

**BILL C-15A: AN ACT TO AMEND THE
CRIMINAL CODE AND TO AMEND OTHER ACTS**

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LEGISLATIVE HISTORY OF BILL C-15A

HOUSE OF COMMONS

SENATE

Bill Stage	Date
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Bill Stage	Date
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Second Reading:	26 September 2001
Committee Report:	5 October 2001
Report Stage:	18 October 2001
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N.B. Any substantive changes in this Legislative Summary which have been made since the preceding issue are indicated in **bold print**.

Legislative history by Peter Niemczak

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BILL C-15A: AND ACT TO AMEND THE
CRIMINAL CODE AND TO AMEND OTHER ACTS*

BACKGROUND

Bill C-15, An Act to amend the Criminal Code and to amend other Acts (the Criminal Law Amendment Act, 2001), was introduced in the House of Commons and given first reading on 14 March 2001. Bill C-15 reintroduced measures contained in Bill C-17 – “An Act to amend the Criminal Code (cruelty to animals, disarming a peace officer and other amendments) and the Firearms Act (technical amendments)” – and in Bill C-36 – “An Act to Amend the Criminal Code (Criminal Harassment, Home Invasions, Applications for Ministerial Review – Miscarriages of Justice, and Criminal Procedure) and to Amend Other Acts” – which were introduced in the previous Parliament but which died on the *Order Paper* at dissolution. Bill C-15 also proposes new *Criminal Code* provisions which seek to counter sexual exploitation of children involving the Internet as well as further amendments to the *Firearms Act*.

The House of Commons passed a motion on 26 September 2001 directing the Standing Committee on Justice and Human Rights to split Bill C-15, An Act to amend the Criminal Code and to amend other Acts, into two separate bills. The Standing Committee reported back to the House on 3 October 2001, indicating that it had divided Bill C-15 into two bills: Bill C-15A, An Act to amend the Criminal Code and to amend other Acts; and Bill C-15B, An Act to amend the Criminal Code (cruelty to animals and firearms) and the Firearms Act. The Committee reported Bill C-15A back to the House on 5 October 2001 with amendments.

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

The highlights of Bill C-15A are:

- creating new offences and enforcement measures to deal with sexual exploitation of children, particularly in connection with the Internet;
- raising the maximum penalty for criminal harassment (i.e., “stalking”) from five to ten years’ imprisonment;
- making “home invasion” an aggravating factor in sentencing;
- creating an offence of disarming, or attempting to disarm, a peace officer;
- facilitating the greater use of technology in the electronic filing of documents and the “virtual” appearance of persons in court through audio-visual links;
- allowing for input from Crown prosecutors in private prosecutions;
- making preliminary inquiries optional and potentially more focused;
- requiring advance notice of the use of expert testimony by either side;
- clarifying the process of criminal conviction reviews by the Minister of Justice (*Criminal Code*, section 690), and extending the process to summary conviction cases; and
- bringing the military justice system further into line with the civilian system by providing for the fingerprinting of persons charged with or convicted of designated service offences under the *National Defence Act*.

DESCRIPTION AND ANALYSIS

A. Sexual Exploitation of Children

1. Child Sex Tourism: Removal of Procedural Condition for Prosecution

In 1997, Parliament amended the *Criminal Code* to extend criminal liability for certain sexual offences to acts committed abroad by Canadian nationals: section 7(4.1). Sections 7(4.2) and (4.3), which were also added at this time, made prosecutions under section 7(4.1) conditional upon the receipt of a request from the government of the country where the offence occurred and the consent of the Attorney General of Canada, except in the case of an offence of child prostitution contrary to section 212(4) of the Code.

Clause 3(2) of the bill amends sections 7(4.2) and (4.3) of the Code in order to eliminate this distinction and simply requires the consent of the Attorney General in all cases as a precondition of a prosecution under section 7(4.1).

2. Child Pornography and the Internet

Section 163.1 of the Code prohibits the production, distribution and possession of child pornography. Clauses 5(2) and (3) of the bill amend section 163.1 to ensure that these criminal prohibitions extend to analogous conduct in an Internet context.

Clause 5(2) adds language to section 163.1(3) of the Code, which prohibits various acts of distribution of child pornography, to cover such things as “transmission” and “making available” in order to ensure that the offence extends to distribution of child pornography in electronic form on the Internet by such means as e-mail and posting items to websites.

Clause 5(3) adds new sections 163.1(4.1) and (4.2) to deal with accessing child pornography. New section 163.1(4.1) makes accessing child pornography an offence punishable on summary conviction (maximum penalty: fine of up to \$2,000 and/or imprisonment for up to six months) or, on an indictment, by imprisonment for up to five years. In contrast with the existing offence of possession which, in the context of the Internet, at least arguably requires that the accused download the material to a computer hard-drive, disk or printer, the new accessing offence would cover those who merely view the material through an Internet browser. New section 163.1(4.2) specifies, however, that the accessing of child pornography must be intentional if it is to be covered by section 163.1(4.1). In other words, the accused must know before viewing the material in question, or causing its transmission to himself or herself, that it contains child pornography. Clause 5(4) makes consequential amendments to subsections 163.1(6) and (7) of the *Criminal Code* in order to extend – to the new “accessing” offence – the defences of artistic merit, educational, scientific or medical purpose, and of serving “the public good,” which apply to the existing child pornography offences.

Clause 76 amends the provisions of the Code dealing with “long-term offenders” (section 753.1) in order to add the child pornography offences of section 163.1, including the new accessing offence in section 163.1(4.1), to the list of offences for which a long-term offender order may be made. The long-term offender order is designed for offenders facing a

sentence of at least two years for certain sexual offences where the court is satisfied that there is a substantial risk of reoffending. In such cases, a sentencing court may order a lengthy period (up to ten years) of post-release supervision in the community.

3. Luring of Children over the Internet

Clause 8 of the bill adds section 172.1 to the Code which would specifically make it an offence to communicate via a “computer system” with a person under a certain age, or a person whom the accused believes to be under a certain age, for the purpose of facilitating the commission of certain sexual offences in relation to children or child abduction. Depending on the offence being facilitated, the requisite age or believed age of the victim varies among the following ages: 18, 16 and 14. As with other offences where the age or believed age of the victim or intended victim is an ingredient of the offence, section 172.1 provides that:

- the accused’s belief in the victim’s age may be inferred from a representation to the accused to that effect; and
- the accused is precluded from relying on the defence of mistake of fact as to the victim’s age unless the accused took reasonable steps to ascertain the person’s age.

Internet luring of children contrary to section 172.1 is punishable on summary conviction (maximum penalty: fine of up to \$2,000 and/or imprisonment for up to six months) or, on an indictment, by imprisonment for up to five years.

Clause 76 amends the provisions of the Code dealing with “long-term offenders” (section 753.1) in order to add the new Internet child-luring offence in section 172.1 to the list of offences for which a long-term offender order may be made. The long-term offender order is designed for offenders facing a sentence of at least two years for various sexual offences where the court is satisfied that there is a substantial risk of reoffending. In such cases, a sentencing court may order a lengthy period (up to ten years) of post-release supervision in the community.

4. Court-Ordered Deletion of Child Pornography from Internet Sites

Clause 7 of the bill adds section 164.1 to the *Criminal Code* which would provide for the court-ordered deletion of material found to constitute child pornography from any computer system within the court’s jurisdiction.

If, on the basis of a sworn information, a judge is satisfied that there are reasonable grounds to believe that such material is stored in or made available through a computer system within the court's jurisdiction, the judge could issue a warrant of seizure ordering the custodian of the computer system (e.g., the Internet Service Provider, or ISP) to:

- provide an electronic copy of the material to the court;
- remove the material from its system; and
- provide information on the identity and location of the person who posted the material on the system.

The court is then required to give notice to the person who posted the material and provide him/her with an opportunity to show cause why it should not be deleted. If this person cannot be identified or located, or if he or she resides outside of Canada, the judge can order the computer system custodian to post the notice at the site where the impugned material was posted. If the person who posted the material does not appear, the hearing may proceed and the court may determine the matter in the person's absence.

If it is satisfied on a balance of probabilities (i.e., the civil standard of proof) that the material in question is either child pornography or computer data that make child pornography available, the court may order the computer system custodian to delete the material. Otherwise, the court must order the return of the electronic copy of the material to the computer system custodian and terminate its order requiring the custodian to remove the material from its system. The court's decision in such a case may be appealed and the Code provisions governing appeals in indictable cases generally apply. A deletion order does not take effect until the expiration of the time for taking an appeal according to the Rules of Court for that province or territory.

5. Seizure and Forfeiture of Offensive Material and of Property Used in the Commission of Child Pornography Offences

Clause 6 of the bill amends section 164(4) of the Code to clarify that, for the purposes of forfeiture, the court need only be satisfied to the civil standard of proof (i.e., balance of probabilities) that the material in question is obscene or constitutes child pornography. The

amended section 164(4) would also make a forfeiture order discretionary on the part of the court, rather than mandatory.

In new sections 164.2 and 164.3, clause 7 provides for the forfeiture of personal property used in the commission of a child pornography offence under section 163.1. Currently, forfeiture of such property is only available where the offence is committed as part of the activities of a criminal organization (see sections 490.1 through 490.9 of the Code).

The new provisions on forfeiture and relief from forfeiture proposed in clause 7 are similar to those found elsewhere in the *Criminal Code* and in other federal statutes. Forfeiture to the Crown, of things used in the commission of a child pornography offence, may be ordered on the application of Crown counsel by a court which, having convicted the owner of the property of a child pornography offence under section 163.1, is satisfied on a balance of probabilities that the items in question were used in the commission of the offence. Forfeiture of such property can also occur where the owner is not convicted of such an offence, but where he or she acquired it from such a person in circumstances which suggest that ownership was transferred for the purpose of avoiding forfeiture. Innocent third parties would have 30 days from the date of the forfeiture order to seek an order from the court declaring that their interest in the property is unaffected by the forfeiture.

Clauses 63 and 69 make consequential amendments providing for the application of Code provisions governing appeals of orders.

6. Preventative Orders

The *Criminal Code* permits courts to make orders restricting the otherwise lawful conduct of individuals in various circumstances, either as part of punishment or in order to prevent the future commission of offences, or both. Two such provisions are specifically aimed at protecting children from sexual predators:

- Section 161 permits courts sentencing persons for certain sexual offences against children under age 14 to prohibit them from various activities which would likely bring them into contact with such children for specified periods up to and including life.
- Section 810.1 permits a court to order a person to enter into a recognizance binding him or her to abstain from various activities likely to bring them into contact with persons under the age of 14. Unlike a section 161 order, an order under section 810.1 does not require a conviction for an offence or even the laying of a charge – it can be obtained by anyone who

can establish a reasonable fear that the person in question will commit one or more of the enumerated sexual offences against a person under the age of 14. However, a section 810.1 order can only be for a maximum period of 12 months.

Clauses 4 and 81 of the bill amend sections 161 and 810.1, respectively, in order to:

- add the child pornography offences in section 163.1 and the new Internet child-luring offence proposed in clause 8 (new section 172.1) to the list of offences – or feared offences, in the case of section 810.1 – in response to which such orders may be made; and
- add to the list of activities which may be proscribed by such orders the use of a computer system (i.e., the Internet) for the purpose of communicating with a person under the age of 14.

B. Disarming a Peace Officer

Clause 11 of the bill creates a new offence of disarming a peace officer. This offence is essentially the same as the one in Bill C-17 and is intended to recognize “the grave risk that police officers face in the line of duty.”⁽¹⁾ Proposed section 270.1(1) makes it an offence to take or attempt to take a weapon in the possession of a peace officer without his or her consent when the peace officer was engaged in the execution of his or her duty.

New section 270.1(2) defines “weapon” for the purposes of subsection (1) as “any thing that is designed to be used to cause injury or death to, or to temporarily incapacitate, a person.” This would include not only firearms but also pepper spray and other items designed to be used to cause injury or death to, or to temporarily incapacitate, a person.

New section 270.1(3) sets out the penalty for this hybrid offence, which would have a maximum penalty of five years’ imprisonment when the Crown proceeded by indictment or a maximum of 18 months’ imprisonment where the Crown proceeded by way of summary conviction.

The proposed offence of disarming or attempting to disarm a police officer is the result of a process initiated by the Canadian Police Association. A resolution from their 1999 annual general meeting in Regina reads as follows:

(1) Department of Justice, “Background, Highlights of the Omnibus Bill,” March 2001, p. 4.

WHEREAS The disarming of police officers of firearms and the interference by offenders with the equipment issued to peace officers is a matter of serious concern which is worthy of note by a separate and distinct recorded criminal offence.

BE IT The *Criminal Code of Canada* is amended so as to create the indictable offence of disarming a police officer or interfering with equipment issued to a peace officer and that section 553 of the *Criminal Code of Canada* be amended to include this offence in those offences over which the provincial court has absolute jurisdiction.

RESOLVED THAT

Their suggested offence, similar but not identical to what is proposed in Bill C-15, states:

ASSAULTING A PEACE OFFICER

270.1 (1) Everyone commits an offence who,
(a) disarms or attempts to disarm a peace officer in the execution of his duty
(b) interferes with equipment issued to a peace officer.

270 (3) Everyone who commits an offence under section 270.1 is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.

C. Sexual Exploitation of Person with Disability

Clauses 12, 13, 14 and 20 add the offence in section 153.1 of the *Criminal Code* (sexual exploitation of person with disability) to the list of other sexual offences for which there are special evidentiary rules. These amendments were also found in Bill C-17. Thus, a person with a disability who is the victim of sexual exploitation receives the same evidentiary protection as is afforded to other victims of sexual offences. The following are the affected provisions of the *Criminal Code*:

- Section 274 provides that in the case of the listed offences, corroboration is not required for a conviction and the judge is not to instruct the jury that it would be unsafe to find the accused guilty in the absence of such corroboration.
- Section 275 abrogates the rules relating to evidence of recent complaint with respect to the listed offences.

- Section 276 provides that, in the case of the listed offences, evidence that the complainant has engaged in sexual activity is not admissible to support an inference that the complainant is likely to have consented to the sexual activity or is less worthy of belief. The section also sets out the test that must be satisfied before evidence that the complainant has engaged in sexual activity can be adduced by or on behalf of the accused.
- Section 277 provides that evidence of sexual reputation is not admissible for the purpose of challenging or supporting the credibility of the complainant in the case of the listed offences.
- Section 486(2.1) provides that a court may, in certain circumstances, order a complainant or witness under the age of 18 years to testify outside the courtroom or behind a screen or other device that would prevent the complainant or witness from seeing the accused.

D. Criminal Harassment

Clause 10 of the bill raises the maximum sentence for the offence of criminal harassment from five years' imprisonment to ten years. Criminal harassment refers to such things as repeatedly following, watching or communicating with someone in a manner which reasonably causes that person to fear for their own safety or the safety of someone known to them. It was first made a distinct criminal offence in 1993 (S.C. 1993, c. 45, s. 2).

E. Home Invasions

Clause 15 of the bill is intended to make "home invasion" an aggravating factor in sentencing for certain offences, rather than a distinct offence. A court sentencing a person for unlawful confinement, robbery, extortion, or break and enter, would have to consider it an aggravating circumstance that the offence was committed in an occupied dwelling where the offender was either aware that it was occupied or was reckless in this regard, and where he or she used violence or threats of violence against a person or property. In other words, the presence of these factors would militate in favour of a harsher sentence.

F. Criminal Procedure

1. Remote Appearances and Electronic Filing of Documents

a. Overview

A key thrust of the bill is to reduce inefficiencies in the criminal justice system by providing for the use and filing of electronic documents with courts and by eliminating unnecessary court appearances by accused persons, particularly those in custody.

As a general matter, clause 2 of the bill ensures the legality and immediate effectiveness of judicial acts from the moment they are done, whether or not they are reduced to writing. This provision ensures the validity of judicial acts made in a number of circumstances where hard-copy documentary proof of the act is not immediately generated. Such situations could include judicial decisions in the form of orders or warrants which may be issued electronically or orally by telephone or some other form of audio or audio-visual communications link.

b. Alternatives to Physical Appearance of Accused in Proceedings

Clause 27 permits an accused to make an election or re-election as to mode of trial through a documentary submission, without personally appearing in court.

Clause 49(2) permits an accused to enter his or her plea to a charge via closed-circuit television or some other means which allow the accused and the court to engage in simultaneous visual and oral communication from a remote location. Such a remote appearance has to be ordered by the court and agreed to by the accused.

Clauses 60 and 61 permit an accused to appear through counsel designated by the accused during any proceedings under the Code, except: where oral evidence is being taken; during jury selection; or during the hearing of an application for a writ of *habeas corpus* (i.e., where the accused is challenging the validity of his or her detention).⁽²⁾ However, the court retains the discretion to order the accused's presence during any part of the proceedings, and the accused has to be present to enter a plea of guilty and for sentencing, unless the court ordered otherwise.

(2) See also clause 77 which would make it clear that a person who was the subject of a writ of *habeas corpus* would have to appear personally in court, notwithstanding any other provision of the Code.

Clause 61 also enables the designated defence counsel or the prosecutor to appear before the court by any technological means satisfactory to the court which permits the court and counsel to communicate simultaneously.

Clauses 67 and 68 provide for the remote appearance of accused persons at appeal proceedings in indictable cases. At such proceedings involving the receiving of evidence, clause 67 permits the court of appeal to order that any party could appear by any technological means satisfactory to the court that permitted the court and the parties to communicate simultaneously. Similar provision could be made at the actual hearing of an appeal for an accused who was in custody and was entitled to be present. At an application for leave to appeal or at other proceedings which are preliminary or incidental to an appeal, such an accused may appear by means of any suitable telecommunications device, including telephone.

Clause 84 (new section 848) provides that, in any proceedings involving an incarcerated accused who did not have access to legal advice during proceedings, before permitting such an accused to appear by means of audio-visual link, the court would have to be satisfied that the accused could understand the proceedings and that any decisions made by the accused during the proceedings would be voluntary.

Clause 19 addresses potential legal problems of a technical nature which may arise from the use of alternatives to physical appearance of accused persons in certain situations. In order for a court to deal with a criminal charge, it must have jurisdiction over the offence and over the accused. Historically, in Anglo-Canadian criminal procedure, a court's jurisdiction over an accused could be lost where the accused was physically absent from the proceedings. Currently, section 485(1.1) of the Code provides that jurisdiction over an accused is not lost by the failure of the accused to appear personally in certain circumstances. Clause 19 expands the scope of this curative provision to cover additional situations where an accused's physical absence from the courtroom is authorized and the accused is represented by counsel. These situations would include:

- remote appearance at a bail hearing;
- remote appearance or authorized absence at a preliminary inquiry;
- remote appearance or appearance through counsel at trial;
- authorized absence from trial; and
- remote appearance at appeal proceedings.

c. Electronic Documents

Clause 84 (new sections 841 to 847) of the bill facilitates the use of electronic documents in the criminal court process. The proposed new provisions deem *Criminal Code* references to documentary and document-filing requirements to include electronic documents and to electronic filing of documents, provided that such use and filing of electronic documents was in accordance with applicable statutory provisions or rules of court.

2. Conditions for Accepting Guilty Pleas

Clause 49(1) requires courts to satisfy themselves as to the following before accepting guilty pleas:

- that the accused's plea is voluntary; and
- that the accused understands:
 - a. that the plea is an admission of guilt of the essential elements of the offence,
 - b. the nature and consequences of the plea, and
 - c. that the court is not bound by any agreement between the accused and the prosecutor (i.e., as to sentencing).

However, a court's failure to fully inquire into these matters would not invalidate such a plea.

3. Case Management

Clause 18 of the bill provides for the application of case management to criminal cases. Case management refers to a system of managing litigation cases through the application of strict timetables for the hearing of cases, depending on the nature and complexity of a case. Such systems currently apply to civil cases in various jurisdictions. Clause 18 provides for the promulgation of court rules dealing with case management for criminal cases in the various provinces and territories.

4. Private Prosecutions

Most criminal prosecutions in Canada are conducted by or on behalf of the provincial or federal Attorney General's office. However, prosecutions can also be launched and conducted by or on behalf of private individuals. Although peace officers and Crown attorneys

have special responsibilities and powers in the criminal justice system, the Crown does not have a monopoly on enforcing the law (although for some offences, the consent of either the provincial or federal Attorney General is required for a prosecution). Section 504 of the *Criminal Code* states that “any one” who has reasonable grounds to do so may lay an information before a justice of the peace alleging the commission of a criminal offence by another person. However, the Attorney General has the power to intervene in any such prosecution and may direct a stay of proceedings with the option of recommencing the case as a public prosecution (see *Criminal Code* sections 579 and 579.1).

Clauses 21 and 22 of the bill make some changes to the process for initiating and conducting private prosecutions, which is currently the same as for public prosecutions. First, a privately laid information has to be referred to a provincial court judge or a specially designated justice of the peace. Second, the provincial or federal Attorney General has to be given notice and an opportunity to be heard before the judge or designated justice of the peace can accept the information and issue a summons or arrest warrant. Finally, if the judge or designated justice of the peace declined to act on an information, the accuser, in order to pursue the matter, has to challenge the legality of that decision in a higher court or offer new evidence in support of the allegation. The accuser, or any other potential complainant in the matter, is precluded from simply bringing an information before a different judge or designated justice with the same evidence.

Clause 47 gives the Attorney General the option of intervening in a private prosecution – to the extent of being entitled to call witnesses, examine and cross-examine witnesses, present evidence, and make submissions – but without being deemed to have taken over the prosecution.

5. Preliminary Inquiries

a. Introduction

Preliminary inquiries are pre-trial hearings at which the prosecution must show that there is evidence to justify putting the accused on trial. Preliminary inquiries are only conducted in cases where the prosecution is proceeding by indictment.

As a way of reducing the time it takes to bring criminal cases to trial, and as a way of minimizing the extent to which complainants (particularly those in sexual assault cases)

are subject to examination and cross-examination, federal and provincial governments have considered ways to reduce the number and duration of preliminary inquiries, including abolishing them altogether. However, it appears for the time being that the federal government prefers to narrow the scope of preliminary inquiries and reduce their number. The proposals contained in Bill C-15A are part of this approach. Other elements of this legislative strategy include increasing the maximum punishment for offences prosecuted summarily, and the reclassification of a large number of indictable offences as hybrid offences (where the Crown has the option of proceeding summarily and thus precluding a preliminary inquiry). However, these are not addressed in the bill.

b. Preliminary Inquiries to be Optional and Could be Limited by Agreement

Clauses 24 through 26 make the holding of a preliminary inquiry in criminal cases dependent on an express request by the defence or the prosecution. A number of other provisions of the bill are largely incidental to this proposed change, including clauses 33 through 46, 59, 89 and 90.

Where preliminary inquiries were requested, clauses 27, 28(1) and 30 permit their scope to be limited in accordance with agreements between the defence and the prosecution. However, this narrowing of preliminary inquiries appears to be optional. Although the party which requested an inquiry (which would almost always be the defence) is required to identify the issues on which it wished evidence to be given, and the witnesses that it would like to hear, nothing in the bill forces the requesting party to do so in a manner which actually limits the scope of the inquiry from what it would otherwise be. However, in order to encourage such agreement, a pre-inquiry hearing before the preliminary inquiry judge can be held, on the application of either side or on the judge's own motion.

c. Conduct of Preliminary Inquiries

Clause 28(2) gives the preliminary inquiry judge the authority to permit the accused to be absent from all or any part of the inquiry on the accused's request. Clause 28(3) requires the preliminary inquiry judge to order the immediate cessation of any part of the examination or cross-examination of a witness that the judge considered to be abusive, excessively repetitive, or otherwise inappropriate.

Clause 29 permits a preliminary inquiry judge to receive otherwise inadmissible evidence which the judge considered to be credible or trustworthy, including a recorded statement of a witness, provided that the party offering the evidence gave reasonable notice to the other parties or the judge ordered otherwise. In such a case, however, a party is able to apply to the judge to have the source of such evidence appear for examination or cross-examination. Pursuant to clause 72, evidence admitted under clause 29 (except, presumably, where cross-examination was allowed) cannot be admitted into evidence at trial under section 715 which, in certain circumstances, allows for the admission at trial of evidence taken at the preliminary inquiry (e.g., where a witness refuses to be sworn or to give evidence, or becomes unavailable to testify by reason of death, insanity, absence from Canada, etc.).

6. Jury Selection

Where the presiding judge considered it advisable, clauses 52 and 57 permit the calling of two alternate jurors to be available until the commencement of trial. Once the trial itself was about to begin, the alternate jurors would either be excused from the proceedings or substituted for jurors who were no longer available to serve on the jury.

Clause 51 permits a different judge to preside over a trial from the one who presided over the jury selection process.

7. Notice of Expert Testimony

Clause 62 of the bill requires parties to give advance notice of any expert testimony being offered at trial. This provision is essentially aimed at the defence, because the prosecution is already required by the *Canadian Charter of Rights and Freedoms* to disclose its case and generally any information which might reasonably be useful to the accused in his or her defence.⁽³⁾

Notice of expert testimony has to be given at least 30 days before the beginning of trial or within such other period fixed by the court. The notice has to include the name of the proposed expert witness, a description of the witness' area of expertise, and a statement of the witness' qualifications. In addition, a copy of any report prepared by the witness or, if no report has been prepared, a summary of the opinion to be given by the witness has to be provided in

(3) *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, 68 C.C.C. (3d) 1; and *R. v. Dixon*, [1998] 1 S.C.R. 244, 122 C.C.C. (3d) 1.

advance to the other side. Certain restrictions apply to the use of information disclosed pursuant to this provision: such information cannot be used in other proceedings, unless a court so ordered; and, absent the accused's consent, the prosecution is precluded from producing into evidence a proposed expert witness' report or opinion summary where the witness did not testify.

8. Restriction on Use of Agents

Clause 79 restricts the ability of non-lawyers (i.e., agents) to represent accused persons in summary conviction proceedings. In such cases, where an accused would be liable on conviction to a possible sentence of imprisonment for more than six months, an agent could act for the accused only where the accused was a corporation or where the agent was so authorized under a program approved by the province's lieutenant governor in council. Agents are already precluded from representing accused persons in indictable proceedings.⁽⁴⁾

9. Peace Bonds

Clauses 80(1), 80(2), 81(1), 81(2), 82(1) and 82(2) make technical amendments to the *Criminal Code* to provide that certain provisions refer to "a provincial court judge" rather than "the provincial court judge." This relates to informations laid before provincial court judges with respect to persons who fear that another person will commit a criminal organization offence,⁽⁵⁾ a listed sexual offence,⁽⁶⁾ or a serious personal injury offence.⁽⁷⁾ As a result of the amendments, a provincial court judge who received such informations could cause the parties to appear before a different provincial court judge. In addition, "a provincial court judge" (rather than "*the* provincial court judge" who had set them) could vary the conditions of a recognizance relating to these provisions.

(4) Although sections 800(2) and 802(2) of the Code, dealing with summary conviction proceedings, provide that an accused may appear and examine and cross-examine witnesses personally, by counsel, or by agent, section 650(3), dealing with indictable proceedings, provides that an accused is entitled to make full answer and defence to the prosecution's case either personally or by counsel (i.e., no reference to agents).

(5) *Criminal Code* section 810.01.

(6) *Ibid.*, section 810.1.

(7) *Ibid.*, section 810.2.

G. Miscarriages of Justice

1. Overview

Clause 71 of the bill adds a new Part XXI.1 (new sections 696.1 to 696.6) to the *Criminal Code*, entitled “Applications for Ministerial Review – Miscarriages of Justice.” The new provisions replace section 690 of the Code which deals with applications to the federal Minister of Justice regarding alleged wrongful convictions. Under this section, if the Minister of Justice chooses to intervene in a case, he or she may take the following steps:

- direct a new trial or appeal of the case; and/or
- refer any question concerning the application to the appropriate court of appeal for its decision.

2. Applications for Ministerial Review Under Section 690

It is estimated that the Minister of Justice receives about 50 to 70 applications for ministerial review each year.⁽⁸⁾ Generally, the Department of Justice requests the following material in support of an application: a description of the reasons behind the claim of a miscarriage of justice, and any new information to support the claim; the trial transcripts; a copy of all court judgements in the case; and the factums filed on appeal.⁽⁹⁾ Once these materials are provided, Justice Department counsel conduct a preliminary assessment of the file to determine whether there is an “air of reality” to the applicant’s claims, based on new and significant information that was not available at trial.⁽¹⁰⁾ If this threshold is met, the applicant’s claims will be investigated and then a recommendation will be made to the Minister.⁽¹¹⁾

Prior to 1994, the Department of Justice took a more or less *ad hoc* approach to section 690 applications. There was no set procedure or designated personnel to deal with them. Applications were assigned to counsel within the Department on an *ad hoc* basis as an extra responsibility. As a result, the process became the subject of some criticism on the following grounds:

(8) Department of Justice, “Addressing Miscarriages of Justice: Reform Possibilities for Section 690 of the Criminal Code” Consultation Paper, Ottawa, October 1998.

(9) *Ibid.*

(10) *Ibid.*

(11) *Ibid.*

- applicants did not know what threshold they had to meet to be successful, or what information went into the final recommendation to the Minister;
- the amount of time taken by the Department to consider the applications;⁽¹²⁾ and
- counsel assigned to the applications tended to have a prosecutorial bias.⁽¹³⁾

3. Recent Administrative Changes to the Section 690 Application Process

In 1994, the Department of Justice instituted a number of measures to address complaints about the section 690 application process.

Additional lawyers were hired, and the Criminal Conviction Review Group (CCRG) was formed within the Department to deal exclusively with section 690 reviews.⁽¹⁴⁾ Also, to provide further independence from the Department's prosecution function, the CCRG was set up in the Policy Sector of the Department.⁽¹⁵⁾ The Department also began to make greater use of outside counsel,⁽¹⁶⁾ which is particularly important in those cases which were prosecuted by the Department itself (i.e., all criminal prosecutions in the three territories and all non-*Criminal Code* federal offence prosecutions throughout Canada).

The Department published a handbook, available on the Department's website, which outlines the documentary requirements, guidelines and process for a section 690 review.⁽¹⁷⁾

Finally, the CCRG adopted the practice of disclosing to the applicant the investigative summary, which indicates all the information gathered during the review which will be disclosed to the Minister, before the Minister makes a final decision.⁽¹⁸⁾ The applicant then has the opportunity to comment on the investigative summary and make final submissions to the Minister.⁽¹⁹⁾

(12) See, for example, Carl Karp and Cecil Rosner, *When Justice Fails, The David Milgaard Story*, Toronto: McClelland & Stewart, 1991, chapters 17-22.

(13) *Ibid.*, chapter 18.

(14) "Addressing Miscarriages of Justice," *supra*, note 8.

(15) *Ibid.*

(16) *Ibid.*

(17) *Ibid.*

(18) *Ibid.*

(19) *Ibid.*

4. Legislative Changes Proposed in Bill C-15A (Clause 71)

Clause 71 preserves the basic elements of the current system for ministerial review provided for in section 690. Ministerial review of convictions continues to be an extraordinary and discretionary remedy available only after the ordinary appeal and review mechanisms have been exhausted. In dealing with such applications, the Minister continues to have the same options available, i.e.:

- reject the application;
- order a new trial;
- refer the case to the court of appeal; and/or
- refer any question concerning the application to the court of appeal.

However, clause 71 makes some changes aimed at enhancing the effectiveness and transparency of the process.

Clause 71 extends ministerial review applications based on an alleged miscarriage of justice to all federal offences. Currently, section 690 applies only to offences prosecuted by indictment.

Regulations to be made by the Governor in Council prescribe the form and content of applications for ministerial review, the necessary accompanying documentation, and the review process generally.

The Minister is:

- given the powers of a commissioner under the *Inquiries Act*, i.e., the power to take evidence, issue subpoenas, compel the attendance and testimony of witnesses and the production of documents and other materials; and
- authorized to delegate these powers to those investigating the applications on behalf of the Minister (such delegates must be lawyers, retired judges, or other persons of a similar background or experience).

The Minister is given statutory criteria on which to base his or her decisions on such applications. To grant one of the remedies available to the applicant, the Minister has to be satisfied that there is a “reasonable basis to conclude that a miscarriage of justice likely

occurred...” (clause 71, new section 696.3(3)). In making such a determination, the Minister has to be guided by the following considerations:

- whether the application was supported by new matters “of significance” not previously considered in the case;
- the relevance and reliability of information presented in connection with the application; and
- the fact that the ministerial review procedure is an extraordinary remedy and is not intended to serve as a further appeal (clause 71, new section 696.4).

These principles are consistent with those enunciated by the then Minister of Justice, Allan Rock, in his April 1994 reasons for decision in the section 690 application of W. Colin Thatcher.⁽²⁰⁾

Although the foregoing criteria and considerations are not particularly precise, they do provide more guidance to the Minister (and also a greater basis for judicial review of the Minister’s decision) than the current provisions. Although clause 71 (new section 696.3(4)) provides that the Minister’s decision on an application is final and not subject to appeal, this language does not appear to preclude judicial review in such matters.

Finally, clause 71 (new section 696.5) requires the Minister of Justice to submit an annual report to Parliament on the handling of applications for ministerial review.

Consistent with the conclusions of a 1991 report of a federal-provincial-territorial working group on the issue, the government has rejected calls by some – including a provincial public inquiry⁽²¹⁾ – to transfer the job of reviewing alleged miscarriages of justice to an independent commission, as has been done in the United Kingdom with the Criminal Cases Review Commission. Among other things, it is argued that the federal Minister of Justice does not have the same conflict-of-interest problem as did the UK Home Secretary (who formerly dealt with such applications there) because, in Canada, the vast majority of criminal prosecutions are conducted by the provinces. Despite this, the Department of Justice has indicated that it

(20) See Department of Justice, “Addressing Miscarriages of Justice: Reform Possibilities for Section 690 of the Criminal Code,” Consultation Paper, Ottawa, October 1998.

(21) *Royal Commission on the Donald Marshall, Jr., Prosecution*, Commissioners’ Report, Halifax, December 1989, Vol. 1, pp. 143-146 (recommendations 1 and 2). Another provincial inquiry into a case of wrongful conviction recommended that the creation of such a body should at least be studied by the federal government: Hon. Fred Kaufman, *The Commission on Proceedings Involving Guy Paul Morin: Report*, Toronto, March 1998, Vol. 2, pp. 1237-1241 (recommendation 117).

intends to appoint a Special Advisor from outside the Department to oversee the review process;⁽²²⁾ however, there is nothing in clause 71 or in the bill which would commit the government to this course of action.

H. *National Capital Act* Offences

Clause 87 would amend the *National Capital Act*, R.S.C. 1985, c. N-4, to effectively raise the maximum fine for violation of regulations made under that Act from \$500 to \$2,000.

I. Military Justice System (Identification of Criminals)

Clause 88 of the bill amends the *National Defence Act*, R.S.C. 1985, c. N-5, in order to provide for the taking of fingerprints, photographs and other authorized measurements from persons charged with or convicted of serious offences under the Code of Service Discipline. Clause 88 essentially adds provisions to that Act which are analogous to the *Identification of Criminals Act*, R.S.C. 1985, c. I-1, which applies to persons charged with or convicted of indictable offences under the *Criminal Code*.

COMMENTARY

A. Sexual Exploitation of Children and the Internet

Although the Internet child-luring provisions of Bill C-15A (clause 8) have won praise from some individuals involved in law enforcement and in searching for missing children,⁽²³⁾ the new offence of accessing child pornography (clause 5(3)) has drawn criticism from some criminal defence lawyers and civil libertarians; concerns have also been expressed in

(22) Department of Justice, Press Release, "Criminal Code Changes Will Strengthen Justice System," Ottawa, 8 June 2000.

(23) Tonda MacCharles, "Child porn viewers on Net may be charged," *Toronto Star*, 15 March 2001, p. A1; Tonda MacCharles, "Child porn targeted in new law; Will be offence to display on computer," *The Hamilton Spectator*, 15 March 2001, p. B3; and Paul Samyn, "Grits aim to tame Net; Ottawa's massive crime bill targets cyberstalkers, child porn on Web," *Winnipeg Free Press*, 15 March 2001, p. A1.

newspaper editorials.⁽²⁴⁾ The child-luring provisions and the provisions dealing with court-ordered deletion of child pornography on the Internet (clause 7) have met with approval from the Canadian Association of Internet Providers who, in particular, support the idea of judges deciding on which material should be deleted, rather than leaving it up to private Internet Service Providers.⁽²⁵⁾

B. Disarming a Peace Officer

The new offence of disarming a peace officer should not raise much controversy. David Griffin, Executive Officer of the Canadian Police Association (CPA), the organization that initiated the process leading to the proposed offence, stated that the CPA is “very much in support of this provision.”⁽²⁶⁾

C. Criminal Procedure Reform

The Ontario-based Criminal Lawyers’ Association (CLA) supports certain initiatives in the bill – such as facilitation of electronic filing of documents and remote court appearances, establishing a guilty plea inquiry procedure, and enabling Attorneys General more flexibility in intervening in private prosecutions – and does not take issue with the notion of requiring advance notice of expert testimony.⁽²⁷⁾ However, both the CLA and the Association in Defence of the Wrongfully Convicted (AIDWYC) oppose any new restrictions on the availability of preliminary inquiries.⁽²⁸⁾ These groups believe that, in addition to its principal function of screening out or reducing charges which the evidence does not support, the preliminary inquiry continues to perform a useful role in permitting the accused to obtain further

(24) MacCharles, “Child porn viewers on Net may be charged,” *supra*, note 57; MacCharles, “Child porn targeted in new law,” *supra*, note 23; Tim Naumetz, “New laws target Internet child porn: Criminal Code changes aim to curb rising cyber-sex trade,” *The Calgary Herald*, 15 March 2001, p. A1; and “Too much for one bill,” *The Gazette* (Montreal), 16 March 2001, p. B2.

(25) MacCharles, “Child porn viewers on Net may be charged,” *supra*, note 23; MacCharles, “Child porn targeted in new law,” *supra*, note 23; Samyn, “Grits aim to tame Net,” *supra*, note 23; and Mark MacKinnon, “Web cleanup law targets child porn,” *The Globe and Mail*, 15 March 2001, p. A1.

(26) Telephone conversation with the author on 24 April 2001.

(27) Criminal Lawyers’ Association, “Submissions on Behalf of the Criminal Lawyers’ Association Regarding Criminal Procedural Reforms,” paragraphs 1-6 (available on the CLA website at www.criminallawyers.ca).

(28) *Ibid.*, paragraphs 12-26.

information, assess the strength of witnesses, and generally test the strength of the prosecution's case before trial.⁽²⁹⁾ In fact, the CLA advocates enhancing the screening role of the preliminary inquiry by raising the standard for committing an accused for trial and enabling the inquiry judge to weigh evidence and exclude evidence which would not be admissible at trial.⁽³⁰⁾

D. Wrongful Conviction Review

With regard to the proposed changes to the section 690 conviction review process, groups involved with the wrongfully convicted, such as the Association in Defence of the Wrongfully Convicted (AIDWYC), have been critical that they do not go far enough in establishing an independent review process. AIDWYC in particular has expressed its support for the British model of an independent commission taking over this function from the Minister of Justice and contends that the amendments proposed in the bill do not represent any substantial change from the existing process.⁽³¹⁾

(29) *Ibid.*, paragraphs 15-23.

(30) *Ibid.*, paragraph 26.

(31) Kaufman, Vol. 2, p. 1237; and Lynne Cohen, "Courage of Convictions," *Canadian Lawyer*, Vol. 24, No. 11 (November/December 2000), p. 47.