Legislative Summary **LS-565E**

BILL C-2: AN ACT TO AMEND THE CRIMINAL CODE AND TO MAKE CONSEQUENTIAL AMENDMENTS TO OTHER ACTS

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Legislative history by Michel Bédard

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BILL C-2: AN ACT TO AMEND THE CRIMINAL CODE AND TO MAKE CONSEQUENTIAL AMENDMENTS TO OTHER ACTS*

INTRODUCTION

Bill C-2, An Act to amend the Criminal Code and to make consequential amendments to other Acts, was introduced and received first reading in the House of Commons on 18 October 2007. The bill – short title: *Tackling Violent Crime Act* – groups together five bills that had been dealt with separately in the first session of the 39th Parliament. The five broad categories of legislative measures will create two new firearm offences and provide escalating mandatory sentences of imprisonment for serious firearm offences, reverse the onus on those seeking bail when accused of serious offences involving firearms and other regulated weapons, make it easier to have someone declared a dangerous offender, introduce a new regime for the detection and investigation of drug-impaired driving and increase the penalties for impaired driving, and raise the age of consent for sexual activity from 14 to 16 years.(1)

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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 also Justice Canada, News Release, "Centrepiece Legislation to Tackle Serious Crime," Ottawa, 18 October 2007; and Justice Canada, Backgrounder, "*Tackling Violent Crime Act*," Ottawa, October 2007.

PART 1 – MINIMUM MANDATORY SENTENCES FOR SERIOUS FIREARMS OFFENCES (CLAUSES 2-12; 15-17; 28-36; 38; 57; 61; 63)[2]

The mandatory minimum sentences for serious firearms offences in Bill C-2 derive from Bill C-10, An Act to amend the Criminal Code (minimum penalties for offences involving firearms) and to make a consequential amendment to another Act, which was introduced and received first reading in the House of Commons on 4 May 2006, followed by second reading and referral to the House of Commons Standing Committee on Justice and Human Rights on 13 June 2006. Its primary objectives were to increase mandatory minimum terms of imprisonment for individuals who commit serious or repeat firearm offences, and to create the new offences of breaking and entering to steal a firearm and robbery to steal a firearm.[3] Bill C-10 was introduced in the Senate on 30 May 2007.

BACKGROUND

A. History of Minimum Sentences for Firearm Offences

There are about 40 offences under the *Criminal Code*, including murder, impaired driving and various sexual offences involving children, for which a mandatory minimum sentence of imprisonment must be imposed.[4] Minimum sentences were first enacted for

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(2) Formerly Bill C-10, An Act to amend the Criminal Code (minimum penalties for offences involving firearms) and to make a consequential amendment to another Act, which is available online at http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=2980100&Language=e&Mode=1&File=14. Bill C-10 is comparable to Bill C-82, An Act to amend the Criminal Code (firearms), which was introduced by the previous government during the 38th Parliament on 25 November 2005 but proceeded no further. Bill C-82 would have increased the minimum sentences for unauthorized possession of a prohibited or restricted firearm with ammunition, and for smuggling and trafficking in firearms and other weapons, from one year to two years. Like Bill C-10, it would also have created the offences of breaking and entering to steal a firearm and robbery to steal a firearm. For further information on Bill C-10, see the Legislative Summary, *Bill C-10: An Act to amend the Criminal Code (minimum penalties for offences involving firearms) and to make consequential amendment to another Act*, LS-525E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, revised 6 June 2007, http://www.parl.gc.ca/ 39/1/parlbus/chambus/house/bills/summaries/c10-e.pdf.

(3) See also Justice Canada, News Release, "Minister of Justice Proposes Tougher Mandatory Minimum Prison Sentences for Gun Crimes," Ottawa, 4 May 2006; and Justice Canada, Backgrounder, "Mandatory Minimum Penalties," Ottawa, May 2006.

(4) For further discussion of mandatory minimum sentences and links to other information, see Wade Riordan Raaflaub, *Mandatory Minimum Sentences*, PRB 05-53E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 18 January 2006, http://lpintrabp.parl.gc.ca/lopimages2/prbpubs/inbrief1000/prb0553-e.asp.

firearm offences in Canada in 1977.[5] The legislation imposed a mandatory additional term of imprisonment of at least one year where a firearm is used in the commission of an indictable offence.[6] In 1995, further amendments to the *Criminal Code* attached four-year mandatory minimum sentences to certain serious offences committed with a firearm, such as attempted murder, sexual assault, kidnapping and robbery.[7] Where a person commits certain firearm offences, or an offence that involves a firearm, weapon or other item that the person was prohibited from possessing at the time, he or she also became subject to a mandatory prohibition order.[8]

B. Constitutionality of Mandatory Minimum Sentences

Mandatory minimum terms of imprisonment are generally inconsistent with the fundamental principle that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender,[9] as they do not allow a judge to make any exception in an appropriate case. However, this does not necessarily mean that a minimum sentence is unconstitutional. A mandatory minimum sentence may constitute cruel and unusual punishment, in violation of the *Canadian Charter of Rights and Freedoms*,[10] if it is possible for the mandatory punishment, in a specific matter or reasonable hypothetical case, to be "grossly disproportionate," given the gravity of the offence or the personal circumstances of the offender.

By way of example, the Supreme Court of Canada concluded in 1987 that a mandatory minimum term of imprisonment of seven years for importing or exporting a narcotic constituted cruel and unusual punishment because it failed to take into account the nature and quantity of the substance, the reason for the offence, or the absence of any previous

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(5) *Criminal Law Amendment Act*, S.C. 1977, c. 53.

(6) *Criminal Code*, R.S.C. 1970, c. C-3, s. 83, as amended. Section 83 later became s. 85: *Criminal Code*, R.S.C. 1985, c. C-46.

(7) *An Act respecting Firearms and Other Weapons*, S.C. 1995, c. 39, s. 139.

(8) *Criminal Code*, s. 109. On a first conviction or discharge, the offender may not possess a firearm, cross-bow, restricted weapon, ammunition or explosive substance for at least 10 years, and may not possess a prohibited firearm, restricted firearm, prohibited weapon, prohibited device or prohibited ammunition for life. On a second or subsequent conviction or discharge, the person may not possess any of these items for life. A discharge, which may be absolute or conditional, means that the person was found guilty but not subject to a conviction, given his or her own interests and those of the public: ibid., s. 730.

(9) Ibid., s. 718.1.

(10) *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11, s. 12.

convictions.[11] The applicable provision was accordingly struck down. Conversely, the current mandatory minimum sentence of four years in prison for criminal negligence causing death, where a firearm is used, was upheld by the Supreme Court in 2000, on the basis that such an offence necessarily involves wanton and reckless disregard for life and safety.[12]

C. Effect of Mandatory Minimum Sentences on Gun Crime

1. Canada

A study published in 2002 concluded that existing research generally does not support the use of mandatory minimum sentences for the purpose of deterrence, or for the purpose of reducing sentencing disparities.[13] That said, the evidence was somewhat inconsistent and unclear in the specific context of firearm offences. In contrast to mandatory minimum sentences for drug offences or impaired driving, for instance, the use of such punishment appears to have some impact in reducing gun crime.[14]

A study in 1983 found that robberies and homicides with firearms decreased after minimum sentences came into force in 1977, but there may have been a compensating increase in offences not involving firearms, and minimum sentences were only one aspect of the legislation.[15] The study concluded that a direct cause-and-effect relationship between the minimum penalties and declines in crime rates could not be drawn, as screening provisions to determine who may possess or acquire a firearm may have contributed.

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(11) *R.* v. *Smith*, [1987] 1 S.C.R. 1045.

(12) *R.* v. *Morrisey*, [2000] 2 S.C.R. 90.

(13) Thomas Gabor, Department of Criminology, University of Ottawa, and Nicole Crutcher, Carleton University, *Mandatory Minimum Penalties: Their Effects on Crime, Sentencing Disparities, and Justice System Expenditures*, prepared for Research and Statistics Division, Department of Justice Canada, Ottawa, January 2002, http://canada.justice.gc.ca/en/ps/rs/rep/2002/rr2002-1a.pdf.

(14) Possible reasons for the difference, among others, are that drug crime tends to be very lucrative, making offenders willing to risk punishment on the basis of the cost-benefit analysis, and impaired driving is better deterred through education and treatment measures.

(15) Elizabeth Scarff, Decision Dynamics Corporation, *Evaluation of the Canadian Gun Control Legislation, Final Report*, prepared for Solicitor General Canada, Ottawa, 1983. The 1977 amendments also put in place stricter controls on the issuance of registration certificates, new types of firearms prohibition orders, and new criminal offences in relation to firearm use. For further analysis of the 1977 legislation generally, see Research, Statistics and Evaluation Directorate, Department of Justice Canada, *A Statistical Analysis of the Impacts of the 1977 Firearms Control Legislation*, Ottawa, October 1996; executive summary available online at http://www.justice.gc.ca/en/ps/eval/reports/96/armes/p_00.html; and Gary Mauser and Richard Holmes, Simon Fraser University, "An Evaluation of the 1977 Canadian Firearms Legislation," *Evaluation Review*, Vol. 16, No. 6, December 1992, pp. 603-617.

In 1995, further amendments to the *Criminal Code* attached four-year mandatory minimum sentences to certain offences committed with a firearm. However, the number of cases was found by Statistics Canada in 1999 and 2000 to be too low to have a noticeable impact on overall sentencing patterns.(16) There does not yet appear to have been a comprehensive study of the effects of the 1995 amendments.

2. United States

There has been some evidence that mandatory minimum sentences have been effective in the context of gun-related crime in the United States, although again, the results are mixed overall. An evaluation, published in 1992, of mandatory gun-use sentencing enhancements (mandatory additional imprisonment) in six large American cities (Detroit, Jacksonville, Tampa, Miami, Philadelphia and Pittsburgh) found that the laws deterred homicide, although not other violent crimes.(17) However, studies of similar laws in Michigan in 1983 and Florida in 1984 found no evidence that crimes committed with firearms had been prevented.(18)

A 1981 evaluation of a 1975 Massachusetts law that imposed mandatory jail terms for possession of an unlicensed handgun concluded that the law was an effective deterrent to gun crime in Boston, at least in the short term.(19) A 1984 study of a 1974 Arizona law, imposing additional minimum prison time where a firearm is used in the commission of an offence, found that offenders committed fewer robberies with a firearm as penalties for firearm

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(16) Julian Roberts and Craig Grimes, *Adult Criminal Court Statistics 1998/99*, Canadian Centre for Justice Statistics, Statistics Canada, Ottawa, March 2000, p. 15; and Liisa Pent, *Adult Criminal Court Statistics 1999/00*, Canadian Centre for Justice Statistics, Statistics Canada, Ottawa, May 2001, pp. 13-14. Mandatory minimum sentences have not been addressed in subsequent issues of *Adult Criminal Court Statistics*.

(17) Dale Parent *et al*., *Key Legislative Issues in Criminal Justice: Mandatory Sentencing*, National Institute of Justice, U.S. Department of Justice, Washington, D.C., January 1997, http://www.ncjrs.gov/txtfiles/161839.txt, citing D. McDowall, C. Loftin and B. Wiersema, "A Comparative Study of the Preventive Effects of Mandatory Sentencing Laws for Gun Crimes," *Journal of Criminal Law and Criminology*, Vol. 83, No. 2, Summer 1992, pp. 378-394.

(18) Parent *et al*. (1997), citing C. Loftin, M. Heumann and D. McDowall, "Mandatory Sentencing and Firearms Violence: Evaluating an Alternative to Gun Control," *Law and Society Review*, Vol. 17, No. 2, 1983, pp. 287-318; and C. Loftin and D. McDowall, "The Deterrent Effects of the Florida Felony Firearm Law," *Journal of Criminal Law and Criminology*, Vol. 75, No. l, 1984, pp. 250-259.

(19) Parent *et al*. (1997), citing G. L. Pierce and W. J. Bowers, "The Bartley-Fox Gun Law's Short-Term Impact on Crime in Boston," *Annals of the American Academy of Political and Social Science*, Vol. 455, 1981, pp. 120-132.

use became more severe.[20] The law was followed by "highly significant reductions in gun robberies in two large counties, with no evidence of displacement to other robberies or property crimes."[21]

More recently, in Richmond, Virginia, a 1997 initiative called "Project Exile" established, among other things, a five-year mandatory minimum sentence for certain gun crimes. During the first 10 months of 1998, compared with the same period of the previous year, the total number of homicides committed in the city was down 36% and the number of firearm homicides was down 41%.[22]

3. Effect of Imprisonment Generally

Mandatory minimum sentences are a subset of criminal penalties generally. Accordingly, studies on the overall effect of prison sentences on crime rates and recidivism may be useful. One Canadian meta-analysis found little difference in general recidivism rates, regardless of length of incarceration or whether the offender was given a prison or community sanction. In fact, prison produced slight increases in recidivism.[23] In a follow-up meta-analysis focussing on juvenile, female and minority offenders, it was tentatively concluded that "increasing lengths of incarceration were associated with slightly greater increases in recidivism."[24]

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(20) Colin Meredith, ABT Associates, Bruno Steinke, Private Contractor, and Sherilyn Palmer, Criminology, *Research on the Application of Section 85 of the Criminal Code of Canada (Working Document)*, prepared for Firearms Control Task Group and Research Section, Department of Justice Canada, Ottawa, December 1994, section 2.5, http://www.cfc-cafc.gc.ca/pol-leg/res-eval/publications/reports/1990-95/sec85_rpt_e.asp, citing L. R. McPheters, R. Mann and D. Schlagenhauf, "Economic Response to a Crime Deterrence Program: Mandatory Sentencing for Robbery with a Firearm," *Economic Enquiry*, Vol. XXI, 1984, pp. 550-570.

(21) Gabor and Crutcher (2002), p. 14, also citing McPheters, Mann and Schlagenhauf (1984).

(22) U.S. Department of Justice, Office of Juvenile Justice and Delinquency Protection, *Promising Strategies to Reduce Gun Violence*, Washington, D.C., February 1999, pp. 145-147, http://www.ojjdp.ncjrs.org/pubs/gun_violence/173950.pdf.

(23) Paul Gendreau and Claire Goggin, Centre for Criminal Justice Studies, University of New Brunswick, and Francis Cullen, Department of Criminal Justice, University of Cincinnati, *The Effects of Prison Sentences on Recidivism*, prepared for Corrections Research and Development and Aboriginal Policy Branch, Department of Solicitor General Canada, Ottawa, 1999, p. 2. http://ww2.ps-sp.gc.ca/publications/corrections/199912_e.pdf.

(24) Paula Smith, Claire Goggin and Paul Gendreau, Department of Psychology and Centre for Criminal Justice Studies, University of New Brunswick, *The Effects of Prison Sentences and Intermediate Sanctions on Recidivism: General Effects and Individual Differences*, prepared for Department of Solicitor General Canada, Ottawa, 2002, p. ii, http://ww2.psepc-sppcc.gc.ca/publications/corrections/200201_Gendreau_e.pdf.

4. Incidental Effects of Mandatory Minimum Sentences

A mandatory minimum sentence may not actually bring about severe and consistent sentencing as intended, or may have incidental implications. The possibility of mandatory punishment sometimes results in charges being stayed or withdrawn, or a plea negotiation for a different charge, because prosecutors consider the penalty to be too harsh. Decisions regarding appropriate punishment are therefore transferred from the judiciary to the prosecution.(25)

When a charge for an offence carrying a minimum sentence is maintained, the accused has no incentive to plead guilty, more likely leading to a costly trial. Trials may also result in "jury nullification," which is a jury's refusal to convict when the mandatory penalty is perceived to be too harsh.(26) Another possibility is that a case heard by a judge may lead to the imposition of a less severe sentence on the accused for accompanying charges to compensate for the minimum sentence for a particular charge.(27) A survey of Canadian judges found that slightly over half felt that mandatory sentencing laws impinged on their ability to impose a just sentence.(28)

Incarcerating offenders for longer periods results in increased prison costs, which are not necessarily offset by any reduction in crime rates and recidivism.(29) In addition to the direct costs of incarceration, there is also an opportunity cost to the extent that fewer public funds are available to be spent on law enforcement, community programs and crime prevention initiatives. Finally, mandatory minimum sentences may have an adverse effect on minority defendants, who may be more likely to be charged with offences carrying a minimum penalty.(30)

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(25) Meredith, Steinke and Palmer (1994), section 2.7; and United States Sentencing Commission, *Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System*, August 1991, pp. ii-iv.

(26) Thomas Gabor, Department of Criminology, University of Ottawa, "Mandatory Minimum Sentences: A Utilitarian Perspective," *Canadian Review of Criminology*, July 2001, pp. 385-404 (p. 393).

(27) Gabor and Crutcher (2002), p. 30.

(28) Julian Roberts, Rafal Morek and Mihael Cole, *Mandatory Minimum Sentences of Imprisonment in Common Law Jurisdictions: Some Representative Models*, prepared for Research and Statistics Division, Department of Justice Canada, Ottawa, 20 September 2005, p. 10, http://canada.justice.gc.ca/en/ps/rs/rep/2005/rr05-10/rr05-10.pdf, citing Canadian Sentencing Commission, *Sentencing Reform: A Canadian Approach*, Ottawa, 1987.

(29) Gabor (2001), p. 395.

(30) American Bar Association, Justice Kennedy Commission, *Report to the House of Delegates*, August 2004, pp. 27-29.

Australian studies, for example, have shown that mandatory minimum sentences disproportionately affect Aboriginal offenders, which has resulted in the repeal of certain sentencing legislation.(31)

DESCRIPTION AND ANALYSIS

A. Higher and Escalating Mandatory Minimum Sentences (Sub-clause 3(2), Clauses 8, 10-12, 16-17, 28-33)

These clauses in Bill C-2 increase the minimum terms of imprisonment that must be imposed for certain firearm offences, particularly where the offence has been committed with a restricted or prohibited firearm, in connection with a criminal organization, or by an individual with a previous conviction for a firearm-related offence. Table 1 summarizes the amendments by comparing existing minimum sentences under the *Criminal Code* with those proposed under Bill C-2.

Table 1 – Minimum Sentences under the *Criminal Code* and Bill C-2

Offence (with *Criminal Code* section reference)	Current Minimum Imprisonment	Minimum Imprisonment Under Bill C-2
Use of a firearm or imitation firearm in the commission of an indictable offence,(32) in an attempt to commit an indictable offence, or during flight afterwards (s. 85): Sub-Clause 3(2)	1 year (1st offence) 3 years (2nd or subsequent offence)	No Change(33)

(31) Roberts, Morek and Cole (2005), pp. 26 and 27, citing Northern Territory Office of Crime Prevention, *Mandatory Sentencing for Adult Property Offenders: The Northern Territory Experience*, Darwin, 2003, http://www.nt.gov.au/justice/ocp/docs/mandatory_sentencing_nt_experience_20031201.pdf; and "Call for Repeal of Western Australian Mandatory Sentencing," *The Guardian*, Surrey Hills, New South Wales, 28 November 2001. The latter cites Neil Morgan, Harry Blagg, Crime Research Centre, and Victoria Williams, Aboriginal Legal Service of Western Australia (Inc.), *Mandatory Sentencing in Western Australia and the Impact on Aboriginal Youth*, prepared for Aboriginal Justice Council, Perth, December 2001.

(32) Except where a firearm (not imitation) is used in the course of 10 more serious indictable offences: criminal negligence causing death, manslaughter, attempted murder, discharge of firearm with intent, sexual assault with a weapon, aggravated sexual assault, kidnapping, hostage-taking, robbery and extortion.

(33) Except that the current subparagraph 85(3)(*b*), which refers to first offences committed before 1 January 1978, is removed.

Offence (with *Criminal Code* section reference)	Current Minimum Imprisonment	Minimum Imprisonment Under Bill C-2
Unauthorized possession of a prohibited or restricted firearm that is loaded or near readily accessible ammunition (s. 95): Clause 8	1 year (but only if the Crown chooses to proceed by indictment)(34)	3 years (1st offence) 5 years (2nd or subsequent offence) Crown still has the option to proceed summarily in all cases; if so, maximum is one year (no minimum)
Breaking and entering to steal a firearm (new s. 98): Clause 9	Not applicable (new offence)	No minimum (maximum life imprisonment)
Robbery to steal a firearm (new s. 98.1): Clause 9	Not applicable (new offence)	No minimum (maximum life imprisonment)
Trafficking in, or possession for the purpose of trafficking in, a firearm, prohibited weapon, restricted weapon, prohibited device, any ammunition or prohibited ammunition (ss. 99 and 100): Clauses 10 and 11	1 year	Where a firearm, prohibited device, any ammunition or prohibited ammunition: 3 years (1st offence) 5 years (2nd or subsequent offence) Where a prohibited or restricted weapon: 1 year
Importing or exporting a firearm, prohibited weapon, restricted weapon, prohibited device, prohibited ammunition or component or part for an automatic firearm knowing that it is unauthorized (s. 103): Clause 12	1 year	Where a firearm, prohibited device or prohibited ammunition: 3 years (1st offence) 5 years (2nd or subsequent offence) Where a prohibited or restricted weapon, component or part for an automatic firearm: 1 year

(34) Where an offence may be prosecuted by indictment or summary conviction (i.e., it is “hybrid”), the Crown has the discretion to prosecute the offence as it considers appropriate, depending on its seriousness, the offender’s criminal record, certain procedural differences and other factors.

Offence (with *Criminal Code* section reference)	Current Minimum Imprisonment	Minimum Imprisonment Under Bill C-2
Use of a firearm in the commission of attempted murder (s. 239), discharging a firearm with intent (s. 244), sexual assault with a weapon (s. 272), aggravated sexual assault (s. 273), kidnapping (s. 279), hostage-taking (s. 279.1), robbery (s. 344) and extortion (s. 346): Clauses 16-17, 28-33	4 years (which minimum includes the punishment for the underlying offence)	4 years (except in the cases below) Where a restricted or prohibited firearm is used, or any firearm is used in connection with a criminal organization: 5 years (1st offence) 7 years (2nd or subsequent offence)

B. Determining Subsequent Offences (Clauses 2, 16-17, 28-33)

The higher mandatory minimum sentences for a second or subsequent offence apply not only if the person has previously committed that particular offence, but also if he or she has committed certain other offences. For the purpose of imposing the sentence for all of the offences in the above table except the eight set out in the last row (i.e., use of a firearm in the commission of attempted murder, etc.), an individual is considered to have committed a previous offence if he or she has committed *any* of the offences in the above table, a firearm offence under three additional sections of the *Criminal Code* (sections 96, 102, and 117.01(1)), criminal negligence causing death with a firearm under s. 220 of the *Criminal Code*, or manslaughter with a firearm under s. 236 (clause 2).

For the purpose of the eight more serious offences in the last row of Table 1, an individual is considered to have committed a previous offence if he or she has committed any of the eight more serious offences, criminal negligence causing death with a firearm, manslaughter with a firearm, or use of a firearm or imitation firearm in the commission of an indictable offence, or in an attempt to commit an indictable offence, or during flight afterwards under s. 85 of the *Criminal Code* (clauses 16-17, 28-33).

For all sentencing purposes under Bill C-2, a previous offence does not count if more than ten years have elapsed since the conviction, not counting time spent in custody. Further, it is the sequence of convictions that is to be considered, not the order in which the

offences were committed (see the final subsections enacted by clauses 2, 16-17, and 28-33). This means, for example, that if an individual illegally imported a firearm and subsequently used a firearm in the commission of attempted murder, but was convicted on the charge of using a firearm first, the "second offence" would be importation. As a result, the individual would receive a minimum sentence of five years (second offence on a charge of importation) rather than seven years (second offence on a charge of use of a firearm in the commission of attempted murder).

C. Two New Offences (Clauses 9, 15, 34 and 38)

Clause 9 of Bill C-2 adds two new firearm offences to the *Criminal Code*, one for breaking and entering to steal a firearm (new s. 98) and the other for robbery to steal a firearm (new s. 98.1). The first offence applies if an individual breaks and enters a place with intent to steal a firearm (even if he or she does not actually steal one), he or she steals a firearm after breaking and entering (even without initial intent to steal), or he or she breaks out of a place after stealing or intending to steal a firearm. "Break" means to break any internal or external part, or to open any thing that is used to close or cover an internal or external opening (*Criminal Code*, s. 321). "Place" means any building, structure, motor vehicle, vessel, aircraft, railway vehicle, container or trailer. It is further clarified that a person is considered to enter as soon as any part of his or her body or any instrument being used comes within the thing being entered, and that a person is considered to have broken and entered if he or she obtained entrance by threat, artifice or collusion with a person within, or entered without lawful justification or excuse by a permanent or temporary opening.

Robbery to steal a firearm applies to an individual who commits robbery with intent to steal a firearm, or in the course of which he or she steals a firearm (even without initial intent to steal the firearm). Robbery means stealing with the use or threat of violence to a person or property; stealing while at the same time wounding, beating or striking a person; assaulting someone with the intent to steal; or stealing while armed with an offensive weapon or imitation (*Criminal Code*, s. 343).

Both offences introduced by Bill C-2 are added to the list of offences in s. 183 of the *Criminal Code*, in respect of which the police may be authorized to intercept

communications (clause 15). References to both break and enter and robbery to steal a firearm are added to a section of the *Criminal Code* under which an aggravating circumstance for the purpose of sentencing is the fact that the offender knew that a person was home, was reckless as to whether the house was occupied, or used or threatened violence against a person or property (clause 34). Finally, subsection 662(6) of the *Criminal Code* is amended to indicate that if a person is charged with stealing a firearm during a break and enter, but actual stealing cannot be proved, the person may still be convicted of break and enter with intent to steal, even if not charged with the latter (clause 38).

D. Miscellaneous Amendments (Sub-clause 3(1), Clauses 4-8, 17, 31, 35 and 36)

Section 98 of the *Criminal Code* was a transitional provision enacted with the 1995 firearm-related amendments. It is no longer necessary and has been replaced by new provisions in Bill C-2. References to the former s. 98 have been removed from ss. 91-95 of the *Criminal Code* (clauses 4-8).[35]

The offence under s. 244 of the *Criminal Code* has been reworded (clause 17). The nature of the offence is essentially the same, which is to discharge a firearm with intent to injure or endanger someone or to avoid arrest or detention, regardless of the person at whom the firearm is discharged. However, the offence is now referred to as "discharging firearm with intent" rather than "causing bodily harm with intent – firearm," presumably because bodily harm is not necessary to commit the offence. The new reference is accordingly inserted in two places in the *Criminal Code* (sub-clause 3(1) and clause 35). The offence of hostage-taking is also reworded without any substantive effect or changes to references in other places (clause 31).

Because of changes to the minimum penalties for aggravated sexual assault based on the type of firearm used and involvement of a criminal organization (see clause 29), a distinction is made between the offences of "aggravated sexual assault – use of a firearm" and "aggravated sexual assault – use of a restricted firearm or prohibited firearm or any firearm in connection with criminal organization." References are accordingly amended in another section of the *Criminal Code* (clause 36).

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(35) There is also a stylistic change to s. 91 in clause 4. The phrase "unless the person is a holder" is replaced by "without being the holder."

E. Consequential Amendment and Coordinating Provision (Clauses 57 and 63)

A consequential amendment is made to the *Corrections and Conditional Release Act*(36) to reflect the new reference for the offence of "discharging firearm with intent" (clause 57). A coordinating provision makes a similar change, depending on which of Bill C-2 and another Act(37) come into force first (clause 63).

PART 2 – INCREASING THE AGE OF CONSENT (CLAUSES 13-14; 54; 58; 62)(38)

The change to the age of consent in Bill C-2 derives from Bill C-22, An Act to amend the Criminal Code (age of protection) and to make consequential amendments to the Criminal Records Act, which was introduced and received first reading in the House of Commons on 22 June 2006 and was passed by the House on 4 May 2007. The goal of Bill C-22, and of the corresponding clauses in Bill C-2, is to amend the *Criminal Code*(39) to raise the age, from 14 to 16 years, at which a person can consent to non-exploitative sexual activity. The existing age of consent of 18 years for exploitative sexual activity will be maintained. This applies to sexual activity involving prostitution, pornography, or where there is a relationship of trust, authority, dependency or any other situation that is otherwise exploitative of a young person. Bill C-22 passed second reading in the Senate on 20 June 2007.

BACKGROUND

A. General

The age of consent refers to the age at which the criminal law recognizes the legal capacity of a young person to consent to sexual activity. Below this age, all sexual activity with

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(36) *Corrections and Conditional Release Act*, S.C. 1992, c. 20

(37) *An Act to amend the Criminal Code, the DNA Identification Act and the National Defence Act*, S.C. 2005, c. 25

(38) Formerly Bill C-22, An Act to amend the Criminal Code (age of protection) and to make consequential amendments to the Criminal Records Act. For further information on Bill C-22, see the Legislative Summary, *Bill C-22: An Act to amend the Criminal Code (age of protection) and to make consequential amendments to the Criminal Records Act*, LS-550E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, revised 2 August 2007, http://www.parl.gc.ca/39/1/parlbus/chambus/house/bills/summaries/c22-e.pdf.

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

a young person, ranging from sexual touching to sexual intercourse, is prohibited. Only girls under 12 were legally unable to consent to sexual intercourse until 1890, when the age limit was raised to 14, where it has remained ever since.(40) When the *Criminal Code* was consolidated in 1892, the strict prohibition against sexual intercourse was retained for girls under 14 who were not married to the accused. At that time, the law was also strengthened to make an accused's belief about the young woman's age irrelevant. The age limit of 14 remains in place today, with a narrow exception for consensual sexual activity between young persons who are less than two years apart in age.

Canadian criminal law has also provided qualified protection from sexual exploitation for females over the age of 14. Thus, seduction of a girl over 12 and under 16 who was of "previously chaste character" was made an offence in 1886. This offence was retained in the 1892 *Criminal Code*, in respect of girls between 14 and 16. It remained in force until 1920, when the offence was changed to prohibit "sexual intercourse." After 1920, the issue became one of who was more to "blame" for sexual intercourse having occurred but the offence remained in force until 1988.

In addition to the offences outlined above, the "seduction" of a female under 18 "under promise of marriage" was made an offence in Canada in 1886 and amended in 1887 to apply to females under 21. In 1920, the offence of "seduction," without reference to a promise of marriage, was made applicable to girls "of previously chaste character" between 16 and 18. This makes clear that a complete ban on sexual intercourse with females over the age of 14 never did apply.

The Report of the Committee on Sexual Offences Against Children and Youths (the Badgley Report) was released in 1984. It contained many recommendations concerning the treatment of sexual offences against children and appears to have been the origin of many of the offences now found in Part V of the *Criminal Code*. For example, Recommendation 9 of the report suggested a definition of a person in a position of trust, which was later adopted in a number of offences, including that of sexual exploitation.

Following the release of the Badgley Report, Bill C-15 in 1988 amended the *Criminal Code* to repeal the unlawful intercourse and seduction offences. In their stead,

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(40) See Marilyn Pilon, *Canada's Legal Age of Consent to Sexual Activity*, PRB 99-3E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, revised 12 April 2001.

new offences were created, which were called “sexual interference” and “invitation to sexual touching.” These offences prohibit adults from engaging in virtually any kind of sexual contact with either boys or girls under the age of 14, irrespective of consent. The offence of “sexual exploitation” was also introduced at this time. This makes it an offence for an adult to have any sexual contact with boys and girls over 14 but under 18, where a relationship of trust or authority exists between the adult and child.

A number of rationales have been offered for the 1988 amendments to the *Criminal Code*. One is that there was perceived unequal treatment of boys and girls, since the earlier offences related strictly to female victims. In addition, the offence of unlawful sexual intercourse did nothing to protect young women from other forms of sexual contact short of intercourse. Furthermore, the lack of protection for girls between 14 and 16 who were not of chaste character or who were found to blame for an offence was seen as a serious limitation on the law’s ability to protect young women from pregnancy. The kind of scrutiny that a complainant might face in testing the proof of her chaste character may also have contributed to the fact that few charges were being laid under that provision prior to its repeal.

Except for the offences of buggery and gross indecency, therefore, the age of consent for sexual activity in Canada has at no time been set higher than 14, although prior laws did allow for men to be prosecuted for sexual intercourse with a woman under the age of 21 in certain circumstances. The differing age of consent concerning homosexual sex may be found in today’s *Criminal Code* in section 159. This section makes 18 the age of consent to anal intercourse, unless it is an act engaged in, in private, between husband and wife.

Aside from the law on the issue, studies of Canadian youth have found that young persons do engage in sexual activity. The 2003 report of the Council of Ministers of Education, Canada, the *Canadian Youth, Sexual Health and HIV/AIDS Study*,(41) found that the average age of first sexual intercourse for its sample (students in Grades 7, 9, and 11) was 14.1 years among boys and 14.5 years among girls. Furthermore, the reasons cited by youth for not having sexual intercourse are most commonly that they are “not ready” or “have not had the opportunity.” Negative family and peer opinions do not play major roles in the decision not to have sex. It is open to question, therefore, what, if any, impact a change in the age of consent in the *Criminal Code* will have upon the sexual activity of Canadian youth.

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(41) *Canadian Youth, Sexual Health and HIV/AIDS Study: Factors influencing knowledge, attitudes and behaviours*, Toronto, 2003, http://www.cmec.ca/publications/aids/.

The age of consent to sexual activity varies widely around the world. The age often varies within countries, as it does in Canada, depending upon the region or circumstances. At the lower end of the scale is Mexico with an age of consent of 12.(42) In Mexico, however, the federal law varies according to the age gap between partners and may be overruled by regional laws. The age of sexual consent in Japan is 13, although prefecture law can override the federal law to raise the age to 18. The age of consent is also 13 in Argentina, Nigeria, South Korea, Spain, and Syria. Fourteen is the age of consent in many countries, including Bulgaria, Chile, China, Colombia, Croatia, Germany, Hungary, Iceland, Italy, Peru, and Portugal.

Although the age of consent in the states of the United States ranges from 14 to 18, the most common age of consent seems to be either 16 or 18. In some states a lower age applies when the age gap between partners is small, or when the older partner is below a certain age (usually 18 or 21). The states in Australia mostly have 16 as their age of consent, as do Belgium, Hong Kong, Finland (although a "close in age" provision applies), the Netherlands, New Zealand, Norway, Russia, Singapore, Ukraine, and the United Kingdom. Countries having 18 as their age of consent include the Dominican Republic, Egypt, Haiti, Malta, and Vietnam. The ages given here may vary between the genders and may also depend upon whether the sexual partners are married. A lower age may also apply when partners are of a similar age. Finally, it should be kept in mind that all of the ages of consent listed above apply only to male-female sex. In many countries, homosexual sex is either illegal or subject to different (often higher) ages of consent.

B. The Current Law

The *Criminal Code* does not criminalize non-exploitative, consensual sexual activity with or between persons who are 14 years of age or older, unless it takes place in a relationship of trust or dependency, in which case sexual activity with persons over 14 but under 18 can constitute an offence, notwithstanding their consent. Even consensual activity with those under 14 but over 12 may not be an offence if the accused is under 16 and less than two years older than the complainant. The exception to this is anal intercourse, to which unmarried

(42) For a complete table of worldwide ages of consent, see the AVERT website, http://www.avert.org/aofconsent.htm.

persons under the age of 18 cannot legally consent, although both the Ontario Court of Appeal[43] and the Quebec Court of Appeal[44] have struck down the relevant section of the *Criminal Code*.

Sections 151 and 152 of the *Criminal Code* prohibit virtually all kinds of sexual contact with children under 14, and the defence of consent is unavailable for those offences as well as for any sexual assault offences in respect of both male and female victims under 14. The maximum available penalty for "sexual interference" or "invitation to sexual touching" is ten years' imprisonment for those prosecuted by way of indictment. Both offences are punishable by minimum terms of imprisonment, making a conditional sentence unavailable.

Section 153 of the *Criminal Code* prohibits the "sexual exploitation" of a "young person," which is defined as a person between the ages of 14 and 18. Sexual exploitation takes place when the accused is in a relationship of trust or authority with the complainant, the complainant is in a relationship of dependency with the accused, or the relationship is exploitative of the young person. Guidance for the judiciary in determining whether a relationship is exploitative is provided by directing a judge to consider the age of the young person, the age difference between the accused and the young person, the evolution of the relationship, and the degree of control or influence by the accused over the young person. Consent is not relevant when this type of relationship exists. The maximum available penalty is ten years' imprisonment for those prosecuted by way of indictment. Minimum terms of imprisonment apply to the offence of sexual exploitation and, therefore, a conditional sentence cannot be imposed.

The age of 14 is the relevant age for a number of other sexual offences in the *Criminal Code*, including bestiality (section 160(3)), parent or guardian procuring sexual activity (section 170(*a*)), householder permitting sexual activity (section 171(*a*)), luring a child (section 172.1(1)(*c*)), indecent act (section 173(2)), and removal of child from Canada (section 273.3(1)(*a*)). Fourteen is also the relevant age for obtaining an order of prohibition under section 161(1) and a recognizance under section 810.1(1) where there is a fear that a sexual offence will be committed against a person under the age of 14.

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(43) *R.* v. *M.(C.)* (1995), 98 C.C.C. (3d) 481 (Ont. C.A.). Two judges found that section 159 of the *Criminal Code* infringed section 15 of the Charter by discriminating on the basis of age, while a third judge found that there was discrimination on the basis of sexual orientation. All three agreed that the law could not be saved as a "reasonable limit" under section 1 of the Charter.

(44) *R.* v. *Roy* (1998), 125 C.C.C. (3d) 442 (Que. C.A.). It was held that this section infringes section 15 of the Charter as it discriminates on the basis of age, sexual orientation and marital status and is therefore of no force and effect.

A separate category of sexual offences may be termed “exploitative,” and the relevant age for these is 18. The offence of “sexual exploitation” in section 153 of the *Criminal Code* is discussed above. The consent of a person under the age of 18 is no defence to a charge of sexual exploitation. Another form of exploitative sexual activity is that concerning child pornography. Section 163.1 of the *Criminal Code* defines child pornography, in part, as a visual representation that shows a person who is or is depicted as being under the age of 18 and is engaged in or is depicted as engaged in explicit sexual activity. Simple possession of child pornography is an offence, as is making, printing, publishing, or transmitting it. A third category of exploitative sexual activity is that related to prostitution. Specific offences are listed in section 212 of the *Criminal Code* concerning living off the avails of a prostitute under the age of 18 and forcing someone under that age to engage in prostitution.

DESCRIPTION AND ANALYSIS

A. Amendments to Section 150.1 (Consent No Defence) of the *Criminal Code* (Clause 13)

Section 150.1 of the *Criminal Code* provides a series of rules which apply to enumerated sections of the Code to prevent an accused from relying on the consent of a complainant under a specified age. It also makes clear when a mistake by the accused may be a defence. It provides that the consent of a complainant who is less than 14 years old is no defence to the sexual assault offences (sections 271 to 273) and no defence at all, no matter what the age of the complainant, to the other enumerated offences, such as sexual exploitation (section 153). There is an exception to this general rule, however. The defence of consent is permitted to be raised to the offences of sexual interference (section 151), invitation to sexual touching (section 152), indecent exposure to a person under 14 (section 173(2)), or sexual assault (section 271) if the complainant is at least 12 but less than 14 years old and certain additional requirements are met. These requirements are that the accused be at least 12 but less than 16, the accused be less than two years older than the complainant, the accused not be in a position of trust nor the complainant in a relationship of dependency with the accused, and the accused not be in a relationship with the complainant that is exploitative of the complainant.

Section 150.1 also limits the circumstances under which a mistake of fact regarding the complainant's age will be an excuse. There is a list of offences for which the excuse of mistake of fact will be permitted if the accused believed that the complainant was 14 years of age or older. Another list of offences is provided for which a mistake of fact will be permitted if the accused believed that the complainant was 18 years of age or older. To rely on any mistake of fact, however, the accused must have taken all reasonable steps to ascertain the age of the complainant. The accused must show what steps he or she took and that those steps were all that could be reasonably required of him or her in the circumstances.

Bill C-2 amends subsection 150.1(1) to provide that the consent of a complainant who is less than 16 years old (rather than 14 years old) is no defence to the sexual assault offences (sections 271 to 273). For certain offences where the complainant is 12 years of age or more but under the age of 14 years, the bill amends subsection 150.1(2) by removing the requirement that the accused be 12 years of age or more but under the age of 16 years. In its place, the bill simply states that the accused must be less than two years older than the complainant.

New subsection 150.1(2.1) sets out new rules for the offences of sexual interference (section 151), invitation to sexual touching (section 152), indecent exposure to a person under 14 (section 173(2)), and sexual assault (section 271), where the complainant is 14 years of age or more but under the age of 16 years. In these circumstances, it will be a defence that the complainant consented to the activity that forms the subject-matter of the charge, provided certain conditions are met; these conditions are that the accused must be less than five years older than the complainant (the so-called "close in age" exception) and must not be in a position of trust or authority towards the complainant, not be a person with whom the complainant is in a relationship of dependency, not be in a relationship with the complainant that is exploitative of the complainant, or be married to the complainant.

New subsection 150.1(2.2) makes transitional provisions for an accused referred to in subsection 150.1(2.1) who is five or more years older than the complainant. In such a circumstance, it will be a defence that the complainant consented to the activity that forms the subject-matter of the charge if, on the day this provision comes into force, one of a number of conditions are satisfied. The defence of consent may be used successfully if the accused is the common-law partner of the complainant, or has been cohabiting with the complainant in a

conjugal relationship for a period of less than one year and has had or is expecting to have a child as a result of the relationship. In addition, the accused must not be in a position of trust or authority towards the complainant, not be a person with whom the complainant is in a relationship of dependency, and not be in a relationship with the complainant that is exploitative of the complainant.

New subsection 150.1(6) makes it clear that an accused cannot raise a mistaken belief in the age of the complainant as a defence under the new and amended subsections unless the accused took all reasonable steps to ascertain the age of the complainant. Existing subsections 150.1(4) and 150.1(5) already use this language for existing offences where the relevant age is either 14 or 18.

B. Amendments to Section 172.1 (Luring a Child) of the *Criminal Code* (Clause 14)

Section 172.1 of the *Criminal Code* creates the offence of using a computer system to lure children for the purpose of committing certain sexual offences. The section lists various sexual offences, which depend upon the age of the child. The offence is committed if the child was under the particular age specified or if the accused believed the child to be under that age. Subsection (3) sets up a rebuttable presumption that the accused believed the child was under the relevant age if there is evidence that the child was represented to the accused as being under that age. It is no defence that the accused believed that the child was over the relevant age unless the accused took reasonable steps to ascertain the age of the child.

New subsection 172.1(1)(*b*) will make 16 the relevant age for the offence of facilitating the commission of an offence under section 151 (sexual interference), section 152 (invitation to sexual touching), subsection 160(3) (bestiality in presence of young person), or subsection 173(2) (exposure to young person). These offences are being added to a list that previously consisted only of section 280 (abduction of person under 16). The relevant age for all four of the added offences is raised from 14 to 16 (see below); thus, the use of a computer system to facilitate the commission of these offences when the complainant is less than 16 is being made an offence.

Since 16 will now be the relevant age, subsection 172.1(1)(*c*) is amended to remove reference to the age of 14 for offences under sections 151 and 152, and

subsections 160(3) and 173(2). Henceforth, luring someone under the age of 14 by means of a computer system will be an offence only if it is done to facilitate the commission of an offence under section 281 (abduction of person under 14).

C. Replacement of "fourteen years" With "sixteen years" (Clause 54)

Clause 54 is the key provision of Bill C-2 on the issue of age of consent as it has the effect of raising the age of consent from 14 years of age to 16. It does so by replacing the words "fourteen years" with the words "sixteen years" wherever they occur in the following provisions:

- subsection 150.1(4) (no defence to a charge under section 151 or 152, subsection 160(3) or 173(2), or section 271, 272 or 273 that the accused believed the complainant was 14 years of age or more at the time the offence is alleged to have been committed);
- sections 151 (sexual interference) and 152 (invitation to sexual touching);
- subsection 153(2) (definition of "young person" for purposes of sexual exploitation);
- subsection 160(3) (bestiality in presence of person under the age of 14 years);
- subsection 161(1) (order of prohibition in respect of a person who is under the age of 14 years);
- paragraphs 170(*a*) and (*b*) (parent or guardian procuring sexual activity of a person under 14 years or between 14 and 18 years of age);
- paragraphs 171(*a*) and (*b*) (householder permitting sexual activity of a person under 14 years or between 14 and 18 years of age);
- subsection 173(2) (exposing genital organs for a sexual purpose to a person under the age of 14 years);
- paragraphs 273.3(1)(*a*) and (*b*) (removal from Canada of a person ordinarily resident in Canada who is under the age of 14 years or between 14 and 18 years of age); and
- subsection 810.1(1) and paragraphs 810.1(3)(*a*) and (*b*) (recognizances based on the fear of a sexual offence being committed against person under the age of 14 years).

D. Consequential Amendments (Clause 58)

Under the *Criminal Records Act*,[45] the effect of a pardon is that the judicial record of a person's conviction is to be kept separate and apart from other criminal records.

(45) R.S.C. 1985, c. C-47.

No such record shall be disclosed to any person, nor shall the existence of the record or the fact of the conviction be disclosed to any person, without the prior approval of the Minister of Public Safety and Emergency Preparedness. An exception to the non-disclosure of a criminal record for which a pardon has been granted is made if a person applies for a paid or volunteer position if the position is one of authority or trust relative to children or vulnerable persons. Should the applicant consent to the verification, the information that the applicant has been convicted of certain specified offences may be disclosed, so long as this information is used only in relation to the assessment of the application.

Clause 58 of Bill C-2 amends the schedule to the *Criminal Records Act*, which is the list of sexual offences, the conviction for which may be disclosed in the circumstances set out above. Thus, section 151 will now be the offence of sexual interference with a person under 16 (rather than under 14) years of age. Similarly, section 152 will now be the offence of invitation to a person under 16 to sexual touching, and section 153 will be the offence of sexual exploitation of a person between the ages of 16 and 18. Other changes to the schedule will raise the age from 14 to 16 for the offences in subsection 160(3) (bestiality), and the removal of a child under 16, or between 16 and 18 years of age, from Canada for the purpose of committing one of the listed offences. The effect of these amendments will be that anyone convicted of the newly defined offences may have the fact of their conviction disclosed to a potential employer or volunteer supervisor if they apply to work with children or other vulnerable persons.

PART 3 – DRUG-IMPAIRED DRIVING (CLAUSES 18-27; 55; 59-60)[46]

The provisions relating to drug-impaired driving in Bill C-2 derive from Bill C-32 of the First Session of the 39th Parliament. Bill C-32 was introduced in the House of Commons on 21 November 2006 and reported with amendments by the Standing Committee on Justice and Human Rights on 20 June 2007.

(46) Formerly Bill C-32, An Act to amend the Criminal Code (impaired driving) and to make consequential amendments to other Acts. For more information on Bill C-32, see the Legislative Summary, *Bill C-32: An Act to Amend the Criminal Code (Impaired Driving)*, LS-543E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, revised 25 September 2007, http://lpintrabp.parl.gc.ca/apps/legisinfo/index-e.asp?Session=14&query=4875&List=toc.

Bill C-2 proposes amendments to the *Criminal Code* and other Acts intended to strengthen the enforcement of drug-impaired driving offences in Canada. Currently, section 253(*a*) of the *Criminal Code* makes it an offence to drive while one's ability to operate a vehicle is impaired by alcohol or a drug, or a combination of alcohol and a drug. While section 253(*b*) contains a further offence for driving while one's blood-alcohol level is over the legal alcohol limit, no similar drug limit offence exists. Thus, although drug-impaired driving is a criminal offence, police have few legally designated means of controlling that offence. Police currently rely on non-quantifiable symptoms of drug-impairment, such as erratic driving behaviour and witness testimony. Drug tests are admissible as evidence in court only if the driver participates voluntarily.

Bill C-2 expands drug enforcement capabilities by giving police the authority to demand physical sobriety tests and bodily fluid samples for section 253(*a*) investigations. Such tests will look for impairment by illegal, over-the-counter, and prescription drugs. As a first step, police officers will be authorized to administer Standardized Field Sobriety Tests (SFST) at the roadside if the officer has a reasonable suspicion that the driver has a drug in his or her body. SFST involves physical sobriety evaluations such as divided attention tests that evaluate the driver's ability to multitask. If the driver fails, the officer will then have reasonable grounds to believe that a drug-impaired driving offence has been committed, and can escort the driver to a police station for administration of a Drug Recognition Expert (DRE) evaluation involving a combination of interviews and physical observations. Should the DRE officer identify that a specific family of drugs is causing impairment, Bill C-2 allows officers to take a saliva, urine, or blood sample. Charges will not be laid without confirmation of preliminary DRE results through a toxicology report, but the results of such tests can then be used as evidence in drug-impaired driving prosecutions. A driver's refusal to comply with an officer's request for a physical sobriety or bodily fluid sample test constitutes a criminal offence punishable under the same provisions that are currently applicable for refusing to perform an alcohol breath or blood test.

Bill C-2 also increases penalties with respect to both alcohol- and drug-impaired driving under section 255(1) of the *Criminal Code*, and creates new offences with respect to impaired driving causing death or bodily harm: driving with a blood-alcohol concentration of over 80 milligrams of alcohol in 100 millilitres of blood and causing death (life imprisonment) or bodily harm (10 years' imprisonment); and refusing to provide a breath, saliva, urine or blood sample while the accused knew or ought to have known that his or her operation of a vehicle had caused an accident resulting in death (life imprisonment) or bodily harm (10 years' imprisonment).

Finally, specifically in terms of alcohol-impaired driving, Bill C-2 restricts challenges in court to the blood-alcohol concentration test result. While previously a defendant could call on witnesses to testify to the fact that he or she had drunk only small amounts of alcohol, or that he or she was drinking at a rate at which the alcohol consumed would have been absorbed and eliminated by the accused's body, Bill C-2 limits the use of "evidence to the contrary" to evidence tending to show that the breathalyzer was malfunctioning or was operated improperly, and that the concentration of alcohol in the accused's blood would not have exceeded 80 milligrams of alcohol in 100 millilitres of blood at the time when the offence was alleged to have been committed.

BACKGROUND

A. Parliamentary and Government Studies

Parliament considered the issue of drug-impaired driving in May 1999, when the House of Commons Standing Committee on Justice and Human Rights released its report entitled *Toward Eliminating Impaired Driving*.(47) In this report, the Committee recognized that drugs play a contributory role in some fatal motor vehicle accidents, and that the extent of drug-impaired driving has been underestimated because police have no easy means to test for drugs under the current legislation. The Committee asserted a clear need to implement better measures for detecting drug-impaired driving and for obtaining the evidence necessary for successful prosecution.

However, the Committee pointed out several obstacles to achieving this goal. For example, the *Criminal Code* requires that police have "reasonable and probable grounds" to suspect impairment before they can administer testing; the Committee noted that Parliament would have to provide clear guidance on the scope of "reasonable and probable grounds" if refusal to comply with testing was to become a criminal offence. As well, there was an apparent lack of a single non-invasive test for detecting the presence of drugs that could impair a driver. Ultimately, a blood sample would probably be required. The Committee approved of DRE testing, but commented that the provinces have ultimate control of training in this area. As well,

(47) Report 21, *Toward Eliminating Impaired Driving*, May 1999, http://cmte.parl.gc.ca/cmte/CommitteePublication.aspx?COM=116&Lang=1&SourceId=36242.

the Committee emphasized the need to consider the Charter implications of any drug testing, as the proposed tests might be more intrusive and time-consuming than those used to detect alcohol impairment.

The Committee made two recommendations on drug-impaired driving. The first was that section 256 of the *Criminal Code* be amended to allow a justice to authorize the taking of a blood sample to test for the presence of alcohol or drugs, based on reasonable and probable grounds that an impaired driving offence has been committed. As well, the Committee recommended that the Minister of Justice consult with the provinces and territories to develop legislative proposals for obtaining better evidence against suspected drug-impaired drivers.

In September 2002, the Senate Special Committee on Illegal Drugs issued a report entitled *Cannabis: Our Position for a Canadian Public Policy*.(48) This report found that between 5% and 12% of drivers may drive while under the influence of cannabis. Emphasizing the use of cannabis among young drivers, the report stated that this percentage increases to over 20% for men under 25. The Committee stated that cannabis alone, particularly in low doses, has little effect on the skills involved in driving and thus is not, in itself, a traffic risk. However, although cannabis use often leads to a more cautious style of driving, it still has a negative impact on decision time and trajectory, making it difficult for drivers to stay in their lanes. In addition, a significant percentage of impaired drivers test positive for both cannabis and alcohol together, and the effects of cannabis when combined with alcohol are more significant than for alcohol alone.

The Senate Committee also pointed out that there is no reliable, non-intrusive, rapid roadside testing method for drugs. Blood is the best medium for testing for cannabis; urine cannot screen for recent use; saliva could work, but no rapid commercial tests are reliable enough. However, the visual recognition method used by police had yielded satisfactory results in the past. The Committee emphasized that it was essential to conduct further studies in order to develop a rapid testing tool, and to learn more about the driving habits of cannabis users.

As a final recommendation with regard to the need to prohibit drug-impaired driving, the Committee suggested two amendments to the *Criminal Code*: lowering the permitted alcohol level to 40 milligrams of alcohol per 100 millilitres of blood when combined with drugs, especially cannabis; and admitting evidence from expert police officers trained in detecting persons operating vehicles under the influence of drugs.

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(48) *Cannabis: Our Position for a Canadian Public Policy*, September 2002, http://www.parl.gc.ca/common/Committee_SenRep.asp?Language=E&Parl=37&Ses=1&comm_id=85.

Responding to the Standing Committee on Justice and Human Rights' 1999 recommendations, the Department of Justice's Working Group on Impaired Driving consulted extensively with provinces and territories on the issue, and published the *Drug-Impaired Driving: Consultation Document*(49) in October 2003. In reaction to apparent concerns that many drug-impaired drivers were not voluntarily participating in testing under the current regime, the Working Group emphasized the need for a legislated system that would allow police to demand that drivers suspected of being impaired submit to testing.

The Working Group outlined two main options. The first of these was to set a legal limit on drugs in the body. However, it recognized that a zero limit might not be appropriate, as it would catch drivers who had cannabis in their system from weeks earlier and who were not currently impaired.

The second option was to legislate in relation to the ability of police officers to demand drug tests. Essentially outlining the scheme established in Bill C-2, with some exceptions, the Working Group suggested that a certified SFST officer could demand a physical sobriety test, or take a saliva or sweat sample at the roadside, based on a reasonable suspicion of drug-impairment. Failure on these tests would constitute reasonable grounds to conduct a DRE evaluation at a police station. The police could then demand a confirmatory bodily fluid sample (blood, urine, saliva) based on a reasonable belief that the driver had committed a section 253(*a*) offence involving a drug or a combination of drugs and alcohol in the previous three hours. Both the DRE and sample test results would be admissible in evidence, and refusal to submit to such tests would constitute an offence under the *Criminal Code*.

However, the Working Group also emphasized that because of Charter rights sensitivities, legislators would have to give serious consideration to current *Criminal Code* provisions permitting demands for evidential breath or DNA samples that have already survived Charter challenges. Legislators would also have to consider the point in the process at which a suspect must be given information on his or her right to counsel.

The House of Commons Special Committee on the Non-medical Use of Drugs published the most recent parliamentary report involving drug-impaired driving in the fall of 2003.(50) It briefly called for Parliament to develop a strategy to address the issue of drug-

(49) *Drug-Impaired Driving: Consultation Document*, October 2003, http://www.justice.gc.ca/en/cons/did/toc.html.

(50) Report 1, Bill C-38, An Act to Amend the Contraventions Act and the Controlled Drugs and Substances Act, November 2003, http://www.parl.gc.ca/committee/CommitteePublication.aspx? SourceID=66174.

impaired driving following a review of a bill proposing to decriminalize possession of small amounts of marijuana. On 26 April 2004, Bill C-32 was introduced in the House of Commons and would have amended the *Criminal Code* to deal with drug-impaired driving. This bill was later referred to committee for study before second reading, but died on the *Order Paper* in May 2004 when an election was called. The following government introduced the substantially similar Bill C-16 in the House of Commons on 1 November 2004. The Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness reported that amended bill back to the House of Commons before second reading on 14 November 2005, but the bill died on the *Order Paper* in late November 2005 when an election was called. Finally, on 21 November 2006, the current government introduced the substantially similar Bill C-32 in the House of Commons. Bill C-32 was reported with amendments by the Standing Committee on Justice and Human Rights on 20 June 2007 but died on the *Order Paper* when Parliament was prorogued in September 2007.

B. National and International Measures

Although DRE testing has not yet been implemented through the *Criminal Code*, this form of testing is already widely used in most U.S. states, Australia, New Zealand, Germany, Norway and Sweden. Even in Canada, police forces are already using DRE testing in Quebec, British Columbia, Alberta, Ontario, Nova Scotia, and Manitoba, although only in cases where the driver participates voluntarily. The tests have survived court challenges up to the United States Supreme Court.(51) A National DRE Coordinator is currently working with law enforcement agencies across the country and developing an operational framework for DRE in Canada. As of November 2004, there were 1,794 police officers trained in standardized field sobriety tests and 106 certified DRE-trained officers in Canada.(52)

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(51) Department of Justice, Press Release, "Government of Canada Introduces Measures to Strengthen Investigations of Drug-Impaired Driving," 26 April 2004, http://www.justice.gc.ca/en/news/nr/2004/doc_31162.html; Ken Pole, "Future of Proposed Drug Statutes Vulnerable to Political Pressure," *Medical Post*, 8 June 2004, p. 10; Mark Asbridge, "Drugs and Driving: When Science and Policy Don't Mix," *Canadian Journal of Public Health*, Vol. 97, No. 4, July-August 2006, pp. 283-285.

(52) Anita Neville, House of Commons, *Debates*, 2 November 2004 (part A), p. 1109.

DESCRIPTION AND ANALYSIS

A. Clarification and Definition – Drug-Impaired Driving
(Clauses 18-19)

In terms of the primary, drug-impaired driving, scope of the proposed legislation, clauses 18 and 19 of Bill C-2 provide some preliminary clarification to support the new provisions in the *Criminal Code*. Clause 18 renumbers the primary impaired driving provision, section 253, as section 253(1), and adds a new subsection clarifying that the phrase "impairment by alcohol or a drug" includes impairment by a combination of alcohol and a drug.

Clauses 19(1) and (2) amend the definitions contained in section 254(1) by expanding the scope of their application to include new provisions laid out in Bill C-2, and to add a definition of "evaluating officer" as a peace officer who is qualified under the regulations to conduct DRE evaluations.

B. New Section 254 – Drug Testing Provisions
(Clauses 19, 20, and 23)

The basis of the new testing system for drug-impaired driving is laid out in clause 19(3), which clarifies and expands the language used in sections 254(2) to (6) of the *Criminal Code*.

Section 254(2) now contains the first phase of testing for drug-impaired driving (SFST), stating that where a roadside peace officer has a reasonable suspicion that a driver has alcohol or a drug in his or her body and has operated a motor vehicle in the preceding three hours, the officer may require the driver to, forthwith, a) perform an SFST physical coordination test as prescribed by the regulations to determine whether further tests for alcohol or drug use must be undertaken, and b) in the case of alcohol, provide a breath sample. The officer may make a video recording of the SFST for greater certainty.

The updated section 254(3) mirrors its predecessor by providing that a peace officer may demand a breath or blood sample where the officer has reasonable grounds to believe that a person has been driving while impaired by alcohol within the preceding three hours.

Sections 254(3.1) to (3.4) are entirely new. Section 254(3.1) contains the second phase of testing for drug-impaired driving (DRE), which will generally follow when a suspect

fails the SFST. As soon as practicable, a peace officer who reasonably believes that a person has been driving while impaired by a drug, or a combination of alcohol and a drug, within the preceding three hours may demand that the driver submit to a DRE[53] conducted by a DRE officer at a police station. The officer may make a video of this evaluation.

Complementing these provisions, section 254(3.3) states that, as soon as practicable, a DRE officer may demand a breath sample where the officer has reasonable grounds to suspect that the driver has alcohol in his or her body and the roadside peace officer did not request a test under sections 254(2) or (3).

Section 254(3.4) contains the final phase of testing for drug-impaired driving – a bodily fluid sample. As soon as practicable upon completion of the DRE evaluation, if the DRE officer has reasonable grounds to believe that the driver's ability to operate a vehicle is impaired by a drug or a combination of alcohol and a drug, the DRE officer may demand that the driver provide a saliva, urine, or blood sample.

Finally, sections 254(4) to (6) are simply reiterated or clarified to encompass the new provisions. Most notably, section 254(4) states that samples of blood may be taken only by a medical practitioner or technician who is satisfied that taking samples would not cause injury to the individual. Clause 23 of the bill updates the former section 257(2) to ensure that neither the physician nor the technician will be guilty of a criminal offence or liable at civil law for taking a blood sample under sections 254(3) or (3.4) when this is reasonably and necessarily done.

Because the precise specifications for the tests laid out in section 254 are not outlined in the *Criminal Code*, clause 20 of Bill C-2 adds section 254.1, allowing the Governor in Council to make regulations on the qualifications and training of DRE officers, prescribing SFST physical coordination tests, and prescribing DRE tests and procedures.

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(53) Left to be implemented by regulations, the exact requirements of the DRE evaluation are not laid out in Bill C-2. The evaluation is a standardized procedure carried out by DRE-certified officers that determines impairment by drugs, or a combination of drugs and alcohol, but does not distinguish between over-the-counter, prescription, and illegal drugs. These tests can identify depressants, inhalants, PCP, cannabis, stimulants, hallucinogens, and narcotics. They involve a breath test to rule out alcohol, an interview of the arresting officer, an eye examination, divided attention tests, an examination of vital signs and typical injection sites, and an interview of the subject. DRE standards are laid down by the International Association of Chiefs of Police. To obtain DRE certification, an officer must pass eight exams and two practical tests, including performing 12 DRE evaluations on four different classes of drugs that are subsequently confirmed by toxicology results. For more information, see the Department of Justice Backgrounder, "Drug Recognition Expert Testing," 26 April 2004, http://www.justice.gc.ca/en/news/fs/2004/doc_31166.html.

C. Punishment
(Clause 21)

As in the earlier section 254(5) “refusal to comply” offence dealing solely with alcohol-related testing, refusal by a driver to comply with drug tests is now also a criminal offence. Section 255(4) holds that a person convicted under section 253 or 254(5) is deemed to be convicted for a subsequent offence if they have already been convicted under these provisions.

Clauses 21(1) and (2) of Bill C-2 increase the penalties for alcohol- and drug-impaired driving offences laid out in section 255(1). For a first offence, the minimum fine will increase from $600 to $1,000; for a second offence, the minimum term of imprisonment will increase from 14 days to 30 days; and for each subsequent offence, the minimum term of imprisonment will increase from 90 to 120 days. Where the offence is punishable on summary conviction, the maximum term of imprisonment will increase from 6 months to 18 months.

Clause 21(3) clarifies language concerning the punishment laid out in section 255 in order to incorporate the new drug-impaired driving provisions. As before, sections 255(2) and (3) hold that an alcohol- or drug-impaired driving offence under section 253(1)(*a*) that causes bodily harm is punishable by up to 10 years’ imprisonment, and that such an offence that causes death is punishable by life imprisonment. Two new offences for impaired driving causing bodily harm or death are also added with the same penalties: driving with a blood-alcohol concentration of over 80 milligrams of alcohol in 100 millilitres of blood under section 253(1)(*b*) and causing death (life imprisonment) or bodily harm (10 years’ imprisonment); and refusing to provide a breath, saliva, urine or blood sample while the accused knew or ought to have known that his or her operation of a vehicle had caused an accident resulting in death (life imprisonment) or bodily harm (10 years’ imprisonment).

D. Technical and Evidentiary Requirements
(Clauses 22, 24, and 25)

Clauses 22 and 24 clarify the language in sections 256(5) and 258 so as to incorporate the new offences and drug-impaired driving provisions. Clause 22 updates section 256(5), which still holds that when a section 256(1) warrant to obtain a blood sample is executed, the peace officer shall give a copy to the person from whom the samples were taken.

Clauses 24 and 25 deal with the ability of prosecutors to use test results as evidence in court proceedings. Charges will not be laid unless a toxicology report confirms preliminary DRE evaluations. Clarifying the language on procedure and evidence, clauses 24(2) to (8) update section 258(1) to incorporate the new drug testing provisions and to ensure that the results of such tests can be used as evidence in drug-impaired driving prosecutions, as is currently the case with alcohol-impaired driving prosecutions. Essentially, the results of analyses of breath, blood, urine, or other bodily fluid samples may be admitted in evidence even if the accused was not warned prior to the taking of the sample that he or she need not consent to the procedure, nor that the result might be used in evidence.

Clauses 24(3) to (6) update section 258(1) to restrict challenges in court to the blood-alcohol concentration test result. While previously a defendant could call on witnesses to testify that he or she had drunk only small amounts of alcohol, or that he or she was drinking at a rate at which the alcohol consumed would have been absorbed and eliminated by the accused's body, Bill C-2 limits the use of "evidence to the contrary" to evidence tending to show that the breathalyzer was malfunctioning or was operated improperly, that the malfunction or improper operation resulted in the determination that the concentration of alcohol in the accused's blood exceeded 80 mg of alcohol in 100 ml of blood, and that the concentration of alcohol in the accused's blood would not have exceeded 80 milligrams of alcohol in 100 millilitres of blood at the time when the offence was alleged to have been committed. Clause 24(6) ensures that the signature of the technician who certifies the breathalyzer printout is sufficient evidence of the facts alleged in that printout, without necessitating proof of the signature or official character of that technician. In essence, the Alcohol Test Record printed by the breathalyzer that confirms that it is in good working order, will be admitted as evidence.

Clarifying the language in sections 258(2) to (6) to incorporate the new provisions, clause 24(9) of the bill provides that unless a person is required to give a sample under sections 254(2)(*b*), (3), (3.3), or (3.4), evidence of failure to give a sample is not admissible at trial, nor may it be made the subject of comment at trial. Evidence of failure to comply with a demand to give a sample under section 254 is admissible as evidence at trial in respect of a section 253(1)(*a*) offence, and the court may draw an adverse inference from such failure to comply. If, at the time a sample is taken, an additional sample is taken and retained, a judge may release one sample for testing if so requested by the accused, subject to any necessary conditions to ensure that the sample is preserved for use in proceedings in respect of which the sample was taken. A sample of the accused's blood taken to test alcohol concentration under

section 254(3) or 256, or with the accused's consent, may be tested to determine any concentration of drugs in the blood. Finally, an accused may require the attendance of the medical practitioner, analyst, or technician who signed a certificate described in section 258(1) for the purposes of cross-examination.

Clause 25 of the bill adds a new provision to the *Criminal Code* concerning the unauthorized use of samples. New section 258.1(1) states that samples taken under sections 254(2)(*b*), (3), (3.3) or (3.4), or 256, or with the consent of the accused from whom it was taken on the request of a peace officer, or medical samples that are provided by consent and subsequently seized under a warrant, may be used only for the analyses referred to in those provisions. Section 258.1(2) holds that the results of tests and sample analysis taken under sections 254(2) to (3.4), or 256, or with consent of the accused from whom it was taken on the request of a peace officer, or medical samples that are provided by consent and subsequently seized under a warrant, may be disclosed or used only in the course of a proceeding for or an investigation of an offence under sections 220, 221, 236, and 249 to 255, an offence under the *Aeronautics Act*, an offence concerning the use of drugs or alcohol under the *Railway Safety Act*, or in relation to a provincial offence. However, the results of physical coordination tests, DRE evaluations, or analyses referred to in subsection (2) may be disclosed to the individual to whom they relate, or to any other person if made anonymously and for statistical or other research purposes. Finally, the restrictions noted above do not apply to persons who are using samples for medical purposes that are subsequently seized under a warrant (new section 258.1(3)). The new section 258.1(4) creates a summary conviction offence for anyone who contravenes sections 258.1(1) or (2).

E. Prohibition Orders (Clauses 26-27)

Clause 26 amends section 259 to include operation of a motor vehicle in Canada while disqualified from doing so under section 259 as an offence for which a sentencing judge is required to impose an order prohibiting an offender from operating a motor vehicle, vessel, aircraft or railway equipment. In addition to the period for which the offender may be incarcerated, for a first offence, this order shall be for 1 to 3 years; for a second offence, for 2 to 5 years; and for each subsequent offence, for a minimum of 3 years. The clause also ensures that the new impaired driving offences causing death or bodily harm (sections 255(2.1) to (3.2)) may also be subject to such an order.

Clause 27 adds a new section 261(1.1) to ensure that upon appeal to the Supreme Court of Canada, only a judge of the court being appealed from can stay an order made under sections 259(1) or (2).

F. Consequential Amendments (Clauses 55, 59, and 60)

The changes to the *Criminal Code* made by Bill C-2 also necessitate consequential amendments to other legislation to incorporate the new drug testing provisions.

Clause 55 amends the *Aeronautics Act*. Section 8.6 of that Act is amended to state that a sample relating to the presence of alcohol or a drug in the body obtained under the *Criminal Code* is admissible in *Aeronautics Act* proceedings. The provisions of section 258 of the Criminal Code, except section 258(1)(a), apply with any necessary modifications.

Clause 59 amends the *Customs Act*. Section 163.5(2) of that Act is amended to grant a customs officer the powers of a peace officer under sections 254 and 256 of the *Criminal Code*. If a blood or breath sample, or DRE testing, is required, a person may be required to accompany a peace officer for that purpose.

Clause 60 amends the *Railway Safety Act*. Section 41(7) of that Act is amended to state that a sample relating to the presence of alcohol or a drug in the body obtained under the *Criminal Code* is admissible in *Railway Safety Act* proceedings involving contraventions respecting the use of alcohol or a drug. The provisions of section 258 of the *Criminal Code* apply with any necessary modifications.

PART 4 – BAIL HEARINGS FOR OFFENCES INVOLVING FIREARMS OR OTHER REGULATED WEAPONS (CLAUSE 37)[54]

The provisions in Bill C-2 relating to bail for offences involving firearms derive from Bill C-35, An Act to amend the Criminal Code (reverse onus in bail hearings for

(54) Formerly Bill C-35, An Act to amend the Criminal Code (reverse onus in bail hearings for firearm-related offences. For more information on Bill C-35, see the Legislative Summary, *Bill C-35: An Act to Amend the Criminal Code (reverse onus in bail hearings for firearm-related offences)*, LS-549E, Parliamentary and Information Research Service, Library of Parliament, Ottawa, 19 February 2007, http://www.parl.gc.ca/39/1/parlbus/chambus/house/bills/summaries/c35-e.pdf.

firearm-related offences), which was introduced in the House of Commons on 23 November 2006 and adopted by the House without amendment on 5 June 2007. The intent of the bill was to restrict the ability of persons charged with certain offences related to firearms to be released on bail. Before the prorogation of Parliament, Bill C-35 had received first reading in the Senate on 5 June 2007.

BACKGROUND

A. Purpose

The purpose of the bill's provisions is to restrict, during criminal proceedings, the judicial interim release[55] 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*:

- 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 37 (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 37(5)).

The bill's provisions apply 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.[56] The bill's provisions concern 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.[57] In deciding whether to release the accused, courts considered factors such as the

(55) The expression "bail" is used synonymously.

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

(57) 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.

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.(58)

In 1972, the *Bail Reform Act*(59) 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.(60)

A few years later, the *Criminal Law Amendment Act, 1975*(61) 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.(62)

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*(63) 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.(64) 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.

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(58) 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.

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

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

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

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

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

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

In 1992, the Supreme Court of Canada recognized the validity of the reverse onus provisions with relation to drugs[65] (*R.* v. *Pearson*)[66] and in the commission of another offence while on bail (*R.* v. *Morales*).[67] 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[68] in 1997 and 2001, as well as the *Anti-terrorism Act*[69] in 2001, reversed the onus in cases where the accused was charged with criminal gang activity or terrorism.[70]

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,[71] except in the case of murder.[72] Release conditions, such as abstaining from possessing a firearm, may be imposed.[73] An accused who breaches the conditions may be imprisoned.[74]

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:

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(65) Ibid.

(66) [1992] 3 S.C.R. 665.

(67) [1992] 3 S.C.R. 711.

(68) *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).

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

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

(71) 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.

(72) 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).

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

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

  - 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.(75)

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.(76)

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;
- 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.(77)

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.

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

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

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

In the case of an offence involving violence against a person or certain specified offences,[78] 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.[79]

In addition to the conditions mentioned above, a judge may take a recognizance, but without deposit of money or other valuable security.[80] 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
- 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.[81]

(78) 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).

(79) Ibid.

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

(81) 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.

(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);(82)
- an offence committed while the accused was on bail;
- an offence involving organized crime;
- a terrorist offence;
- an 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.(83)

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.

(ii) 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.(84) Section 11(*e*) of the Charter protects the right of the accused "not to be denied reasonable bail without just cause."(85)

As mentioned above, the Supreme Court has recognized the constitutional validity of the current provisions reversing the burden of proof in offences involving drugs(86) and offences committed during release on bail.(87)

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

(83) 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)).

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

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

(86) Ibid.

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

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.(88)

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.(89)

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.

D. Review of the Order

The accused and the prosecutor(90) 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.(91)

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.(92)

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

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

(90) 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)).

(91) Section 680 of the Code.

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

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.(93)

DESCRIPTION AND ANALYSIS

A. Reverse Onus for Certain Offences Involving Firearms or Other Regulated Weapons (Clause 37(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,(94) clause 37(2) adds certain offences involving firearms or other regulated weapons.(95) The 12 indictable offences are as follows:

- weapons trafficking;
- possession of weapons for the purpose of trafficking;
- 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.(96)

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

(94) 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.

(95) 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).

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

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.(97)

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.

B. Reasons Justifying Release or Detention (Clause 37(5))

Clause 37(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 37(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*.(98)

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(97) 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).

(98) [2002] 3 S.C.R. 309, s. 12.

PART 5 – DANGEROUS OFFENDERS, LONG-TERM OFFENDERS AND RECOGNIZANCES TO KEEP THE PEACE (CLAUSES 39-53; 56)[99]

The changes to the provisions concerning dangerous offenders, long-term offenders and recognizances to keep the peace in Bill C-2 derive from Bill C-27, An Act to amend the Criminal Code (dangerous offenders and recognizance to keep the peace), which was introduced and received first reading in the House of Commons on 17 October 2006 and was sent to a special legislative committee following second reading on 4 May 2007. The goal of Bill C-27, and of the corresponding clauses in Bill C-2, is to amend the *Criminal Code* to facilitate the declaration of certain convicted persons as dangerous offenders. One modification in Bill C-2 from Bill C-27 is the possibility for a sentence of detention for an indeterminate period in the case of an offender who has breached a long-term supervision order. It should be noted that Bill C-2 retains the dangerous offender presumption that was provided in Bill C-27 for three primary designated offences. Before the prorogation of Parliament, the legislative committee had held six meetings on the study of Bill C-27.

BACKGROUND

A. Purpose of the Bill's Provisions and Principal Amendments Made

The bill's provisions address, in two ways, the problem of offenders who have committed one or more violent or sexual offences. First, it tightens the rules that apply to dangerous offenders in the case of repeat offenders. Second, it extends the recognizance to keep the peace and clarifies the terms of recognizances in order to prevent repeat offences. More specifically, the bill makes the following amendments to the *Criminal Code*:

- an offender convicted of a third violent or sexual offence ("primary designated offence") for which it would be appropriate to impose a sentence of two years or more is presumed to be a dangerous offender, and will therefore be incarcerated for as long as the offender presents an unacceptable risk to society (subclause 42(2) of the bill);

(99) Formerly Bill C-27, An Act to amend the Criminal Code (dangerous offenders and recognizance to keep the peace. For further information on Bill C-27, see the Legislative Summary, *Bill C-27: An Act to amend the Criminal Code (dangerous offenders and recognizance to keep the peace)*, LS-544E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 10 January 2007, http://www.parl.gc.ca/39/1/parlbus/chambus/house/bills/summaries/c27-e.pdf.

- the possibility for a sentence of detention for an indeterminate period in the case of an offender who has breached a long-term supervision order (clause 43 of the bill);
- a recognizance to keep the peace may be ordered for a period that does not exceed two years in the case of a defendant who has previously been convicted of a violent or sexual offence (clause 52 and subclause 53(1) of the bill);
- the conditions of a recognizance to keep the peace in relation to a violent or sexual offence may include participation in a treatment program, wearing an electronic monitoring device or requiring the defendant to observe a curfew (clause 52 and subclause 53(2) of the bill).

B. The Dangerous Offender and Long-term Offender Regime[100]

1. Purpose of the Regime and Differences Between Dangerous Offenders and Long-term Offenders

The provisions applicable to offenders presenting a high risk of recidivism are set out in Part XXIV of the *Criminal Code*. It is important to note that these rules apply at the sentencing stage.

The primary objective of this regime is to protect the public from offenders who have committed "serious personal injury offences"[101] (dangerous offenders[102] or long-term offenders[103]) or a sexual offence[104] (long-term offenders) and who continue to pose a threat to

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(100) The information that follows is taken from Dominique Valiquet, *The Dangerous Offender and Long-term Offender Regime*, PRB 06-13E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 4 April 2006, http://www.parl.gc.ca/information/library/PRBpubs/prb0613-e.htm.

(101) Section 752 of the Code defines the term as follows:

> "Serious personal injury offence" means
>
> (*a*) an indictable offence, other than high treason, treason, first degree murder or second degree murder, involving
>
> (i) the use or attempted use of violence against another person, or
>
> (ii) conduct endangering or likely to endanger the life or safety of another person or inflicting or likely to inflict severe psychological damage on another person,
>
> and for which the offender may be sentenced to imprisonment for ten years or more, or
>
> (*b*) an offence or attempt to commit an offence mentioned in section 271 (sexual assault), 272 (sexual assault with a weapon, threats to a third party or causing bodily harm) or 273 (aggravated sexual assault).

(102) Subsection 753(1) of the Code.

(103) Paragraph 753.1(1)(*a*) of the Code. See *R.* v. *Weasel*, (2001) 181 C.C.C. (3d) 358 (C.A. Sask).

(104) It must be one of the sexual offences listed in paragraph 753.1(2)(*a*) of the Code – that is, an offence under section 151 (sexual interference), 152 (invitation to sexual touching) or 153 (sexual exploitation), subsection 163.1(2) (making child pornography), subsection 163.1(3) (distribution, etc., of child pornography), subsection 163.1(4) (possession of child pornography), subsection 163.1(4.1) (accessing

society.[105] A very high proportion of these criminals have committed sexual offences. Indeed, in roughly 82% and 76.5% of cases, respectively, the offence that gave rise to the dangerous offender or long-term offender designation ("the underlying offence") was a sexual offence.[106]

Within this very limited group, dangerous offenders are, by definition, considered as being at higher risk to reoffend than long-term offenders and, unlike the situation for the latter,[107] there is no possible treatment that could control this risk in the community.[108] Thus, a long-term offender could, after being sentenced to a term of imprisonment of two years or more (other than life imprisonment),[109] be released under the conditions of a long-term supervision order;[110] by contrast, a dangerous offender will have to serve a prison sentence of indeterminate length.[111]

2. Background

In response to the recommendations made in 1938 by the Archambault Commission,[112] the first habitual offenders act was adopted in Canada in 1947.[113] An "habitual offender" was a person who had been convicted of three criminal offences. An

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(cont'd)

child pornography), section 172.1 (luring a child), subsection 173(2) (exposure) or section 271 (sexual assault), 272 (sexual assault with a weapon) or 273 (aggravated sexual assault) – or serious conduct of a sexual nature in the commission of another offence.

(105) Subsection 753(1) of the Code (dangerous offenders) and para. 753.1(1)(*b*) (long-term offenders). See *R.* v. *Lyons*, [1987] 2 S.C.R. 309, 350; *R.* v. *Johnson*, [2003] 2 S.C.R. 357, para. 2.

(106) Public Safety and Emergency Preparedness Canada, *Corrections and Conditional Release Statistical* Overview, December 2005, pp. 103 and 105. In the general prison population, the proportion is about 12.5% (Shelly Trevethan, Nicole Crutcher and John-Patrick Moore, *A Profile of Federal Offenders Designated as Dangerous Offenders or Serving Long-Term Supervision Orders*, Research Branch, Correctional Service Canada, December 2002, p. 22). As regards the database containing information on sexual offenders, see the *Sex Offender Information Registration Act*, S.C. 2004, c. 10 (came into force on 15 December 2004) and sections 490.011 *et seq.* of the Code.

(107) Paragraph 753.1(1)(*c*) of the Code.

(108) Subsection 753(1) of the Code. See *R.* v. *Ménard*, REJB 2002-35993 (Que. C.A.).

(109) Subsections 753.1(3) and 753.1(4) of the Code.

(110) Of a maximum duration of 10 years (*ibid*).

(111) Subsection 753(4) of the Code. The reference is to "preventive detention."

(112) Royal Commission to Investigate the Penal System of Canada, *Report of the Royal Commission to Investigate the Penal System of Canada*, Ottawa, 1938.

(113) *An Act to amend the Criminal Code*, S.C. 1947, c. 55. It was inspired by an act in the United Kingdom, the *Prevention of Crime Act, 1908* (8 Edw. 7, c. 59).

offender of this type, and, later on, an offender who was a "criminal sexual psychopath,"[114] could be imprisoned indefinitely. The rules were criticized, however, for applying to non-dangerous offenders as well[115] and for requiring recidivism as an eligibility condition.[116]

Feeling that the applicable regime did not adequately protect the public, the *Criminal Law Amendment Act, 1977*[117] started from scratch and enacted the current rules on dangerous offenders. In 1997, Bill C-55 introduced the long-term offender category in order to monitor these offenders in the community on a long-term basis because, even though they present a risk of recidivism, they cannot be characterized as dangerous offenders.[118]

3. Statistics

a. A Limited Group

Between 1978 and April 2006, a total of 403 criminals were designated dangerous offenders.[119] In July 2006, there were 333 in the prison population and 18 on supervised parole.[120] While, on average, 14 people a year are designated dangerous offenders, that number has generally increased in recent years, rising from 8 (1978 to 1987) to 22 offenders a year (1995 to 2004).[121] According to April 2006 data, there were no women in this group, while the Aboriginal population accounted for 21% of dangerous offenders.[122]

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(114) That is, a person incapable of controlling his sexual impulses (*An Act to amend the Criminal Code*, S.C. 1948, c. 39, s. 43). Subsequent amendments would replace this expression by the term "dangerous sexual offenders" (*An Act to amend the Criminal Code*, S.C. 1960-61, c. 43, s. 32).

(115) For example, offenders convicted of property offences.

(116) See, for example, Committee on Corrections, *Report of the Canadian Committee on Corrections: Toward Unity: Criminal Justice and Corrections* (Ouimet Report), Ottawa, 1969.

(117) S.C. 1976-77, c. 53 (came into force on 15 October 1977).

(118) *An Act to amend the Criminal Code (high-risk offenders)*, S.C. 1997, c. 17 (came into force 1 August 1997). This act also introduced other amendments, such as extending a dangerous offender's period of ineligibility for parole (from three to seven years). Note also that, in 1995, a national system to detect high-risk offenders was created: the National Flagging System (NFS), which is maintained by the Royal Canadian Mounted Police (RCMP) and other police services.

(119) Public Safety and Emergency Preparedness Canada, *Corrections and Conditional Release Statistical Overview*, December 2006, pp. 103 and 104. A large number of criminals were designated dangerous offenders in Ontario (168) and British Columbia (90), followed by Quebec (38), Alberta (31), and Saskatchewan (29).

(120) Public Safety and Emergency Preparedness Canada, *Dangerous Offender Designation*, http://www.psepc-sppcc.gc.ca/prg/cor/tls/dod-en.asp.

(121) Public Safety and Emergency Preparedness Canada (2005), p. 103. The lowest number of persons designated dangerous offenders was in 1978 (3) and the highest in 2001 (29).

(122) Public Safety and Emergency Preparedness Canada (2006), p. 103.

From 1 August 1997 to 9 April 2006, 384 criminals were designated long-term offenders, an average of some 43 a year.(123) As of the later date, there were four women in this group. It is worth noting that, according to 2001 data, the number of long-term offenders has increased continuously since the new provisions came into force in 1997.(124)

b. Offences

Ninety-three percent of dangerous offenders and 98% of long-term offenders had at least one previous conviction as adults.(125) Many dangerous offenders and long-term offenders are habitual criminals. At the time they were designated, 45% of dangerous offenders and 26% of long-term offenders had 15 or more previous convictions on their adult record.(126) This cycle of criminality often began at a young age. According to a 1996 study, 75% of dangerous offenders had a juvenile record and 96.6% showed evidence of forcible sexual activity before the age of 16.(127) With regard to the adults, the average age on first conviction was 22 (dangerous offenders) or 25 (long-term offenders).(128) However, the average age at the time of designation was around 40.(129)

When the underlying offence is not a sexual offence(130) – typically sexual assault or an act of paedophilia – it is still serious(131) and involves violence and coercion,(132) typically armed assault(133) or kidnapping or forcible confinement.

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(123) Ibid., pp. 105 and 106. The majority were designated long-term offenders in Quebec (100), Ontario (91) or British Columbia (64).

(124) Trevethan, Crutcher and Moore (2002), p. 15.

(125) Ibid., p. 21.

(126) Ibid. Moreover, many dangerous offenders admit to having committed a large number of sexual offences for which they were not arrested – an average of 27 offences per offender. See James Bonta, Andrew Harris (Solicitor General of Canada) and Ivan Zinger, Debbie Carrière (Carleton University), *The Crown Files Research Project: A Study of Dangerous Offenders*, May 1996, http://ww2.psepc-sppcc.gc.ca/publications/corrections/199601_e.asp.

(127) Bonta *et al.* (1996).

(128) Trevethan, Crutcher and Moore (2002), p. 27.

(129) Ibid., pp. 19 and 27.

(130) In other words, in 18% (dangerous offenders) and 23.5% (long-term offenders) of cases (Public Safety and Emergency Preparedness Canada (2005), pp. 103 and 105).

(131) Trevethan, Crutcher and Moore (2002), p. 66. The dangerous offenders caused physical injury and serious psychological damage in 31% and 88% of cases, respectively. The percentages are 9% and 89% in the case of long-term offenders.

(132) Ibid., pp. 23, 26 and 60.

(133) Forty percent of dangerous offenders used a weapon while committing the underlying offence (ibid., p. 26).

c. Victims and the Risk of Recidivism

In cases where there have been previous offences, most dangerous offenders and long-term offenders have had three or more victims.(134) Female victims predominate.(135) Studies show that the majority of dangerous offenders (49%) and long-term offenders (61%) have victimized children.(136) As the factor most predictive of sex offence recidivism is a preference for children,(137) it is not surprising to learn that 98% of dangerous offenders and 90% of long-term offenders are classified as at high risk to re-offend. It should be noted that a majority of incarcerated dangerous offenders are placed in protective custody or administrative segregation.(138)

4. Existing Provisions of the *Criminal Code*

a. Offender Assessment

Before a Crown prosecutor submits a dangerous offender or long-term offender application, experts in corrections and mental health must assess the offender's behaviour in order to establish a psychological diagnosis.(139) In the case of a sexual offender, the sexual preferences and deviances will also be assessed. The assessment, which lasts a maximum of 60 days, is based on reasonable criteria for dangerousness(140) and on the possibility of supervising the offender in the community. The assessment report will be entered into evidence and the experts will be able to testify in court.

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(134) Ibid., p. 25. In other words, 80% of dangerous offenders and 75% of long-term offenders.

(135) Ibid., p. 26.

(136) Ibid., p. 25. Few offenders in the general prison population have victimized children.

(137) Bonta *et al.* (1996).

(138) Trevethan, Crutcher and Moore (2002), p. 10. Some 2004-2005 data provided by Correctional Service Canada show that it costs $113,591 per year to keep an offender in a maximum security institution (House of Commons, Standing Committee on Justice and Human Rights, *Evidence*, 1st Session, 39th Parliament, 8 November 2006, 1535 (Ian McCowan)).

(139) Section 752.1 of the Code. See Solicitor General of Canada, *High-Risk Offenders: A Handbook for Criminal Justice Professionals*, May 2001, http://ww2.psepc-sppcc.gc.ca/publications/corrections/200105_Handbook_e.asp.

(140) For example: preference for children; criminal social environment; mental problems; antisocial tendencies (characterized by impulsiveness, egocentricity, thrill-seeking, inability to control one's actions, as well as a criminal propensity and flagrant indifference to the welfare of others) (Bonta *et al.* (1996)).

b. Application for a Finding

The Crown attorney must obtain the consent of the province's attorney general and give the offender seven clear days' notice before the date of the application hearing.(141) The notice must contain the grounds for making the application.

Depending on whether it is a dangerous offender application or a long-term offender application, the prosecutor must prove, beyond a reasonable doubt, very specific elements.(142) The prosecutor must therefore convince a judge sitting without a jury(143) that the offender presents a high risk of recidivism.

In the case of a dangerous offender, the judge must first be convinced that the underlying offence constitutes a serious personal injury offence.(144) At present, there are two opposing lines of decision on the question of whether the underlying offence under paragraph 725(*a*) of the Code must involve a high degree of violence and dangerousness.(145) The first line holds that the underlying offence must involve an objectively serious degree of violence or dangerousness.(146) The second line – supported by the Supreme Court of Canada in *Currie*(147) – holds, rather, that emphasis must be placed on the offender's previous conduct, and accordingly that it is not necessary that the underlying offence involve a high degree of violence. It is enough that the underlying offence correspond to the definition of serious personal injury in the Code.

Second, after proving that the underlying offence constitutes a serious personal injury offence, the prosecutor must show that the offender represents a risk to society.(148) To do

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(141) Paragraphs 754(1)(*a*) and (*b*) of the Code.

(142) *R.* v. *B. (R.B.)*, (2002) 174 B.C.A.C. 243. Note that, before considering designating an offender a dangerous offender, the judge must determine whether a designation as a long-term offender would be more appropriate (*R.* v. *Johnson*, [2003] 2 S.C.R. 357, para. 40).

(143) Subsection 754(2) of the Code.

(144) Paragraphs 753(1)(*a*) and (*b*) of the Code.

(145) Pierre Béliveau and Martin Vauclair, *Traité général de la preuve et de procédure pénales*, 12th ed., Les Éditions Thémis, Montréal, 2005, paras. 2099A and 2100. The sexual assault offences in para. 725(*b*) need not be of any particular level of seriousness (*R.* v. *Hall*, (2004) 186 C.C.C. (3d) (Ont. C.A.)).

(146) *R.* v. *Neve*, (1999) 137 C.C.C. (3d) 97 (C.A. Alta.).

(147) [1997] 2 S.C.R. 260. See also *R.* v. *Goforth*, (2005) 27 C.R. (6th) 263 (Sask. C.A.), application to extend time for filing an application for leave to appeal denied [2005] S.C.C.A. No. 456; and *R.* v. *Trahan*, EYB 2006-100398 (C.Q. Que).

(148) Note that the offender need not represent a danger to society as a whole; it is enough that the offender represent a danger to one identifiable victim (e.g., a former spouse) (*R.* v. *Imming*, [2000] R.J.Q. 215 (Que. C.A.)).

that, the prosecutor must prove that the offender demonstrates a marked indifference to the consequences of his or her actions,(149) that his or her behaviour is so brutal that it cannot be controlled,(150) or that the offender is incapable of controlling his or her actions or sexual impulses and will in all probability(151) cause death or other serious injury if he or she is not put in preventive detention.(152)

In the case of a long-term offender, the underlying offence must, first of all, be a serious personal injury offence or a sexual offence covered by paragraph 753.1(2)(*a*) of the Code. The judge must then be convinced that there is reason to impose a prison sentence of two years or more (other than a life sentence),(153) that the offender presents a high risk of recidivism, and that there is a real possibility of managing that risk within the community.(154)

In both cases, evidence concerning the offender's morality or reputation is admissible in court.(155) While prior convictions are not essential to decide that the dangerous offender or long-time offender designation is warranted,(156) most of these offenders have a criminal record. The prosecutor may also enter into evidence behaviour that did not result in a charge.(157) The judge will also examine the offender's previous behaviour to help evaluate the potential dangerousness.(158) In order to determine whether the risk can be controlled within the community, the court will consider, among other things, the offender's age, character, family or community support, and the circumstances of the offence.(159)

(149) Subparagraph 753(1)(*a*)(ii) of the Code.

(150) Subparagraph 753(1)(*a*)(iii) of the Code.

(151) See *R.* v. *Currie*, [1997] 2 S.C.R. 260, para. 42.

(152) Subparagraph 753(1)(*a*)(i) and para. 753(1)(*b*) of the Code.

(153) Subsection 753.1(4) of the Code.

(154) Subsection 753.1(1) of the Code.

(155) Section 757 of the Code.

(156) *R.* v. *Langevin*, (1984) 39 C.R. (3d) 333; Solicitor General of Canada (2001).

(157) *R.* v. *Neve*, (1999) 137 C.C.C. (3d) 97 (C.A. Alta).

(158) See *R.* v. *Ménard*, REJB 2002-35993 (C.A. Que).

(159) *R.* v. *Blair*, (2002) 164 C.C.C. (3d) 453 (C.A. BC).

c. Sentencing

Since 1997, a dangerous offender designation has automatically resulted in an indeterminate prison sentence in a penitentiary.(160) This is the harshest sentence in Canada's system of criminal law.(161)

While no statutory release date is provided,(162) a dangerous offender will be eligible for day parole after four years' imprisonment(163) and for ordinary parole after seven years.(164) Dangerous offenders who are paroled are monitored for the rest of their lives.(165) If they continue to present an unacceptable risk to society, they will stay in prison for life.(166)

In the case of long-term offenders, a prison sentence of two years or more (other than a life sentence)(167) will be followed by a long-term supervision order (LTSO), of a maximum duration of 10 years, in order to ensure the offender is monitored in the community.(168) It is important to note that a long-term offender remains eligible for parole. The LTSO does not take effect until the expiration date of the warrant of committal.(169) When the

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(160) Subsection 753(4) of the Code. A large number of dangerous offenders have been incarcerated for over 20 years (Solicitor General of Canada (2001)).

(161) Department of Justice Canada, "Minister of Justice Proposes Stringent New Rules to Protect Canadians from Dangerous and High-risk Offenders," media release, 17 October 2006, http://canada.justice.gc.ca/en/news/nr/2006/doc_31908.html. See also *R.* v. *Ménard*, REJB 2002-35993 (Que. C.A.).

(162) See s. 127 of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20.

(163) Paragraph 119(1)(*b*) of the *Corrections and Conditional Release Act*. In day parole, the offender must return to the correctional institution or community residential facility each night.

(164) After that time, the Parole Board must assess the offender's file every two years (subsection 761(1) of the Code).

(165) Solicitor General of Canada (2001).

(166) See sections 101 and 102 of the *Corrections and Conditional Release Act* and Charles B. Davison, "The Next Step after *Johnson*: The Royal Prerogative of Mercy and Dangerous Offenders," *Criminal Reports*, Vol. 13 (6th), 2003, p. 227.

(167) Subsection 753.1(4) of the Code.

(168) Subsection 753.1(3) of the Code. The average length of the prison sentences imposed is a little more than four and a half years (Trevethan, Crutcher and Moore (2002), p. 24). In 70.7% of cases, the court imposed a monitoring period of 10 years (Public Safety and Emergency Preparedness Canada (2005), p. 105). The LTSO extends the period of monitoring in the community, because research shows that the recidivism period is longer in the case of sexual offenders (Trevethan, Crutcher and Moore (2002), p. 4); see Public Safety and Emergency Preparedness Canada, *Sex offender recidivism*, Research summary, Vol. 9, No. 4, July 2004, http://www.psepc-sppcc.gc.ca/res/cor/sum/cprs200407_1-en.asp?lang_update=1.

(169) Subsection 753.2(1) of the Code. The period required to review an application for pardon (three or five years) will not begin until the LTSO expires (s. 4 and 4.01 of the *Criminal Records Act*, R.S. 1985, c. C-47).

LTSO expires, it is still possible to lay an information every year under section 810.2 of the Code to ensure that the offender remains subject to conditions.(170)

While the order is in effect, the long-term offender must respect the conditions imposed by the National Parole Board (NPB).(171) Failure to observe the conditions of an LTSO is punishable by a maximum of 10 years' imprisonment.(172) As a preventive measure, the NPB may, in order to prevent a potential violation of the LTSO or to protect society, order the offender's imprisonment for a maximum period of 90 days.(173)

The Code allows an appeal of the dangerous offender or long-term offender designation.(174) The length of the supervision period imposed on a long-term offender under an LTSO may also be appealed.

C. Recognizances to Keep the Peace

1. Purpose of Recognizances

A recognizance to keep the peace is a preventive measure that has been part of the Canadian legal system since 1892.(175) Generally speaking, it allows someone – very often a peace officer – to lay an information before a judge if there are reasonable grounds to believe that a particular offence will be committed. While it is not necessary that the defendant have committed an offence, a reasonable fear of serious and imminent danger must be proved on a

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(170) See *R.* v. *Goodwin*, (2003) 168 C.C.C. (3d) 14 (B.C.C.A.).

(171) Subsections 134.1(1) and (2) of the *Corrections and Conditional Release Act*. For example: abstain from consuming intoxicating substances; not possess a firearm; participate in a program for sexual offenders or a 90-day residency condition (*Normandin* v. *Canada (Attorney General)*, 2005 FCA 345). The offender or the NPB can ask the court to reduce the supervision period or cancel the order (subs. 753.2(3) of the Code).

(172) Subsection 753.3(1) of the Code. The prison sentence will be served in a penitentiary, even if it is a sentence of less than two years (par. 743.1(3.1) of the Code). As of 10 April 2005, 12 long-term offenders (representing some 11% out of a total of 105 long-term offenders subject to an LTSO) had been convicted of a new offence while they were being supervised under the LTSO (Public Safety and Emergency Preparedness Canada (2005), p. 106). In those cases, the LTSO was suspended until the offender had finished serving the new sentence (subs. 753.4(1) of the Code).

(173) Paragraph 135.1(1)(*c*) and subs. 135.1(2) of the *Corrections and Conditional Release Act.*

(174) Section 759 of the Code.

(175) See Department of Justice of Canada, *Dangerous and High-Risk Offender Reforms*, Backgrounder, 17 October 2006, http://canada.justice.gc.ca/en/news/nr/2006/doc_31910.html.

balance of probabilities.[176] In some cases, the consent of the attorney general must be obtained before the information may be laid.[177]

2. Types of Recognizance

The Code provides for four types of recognizance to keep the peace, relating to different offences or designed to protect different people. Those recognizances relate to:

- personal injury to a person or to his or her spouse or child, or damage to his or her property (section 810 of the Code);
- offences of intimidating a justice system participant or a journalist, a criminal organization offence or a terrorism offence (sections 83.3 and 810.01 of the Code);
- certain sexual offences in respect of a person under the age of 14 years (section 810.1 of the Code); and
- serious personal injury offences (section 810.2 of the Code).

Bill C-2 deals with only the last two types of recognizances, relating to sexual offences in respect of a person under the age of 14 years (clause 52 of the bill) and serious personal injury offences (clause 53 of the bill).

3. Conditions and Length of Recognizance

A judge may order that a defendant enter into a recognizance to keep the peace and be of good behaviour. The judge may also impose other reasonable conditions on the defendant to prevent the commission of an offence. Those conditions may include:

- providing a bond;
- not possessing firearms or other weapons;
- not approaching or communicating with the person named in the recognizance;
- not coming into contact with or attending a public place where persons under the age of 14 years may be present; and
- reporting to a correctional or police authority.

At present, the maximum length of all types of recognizance is 12 months.

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(176) See *R.* v. *Budreo*, (1996) 45 C.R. (4th) 133 (Ont. S.C.), aff'd (2000) 32 C.R. (5th) 127 (Ont. C.A.) and *Québec (Procureur général)* v. *Nabhan*, REJB 2003-47974 (Que. C.A.).

(177) Subsections 83.3(1), 810.01(1) and 810.2(1) of the Code.

4. Sentencing

If the defendant refuses to enter into a recognizance to keep the peace, the judge may commit him or her to prison for a term not exceeding 12 months. A breach of any type of recognizance is a hybrid offence punishable by imprisonment for a term not exceeding two years (indictable offence) or a fine not exceeding $2,000 or imprisonment for a term not exceeding six months, or both (summary conviction offence).(178)

DESCRIPTION AND ANALYSIS

A. Definitions (Clause 40)

The Code gives two definitions for "serious personal injury offence":

- offences for which the offender may be sentenced to imprisonment for 10 years or more (other than high treason, treason and murder) *and* that involve the use or attempted use of violence, conduct endangering another person or conduct inflicting severe psychological damage;(179) and
- all forms of sexual assault.(180)

The bill retains this definition of "serious personal injury offence," but clause 40 adds two other categories of offences: designated offences and primary designated offences. It should be noted that an offence can be included in more than one category. Examples are sexual assault, attempted murder and assault with a weapon or causing bodily harm, which are found in three offence categories.

B. Assessment of the Offender (Clause 41)

Before the prosecutor may make an application to the court for a finding that an offender is a dangerous offender or long-term offender, the dangerousness of the offender must be assessed by criminal justice and mental health experts.(181)

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(178) Subsection 787(1) and s. 811 of the Code.

(179) Section 752, definition of "serious personal injury offence" in para. (*a*).

(180) Section 752, definition of "serious personal injury offence" in para. (*b*).

(181) Section 752.1 of the Code.

1. Obligation to Inform the Court and “Designated Offences”

At present, the application for assessment is made to the court by the prosecutor in cases where the prosecutor thinks it appropriate to do so.[182] A prosecutor has no obligation to inform the court of whether he or she intends to make an application.

Clause 41 of the bill imposes an obligation on the prosecutor to inform the court, as soon as is feasible before sentencing, whether he or she intends to make an application for assessment of the offender in certain specific cases. For example, in a case in which an offender who has been previously convicted of two designated offences (for each of which the offender was sentenced to at least two years of imprisonment) is convicted of an offence that is both a serious personal injury offence and a designated offence, the prosecutor has an obligation to inform the court as to whether he or she intends to make an application for assessment of the dangerousness of the offender (clause 41 of the bill, adding new s. 752.01 to the Code).

The definition of “designated offence” in clause 40 of the bill includes any “primary designated offence” and a list of 25 offences[183] such as certain offences in relation to explosives, firearms, prostitution, luring a child, assault, kidnapping a minor, robbery, and breaking and entering, along with some of those offences as they appeared in previous versions of the Code.

2. Obligation to Refer the Offender for Assessment

At present, the court has the discretion, on application by the prosecutor, to refer an offender for assessment if the following two conditions are met:

- the offender has committed a serious personal injury offence or a sexual offence referred to in paragraph 753.1(2)(*a*) of the Code;
- there are reasonable grounds to believe that the offender might be found to be a dangerous offender or a long-term offender.[184]

The bill provides that, in those circumstances, the court has an obligation to refer the offender to be assessed by experts (clause 41 of the bill, amending subsection 752.1(1) of the Code). Such an assessment is needed in order for an offender to be found by the court to be a dangerous offender or a long-term offender.

(182) Subsection 752.1(1) of the Code.

(183) Clause 61 of the bill adds two new offences to the list: breaking and entering to steal a firearm, and robbery to steal a firearm (see clause 9 of the bill).

(184) Subsection 752.1(1) of the Code.

3. Filing the Assessment Report

At present, the person to whom the offender is remanded must file an assessment report with the court not later than 15 days after the end of the assessment period.(185) The prosecutor and defence counsel will be given a copy of the report.

The bill extends the period within which the report may be filed to 30 days (clause 41, amending subsection 752.1(2) of the Code). As well, if there are reasonable grounds for filing the report after that period, the court may allow it to be filed not later than 60 days after the end of the assessment period (clause 41 of the bill, adding new subsection 752.1(3) to the Code).

C. Application for Dangerous Offender Finding (Clause 42)

1. Presumption of Dangerous Offender and "Primary Designated Offence" (Subclause 42(2))

After the assessment report for an offender is filed with the court, the prosecutor may apply for a dangerous offender finding. At present, in order for an offender to be found to be a dangerous offender, the prosecutor must essentially prove two very specific facts beyond a reasonable doubt:

- the underlying offence is a "serious personal injury offence" as defined in section 752 of the Code;
- the offender presents an actual threat and a risk of recidivism for society, as set out in paragraph 753(1)(*a*) or 753(1)(*b*) of the Code.(186)

The bill retains this "traditional" method for making a dangerous offender finding. Rather, subclause 42(2) of the bill adds another method of making that finding, by incorporating a presumption that certain repeat offenders are dangerous offenders.

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(185) Subsection 752.1(2) of the Code. The assessment period may not exceed 60 days (subs. 752.1(1) of the Code).

(186) In *Currie* ([1997] 2 S.C.R. 260, para. 42), the Supreme Court of Canada considered the burden of proof in the case of sexual assault: "The Court cannot forget that s. 753(*b*) does not require proof beyond a reasonable doubt that the respondent will re-offend. Such a standard would be impossible to meet. Instead, s. 753(*b*) requires that the court be satisfied beyond a reasonable doubt that there is a "likelihood" that the respondent will inflict harm … ."

Accordingly, anyone who is convicted a third time for a primary designated offence (the underlying offence and the prior offences, for each of which a term of imprisonment of at least two years was imposed) is presumed to be a dangerous offender (subclause 42(2) of the bill, adding new subsection 753(1.1) to the Code). It must be noted, however, that even in this case the court may find that the offender is a dangerous offender only where application is made by the prosecutor.(187)

It may be asked whether the three primary designated offences may have been committed in the course of a single event, or must have been committed at separate times. As the new subsection 753(1.1) of the Code is worded, it seems that the presumption applies where there are three successive convictions.

The definition of "primary designated offence" in clause 40 of the bill contains a list of 12 offences, such as certain sexual offences against minors,(188) sexual assault, attempted murder, assault with a weapon, causing bodily harm and kidnapping, with the addition of former sexual offences such as rape and indecent assault. These 12 primary designated offences are punishable by imprisonment for 10 years or more. Sexual assault is already defined as a "serious personal injury offence" under the definition in paragraph 752(*b*) of the Code. The other primary designated offences could be characterized as "serious personal injury offences" under paragraph 752(*a*) if the facts showed that they involved violence, conduct endangering another person or severe psychological damage.

a. Reversal of the Onus of Proof and Constitutional Rights

Subclause 42(2) of the bill introduces a reversal of the onus of proof: after the prosecutor has proved that the offender has been convicted of a third primary designated offence (the underlying offence and the prior offences, for each of which a term of imprisonment of at least two years was imposed), the onus shifts to the offender, who must prove, on a balance of probabilities, that he or she does not present a threat to the life, safety or physical or mental well-being of other persons (see paragraph 753(1)(*a*) of the Code), or, if the third primary designated offence is a sexual assault, that the offender is able to control his or her sexual impulses and there is no likelihood of causing injury, pain or other evil to other persons (see paragraph 753(1)(*b*) of the Code).

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(187) Subsection 753(1) of the Code.

(188) Sections 151, 152 and 153 of the Code. Sections 151 and 152 relate to victims under the age of 14, while s. 153 relates to victims aged 14 to 18. Clause 54 of the bill replaces "14 years" with "16 years."

With the reversed onus of proof in the bill, an offender could be found to be a dangerous offender notwithstanding any reasonable doubt as to his or her dangerousness or the risk of recidivism under the criteria set out in paragraph 753(1)(*a*) or 753(1)(*b*) of the Code.

On the other hand, it should be noted that in *Mack*,[189] the Supreme Court of Canada held that the standard of proof beyond a reasonable doubt applies only where the issue is the guilt or innocence of the accused. It should also be noted that where the accused has been convicted, he or she is no longer an "accused" within the meaning of section 11 of the *Canadian Charter of Rights and Freedoms* (the Charter), and so the presumption of innocence guaranteed by paragraph 11(*d*) does not apply.[190] In this case, the bill applies to people who have already been convicted. It therefore seems that the presumption of innocence could not be used to challenge the reverse onus that operates at the dangerous offender finding stage. In *Lyons*,[191] the majority of the Supreme Court of Canada was of the opinion that the right to be presumed innocent did not apply in the context of a dangerous offender application.

In its review of the various forms of reverse onus of proof in the Code before an accused is convicted, the Supreme Court took into account, having regard to the presumption of innocence and section 1 of the Charter, the importance of the objective, whether there are effective means available to Parliament to achieve that objective, and proportionality between the objective and the degree of impairment of constitutional rights.[192]

From another perspective, an offender who is presumed to be a dangerous offender under the bill could argue that he or she is being sentenced to imprisonment for an indeterminate period for offences for which he or she has already been punished. Paragraph 11(*h*) of the Charter might therefore come into play.

In section 12 scrutiny, the court must consider whether the sentence is grossly disproportionate for the offender or grossly disproportionate having regard to reasonable

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(189) *R.* v. *Mack*, [1988] 2 S.C.R. 903.

(190) Ibid., para. 147.

(191) *R.* v. *Lyons*, [1987] 2 S.C.R. 309.

(192) *Whyte* v. *The Queen*, [1988] 2 S.C.R. 3 (care or control of a motor vehicle, para. 258(1)(*a*) of the Code); *R.* v. *Chaulk*, [1990] 3 S.C.R. 1303 (insanity, subs. 16(3) of the Code); *A. G. of Quebec* v. *Pearson*, [1992] 3 S.C.R. 665, *R.* v. *Morales*, [1992] 3 S.C.R. 711 (bail hearing, subs. 515(6) of the Code); *Downey* v. *The Queen*, [1992] 2 S.C.R. 10 (living on avails of prostitution, subs. 212(3) of the Code). In those decisions, the Supreme Court held either that the statutory provisions at issue did not violate the accused's constitutional rights or that notwithstanding the violation they were justified under s. 1 of the Charter.

hypotheticals.[193] In *Lyons*,[194] the Supreme Court of Canada held that imprisonment for an indefinite period was not cruel and unusual treatment, contrary to section 12 of the Charter, because, *inter alia*, "… the group to whom the legislation applies has been functionally defined so as to ensure that persons within the group evince the characteristics that render such detention necessary."[195] In the opinion of the Court, the availability of parole for dangerous offenders "can truly accommodate and tailor the sentence to fit each offender's circumstances."[196]

Section 9 of the Charter provides protection against arbitrary detention or imprisonment. In *Lyons*,[197] the Supreme Court of Canada held that the rules governing dangerous offenders did not violate section 9 of the Charter; the Court stated:

> In this respect, I am in complete agreement with Crown counsel's submission that "… it is the absence of discretion which would, in many cases, render arbitrary the law's application." As he notes, "the absence of any discretion with respect to Part XXI [now Part XXIV] would necessarily require the Crown to always proceed under Part XXI if there was the barest *prima facie* case and the Court, upon making a finding that the offender is a dangerous offender, would always be required to impose an indeterminate sentence."[198]

2. Discretion of the Court
(Subclauses 42(1) and 42(4))

In 2003, the Supreme Court of Canada held, in *Johnson*,[199] that before considering finding that an offender is a dangerous offender the judge must consider whether the risk presented by the offender can be adequately controlled in the community, and thus whether it would be appropriate to apply the long-term offender rules. The Court said: "the imposition of an indeterminate sentence is justifiable only insofar as it actually serves the objective of protecting society."[200]

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(193) See *R.* v. *Wiles*, [2005] 3 S.C.R. 895.

(194) *R.* v. *Lyons*, [1987] 2 S.C.R. 309.

(195) Ibid., para. 45.

(196) Ibid., para. 48. Note that Bill C-2 does not alter the rules relating to parole for dangerous offenders.

(197) Ibid.

(198) Ibid., para. 64.

(199) *R.* v. *Johnson*, [2003] 2 S.C.R. 357, para. 40.

(200) Ibid., para. 36.

Subclause 42(1) of the bill provides that the court “shall” (replacing “may” in the current subsection 753(1) of the Code) make a dangerous offender finding if it is satisfied that the statutory conditions are met. However, the court has the discretion *not to sentence a dangerous offender to detention for an indeterminate period* in a case where another sentence would adequately protect the public *against the commission by the offender of murder or a serious personal injury offence* (subclause 42(4) of the bill, amending subsection 753(4) and (4.1) of the Code).

Accordingly, even if the court makes a dangerous offender finding, it may decide to impose a less severe sentence; that is, it may:

- impose a minimum punishment of two years’ imprisonment and order that the offender be subject to a LTSO; or
- impose a sentence for the underlying offence (subclause 42(4) of the bill, amending subsection 753(4) of the Code).

D. Later conviction (Clause 43)

If an offender who is found to be a dangerous offender is later convicted of a serious personal injury offence or a breach of a LTSO, he or she must be, on application by the prosecutor, assessed by experts in corrections and mental health (clause 43 of the bill, adding new subsection 753.01(1) to the Code).

After the assessment report is filed and on application by the prosecutor, the court must, if it is necessary to protect the public against the commission by the offender of murder or a serious personal injury offence:

- impose a sentence of detention for an indeterminate period (clause 43 of the bill, adding new subsection 753.01(5) to the Code); or
- impose a new period of long-term supervision in addition to any other sentence that may be imposed for the offence (clause 43 of the bill, adding new subsection 753.01(6) to the Code).

E. Recognizances to Keep the Peace (Clauses 52 and 53)

1. Recognizance in Relation to a Sexual Offence Against a Person Under the Age of 14 Years[201] (Clause 52)

Under section 810.1 of the Code, a judge may order that a defendant enter into a recognizance that includes conditions if there are reasonable grounds to believe that a person will commit one of the sexual offences listed in subsection 810.1(1) of the Code against a person under the age of 14 years:

- sexual interference;
- invitation to sexual touching;
- incest;
- anal intercourse;
- bestiality;
- child pornography;
- parent or guardian procuring sexual activity;
- householder permitting sexual activity;
- luring a child by means of a computer;
- exhibitionism; and
- any form of sexual assault.

a. Period of the Recognizance (Clause 52)

At present, the maximum period of a recognizance is 12 months.[202] The bill extends the maximum period to two years in a case in which the defendant has a criminal record for a sexual offence in respect of a person under the age of 14 years (clause 52 of the bill, adding new subsection 810.1(3.01) to the Code). The bill does not specify the nature of the previous sexual offence, but it may be presumed that this includes at least the sexual offences listed in subsection 810.1(1) of the Code.

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(201) Clause 54 of the bill replaces “14 years” with “16 years.”

(202) Subsection 810.1(3) of the Code.

It must be noted that the two-year maximum period would not apply to a defendant who had entered into a recognizance to keep the peace in the past, because a recognizance of that nature does not amount to a criminal conviction. It seems that this would also be the case where a court had granted an absolute or conditional discharge for the previous offence.(203)

b. Conditions of the Recognizance (Clause 52)

Under the existing rules, the judge who orders a defendant to enter into a recognizance in relation to a sexual offence in respect of a person under the age of 14 years may impose such conditions as the judge considers to be necessary to guarantee that the defendant will keep the peace and be of good behaviour.(204)

Form 32 of the Code, which may be used to prepare the recognizance,(205) provides examples of conditions that may be imposed:

- report to a peace officer or other person designated;
- remain within the designated territorial jurisdiction;
- notify a peace officer or other person designated of any change of address, employment or occupation;
- abstain from communicating with the victim, witness or other person; and
- deposit his or her passport.

The present subsection 810.1(3) of the Code provides two examples of conditions that may be imposed in the specific case of a recognizance in relation to a sexual offence in respect of a person under the age of 14 years:

- prohibition on engaging in any activity that involves contact with persons under the age of 14 years, including using a computer system for the purpose of communicating with such persons;(206) and
- prohibition on attending a public park or public swimming area where persons under the age of 14 years are present or can reasonably be expected to be present, or a daycare centre, schoolground, playground or community centre.(207)

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(203) Subsection 730(3) of the Code.

(204) Subsection 810.1(3) of the Code.

(205) Subsections 810.1(5) et 810(4) of the Code.

(206) Paragraph 810.1(3)(*a*) of the Code.

(207) Paragraph 810.1(3)(*b*) of the Code.

Clause 52 of the bill provides that the judge may impose any "reasonable" condition[208] that the judge considers desirable (new subsection 810.1(3.02) of the Code), retains the two specific conditions set out above (except that the expression "community centre" is removed;[209] new paragraphs 810.1(3.02)(*a*) and (*b*) of the Code), and adds seven other examples of conditions that may be imposed:

- participate in a treatment program (new paragraph 810.1(3.02)(*c*) of the Code);[210]
- wear an electronic monitoring device (new paragraph 810.1(3.02)(*d*) of the Code);
- remain within a specified geographic area (new paragraph 810.1(3.02)(*e*) of the Code);[211]
- observe a curfew (new paragraph 810.1(3.02)(*f*) of the Code);
- abstain from the consumption of drugs or alcohol (new paragraph 810.1(3.02)(*g*) of the Code);
- not possess firearms or other weapons (new subsection 810.1(3.03) of the Code);[212] and
- report to the correctional authority of the province or an appropriate police authority (new subsection 810.1(3.05) of the Code).[213]

2. Recognizance in Relation to a Serious Personal Injury Offence (Clause 53)

Under section 810.2 of the Code, a judge may order that a defendant enter into a recognizance with conditions if there are reasonable grounds to believe that a person will commit a "serious personal injury offence."[214] Unlike a recognizance in relation to a sexual offence in respect of a person under the age of 14 years, prior consent of the Attorney General is required.[215]

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(208) Form 32 of the Code also specifies that the judge may impose other reasonable conditions.

(209) In *R.* v. *Budreo* ((2000), 32 C.R. (5th) 127), the Ontario Court of Appeal held that the concept of "community centre" was overbroad and contrary to s. 7 of the Charter.

(210) The Ontario Court of Appeal observed that a provision that would allow the judge to order the defendant to take a course or treatment or to take a particular drug, where the defendant's guilt has not been proved, as is the case in s. 810.1 of the Code, would raise serious Charter concerns (*R.* v. *Budreo* (2000) 32 C.R. (5th) 127, para. 41).

(211) Form 32 of the Code provides for a similar condition.

(212) Contrary to what the Code now provides in respect of recognizances in relation to serious personal injury offences (subs. 810.2(5.2)), a judge who decides not to impose this condition is not required to state reasons.

(213) Form 32 of the Code provides for a similar condition.

(214) Section 752 of the Code provides the definition of "serious personal injury offence," which is essentially a offence involving violence that is punishable by a maximum of imprisonment for 10 years or more, or any form of sexual assault. This category of offences is used to make a dangerous offender finding.

(215) Subsection 810.2(1) of the Code.

a. Period of the Recognizance (Subclause 53(1))

Under the existing rule, the maximum period of a recognizance of this nature is 12 months.(216) Subclause 53(1) of the bill extends the maximum period to two years in a case where the defendant was convicted previously of a serious personal injury offence (new subsection 810.2(3.1) of the Code).

It should be noted that the two-year maximum would not apply to a defendant who had entered into a recognizance to keep the peace for the previous serious personal injury offence or was discharged by the court.(217)

b. Conditions of the Recognizance (Subclause 53(2))

At present, a judge who orders a defendant to enter into a recognizance in relation to a serious personal injury offence may impose such reasonable conditions as the judge considers desirable for securing the good conduct of the defendant.(218)

As noted under the preceding heading, Form 32 of the Code, which may be used to prepare the recognizance,(219) provides examples of conditions that may be imposed:

- report to a peace officer or other person designated;
- remain within a designated territorial jurisdiction;
- notify a peace officer or other person designated of any change of address, employment or occupation;
- abstain from communicating with the victim, witness or other person; and
- deposit his or her passport.

The present subsections 810.2(5) and 810.2(6) of the Code provide two other examples of conditions that may be imposed in a recognizance in relation to a serious personal injury offence:

- prohibition on possessing firearms or other weapons;(220) and
- report to the correctional authority of a province or to an appropriate police authority.(221)

(216) Subsection 810.2(3) of the Code.

(217) Subsection 730(3) of the Code.

(218) Subsection 810.2(3) of the Code.

(219) Subsections 810.2(8) and 810(4) of the Code.

(220) Subsection 810.2(5) of the Code. A judge who does not impose this condition is required to give reasons (subs. 810.2(5.2) of the Code).

(221) Subsection 810.2(6) of the Code.

Clause 53(2) of the bill retains those two conditions and adds five other examples of conditions that may be imposed by the judge:

- participate in a treatment program (new paragraph 810.2(4.1)(*a*) of the Code);
- wear an electronic monitoring device (new paragraph 810.2(4.1)(*b*) of the Code);
- remain within a specified geographic area (new paragraph 810.2(4.1)(*c*) of the Code);[(222)]
- observe a curfew (new paragraph 810.2(4.1)(*d*) of the Code);
- abstain from the consumption of drugs or alcohol (new paragraph 810.2(4.1)(*e*) of the Code).

If a comparison is made with recognizances in relation to sexual offences in respect of persons under the age of 14 years, the examples of conditions that may be imposed are identical except for the fact that in the latter case the judge may also impose specific conditions prohibiting the defendant from being in contact with or in the presence of a person under the age of 14 years in certain public places.

(222) Form 32 of the Code provides for a similar condition.