Legislative Summary **LS-667E**

BILL C-59: AN ACT TO AMEND THE INTERNATIONAL TRANSFER OF OFFENDERS ACT

Cynthia Kirkby
Legal and Legislative Affairs Division

7 January 2010

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LEGISLATIVE HISTORY OF BILL C-59

HOUSE OF COMMONS		SENATE	
Bill Stage	**Date**	**Bill Stage**	**Date**
First Reading:	26 November 2009	First Reading:	
Second Reading:		Second Reading:	
Committee Report:		Committee Report:	
Report Stage:		Report Stage:	
Third Reading:		Third Reading:	

Royal Assent:

Statutes of Canada

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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INTRODUCTION

Bill C-59, An Act to amend the International Transfer of Offenders Act (short title: Keeping Canadians Safe [International Transfer of Offenders] Act), was introduced in the House of Commons on 26 November 2009 by the Minister of Public Safety, the Honourable Peter Van Loan. The bill amends the purpose of the *International Transfer of Offenders Act*,[1] as well as the factors for the Minister's consideration in deciding whether to consent to an offender's transfer. The bill also contains a coordinating amendment related to Bill C-36, An Act to amend the Criminal Code, which proposes to eliminate the "faint hope" clause of the *Criminal Code* (the Code).[2]

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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 *International Transfer of Offenders Act*, S.C. 2004, c. 21.

2 The "faint hope" clause, s. 745.6 of the Code, provides offenders serving a sentence for high treason or murder with the possibility of parole after having served 15 years in prison when the sentence was imprisonment for life without eligibility for parole for more than 15 years. For more information on Bill C-36, see Robin MacKay, *Bill C-36: An Act to amend the Criminal Code (Serious Time for the Most Serious Crime Act)*, LS-659E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 11 September 2009, http://www2.parl.gc.ca/Sites/LOP/LegislativeSummaries/Bills_ls.asp?lang=E&ls=c36&source=library_prb&Parl=40&Ses=2.

BACKGROUND

A. Legislative Scheme

Canada has been a party to treaties relating to the transfer of offenders since 1978.[3] These agreements have been characterized as humanitarian in nature[4] in that they "enable offenders to serve their sentence in their country of citizenship, to alleviate undue hardships borne by offenders and their families and facilitate their eventual reintegration into society."[5] The problems Canadians incarcerated in foreign countries can face are said to include "culture shock, isolation, language barriers, poor diets, inadequate medical care, disease and inability to contact friends and family."[6]

The *Transfer of Offenders Act*[7] came into force in Canada in 1978, and was modernized by the *International Transfer of Offenders Act* [the Act] in 2004.[8] The Act enables offenders to serve their sentences in the country of which they are citizens or nationals (section 3). Generally speaking, the principle of "dual criminality" applies, so that a transfer is not available unless the Canadian offender's conduct would have constituted a criminal offence in Canada as well (subsection 4(1)).[9] A transfer can take place only with the consent of the offender, the foreign entity, and Canada (subsection 8(1)). It is the Minister, currently defined as the Minister of Public Safety and Emergency Preparedness (section 2), who decides whether to consent to the transfer into Canada of a Canadian offender or the transfer out of Canada of a

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3 For more information on these treaties, see Correctional Service of Canada, *International Transfer Of Offenders – Bilateral Treaties (with Canada)*, http://www.csc-scc.gc.ca/text/prgrm/inttransfer/bilateral-eng.shtml, and *International Transfer Of Offenders – Multilateral Conventions*, http://www.csc-scc.gc.ca/text/prgrm/inttransfer/multilateral-eng.shtml.

4 Correctional Service of Canada, *Programs: International Transfer Of Offenders*, 13 May 2008, http://www.csc-scc.gc.ca/text/prgrm/inttransfer/trans-eng.shtml.

5 Ibid.

6 Ibid.

7 *Transfer of Offenders Act*, R.S.C. 1985, c. T-15. The *Transfer of Offenders Act* came into force following a United Nations meeting at which member states agreed that the international transfer of offenders was desirable due to the increasing mobility of offenders and the need for countries to cooperate on criminal justice matters. The intent of the *Transfer of Offenders Act* was to authorize the implementation of treaties between Canada and other countries, including multilateral conventions, for the international transfer of offenders.

8 Public Safety Canada, *Keeping Canadians Safe (International Transfer of Offenders Act)*, 26 November 2009, http://www.publicsafety.gc.ca/media/nr/2009/nr20091126-1-eng.aspx.

9 The "dual criminality" principle also applies to extradition (s. 3 of the *Extradition Act*, S.C. 1999, c. 18).

foreign offender. The Minister is currently required to consider certain factors, such as whether a Canadian offender's return to Canada would constitute a threat to the security of Canada, and whether that offender has social or family ties in Canada, in making that decision (section 10).

Once an offender is transferred, his or her sentence is administered in accordance with the laws of the receiving country.[10] The Correctional Service of Canada notes, in its *International Transfers Annual Report 2006-2007*, that if offenders are not transferred, "they may ultimately be deported to Canada at the end of their sentence, without correctional supervision/jurisdiction and without the benefit of programming."[11]

B. Statistics[12]

1. Transfers to Canada

A total of 1,351 Canadian offenders were transferred to Canada between 1978 and 2007. Of these, 1,069 (79%) were transferred from the United States. The other countries from which the most Canadians were repatriated were Mexico (59 offenders, or 4.4% of transfers), the United Kingdom (33 offenders, or 2.4% of transfers),[13] Peru (31 offenders, or 2.3% of transfers), Trinidad and Tobago (20 offenders, or 1.5% of transfers), Thailand (17 offenders, or 1.3% of transfers), Venezuela (17 offenders, or 1.3% of transfers), Cuba (16 offenders, or 1.2% of transfers), and Costa Rica (14 offenders, or 1.0% of transfers). Fewer than 10 offenders were repatriated from any other country.

The number of offenders transferred to Canada in a fiscal year has ranged from a low of 7 in 1980–1981 to a high of 98 in 2003–2004. In 2006–2007, 53 offenders were

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10 Correctional Service of Canada, *Programs: International Transfer Of Offenders* (2008). For further description and analysis of the Act, see Robin MacKay, *Bill C-15: International Transfer of Offenders Act*, LS-469E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 16 February 2004, http://www2.parl.gc.ca/Content/LOP/LegislativeSummaries/37/3/c15-e.pdf.

11 Correctional Service of Canada, *International Transfers Annual Report 2006-2007*, 13 May 2008, http://www.csc-scc.gc.ca/text/prgrm/inttransfer/2006-2007rprt/rprt_trns_06-eng.shtml. This is the most recent annual report available on the website.

12 The statistics in this section were compiled from Correctional Service of Canada, *International Transfers Annual Report 2006-2007* (2008); Correctional Service of Canada, "Transfer to Canada" table, 13 May 2008, http://www.csc-scc.gc.ca/text/prgrm/inttransfer/2006-2007rprt/trns_t_cn_06-eng.shtml; and Correctional Service of Canada, "Transfer from Canada" table, 13 May 2008, http://www.csc-scc.gc.ca/text/prgrm/inttransfer/2006-2007rprt/trns_f_cn_06-eng.shtml.

13 The "Transfer to Canada" table (see note 12) shows 30 offenders transferred to Canada from the United Kingdom, and 3 from England.

transferred to Canada, which was the lowest annual total since 1994–1995, when 40 offenders were transferred to Canada. In the last 10 years for which statistics are available (1997–1998 to 2006–2007), 768 offenders were transferred to Canada, for a yearly average of 77 offenders. Of those 768 offenders, 313 (40.8%) were transferred to the Ontario region, 207 (27.0%) were transferred to the Pacific region, 200 (26.0%) were transferred to the Quebec region, 33 (4.3%) were transferred to the Prairies, and 15 (2.0%) were transferred to the Atlantic region.

2. Transfers From Canada

A total of 124 offenders were transferred out of Canada between 1978 and 2007. Of these, 106 offenders (85.5%) were transferred to the United States. Eight offenders (6.5%) were transferred to the Netherlands, 3 (2.4%) were transferred to the United Kingdom, and 2 were transferred to France (1.6%). One offender (.08%) was transferred to each of the following countries: Estonia, Ireland, Israel, Italy, and Poland. Ninety of the 124 transfers (72.6%) took place between 1978 and 1983. Since then, transfers from Canada have generally taken place at the rate of 1 or 2 offenders per year, although there were 3 transfers in 1990–1991 (all to the United States) and 4 in 2006–2007 (1 each to Estonia, France, Israel and Italy).

3. Applications and Denials

In the last five fiscal years (2002–2003 to 2006–2007), the International Transfers Unit of the Correctional Service of Canada received 1,314 applications for transfer. Of those, 367 (27.9%) have resulted in a transfer, while 519 (39.5%) were denied. Some applications are still “in process.” Of the 519 denied applications, 24 (4.6%) were denied by Canada, and 495 (95.4%) were denied by the foreign country involved. The majority of denials by Canada were based on the Minister’s finding that the offenders would constitute a threat to the security of Canada, and/or that the offenders had abandoned Canada as their place of permanent residence as they had been living in the other country for a number of years.

C. Jurisprudence

Since the Act came into force in 2004, at least three offenders have applied for judicial review of the Minister’s refusal to consent to a request for transfer made pursuant to it.

In *Kozarov* v. *Canada (Minister of Public Safety and Emergency Preparedness)*,[14] although the offender and the United States consented to the transfer back to Canada, the Minister denied Mr. Kozarov's application because he had spent the past 10 years in the United States, the file information suggested he left Canada with no intention of returning, and the file information stated that there did not appear to be sufficient ties to Canada to warrant a transfer.[15] After stating that courts should not readily interfere with a discretionary decision of a minister, Justice Harrington of the Federal Court held that the Minister's findings with respect to Mr. Kozarov were not unreasonable.[16] Mr. Kozarov's appeal of this decision was dismissed as he had already been deported to Canada.[17]

The offender and the United States had also consented to a transfer to Canada in *Getkate* v. *Canada (Minister of Public Safety and Emergency Preparedness)*.[18] The Minister initially refused to consent because the offender's return to Canada would constitute a potential threat to the safety of Canadians and the security of Canada, and there was no evidence to suggest the offender's risk had been mitigated through treatment.[19] The Minister denied Mr. Getkate's second request for these same reasons and because there was evidence that the offender had abandoned Canada as his place of permanent residence.[20] On judicial review, Justice Kelen of the Federal Court stated that while the Minister's decision is discretionary and is entitled to the highest level of deference, the record clearly established that the decisions disregarded the evidence.[21] In particular, there was evidence that the offender had undertaken intensive treatment at his own expense,[22] and "clear and unambiguous evidence," including from

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14 *Kozarov* v. *Canada (Minister of Public Safety & Emergency Preparedness)*, [2008] 2 F.C.R. 377, 2007 FC 866.

15 Ibid., para. 2.

16 Ibid., paras. 12 and 24. This decision was released prior to *Dunsmuir* v. *New Brunswick*, [2008] 1 S.C.R. 190, 2008 SCC 9, so although Justice Harrington found that the appropriate standard of review was patent unreasonableness, he held that the Minister's findings "*were not unreasonable*, much less patently so" [emphasis added].

17 *Kozarov* v. *Canada (Public Safety and Emergency Preparedness)*, 2008 FCA 185.

18 *Getkate* v. *Canada (Minister of Public Safety and Emergency Preparedness)*, [2009] 3 F.C.R. 26, 2008 FC 965.

19 Ibid., para. 6.

20 Ibid., para. 8.

21 Ibid., para. 33.

22 Ibid., para. 34.

the Correctional Service of Canada, that Mr. Getkate never abandoned or intended to abandon Canada as his place of permanent residence.[23] Finally, Justice Kelen noted that the use of the phrase "threat to the security of Canada" had traditionally been limited to threats of general terrorism and warfare against Canada, or threats to the security of Canadians *en masse*, and that if the phrase referred to the mere risk that the offender would reoffend, then such a consideration could be applied to every inmate seeking a transfer.[24] Since the reasons articulated by the Minister were "contrary to the evidence and to the assessment and recommendations by his own Department," Mr. Getkate's request for a transfer was referred back to the Minister for redetermination.[25]

Finally, in *DiVito* c. *Canada (Ministre de la Sécurité publique et de la Protection civile)*,[26] the Minister refused a transfer request because "the prisoner has been identified as being a member of a criminal organization and has been sentenced for an offence involving a large quantity of drugs" and "both the nature of the offence and the prisoner's affiliations suggest that his return to Canada could constitute a threat to the security of Canada and the safety of Canadians."[27] On judicial review, Justice Harrington noted the existence of "information received from the RCMP that suggests Mr. DiVito is a member of a traditional criminal organization."[28] Although there was also conflicting evidence, namely that Mr. DiVito "would not constitute a threat to the security of Canada," and although the report from the Correctional Service of Canada stated that "Mr. DiVito's transfer from the United States to Canada … would be highly beneficial,"[29] Justice Harrington held that the Minister's decision was reasonable.[30]

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23 Ibid., para. 40.

24 Ibid., para. 41.

25 Ibid., paras. 44–45.

26 *DiVito* c. *Canada (Ministre de la Sécurité publique et de la Protection civile)*, 2009 CF 983.

27 *DiVito*, para. 1 [translation].

28 Ibid., para. 21 [translation].

29 Ibid., paras. 20, 22 and 23 [translation].

30 Ibid., para. 26.

DESCRIPTION AND ANALYSIS

A. Purpose of the Act (Clause 2)

Currently, the purpose of the Act "is to contribute to the administration of justice and the rehabilitation of offenders and their reintegration into the community by enabling offenders to serve their sentences in the country of which they are citizens or nationals" (section 3). Clause 2 of Bill C-59 amends this by adding the following reference to public safety: "The purpose of this Act is to *enhance public safety and to* contribute to the administration of justice and the rehabilitation of offenders and their reintegration into the community by enabling offenders to serve their sentences in the country of which they are citizens or nationals." Some commentators, however, have questioned the rationale for this amendment, arguing that international transfers already enhance public security by helping to rehabilitate the worst offenders, who are likely to be deported back to the country after they complete their sentences.[31]

B. Factors for the Minister to Consider (Clause 3)

In determining whether to consent to the transfer of a Canadian offender back to Canada, the Minister is currently required, under subsection 10(1) of the Act, to consider the following factors:

> (*a*) whether the offender's return to Canada would constitute a threat to the security of Canada;
>
> (*b*) whether the offender left or remained outside Canada with the intention of abandoning Canada as their place of permanent residence;
>
> (*c*) whether the offender has social or family ties in Canada; and
>
> (*d*) whether the foreign entity or its prison system presents a serious threat to the offender's security or human rights.

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31 The Canadian Press, "Feds to make it harder for prisoners abroad to return to Canada," *The Daily Gleaner* [Fredericton], 27 November 2009, p. A10, citing criminologist Neil Boyd; and Nathalie Des Rosiers, "Benign amendments or undermining of the rule of law?" *Canadian Civil Liberties Association*, 4 December 2009, http://ccla.org/?p=2905.

The Minister is also required, under subsection 10(2), to consider the following factors with respect to the transfer of both Canadian and foreign offenders:

> (*a*) whether, in the Minister's opinion, the offender will, after the transfer, commit a terrorism offence or criminal organization offence within the meaning of section 2 of the *Criminal Code*; and
>
> (*b*) whether the offender was previously transferred under this Act or the *Transfer of Offenders Act*, chapter T-15 of the Revised Statutes of Canada, 1985.

Clause 3 of the bill makes the Minister's consideration of all factors under section 10 of the Act discretionary ("the Minister may consider"), rather than mandatory ("the Minister shall consider") as is currently the case.[32] As well, clause 3 amends paragraphs 10(1)(*a*), (*b*), and (*d*) by adding "whether, *in the Minister's opinion*" at the beginning of the paragraph. This would appear to allow for a subjective assessment by the Minister should he or she choose to consider one of those factors. Paragraph 10(1)(*c*), "whether the offender has social or family ties in Canada," is not amended in this way, so it would appear to be a more objective factor.[33] Finally, clause 3 adds to subsection 10(1) additional factors that the Minister *may* consider in determining whether to transfer a Canadian offender:

- whether, in the Minister's opinion, the offender's return to Canada will endanger public safety, including
  - the safety of any person in Canada who is a victim, as defined in subsection 2(1) of the *Corrections and Conditional Release Act*, of an offence committed by the offender,
  - the safety of any member of the offender's family, in the case of an offender who has been convicted of an offence against a family member, and
  - the safety of any child, in the case of an offender who has been convicted of a sexual offence involving a child;
- whether, in the Minister's opinion, the offender is likely to continue to engage in criminal activity after the transfer;
- the offender's health;

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32 Nathalie Des Rosiers, general counsel for the Canadian Civil Liberties Association, expressed concern that under the amendments, the Minister would no longer be *required* to consider factors including whether the conditions of foreign detention present a serious threat to the offender's security or human rights. (See Des Rosiers (2009).)

33 Note also that the word "would" in paragraph 10(1)(*a*) is amended to "will," and the other existing factors are renumbered to accommodate the additional factors.

- whether the offender has refused to participate in a rehabilitation or reintegration program;
- whether the offender has accepted responsibility for the offence for which he or she has been convicted, including by acknowledging the harm done to victims and to the community;
- the manner in which the offender will be supervised, after the transfer, while he or she is serving his or her sentence;
- whether the offender has cooperated, or has undertaken to cooperate, with a law enforcement agency; and
- any other factor that the Minister considers relevant.

With respect to the factor about accepting responsibility for the offence, concern has been expressed that this could result in innocent individuals pleading guilty "in order to avoid remaining in a foreign jail."[34]

C. Coordinating Amendment (Clause 4)

Bill C-36[35] would eliminate the "faint hope" clause of the Code (section 745.6), which provides offenders serving a sentence for high treason or murder with the possibility of parole after having served 15 years in prison even though the sentence was imprisonment for life without eligibility for parole for more than 15 years. Since the Act includes provisions relating to sentence calculation, including with respect to parole eligibility for those convicted of murder, clause 4 of Bill C-59 would amend section 24(1) of the Act in the event that Bill C-36 receives Royal Assent.

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34 Des Rosiers (2009).

35 Bill C-36 has been adopted by the House of Commons and received first reading in the Senate on 26 November 2009.