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LEGISLATIVE SUMMARY

Bill C-12:

An Act to amend the Corrections and Conditional Release Act

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Tanya Dupuis
Christine Morris

Legal and Social Affairs Division
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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-12
(Legislative Summary)

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1 BACKGROUND

Bill C-12, An Act to amend the Corrections and Conditional Release Act (short title: Drug-Free Prisons Act) was introduced in the House of Commons and received first reading on 8 November 2013.

The bill requires the Parole Board of Canada (PBC) (or a provincial parole board, if applicable) to cancel the parole of an offender who has not yet been released if the offender tests positive in a urinalysis or fails to provide a urine sample and the Board is of the opinion that the criteria for granting parole are no longer met.

The bill also clarifies the legislative intent underlying section 133(3) of the *Corrections and Conditional Release Act*[1] (CCRA) – which authorizes a releasing authority to set conditions on an offender's parole, statutory release or unescorted temporary absence – to provide that conditions may be set regarding the offender's use of drugs or alcohol, including when that use has been identified as a risk factor in the offender's criminal behaviour.

1.1 THE PRESENCE OF DRUGS IN THE FEDERAL PENITENTIARY SYSTEM

Prevalence rates of substance abuse for persons involved in the criminal justice system are "much higher" than those in the general population.[2] According to the Correctional Service of Canada (CSC), "in Canada, 80% of offenders entering the federal prison system are identified as having a substance abuse problem."[3] The presence of drugs within the federal penitentiary system is not a recent phenomenon. Problems associated with drugs in the penitentiary system were noted in 1990 by the Federal Court of Canada in *Jackson v. Joyceville Penitentiary (T.D.)*, when the Court found that the evidence clearly indicated that:

> unauthorized intoxicants in the prison setting create very serious problems including a greater risk and level of violence that affects the safety and security of prison institutions for both staff and inmates.[4]

In 2000, the Sub-committee on the Corrections and Conditional Release Act of the House of Commons Standing Committee on Justice and Human Rights tabled a report entitled *A Work in Progress: The* Corrections and Conditional Release Act, in which it noted:

> One of the issues that arose in virtually every correctional facility visited by the Sub-committee was the entry, presence and use of drugs in an environment where they are not supposed to be found. The Sub-committee also learned that the brewing, distribution and consumption of alcohol are serious problems in many correctional institutions. The consequences of the presence of alcohol and drugs in correctional facilities can be devastating to both the correctional environment and to what corrections personnel are trying to achieve in working with offenders.[5]

The Committee went on to state that the National Drug Strategy was put in place by the CSC to address these issues, and that the basic policy objective of this strategy was to establish a safe, drug-free institutional environment from which offenders could be successfully reintegrated into the community as law-abiding citizens.

More recently, in 2012, the House of Commons Standing Committee on Public Safety and National Security emphasized in its report on drugs and alcohol in federal penitentiaries that despite CSC's efforts to prevent their introduction, illegal drugs continue to cause challenges within the correctional system, thus having "an impact on a number of critical issues, such as providing a safe institutional environment for both staff and inmates, as well as ensuring an atmosphere that promotes inmate rehabilitation and reintegration."[6]

Nevertheless, when he appeared before the Committee during its study, CSC Commissioner Don Head said that there had been a decrease in the percentage of positive urinalysis over the previous decade:

> [W]e have seen an encouraging decrease in the percentage of positive tests, and we've also seen a drop in the rate of refusals to provide a sample. The most dramatic decrease in positive testing and refusal rates has been observed in our maximum security institutions. Statistics also show a decrease in offender deaths by drug overdose and an increase in drug seizures.[7]

1.2 History of Urinalysis

Mandatory urinalysis within the Canadian penitentiary setting began in the mid-1980s when the *Penitentiary Service Regulations*[8] (enacted pursuant to the *Penitentiary Act*[9]) were amended to authorize mandatory urine sampling (section 41.1) and provide disciplinary consequences for positive urine tests (section 39(*i.1*)).

The objective of the program was to detect the presence and deter the use of drugs and any other form of intoxicants. The intent is that this would in turn enhance the CSC's capability to provide a safe and secure environment for staff and inmates, to identify appropriate treatment programs, and to afford inmates opportunities for self-improvement and treatment.[10]

The development and expansion of the program included provisions authorizing:

- the testing of a random selection of 10% of all inmates every two months;
- the testing of inmates with a history of drug abuse either outside or inside the institution; and
- testing where a staff member had reason to believe that an inmate was under the influence of an intoxicant.[11]

The wording used in section 41.1 of the *Penitentiary Service Regulations* required inmates to provide a urine sample on the sole basis of the subjective determination of a CSC employee.

In 1990, the legality of CSC's mandatory drug testing program was challenged in the case of *Jackson v. Joyceville Penitentiary (T.D.)*. The Federal Court of Canada found that the absence of standards or criteria in the provision creating a requirement to provide a urine sample contravened the right to liberty and security of the person and the right to be secure against unreasonable search and seizure under sections 7 and 8 of the *Canadian Charter of Rights and Freedoms*.[12] Section 1 of the Charter permits reasonable restrictions as long as they are prescribed by law and can be demonstrably justified in a free and democratic society. However, the Federal Court determined that section 41.1 was not a reasonable limitation under section 1.

In 1992, the CCRA replaced the *Penitentiary Act* and *Parole Act*.[13] Its enactment marked a milestone in human rights development in corrections, incorporating significant legal developments in administrative law, reflecting the rights articulated in the Charter and affirming the rule of law.[14] Section 3 of the CCRA states that the purpose of the correctional system is to contribute to the maintenance of a just society by carrying out sentences through the safe and humane custody and supervision of offenders.

Moreover, according to section 100 of the CCRA, the purpose of conditional release is to contribute to the maintenance of a just, peaceful and safe society by means of decisions on the timing and conditions of release that will best facilitate the rehabilitation of offenders and their reintegration into the community. Section 100.1 specifies that the protection of society is the paramount consideration in the determination of all cases. Section 101 states that release decisions must be consistent with the protection of society, while limited to only what is necessary and proportionate to the purpose of conditional release.

CSC's earlier urinalysis program was incorporated into the 1992 legislative reform, but in response to *Jackson v. Joyceville Penitentiary (T.D.)*, the new Act required CSC employees to have reasonable grounds for making a demand to provide a urine sample. In addition, testing was permitted only where previous authorization had been obtained from the institutional head.

The CCRA provisions also permitted urinalysis testing by CSC as part of a prescribed random selection urinalysis program that began with a pilot project in three prisons. In *Fieldhouse v. Canada*,[15] in which inmates of one such prison – Kent Institution in British Columbia – challenged the program, random urine testing was found to constitute neither an unreasonable limit on inmate liberty, nor an unreasonable invasion of privacy or integrity of the person under sections 7 and 8 of the Charter. The British Columbia Court of Appeal found that the connection between drugs and violence at Kent Institution was compelling and the nature and extent of drug use within the institutional setting was serious, with little in the way of alternative means to combat it effectively.

A report published by Public Works and Government Services Canada entitled *Report on the Provisions and Operations of the Corrections and Conditional Release Act* states that the *Fieldhouse* case:

> paved the way for the development and implementation of CSC's Drug Strategy. This decision provided strong judicial support for the "eradication" of intoxicants in prisons by the most appropriate means available under the law, including random and other forms of urinalysis, in addition to interdiction and searching practices.[16]

In 1996, CSC National Headquarters began randomly selecting 5% of the population of each penitentiary each month for urinalysis. Standards were established to dictate procedure that would help guide the implementation of the urinalysis program.[17] Moreover, the 2007 Commissioner's Directive on the National Drug Strategy clearly states that CSC will not tolerate the trafficking and consumption of drugs and alcohol in its institutions.[18]

1.3 Key Provisions for the Use of Urinalysis in the *Corrections and Conditional Release Act* and its Regulations

1.3.1 Authority to Collect Urine Samples

Today, the CCRA authorizes the collection of urine samples within the institutional setting in the following prescribed circumstances.

1.3.1.1 Reasonable Grounds

Section 54(*a*) of the CCRA states that when a staff member believes on reasonable grounds that an inmate has committed or is committing the disciplinary offence of taking an intoxicant into his or her body (section 40(*k*) of the CCRA) and that a urine sample is necessary to provide evidence of the offence, such testing is permitted. However, prior authorization must be obtained from the institutional head.

Where the demand is based on reasonable grounds, the offender has up to two hours to file an objection concerning the sample requirement.[19] Section 62 of the *Corrections and Conditional Release Regulations*[20] (CCRR) states that the institutional head must "review the demand for a sample and the inmate's objections to determine whether there are reasonable grounds on which to require the sample."

1.3.1.2 Random Selection

Section 54(*b*) of the CCRA also allows for the taking of urine samples as part of a prescribed random selection urinalysis program on a periodic basis under section 63(2) of the CCRR. The names are chosen by "random selection from among the names of the entire inmate population of the penitentiary."[21]

Presently, a Commissioner's Directive on urinalysis testing states that the National Urinalysis Program Manager is responsible for generating "a random list of names of inmates, monthly, for each institution based on a minimum of 5% of the total incarcerated population."[22] A CSC Departmental Performance Report for 2012–2013 notes that during that period:

> [a]s part of its anti-drug operations, CSC expanded the random urinalysis testing of offenders from 5 percent to 8 percent during the reporting period as a disincentive measure to reduce the availability and consumption of drugs inside institutions.[23]

1.3.1.3 When Required for Program Activity Involving Community Contact or a Treatment Program

Section 54(*c*) of the CCRA requires offenders to provide a urine sample when it is required for participation in a correctional program or activity involving contact with the community or when it is prescribed by a substance abuse treatment program.

1.3.1.4 Testing to Monitor Compliance with Conditions to Abstain from the Consumption of Drugs or Alcohol

Section 55 of the CCRA permits urinalysis testing in order to monitor the offender's compliance with a condition of a temporary absence, work release, parole or statutory release imposed by the PBC that requires abstention from alcohol or drugs. Such testing can be conducted at regular intervals, as well as in circumstances where there are reasonable grounds to suspect that the offender has breached a condition to abstain from the consumption of drugs or alcohol.

As is the case for the urinalysis testing of inmates, the offender in the community must be informed of the basis of the demand and the consequences of non-compliance, and must be given a reasonable opportunity to make representations to the relevant official before submitting to the test.

1.3.2 Consequences of a Positive Result or a Refusal to Provide a Sample

An inmate who takes an intoxicant or who fails or refuses to provide a sample in accordance with section 54 or 55 of the CCRA commits a disciplinary offence pursuant to section 40 of the CCRA.

Under the CCRR, positive test results and refusals to provide urinary samples can lead to sanctions for disciplinary offences, administrative sanctions and the cancellation of parole or statutory release.

Sanctions for disciplinary offences include a warning or reprimand, a loss of privileges, a fine, performance of extra duties, or segregation from other offenders (section 44 of the CCRA). The inmate can also be made subject to administrative sanctions, such as transfer to higher security, loss of temporary absences, or referral to a substance abuse program.

Under the CCRR, an inmate found guilty of the disciplinary offences of taking an intoxicant or failing or refusing to provide a urine sample may, in addition to any sanction imposed pursuant to section 44(1) of the CCRA, be required to provide a sample each month until three consecutive negative monthly samples have been provided (section 71 of the CCRR).

Decisions regarding conditional release are made by the PBC based on hearings that it conducts or information provided by CSC or both. The PBC may impose conditions in order to protect society or facilitate the successful reintegration of the offender. In practical terms:

> if an offender is convicted in disciplinary court of taking an intoxicant, a record of substance abuse is placed on the offender's file. When the National Parole Board [now the PBC] examines the offender's case to determine the need for special conditions of release, a record of substance abuse may result in the imposition of an order of abstinence from all substances. As a method of monitoring abstinence conditions, parole officers are required to devise a schedule of urinalysis testing for the offender that occurs with a prescribed frequency but at irregular intervals. Therefore if offenders in the institution know that conviction of taking an intoxicant as a result of submitting a positive sample will likely lead to the requirement of providing urinalysis samples in the community, they might be more likely to refuse.[24]

1.3.3 Consequences for Offenders on Conditional Release

If an offender under a form of conditional release by the PBC is unable or refuses to provide a sample, or provides, pursuant to section 55 of the CCRA, a sample that is positive, CSC shall inform the PBC in writing, and shall:

- ensure that the offender is provided with counselling or other appropriate post-release intervention; or
- proceed with the measures under section 135 of the CCRA governing the possible suspension, termination or revocation of an offender's parole or statutory release following the breach of a condition of parole (section 72 of the CCRR).

Commissioner's Directives help to clarify policy objectives for the drug testing of inmates and offenders in the community and to establish procedures for the collection, storage, shipment and testing of urine samples.[25]

2 DESCRIPTION AND ANALYSIS

Clause 2 of Bill C-12 amends the CCRA by creating new section 123.1, which states that the CSC is required to inform the PBC when an offender who has been granted day or full parole, but has not yet been released, has failed or refused to provide a urine sample or has had a positive urinalysis result.

Clause 3 of the bill adds new section 124(3.1), which states that if the PBC has been informed of an offender's failure or refusal to provide a urine sample or positive urinalysis result and the offender has not yet been released, it must cancel the offender's parole but only if, in its opinion, the criteria for granting parole provided for in section 102 of the CCRA are no longer met. Section 102 states:

> The Board or a provincial parole board may grant parole to an offender if, in its opinion,
>
> (*a*) the offender will not, by reoffending, present an undue risk to society before the expiration according to law of the sentence the offender is serving; and
>
> (*b*) the release of the offender will contribute to the protection of society by facilitating the reintegration of the offender into society as a law-abiding citizen.

It should be noted that pursuant to the *PBC Policy Manual*, when reviewing an offender's case for conditional release, the PBC must consider any documented occurrences of positive urinalysis tests.[26]

Clause 4 of the bill modifies section 133(3) of the CCRA (Conditions of Release) to direct the consideration of a condition regarding the offender's use of drugs or alcohol following an offender's failure or refusal to provide a urine sample. Section 133(3) currently provides that the PBC:

> may impose any conditions on the parole, statutory release or unescorted temporary absence of an offender that it considers reasonable and necessary in order to protect society and to facilitate the successful reintegration into society of the offender.

Bill C-12 gives the PBC clear legal authority for the imposition of a condition regarding the use of drugs or alcohol by adding that, "for greater certainty," such conditions may include a "condition regarding the offender's use of drugs or alcohol, including in cases when that use has been identified as a risk factor in the offender's criminal behaviour."

NOTES

1. *Corrections and Conditional Release Act*, S.C. 1992, c. 20.
2. Patricia MacPherson, "Use of Random Urinalysis to Deter Drug Use in Prison: A Review of the Issues," *Research Reports*, No. R-149, Correctional Service of Canada, February 2004, p. 3.
3. Ibid., pp. 3–4.
4. *Jackson v. Joyceville Penitentiary (T.D.)*, [1990] 3 F.C. 55 [*Jackson*], para. 105.
5. House of Commons, Sub-committee on Corrections and Conditional Release Act of the Standing Committee on Justice and Human Rights, *A Work in Progress: The* Corrections and Conditional Release Act, 2nd Session, 36th Parliament, May 2000, para. 9.41.
6. House of Commons, Standing Committee on Public Safety and National Security, *Drugs and Alcohol in Federal Penitentiaries: An Alarming Problem*, 1st Session, 41st Parliament, April 2012.

7. House of Commons, Standing Committee on Public Safety and National Security [SECU], *Evidence*, 1st Session, 41st Parliament, 29 September 2011, 1105 (Mr. Don Head, Commissioner of the Correctional Service of Canada [CSC]). Commissioner Head went on to state that positive urinalysis tests have dropped from the range of 11%–12% to 7.5%. However, Ivan Zinger, Executive Director and General Counsel, Office of the Correctional Investigator, told the Committee that the national average of positive random urinalysis drug results in CSC facilities has "remained remarkably stable over the last decade – averaging 10.5%."(SECU, *Evidence*, 1st Session, 41st Parliament, 6 October 2011, 1145.)
8. *Penitentiary Service Regulations*, C.R.C. 1978, c. 1251.
9. *Penitentiary Act*, R.S.C., 1985, c. P-5, ss. 35(4) and 37.
10. *Jackson*, para. 21.
11. Ibid.
12. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.
13. *Parole Act*, R.S.C., 1985, c. P-2, s. 25 (as amended by R.S.C., 1985 (2nd Supp.), c. 34, s. 7).
14. Patricia MacPherson, "Random Urinalysis Program: Policy, practice, and research results," *Forum on Corrections Research: Focusing on Alcohol and Drugs*, Vol. 13, No. 3, January 2001.
15. *Fieldhouse v. Canada*, [1995] B.C.J. No. 975 (British Columbia Court of Appeal).
16. Public Works and Government Services Canada, *Report on the Provisions and Operations of the Corrections and Conditional Release Act,* Ottawa, March 1998.
17. Correctional Service of Canada, "Urinalysis Testing," *Commissioner's Directive*, No. 566-10, 13 June 2012.
18. Correctional Service of Canada, "National Drug Strategy," *Commissioner's Directive*, No. 585, 8 May 2007.
19. Correctional Service of Canada (2012).
20. *Corrections and Conditional Release Regulations*, SOR/92-620.
21. Ibid., s. 63(2).
22. Correctional Service of Canada (2012).
23. Correctional Service of Canada, *2012–13 Departmental Performance Report*.
24. MacPherson (2004), p. 15.
25. Correctional Service of Canada (2012); and Correctional Service of Canada, "Post-Release Decision Process," *Commissioner's Directive*, No. 715-2, 1 April 2014.
26. Parole Board of Canada, *PBC Policy Manual*, Vol. 1, No. 30, April 2014, Section 2.1 "Assessment for Pre-Release Conditional Release Decisions," ss. 13(e) and 17(c), pp. 3 and 6.