. In addition, section 181 was too broad, had vague wording and was more invasive than strictly necessary (as an indictable offence). For these reasons, the provision could not be justified as minimally impairing the section 2 right. Finally, the benefits of the provision were insufficiently compelling to justify the violation of a constitutional right. Section 181 was thus struck down as unconstitutional.

Clause 7 of Bill C-39 repeals section 181 of the *Criminal Code* to reflect the current state of the law in Canada.³⁰

2.1.4 SECTION 229(C) (UNLAWFUL OBJECT MURDER) (CLAUSE 8)

Section 229(c) of the *Criminal Code* states that it is murder to cause someone's death, where

a person, for an unlawful object, does anything that he knows or ought to know is likely to cause death, and thereby causes death to a human being, notwithstanding that he desires to effect his object without causing death or bodily harm to any human being.

In the 1978 case of *R. v. Sault Ste. Marie*,³¹ the Supreme Court stated that there was a common law presumption against convicting a person of a true crime without proof of intent or recklessness:

Where the offence is criminal, the Crown must establish a mental element, namely, that the accused who committed the prohibited act did so intentionally or recklessly, with knowledge of the facts constituting the offence, or with wilful blindness toward them. Mere negligence is excluded from the concept of the mental element required for conviction. Within the context of a criminal prosecution a person who fails to make such enquiries as a reasonable and prudent person would make, or who fails to know facts he should have known, is innocent in the eyes of the law.³²

It is notable, therefore, that one could be convicted of murder under section 229(c) of the Code without there being either an intent to kill or recklessness as to whether one's actions could lead to someone's death. This is because knowledge of a possible outcome of death ("ought to know is likely to cause death") was imputed to

the accused. In *R. v. Vaillancourt*,³³ though, the Supreme Court held that there are certain crimes where, because of the special nature of the stigma attached to a conviction therefor or the available penalties, the principles of fundamental justice require a *mens rea* (guilty intent) reflecting the particular nature of that crime. Murder is one such offence. The punishment for murder is the most severe in Canadian law and the stigma that attaches to a conviction for murder is similarly extreme. Thus,

there must be some special mental element with respect to the death before a culpable homicide³⁴ can be treated as a murder. That special mental element gives rise to the moral blameworthiness which justifies the stigma and sentence attached to a murder conviction.³⁵

In dealing directly with the wording of section 229(c), the Supreme Court held in the 1990 case of *R. v. Martineau* that the principles of fundamental justice require that a conviction for murder be based upon proof beyond a reasonable doubt of subjective foresight of death. Following on from the *Vaillancourt* decision, Justice Lamer wrote:

It is, therefore, essential that to satisfy the principles of fundamental justice, the stigma and punishment attaching to a murder conviction must be reserved for those who either intend to cause death or who intend to cause bodily harm that they know will likely cause death.³⁶

Any murder provision, such as section 229(c) of the *Criminal Code*, that expressly eliminates the requirement for proof of subjective foresight was found, therefore, to infringe sections 7 and 11(d) of the Charter.³⁷ Accordingly, section 229(c) was struck down by the Court.

In *Martineau*, the Supreme Court found that the murder provision could not be justified under section 1 of the Charter because it was not necessary to convict of murder persons who do not intend or foresee the death in order to achieve the objective of discouraging the infliction of bodily harm during the commission of certain offences because of the increased risk of death. If Parliament wished to deter persons from causing bodily harm during certain offences, the Supreme Court held that it should punish persons for causing the bodily harm.

Because courts have found that subjective foresight of death must be proven beyond a reasonable doubt before a conviction for murder can be sustained, clause 8 amends section 229(c) by removing the provision that allows for a conviction upon proof that the accused “ought to know” that his or her actions are likely to cause death. This means that a conviction for murder under this provision can only be based on a finding that the accused knew that his or her illegal act was likely to cause death.

2.1.5 SECTION 230 (MURDER IN THE COMMISSION OF OFFENCES) (CLAUSES 9 AND 19)

Section 230 of the *Criminal Code* states that causing the death of a person is murder when the death is caused while committing or attempting to commit certain offences – like sexual assault or robbery – “whether or not the person means to cause death to any human being and whether or not he knows that death is likely to be caused to any human being.”

The findings of the *Martineau* decision outlined above also applied to strike down section 230 of the Code in its entirety as being in violation of the Charter. In the *Martineau* case, the Supreme Court held that it is a principle of fundamental justice that a conviction for murder cannot rest on anything less than proof beyond a reasonable doubt of subjective foresight of death. Section 230 expressly eliminates the requirement for proof of subjective foresight, as it calls for a conviction for murder even if the accused does not know that anyone is likely to be killed. For the reasons set out in *Martineau*, section 230 of the Code was also found to infringe sections 7 and 11(d) of the Charter.

Clause 9 of Bill C-39 therefore repeals section 230 of the *Criminal Code*. As a consequence of this repeal, clause 19 of Bill C-39 also removes an offence under section 230 from the definition of a “designated offence” in section 490.011(1)(b)(iii) of the Code, which sets out the offences that can lead to registration in the national sex offender registry.

2.1.6 SECTIONS 258(1)(C) AND 258(1)(D) (IMPAIRED DRIVING – LEGAL PRESUMPTIONS) (CLAUSE 10)

Section 258 of the *Criminal Code* sets out a framework of legal presumptions that relieve the Crown of the burden of proof for certain aspects of a prosecution under section 255 of the Code (impaired driving offences). This provision was amended in 2008 by the *Tackling Violent Crime Act*.³⁸

In recent years, the Code offences for impaired driving have been the subject of multiple court decisions. In *R. v. St-Onge Lamoureux*, the Supreme Court of Canada had to determine whether certain Code provisions were consistent with the Charter. In its decision, the majority ruled that, although sections 258(1)(c), 258(1)(d.01) and 258(1)(d.1) of the Code infringe the presumption of innocence in section 11(d) of the Charter, only the requirements in section 258(1)(c) violate section 1 of the Charter in that they are not justified as reasonable limits in a free and democratic society. However, the Court found that section 258(1)(c) is justified within the meaning of section 1 of the Charter if the following wording is struck from the provision: “all of the following three things –” and

, that the malfunction or improper operation resulted in the determination that the concentration of alcohol in the accused’s blood exceeded 80 mg of alcohol in 100 mL of blood, and that the concentration of alcohol in the accused’s blood would not in fact have exceeded 80 mg of alcohol in 100 mL of blood at the time when the offence was alleged to have been committed.

In other words, the second and third requirements to be met in order to rebut section 258(1)(c) were struck down, and the majority ruled that Parliament was justified in requiring that evidence in the accused’s defence must be directed at the functioning or operation of the instrument (i.e., the first requirement).³⁹ Table 1 summarizes the requirements the accused must satisfy in order to rebut each presumption.

Table 1 – Impaired Driving Presumptions and Rebuttal Requirements Considered in *R. v. St-Onge Lamoureux*^a

| Presumptions | Rebuttal Requirements |
|---|--|
| <p>A presumption of accuracy of the breath test results (s. 258(1)(c) of the <i>Criminal Code</i>).</p> <p>A presumption of identity according to which the results are presumed to correspond to the blood alcohol level of the accused at the time of the alleged offence (s. 258(1)(c)).</p> | <ol style="list-style-type: none"> 1. Raise a reasonable doubt that the instrument was functioning or was operated properly (ss. 258(1)(c) and 258(1)(d.01) of the Code). 2. Raise a reasonable doubt by showing that the breath test results indicating a blood alcohol level in excess of 0.08 were caused by the aforesaid malfunction or improper operation of the instrument (s. 258(1)(c)).^b 3. Present evidence raising a reasonable doubt that the blood alcohol level actually exceeded 0.08 at the time of the alleged offence (s. 258(1)(c)).^b |
| <p>A presumption of identity according to which a blood alcohol level over 0.08 at the time of the analysis is presumed to be the same as the blood alcohol level of the accused at the time of the alleged offence (s. 258(1)(d.1) of the Code.)</p> | <ol style="list-style-type: none"> 1. Show that the accused's consumption of alcohol was consistent with a blood alcohol level not exceeding 0.08 at the time of the alleged offence.^c 2. Show that the accused's alcohol consumption was consistent with the breath test results.^c |

- Notes:
- a. See *R. v. St-Onge Lamoureux*, paras. 15 and 17–19, for more details.
 - b. The rebuttal requirements in the table that are struck through were deemed by the Supreme Court to be both contrary to the presumption of innocence provided by section 11(d) of the Charter and not justified in a free and democratic society, in violation of section 1 of the Charter. The evidence needed to satisfy the first two requirements relates to circumstances directly associated with the taking of blood alcohol samples, whereas a *Carter* defence would usually be needed to satisfy the third.
 - c. These rebuttal requirements necessitate a *Carter* defence.

While the constitutionality of section 258(1)(d) was not challenged in *R. v. St-Onge Lamoureux*, clause 10(3) of Bill C-39 makes a comparable amendment, as this provision has wording similar to that of section 258(1)(c). Whereas section 258(1)(c) of the Code applies to the taking of breath samples, section 258(1)(d) applies to the taking of blood samples. Accordingly, clause 10 removes the portions of sections 258(1)(c) and 258(1)(d) that were struck down by the Supreme Court. This clause also harmonizes the presentation of the English and French versions of the two subsections.

2.1.7 SECTION 287 (ABORTION) (CLAUSE 16)

Section 287 of the *Criminal Code* makes it an indictable offence to use any means to procure a miscarriage. The maximum penalty for this offence is imprisonment for life. Every pregnant female who attempts to procure her own miscarriage is liable to a maximum term of imprisonment of two years. The offence does not apply if a therapeutic abortion committee of an accredited or approved hospital certifies that the continuation of the pregnancy would or would be likely to endanger the pregnant woman's life or health.

In the 1988 case known as *R. v. Morgentaler*, the Supreme Court found that forcing a woman, by threat of criminal sanction, to carry a foetus to term unless she meets certain criteria unrelated to her own priorities and aspirations, is a profound interference with a woman's body and thus a violation of security of the person, contrary to section 7 of the Charter. These Code requirements caused a certain amount of delay in obtaining medical treatment for women who were successful in meeting the criteria. In the context of abortion, any unnecessary delay could have profound consequences on the woman's physical and emotional well-being. The procedures set out in the Code in practice prevented a pregnant woman from gaining the benefit of the defence held out to her in section 287. The system regulating access to therapeutic abortions contained so many potential barriers to its own operation that the defence it created would in many circumstances be practically unavailable to women. Therefore, the Court held that the provision was neither consistent with the principles of fundamental justice nor section 1 of the Charter.

Section 287 of the *Criminal Code* was declared of no force and effect as a result of the *Morgentaler* decision, but has remained untouched in the legislation since 1988. It is repealed by clause 16 of Bill C-39.

2.1.8 SECTION 719(3.1) (CREDIT FOR PRE-SENTENCE CUSTODY)
(CLAUSE 20)⁴⁰

Section 719 of the *Criminal Code* concerns the determination of the sentence to be imposed on a person convicted of an offence. More specifically, section 719(3) provides that, in determining a sentence, a court may take into account any time spent in pre-sentence custody. The credit given is limited to a maximum of one day for each day spent in custody. In spite of this, section 719(3.1) allows for greater credit, a maximum of one and one-half days for each day spent in custody, but only "if the circumstances justify it." However, this exception does not apply to cases where the offender has been denied release on bail primarily on the basis of a prior conviction (pursuant to section 515(9.1) of the Code).

Section 719 was amended in 2009 by the *Truth in Sentencing Act*.⁴¹ Previously, the widespread practice was to count time spent in pre-sentence custody as double time, partly because this time does not count in calculating eligibility for parole. In addition, the credit provided some compensation for the stricter and harsher conditions in pre-sentence custody that result from the high level of security, overcrowding problems and the fact that there are no training and treatment programs in many institutions. In *R. v. Wust*,⁴² the Supreme Court ruled that courts must reduce sentences to take into account pre-sentence custody unless they justify not doing so, but did not set out a rigid formula for the reduction.

In 2016, in *R. v. Safarzadeh-Markhali*, the Supreme Court found that the exclusion from greater credit for pre-sentence custody (provided in section 719(3.1) of the Code) for accused who have been denied release on bail primarily on the basis of a prior conviction infringes section 7 of the Charter. The Court explained that this provision curtails liberty in a way that is overbroad and does not conform to the principles of fundamental justice. It requires offenders to serve more time in prison than they would have otherwise. As a result, the Supreme Court declared the

challenged portion of section 719(3.1) to be of no force and effect: “unless the reason for detaining the person in custody was stated in the record under subsection 515(9.1).”

Clause 20 removes the portion of section 719(3.1) of the *Criminal Code* that was struck down by the Supreme Court.

2.2 CONSEQUENTIAL AMENDMENTS (CLAUSES 22 TO 24)

The bill includes amendments to remove references to section 159 of the *Criminal Code* in the *Corrections and Conditional Release Act* and the *Youth Criminal Justice Act*.

2.3 COORDINATING AMENDMENTS (CLAUSE 25)

Clause 25 coordinates the coming into force of Bill C-39 in case Bill C-226, An Act to amend the Criminal Code (offences in relation to conveyances) and the Criminal Records Act and to make consequential amendments to other Acts, is enacted and comes into force.⁴³ Bill C-226, sponsored by MP Steven Blaney, has essentially the same content as Bill C-73, An Act to amend the Criminal Code (offences in relation to conveyances) and the Criminal Records Act and to make consequential amendments to other Acts, which was introduced on 16 June 2015 by the then Minister of Justice Peter MacKay.⁴⁴ Bill C-73 died on the *Order Paper* at first reading when Parliament was dissolved on 2 August 2015. The bill revised the *Criminal Code* provisions governing offences in relation to conveyances, primarily by harmonizing penalties and providing for rules governing the disclosure of evidence.

NOTES

1. [Bill C-39, An Act to amend the Criminal Code \(unconstitutional provisions\) and to make consequential amendments to other Acts](#), 1st Session, 42nd Parliament.
2. [Criminal Code](#), R.S.C. 1985, c. C-46.
3. [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.
4. [Corrections and Conditional Release Act](#), S.C. 1992, c. 20.
5. [Youth Criminal Justice Act](#), S.C. 2002, c. 1.
6. [R. v. C.M.](#), 1995 CanLII 8924 (ON CA).
7. [R. c. Roy](#), 1998 CanLII 12775 (QC CA). [Available in French only]
8. [R. v. Heywood](#), [1994] 3 S.C.R. 761.
9. [R. v. Zundel](#), [1992] 2 S.C.R. 731.
10. [R. v. Martineau](#), [1990] 2 S.C.R. 633.
11. [R. v. St-Onge Lamoureux](#), 2012 SCC 57.

12. [R. v. Morgentaler](#), [1988] 1 S.C.R. 30.
13. [R. v. Safarzadeh-Markhali](#), 2016 SSC 14.
14. World Justice Project, [What is the Rule of Law?](#)
15. On 15 September 2016, Travis Vader was convicted of second degree murder under section 230 of the *Criminal Code*. That section states that causing the death of a person is murder when the death is caused during the commission of certain offences – like sexual assault or robbery – even if the accused did not intend to cause the other person's death or did not know death was likely to result from their behaviour. However, the Supreme Court had struck down section 230 in 1990 as being in violation of the Charter. On 31 October 2016, Justice Thomas, of the Court of Queen's Bench of Alberta, vacated the original conviction and substituted a verdict of manslaughter. On 25 January 2017, Vader was sentenced to a single term of life in prison, with parole eligibility after seven years. See [R. v. Vader](#), 2016 ABQB 625.
16. House of Commons, Standing Committee on Justice and Human Rights, Letter to the Honourable Jody Wilson-Raybould, Minister of Justice and Attorney General of Canada, 6 October 2016.
17. The Honourable Jody Wilson-Raybould, Minister of Justice and Attorney General of Canada, Letter to Mr. Anthony Housefather, Chair of the House of Commons Standing Committee on Justice and Human Rights, 16 January 2017.
18. Department of Justice, [Questions and Answers – An Act to amend the Criminal Code \(removing unconstitutional portions or provisions\)](#) [*Questions and Answers – Removing Unconstitutional Provisions*]. See also [Bill C-39, An Act to amend the Criminal Code \(unconstitutional provisions\) and to make consequential amendments to other Acts](#), Charter statement.
19. A hybrid offence may be proceeded with by summary conviction or indictment, depending on the severity of the acts in question.
20. *R. v. C.M.*; *R. c. Roy*; [R. v. Blake](#), 2003 BCCA 525 (CanLII); [R. v. T.C.F.](#), 2006 NSCA 42 (CanLII); [Halm v. Canada \(Minister of Employment and Immigration\)](#), [1995] 2 FCR 331, 1995 CanLII 3573 (FC); and [R. v. Roth](#), 2002 ABQB 145 (CanLII).
21. In *R. v. C.M.*, the accused had had a relationship with his fiancée's niece, which began when he was 23 years old and the niece was 13 years old, and which lasted three years. He was convicted at trial of sexual assault and sexual interference and sentenced to 18 months' imprisonment, but was found not guilty of the offence of anal intercourse under section 159 because the provision was found to be unconstitutional.
22. Section 15 of the Charter reads:

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
23. Department of Justice, [Questions and Answers – An Act related to the repeal of section 159 of the Criminal Code](#). [*Questions and Answers – Repeal of Section 159*]
24. Currently, the age at which a person can consent to most sexual activities is 16 years. Exceptions provide for a lower age of consent where the act is consensual and the complainant is 14 or 15 years old and the accused is less than five years older or where the complainant is 12 or 13 years old and the accused is less than two years older (*Criminal Code*, s. 150.1). The age of consent is raised to 18 years where there is a relationship of trust, authority or dependence, or where the sexual activity is exploitative of the young person (*Criminal Code*, s. 153).

25. Julia Nicol, [Legislative Summary of Bill C-32: An Act related to the repeal of section 159 of the Criminal Code](#), Publication no. 42-1-C32-E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 11 January 2017.
26. Department of Justice, *Questions and Answers – Repeal of Section 159*.
27. Section 7 of the Charter reads: “Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.”
28. In its background materials on Bill C-39, the government states:
- There are other *Criminal Code* provisions that provide comprehensive protection to children from sex offenders including, for example, section 161, requiring a sentencing court to consider imposing a prohibition order to prevent a child-sex offender from going to a public park or swimming area where children can reasonably be expected to be present.
- Department of Justice, *Questions and Answers – Removing Unconstitutional Provisions*.
29. *R. v. Zundel*.
30. The government’s resources on Bill C-39 describe other laws in place to address the spreading of false news: sections 318 and 319 (hate propaganda) of the *Criminal Code*, section 300 (defamatory libel) of the Code, section 8(1) of the *Broadcasting Distribution Regulations*, as well as provincial laws. See Department of Justice, *Questions and Answers – Removing Unconstitutional Provisions*. The same document says that the government is also considering whether new measures are required to address this issue as part of its review of the criminal justice system.
31. [R. v. Sault Ste. Marie](#), [1978] 2 S.C.R. 1299.
32. *Ibid.*, pp. 1309–1310.
33. [R. v. Vaillancourt](#), [1987] 2 S.C.R. 636.
34. Section 222 of the *Criminal Code* defines “culpable homicide” as being “murder or manslaughter or infanticide.” A person commits culpable homicide when he or she causes the death of a human being
- (a) by means of an unlawful act;
 - (b) by criminal negligence;
 - (c) by causing that human being, by threats or fear of violence or by deception, to do anything that causes his death; or
 - (d) by wilfully frightening that human being, in the case of a child or sick person.
35. *R. v. Vaillancourt*, para. 28.
36. *R. v. Martineau*.
37. Section 11(d) of the Charter reads: “Any person charged with an offence has the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.”
38. [Tackling Violent Crime Act](#), S.C. 2008, c. 6. One of the aims of this Act was to limit the “two-beer defence,” or “Carter defence,” whereby the accused would raise a reasonable doubt regarding the reliability of the breath test by presenting the court with a consumption scenario corroborated by a toxicologist’s testimony.
39. *R. v. St-Onge Lamoureux*, para. 3.

40. Some passages in this section of the Legislative Summary are drawn from Lyne Casavant and Dominique Valiquet, [Legislative Summary of Bill C-25: Truth in Sentencing Act](#), Publication no. LS-638E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 25 January 2010.
41. [Truth in Sentencing Act](#), S.C. 2009, c. 29, s. 3.
42. [R. v. Wust](#), 2000 SCC 18.
43. [Bill C-226: An Act to amend the Criminal Code \(offences in relation to conveyances\) and the Criminal Records Act and to make consequential amendments to other Acts](#), 1st Session, 42nd Parliament.
44. [Bill C-73: An Act to amend the Criminal Code \(offences in relation to conveyances\) and the Criminal Records Act and to make consequential amendments to other Acts](#), 2nd Session, 41st Parliament.