Legislative Summary **LS-459E**

BILL C-33: INTERNATIONAL TRANSFER OF OFFENDERS ACT

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LEGISLATIVE HISTORY OF BILL C-33

HOUSE OF COMMONS		SENATE	
Bill Stage	**Date**	**Bill Stage**	**Date**
First Reading:	28 April 2003	First Reading:	
Second Reading:	13 May 2003	Second Reading:	
Committee Report:	30 October 2003	Committee Report:	
Report Stage:		Report Stage:	
Third Reading:		Third Reading:	

Royal Assent:

Statutes of Canada

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-33: INTERNATIONAL TRANSFER OF OFFENDERS ACT *

Bill C-33, An Act to implement treaties and administrative arrangements on the international transfer of persons found guilty of criminal offences (the International Transfer of Offenders Act), was introduced in the House of Commons on 28 April 2003. The Bill's purpose is to enable offenders to serve their sentences in the country of which they are citizens or nationals. It repeals and replaces the *Transfer of Offenders Act*,(1) sets out the principles that govern the international transfer of offenders, and authorizes Canada to enter into administrative agreements for the international transfer of offenders. The Bill expands the class of offenders who may be transferred, expands the class of jurisdictions with which Canada may enter into a transfer agreement, identifies who must consent to a transfer, and clarifies the sentence calculation rules that apply to transferred Canadian offenders. A transfer is not available unless the Canadian offender's conduct would have constituted a criminal offence if it had occurred in Canada at the time the Solicitor General of Canada receives the request for a transfer. The verdict and the sentence imposed by a foreign entity are not subject to any appeal or other form of review in Canada. Along with setting out the conditions for transferring offenders, the Bill also makes a consequential amendment to the *Corrections and Conditional Release Act,*(2) along with coordinating amendments to make it consistent with the provisions of Bill C-18, the Citizenship of Canada Act.

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

(1) R.S.C. 1985, c. T-15.

(2) R.S.C. 1985, c. A-1.

BACKGROUND

A. International Transfer Treaties

Canada has been a party to transfer of offenders treaties since 1978. It has concluded 13 bilateral treaties and accedes to three multilateral conventions on the transfer of offenders, totalling over 60 sovereign entities. With regard to the United States, the Treaty Between Canada and the United States of America on the Execution of Penal Sentences applies not only to the U.S. federal authorities but also to all of the states except Delaware and West Virginia. The International Transfers Program is administered by the Correctional Service of Canada's International Transfers Unit, with the assistance of the Department of Foreign Affairs and International Trade's Consular Services.

One of the three above-mentioned multilateral conventions to which Canada is a party is the Council of Europe's Convention on the Transfer of Sentenced Persons.(3) The Convention entered into force on 1 July 1985 and now applies to some 53 states. The Convention was primarily intended to facilitate the social rehabilitation of prisoners by giving foreigners convicted of a criminal offence the possibility of serving their sentences in their own countries. It was also considered to be a humanitarian measure, since difficulties in communication by reason of language barriers and the absence of contact with relatives may have detrimental effects on a person imprisoned in a foreign country.

By the terms of the Convention, a transfer may be requested by either the state in which the sentence was imposed (the sentencing state) or the state of which the sentenced person is a national (the administering state). A transfer is subject to the consent of those two states, as well as that of the sentenced person. A condition of any transfer is that the acts or omissions on account of which the sentence has been imposed must constitute a criminal offence in the administering state. Other conditions are that the sentenced person must be a national of the administering state, the judgment must be final, and the sentenced person must have at least six months of the sentence to serve. The Convention also sets out the procedure for enforcement of the sentence following the transfer. Whatever the procedure chosen by the administering state, a custodial sentence may not be converted into a fine, and any period of detention already served

(3) ETS No. 112.

by the sentenced person must be taken into account by the administering state. The sentence in the administering state must not be longer or harsher than that imposed in the sentencing state.

All states parties to the Convention are obligated to inform sentenced persons of the substance of the Convention. Once a transfer has taken place, the enforcement of the sentence is governed by the law of the administering state only. While the administering state is bound by the legal nature and duration of the sentence as determined by the sentencing state, if that sentence is incompatible with the law of the administering state, that state may adapt the sanction to the punishment prescribed by its own law for a similar offence. The administering state shall not aggravate, by its nature or duration, the sanction imposed in the sentencing state, nor exceed the maximum prescribed by the law of the administering state. The sentencing state alone has the right to decide on any application for review of the judgment, but either state may grant pardon, amnesty or commutation of the sentence.

The two other multilateral conventions to which Canada is a party are the Scheme for the Transfer of Convicted Offenders within the Commonwealth (1990),[4] with seven nations adhering, and the Inter-American Convention on Serving Criminal Sentences Abroad (1996),[5] ratified or adhered to by nine nations. Both of these conventions state that prisoners are not to be moved between nations against their will and must be informed of the consequences of agreeing to such a transfer. The conventions have other requirements in common. One is that the governments of both the sending and receiving nations must agree to the transfer. (In Canada, for offenders sentenced to less than two years, the approval of the relevant provincial or territorial government is required, along with that of the federal government.) The convicted person must be a national of the receiving state. It is also a general requirement of eligibility that a prisoner will be considered for transfer only after all appeals have been settled and he or she has no further legal matters pending. Furthermore, the convicted person must have at least six months of the sentence to serve at the time the request for a transfer is made. A sentence may not be lengthened by the receiving state, but the enforcement of the sentence is governed by the laws of the receiving state. In both of these conventions, the sentencing state retains full jurisdiction to grant pardon, amnesty or commutation of sentence.

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(4) See text of the scheme at: http://www.voyage.gc.ca/main/legal/cw_scheme-en.asp.

(5) OAS, Treaty Series, No. 76.

In 2001, some 5% (or 1,100) of all offenders under the jurisdiction of the Correctional Service of Canada were foreigners, the overwhelming majority coming from the United States.(6) During 1978-2003, a total of 118 prisoners were transferred from Canada to a total of six nations; the overwhelming majority (106) were transfers to the United States. Over the same period, 1,066 prisoners were transferred to Canada from a total of 25 different nations; the overwhelming majority (836) were transfers from the United States. The other nations returning the most prisoners to Canada were Mexico (54), Peru (29), the United Kingdom (31), and Thailand (17).(7)

B. Current Canadian Legislation

The current *Transfer of Offenders Act* came into force in 1978, 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 Act was to authorize the implementation of treaties between Canada and other countries, including multilateral conventions, for the international transfer of offenders.

The *Transfer of Offenders Act* provides that Canada may enter into a treaty, international agreement, arrangement, or convention only with recognized foreign states. The states with which Canada has signed a treaty to transfer offenders are listed in the Schedule to the Act. The regulations to the Act set out some factors to be considered when deciding on a transfer request, but neither the regulations nor the Act itself enunciate the purpose or principles of the Act. The current *Transfer of Offenders Act* provides for the transfer to Canada of young offenders committed to custody, but not for young offenders on probation. There is no provision that allows for the transfer of Canadian children, nor is any provision made for the transfer of mentally disordered offenders.

Since the implementation of the *Transfer of Offenders Act* in 1978, Canada has implemented the *Corrections and Conditional Release Act*. Enacted in 1992, this statute sets out the law dealing with the detention and conditional release of offenders. The definition of the

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(6) See the Web site of the 21st Asian and Pacific Conference of Correctional Administrators (October 2001) at: http://www.apcca.org/Pubs/21st/agenda2.htm.

(7) International Transfers Unit, Correctional Service of Canada.

term "sentence" in the *Corrections and Conditional Release Act* is to be amended to include a sentence imposed by a foreign entity on a Canadian offender who has been transferred to Canada under the proposed International Transfer of Offenders Act, making it clear that Canadian law will apply to Canadian offenders transferred from a foreign country.

DESCRIPTION AND ANALYSIS

Bill C-33 consists of 43 clauses. The following description highlights selected aspects of the bill and does not review every clause.

A. Clauses 3 and 4: Purpose and Principles of the Act

Clause 3 of the Bill describes its purpose in humanitarian terms as being 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. This clause reflects the view that access to family and friends, and a familiar language and culture, will ease a convicted person's transition from prison to life in the community.

Clause 4 of the Bill states that a transfer is not available unless the Canadian offender's conduct would have constituted a criminal offence if it had occurred in Canada at the time the Solicitor General of Canada receives the request for a transfer. This is known as the "dual criminality" principle. Clause 4 makes an exception to this principle, however, as it also states that a transfer is available to a Canadian offender who, at the time the offence was committed, was a "child" within the meaning of the *Youth Criminal Justice Act*,[8] even if the offender's conduct would not have constituted a criminal offence if it had occurred in Canada. The *Youth Criminal Justice Act* defines a "child" as anyone under the age of 12. Such a person may not be charged with a criminal offence in Canada, but such a person may be a convicted criminal in a foreign country. Any Canadian under the age of 12 can be transferred under the terms of the proposed Act, but may not be detained upon his or her return to Canada.

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(8) S.C. 2002, c. 1.

B. Clause 5: Effect of a Transfer

Clause 5 of the Bill states that a transfer may not have the effect of increasing a sentence imposed by a foreign entity or of invalidating a guilty verdict or a sentence imposed by a foreign entity. The verdict and the sentence are not subject to any appeal or other form of review in Canada (but see discussion of clause 14). This clause also specifies that a document supplied by a foreign entity that sets out a finding of guilt and a sentence, and that purports to be signed by a judicial official or a director of a place of confinement in the foreign entity, is proof of the facts alleged. No further proof of the signature or the official character of the person appearing to have signed the document is required.

C. Clauses 8 and 9: Consent

Clause 8 specifies that the consent of all three parties to a transfer – the offender, the foreign entity and Canada – is required before a transfer may take place. Consent may be given by whoever is authorized to consent in accordance with the laws of the province where the person is detained, is released on conditions, or is to be transferred, if the offender is legally incapable of giving consent. The offender's consent may be withdrawn at any time before the transfer takes place. Both Canadian and foreign offenders are to be informed of the substance of any transfer treaty or administrative arrangement that applies to them. To ensure that the offender's consent is an informed one, the Solicitor General must inform a Canadian offender as to how his or her foreign sentence is to be served in Canada. The Solicitor General is also obligated to deliver to a foreign offender the information provided to the Solicitor General by the foreign entity as to how his or her Canadian sentence is to be served abroad. Clause 9 indicates that provincial consent is required if the offender in question is under the authority of a province or if a Canadian offender is a child within the meaning of the *Youth Criminal Justice Act*.

D. Clause 10: Transfer Factors

Clause 10 requires the Solicitor General to consider a number of factors before determining whether to consent to the transfer of a Canadian offender. The Solicitor General must consider: whether the offender's return to Canada would constitute a threat to the security of Canada; whether the offender left or remained outside Canada with the intention of abandoning Canada as his or her place of permanent residence; and whether the offender has

social or family ties in Canada. For both Canadian and foreign offenders, the Solicitor General must consider whether the offender is likely, after the transfer, to commit a terrorism offence or criminal organization offence, as those terms are defined in the *Criminal Code*; and whether the offender has been transferred previously.

Special considerations apply to the possible transfer of a Canadian offender who is a "young person" as that term is defined by the *Youth Criminal Justice Act* (persons between the ages of 12 and 17). In such an instance, the Solicitor General and the relevant provincial authority shall consider the best interests of the young person. Clause 10 states that, when determining whether to consent to the transfer of a Canadian offender who is a child within the meaning of the *Youth Criminal Justice Act* (anyone under the age of 12), the primary consideration of the Solicitor General and the relevant provincial authority is to be the best interests of the child.

E. Clauses 13 and 14: Continued Enforcement and Adaptation

While clause 5 states that the transfer of an offender may not have the effect of invalidating a guilty verdict rendered, or a sentence imposed, by a foreign entity, clause 13 makes it clear that, once a Canadian offender is transferred to Canada, the enforcement of his or her sentence is to be continued in accordance with the laws of Canada as if the offender had been convicted and his or her sentence imposed by a court in Canada. In other words, the laws of the foreign entity on matters such as parole eligibility will not apply. In this vein, clause 14 states that if, at the time the Solicitor General receives a request for the transfer of a Canadian offender, the sentence imposed by the foreign entity is longer than the maximum sentence provided for in Canadian law for the equivalent offence, the Canadian offender is to serve only the shorter sentence.

F. Clauses 17 to 20: Young Persons

Clauses 17 to 20 seek to ensure that the provisions of the Bill are consonant with those in the new *Youth Criminal Justice Act* (in force as of 1 April 2003). Thus, clause 17 specifies that the maximum sentence to be enforced in Canada on a 12- or 13-year-old Canadian offender is the maximum youth sentence that could have been imposed under the *Youth Criminal Justice Act* for an equivalent offence. If such an offender has committed first- or second-degree

murder, the sentence imposed by the foreign entity will be reduced, if necessary, to the maximum sentence that can be imposed in Canada, which is ten and seven years, respectively.

Clauses 18 and 19 deal with 14- to 17-year-old Canadian offenders. Clause 18 states that these young persons are deemed to be serving an "adult sentence," as that term is defined in the *Youth Criminal Justice Act*, if their sentence is longer than the maximum youth sentence that could have been imposed in Canada for an equivalent offence. Clause 19 applies this deeming provision to 14- to 17-year-olds who are convicted of the equivalent of first- or second-degree murder. If the sentence imposed by the foreign entity is more than ten or seven years for first- or second-degree murder, it is deemed to be an adult sentence; if less than those periods, it is deemed to be a youth sentence. If the Canadian young offender has been sentenced to life imprisonment for first- or second-degree murder, his or her parole eligibility is to be determined with reference to section 745.1 of the *Criminal Code.* That section sets a period of five years before a 14- or 15-year-old is eligible for full parole, and a period of ten years for first-degree murder and seven years for second-degree murder in the case of 16- and 17-year-old offenders.

Clause 20 concerns the place of detention in Canada for Canadian offenders between the ages of 12 and 17 at the time the offence was committed. The offender will be detained in a youth custody facility, a provincial correctional facility for adults, or a penitentiary, depending upon whether the sentence imposed in the foreign entity could have been a youth or an adult sentence and upon the age of the offender at the time of the transfer.

G. Clauses 21 to 29: Sentence Calculation

Clauses 21 to 29 set out the calculations as to the length of the sentence a Canadian offender must serve after a transfer, as well as the eligibility for parole and statutory release. Clause 22 calculates the length of a Canadian offender's sentence as the length of the sentence imposed by the foreign entity, minus any reduction given by the foreign entity, and any time the Canadian offender has already spent in custody after the sentence was imposed. Clause 23 sets out the general parole eligibility for a Canadian offender who is transferred to Canada. Such an offender is eligible for full parole on the day on which he or she has served the lesser of 7 years and one-third of the length of the sentence, as that length is determined by the foreign entity. This general parole eligibility is subject to the exception for young persons set out in

clause 19. It is also subject to the exception for the crime of murder set out in clause 24. For anyone over the age of 17, the full parole ineligibility period for murder can range from 10 to 15 years or more if the offender has committed multiple murders.

The key clause in this section of the Bill is clause 29, which states that a Canadian offender who is transferred to Canada is subject to the *Corrections and Conditional Release Act,*(9) the *Prisons and Reformatories Act*,(10) and the *Youth Criminal Justice Act* as if he or she had been convicted and the sentence imposed by a court in Canada. Therefore, although a Canadian offender may have been convicted and sentenced in accordance with the laws of a foreign jurisdiction, once he or she is transferred into the Canadian correctional system, Canadian laws apply.

H. Clause 30: Compassionate Measures

Clause 30 allows for both Canadian and foreign offenders to benefit from any compassionate measures – including a cancellation of their conviction or shortening of their sentence – taken by a foreign entity or by Canada after the offender has been transferred. The Solicitor General is to take all reasonable steps to inform the foreign entity and the foreign offender of any compassionate measures taken by Canada after the transfer.

I. Clauses 31 to 36: Administrative Arrangements

Clause 31 of the Bill allows for an offender to be transferred in accordance with the Act even if no treaty is in force between Canada and a foreign entity on the transfer of offenders. The Minister of Foreign Affairs may, with the consent of the Solicitor General, enter into an administrative arrangement with the foreign entity for the transfer of offenders. This has the potential to expand greatly the number of foreign entities with which Canada may exchange offenders, particularly since the term “foreign entity” is expanded by clause 33 to include not just a foreign state, but also a political subdivision of a foreign state or any territory falling under the jurisdiction of a foreign state.

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(9) S.C. 1992, c. 20.

(10) R.S.C. 1985, c. P-20.

Clause 32 allows for an administrative arrangement to be entered into for the transfer of a person in respect of whom a verdict of unfit to stand trial or not criminally responsible on account of mental disorder was rendered and may no longer be appealed. The relevant provincial authority must consent to the transfer. This authority must take into consideration both the best interests of the mentally disordered person and the need to protect society from dangerous persons. Clause 34 states that a mentally disordered person who is transferred under the Act is subject to Part XX.1 of the *Criminal Code*, which deals with mentally disordered persons, and is deemed to be subject to a warrant of committal until a Review Board can make a disposition.

J. Clause 38: Transitional Provision

Clause 38 makes the Act retroactive. The Act will apply in respect of all requests for transfer that are pending on the day that the Act comes into force.

K. Clause 39: Consequential Amendment

Currently, the term "sentence" in the *Corrections and Conditional Release Act* is defined to include a sentence imposed by the court of a foreign state on a Canadian offender who has been transferred to Canada pursuant to the *Transfer of Offenders Act*. Clause 39 will change this definition to a sentence imposed by a foreign entity on a Canadian offender who has been transferred to Canada under the International Transfer of Offenders Act and a youth sentence imposed under the *Youth Criminal Justice Act*.

L. Clause 41: Coordinating Amendment

This clause will ensure that the definition of "Canadian offender" in section 2 of the Act will mean a Canadian citizen within the meaning of the Citizenship of Canada Act, once that statute, now before Parliament as Bill C-18, is enacted into law.

M. Clause 42: Repeal

The *Transfer of Offenders Act* and any regulations under it will be repealed.

N. Clause 43: Coming Into Force

The provisions of the Bill will come into force on a day to be fixed by order of the Governor in Council.

COMMENTARY

No commentary upon the Bill has been noted in the media to date.