Legislative Summary **LS-549E**

BILL C-35: AN ACT TO AMEND THE CRIMINAL CODE (REVERSE ONUS IN BAIL HEARINGS FOR FIREARM-RELATED OFFENCES)

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19 February 2007

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LEGISLATIVE HISTORY OF BILL C-35

HOUSE OF COMMONS	
Bill Stage	**Date**
First Reading:	23 November 2006
Second Reading:	27 March 2007
Committee Report:	30 May 2007
Report Stage:	4 June 2007
Third Reading:	5 June 2007

SENATE	
Bill Stage	**Date**
First Reading:	5 June 2007
Second Reading:	
Committee Report:	
Report Stage:	
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-35: AN ACT TO AMEND THE CRIMINAL CODE (REVERSE ONUS IN BAIL HEARINGS FOR FIREARM-RELATED OFFENCES)*

BACKGROUND

A. Purpose

Bill C-35, An Act to amend the Criminal Code (reverse onus in bail hearings for firearm-related offences) was introduced by the Minister of Justice and received first reading in the House of Commons on 23 November 2006.(1)

The purpose of the bill is to restrict, during criminal proceedings, the judicial interim release(2) of a person charged with certain offences involving firearms or other regulated weapons. To this end, the bill makes two amendments to the *Criminal Code* (the Code):(3)

- It reverses the onus in bail hearings for certain offences involving firearms or other regulated weapons. The accused will be required to demonstrate that he or she should be released pending trial (clause 1(2)).

- It introduces two additional factors that the judge must take into account in deciding whether an accused should be released or detained pending trial. They concern the use of a firearm and the potential for a minimum punishment of imprisonment for a term of three years or more (clause 1(5)).

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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) See the on-line version of Bill C-35, http://www.parl.gc.ca/LEGISINFO/index.asp?Language=E&Chamber=N&StartList=A&EndList=Z&Session=14&Type=0&Scope=I&query=4881&List=toc-1.

(2) The expression “bail” is used synonymously.

(3) R.S. 1985, c. C-46.

The bill applies only to an accused who has been taken into custody by peace officers following arrest. The *Criminal Code* rules permitting peace officers to release a person who has been arrested therefore remain unchanged.(4) The bill concerns solely the decision of the judge, at the bail hearing, to release the accused or to continue his or her provisional detention.

B. Judicial Interim Release: A Brief History

In 1869, the federal government enacted legislation making bail discretionary for all offences.(5) In deciding whether to release the accused, courts considered factors such as the need to ensure the accused's attendance in court, the nature of the offence, the severity of the penalty, the evidence against the accused, and the character of the accused.(6)

In 1972, the *Bail Reform Act*(7) codified the reasons for keeping an accused in custody:

- to ensure the accused's attendance in court;
- as protection against criminal offences before the trial;
- in the public interest.(8)

A few years later, the *Criminal Law Amendment Act, 1975*(9) reversed the onus in cases where the accused was charged with:

- an indictable offence that is alleged to have been committed while the accused was at large awaiting trial for another offence;
- an indictable offence and the accused was not ordinarily resident in Canada; and
- drug trafficking, importing or exporting.(10)

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(4) See s. 495 *et seq*.

(5) See *An Act respecting the duties of Justices of the Peace, out of sessions, in relation to persons charged with Indictable Offences*, S.C. 1869, c. 30.

(6) See *R.* v. *Gottfriedson* (1906), 10 C.C.C. 239 (B.C. Co. Ct.), and *Re N*. (1945), 87 C.C.C. 377 (P.E.I.S.C.), as quoted by the Supreme Court of Canada in *R.* v. *Hall*, [2002] 3 S.C.R. 309, para. 14.

(7) *Bail Reform Act*, S.C. 1970-71-72, c. 37.

(8) Today, see s. 515(10) of the Code.

(9) S.C. 1974-75-76, c. 93.

(10) Today, see s. 515(6) of the Code.

In these cases, the judge will order the detention of the accused, unless the accused demonstrates that he or she should remain at large pending the trial.

In the early 1990s, the *Act to amend the Criminal Code and the Customs Tariff in consequence thereof*[11] included a provision for the judge to consider including in the bail order a condition prohibiting the accused from possessing firearms, ammunition, or explosive substances.[12] This condition could be imposed if the accused was charged with an offence involving the use or threat of violence or a drug-related offence.

In 1992, the Supreme Court of Canada recognized the validity of the reverse onus provisions with relation to drugs[13] (*R.* v. *Pearson*)[14] and in the commission of another offence while on bail (*R.* v. *Morales*).[15] The Court had reviewed these provisions in light of the *Canadian Charter of Rights and Freedoms* (the Charter), in which section 11(*e*) provides that any person charged with an offence has the right "not to be denied reasonable bail without just cause."

Legislation on organized crime[16] in 1997 and 2001, as well as the *Anti-terrorism Act*[17] in 2001, reversed the onus in cases where the accused was charged with criminal gang activity or terrorism.[18]

C. Current *Criminal Code* Rules on Interim Release

1. Interim Release by the Peace Officer

It should be noted at the outset that the peace officer may release a person who has been arrested with or without warrant,[19] except in the case of murder.[20] Release conditions,

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(11) S.C. 1991, c. 40.

(12) Today, see s. 515(4.1) of the Code.

(13) *Ibid.*

(14) [1992] 3 S.C.R. 665.

(15) [1992] 3 S.C.R. 711.

(16) *An Act to amend the Criminal Code (criminal organizations) and to amend other Acts in consequence* (S.C. 1997, c. 23); *An Act to amend the Criminal Code (organized crime and law enforcement) and to make consequential amendments to other Acts* (S.C. 2001, c. 32).

(17) S.C. 2001, c. 41.

(18) Today, see s. 515(6)(*a*)(ii) and (iii) of the Code.

(19) Subsection 503(2) of the Code. See Pierre Béliveau and Martin Vauclair, *Traité général de la preuve et de procédure pénales*, 12th ed., Les Éditions Thémis, Montréal, 2005, para. 1276.

(20) In fact, in the case of the offences listed in s. 469 of the Code (including treason, murder, and bribery by a judicial officer), the peace officer is obliged to keep the accused in custody. Release may be granted only by a Superior Court judge (ss. 503(2) and 522 of the Code).

such as abstaining from possessing a firearm, may be imposed.(21) An accused who breaches the conditions may be imprisoned.(22)

In general, the peace officer can keep the person under arrest in custody until the bail hearing, if it is necessary:

- to protect the public interest, including the need to:
  - establish the identity of the person;
  - secure or preserve evidence of or relating to the offence;
  - prevent the repetition of the offence; or
  - ensure the safety and security of any victim or witness; or
- to ensure the presence of the person under arrest in court.(23)

2. Judicial Interim Release

a. Release Is the General Rule

If the accused was detained by peace officers following arrest, the judge must, in principle, release the accused at the bail hearing after he or she has signed an undertaking without conditions.(24)

In general, the prosecutor must provide justification for imposing release conditions or for keeping the accused in custody pending the trial, so the judge is able to make one of these decisions.

b. Release Conditions

The judge may include conditions in the release order. The accused may, for example, be required to:

- report to a peace officer at stated times;
- remain in the territorial jurisdiction of the court;

(21) Subsection 503(2.1) of the Code.

(22) Subsection 524(3) of the Code.

(23) See s. 495 *et seq.* of the Code, and Béliveau and Vauclair (2005), para. 1274.

(24) Subsection 515(1) of the Code.

- notify the peace officer of any change in address or employment;
- abstain from communicating with any victim, witness or other person identified in the order.(25)

The judge may also impose any other reasonable condition that he or she deems appropriate, such as a curfew or to abstain from alcohol and non-prescription drugs.

In the case of an offence involving violence against a person or certain specified offences,(26) the judge must, in order to ensure the safety of the accused, the victim or another person, prohibit the accused from possessing firearms or other regulated weapons.(27)

In addition to the conditions mentioned above, a judge may take a recognizance, but without deposit of money or other valuable security.(28) Only in cases where the accused lives outside the province or more than 200 kilometres from the place of detention, or if the prosecutor agrees, may the judge impose a deposit of money or other valuable security.

c. Detention of the Accused

Apart from the offences for which Parliament has provided for reverse onus, the prosecutor must establish certain grounds for the judge to order the detention of the accused pending the trial.

The grounds justifying the detention of an accused in custody are set out in subsection 515(10) of the *Criminal Code*. The detention of the accused must be necessary:

- in order to ensure the accused's attendance in court;
- for the protection or safety of the public, including any victim of or witness to the offence, having regard to all the circumstances including any substantial likelihood that the accused will, if released from custody, commit a criminal offence or interfere with the administration of justice; and

(25) Subsection 515(4) of the Code.

(26) These offences are: a terrorism offence; criminal harassment; intimidation of a justice system participant; trafficking, importation, exportation and production of drugs; an offence that involves, or the subject-matter of which is, a firearm or other regulated weapon; foreign-influenced or terrorist-influenced threats or violence (s. 515(4.1) of the Code).

(27) *Ibid.*

(28) Subsection 515(2) of the Code.

- in order to maintain confidence in the administration of justice, having regard to all the circumstances, including the apparent strength of the prosecution's case, the gravity of the nature of the offence, the circumstances surrounding its commission and the potential for a lengthy term of imprisonment.(29)

(i) Reverse Onus

For certain specific offences, the *Criminal Code* provides in subsections 515(6) and 515(11) that the accused is to be detained during the proceedings. The accused may, however, be released if he or she proves that detention is not justified in the circumstances. The burden is shifted from the prosecutor to the accused, if the accused is charged with one of the following offences:

- an offence listed in section 469 of the Code (including murder);(30)
- an offence committed while the accused was on bail;
- an offence involving organized crime;
- a terrorist offence;
- a offence involving threats, accusations, menace or violence for the benefit of a foreign entity or a terrorist group;
- a criminal act committed by an accused not ordinarily resident in Canada;
- the trafficking, import, export and manufacture of drugs.(31)

If the accused wants to be released, he or she must prove that detention is not justified under the three grounds set out in subsection 515(10) of the Code, as listed above.

(29) In *R.* v. *Hall* ([2002] 3 S.C.R. 309, s. 12), the Supreme Court of Canada ruled that the opening phrase of s. 515(10)(*c*) of the Code, permitting denial of bail to an accused for "any other just cause," was unconstitutional.

(30) Subsection 515(11) and s. 522 of the Code. Release may be granted only by a Superior Court judge.

(31) Subsection 515(6) of the Code. For the most part, these involve offences for which a condition prohibiting the possession of firearms or other regulated weapons is to be imposed by the justice if he or she decides to release the accused (s. 515(4.1)).

D. Review of the Order

The accused and the prosecutor[32] may, at any time before the trial, apply to a Superior Court judge for a review of the order. For instance, the accused may apply to have the release conditions made more lenient or to have the detention order quashed. An accused who is charged with an offence listed in section 469 of the Code (one of which is murder) must apply for a review to the court of appeal on the direction of the chief justice.[33]

If new facts have been presented, the judge may, on cause being shown, quash any release or interim detention order at any time, for instance, during the trial or at the end of the preliminary hearing.[34]

If the accused does not comply with the bail conditions, he or she may be imprisoned following a hearing and an order from a judge.[35]

DESCRIPTION AND ANALYSIS

A. Reverse Onus for Certain Offences Involving Firearms or Other Regulated Weapons (Clause 1(2))

To the seven types of offences currently provided in the Code for which the accused has the burden of proving that his or her interim detention is not justified,[36] clause 1(2) adds certain offences involving firearms or other regulated weapons.[37] The 12 indictable offences are as follows:

- weapons trafficking;
- possession of weapons for the purpose of trafficking;

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(32) Sections 520 and 521 of the Code. Another application for a review of an order may be made, but no sooner than 30 days after the previous application (s. 520(8)).

(33) Section 680 of the Code.

(34) Subsection 523(2) of the Code.

(35) Subsection 524(3) of the Code.

(36) See ss. 515(6), 515(11) and 522. The bill adds other indictable offences to the list of indictable offences currently provided in s. 515(6)(*a*) of the Code.

(37) For details on the types of weapons in question, consult the *Regulations Prescribing Certain Firearms and other Weapons, Components and Parts of Weapons, Accessories, Cartridge Magazines, Ammunition and Projectiles as Prohibited or Restricted* (SOR/98-462).

- importing or exporting a firearm knowing it is unauthorized;
- discharging a firearm with the intent to cause bodily harm, etc.;
- attempted murder (with a firearm);
- sexual assault with a weapon, threats to a third party or causing bodily harm (with a firearm);
- aggravated sexual assault (with a firearm);
- kidnapping (with a firearm);
- hostage-taking (with a firearm);
- robbery (with a firearm);
- extortion (with a firearm);
- a criminal act involving firearms or other regulated weapons (i.e., a cross-bow, a prohibited weapon, a restricted weapon, a prohibited device, ammunition, prohibited ammunition or an explosive substance) committed when the accused was under an order prohibiting him or her from possessing such weapons.[38]

If an accused is charged with one of these indictable offences, the judge will order his or her detention unless the accused proves, according to the criteria in subsection 515(10) of the Code, that he or she should be released pending the criminal proceedings.

It should also be noted that for eight of the indictable offences involving a firearm mentioned in the bill, the Code provides a minimum four-year term of imprisonment.[39]

Finally, the bill does not provide for reverse onus in the case of criminal negligence causing death or manslaughter involving firearms or other regulated weapons, unless the accused was under an order prohibiting him or her from possessing such weapons.

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(38) See, for example, the prohibition orders provided under ss. 109 and 110 of the Code.

(39) These are offences set out in ss. 239 (attempted murder), 244 (causing bodily harm with intent – firearm), 272 (sexual assault with a weapon) 273 (aggravated sexual assault), 279(1) (kidnapping), 279.1 (hostage-taking), 344 (robbery) or 346 (extortion).

1. Justification for Reversing the Onus According to the Supreme Court of Canada

It should be noted that the Supreme Court of Canada has stated that the presumption of innocence guaranteed by section 7 of the Charter applies at all stages of the criminal process, including the bail hearing.(40) Section 11(*e*) of the Charter protects the right of the accused "not to be denied reasonable bail without just cause."(41)

As mentioned above, the Supreme Court has recognized the constitutional validity of the current provisions reversing the burden of proof in offences involving drugs(42) and offences committed during release on bail.(43)

In connection with drug-related offences, the Court considered that these were very specific offences that therefore required special rules. It expressed its views as follows:

> Most offences are not committed systematically. By contrast, trafficking in narcotics occurs systematically, usually within a highly sophisticated commercial setting. It is often a business and a way of life. It is highly lucrative, creating huge incentives for an offender to continue criminal behaviour even after arrest and release on bail. In these circumstances, the normal process of arrest and bail will normally not be effective in bringing an end to criminal behaviour. … Another specific feature of the offences subject to s. 515(6)(*d*) is that there is a marked danger that an accused charged with these offences will abscond rather than appear for trial.(44)

Reverse onus is therefore permitted, but for very specific offences in which it has been shown that the normal system of release on bail is not adequate.(45)

In summary: reversing the burden of proof may be justified in specific offences where, *generally speaking*, the accused will flee, will represent a danger to public safety or will bring the administration of justice into disrepute. It should be noted that, in cases where the onus is reversed, the accused may still be released if he or she proves that detention is not justified in his or her particular case.

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(40) *R.* v. *Pearson*, [1992] 3 S.C.R. 665; see Béliveau and Vauclair (2005), para. 1397.

(41) See *R.* v. *Pearson*, [1992] 3 S.C.R. 665, 689.

(42) *Ibid.*

(43) *R.* v. *Morales*, [1992] 3 S.C.R. 711.

(44) *R.* v. *Pearson*, [1992] 3 S.C.R. 665.

(45) The same reasoning could be applied in offences involving organized crime (see Béliveau and Vauclair (2005), para. 1401).

B. Reasons Justifying Release or Detention (Clause 1(5))

Clause 1(5) adds two factors that the judge must take into consideration in deciding whether an accused should be released or detained pending the criminal proceedings.

Currently, the grounds that the judge must consider in making his or her decision are set out in subsection 515(10) of the *Criminal Code*. In general, they involve the risk that the accused will not attend the court proceedings, the protection of the public, and the public's confidence in the administration of justice.

The bill provides that the judge who is to decide whether the detention of the accused is necessary to maintain confidence in the administration of justice must consider, among other things, the fact that the accused:

- used a firearm in the commission of the offence (new section 515(10)(*c*)(iii) of the Code);
- is charged with an offence involving a firearm that involves a minimum punishment of imprisonment for a term of three years or more (new section 515(10)(*c*)(iv) of the Code).

Finally, clause 1(5) repeals the phrase in section 515(10)(*c*) of the Code permitting the detention of an accused for "any other just cause." The Supreme Court ruled that this expression was unconstitutional in *R.* v. *Hall*.(46)

COMMENTARY

Bill C-35 has received the support of the Premier of Ontario, Dalton McGuinty, and Toronto Mayor David Miller,(47) who had suggested some time ago that a bill of this nature be adopted.

Mr. Miller has said that the legislative amendment to the bail system is very important and that he hopes the legislation will encourage witnesses to gun crimes to talk to police, knowing that criminals would remain behind bars and not out on bail.(48) According to the Mayor, guns serve only one purpose: to kill. Mr. McGuinty has said, for his part, that when someone picks up a gun and commits a crime, that person loses the right to be free.(49)

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(46) [2002] 3 S.C.R. 309, s. 12.

(47) "Harper Wins Backing for Gun-crime Legislation: 'Reverse Onus' Bill Introduced in House," *The Gazette* [Montréal], 24 November 2006, p. A13.

(48) Jim Byers, "Leaders Gather in Rare Accord; 'It's a Good Start' as Miller, Harper and McGuinty all Support Crime Bill," *Toronto Star*, 24 November 2006, p. E1.

(49) Susan O'Neill, "Mayor Praises PM's New Bail Legislation," *Etobicoke Guardian*, 23 November 2006, p. 1.

Other observers, such as British Columbia Attorney General Wally Oppal, are of the opinion that Bill C-35 is an excellent step forward in preventing repeated serious offences involving firearms.(50) Vancouver police have also applauded the provisions set out in the bill, on the grounds that introducing measures to help prevent a person charged with an offence involving a firearm from getting back into the community during the criminal proceedings is a good start in the fight against crime.

Simon Fraser University criminologist Gary Mauser has stated that many violent crimes are committed by people who have been released after committing an earlier violent crime.(51) Detention until sentencing would be a powerful tool in reducing the crime rate.

According to statistics cited by the Government of Canada, of almost 1,000 crimes involving firearms or restricted weapons committed in Toronto in 2006, "nearly 40 per cent … were committed by someone who was on bail, parole, temporary absence or probation."(52) According to the Toronto police, 70% of people charged in a homicide in 2006 were under a court order at the time of the slaying.(53) Furthermore, 29 Toronto homicide victims in 2006 were allegedly killed by someone already on bail, on probation or under a court order not to possess firearms.

Some observers, however, believe that an accused should be denied release only in exceptional cases. Preventive detention should be reserved for accused who are obvious flight risks or are clearly dangerous to the public.(54) A person charged with an offence involving a firearm is not a higher risk than a person who committed the same offence with a knife or some other weapon. Gang battles in Toronto are not a legitimate reason to trample on basic principles of justice, such as the presumption of innocence.(55)

In fact, according to James Morton, a lawyer and professor at Osgoode Hall Law School, in 90% of gun-crime cases bail was refused.(56) In the rare cases where bail was granted, stringent conditions were attached to the order.

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(50) David Carrigg, "Harper Gets Tough on Gun Crime: Law Will Force Firearms Offenders to Prove Why They Deserve Bail," *The Province* [Vancouver], 24 November 2006, p. A3.

(51) *Ibid.*

(52) Office of the Prime Minister, *Canada's New Government tackles gun crime by introducing bail reform amendments*, Press release, 23 November 2006, http://news.gc.ca/cfmx/view/en/index.jsp?articleid=257689&.

(53) Byers (2006).

(54) "'Reverse Onus' Must Be Reversed," Editorial, *The Gazette* [Montréal], 25 November 2006, p. B6.

(55) *Ibid.*

(56) James Morton, "John Tory Twisting Facts on Justice System; Judges, Crowns Are Famous for Balance and Common Sense," *Toronto Star*, 16 August 2006, p. A21.