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LEGISLATIVE SUMMARY

Bill C-60:

An Act to amend the Criminal Records Act, the Corrections and Conditional Release Act, the Immigration and Refugee Protection Act and the International Transfer of Offenders Act

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

Legislative Summary of Bill C-60
(Legislative Summary)

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1 BACKGROUND

Bill C-60, An Act to amend the Criminal Records Act, the Corrections and Conditional Release Act, the Immigration and Refugee Protection Act and the International Transfer of Offenders Act (short title: Removal of Serious Foreign Criminals Act) was introduced by the Minister of Public Safety and Emergency Preparedness in the House of Commons on 12 May 2015.

In summary, the bill:

- amends the *Criminal Records Act* (CRA)[1] to provide that foreign nationals[2] and certain permanent residents[3] may not apply for a record suspension;
- amends the *Corrections and Conditional Release Act* (CCRA)[4] to authorize the disclosure, to victims, of information relating to the release of foreign offenders under the *Immigration and Refugee Protection Act* (IRPA);[5]
- amends the *Immigration and Refugee Protection Act* to simplify the removal process for certain foreign offenders, to provide for the revocation and renunciation of protected person status,[6] and to allow certain foreign nationals to waive an admissibility hearing if specific requirements are met; and
- amends the *International Transfer of Offenders Act* (ITOA)[7] to provide for the transfer of certain offenders without their consent.

1.1 THE CURRENT LAW

1.1.1 THE *CRIMINAL RECORDS ACT*

A record suspension (formerly known as a pardon), available under the CRA, allows people who have been convicted of a criminal offence, after they have completed their sentence and demonstrated that they are law-abiding citizens for a prescribed number of years, to have their criminal record kept separate and apart from other criminal records. The Parole Board of Canada states that this can help offenders to access employment and educational opportunities and to reintegrate into society.[8] The Parole Board must be satisfied that ordering the record suspension would provide a measurable benefit to the applicant, would sustain his or her rehabilitation as a law-abiding citizen and would not bring the administration of justice into disrepute.

In addition to having a criminal record kept separate and apart from other criminal records, a record suspension removes any disqualifications or obligations that would otherwise flow from a conviction, except for such things as driving and firearms prohibitions and registration in the sex offender registry.

A person may apply for a record suspension if he or she has been convicted of an offence under a federal Act or regulation of Canada. Such an application may be made even if the person is not a Canadian citizen or a resident of Canada. A person may also apply if he or she was convicted in another country and transferred to Canada under the ITOA.[9]

1.1.2 THE *CORRECTIONS AND CONDITIONAL RELEASE ACT*

Section 3 of the CCRA sets out that the purpose of the federal correctional system is to contribute to the maintenance of a just, peaceful and safe society by carrying out sentences imposed by the courts and assisting in the rehabilitation of offenders and their reintegration into the community as law-abiding citizens. As set out in section 4 of the CCRA, one of the principles that guides the Correctional Service of Canada (CSC) is ensuring that sentences are carried out having regard to all the relevant information obtained from and exchanged with victims, offenders and others involved in the criminal justice system.

Under section 25 of the CCRA, the CSC is obliged to give all information under its control relevant to decision-making regarding release or to the supervision or surveillance of offenders in the community to the following parties: the Parole Board of Canada, provincial governments, provincial parole boards, police and any body authorized by the CSC to supervise offenders.

1.1.3 THE *IMMIGRATION AND REFUGEE PROTECTION ACT*

Part I, Division 4, of the IRPA is entitled “Inadmissibility.” It sets out a number of grounds on which permanent residents and foreign nationals may not enter or remain in Canada, including security grounds and human rights violations. Section 36 of the IRPA states that a permanent resident or a foreign national is inadmissible on grounds of serious criminality for:

> (*a*) having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed;
>
> (*b*) having been convicted of an offence outside Canada that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years; or
>
> (*c*) committing an act outside Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years.

Section 44 of the IRPA states that an immigration officer who is of the opinion that a permanent resident or a foreign national who is in Canada is inadmissible may prepare a report setting out the relevant facts for the minister (of Public Safety and Emergency Preparedness). If the minister is of the opinion that the report is well-founded, he or she may refer the report to the Immigration Division of the Immigration and Refugee Board of Canada, which conducts an admissibility hearing and, when

necessary, issues a removal order. Such a hearing is not required in the case of a permanent resident who is inadmissible solely on the grounds that he or she has failed to comply with the residency obligation under section 28 of the IRPA[10] and, generally, in the case of a foreign national. In those cases, the minister may make a removal order.

1.1.4 THE *INTERNATIONAL TRANSFER OF OFFENDERS ACT*

The stated purpose of the ITOA is to assist in the rehabilitation of offenders and their reintegration into the community by enabling them to serve their sentences in the country of which they are citizens or nationals (section 3). Transfer-of-offender treaties enable offenders, with their consent as well as that of the sentencing country and the country of citizenship, to serve a foreign-imposed sentence in their country of citizenship. Once an offender is transferred, his or her sentence is administered in accordance with the laws of the receiving country. Transfer agreements are humanitarian in nature, aimed at alleviating undue hardships borne by offenders and their families.[11]

Canada has negotiated bilateral treaties on the transfer of offenders with the following countries: Argentina, Barbados, Bolivia, Brazil, Cuba, Dominican Republic, Egypt, France, Mexico, Mongolia, Morocco, Peru, Thailand, United States and Venezuela. While the terms of these treaties vary to some degree, every one requires the consent of the offender, the sentencing country, and the receiving country before a transfer may take place.[12] Canada is also a party to three multilateral conventions on the transfer of offenders:

- the *Convention on the Transfer of Sentenced Persons* (Council of Europe);
- the *Scheme for the Transfer of Convicted Offenders within the Commonwealth*; and
- the *Inter-American Convention on Serving Criminal Sentences Abroad*.

As with the bilateral treaties, the multilateral treaties all require the consent of the offender, the sentencing country and the receiving country before a transfer may take place.[13]

1.1.4.1 TRANSFER OF OFFENDER TREATIES NOT REQUIRING CONSENT

In the international community, there are some examples of transfer-of-offender treaties where the consent to a transfer of the person serving the sentence is not required. One example is the treaty between the United Kingdom and Rwanda.[14] Under the terms of this agreement, a prisoner may be transferred without his or her consent when he or she is subject to a deportation or removal order from the transferring state. The prisoner must be given the opportunity to make written representations to the transferring state before any transfer takes place.

A similarly worded agreement is in place between the United Kingdom and Nigeria.[15] This treaty also permits transfers of prisoners without their consent if they are subject to an order for expulsion, removal or deportation from the transferring state. This treaty includes an "Explanatory Memorandum,"[16] which states:

> In deciding whether or not a prisoner should be transferred without his or her consent, account will be taken of the prisoner's views and of any links they may have with the United Kingdom and with Nigeria. Account will also be taken of prison conditions in the receiving State and any concerns as to the prisoner's safety in the event of transfer.

Another exception to the need for the consent of a prisoner before he or she can be transferred from one country to another is found in the *Additional Protocol to the Convention on the Transfer of Sentenced Persons* of the Council of Europe.[17] Under this protocol, as well, a prisoner can be transferred despite a lack of consent only in certain limited cases: where the prisoner fled from the sentencing state (article 2) or where the prisoner is subject to an expulsion or deportation order (article 3).

2 DESCRIPTION AND ANALYSIS

Bill C-60 contains 32 clauses. The following discussion highlights the most significant aspects of the bill; it does not review every clause.

2.1 AMENDMENTS TO THE *CRIMINAL RECORDS ACT* (CLAUSE 2)

Under the CRA, an offender is currently not eligible for a record suspension if he or she has been convicted of:

- a Schedule 1 offence (mainly sexual offences involving young people) under the *Criminal Records Act*;[18] or
- more than three offences prosecuted by indictment, each with a prison sentence of two years or more.

Clause 2 of Bill C-60 adds a new category of ineligibility for a record suspension, namely one based upon immigration status. Currently, there is no distinction between the ability of a foreign national, a permanent resident and a Canadian citizen to apply for a record suspension. Bill C-60 changes this, making a foreign national ineligible to apply for a record suspension in Canada. A permanent resident is also ineligible to apply if he or she has been convicted in Canada of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed.

This change affects how inadmissibility on grounds of serious criminality is defined. Under section 36 of the *Immigration and Refugee Protection Act*, a permanent resident or a foreign national can be found inadmissible to Canada on grounds of serious criminality for having been convicted of certain serious offences, while a foreign national can also be found inadmissible for having committed certain less serious offences. Section 36(3)(*b*) of the Act, however, states that the finding of inadmissibility on criminality grounds cannot be based on a conviction for which a record suspension has been ordered. The effect of the clause 2 amendment to the CRA is that foreign nationals and permanent residents convicted of serious offences in Canada cannot be granted a record suspension and, therefore, cannot avoid being found inadmissible and removed from Canada on the basis of a criminal conviction.

2.2 AMENDMENTS TO THE *CORRECTIONS AND CONDITIONAL RELEASE ACT* (CLAUSES 3 TO 5)

The information that the CSC must obtain about an offender is set out in section 23 of the CCRA. This includes information about the offence and the offender's personal history, as well as information from the victim, including any victim impact statement. Currently, there is no explicit requirement that the CSC obtain information about an offender's immigration history when he or she is sentenced.

Clause 3 of Bill C-60 changes this. Under new section 23(1)(*b.1*) of the CCRA, when a person is sentenced, committed or transferred to a penitentiary, the CSC must take all reasonable steps to obtain, as soon as is practicable, any relevant information about the person's Canadian immigration status, including, if applicable, any information regarding his or her possible removal from Canada. This would, presumably, help to prevent the potential release of an offender into the community who should, instead, be removed from Canada.

Section 25 of the CCRA provides the CSC with the authority to disclose information relevant both to release decision-making and to the supervision of offenders to any body authorized to supervise offenders in the community, including the Parole Board of Canada. This section also obliges the CSC to notify police forces of the release of an inmate into their jurisdictions and to provide them with all information relevant to any perceived threat posed by the inmate.

Currently, there is no explicit legislative authority for the CSC to disclose information to the Canada Border Services Agency; that agency is neither a police force nor a body that supervises offenders. Clause 4 of Bill C-60 adds new section 25.1 to the CCRA, allowing the Commissioner of Corrections to disclose to the Canada Border Services Agency any information under his or her control about an offender that is relevant to the enforcement of the IRPA. This would be important, for example, if there was a removal order against an offender, because the Canada Border Services Agency is the body responsible for enforcing such orders.

Section 26 of the CCRA deals with the disclosure of information to victims. Once a victim has requested it, the Commissioner of Corrections is obliged to disclose certain information about an offender, including eligibility and review dates applicable to an offender's parole.

Clause 5 of Bill C-60 adds section 26(1)(*e*)[19] to the CCRA, stating that, if a victim makes a request, the Commissioner of Corrections must, for an offender who is released under the IRPA, disclose to the victim the date on which the offender was released and the destination of the offender on release, if, in the Commissioner's opinion, the disclosure would not have a negative impact on the safety of the public.

2.3 AMENDMENTS TO THE *IMMIGRATION AND REFUGEE PROTECTION ACT* (CLAUSES 6 TO 18)

Clause 7 of Bill C-60 amends section 44 of the IRPA ("Report on Inadmissibility") in two ways. First, it sets out prescribed factors in regulations for an immigration officer to take into account when determining whether to prepare an inadmissibility report. In some circumstances, the writing of an inadmissibility report will be mandatory. Second, the amended section stipulates that the report need not be referred to the Immigration Division for an admissibility hearing in the case of a permanent resident found to be inadmissible on grounds of serious criminality. In such a case, the minister has the legal authority to make the applicable removal order. The minister already has the authority to issue a removal order for a foreign national on grounds of serious criminality.[20]

Currently, under Part I, Division 5, of the IRPA ("Loss of Status and Removal"), there is no provision for uncontested removal orders. Clause 8 of Bill C-60 changes this by adding section 44.1 to the IRPA. Under this new section, in certain circumstances a foreign national – other than a protected person or a person who has made a claim for refugee protection – who has been referred to the Immigration Division for an admissibility hearing may waive such a hearing. If a foreign national waives the admissibility hearing, he or she is deemed to have consented to being the subject of a removal order. The Immigration Division must then decide, within 48 hours, whether to accept the waiver. If it accepts the waiver, it must make the applicable removal order without holding an admissibility hearing.

Clauses 9 and 10 of Bill C-60 make changes to provisions connected with protected person status. Currently, under section 115(2), the minister may conclude that a protected person can be removed from Canada because he or she is inadmissible on grounds of serious criminality and constitutes a danger to the public in Canada or is inadmissible on grounds of danger to the security of Canada. Under this immigration regime, a foreign national who is the subject of such a danger opinion does not lose protected person status (the status of a person granted refugee protection under the Act).

Clause 9(1) of Bill C-60 adds new section 47.1 to the IRPA, under which a foreign national loses protected person status if the minister is of the opinion that the person constitutes a danger to the public or to the security of Canada. In clause 10, provision is also made for a foreign national to renounce his or her protected person status. Not having protected person status can facilitate the transfer of a prisoner from Canada to his or her home country without the need for the consent of the prisoner (see section 2.4 of this Legislative Summary).

Part 2, Division 3, of the IRPA concerns pre-removal risk assessments. A pre-removal risk assessment considers factors in the country of origin that would put a specific individual's life at risk in the case of removal to that country. Conducting a pre-removal risk assessment is a way of ensuring compliance with the principle of non-refoulement (not sending a victim of persecution back to his or her persecutor) and with international law. Changes to the *International Transfer of Offenders Act* in Bill C-60 (see section 2.4 of this Legislative Summary) allow for the transfer of foreign offenders under certain circumstances without their consent. To offset the absence of consent, a procedure in the pre-removal risk assessment is created by clause 15 of Bill C-60.

Clause 15 allows foreign offenders considered for transfer to apply for a risk assessment by Citizenship and Immigration Canada. There are, however, several exceptions. Foreign offenders will not have their application considered if they have lost their protected person status as a result of a decision made by the minister because they are a danger to the public or to the security of Canada, or if they voluntarily lost their protected person status. Further, foreign offenders are ineligible to apply for a risk assessment if they are inadmissible to Canada on the grounds of security, violation of human rights, organized crime or serious criminality.

Clause 16 of Bill C-60 provides for information-sharing between the Canada Border Services Agency and the CSC. It also authorizes Citizenship and Immigration Canada to share information with both the Department of Public Safety and Emergency Preparedness and the CSC that is relevant to the transfer of an offender under the ITOA.

Clause 13 specifies that a decision excluding a person from refugee protection because he or she has found protection elsewhere or has been found to have committed crimes in violation of Article 1F of the *United Nations Convention and Protocol relating to the Status of Refugees* cannot be appealed to the Refugee Appeal Division of the Immigration and Refugee Board.

2.4 Amendments to the *International Transfer of Offenders Act* (Clauses 19 to 24)

Section 7 of the ITOA requires an offender to make a written request to the Minister of Public Safety and Emergency Preparedness before any prison transfer may take place. Clause 20 of Bill C-60 amends this section to permit the minister to make a request for a transfer to a foreign entity on his or her own initiative. The ability to transfer a prisoner without his or her consent is then detailed in clause 21 of the bill, which amends section 8 of the ITOA. Under the amended section, the minister may request the transfer of a foreign offender, or consent to the transfer of a Canadian offender, if there is a treaty in place between Canada and the foreign entity to provide for a transfer of offenders without consent.

A barrier to such a transfer – in addition to a lack of treaties allowing for transfers of offenders without their consent – is that new section 8(2.2) of the ITOA (clause 21) states that such a transfer cannot be requested or carried out if the foreign offender:

- is also a Canadian citizen within the meaning of the *Citizenship Act*;[21]
- is a protected person within the meaning of section 95(2) of the IRPA; or
- is the subject of a provisional arrest warrant issued under section 13 of the *Extradition Act* [22] or of an authority to proceed issued under section 15 of that Act that has not been finally discharged under that Act.[23]

Such a transfer also cannot currently be made under the ITOA in the case of a young person or an offender who is not able to consent (section 8(5)).

Clause 22 of Bill C-60 adds sections 10.1 and 10.2 to the ITOA. These sections impose an obligation upon the minister to take into account the submissions of an offender on a potential transfer and consider whether a transfer would put an offender's life, liberty or security of the person at substantial risk. In the case of an offender who has been convicted of an offence under Canadian law that is punishable under federal law by a maximum term of imprisonment of less than 10 years and who is entitled to make a claim for refugee protection or an application for protection, the offender shall not be transferred before a final determination is made for any such claim or application.

New section 10.1(3) then lists a number of factors the minister may consider before requesting a transfer without consent, such as whether there is a risk the offender will, after the transfer, commit a terrorism or criminal organization offence.

New section 10.1(4) of the ITOA makes it clear that transferring an offender without his or her consent does not constitute a removal within the meaning of the IRPA. Any objection to such a transfer, therefore, would be made to the Federal Court and not to the Immigration and Refugee Board.

Finally, the amendments to the ITOA provide that, if a determination is made to transfer an offender without the offender's consent, the minister must provide written reasons for doing so. Presumably, this would allow the offender to bring a judicial review application to challenge the minister's decision. There is no provision for judicial review in the current ITOA, because all transfers must be made with the consent of all parties concerned.

NOTES

1. *Criminal Records Act*, R.S.C. 1985, c. C-47.
2. A "foreign national" is defined in section 2(1) of the *Immigration and Refugee Protection Act* as "a person who is not a Canadian citizen or a permanent resident, and includes a stateless person." A foreign national can be, for example, a refugee claimant, a visitor, or a person who is in Canada without any immigration status.
3. A "permanent resident" is defined in section 2(1) of the *Immigration and Refugee Protection Act* as "a person who has acquired permanent resident status and has not subsequently lost that status under section 46." A permanent resident (sometimes referred to as a "landed immigrant") is an immigrant or refugee who has been granted the right to live permanently in Canada. A permanent resident will usually have a "Permanent Resident Card" or a "Record of Landing" as proof of status.
4. *Corrections and Conditional Release Act*, S.C. 1992, c. 20.
5. *Immigration and Refugee Protection Act*, S.C. 2001, c. 27.
6. If the Immigration and Refugee Board of Canada determines that a person is in need of protection or is a refugee according to the United Nations *Convention and Protocol relating to the Status of Refugees* or if a person has received a positive decision on his or her pre-removal risk assessment from Citizenship and Immigration Canada, then that person is considered a "protected person." Protected persons are also those who fear torture and inhumane treatment if removed to their country of origin. See section 95 of the *Immigration and Refugee Protection Act*.

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

8. Parole Board of Canada, *Applying for a Record Suspension?*

9. Parole Board of Canada, "Record Suspensions," *Fact Sheet*.

10. Under section 28 of the *Immigration and Refugee Protection Act*, a permanent resident must comply with a residency obligation for every five-year period. A permanent resident does this if, on each of a total of at least 730 days in that five-year period, he or she is:

    - physically present in Canada;
    - outside Canada accompanying a Canadian citizen who is his or her spouse or common-law partner or, in the case of a child, his or her parent;
    - outside Canada employed on a full-time basis by a Canadian business or in the federal public administration or the public service of a province; or
    - outside Canada accompanying a permanent resident who is his or her spouse or common-law partner or, in the case of a child, his or her parent and who is employed on a full-time basis by a Canadian business or in the federal public administration or the public service of a province.

11. Correctional Service Canada, *International Transfer of Offenders*.

12. Correctional Service Canada, *List of Countries acceding a Bilateral Treaty with Canada*.

13. Correctional Service Canada, *Multilateral Conventions*.

14. See *Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Rwanda on the Transfer of Sentenced Persons*, 11 February 2010. Article 2(3) of the agreement states:

    > Provided both Parties agree, a sentenced person may be transferred from the territory of the transferring State to the territory of the receiving State without the consent of the sentenced person in accordance with the provisions of this Agreement in order to continue serving the sentence imposed on him or her by the transferring State.

    Article 3(b), however, requires that, for all transfers under the agreement, "the sentenced person is subject to an order for deportation or removal from the transferring State." In addition, under article 4(7), when considering whether to agree to the transfer of a sentenced person, the transferring state may at any time seek from the receiving state information, undertakings or assurances regarding the location of or access to the facility in which the sentenced person shall serve the remainder of his or her sentence, the conditions or treatment that shall be afforded to the sentenced person, the monitoring of those conditions and treatment or any other matter relating to the transfer. Finally, under article 8(4), a sentenced person whose transfer is requested under the agreement must be given the opportunity to make written representations to the authorities of the transferring state before the transferring state provides its written agreement to the terms of the transfer.

15. See *Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Federal Republic of Nigeria on the Transfer of Sentenced Persons*, 9 January 2014.

16. *Explanatory Memorandum on an Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Federal Republic of Nigeria on the Transfer of Sentenced Persons*, Command Paper Number 8791.

17. *Additional Protocol to the Convention on the Transfer of Sentenced Persons*, CETS No. 167.

18. A person who has been convicted of an offence referred to in Schedule 1 of the *Criminal Records Act* may apply for a record suspension if the Parole Board of Canada is satisfied that:

> (*a*) the person was not in a position of trust or authority towards the victim of the offence and the victim was not in a relationship of dependency with him or her;
>
> (*b*) the person did not use, threaten to use or attempt to use violence, intimidation or coercion in relation to the victim; and
>
> (*c*) the person was less than five years older than the victim. (*Criminal Records Act*, s. 4(3).)

19. The new section will in fact be 26(1)(*e*) and not 26(1)(*c*), because this section was also amended by Bill C-32, the *Victims Bill of Rights Act*. The conflict between the two enactments is addressed as one of the coordinating amendments in clause 30 of Bill C-60. The *Victims Bill of Rights Act* received Royal Assent on 23 April 2015, and new section 26(1)(*c*) of the *Corrections and Conditional Release Act* (CCRA) was proclaimed in force on 23 July 2015. The mandatory disclosure of immigration information about a released offender will, therefore, become section 26(1)(*e*) of the CCRA.

20. *Immigration and Refugee Protection Regulations*, SOR/2002-227, s. 228(1).

21. *Citizenship Act*, R.S.C. 1985, c. C-29.

22. *Extradition Act*, S.C. 1999, c. 18.

23. This provision ensures that all extradition requests are determined before a transfer for an existing conviction may take place. An extradition request can be for the purpose of prosecuting a person and that prosecution may take priority over enforcing a current sentence.