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Bill C-21: An Act to Amend the Criminal Code (Sentencing for Fraud)

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Legislative Summary of Bill C-21

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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.

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

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LEGISLATIVE SUMMARY OF BILL C-21: AN ACT TO AMEND THE CRIMINAL CODE (SENTENCING FOR FRAUD)

1 BACKGROUND

1.1 PURPOSE OF THE BILL AND PRINCIPAL AMENDMENTS

Bill C-21, An Act to amend the Criminal Code (sentencing for fraud) (short title: Standing up for Victims of White Collar Crime Act), was introduced in the House of Commons on 3 May 2010 by the Minister of Justice, the Honourable Robert Nicholson. It is almost identical to Bill C-52, which was introduced during the 2nd Session of the 40th Parliament but did not become law before Parliament was prorogued on 30 December 2009. The intent of the bill is to “help crack down on white-collar crime and increase justice for victims”¹ through measures that include a two-year mandatory minimum sentence for fraud over \$1 million, additional specified aggravating factors for the court’s consideration in sentencing, a new type of prohibition order, new obligations on the judge with respect to restitution orders, and a new type of impact statement to consider in sentencing.

1.2 PRIOR AMENDMENTS TO FRAUD PROVISIONS OF THE *CRIMINAL CODE*

The fraud provisions of the *Criminal Code* (the Code) were most recently amended in 2004,² in response to the global impact of corporate scandals associated with companies such as Enron, Tyco and WorldCom.³ These amendments created a new offence of improper insider trading, increased the maximum sentence for the offences of fraud and fraud affecting the market from 10 to 14 years, and established a list of aggravating factors to aid the courts in sentencing.⁴ The federal government also announced it would create a number of Integrated Market Enforcement Teams (IMETs), composed of Royal Canadian Mounted Police (RCMP) officers, federal lawyers and other investigators, such as forensic accountants, to deal with capital markets fraud cases.⁵

1.3 INTEGRATED MARKET ENFORCEMENT TEAMS

In 2003, the Government of Canada created the IMET program, funding it through the RCMP. Ten IMETs are operational in four of Canada’s major financial centres,⁶ and their mandate is to investigate and lay charges for serious *Criminal Code* offences involving capital markets.

According to the 2007–2008 IMET annual report, the program’s total budget increased from \$13.2 million in fiscal 2005 to \$18.9 million in fiscal 2008.⁷ The IMET budget decreased to \$16.1 million in fiscal year 2008–2009.⁸ From December 2003, when the program began, to March 2008, five investigations led to nine individuals being charged with a total of 29 *Criminal Code* offences.⁹ In fiscal year 2008–2009, however, 17 individuals were charged with 979 counts.¹⁰ A total of five individuals

have been convicted since the IMET program was established, with sentences ranging from 39 months to 13 years.¹¹

According to the RCMP's 2009–2010 Report on Plans and Priorities, it is anticipated that annual funding of just over \$30 million will be allocated for fiscal 2010–2011 and 2011–2012 to support the investigation and prosecution of fraud offences in capital markets.¹²

1.4 STATISTICS ON FRAUD IN CANADA

According to the Uniform Crime Reporting Survey, which “reflect[s] reported crime that has been substantiated by police,”¹³ there were 90,932 actual incidents of fraud in Canada in 2008.¹⁴ The Adult Criminal Court Survey, which collects “statistical information on appearances, charges, and cases in adult criminal courts,”¹⁵ indicates that across Canada there were 9,790 cases of fraud in which the accused were found guilty in 2008–2009.¹⁶ A prison sentence was imposed in 3,338 of those cases (34.1%), a conditional sentence in 1,007 cases (10.3%), probation in 6,349 cases (64.9%), a fine in 1,131 cases (11.6%), and restitution in 1,591 cases (16.3%). In 4,398 cases (44.9%), “other sentences” were imposed, such as an absolute or conditional discharge, a community service order, or a prohibition order.¹⁷

These statistics do not provide details on the monetary value of the fraud, or on the type of fraud, which can include “securities-related frauds such as Ponzi schemes, insider trading, and accounting frauds that overstate the value of securities,” as well as “mass marketing fraud, mortgage and real estate fraud, and many other deceptive practices.”¹⁸

1.5 SENTENCING FOR FRAUD OVER \$1,000,000

Despite the lack of statistics on sentences imposed for fraud over \$1,000,000 specifically, case law indicates that “[b]oth before and after Parliament’s introduction of conditional sentences, cases of large-scale fraud by persons in a position of trust have typically resulted in substantial jail sentences.”¹⁹ The range has been estimated at 4 to 15 years for large-scale frauds, although sentences of less than two years and conditional sentences have been imposed where there have been “important mitigating circumstances.”²⁰

2 DESCRIPTION AND ANALYSIS

2.1 MINIMUM SENTENCE FOR FRAUD (CLAUSE 2)

Currently, a person convicted of the general offence of fraud²¹ is liable under subsection 380(1) of the *Criminal Code* to a maximum term of imprisonment of 14 years where the value of the subject-matter of the offence exceeds \$5,000, or two years where the value of the subject-matter of the offence does not exceed \$5,000. No minimum sentence is specified.

Clause 2 of the bill introduces a minimum sentence of two years' imprisonment in cases of fraud over \$1 million. Currently, where the value of the subject-matter of the fraud exceeds \$1 million, this is considered an aggravating circumstance to be taken into consideration by the sentencing judge.²²

The minimum sentence proposed in the bill will also apply when the value of the subject-matter of a number of fraud offences totals over \$1 million. For example, if a person is convicted of 10 fraud offences of \$125,000 each, the judge must impose a sentence of at least two years. On the other hand, the minimum sentence applies solely to a person convicted of the general offence of fraud (subsection 380(1) of the Code) and does not seem to apply to other related offences, such as fraud affecting the market,²³ fraudulent manipulation of stock markets,²⁴ insider trading²⁵ or the publication of a false prospectus.²⁶ In the latter three cases, however, where the value of the subject-matter exceeds \$1 million, this remains an aggravating circumstance.²⁷

2.2 AGGRAVATING CIRCUMSTANCES (CLAUSE 3)

In cases involving fraud, fraudulent stock market manipulation, insider trading or a false prospectus, the existing subsection 380.1(1) of the Code lists the following aggravating circumstances (in addition to value exceeding \$1 million), which often lead to more severe sentences:

- The offence adversely affected, or had the potential to adversely affect, the stability of the Canadian economy or financial system or any financial market in Canada, or investor confidence in such a financial market.
- The offence involved a large number of victims.
- In committing the offence, the offender took advantage of the high regard in which he or she was held in the community.²⁸

Clause 3 of the bill adds four aggravating circumstances to this list:

- The magnitude, complexity, duration or degree of planning of the fraud committed was significant.
- The offence had a significant impact on the victims, given their personal circumstances, including their age, health and financial situation.
- The offender did not comply with a licensing requirement, or professional standard, that is normally applicable to the activity or conduct that forms the subject-matter of the offence.
- The offender concealed or destroyed records related to the fraud or to the disbursement of the proceeds of the fraud.

In addition to these specific aggravating circumstances, the general aggravating circumstances contemplated in paragraph 718.2(a) of the Code will continue to apply; these include abuse of a position of trust or evidence that the offence was committed in association with a criminal organization. Moreover, "[t]he court shall cause to be stated in the record the aggravating and mitigating circumstances it took into account when determining the sentence" (new subsection 380.1(3) of the Code).

2.3 PROHIBITION ORDER (CLAUSE 4)

Since 1 March 2007, a person convicted of an offence against the federal government or a provincial or territorial government under section 380 of the Code is prohibited, generally for a period of five years after the sentence expires, from receiving any benefit under a government contract or holding government office.²⁹

The bill introduces a new type of order into the Code: a discretionary order prohibiting the offender from seeking employment (new section 380.2 of the Code). A judge sentencing an offender for the general offence of fraud (subsection 380(1) of the Code) may, in addition to any other punishment, prohibit the offender from seeking, obtaining or continuing any employment, or becoming or being a volunteer in any capacity, that involves having authority over the real property, money or valuable security of another person (new subsection 380.2(1) of the Code).

The bill does not prescribe the minimum or maximum duration of the prohibition. It is therefore the judge who determines what period is appropriate (new subsection 380.2(2) of the Code). The court may also impose conditions or exemptions. Failure to comply with an order is punishable by imprisonment for a maximum term of two years (new subsection 380.2(4) of the Code).

2.4 RESTITUTION ORDER (CLAUSE 4)

Under the existing provisions, a judge passing sentence for any offence under the Code may order the offender to make restitution to the victim for damage to property or for bodily or psychological harm.³⁰ The court must give priority to restitution before imposing a fine on the offender.³¹ A restitution order is discretionary, however, meaning that the judge may decide not to grant it.

The bill states that a judge passing sentence for the general offence of fraud (subsection 380(1) of the Code) “shall consider making a restitution order” (new subsection 380.3(1) of the Code). Moreover, “the court shall inquire of the prosecutor if reasonable steps have been taken to provide the victims with an opportunity to indicate whether they are seeking restitution for their losses” (new subsection 380.3(2) of the Code). **As the bill was originally drafted, if the court decided not to make a restitution order, it would have been required to give reasons for that decision and cause those reasons to be stated in the record (new subsection 380.3(5) of the Code). The House of Commons Standing Committee on Justice and Human Rights amended this section, however, to clarify that the court would only have to give reasons for not making a restitution order *if the victim seeks restitution*.**³²

2.5 COMMUNITY IMPACT STATEMENT (CLAUSE 4)

The Code currently provides for a victim impact statement to be filed at the sentencing stage.³³ For the purpose of determining the sentence to be imposed for any offence under the Code, the court is required to consider any victim impact statement describing the harm done to, or loss suffered by, the victim arising from the commission of the offence. For the purposes of the Code, “victim” means a

person to whom harm was done or who suffered physical or emotional loss as a result of the commission of the offence.³⁴ Only where the victim is dead, ill or otherwise incapable of making a statement may another person, such as the spouse, prepare a statement.

The bill introduces a new type of statement into the Code: a community impact statement (new section 380.4 of the Code). A judge passing sentence for the general offence of fraud (subsection 380(1) of the Code) may consider a statement made by a person on a community's behalf describing the harm done to, or losses suffered by, the community arising from the commission of the offence (new subsection 380.4(1) of the Code). Unlike consideration of the victim impact statement, which is mandatory, the court's consideration of a community impact statement is discretionary.

In order to be considered, the community impact statement must be in writing. It must also identify the community on whose behalf the statement is made, and explain how the statement reflects the community's views (new subsection 380.4(2) of the Code).

NOTES

1. Department of Justice, "[Government of Canada to introduce legislation to tackle white collar crime](#)," News release, 20 October 2009.
2. *An Act to Amend the Criminal Code (Capital Markets Fraud and Evidence-Gathering)* [Bill C-13, 3rd Session, 37th Parliament], S.C. 2004, c. 3. A bill had been introduced in substantially the same form in the previous session of Parliament (Bill C-46, 2nd Session, 37th Parliament).
3. See Robin MacKay and Margaret Smith, *Bill C-13: An Act to Amend the Criminal Code (Capital Markets Fraud and Evidence-Gathering)*, Publication no. LS-468E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 16 February 2004.
4. Ibid. See current sections 382.1, 380, and 380.1 of the *Criminal Code* (the Code) respectively.
5. Ibid.
6. There are four IMETs in Greater Toronto, two in Calgary, two in Vancouver and two in Montréal.
7. Royal Canadian Mounted Police [RCMP], *IMET – 2007/2008 Integrated Market Enforcement Program: Annual Report* [2007/2008 IMET Annual Report], p. 23.
8. RCMP, *2008–2009 Integrated Market Enforcement Program Annual Report* [2008–2009 IMET Annual Report].
9. RCMP, 2007/2008 IMET Annual Report, p. 11.
10. RCMP, 2008–2009 IMET Annual Report.
11. RCMP, "[Backgrounder: Integrated Market Enforcement Team Program](#)."
12. RCMP, "Departmental Planned Spending Table and Full Time Equivalents," Table 1, *2009–2010 Report on Plans and Priorities*.
13. Statistics Canada, "[Detailed information for 2009](#)," *Uniform Crime Reporting Survey (UCR)*.

14. Statistics Canada, Table 252-0051, "Incident-based crime statistics, by detailed violations, annual," CANSIM (database), accessed 10 February 2011.
15. Statistics Canada, "[Detailed information for 2008–2009](#)," *Adult Criminal Court Survey (ACCS)*.
16. Statistics Canada, "[Cases in adult criminal court by type of sentence, by province and territory \(Canada\)](#)," 28 July 2010.
17. Ibid.
18. Department of Justice, "[Tackling white-collar crime](#)," Backgrounder, October 2009. The RCMP describes a "Ponzi" scheme as an investment fraud in which "[u]nknown to the investors, returns are paid from their own money or money paid by subsequent investors rather than from profit" (Royal Canadian Mounted Police, "[Investment and Securities Fraud](#)").
19. *R. v. Bogart* (2002), 61 O.R. (3rd) 75 (C.A.), para. 36.
20. *R. v. Drabinsky*, [2009] O.J. No. 3282 (S.C.J.) (QL), paras. 26–29.
21. The two essential elements of fraud are dishonesty and deprivation. The element of deprivation is satisfied on proof of risk of prejudice to the economic interests of the victim (*Vézina v. The Queen*, [1986] 1 S.C.R. 2; see also *R. v. Guité*, EYB 2008-141626, 2008 QCCA 1433).
22. The Code, para. 380.1(1)(a).
23. The Code, subsection 380(2).
24. The Code, s. 382.
25. The Code, s. 382.1.
26. The Code, s. 400.
27. The Code, para. 380.1(1)(a); see also subclause 3(5) of the bill, which introduces the new subsection 380.1(1.1) of the Code.
28. Under subsection 380.1(2) of the Code, the sentencing judge is not to consider as mitigating circumstances the offender's employment, employment skills or status or reputation in the community if those circumstances were relevant to, contributed to, or were used in the commission of the offence.
29. The Code, subsections 750(3) and (4).
30. The Code, ss. 738 and 739.
31. The Code, s. 740.
32. **House of Commons, Standing Committee on Justice and Human Rights, [Tenth Report](#), 25 November 2010.**
33. The Code, s. 722.
34. The Code, subsection 722(4).