Legislative Summary **LS-575E**

BILL C-13: AN ACT TO AMEND THE CRIMINAL CODE (CRIMINAL PROCEDURE, LANGUAGE OF THE ACCUSED, SENTENCING AND OTHER AMENDMENTS)

Dominique Valiquet
Law and Government Division

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LEGISLATIVE HISTORY OF BILL C-13

HOUSE OF COMMONS		SENATE	
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N.B. Any substantive changes in this Legislative Summary that have been made since the preceding issue are indicated in **bold print.**

Legislative history by Michel Bédard

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BILL C-13: AN ACT TO AMEND THE CRIMINAL CODE (CRIMINAL PROCEDURE, LANGUAGE OF THE ACCUSED, SENTENCING AND OTHER AMENDMENTS)*

BACKGROUND

Bill C-13, An Act to amend the Criminal Code (criminal procedure, language of the accused, sentencing and other amendments),(1) was introduced in the 1st Session of the 39th Parliament as Bill C-23. Before the prorogation of Parliament, Bill C-23 was passed by the House of Commons on third reading on 13 June 2007.

Pursuant to an order adopted by the House of Commons on 25 October 2007, Bill C-13 was deemed to have been read a third time and was referred to the Senate. **After examining the bill, the Standing Senate Committee on Legal and Constitutional Affairs made a number of amendments, most of which related to provisions concerning the language of the accused. The Committee also made certain observations expressing concern about the use of official languages in criminal proceedings as regards the special situation of Canada's Aboriginal people.(2)**

Bill C-13 makes various amendments, especially procedural ones, to the *Criminal Code*(3) (the Code). Other amendments concern the language of the accused, sentencing and certain criminal offences.

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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) Bill C-13 is available online at: http://www2.parl.gc.ca/content/hoc/Bills/392/Government/C-13/C-13_3/C-13_3.PDF.

(2) Observations to the Fourth Report of the Standing Senate Committee on Legal and Constitutional Affairs (Bill C-13), 2nd Session, 39th Parliament, 11 December 2007, http://www.parl.gc.ca/39/2/parlbus/commbus/senate/Com-e/lega-e/rep-e/rep04dec07-e.htm.

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

Although certain amendments merely clarify existing Code provisions, others are substantive. The following changes are of particular note:

- two unsworn jurors will determine whether the cause of challenge is true;
- bilingual trials will be warranted where they involve co-accused persons who understand different official languages;
- orders of prohibition from driving may be consecutive;
- sentencing may be delayed to enable the offender to receive treatment;
- the default maximum fine for a summary conviction will increase from $2,000 to $5,000;
- an offence is created in respect of failure to comply with a non-communication order where the offender is in custody;
- book-making and betting offences will be "technologically neutral"; and
- the offence of possession of break-in instruments may be punishable on summary conviction.

As this varied list indicates, the amendments concern a host of unrelated *Criminal Code* provisions. However, they are the result of consultations with the provinces and territories, for example within the context of the Uniform Law Conference of Canada.(4)

On 29 January 2008, the Senate passed Bill C-13, including an amendment stipulating that a parliamentary review of the provisions of Part XVII of the *Code*, which deals with the language of the accused, shall be undertaken within three years after the coming into force of the provision.

The Senate also sought to amend the bill to make judges personally responsible for advising the accused of the right to a trial in the official language of his or her choice. Another amendment carried by the Senate sought to require the Minister of Justice to report to Parliament on the operation of the provisions of the *Criminal Code* pertaining to the language of the accused. Following an exchange of messages between the Senate and the House of Commons, the latter two amendments were rejected.

Bill C-13 received Royal Assent on 29 May 2008.

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(4) See the website of the Uniform Law Conference of Canada, http://ulcc.ca/en/about/Indx.cfm?.

DESCRIPTION AND ANALYSIS

The bill comprises 47 clauses. The various provisions have been grouped by subject, as follows: procedure, language of the accused, sentencing, offences and coming into force.

A. Proceedings

1. Service (Clauses 1 and 33)

Section 40 of the *Canada Evidence Act*[5] provides that provincial laws of evidence concerning proof of service of any warranty, summons, subpoena or other document apply to federal proceedings.

In the same vein, the bill establishes the general rule that, in criminal law matters, the service of any document (clause 33) and proof of service (clause 1) may be made in accordance with provincial law.[6] To reflect this rule, a number of the provisions of the Code have been repealed.[7]

2. Warrants Endorsed by Telecommunication (Subclause 11(1) and Clause 12)

In general, for a warrant to be executed in another territorial division or province, authorization (an endorsement) must be obtained from a judge of that division or province. To expedite this proceeding, the bill enables law enforcement organizations to use any means of telecommunication to endorse a search warrant[8] [subclause 11(1)], a general warrant,[9] a warrant to take bodily substances,[10] a tracking warrant[11] or a warrant for number recorder[12] (clause 12). This possibility was already provided for in the case of an arrest warrant.[13]

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(5) R.S.C. 1985, c. C-5.

(6) Section 701.1 of the Code addresses these matters.

(7) See clauses 2, 13, 15, 17 and 32 of the bill.

(8) Section 487 of the Code.

(9) Section 487.1 of the Code.

(10) Section 487.05 of the Code. However, the use of a means of telecommunication is not permitted for all warrants concerning DNA analyses [subsection 487.03(2)]. Consider, for example, the warrant to take bodily substances from a person convicted of a designated offence (sections 487.051 and 487.052 of the Code).

(11) Section 492.1 of the Code.

(12) Subsection 492.2(1) of the Code.

(13) Subsection 528(1.1) of the Code.

3. Appeal From an Order Respecting Seized Property (Clause 14)

In general, a person who has conducted a search must either bring the seized property before a judge or make a report to the judge regarding the property.[14] The judge must make an order respecting the detention of the property.[15]

Currently, a person who is dissatisfied by the order may appeal from it to the trial court having appellate jurisdiction related to summary proceedings[16] (e.g., the Superior Court in Quebec). In accordance with the logic of criminal procedure, the bill adds that, if the order is made by a judge of a "superior court of criminal jurisdiction"[17] (e.g., the Superior Court in Quebec), the appeal may then be filed before the appeal court of the province that has criminal jurisdiction.[18] This is the Court of Appeal or, in the case of the Province of Prince Edward Island, the Supreme Court, Appeal Division.

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(14) Section 489.1 of the Code.

(15) Section 490 of the Code.

(16) Subsection 490(17) of the Code. Under subsection 812(1) of the Code, these are:

> (*a*) in the Province of Ontario, the Superior Court of Justice sitting in the region, district or county or group of countries where the adjudication was made;
> (*b*) in the Province of Quebec, the Superior Court;
> (*c*) in the Provinces of Nova Scotia and British Columbia, the Supreme Court;
> (*d*) in the Provinces of New Brunswick, Manitoba, Saskatchewan and Alberta, the Court of Queen's Bench;
> (*f*) in the Province of Prince Edward Island, the Trial Division of the Supreme Court;
> (*g*) in the Province of Newfoundland, the Trial Division of the Supreme Court;
> (*h*) in Yukon and the Northwest Territories, a justice of the Supreme Court; and
> (*i*) in Nunavut, a justice of the Nunavut Court of Justice.

On the power of these appeal courts respecting orders of detention, forfeiture or restitution of property, see *R.* v. *Hickey*, (2004) 181 C.C.C. (3d) 399 (C.A. N.B.), and *R.* v. *MacLeod*, (2005) 194 C.C.C. (3d) 257 (M.B.R.B.).

(17) Under section 2 of the Code, this means:

> (*a*) in the Province of Ontario, the Court of Appeal or the Superior Court of Justice,
> (*b*) in the Province of Quebec, the Superior Court,
> (*c*) in the Province of Prince Edward Island, the Supreme Court,
> (*d*) in the Provinces of New Brunswick, Manitoba, Saskatchewan and Alberta, the Court of Appeal or the Court of Queen's Bench,
> (*e*) in the Provinces of Nova Scotia, British Columbia and Newfoundland, the Supreme Court or the Court of Appeal,
> (*f*) in Yukon, the Supreme Court,
> (*g*) in the Northwest Territories, the Supreme Court, and
> (*h*) in Nunavut, the Nunavut Court of Justice.

(18) Sections 2 and 673 of the Code.

4. Private Proceedings (Clause 16)

In theory, anyone with reasonable grounds to believe that a person has committed an indictable offence may lay an information before a judge.(19) Charges are generally laid by a provincial Attorney General's prosecutor and, in some cases, by a federal Attorney General's prosecutor.(20)

Where the information is laid by an ordinary citizen (e.g., the victim), a hearing shall be held before a judge.(21) The judge must then be satisfied that the Attorney General has received a copy of the information, has received reasonable notice of the hearing and has had an opportunity to attend the hearing and to cross-examine, to call witnesses and to present any relevant evidence.(22)

Thus, in most cases, the person must inform the Attorney General of the province. However, the bill provides that the person must also inform the federal Attorney General if the latter has jurisdiction with respect to the alleged offence, such as in the case of fraud.(23)

5. Absence of Accused or Co-Defendant

a. Preliminary Inquiry (Clauses 22 and 34)

The judge presiding over the preliminary inquiry may permit the accused to be absent from court during all or part of the inquiry.(24) In this case, he or she must inform the accused that the evidence gathered in his or her absence may be admissible at trial (clause 22 of the bill). In that case, the accused cannot complain that he or she did not have the opportunity to cross-examine a witness at the preliminary inquiry (clause 34). Note, however, that inadmissible information admitted at the preliminary inquiry may still not be admitted by the trial judge.(25)

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(19) Section 504 of the Code. For exceptions to this principle, see subsections 136(3) (contradictory evidence) and 319(6) of the Code (public incitement of hatred).

(20) See the definition of "Attorney General" in section 2 of the Code.

(21) Subsection 507.1(1) of the Code.

(22) Subsection 507.1(3) of the Code.

(23) Definition of "Attorney General" in sections 2 and 380 of the Code.

(24) Paragraph 537(1)(*j*.1) of the Code.

(25) Subsection 715(4) of the Code.

b. Summary Trial (Clause 45)

In the case of summary conviction offences, if the defendant fails to appear at the time and place set for his or her trial, the judge may either proceed in the defendant's absence to hear and determine the proceedings (proceed *ex parte*) or issue an arrest warrant.(26) Clause 45 of the bill provides that these options also apply to a co-defendant who does not appear.

Currently in the case of indictable offences, a judge may clearly proceed *ex parte* or issue an arrest warrant for a co-accused.(27) The difference is that, for the judge to be able to proceed *ex parte*, the co-accused must have absconded after the hearing of his case has started.(28)

6. Election of Type of Trial

In general, for most indictable offences, the accused may make an election from among three types of trials: by judge without a jury and without a preliminary inquiry; by judge without a jury with a preliminary inquiry; or by judge with jury and with a preliminary inquiry.(29) The accused may waive the preliminary inquiry and may also change his original election.(30)

a. Direct Indictment (Clauses 23 and 24)

Under section 577 of the Code, the Attorney General may file an indictment, personally and in writing, despite the fact that the accused has not had the opportunity to request a preliminary inquiry, whether the preliminary inquiry has started or has not yet been completed or a preliminary inquiry has been held and the accused has been discharged.(31) By filing a direct indictment, the Attorney General may thus deny a preliminary inquiry to an accused.

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(26) Subsection 803(2) of the Code. The British Columbia Court of Appeal held that this subsection was constitutional (*R.* v. *Tarrant*, (1984) 13 C.C.C. (3d) 219).

(27) Subsections 475(1) and 597(1) of the Code.

(28) Subsection 475(1) 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, p. 18.

(29) Subsection 536(2) of the Code.

(30) Section 561 of the Code.

(31) This provision is very rarely used, only a few times a year (Béliveau et Vauclair (2005), p. 574), in the case, for example, of certain "mega-trials" involving organized crime.

In these circumstances, the accused is deemed to have elected a trial by judge and jury without a preliminary inquiry.(32) The accused may then elect instead a trial by judge without jury and without a preliminary inquiry, but the prosecutor's written consent is currently required in order for him or her to do so.(33) Clause 23 of the bill removes the requirement for this consent.

However, it should be noted that, in the case of an indictable offence that is the subject of a direct indictment and that is punishable by a term of imprisonment of more than five years, even if the accused elects a trial by judge without jury, the Attorney General may require that a trial by jury be held, and that this be done without a preliminary enquiry (clause 24 of the bill).

b. New Trial Ordered by the Supreme Court of Canada (Clause 31)

Clause 31 of the bill provides that, where the Supreme Court of Canada orders a new trial by judge and jury, the accused may instead elect to be tried by a judge without jury. However, the consent of the prosecutor is required.

7. Challenge of Jurors (Clauses 25 and 26)

During jury selection, two types of challenges are available to the prosecutor and the accused: peremptory challenges(34) and challenges for cause.(35) Unlike the latter, peremptory challenges do not have to be justified, and their number depends on the type of offence for which the accused is being tried.

Clause 25 of the bill grants the prosecutor and the accused a peremptory challenge for each juror who must be replaced. For example, if the judge were to replace juror 12,(36) the prosecutor could then peremptorily challenge the replacement candidate, and the accused could peremptorily challenge the subsequent candidate. The next candidate would then become a member of the jury (unless he or she is excused by the judge(37) or is the subject of a challenge for cause).

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(32) Subsection 565(2) of the Code.

(33) *Ibid.*

(34) Section 634 of the Code.

(35) Section 638 of the Code.

(36) Subsection 644(1.1) of the Code.

(37) Section 632 of the Code.

With respect to challenges for cause, currently it is the last two jurors sworn[38] (the triers) who decide whether the ground of challenge is true.[39] Clause 26 of the bill introduces a new procedure in this case. If the accused requests it, the judge may order the exclusion from the courtroom of the jurors (those already on the jury and jury candidates), with the exception of the two triers (new subsection 640(2.1) of the Code). The triers will not be part of the jury, but will instead be two jury candidates or two persons present whom the judge appoints for that purpose (new subsection 640(2.2) of the Code). The judge may make such an order if he or she feels the measure is necessary to preserve the jury's impartiality (new subsection 640(2.1) of the Code).

8. Appeal Before the Court of Appeal of a Province

a. Verdict of Acquittal in a Summary Offence Proceeding (Clause 28)

Currently, the Attorney General may, if certain conditions are met, institute an appeal before a provincial court of appeal from a *summary conviction* or from the sentence that was imposed.[40] It is much more likely that the Attorney General, as the prosecutor in criminal cases, will want to appeal from a verdict of acquittal. Clause 28 of the bill thus substitutes *verdict of acquittal* for *summary conviction* in subsection 676(1.1) of the Code.

b. Power to Order Suspension (Clause 29)

In the interests of justice, the court of appeal or one of the judges of that court may suspend certain orders during the appeal, such as an obligation to pay a fine or the conditions of a probation order concerning an individual.[41] Clause 29 of the bill also makes it possible to suspend the optional conditions of a probation order concerning an organization (new paragraph 683(5)(*e*) of the Code) and a conditional sentence order (new paragraph 683(5)(*f*) of the Code).

However, before suspending a probation order or a conditional sentence order, the court of appeal, or a judge of that court, may order the offender to meet certain conditions

(38) "Or if no jurors have been sworn, two persons present whom the court may appoint for the purpose." Subsection 640(2) of the Code.

(39) *Ibid.*

(40) Subsection 676(1.1) of the Code.

(41) Subsection 683(5) of the Code.

during the suspension by entering into an undertaking or recognizance (new subsection 683(5.1) of the Code),[42] that, for example, he or she remain in a certain territorial jurisdiction or refrain from communicating with any identified person.

In addition, in determining whether to vary the sentence of the offender, the court of appeal must take into account the conditions of that undertaking or recognizance and the period during which they were imposed (new subsection 683(7) of the Code). If, for example, a two-year probation order is suspended during the appeal and replaced with a conditional undertaking, even if the court of appeal confirms the initial sentence (two years' probation), it may shorten the probation period on the basis of that conditional undertaking.

c. Appeal Filed in Error (Clause 30)

At present, a court of appeal may summarily dismiss – that is to say without calling on any person to attend the hearing or to appear for the respondent – a frivolous or vexatious appeal.[43] Clause 30 of the bill also allows a judge of the court of appeal to proceed in this manner when a notice of appeal should have been filed in another court, such as the trial court having appellate jurisdiction related to summary proceedings.

B. Language of the Accused

At the accused's request, a judge will order that the accused be granted a preliminary inquiry and trial before a judge without jury or a judge and jury who speak the official language of Canada that is the language of the accused.[44] If the accused speaks neither English nor French, a judge will order that the accused be granted a preliminary inquiry and trial before a judge without a jury or a judge and jury who speak the official language of Canada in which the accused can best give testimony.[45] The court is also required to provide interpretation services to the accused, to the accused's lawyer and to witnesses.[46]

(42) See sections 515 and 515.1 of the Code.

(43) Section 685 of the Code.

(44) Subsection 530(1) of the Code.

(45) Subsection 530(2) of the Code.

(46) Paragraph 530.1(*f*) of the Code.

1. Right of the Accused to Be Advised [Subclause 18(1)]

Currently, once the accused appears in court, the judge is required to advise him or her of the right to a trial in the official language of his or her choice, but this requirement applies only if the accused is not represented by counsel.(47) Subclause 18(1) of the bill removes this last condition. The judge will thus have to advise the accused of this right in all cases.

2. Preliminary Inquiry and Trial in Both Official Languages [Subclause 18(2) and Clause 21]

The accused is also entitled to undergo a preliminary inquiry and trial before a judge without jury or a judge and jury who speak English *and* French, but only where circumstances warrant.(48) The bill provides that a bilingual preliminary inquiry and trial will be warranted in the case of co-accused who understand different official languages (subclause 18(2) of the bill introducing the new subsection 530(6) of the Code).

If a bilingual preliminary inquiry and trial are held, the court may determine to what extent each of the official languages will be used (clause 21 of the bill introducing new section 530.2 of the Code). The court order must, to the extent possible, respect the accused's right to a trial in his or her official language.

3. Translation of Documents (Clause 19)

When an accused requests a trial in the official language of his or her choice, clause 29 of the bill provides that the prosecutor is required to cause documents containing the charges against the accused, that is the information and the indictment, to be translated into the official language of the accused (or into the language in which the accused can best give testimony). The prosecutor will be required to provide the accused with a written copy of the translated text at the earliest possible time. However, the wording of the original document shall prevail in the event of a discrepancy between the original document and the translation.

(47) Subsection 530(3) of the Code.

(48) Subsections 530(1), 530(2) and 530(5) of the Code.

4. Examination and Cross-Examination of Witnesses [Subclause 20(2)]

Witnesses may use either official language in a preliminary inquiry or trial.[49] Subclause 20(2) of the bill permits the prosecutor, with the judge's permission where circumstances warrant, to examine and cross-examine a witness in his or her official language, even if that language is not that of the accused.

Consider the example of a French-speaking accused, an Anglophone witness and a bilingual prosecutor. The accused has obtained the right to a trial in French. The witness testifies in English. The prosecutor may cross-examine (or examine) that witness in English. The objective of this amendment is to make the process more effective, because the prosecutor is able to speak directly to the witness without the services of an interpreter.

5. Change of Venue (Clause 21)

Under section 531 of the Code, a trial can be transferred to another territorial division in the same province when the accused cannot reasonably receive a trial in his or her official language in the territorial division where the offence would normally be tried. Clause 21 of the Bill excludes New Brunswick from the application of this provision. Thus, in New Brunswick, the trial of an accused who wishes to be tried in his or her official language must be held in the territorial division where the offence would normally be tried (i.e., often the location where the offence was committed). The trial cannot be transferred to another territorial division.

6. Parliamentary Review (Clause 21.1)

The bill stipulates that a comprehensive review of the provisions and operation of Part XVII of the Code, which pertains to the language of the accused, shall be undertaken within three years after the coming into force of clause 21.1.

The parliamentary committee conducting the review shall submit a report to Parliament, including a statement of any changes the committee recommends.

(49) Paragraph 530.1(*c*) of the Code. Furthermore, if the witness speaks a language other than English or French, the court will provide the services of an interpreter (paragraph 530.1(*f*) of the Code).

C. Sentencing

1. Forfeiture for Luring a Child (Clause 4)

The offence of luring,[(50)] which came into force in 2002, consists in communicating with a minor by means of a computer for the purpose of facilitating the commission of certain designated offences, such as the possession of child pornography[(51)] or an invitation to sexual touching.[(52)]

At present, where a person is convicted of a child pornography offence, the court may, in addition to any other sentence, order the forfeiture of anything – other than real property – that has been used to commit the offence.[(53)] Clause 4 of the bill extends the application of that order to the offence of luring. Thus, if satisfied, on a balance of probabilities, the prosecutor may order the forfeiture of the computer of a person convicted of luring a child.

This clause is a useful addition because not all persons convicted of luring a child have also been convicted of child pornography offences.

The Code provides for a procedure to protect the property of a third party if he or she acted in good faith.[(54)]

2. Minimum Sentences for Impaired Driving (Clauses 7 **and 45.2**)

The bill stipulates that the minimum sentences provided for impaired driving offences[(55)] shall also apply to offences of impaired driving causing bodily harm or death.[(56)]

Those minimum sentences, as amended by the *Tackling Violent Crime Act,* are as follows:

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(50) Section 172.1 of the Code.

(51) Section 163.1 of the Code.

(52) Section 152 of the Code.

(53) Subsection 164.2(1) of the Code.

(54) Subparagraph 164.2(1)(*b*)(ii) and subsections 164.2(2) and 164.2(3) of the Code.

(55) Paragraphs 253(*a*) (impaired driving) and 253(*b*) (driving with an excessively high blood alcohol level) and section 254 (refusal to provide a sample) of the Code.

(56) See subsections 255(2) to 255(3.2) (impaired driving, driving with an excessively high blood alcohol level and refusal to provide a sample, leading to bodily harm or death) and subsection 21(3) of the *Tackling Violent Crime Act,* S.C. 2008, Chapter 6 (Bill C-2).

- **for a first offence, a fine of not less than $1,000;**
- **for a second offence, imprisonment for not less than 30 days; and**

- **for each subsequent offence, imprisonment for not less than 120 days.[57]**

3. Driving Prohibition Order

For certain offences, a court imposing a sentence has an obligation[58] or the discretion[59] to prohibit the offender from operating a motor vehicle, vessel, aircraft or railway equipment for a period determined by the court. In some cases, the Code provides for minimum periods.[60] These orders are in addition to any other sentences that the court may impose. The driving prohibition period will thus follow any term of imprisonment.

a. Consecutive Prohibitions From Driving [Subclause 8(3)]

Subclause 8(3) of the bill provides that the court may order consecutive periods of prohibition from driving.

Consider, for example, a person convicted of two driving offences – criminal negligence causing bodily harm[61] and criminal negligence causing death.[62] In this case, in addition to imposing a prison term, the court could,[63] for example, prohibit the offender from operating a motor vehicle for a total of 25 years, as follows:

- 10 years for the offence of criminal negligence causing bodily harm; and

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(57) See paragraph 255(1)(a) of the Code and subsection 21(1) of the *Tackling Violent Crime Act*, S.C. 2008, Chapter 6 (Bill C-2).

(58) For example, for an offence of driving while impaired or with an excessively high blood alcohol level (without causing bodily harm or injury causing death) (subsection 259(1) of the Code). Bill C-19 (An Act to amend the Criminal Code (street racing) and to make a consequential amendment to the Corrections and Conditional Release Act, first reading, 1st Session, 39th Parliament, http://www.parl.gc.ca/ 39/1/parlbus/chambus/house/bills/government/C-19/C-19_1/C-19_cover-e.html) also introduces driving prohibition orders for the street racing offences that it creates. See also the legislative summary of Bill C-19, prepared by the Library of Parliament (http://lpintrabp.parl.gc.ca/lopimages2/prbpubs/ls3811000/381c19-e.asp).

(59) For example, for negligent driving or an offence of impaired driving or driving with an excessively high blood alcohol level causing bodily harm or death (subsection 259(2) of the Code).

(60) For example, in the case of a charge of impaired driving or driving with an excessively high blood alcohol level (without bodily harm or causing death) (subsection 259(1) of the Code). Bill C-19 also provides for minimum sentences for the street racing offences it creates.

(61) Section 221 of the Code.

(62) Section 220 of the Code.

(63) By means of a discretionary order in this instance (subsection 259(2) of the Code).

- 15 years for the offence of criminal negligence causing death.

However, the court has an obligation to avoid unduly harsh or long consecutive sentences.(64)

b. Alcohol Ignition Interlock Device Program [Subclauses 8(1) and 8(4)]

During the prohibition period, the offender may nevertheless drive if the vehicle that he or she drives is equipped with an alcohol ignition interlock device, the offender is registered in a provincial alcohol ignition interlock device program(65) and if, by the terms of the bill, he or she meets the conditions of that program (subclause 8(1) of the bill amending subsection 259(1.1) of the Code).

Currently, for the offender to be granted this special authorization, it must be expressly ordered by the court.(66) The bill provides that the offender may take advantage of this option without making a request to the court (subclause 8(1) of the bill amending subsection 259(1.1) of the Code). However, the court may oppose this authorization by issuing an order to that effect.

The Code provides for a minimum initial period – which the court may increase – during which the offender may not have access to the alcohol ignition interlock device program.(67) This is a three-month period in the case of a first offence.(68) The bill provides that this minimum initial period will begin at the time of sentencing, rather than when the order of prohibition from driving takes effect (i.e., at the end of the prison term), where applicable (subclause 8(1) of the bill amending subsection 259(1.2) of the Code).

Thus, in the event the offender is sentenced to more than three months for a first offence, it appears that he or she may benefit from the alcohol ignition interlock device program (and operate a motor vehicle under those circumstances) as soon as the term of imprisonment ends.

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(64) Paragraph 718.2(*c*) of the Code.

(65) Subsection 259(1.1) of the Code. On the application of this subsection where the court issues a discretionary driving prohibition order, see *R.* v. *Fortin*, REJB 2003-50620, [2003] A.Q. No. 17687 (C.A. Que).

(66) Subsection 259(1.1) of the Code.

(67) Subsection 259(1.2) of the Code.

(68) Paragraph 259(1.2)(*a*) of the Code.

In addition, subclause 8(4) of the bill provides that driving while a prohibition order is in effect is not an offence if the offender is registered in an alcohol ignition interlock device program and is complying with its conditions.

4. Delay of Sentencing for Treatment (Clause 35)

To take into account the specific situation of the offender and to address the reasons why the offence was committed, clause 35 of the bill expressly permits the court to delay sentencing where certain conditions are met, as follows:

- the offender will attend a treatment program approved by the province (e.g., a substance abuse or spousal abuse treatment program);(69)
- the Crown prosecutor and the offender give their consent;
- the court considers the interests of any victim of the offence; and
- the court is of the view that such a delay will be in the interests of justice.

5. Probation (Clause 37)

Where a court issues a probation order, it must provide a copy to the offender(70) and explain the conditions of the order to the offender, particularly as to how the order may be changed.(71) The court must also explain the consequences of committing an offence during the probation period(72) and of failure to comply with the conditions of the order.(73)

The bill adds a requirement for the court to explain to the offender the mandatory and optional conditions that he or she must meet as part of his probation (clause 37 of the bill amending paragraph 732.1(5)(*b*) of the Code). The court must also take steps to ensure that the offender clearly understands the conditions, such as the condition of providing for the support or care of dependants.(74)

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(69) This type of condition may also be imposed, for example, in the context of a probation order (paragraphs 732.1(3)(*g*) and (*g*.1) of the Code) or a conditional sentence order (paragraph 742.3(2)(*e*) of the Code).

(70) Subparagraph 732.1(5)(*a*)(i) of the Code.

(71) Subparagraphs 732.1(5)(*a*)(ii) and 732.1(5)(*a*)(iii) of the Code.

(72) Subparagraph 732.1(5)(*a*)(ii) of the Code.

(73) *Ibid.*

(74) Paragraph 732.1(3)(*e*) of the Code.

However, the probation order shall remain valid even if the court does not discharge all these obligations (new subsection 732.1(6) of the Code).

6. Fine

a. Imprisonment for Default of Payment (Clause 38)

The Code provides a calculation for determining the term of imprisonment imposed where the offender does not completely pay the fine (or does not perform all community work) imposed by the court.[75] Clause 38 of the bill maintains the same calculation, and further states that, if punishment for the offence does not include a term of imprisonment, the maximum term of imprisonment will be five years in the case of an indictable offence[76] and six months in the case of a summary conviction offence.[77]

However, the calculation provided for will not apply if a federal act establishes other methods of calculation or a minimum or maximum term of imprisonment in case of failure to pay the fine.[78]

The court will generally consider the offender's ability to pay before determining the amount of the fine.[79]

b. Explanation of the Order (Clause 39)

A court imposing a fine must provide the offender with a copy of the order[80] and provide an explanation, particularly concerning the community work program[81] and the consequences of a failure to pay the fine.[82] It must also ensure that the offender understands how to have the terms of payment changed, the deadline for payment and the other optional conditions that the court may set.[83]

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(75) Subsection 734(5).

(76) See section 743 of the Code.

(77) See subsection 787(1) of the Code.

(78) Subsection 734(8) of the Code.

(79) This rule does not apply if the act provides for a minimum fine or in the case of a fine imposed in lieu of an order of forfeiture (subsection 734(2) of the Code). See *R.* v. *Lavigne*, [2006] 1 S.C.R. 392.

(80) Subparagraph 734.2(*a*)(i) of the Code.

(81) Subparagraphs 734.2(*a*)(ii) and 734.2(*a*) (iii) of the Code.

(82) Subparagraph 734.2(*a*)(ii) and sections 734.5, 734.6 and 734.7 of the Code.

(83) Subparagraph 734.2(*a*)(iv) of the Code.

Clause 39 of the bill reiterates those obligations, while adding that any failure by the court to meet those obligations does not affect the validity of the order imposing the fine (new subsection 734.2(2) of the Code).

c. General Penalty (Clause 44)

At present, where the provisions of an act do not provide for any specific penalty for a summary conviction offence, the defendant is liable to a fine of not more than $2,000 or to imprisonment for up to six months or to both.[84]

Clause 44 of the bill increases this minimum fine to $5,000. The maximum term of imprisonment remains unchanged. The defendant will thus be liable to a fine of not more than $5,000 and to imprisonment for up to six months or to both.

7. Conditional Sentence (Clause 40)

When the court decides to issue a conditional sentence order, it must provide the offender with a copy of the order[85] and an explanation of the procedures for changing the optional conditions,[86] in addition to ensuring that the offender understands the consequences of a possible failure to comply with the order.[87]

The bill restates these obligations by providing that the court must provide an explanation of the mandatory conditions of the order (clause 40 of the bill amending subsection 742.3(3) of the Code). As is the case with probation and fines, the order will remain valid even if the court does not discharge all these obligations (new subsection 742.3(4) of the Code).

D. Offences

1. Violation of Non-communication Order (Clause 42)

At present, a peace officer (in the case of a conditional release[88]) or a judge (in the case of a release[89] or detention in custody[90] at the bail hearing stage) may order the

(84) Subsection 787(1) of the Code.

(85) Subparagraph 742.3(3)(*a*)(i) of the Code.

(86) Subparagraphs 742.3(3)(*a*)(ii) and 742.3(3)(*a*)(iii) of the Code.

(87) Subparagraph 742.3(3)(*a*)(ii) of the Code.

(88) Paragraphs 499(2)(*c*) and 503(2.1)(*c*) of the Code.

(89) Paragraphs 515(4)(*d*) and 515(4.2)(*a*) and subsection 522(3) of the Code.

(90) Subsections 515(12), 516(2) and 522(2.1) of the Code.

accused not to communicate with certain identified persons.[91] Such an order therefore cannot be issued once the accused has been convicted and sentenced to a term of imprisonment.

Clause 42 of the bill corrects this deficiency. Recognizing that the walls of a prison cannot prevent threats, intimidation and conspiracies, the court may now prohibit the offender from communicating with certain persons during his period of detention (new subsection 743.21(1) of the Code).

Furthermore, clause 42 of the bill provides that failure to comply with this order constitutes a dual procedure offence punishable by two years (in the case of an indictable offence) or 18 months in prison (in the case of a summary procedure offence) (new section 743.21(2) of the Code).

The maximum term of imprisonment in the case of a summary procedure offence (18 months) is greater than that provided for violation of a non-communication condition imposed by a peace officer[92] or a justice at the bail hearing stage (six months).[93] On the other hand, in these last two cases, the defendant may also have to pay a fine of not more than $2,000[94] ($10,000 under clause 44 of the bill).

If instead the Attorney General considers the offence an indictable offence, the maximum term of imprisonment is two years in all cases.[95]

In addition, in all cases, the accused may avoid conviction by proving that he had a lawful excuse justifying his failure to comply with the non-communication condition.[96]

2. Gambling and Betting (Clauses 5 and 6)

Currently, for a person to be convicted of the offence of providing information intended for use in connection with book-making, pool-selling, betting or wagering, that person must use the radio, telegraph, telephone, mail or express.[97]

To reflect current and future technological advances, the bill does not list the means of telecommunication (clause 5). Consequently, the use of any means of telecommunication may result in charges under this offence. **During its consideration of the**

(91) Such as the victim or witnesses, for example.

(92) Paragraph 145(5.1)(*b*) and subsection 787(1) of the Code.

(93) Paragraph 145(3)(*b*) and subsection 787(1) of the Code. See also clause 3 of the bill.

(94) Paragraphs 145(3)(*b*) and 145(5.1)(*b*) and subsection 787(1) of the Code.

(95) Paragraphs 145(3)(*a*) and 145(5.1)(*a*) and new paragraph 743.21(2)(*a*) of the Code.

(96) Subsections 145(3) and 145(5.1) and new subsection 743.21(2) of the Code.

(97) Paragraph 202(1)(*i*) of the Code.

bill, the Standing Senate Committee on Legal and Constitutional Affairs said that it was satisfied that clause 5 of the bill will not have extra-territorial application.(98)

In the same vein, clause 6 of the bill replaces the word "telephone" with "any means of telecommunication" to extend the legality of parimutuel wagering on horse races, regardless of the means of telecommunication used to transmit wagers to a regulated race track betting theatre.(99)

3. Possession of Break-in Instruments (Clause 9)

The offence of possession of break-in instruments is currently an indictable offence punishable by a term of imprisonment of up to 10 years.(100)

Clause 9 of the bill makes it a dual procedure offence. As a result, the prosecutor will have the option of considering it an indictable offence (the maximum penalty in this case is still a term of imprisonment of 10 years) or prosecuting the defendant by way of summary procedure (in this case, the default penalty applies, that a fine of not more than $2,000 – or $10,000 under clause 44 of the bill – and a maximum term of imprisonment of six months, or both).

The Crown attorney thus has more flexibility. For example, if he or she chooses to proceed by way of summary conviction, a preliminary inquiry will not be necessary. However, if, at the time the Crown attorney chooses to institute the proceeding, the limitation period for summary proceeding has expired,(101) he or she may still prosecute the accused under the rules applicable to indictable offences.

E. Coming Into Force (Clause 46)

The clauses of the bill enumerated in clause 46 of the bill will come into force on a day or days to be fixed by Order in Council. The other clauses will come into force on the day Royal Asset is given.(102)

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(98) Observations to the Fourth Report of the Standing Senate Committee on Legal and Constitutional Affairs (Bill C-13), 2nd Session, 39th Parliament, 11 December 2007 (http://www.parl.gc.ca/39/2/parlbus/commbus/senate/Com-e/lega-e/rep-e/rep04dec07-e.htm).

(99) See, for example, the website of "Paritel," a horse race betting service via telephone or Internet http://www.paritel.ca/en/e_index.htm).

(100) Subsection 351(1) of the Code.

(101) Subsection 786(2) of the Code.

(102) *Interpretation Act*, R.S.C. 1985, c. I-21, subsection 5(2).

COMMENTARY

To date, the bill – perhaps as a result of its highly technical nature – does not appear to have triggered any reaction from the public, media or interest groups.