Legislative Summary **LS-662E**

BILL C-31: AN ACT TO AMEND THE CRIMINAL CODE, THE CORRUPTION OF FOREIGN PUBLIC OFFICIALS ACT AND THE IDENTIFICATION OF CRIMINALS ACT AND TO MAKE A CONSEQUENTIAL AMENDMENT TO ANOTHER ACT

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LEGISLATIVE HISTORY OF BILL C-31

HOUSE OF COMMONS		SENATE	
Bill Stage	**Date**	**Bill Stage**	**Date**
First Reading:	15 May 2009	First Reading:	
Second Reading:	27 November 2009	Second Reading:	
Committee Report:		Committee Report:	
Report Stage:		Report Stage:	
Third Reading:		Third Reading:	

Royal Assent:

Statutes of Canada

This bill did not become law before the 2nd Session of the 40th Parliament ended on 30 December 2009.

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

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CONTENTS

Page

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BILL C-31: AN ACT TO AMEND THE CRIMINAL CODE, THE CORRUPTION OF FOREIGN PUBLIC OFFICIALS ACT AND THE IDENTIFICATION OF CRIMINALS ACT AND TO MAKE A CONSEQUENTIAL AMENDMENT TO ANOTHER ACT*

INTRODUCTION

Bill C-31, An Act to amend the Criminal Code, the Corruption of Foreign Public Officials Act and the Identification of Criminals Act and to make a consequential amendment to another Act, was introduced in the House of Commons on 15 May 2009 by the Honourable Jay Hill, Leader of the Government in the House of Commons, on behalf of the Minister of Justice, the Honourable Robert Nicholson. According to the Department of Justice, the bill is intended to modernize criminal procedure and make the justice system more efficient and effective.[1]

Bill C-31 addresses a number of distinct areas under the *Criminal Code* ("the Code"), including telewarrants, the interception of private communications in exceptional circumstances, and the offence of prize fighting, amongst others. The bill also expands the jurisdiction of Canadian courts under the *Corruption of Foreign Public Officials Act*, and amends the *Identification of Criminals Act* to permit the fingerprinting and photographing of certain individuals who have been arrested but not charged with or convicted of an offence. The following discussion canvasses selected aspects of the bill, rather than reviewing every clause.

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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 Department of Justice, "Minister of Justice Moves to Modernize Criminal Law Procedure in Canada," News release, 15 May 2009 [Department of Justice, News release], http://www.justice.gc.ca/eng/news-nouv/nr-cp/2009/doc_32370.html.

DESCRIPTION AND ANALYSIS

A. Prize Fighting (Clause 1)

Subsection 83(1) of the *Criminal Code* sets out the summary conviction offence[2] of prize fighting. Those who may be found guilty are anyone who engages as a principal in a prize fight; anyone who advises, encourages or promotes a prize fight; and anyone who is present at a prize fight as "an aid, second, surgeon, umpire, backer or reporter."

The current subsection 83(2) defines "prize fight" as "an encounter or fight with fists or hands between two persons who have met for that purpose by previous arrangement made by or for them." "Boxing contests" are excluded from the definition of "prize fight" if the amateur contestants are wearing gloves of at least 140 grams each or if the contest is held with the permission or under the authority of the appropriate provincial body. Consequently, case law has interpreted the purpose and goals of prize fighting offences as being "to protect the health of the contestants," and convictions may follow in provinces that have not established an appropriate governing body or for bouts that do not meet the "ordinary meaning" of "boxing contest."[3]

Clause 1 of Bill C-31 amends subsection 83(2) of the Code to expand the definition of prize fight to encompass an encounter or fight with fists, hands *or feet*, and then creates additional exceptions to that definition. Under new paragraph 83(2)(*a*), contests between amateur athletes using fists, hands or feet in combative sports that are on the programme of the International Olympic Committee (IOC) are excluded, as are those in sports designated by the province in which the contest is held under new paragraph (2)(*b*). In both instances, any provincially required permission must also be obtained. Under new paragraph (2)(*c*), individual contests can be excluded with the appropriate provincial permission, without the need for the sport to be designated by the province or added to the IOC programme.

Although it appears that the reference to sports on the IOC programme was expected to exempt both judo and karate from the offence of prize fighting,[4] only judo is

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2 Offences are divided into "summary conviction" and "indictable" offences; the former generally are less serious and carry a lighter penalty. Offences that can be prosecuted either summarily or by indictment are referred to as "hybrid" offences, which are discussed further below.

3 *R.* v. *Jay Chang*, 2003 NBPC 11, citing *R.* v. *M.A.F.A. Inc.*, [2000] O.J. No. 899 (Ct. J.) (QL).

4 Department of Justice, "Backgrounder: Modernizing Criminal Procedure," May 2009 [Department of Justice, Backgrounder], http://www.justice.gc.ca/eng/news-nouv/nr-cp/2009/doc_32371.html.

currently listed among the summer sports by the IOC.[5] Karate was under consideration for the 2016 Olympics,[6] but was not selected.[7]

B. Telewarrants (Clauses 2, 6, 10, 16–23, 25–26, and 28)

1. Background

The term "telewarrant" is generally understood to refer to a warrant that a peace officer[8] applies for by "a means of telecommunication," rather than by appearing in person before a judge or justice. The "means" employed can be a telephone, a "means of telecommunication that produces a writing," which is generally associated in the case law with a fax machine, or another such means of telecommunication. The telewarrant procedure allows for warrants to be issued with relative speed.[9]

Section 487.1 of the *Criminal Code* sets out the different procedural rules for telewarrants that must be followed depending on the means of telecommunication used to apply for a search warrant under section 487 or a warrant to obtain blood samples under section 256. In all cases, the information must be submitted on oath or must include a statement in writing through which the information is deemed to be made under oath. The information must also include, as per subsection 487.1(4), a statement of the circumstances that make it *impracticable* for the peace officer to appear personally before a justice, and a statement as to any prior warrant applications that the peace officer knows of that were submitted in respect of the same matter. Additional details must also be provided about, amongst other things, the indictable offence alleged.

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5 Olympic.org (Official website of the Olympic Movement), "Olympic Sports," http://www.olympic.org/en/content/Sports/.

6 "Seven sports seek to join the Olympic programme," 15 June 2009, http://www.olympic.org/en/content/Media/?FromMonth=June&FromYear=2009&ToMonth=July&ToYear=2009&currentArticlesPageIPP=10&currentArticlesPage=4&articleNewsGroup=-1&articleId=72423.

7 "Women's boxing for 2012 and golf and rugby proposed for 2016," 14 August 2009, http://www.olympic.org/en/content/Media/?FromMonth=August&FromYear=2009&ToMonth=September&ToYear=2009&currentArticlesPageIPP=10&currentArticlesPage=4&articleNewsGroup=-1&articleId=72492.

8 "Peace officer," as defined in section 2 of the Code, includes police officers and sheriffs.

9 James A. Fontana and David Keeshan, *The Law of Search and Seizure in Canada*, 7th ed., LexisNexis Canada Inc., Markham, Ontario, 2007, p. 332.

2. Amendments Under Bill C-31

a. Overview

Bill C-31 would in general make two changes to the current telewarrant procedure set out in section 487.1. First, on a procedural level, for sections to which the telewarrant procedure already applies, the amendments would, in general, remove the requirement that the telewarrant procedure be used only where appearing in person would be *impracticable*.[10] This would avoid situations where a warrant was later found to have been obtained improperly because the applicant had not established that appearing in person would be impracticable.[11] Under the proposed amendments, application for a warrant could be made in person or by a means of telecommunication that produces a writing. However, where an application is made by telephone or other means of telecommunication that does *not* produce a writing, the applicant must demonstrate why it would be impracticable to use a means of telecommunication that *does* produce a writing.

The other change proposed by the bill is to extend the use of the telewarrant procedure to sections where it does not currently apply. This would save the travel and wait time it would take if the officer had to apply in person.[12] The wording of the amendments again indicates that appearing in person would no longer be preferred to using a means of telecommunication that produces a writing, but where application is made by telephone or other means of telecommunication that does *not* produce a writing, the applicant must again demonstrate why it would be impracticable to use a means of telecommunication that *does* produce a writing.

b. The Proposed Procedural Changes

Clause 22 would amend section 487.1, the general provision for the telewarrant procedure, so that impracticability would need to be demonstrated only if the applicant uses a means of telecommunication that does not produce a writing. In addition, new

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10 Department of Justice, Backgrounder (May 2009).

11 See, for example, *R.* v. *Cam and Phun*, 2007 BCPC 38, paras. 32–33, citing *R.* v. *Kaprowksi*, [2005] B.C.J. 2940, *R.* v. *Nguyen*, [2006] B.C.J. 1922, *R.* v. *Ong*, [2006] B.C.J. 1836, *R.* v. *Huber*, [2005] B.C.J. 260, *R.* v. *Chung*, [2005] B.C.J. 2839, *R.* v. *Nguyen*, [2006] B.C.J. 3040, and *R.* v. *Nguyen*, [2006] B.C.J. 2659: "the applicant for the warrant either did not make any inquiry as to the availability of a justice of the peace or failed to describe their efforts to find a justice of the peace. In those cases, the Court found that s. 487.1 had not been complied with and, accordingly, the warrants were improperly obtained."

12 Department of Justice, Backgrounder (May 2009).

subsection 487.1(1.1) extends the use of the revised telewarrant procedure to certain *public officers*. "Public officer" is defined in section 2 of the Code as including a customs or excise officer, an officer of the Canadian Forces, an officer of the Royal Canadian Mounted Police, and any officer while the officer is engaged in enforcing the laws of Canada relating to revenue, customs, excise, trade or navigation. For the purposes of new subsection (1.1), the only public officers who could use the telewarrant procedure to apply for a search warrant under section 487 are those "appointed or designated to administer or enforce a federal or provincial law and whose duties include the enforcement of this Act or any other Act of Parliament." This is the same phrasing currently found in subsection 487(1), which is the general search warrant provision. Consequently, while these public officers are already able to apply for these search warrants in person, the proposed amendments would allow them also to apply for such warrants through the telewarrant procedure. Clause 23 makes related amendments to section 489.1 of the Code, which deals with the disposition of seized property, in particular by extending to public officers the same procedures currently applicable to peace officers.

Similar amendments are made to other *Criminal Code* provisions to which the telewarrant procedure already applies, with any necessary modifications. Clause 17 amends subsection 487.01(7), which concerns general or video surveillance warrants. Clause 20 amends subsection 487.05(3), which concerns warrants to take bodily substances for DNA analysis. Clause 21 amends subsection 487.092(4), which concerns warrants for bodily impressions, although the words "impracticable to appear personally" are still found in the English version but have been removed from the French version. Clause 28 amends section 529.5 of the Code, which concerns warrants for a peace officer to enter a dwelling house to arrest or apprehend a suspect and related authorizations, including those that authorize the peace officer to enter the dwelling house without first announcing his or her presence. Clause 6 amends section 184.3 of the Code, which concerns authorizations to intercept private communications with the consent of one of the parties.

c. Proposed Changes in Application

Clause 2 of Bill C-31 applies the revised telewarrant procedure to section 117.04, which concerns warrants to search for and seize weapons and other dangerous objects. Clause 10 does the same for search warrants related to gaming or betting houses and bawdy-houses under section 199 of the Code, and clause 16 does the same for search warrants related to valuable minerals under section 395.

Clause 25 also applies the proposed telewarrant procedure to warrants to install and monitor tracking devices under section 492.1 of the Code. As well, under the amended subsection 492.1(5), an application can be made either in person or by a means of telecommunication that produces a writing to have the tracking device removed covertly after the expiry of the warrant. This application must be in writing, with supporting affidavit.

Clause 26 amends section 492.2 of the Code, which concerns warrants to install and monitor telephone number recorders. Because a justice can order any person or body lawfully in possession of such records to provide a copy under the current subsection 492.2(2), the amendments refer to orders as well as to warrants. Clause 18 applies the telewarrant procedure to section 487.012, which relates to orders to produce documents or data and give them to a specified peace officer or public officer, and clause 19 does the same for section 487.013, which relates to production orders directed at financial institutions.

C. Hybrid Offences (Clauses 4 and 13–15)

Under the *Criminal Code*, offences are divided into "summary conviction" and "indictable" offences. Summary conviction offences are generally less serious, and, unless otherwise stated, the maximum penalty is a fine of $5,000, or six months in prison, or both, as per section 787 of the Code. Indictable offences are generally more serious, and are subject to different procedural rules.

Offences that can be prosecuted either summarily or by indictment are generally referred to as "hybrid" or "Crown election" offences. This allows the Crown discretion to choose how to proceed, based on considerations such as how serious the allegations are and whether the accused has a lengthy criminal record.[13] Prior to Crown election, hybrid offences are treated as indictable offences.[14]

Bill C-31 reclassifies six offences as hybrid offences. The three new hybrid offences that, prior to amendment, could be prosecuted only summarily are the following:

- Personating peace officer (section 130 of the Code as amended by clause 4);
- Indecent telephone calls (subsection 372(2) as amended by clause 13); and
- Harassing telephone calls (subsection 372(3) as amended by clause 13).

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13 Department of Justice, *A Crime Victim's Guide to the Criminal Justice System*, http://www.justice.gc.ca/eng/pi/pcvi-cpcv/guide/sech.html.

14 *Interpretation Act*, R.S.C. 1985, c. I-21, paragraph 34(1)(*a*).

The three new hybrid offences that, prior to amendment, could be prosecuted only by indictment are the following:

- False messages (subsection 372(1) of the Code as amended by clause 13);
- Misleading receipt (section 388 as amended by clause 14); and
- Fraudulent disposal of goods on which money advanced (section 389 as amended by clause 15).

For those offences that, prior to amendment, were prosecuted summarily, the amendments may also provide the police with broader powers of arrest and identification, discussed further below, under the *Identification of Criminals Act*.

D. Failure to Remain in Territorial Jurisdiction (Clauses 5 and 27)

An individual who has been arrested may, in some circumstances, be released from custody even though criminal proceedings are ongoing. Release by the court is commonly referred to as "bail,"[15] while release by the police has been referred to as "police bail."[16] In order to be released, an individual may be required to agree to certain conditions, such as remaining within a specified territorial jurisdiction[17] and relinquishing his or her passport.[18]

Section 145 of the *Criminal Code* sets out certain offences related to failure to abide by these conditions. The current subsection 145(3) includes the offence of failing to comply with a condition of an undertaking or a recognizance entered into before a justice or judge. The current subsection 145(5.1) sets out the offence of failing to comply with a condition of an undertaking related to "police bail." Offences under both subsections are hybrid offences. A person convicted of either indictable offence is liable to imprisonment for a maximum of two years.

Clause 5 of Bill C-31 creates subsection 145(5.2) of the Code, which sets out the hybrid offence of failing to comply with a condition of an undertaking or a recognizance to remain in a specified territorial jurisdiction. The section appears to apply to both judicial release

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15 Section 515 of the Code uses the phrase "Judicial Interim Release."

16 Gary T. Trotter, "Police Bail," in *The Law of Bail in Canada*, 2nd ed., Carswell, Toronto, 1999, and *R.* v. *Oliveira*, 2009 ONCA 219, para. 6. These release mechanisms are discussed further below, under the *Identification of Criminals Act*.

17 See, for "judicial bail," paragraph 515(4)(*b*), and for "police bail" paragraphs 499(2)(*a*) and 503(2.1)(*a*).

18 See, for "judicial bail," paragraph 515(4)(*e*), and for "police bail" paragraphs 499(2)(*d*) and 503(2.1)(*d*).

and police bail, and the same penalties would apply as under subsections 145(3) and (5.1). Those subsections would both be amended to indicate that they apply only to conditions "other than a condition referred to in subsection (5.2)." As a result, the offence of failure to comply with the condition to remain in a specified territorial jurisdiction would be separate from other "failure to comply" offences.

An additional amendment, found in clause 27, relates to which party has the onus at a "show cause" or bail hearing in court, which is governed by section 515 of the Code. Generally, except where an accused is charged with one of the serious offences listed under section 469 of the Code, such as murder or treason, the judge is required to release the accused unless the prosecutor "shows cause … why the detention of the accused in custody is justified." In certain situations, however, the onus is reversed, and the justice must order that the accused be detained unless the *accused* shows why detention is *not* justified. As the law stands, these reverse onus offences include those under subsections 145(2) to (5); that is, failure to comply with judicial release (subsection 145(3)) is currently reverse onus, but failure to comply with police bail (subsection 145(5.1)) is not. Subclause 27(2) would amend paragraph 515(6)(*c*) of the Code so that the onus would be on the accused charged under subsections 145(2) to 145(5.2) to show why detention is not justified. This would extend the reverse onus to the offence of failure to comply with the conditions of "police bail," and to the new subsection 145(5.2), "Failure to remain in territorial jurisdiction."

E. Interception of Private Communications (Clauses 6–9)

Clauses 6 to 9 of Bill C-31 relate to certain provisions on the interception of private communications found in Part VI of the *Criminal Code*, Invasion of Privacy. Clause 6 relates to telewarrants and was discussed above. Clauses 7 through 9 relate to "interception in exceptional circumstances."

Under the current section 184.1, an *agent of the state*[19] may intercept private communications when one of the parties has consented to the interception, the agent believes on reasonable grounds that there is a risk of bodily harm to the party who consented, and the purpose of the interception is to prevent the bodily harm. Under the current section 184.2,

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19 "Agent of the state" is defined in subsection 184.1(4) as meaning a peace officer and a person acting under the authority of, or in cooperation with, a peace officer.

a person may intercept a private communication where one of the parties has consented to the interception and judicial authorization has been obtained. Under the current section 184.4, *a peace officer* may intercept a private communication where (a) he or she believes on reasonable grounds that the urgency of the situation is such that an authorization could not, with reasonable diligence, be obtained, (b) he or she believes on reasonable grounds that the interception is immediately necessary to prevent an unlawful act that would cause serious harm to any person or to property, and (c) one of the parties to the private communication is the person who would cause the harm or be the victim or intended victim of it. Section 184.4 is described as "interception in exceptional circumstances."

Section 195 of the Code requires a yearly public reporting of authorizations granted and interceptions made under them, and subsection 196(1) requires notification in writing to the person who was the object of an authorized interception within 90 days. These requirements do not currently apply to section 184.4, under which no authorization is required.

Clause 7 of Bill C-31 amends section 184.4 by replacing the phrase "unlawful act" ("un acte illicite") in paragraph 184.4(*b*) with the word "offence" ("une infraction"), and by restructuring the provision so that the peace officer must have "reasonable grounds to believe" each of the three specified elements, rather than only the first two.

Clause 8 adds paragraph 195(1)(*c*) to the Code, which requires the Minister of Public Safety and Emergency Preparedness to prepare a report relating to "interceptions made under section 184.4 in the immediately preceding year if the interceptions relate to an offence for which proceedings may be commenced by the Attorney General of Canada," such as offences under the *Controlled Drugs and Substances Act*.[20] A similar obligation is imposed, under new paragraph 195(5)(*c*), on the Attorney General of each province for all other offences; generally, the authority to prosecute offences under the *Criminal Code* is given to provincial Attorneys General.[21] Under the new subsection 195(2.1), the content of these reports includes the number of interceptions made, a general description of the methods of interception used, the duration of each interception, the number of criminal proceedings in which private communications obtained by interception were adduced in evidence, and more. Under the amendments, reporting is also

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20 Public Safety Canada, *Annual Report on the Use of Electronic Surveillance 2007*, 2008, http://www.publicsafety.gc.ca/abt/dpr/le/elecsur-07-eng.aspx.

21 Public Prosecution Service of Canada, *The Federal Prosecution Service Deskbook*, 2000, http://www.ppsc-sppc.gc.ca/eng/fps-sfp/fpd/index.html.

required on broader law enforcement activity that results from interceptions under section 184.4, such as the number of persons arrested whose identity became known to a peace officer as a result of an interception, as well as the offences in respect of which interceptions were made and any other offences for which proceedings were commenced as a result of an interception. These reporting requirements are similar to what was already required, under subsection 195(2), with respect to authorized interceptions.

Finally, clause 9 adds section 196.1, imposing a notification requirement with respect to interceptions in exceptional circumstances. In general under this new section, notification must be provided within 90 days to any person who was the object of the interception. Where an investigation is ongoing, however, whether of the offence to which the interception relates or of an offence investigated as a result of information obtained from the interception, application can be made for extensions of that 90-day period, for periods of not more than three years each. Additional provisions relate to the application process and to extensions when the offence being investigated relates to terrorism or criminal organizations.

The interception provisions of the Code were originally intended to respond to a series of decisions from the Supreme Court of Canada on unauthorized electronic surveillance.[22] As Bill C-109[23] progressed through Parliament in 1993, however, concerns were raised that section 184.4 lacked sufficient measures of oversight and accountability,[24] and it is interesting to note that at least one case has since found that the current section breaches section 52 of the *Constitution Act, 1982*, by contravening section 8 of the *Canadian Charter of Rights and Freedoms*, which protects against unreasonable search and seizure.[25] Of particular concern were the absence of notice and reporting requirements, to balance the invasion of privacy caused by the interception.[26] The court held that such safeguards would not interfere with the section's objectives since notice and reporting would not "impact in any way upon the ability of the police

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22 *R.* v. *Tse*, 2008 BCSC 211, para. 141 [*R.* v. *Tse*]; see also Marilyn Pilon, *Search, Seizure, Arrest and Detention Under the Charter*, CIR 91-7E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 15 February 2000.

23 Enacted as *An Act to amend the Criminal Code, the Crown Liability and Proceedings Act and the Radiocommunication Act*, S.C. 1993, c. 40.

24 *R.* v. *Tse*, para. 146.

25 *R.* v. *Tse*, para. 275. See also *R.* v. *Sipes*, 2009 BCSC 285, in which the ruling in *Tse* was deemed binding.

26 *R.* v. *Tse*, para. 256. The court in *R.* v. *Riley*, 2008 CanLII 36773 (ON S.C.), agreed in paras. 95 and 118 that a notice requirement was necessary.

to act in exigent circumstances."[27] The scope of the phrase "unlawful act" was also considered. The phrase was found to refer only to the offences enumerated in section 183 and, as such, it was not unconstitutionally vague.[28]

Additional concerns canvassed by the courts in cases considering section 184.4 include that judicial authorization is not required, even for ongoing investigations, and that the broad definition of "peace officer" could permit, amongst others, mayors and fishery guardians to intercept private communications. Neither issue is addressed in the Bill C-31 amendments.

F. Expert Evidence (Clause 30)

Section 657.3 of the Code governs expert testimony in criminal proceedings. It was amended in 2002 to require the accused to provide notice of expert testimony; the Crown already had disclosure obligations on account of the Charter.[29] The 2002 amendments were designed to create fairness for the Crown and to improve trial efficiency since, in the absence of sufficient notice, the Crown might be taken by surprise by the accused's expert witness and would then have to ask for an adjournment to prepare for cross-examination or even to obtain and prepare an expert in rebuttal.[30] Similarly, clause 30 of Bill C-31 is intended to ensure that parties to a proceeding have enough time to prepare adequately for expert evidence, which can be complex and highly technical.[31]

Currently, under subsection 657.3(3) of the Code, a party intending to call an expert witness must give notice to the other party or parties at least 30 days before trial, unless the court sets a different notice period. This notice must be accompanied by the name of the proposed witness, a description of the witness's area of expertise sufficient for the other parties to familiarize themselves with it, and a statement of the witness's expert qualifications. In addition, the Code currently requires a prosecutor intending to call an expert witness to provide,

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27 *R.* v. *Tse*, paras. 255–56.

28 *R.* v. *Tse*, paras. 175–76. This limitation was rejected in para. 21 of *R.* v. *Riley*, however, for reasons including that the requirement of "serious" harm was sufficient to circumscribe the use of the section, and that "most" of the offences enumerated in s. 183 "could never trigger the use of s. 184.4."

29 David Goetz and Gérald Lafrenière, *Bill C-15A: An Act to amend the Criminal Code and to amend other Acts*, LS-410E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 30 September 2002, http://www2.parl.gc.ca/Sites/LOP/LEGISINFO/index.asp?Language=E&query=2979&Session=9&List=ls, citing *R.* v. *Stinchcombe*, [1991] 3 S.C.R. 326.

30 *R.* v. *Mousseau*, 2003 ABQB 624.

31 Department of Justice, Backgrounder (May 2009).

"within a reasonable period before trial," a copy of the expert witness's prepared report, or, if the witness did not prepare a report, then "a summary of the opinion anticipated to be given by the proposed witness and the grounds on which it is based." The accused or his or her counsel intending to call an expert witness must provide the same material "not later than the close of the case for the prosecution."

Clause 30 of Bill C-31 amends the provisions relating to the consequences for failing to provide the required information. Currently, paragraph 657.3(4)(*a*) states that the court shall "grant an adjournment of the proceedings to the party who requests it to allow him or her to prepare for cross-examination of the expert witness." Bill C-31 specifies that the adjournment shall be for a minimum of 10 clear days, unless the party requesting the adjournment consents otherwise. The stated purpose, as amended, is to allow the requesting party sufficient time "to prepare *adequately* for the *evidence* of the expert witness."

Similarly, clause 30 mandates a 10-day minimum adjournment with respect to subsection 657.3(5), which enumerates the court's powers when a party has received the required notice and material but has nonetheless been unable to prepare for the evidence of the proposed expert witness. It bears noting, however, that, before and after amendment, the court's powers under subsection 657.3(5) are permissive, rather than mandatory as is the case under subsection 657.3(4).

Clause 30 also adds a provision relating to cases tried with a jury, applicable both when the requirements of subsection 657.3(3) have been complied with and when they have not. Under the new subsection 657.3(5.1), the court may adjourn proceedings for less than 10 clear days when (a) the requesting party would be able to prepare adequately in a shorter period *and* (b) "it would be unreasonable to adjourn the proceedings for 10 clear days because of exceptional circumstances related to the fact that the case is tried with a jury, although the fact that the case is tried with a jury is not in itself a justification for a shorter adjournment."

A new subsection 657.3(5.2) also requires the court to consider certain factors with respect to paragraphs (4)(*a*), (5)(*a*) and (5.1)(*a*), including any prejudice to the parties that may result from an adjournment or a decision not to adjourn, the availability of experts qualified in the subject matter, and the nature, complexity and novelty of the evidence. In addition to the enumerated factors, the court may also take into account any other factors it considers appropriate in the circumstances.

Finally, under the new subsection 657.3(5.3), the court is required to provide reasons for refusing to grant an adjournment under paragraph (5)(*a*) or for granting an adjournment of less than 10 clear days under subsection (5.1).

G. Agents (Clauses 31–33)

Clauses 31 to 33 of Bill C-31 amend certain provisions governing the use of agents in court. According to the Department of Justice backgrounder, these amendments relate to ensuring that individuals have access to adequate representation when charged with summary offences, which are less serious than indictable offences and have fewer procedural requirements.[32] Specifically, the amendments in Bill C-31 "would give each province the power to authorize programs and establish criteria outlining when an agent (non-lawyer) can represent a defendant charged with a summary offence."[33]

Subsection 800(2) of the Code currently states that a defendant before a summary conviction court may generally appear personally, or by counsel or agent. The term "agent" is not defined in the *Criminal Code*, but it has been interpreted according to its ordinary meaning of a "representative."[34] "Agent" is commonly associated in case law with "paralegal," although there are also examples of a friend or family member acting as agent for an accused.

For summary conviction cases that proceed to trial, subsection 802(2) currently indicates that both the prosecutor and the defendant may examine and cross-examine witnesses personally or by counsel or agent. Section 802.1 of the *Criminal Code* describes when agents may not be used in summary conviction proceedings. Currently, a defendant may not appear or examine or cross-examine witnesses by agent when he or she is liable, on summary conviction, to imprisonment for a term of more than six months. The stated exceptions are when the defendant is a corporation or the agent is authorized under a provincially approved program.

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32 Ibid.

33 Ibid. The federal government has legislative jurisdiction over criminal procedure, including when agents can be used in criminal proceedings (*R.* v. *Romanowicz* (1999), 45 O.R. (3d) 532 (C.A.) [*R.* v. *Romanovicz*], para. 20), while the provinces have control over the "education, qualification, competence and probity" of such agents since that relates to the administration of justice (*R.* v. *Lemonides* (1997), 35 O.R. (3d) 611 (S.C.), para. 40, citing *R.* v. *Lawrie* (1987), 59 O.R. (2d) 161 (C.A.)).

34 *R.* v. *Romanowicz*, para. 24.

The amendments in clauses 31 through 33 further distinguish between individual and corporate defendants, and establish different rules for the use of agents depending on whether or not the province has approved a program or established criteria permitting agents to appear and to examine or cross-examine witnesses and whether the term of imprisonment that may result is longer than six months or not.

Clause 33 amends section 802.1 so that it applies only to a defendant who is an individual. As was the case prior to amendment, an individual defendant who is liable on summary conviction to imprisonment for *more than* six months may appear or examine and cross-examine witnesses by agent only if the agent is provincially authorized. An individual defendant who is liable on summary conviction to imprisonment for *six months or less* may still appear or examine and cross-examine witnesses by agent, although *if* the province has approved a program or established criteria permitting the use of agents, the agent must be authorized by the province. In other words, in provinces that have approved a program or established criteria governing the use of agents, *unauthorized* agents may not appear or examine or cross-examine on behalf of individual defendants, regardless of the length of imprisonment that may result on summary conviction. Under new subsection 802.1(2), however, a defendant who is an individual may nonetheless appear by agent to request an adjournment of the proceedings.

H. Corruption of Foreign Public Officials (Clause 38)

Generally speaking, the *Criminal Code* deals with offences that take place in Canada,[35] such as bribing a domestic official.[36] This concept is referred to as territorial jurisdiction: "the state in whose territory a crime was committed has jurisdiction over the offence."[37] The Code also establishes jurisdiction over certain offences committed by Canadian citizens abroad, including treason, terrorism, and certain sexual offences against children.[38] Jurisdiction on the basis of the nationality of the offender is referred to as the nationality principle.[39]

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35 Subsection 6(2) of the Code states that "[s]ubject to this Act or any other Act of Parliament, no person shall be convicted or discharged under section 730 of an offence committed outside Canada."

36 See, in particular, section 121 of the Code.

37 Hugh M. Kindred et al., *International Law, Chiefly as Interpreted and Applied in Canada*, 7th ed., Emond Montgomery, Toronto, 2006, p. 556.

38 Respectively, sections 46(3), 7(3.74), and 7(4.1) of the Code. Certain provisions also refer to, for example, stateless individuals ordinarily resident in Canada.

39 Kindred et al. (2006), p. 557.

The *Corruption of Foreign Public Officials Act* (the Act),[40] which responds to Canada's obligations under the *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (the Convention),[41] establishes the offence of bribing a foreign public official. The language used draws, in places, from equivalent provisions in the Code, and was intended to capture offences committed by corporations in addition to those committed by individuals.[42] Of note is the use of the phrase "in the course of business," rather than specifying "international" business as the Convention does; this was intended to capture those offences that do not involve crossing actual borders, such as the bribery of a foreign public official in Canada to obtain a business contract to build a new wing on an embassy in Canada.[43]

Clause 38 of Bill C-31 would add provisions to the *Corruption of Foreign Public Officials Act* based on the nationality principle[44] so that, in certain cases, offences committed outside Canada would be deemed to have been committed in Canada. Proceedings could then be commenced in any territorial division in Canada, and the provisions of the Code that relate to the accused's appearance during those proceedings would apply. The new provisions also provide safeguards, subject to certain exceptions, for a person who has already been tried and dealt with outside Canada for an act or omission that is deemed to have been committed inside Canada under this Act. This addresses the concern that someone could be tried twice for the same offence, once by a court exercising jurisdiction on the basis of territory and once by a court exercising jurisdiction on the basis of nationality. Similar safeguards are already in place in the Code.[45]

The issue of nationality jurisdiction was raised during the recent evaluation of Canada's compliance with the Convention. Article 4.2 of the Convention requires states that have jurisdiction to prosecute nationals for other offences committed outside of their territory to

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40 *Corruption of Foreign Public Officials Act*, S.C. 1998, c. 34 (entered into force on 14 February 1999).

41 Department of Justice, *The Corruption of Foreign Public Officials Act: A Guide*, May 1999, p. 2, http://www.justice.gc.ca/eng/dept-min/pub/cfpoa-lcape/guide.pdf.

42 Ibid., pp. 4–5.

43 Ibid., p. 5.

44 The amendments would apply if the person committing the offence is a Canadian citizen, a permanent resident, or "a public body, corporation, society, company, firm or partnership that is incorporated, formed or otherwise organized under the laws of Canada or a province."

45 See, for example, subsection 7(6).

apply the same principles to the offence of bribery of a foreign public official.[46] Since Canada has established jurisdiction over certain offences committed by nationals abroad, as discussed above, the evaluation indicated Canada "should be in a position to adopt a similar approach pursuant to Article 4.2 of the Convention and establish nationality jurisdiction for foreign bribery."[47] Further, it was noted, Canada was the only party to the Convention that had not.[48] Clause 38 of the bill appears to address this concern.

An additional concern raised during the evaluation process related to the definition of "business" in section 2 of the Act: "any business, profession, trade, calling, manufacture or undertaking of any kind carried on in Canada or elsewhere *for profit*." The Convention does not draw a distinction between transactions that are "for profit" and "not for profit," however, which "could create a problem in the enforcement of the foreign bribery offence in Canada, notably as many non-profit organisations operating internationally are based in Canada."[49] The federal government responded to this issue by pointing out that the title of the Convention includes the phrase "business transactions," and "[b]usiness transactions imply a profit motive."[50] Accordingly, Bill C-31 does not amend the definition of "business."

I. The *Identification of Criminals Act* (Clause 39)

1. Background

The *Identification of Criminals Act* (the Act)[51] identifies who may be subject to fingerprinting, photographing, or other measures, for the purposes of identification. This currently includes, under paragraph 2(1)(*a*), any person who is in lawful custody *charged with* or *convicted of* either (i) an indictable offence, with certain exceptions related to the *Contraventions*

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46 Organisation for Economic Co-operation and Development, *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, DAFFE/IME/BR(97)20, 8 April 1998, http://www.oecd.org/dataoecd/4/18/38028044.pdf.

47 Organisation for Economic Co-operation and Development, *Follow-up Report on the Implementation of the Phase 2 Recommendations on the Application of the Convention and the 1997 Recommendation on Combating Bribery of Foreign Public Officials in International Business Transactions*, 21 June 2006, p. 5, http://www.oecd.org/dataoecd/5/6/36984779.pdf.

48 Ibid.

49 Ibid., p. 4.

50 Ibid., p. 20.

51 *Identification of Criminals Act*, R.S.C. 1985, c. I-1.

Act, or (ii) an offence under the *Security of Information Act*.[52] It also includes, under paragraph 2(1)(*c*), any person alleged to have committed an indictable offence – again with exceptions related to the *Contraventions Act* – who is required to appear for identification by an appearance notice, a promise to appear, a recognizance or a summons.

In general terms, the police can issue an appearance notice without taking the accused into custody, while an accused can give a promise to appear to an officer on the street or at the detachment in order to be released.[53] Both mechanisms can require the accused to appear in court on a specified date and to appear on a specified date "for the purposes of the *Identification of Criminals Act*," as per subsection 501(3) of the Code. A police recognizance can also require the accused to appear in court and for identification, with the additional safeguard that the accused will owe an amount of up to $500 if he or she fails to attend court as required. These mechanisms are binding on an accused only after a justice considers the allegations and, where necessary or desirable, the evidence of witnesses and determines it would be appropriate to "confirm" the appearance notice, promise to appear, or recognizance.[54] The justice has other options under section 508 of the Code if confirmation is not deemed appropriate, including cancelling the appearance notice, promise to appear, or recognizance.

A summons is similar to these mechanisms in that it can also require the accused to appear in court and for identification purposes, but it is issued by a justice. The justice considers the allegations and, where necessary or desirable, the evidence of witnesses and decides whether to issue a summons, under section 507 of the Code. A peace officer must then serve the summons on the accused, as required by subsection 509(2). The summons is considered to be a more "onerous" mechanism, since an officer is able to compel the accused's appearance "on the spot" with an appearance notice or a promise to appear.[55]

It is an offence under subsection 145(4) of the Code to fail to appear for identification as required by a summons, and it is an offence under subsection 145(5) of the Code to fail to appear for identification as required by an appearance notice, a promise to appear, or a

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52 *Contraventions Act*, S.C., 1992, c. 47; *Security of Information Act*, R.S.C. 1985, c. O-5. Persons apprehended under the *Extradition Act*, S.C. 1999, c. 18, and persons in lawful custody pursuant to section 83.3, which relates to terrorism, may also be subject to identification measures, under paragraphs 2(1)(*b*) and (*d*) respectively.

53 Trotter (1999), pp. 90–91.

54 Ibid., p. 96.

55 Ibid., p. 92.

recognizance that has been confirmed by a justice.[56] Finally, with respect to the retention of identifying information, the *Identification of Criminals Act* requires the destruction of fingerprints and photographs only in certain situations related to the *Contraventions Act*.[57]

2. Amendment Under Bill C-31

Clause 39 of Bill C-31 would amend paragraph 2(1)(*a*) of the Act so that anyone in lawful custody *after being arrested for* the specified offences could be subject to fingerprinting, photographing, or other identification procedures. This amendment is intended to "streamlin[e] the identification process in police stations by allowing the fingerprinting and photographing of persons in lawful custody who have not yet been charged or convicted of specific offences."[58] According to the Department of Justice backgrounder, because the police do not currently have that authorization, the process "often results in unnecessary delays and can prolong an accused individual's stay at a police station."[59]

Since arrest is often the first step of criminal justice proceedings, the amended Act would allow fingerprinting and photographing to take place immediately in some situations, rather than after charging or conviction. Although "charged" is not defined in the *Criminal Code*, case law indicates that a person is not charged until an information has been sworn or an indictment preferred.[60] Charges may be laid a considerable amount of time after arrest, if at all.[61] Consequently, the proposed amendment in Bill C-31 could result in the fingerprinting and photographing of individuals who are not subsequently charged with an indictable (or hybrid) offence.[62]

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56 According to Trotter (1999), p. 442, "the Crown must prove that the process had been confirmed prior to the time that the accused person was required to attend."

57 Section 4 of the *Identification of Criminals Act*. In considering the constitutionality of police retention of fingerprints in *R.* v. *Dore* (2002), 166 C.C.C. (3d) 225, para. 71, the Ontario Court of Appeal approved the process, at least in some circumstances, of retaining such information until a request is made to destroy the records.

58 Department of Justice, News release (15 May 2009).

59 Department of Justice, Backgrounder (May 2009).

60 *R.* v. *Berthiaume* (1997), 45 C.R.R. (2d) 170 (B.C.S.C.), *R.* v. *Connors* (1998), 155 D.L.R. (4th) 391 (B.C.C.A.), and *R.* v. *Kalanj*, [1989] 1 S.C.R. 1594.

61 In *Kalanj*, for example, the information was sworn eight months and nineteen days after the accused were arrested and released.

62 Because of section 34(1)(*a*) of the *Interpretation Act*, R.S.C. 1985, c. I-21, hybrid offences are treated as indictable offences prior to Crown election.

In addition, since an individual could be fingerprinted and photographed while in lawful custody after arrest, there would be no need to compel his or her appearance at a later date through a court-issued summons or a court-confirmed appearance notice, promise to appear, or recognizance under paragraph 2(1)(*c*).

COMMENTARY

Reaction to Bill C-31 has been mixed. The telewarrant and failure to remain in the territorial jurisdiction amendments have prompted favourable commentary from the law enforcement community. Police Chief Bob Rich of Abbottsford, British Columbia, is quoted as saying that "[a]n electronic interface with the justice of the peace is just as good as standing on his porch at 3 o'clock in the morning," and that "[w]e shouldn't be sending officers driving for hours to go and meet face-to-face with the justice of the peace."[63]

With respect to failure to remain in the territorial jurisdiction, most of the commentary has been about "non-returnable warrants," which are "limited to a specific city or province, and once an accused individual leaves that area, police in other provinces have limited ability to make an arrest and send the individual back."[64] Vancouver Staff Sgt. Ruben Sorge led a three-month study in 2006 that found 752 people confronted on the streets by Vancouver police officers were wanted on arrest warrants somewhere else in the country, for offences ranging from shoplifting to sexual assault and robbery.[65] According to Supt. Warren Lemcke of the Vancouver Police Department, "there are hundreds of people on outstanding so-called non-returnable, limited radius warrants walking around the city," and it costs up to $2,500 to send each one home.[66]

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63 Terri Theodore, "Print 'em, Dano, then charge 'em; Proposed legal changes would OK quick fingerprinting, mug shots of suspects," *The Chronicle-Herald* [Halifax], 21 May 2009, p. B1.

64 Rebecca Tebrake, "Accused who flee will face jail time under proposed law; Aim is to close loophole that tempted criminals to escape justice by leaving the province where they were charged," *The Vancouver Sun*, 21 May 2009, p. A7.

65 "Planned Criminal Code changes include fingerprinting without charge," Canadian Press Wire, 20 May 2009.

66 "Provinces co-operating with Vancouver program that sends convicts home: police," Canadian Press Wire, 11 September 2009.

The greatest amount of public commentary with respect to Bill C-31 has been regarding the *Identification of Criminals Act*. The assertion that the amendments will increase police efficiency has been referred to as "unsupported,"[67] and the "streamlining" rationale for the amendments as "nonsense."[68] Others argue that inefficiency in the system is due to "poor case management and delays once charges are actually laid."[69]

Some opponents of the amendment argue it would erode the presumption of innocence and invade privacy.[70] Toronto defence attorney Clayton Ruby has argued that "[p]roviding fingerprints is self-incrimination and the Constitution protects us from this. The line that is drawn is when you are charged. And to allow police to compel you to incriminate yourself before that moment is open to abuse."[71] With respect to the scope of the amendment, the President of the BC Civil Liberties Association has stated that "[i]f they are going to say anybody who is not charged can be fingerprinted … they might as well fingerprint the whole country."[72]

Those in favour of the amendment respond that the distinction between arrest and charging is a mere loophole that Bill C-31 will close, and that fingerprints are simply a method of positive identification, unrelated to innocence or guilt.[73] Others add that officers will still require, before arresting someone, reasonable and probable grounds to believe they have committed an offence, and police will not be able to randomly obtain the fingerprints of "average folk going about their business."[74]

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67 Caleigh Rabbitte, "New police powers infringe on individual rights," *The Edmonton Journal*, 28 May 2009, p. A19.

68 Steven Chase, "Ottawa's plan to fingerprint those not yet charged comes under fire," *The Globe and Mail* [Toronto], 16 May 2009, p. A4, citing Toronto defence attorney Clayton Ruby.

69 "Justice System; Feds should keep hands off fingerprinting," *The Windsor Star*, 22 May 2009, p. A6, citing William Trudell, Chair of the Canadian Council of Criminal Defence Lawyers.

70 Rabbitte (28 May 2009).

71 Chase (16 May 2009).

72 Robert Koopmans, "Book 'Em; Changes to fingerprinting rules will help protect public, police say," *Kamloops Daily News*, 22 May 2009, p. A1.

73 S.D. McDonald, "Nothing sinister here," *The Edmonton Journal*, 2 June 2009, p. A13.

74 Koopmans (22 May 2009). Section 495 of the Code describes certain limits on a peace officer's power to effect a warrantless arrest.

With respect to retention of records, some commentators expressed concern because records are not automatically destroyed even if charges are dropped or an acquittal is entered.[75] The President of the BC Civil Liberties Association has argued the reason that records are not automatically destroyed is because the police "just want to keep a large pool of fingerprints on hand."[76] Others have expressed concern that fingerprints could be shared with foreign jurisdictions, which could lead to complications for innocent travellers.[77]

75 Rabbitte (28 May 2009).

76 Koopmans (22 May 2009).

77 Manon Cornellier, "Encore une petite vite," *Le Devoir* [Montréal], 27 May 2009, p. A3.