



LEGISLATIVE SUMMARY



Bill C-75: An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts

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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-75
(Legislative Summary)

Publication No. 42-1-C75-E

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LEGISLATIVE SUMMARY OF BILL C-75: AN ACT TO AMEND THE CRIMINAL CODE, THE YOUTH CRIMINAL JUSTICE ACT AND OTHER ACTS AND TO MAKE CONSEQUENTIAL AMENDMENTS TO OTHER ACTS

1 BACKGROUND

On 29 March 2018, the Honourable Jody Wilson-Raybould, **then** Minister of Justice and Attorney General of Canada, introduced Bill C-75, An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts,¹ in the House of Commons.

After second reading, the bill was referred to the House of Commons Standing Committee on Justice and Human Rights for consideration on 11 June 2018. This committee adopted more than 50 amendments to the bill on 24 and 29 October 2018.² Many of these are technical amendments. In addition, four other technical amendments were adopted at the report stage on 20 November 2018.³

The bill was introduced in the Senate, where it received first reading on 3 December 2018. **It received second reading and was referred to the Standing Senate Committee on Legal and Constitutional Affairs on 4 April 2019. On 4 June 2019, the committee reported the bill back to the Senate with 14 amendments and seven observations.⁴ The bill was passed by the Senate without additional amendments on third reading on 13 June 2019, and a message was sent to the House of Commons the same day.**

The House of Commons considered the Senate's amendments on 17 and 19 June 2019 and adopted a motion approving (in whole or in part) 10 amendments, replacing (in whole or in part) four amendments, adding one new amendment and rejecting one.⁵ As the Senate did not insist on its amendments, the bill subsequently received Royal Assent on 21 June 2019.

This bill is intended to make the criminal justice system more modern and efficient and to reduce delays in criminal proceedings.⁶ The proposed amendments are in response to the Supreme Court of Canada rulings in *R. v. Jordan* and *R. v. Cody*,⁷ and to the final report of the Standing Senate Committee on Legal and Constitutional Affairs, *Delaying Justice is Denying Justice: An Urgent Need to Address Lengthy Court Delays in Canada*.⁸ According to the federal government, many of these reforms “reflect collaborative efforts to address court delays, and have been identified as priorities by federal, provincial, and territorial Justice Ministers.”⁹

The bill amends many aspects of criminal law and criminal procedure in the *Criminal Code* (the Code) to:

- reclassify a number of criminal offences (many offences that can only be prosecuted by indictment and are punishable by 10 years' imprisonment or less now become hybrid offences, and the maximum penalty of imprisonment for almost all summary conviction offences is standardized to two years less a day);
- restrict the availability of preliminary inquiries to adults accused of an offence punishable by **a maximum term of imprisonment of 14 years or more**;
- better protect victims of intimate partner violence (by introducing the concept of "intimate partner" and making it applicable to the entire Code; by imposing a reverse onus at bail for repeat offences; and by allowing a higher maximum penalty in cases involving repeat offences);
- modernize bail practices and procedures by providing that any bail decision must give primary consideration to releasing the accused at the earliest reasonable opportunity and on the least onerous conditions possible and by requiring special consideration to the circumstances of accused persons who are Indigenous or members of vulnerable populations;
- give judges and the police greater discretion regarding administration of justice offences by creating an alternative mechanism if the failure to comply or appear in question has not caused harm to victims;
- strengthen the case management powers of judges, allow some evidence to be admissible, facilitate hearings in another territorial division, and simplify the process for making rules of court;
- reform the jury selection process, particularly by abolishing peremptory challenges, which allow Crown and defence counsel to exclude a potential juror without giving a reason, and by empowering judges to decide on all challenges for cause; and
- facilitate the appearance by audioconference or videoconference of all individuals involved in criminal cases.

The bill also amends the *Youth Criminal Justice Act* (YCJA),¹⁰ in particular "to encourage a more flexible response to administration of justice offences."¹¹

As well, Bill C-75 reintroduces legislative amendments from the following bills:

- Bill C-28, An Act to amend the Criminal Code (victim surcharge);¹²
- Bill C-38, An Act to amend An Act to amend the Criminal Code (exploitation and trafficking in persons); and
- Bill C-39, An Act to amend the Criminal Code (unconstitutional provisions) and to make consequential amendments to other Acts (this bill also included amendments similar to those in Bill C-32, An Act related to the repeal of section 159 of the Criminal Code).

Lastly, Bill C-75 includes provisions to coordinate with the following bills, which in some cases amend the same provisions:

- Bill C-45, An Act respecting cannabis and to amend the Controlled Drugs and Substances Act, the Criminal Code and other Acts;
- Bill C-46, An Act to amend the Criminal Code (offences relating to conveyances) and to make consequential amendments to other Acts;
- Bill C-51, An Act to amend the Criminal Code and the Department of Justice Act and to make consequential amendments to another Act; and
- Bill C-59, An Act respecting national security matters.

2 DESCRIPTION AND ANALYSIS

2.1 AMENDMENTS TO THE *CRIMINAL CODE* (CLAUSES 1 TO 353)

2.1.1 RECLASSIFICATION AND STANDARDIZATION OF CERTAIN OFFENCES

The bill amends over **110** offences that are punishable by a maximum penalty of 10 years or less and currently may only be prosecuted as an indictable offence. Under the bill, these offences become hybrid offences, meaning that they can be prosecuted either as an indictable offence or as a summary conviction offence (as decided by the prosecution). However, not all indictable Code offences punishable by a maximum penalty of 10 years or less are hybridized. These exceptions include certain firearms offences, such as possession of a firearm or another weapon knowing its possession is unauthorized (section 92), weapons trafficking (section 99), possession for purpose of weapons trafficking (section 100) and importing or exporting certain firearms knowing it is unauthorized (section 103).

Of the amendments adopted by the House of Commons, some ensure that the following Code offences are no longer hybridized:

- providing or collecting property for certain activities (section 83.02);
- providing, making available, etc., property or services for terrorist purposes (section 83.03);
- using or possessing property for terrorist purposes (section 83.04);
- participating in an activity of a terrorist group (section 83.18(1));
- leaving Canada to participate in an activity of a terrorist group (section 83.181);
- advocating or promoting commission of terrorism offences (section 83.221);
- concealing a person who carried out a terrorist activity (section 83.23(1)(b)) and concealing a person who is likely to carry out a terrorist activity (section 83.23(2)); and
- advocating genocide (section 318(1)).

In addition, further to an amendment adopted by the House of Commons Standing Committee on Justice and Human Rights, the offence of keeping a common bawdy-

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house is no longer hybridized since all common bawdy-house offences and provisions are repealed.¹³

Table 1 presents all the offences being hybridized.

Table 1 – Reclassification of Indictable Offences
(Maximum Term of Imprisonment of 10 Years or Less) as Hybrid Offences

Bill C-75	<i>Criminal Code</i>	Offence
Clause 6	Section 52(1)	Sabotage
Clause 7	Section 57(3)	Possession of forged passport, etc.
Clause 8	Section 58(1)	Fraudulent use of certificate of citizenship
Clause 9	Section 62(1)	Offences in relation to military forces
Clause 10	Section 65	Punishment of rioter; Concealment of identity
Clause 11	Section 69	Neglect by peace officer
Clause 12	Section 70(3)	Unlawful drilling
Clause 14	Section 82(1)	Possession of explosive
Clause 33	Section 121(3)	Frauds on the government
Clause 35	Section 122	Breach of trust by public officer
Clause 36	Sections 123(1), 123(2)	Municipal corruption; Influencing municipal official
Clause 37	Section 124	Selling or purchasing office
Clause 38	Section 125	Influencing or negotiating appointments or dealing in offices
Clause 39	Section 126(1)	Disobeying a statute
Clause 42	Section 138	Offences relating to affidavits
Clause 43	Section 139(2)	Obstructing justice
Clause 44	Section 141(1)	Compounding indictable offences
Clause 45	Section 142	Corruptly taking reward for recovery of goods
Clause 46	Section 144	Prison breach
Clause 48	Section 146	Permitting or assisting escape
Clause 49	Section 147	Rescue or permitting escape
Clause 50	Section 148	Assisting prisoner of war to escape
Clause 57	Section 172(1)	Corrupting children
Clause 59	Section 176(1)	Obstructing or violence to or arrest of officiating clergyman
Clause 61	Section 180(1)	Common nuisance
Clause 63	Section 182	Dead body
Clause 64	Section 184(1)	Interception
Clause 65	Section 184.5(1)	Interception of radio-based telephone communications
Clause 67	Section 191(1)	Possession, etc.
Clause 68	Section 193(1)	Disclosure of information
Clause 69	Section 193.1(1)	Disclosure of information received from interception of radio-based telephone communications
Clause 70	Section 201(1)	Keeping gaming or betting house
Clause 71	Section 206(1)	Offence in relation to lotteries and games of chance

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Bill C-75	<i>Criminal Code</i>	Offence
Clause 72	Section 209	Cheating at play
Clause 76	Section 221	Causing bodily harm by criminal negligence
Clause 79	Section 237	Punishment for infanticide
Clause 82	Sections 242, 243	Neglect to obtain assistance in childbirth; Concealing body of a child
Clause 83	Section 245(1)	Administering noxious thing
Clause 84	Sections 247(1), 247(2), 247(3)	Traps likely to cause bodily harm; Bodily harm; Offence-related place
Clause 85	Section 249(3)	Dangerous operation causing bodily harm
Clause 86	Section 251(1)	Unseaworthy vessel and unsafe aircraft
Clause 87	Section 252(1.2)	Failure to stop at scene of accident
Clause 88	Sections 255(2), 255(2.1), 255(2.2)	Impaired driving
Clause 90	Section 262	Impeding attempt to save life
Clause 104	Section 279.02(1)	Material benefit – trafficking
Clause 105	Section 279.03(1)	Withholding or destroying documents – trafficking
Clause 106	Section 280(1)	Abduction of person under age of 16
Clause 107	Section 281	Abduction of person under age of 14
Clause 109	Section 286.2(1)	Material benefit from sexual services
Clause 112	Section 291(1)	Bigamy
Clause 113	Section 292(1)	Procuring feigned marriage
Clause 114	Section 293(1)	Polygamy
Clause 115	Sections 293.1, 293.2	Forced marriage; Marriage under age of 16 years
Clause 116	Section 294	Pretending to solemnize marriage
Clause 117	Section 295	Marriage contrary to law
Clause 118	Sections 300, 301	Libel known to be false; Defamatory libel
Clause 119	Section 302(3)	Extortion by libel
Clause 122(1)	Section 334(a)	Punishment for theft
Clause 123	Sections 338(1), 338(2)	Fraudulently taking cattle or defacing brand; Theft of cattle
Clause 124	Section 339(1)	Taking possession, etc., of drift timber
Clause 125	Section 340	Destroying documents of title
Clause 126	Section 341	Fraudulent concealment
Clause 128	Section 351(2)	Disguise with intent
Clause 129	Section 352	Possession of instruments for breaking into coin-operated or currency exchange devices
Clause 130	Section 353(1)	Selling, etc., automobile master key
Clause 131	Section 355(a)	Possession of property obtained by crime
Clause 132	Section 357	Bringing into Canada property obtained by crime
Clause 133	Sections 362(2)(a), 362(3)	False pretence or false statement
Clause 134	Section 363	Obtaining execution of valuable security by fraud
Clause 135	Section 377(1)	Damaging documents

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Bill C-75	<i>Criminal Code</i>	Offence
Clause 136	Section 378	Offences in relation to registers
Clause 137	Section 381	Using mails to defraud
Clause 138	Section 382	Fraudulent manipulation of stock exchange transactions
Clause 139	Section 382.1(1)	Prohibited insider trading
Clause 140	Section 383(1)	Gaming in stocks or merchandise
Clause 141	Section 384	Broker reducing stock by selling for their own account
Clause 142	Section 385(1)	Fraudulent concealment of title documents
Clause 143	Section 386	Fraudulent registration of a title
Clause 144	Section 387	Fraudulent sale of real property
Clause 145	Section 388	Misleading receipt
Clause 146	Section 389(1)	Fraudulent disposal of goods on which money advanced
Clause 147	Section 390	Fraudulent receipts under <i>Bank Act</i>
Clause 148	Section 392	Disposal of property to defraud creditors
Clause 149	Sections 393(1), 393(2)	Fraud in relation to fares, etc.
Clause 150	Section 394(5)	Fraud in relation to valuable minerals
Clause 151	Section 394.1(3)	Possession of stolen or fraudulently obtained valuable minerals
Clause 153	Section 396(1)	Offences in relation to mines
Clause 154	Sections 397(1), 397(2)	Books and documents
Clause 155	Section 399	False return by public officer
Clause 156	Section 400(1)	False prospectus, etc.
Clause 157	Section 405	Acknowledging instrument in false name
Clause 158	Section 417(1)	Applying or removing marks without authority
Clause 160	Sections 424, 424.1	Threat against internationally protected person; Threat against United Nations or associated personnel
Clause 161	Section 426(3)	Secret commissions
Clause 163	Section 435(1)	Arson for fraudulent purpose
Clause 164	Section 436(1)	Arson by negligence
Clause 165	Section 436.1	Possession of incendiary material
Clause 166	Section 438(1)	Interfering with saving of wrecked vessel
Clause 167	Section 439(2)	Interfering with marine signal, etc.
Clause 168	Sections 440, 441	Removing natural bar without permission; Occupant injuring building
Clause 169	Section 443	Interfering with international boundary marks, etc.
Clause 175	Section 451	Having clippings, etc.
Clause 176	Section 453	Uttering coin
Clause 177	Section 460(1)	Advertising and dealing in counterfeit money, etc.
Clause 183	Section 465(1)(b)	Conspiracy
Clause 184	Section 467.11(1)	Participation in activities of criminal organization
Clause 307	Section 753.3(1)	Breach of long-term supervision

Source: Table prepared by the authors using information obtained from Bill C-75 and the *Criminal Code*.

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Another amendment in the bill increases the general penalty for summary conviction offences so that the maximum term of imprisonment in section 787 is raised from six months to two years less a day. The maximum fine of \$5,000 remains the same.

Further, summary conviction offences with a maximum penalty other than what is currently provided in section 787 are standardized so that the maximum term of imprisonment is also two years less a day.

However, the maximum term of imprisonment has not been changed for the following **two** Code offences:

- exposure involving a person under the age of 16 years (section 173(2)(b)) (the maximum penalty is still six months); and
- sexual assault against a person who is 16 years or older (section 271(b)) (the penalty is still 18 months)

Table 2 presents all offences being standardized in this way.

Table 2 – Standardization of Maximum Terms of Imprisonment
for Summary Conviction Offences (Two Years Less a Day)

Bill C-75	<i>Criminal Code</i>	Offence
Clause 18	Section 83.12(1)(a)	Freezing of property, disclosure or audit
Clause 23	Section 83.231(3)(b)	Hoax – terrorist activity; Causing bodily harm
Clause 25	Section 95(2)(b)	Possession of prohibited or restricted firearm with ammunition
Clause 26	Section 96(2)(b)	Possession of weapon obtained by commission of offence
Clause 27	Section 102(2)(b)	Making automatic firearm
Clause 34(2)	Section 121.1(4)(b)	Selling, etc., of tobacco products and raw leaf tobacco
Clause 52(1)	Section 153.1(1)	Sexual exploitation of person with disability
Clause 55(2)	Section 161(4)(b)	Order of prohibition – offence in relation to a person under the age of 16 years
Clause 56	Section 162.2(4)(b)	Prohibition order – publication, etc., of an intimate image without consent
Clause 58	Section 173(1)(b)	Indecent acts
Clause 74	Section 215(3)(b)	Duty of persons to provide necessaries
Clause 75	Section 218(b)	Abandoning child
Clause 80	Section 241.3(b)	Failure to comply with safeguards (medical assistance in dying)
Clause 81	Section 241.4(3)(b)	Forgery (medical assistance in dying)
Clause 88	Section 255(1)	Impaired driving
Clause 92	Section 264.1(2)(b)	Uttering threats
Clause 94	Section 269(b)	Unlawfully causing bodily harm
Clause 95	Section 270.01(2)(b)	Assaulting peace officer with weapon or causing bodily harm
Clause 96	Section 270.1(3)(b)	Disarming a peace officer

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Bill C-75	<i>Criminal Code</i>	Offence
Clause 103	Section 279(2)(b)	Forcible confinement
Clause 108	Section 286.1(1)(b)	Obtaining sexual services for consideration
Clause 110	Section 286.4(b)	Advertising sexual services
Clause 121	Section 333.1(1)(b)	Motor vehicle theft
Clause 127	Section 347(1)(b)	Criminal interest rate
Clause 162(1)	Section 430(4.1)(b)	Mischief relating to religious property, educational institutions, etc.
Clause 162(2)	Section 430(4.11)(c)	Mischief relating to war memorials
Clause 170	Section 445(2)(b)	Injuring or endangering other animals
Clause 171	Section 445.01(2)(b)	Killing or injuring certain animals
Clause 172	Section 445.1(2)(b)	Causing unnecessary suffering
Clause 173	Section 446(2)(b)	Causing damage or injury (animal, bird)
Clause 174	Section 447(2)(b)	Keeping cockpit
Clause 178	Section 462.2	Importation, exportation, manufacturing, promoting or selling instruments or literature for illicit drug use
Clause 194	Section 487.0198	Offence – preservation or production order
Clause 200	Section 487.08(4)(b)	Use of bodily substances – warrant
Clause 204	Section 490.031(1)(b)	Not complying with specific orders
Clause 205	Section 490.0311(b)	Providing false or misleading information under the <i>Sex Offender Information Registration Act</i>
Clause 298	Section 733.1(1)(b)	Failure to comply with probation order
Clause 299	Section 734(5)(b)	Imprisonment in default of payment
Clause 305	Section 743.21(2)(b)	Non-communication order
Clause 322	Section 811(b)	Breach of recognizance

Source: Table prepared by the authors using information obtained from Bill C-75 and the *Criminal Code*.

2.1.1.1 CONSEQUENTIAL AMENDMENTS

The Senate Standing Committee on Legal and Constitutional Affairs adopted two amendments to ensure that the reclassification of indictable offences as hybrid offences has no impact on the taking of samples of bodily substances for forensic DNA analysis or for identification.

The first amendment (clause 196.1) adds all reclassified offences to paragraph (c) of the definition of “secondary designated offence” in section 487.04 of the Code. This would allow the court to still issue a DNA collection order for summary conviction offences.

Second, clause 388 amends the *Identification of Criminals Act* to specify and clarify that any person in lawful custody charged with those a hybrid offence may be fingerprinted, photographed or subjected to other similar measurements, processes and operations, even if the prosecution later proceeds by summary conviction.

2.1.2 RESTRICTIONS ON PRELIMINARY INQUIRIES

2.1.2.1 BACKGROUND

A preliminary inquiry is a pre-trial procedure to determine whether there is sufficient evidence to require an accused to stand trial for an indictable offence, in accordance with Part XVIII of the Code (sections 535 and following). The purpose of a preliminary inquiry is

to determine whether the Crown has sufficient evidence to warrant committing the accused to trial. The preliminary inquiry is not a trial. It is rather a pre-trial screening procedure aimed at filtering out weak cases that do not merit trial. ... The justice evaluates the admissible evidence to determine whether it is sufficient to justify requiring the accused to stand trial.¹⁴

Currently, a preliminary inquiry may be held in the following instances:

- an accused charged with an indictable offence elects to be tried by a judge alone or by a court composed of a judge and jury before a superior court (sections 536(2) and 536(4)) or did not select a mode of trial (section 565);
- an accused is charged with an offence under section 469 (e.g., murder, treason);
- a provincial court judge exercises the discretion to decide that the charge should be prosecuted by indictment (section 555(1)); or
- the Attorney General requires that the accused be tried by a judge and jury (section 568).

Following the preliminary inquiry, the judge must either order the accused to stand trial or discharge the accused (section 548(1)).

According to Statistics Canada, in 2015–2016:¹⁵

- 34,698 of the charges completed in provincial court (or 3% of all charges completed in provincial court) had a preliminary inquiry (representing 8,047 actual cases heard in provincial court, or 2% of the total); and
- 6,467 of the charges completed in superior court (or 49% of all charges completed in superior court) had a preliminary inquiry (representing 1,674 of actual cases heard in superior court, or 54% of the total).

In both cases, the statistics show that charges that had a preliminary inquiry generally took longer to reach a final decision.

In the 2016 *Jordan* decision, a majority of the Supreme Court held that “Parliament may wish to consider the value of preliminary inquiries in light of expanded disclosure obligations.”¹⁶ According to the federal government, “[u]se of the procedure varies across provinces, and some argue that its purpose has been significantly reduced by the obligation on the Crown to provide the accused with all evidence relating to his or her charges.”¹⁷ As well, there was a “lively debate” about the very nature and value of preliminary inquiries in the course of the study into court delays by the Standing Senate Committee on Legal and Constitutional Affairs, which, in its final report of June 2017,

recommended eliminating preliminary inquiries or limiting their use to the most serious offences.¹⁸

Reforms were also introduced in 2002 when Parliament made preliminary inquiries dependent on an express request by the defence or the prosecution, authorized agreements to limit their scope and authorized the submission of evidence in writing.¹⁹

2.1.2.2 AMENDMENTS

Bill C-75 (clauses 238 and following) restricts the use of preliminary inquiries to cases involving adults charged with offences punishable by **a maximum term of imprisonment of 14 years or more (including life imprisonment)**. **Initially, the bill restricted these inquiries to offences punishable by life imprisonment.**

As well, under amended section 537 of the Code, a justice acting in the course of a preliminary inquiry may “regulate the course of the inquiry in any way that appears to the justice to be desirable, including to promote a fair and expeditious inquiry” (clause 242(1)). The judge may “limit the scope of the preliminary inquiry to specific issues and limit the witnesses to be heard on these issues” (clause 242(3)).

2.1.3 INTIMATE PARTNER OFFENCES

2.1.3.1 BACKGROUND

There are no offences in the Code specific to intimate partner violence (also known as family or domestic violence). However, the various forms of this kind of violence are generally covered by a number of offences, including those related to the use of physical and sexual violence; the administration of justice; some forms of psychological or emotional abuse; neglect; and financial abuse.²⁰ Six provinces (Alberta, Manitoba, Nova Scotia, Prince Edward Island, Newfoundland and Labrador, and Saskatchewan) and three territories (Northwest Territories, Yukon and Nunavut) have proclaimed specific legislation on family violence in areas within their jurisdiction, which can include measures restraining the abuser from communicating with or contacting the victim.²¹

Various Code provisions currently offer some protection to victims of domestic violence. Under section 515, courts may set release conditions that, for instance, prohibit the accused from having any contact with the victim. Under section 810, courts may also order peace bonds or recognizances, which require an individual to agree to specific conditions to keep the peace, for instance where personal injury or damage is feared. Section 718.2(a)(ii) makes it an aggravating factor for sentencing purposes when the offence involves abuse of a spouse or common-law partner. Lastly, section 720 authorizes courts, under certain conditions, to delay sentencing to enable the offender to attend a domestic violence counselling program.

According to the latest statistics, in 2016, 28% of victims of police-reported violent crime aged 15 and older were victimized by an intimate partner. In 12% of cases, the victim was a current or former spouse. In 15% of cases it was a current or former dating partner, and in 0.4% of cases it was another intimate partner. As well, 79% of victims

of intimate partner violence were women, and intimate partner violence was the leading type of violence experienced by women.²²

2.1.3.2 AMENDMENTS

Clause 1(3) of the bill adds the definition of “intimate partner” to section 2 of the Code. This new definition includes a person’s current or former spouse, common-law partner and dating partner. This makes its scope broader than that of “common-law partner,” currently in section 2 of the Code.²³ It is also broader than the definition of “intimate partner” in section 110.1 (whose scope is limited to sections 109 and 110), which includes a spouse, a common-law partner and a dating partner. Section 110.1 of the Code is repealed by clause 32. As a result of this new definition, several *Criminal Code* provisions are being amended to incorporate the term (e.g., clauses 30, 31, 159, 225(3), 225(6), 293, 302, 319(1) and 319(4)).

The bill also strengthens a number of provisions and procedures pertaining to offences involving intimate partner violence:

- Clauses 225(3) and 225(6) amend section 515 of the Code by introducing a reversal of the onus of proof when an application for bail is being considered if an accused is charged with such an offence and has been previously convicted of an offence against an intimate partner.
- Clause 294 adds section 718.3(8) to those provisions of the Code that concern sentencing. This new section authorizes the court to impose a longer maximum sentence when an accused is convicted of an indictable offence against an intimate partner and was previously convicted of such an offence. Depending on the maximum term of imprisonment, the court may impose a sentence which exceeds that maximum term by another five, 10 or 14 years, or impose a life sentence. Section 718.2(a)(ii) (amended by clause 293) also provides that an offence committed against an intimate partner **or a family member of the victim or the offender** is treated as an aggravating circumstance on sentencing.

In addition, new sections 718.04 and 718.201 have been added to the Code to provide the courts with new sentencing requirements. Section 718.04 requires courts to give primary consideration to the objectives of denunciation and deterrence of the conduct that forms the basis of the offence when the offence involves “the abuse of a person who is vulnerable because of personal circumstances – including because the person is Aboriginal and female.” Section 718.201 provides that a court imposing a sentence for an offence involving the abuse of an intimate partner must now consider “the increased vulnerability of female persons who are victims, giving particular attention to the circumstances of Aboriginal female victims.” According to the Minister of Justice, these two amendments address recommendations 5.17 and 5.18 in the final report of the National Inquiry into Missing and Murdered Indigenous Women and Girls, as well as some of the concerns noted by the Supreme Court in *R. v. Barton*.²⁴

2.1.4 BAIL

2.1.4.1 BACKGROUND

Section 11(e) of the *Canadian Charter of Rights and Freedoms*²⁵ (the Charter) guarantees accused persons the right “not to be denied reasonable bail without just cause.” Given this right, any detention of an accused person must be justified. Generally, a peace officer may keep the person in custody until a bail hearing, though depending on the offence, the peace officer may also release the accused subject to conditions.²⁶ In order for an accused person to remain in custody, the Crown prosecutor must demonstrate at a bail hearing why that person should be detained while awaiting the final disposition of the charges. If the Crown cannot demonstrate that detention is properly justified, the court may grant the accused a judicial interim release (i.e., release on bail) that would allow the accused to remain at liberty unless found guilty. For certain crimes, the onus is reversed and accused persons will be detained unless they can demonstrate they should remain at large, for example, where an accused is charged with:

- an indictable offence that is alleged to have been committed while the accused was at large awaiting trial for another offence;
- an indictable offence (if the accused is not ordinarily resident in Canada);
- drug trafficking, importing or exporting;
- offences involving firearms; or
- terrorism.²⁷

Section 503 of the Code states that once arrested and taken into custody, an accused person must be brought before a justice of the peace (or judge) within 24 hours or as soon as possible if a justice is not available within that period. Section 515 sets out the procedure to determine whether the accused will be granted bail or held in remand. The administration of justice is a matter of provincial jurisdiction and therefore there is some variation among the provinces as to whether a judge or justice of the peace will rule on release.²⁸

Section 515(10) sets out the grounds upon which an accused’s detention can be considered necessary, including:

- to ensure the accused’s attendance in court;
- to protect the public, victims and witnesses, particularly where there is a likelihood that the accused will commit another offence or interfere with the administration of justice if released from custody;
- to maintain confidence in the administration of justice, bearing in mind specific circumstances such as the strength of the prosecution’s case, the gravity of the offence, the sentence for the offence, and whether a firearm was used.

The release order may set out conditions with which the accused must comply or face possible breach of condition charges. The conditions that may be specified in the release order are covered in sections 515(4) to 515(4.3). They include requirements to report to peace officer, abstain from communicating with victims and witnesses, keep a curfew, abstain from alcohol or drugs, not possess a firearm or other regulated weapon, or other “reasonable conditions” as the justice considers “desirable.”

In recent years, the number of accused persons detained on remand has increased considerably. According to Statistics Canada, the remand population over the last 10 years in provincial/territorial prisons has consistently exceeded the sentenced population. For instance, adults in remand accounted for 60% of the custodial population in 2015–2016, an increase of 35% over 2005–2006. Among the provinces and territories, seven out of 13 jurisdictions had higher proportions in remand versus sentenced custody.²⁹

Bail reform has been an ongoing subject of discussion for many years.³⁰ More recently, in 2015, a report commissioned by the Department of Justice Canada and written by Professor Cheryl Marie Webster described what she referred to as Canada’s “broken bail system” and the problems with the remand system. Webster reviewed the relevant statistics and consequences of the high number of persons on remand, and noted that this has placed a strain on limited resources and created challenges in managing the remand population. She added that bail has become more difficult to obtain due to an increased number of offences involving a shift in the onus of proof from the Crown to the accused (making it particularly hard for self-represented accused persons). Other factors behind this trend include a “tough-on-crime mentality”; the interest of a judge or justice of the peace in maintaining confidence in the administration of justice; and the use of increasingly stringent release orders.³¹ She recommended a systemic change:

[A] different mindset is needed that will force the key players to reconceptualise bail as it was originally intended: a summary procedure which upholds and defends the presumption of innocence while ensuring – above all – the attendance of the accused in court.³²

During its study on court delays, the Standing Senate Committee on Legal and Constitutional Affairs heard from a range of witnesses from across Canada, including Professor Webster, who discussed the high numbers of individuals detained in remand and the need for reform in this area. The Committee recommended reform and the prioritization of reducing the number of persons on remand across Canada.³³

2.1.4.2 AMENDMENTS

Bill C-75 makes several amendments to Part XVI of the Code, “Compelling Appearance of Accused Before a Justice and Interim Release” (sections 493 to 529.5). These amendments are intended to modernize bail practices and procedures. The bill reorganizes several provisions and amends some procedures to “promote the timely release of accused persons with the least onerous conditions that are appropriate in the circumstances,”³⁴ at various steps of the process.

First, clause 210 introduces new principles and factors to consider in any bail decision. New section 493.1 introduces the “principle of restraint,” providing that in any decision, the primary consideration is to be given to releasing the accused at the earliest reasonable opportunity and on the least onerous conditions. New section 493.2 requires that any decision give particular attention to the circumstances of Indigenous accused and accused who “who belong to a vulnerable population that is overrepresented in the criminal justice system and that is disadvantaged in obtaining release under this Part.”

The bill expands certain police powers by providing that a peace officer (rather than by an officer in charge, as is currently the case) may release a person from custody (e.g., see new sections 498 and 499). For example, in cases of certain breaches or violations of conditions (new sections 495.1 and 496), a peace officer may now require an individual to appear before a judge or justice, either by charging the individual or by issuing a notice to appear at a judicial referral hearing under the new “Proceedings Respecting Failure to Comply with Release Conditions” (new sections 523.1 and following; see also the next section of this Legislative Summary, “Administration of Justice Offences”). These new provisions provide an alternative for managing some administration of justice offences. The bill also specifies that “undertakings” (as newly defined in clause 1(3)) given to a peace officer must set out certain aspects, including mandatory conditions and additional conditions imposed on the accused that are “reasonable in the circumstances” and “necessary” (new section 501). Another new provision is the addition by clause 217 of section 503(1.1) of the Code, which states that the peace officer may re-evaluate the decision to detain an individual who committed an offence (with exceptions).

The intent to impose the least onerous form of release can also be found at the judicial interim release proceedings stage. This is stipulated by clause 225, amending section 515, providing restraint in the use of surety.

Clause 235 amends section 525 of the Code, which provides for a procedure to review detentions that exceed 30 days for summary offences, or 90 days for indictable offences.³⁵ An application is made to a judge by the person having the custody of the accused. Clause 235 makes several amendments to “simplify” this procedure, particularly by providing that the accused may waive in writing their right to a hearing. Amended section 525 of the Code sets out the criteria that the judge must consider when determining whether there is an unreasonable delay in the proceedings.

2.1.5 ADMINISTRATION OF JUSTICE OFFENCES

2.1.5.1 BACKGROUND

Administration of justice offences, found in various provisions of the Code,³⁶ pertain to such matters as an accused or offender’s failure to comply with the conditions imposed; escape from custody or otherwise being unlawfully at large; failure to appear in court when required to do so, and breach of probation, among others. They also apply to such matters as impersonating a peace officer, misleading a peace officer and perjury. These offences largely concern the proper administration of the justice system, rather than involving some form of harm to any particular victim. They generally are also committed subsequent to another offence having been, or alleged to have been,

committed. Many were created to ensure the system functions properly by allowing accused persons to maintain their liberty, while ensuring that they keep the peace by abiding by certain conditions and appearing in court to respond to the charges against them.

Administration of justice offences form a significant portion of cases proceeding before criminal courts. According to Statistics Canada, just over a million charges were completed in criminal provincial courts in 2015–2016, of which slightly more than 350,000 were for administration of justice offences – the largest number of these being failure to comply with an order (175,170).³⁷ In 2014–2015, administration of justice offences represented 23% of cases completed in adult criminal court.³⁸ In report, *Delaying Justice Is Denying Justice*, the Standing Senate Committee on Legal and Constitutional Affairs concurred with many of its witnesses that administration of justice offences were unnecessarily clogging up the courts, thereby contributing to the “delays crisis,”³⁹ and it recommended that

the Minister of Justice prioritize the reduction of court time spent dealing with administration of justice offences and develop alternative means of dealing with such matters with the provinces and territories.⁴⁰

2.1.5.2 JUDICIAL REFERRAL HEARINGS

Clause 234 of the bill adds new section 523.1 to the Code, creating an alternative procedure for handling certain administration of justice offences, namely when an individual has failed to comply with a summons, appearance notice, undertaking or release order or has failed to attend court as required. Under the new procedure, as provided for in new section 496 (clause 212), police may decline to charge individuals but may issue a notice to appear before a judge or justice of the peace for failing to comply with the requirements placed on them. Even if charges are laid, a judge or justice of the peace or has the authority to consider various responses under the new procedure. In order for a judicial referral hearing under section 523.1 to proceed, the Crown prosecutor must seek a decision under this section and the failure in question must not have caused a victim physical or emotional harm, property damage or economic loss. Judicial referral hearings under new section 523.1 may be conducted by a justice of the peace or provincial court judge (unless the accused had been released from custody further to a judicial interim release order made under new section 522(3) (clause 232)), in which case the matter must be referred to a judge of a provincial superior court). Upon hearing the matter, the judge or justice may decide to:

- take no further action;
- cancel any other summons, appearance notice, undertaking or release order in respect of the accused and
 - make a release order under section 515, or
 - where detention of the accused in custody is justified under section 515(10), make an order accordingly and provide reasons for why the accused should be detained until he or she can be “dealt with according to law” (see section 515(5)); or
- remand the accused to custody to be photographed and have his or her fingerprints recorded pursuant to the *Identification of Criminals Act*.

If the judge or justice decides to do any of the above, then any charges that were laid against the accused for the failure in question must be dismissed. No further charges may be laid thereafter against the individual for any failure that was the subject of the hearing.

2.1.6 PEREMPTORY CHALLENGES IN JURY SELECTION

2.1.6.1 BACKGROUND

As guaranteed by section 11(f) of the Charter, when individuals are charged with an offence where the maximum punishment is imprisonment for five years or more, they have the right to a trial by jury. Juries are comprised of up to 12 Canadian citizens. Their role is to decide whether the prosecutor has proven beyond a reasonable doubt that the accused is guilty. This process is administered separately by each province and territory. Once an individual is called for jury duty, then the person must appear in court for the selection process. The jury selection process is controlled by the judge in accordance with the rules set out in Part XX of the Code. Most commonly, a jury is selected by randomly drawing the names of potential jurors present in court that day. Further to section 632, jurors may be excused for various reasons, such as a personal interest in the matter, their relationship with the parties involved, personal hardships or any other reasonable cause. The Crown prosecutor or the defence can challenge the inclusion of any juror for cause based on the reasons provided in section 638, such as the juror is not unbiased or is not proficient in the official language of the accused, etc. They can also use their peremptory challenge to exclude any juror without having to explain why. Section 634 of the Code stipulates the number of peremptory challenges allowed, which depends, among other things, on the offence.

Bill C-75 was tabled at a time when reform of the jury selection process has been the subject of much attention, following an acquittal in the second-degree murder trial for the killing of Colten Boushie. As the accused was a white person and the victim was an Indigenous person, it was noted in many media reports that jurors with an Indigenous appearance were being “challenged” (i.e., dismissed) by the defence and that the jury that was ultimately selected consisted of solely of white people.⁴¹

In its decision in *R. v. Sherratt*, the Supreme Court of Canada recognized that juries must be impartial, adding that the requirement of a representative jury is a constitutional principle. The Court noted that peremptory challenges have proper uses, but also “can be used to alter somewhat the degree to which the jury represents the community.” It added that although challenges for cause also have their place, they “stray into illegitimacy” if used merely to “over- or under-represent a certain class in society.”⁴² Some studies have called for reform of peremptory challenges.⁴³ For example, Manitoba’s Public Inquiry into the Administration of Justice and Aboriginal People recommended in its 1991 report that peremptory challenges be abolished and only challenges for cause should be permitted when selecting a jury.⁴⁴ In 2013, former Supreme Court Justice Frank Iacobucci completed a report on “the lack of representation of First Nations peoples living in reserve communities on juries in Ontario.” He reviewed the history of jurisprudence and law reform commissions concerning jury selection and recommended that the Code be amended to “prevent the use of peremptory challenges to discriminate against First Nations people serving on juries.”⁴⁵

2.1.6.2 AMENDMENTS

Bill C-75 amends various provisions pertaining to the empanelling of juries. Some of the changes are comparatively minor and serve primarily to modernize or update the language currently used. For instance, clause 271 updates section 638(1)(c) to permit a challenge for cause where a juror has been convicted of an offence, sentenced to two years or more and for which no pardon or record suspension is in effect. The current wording refers to a sentence of 12 months or more or a death sentence (the death penalty was abolished in 1976).

The more significant amendments concern the reasons for which a juror may be challenged or not selected. For instance, clause 269 repeals section 634 of the Code, which permits peremptory challenges. As a result of these amendments, jurors can only be challenged, removed, or asked to stand by for specified reasons.

Clause 269 also amends section 633 of the Code, which currently permits a judge to direct a juror to “stand by” for reasons of personal hardship or any other reasonable cause. If a potential juror is made to “stand by,” that individual is asked to wait until other jurors have been sworn, in case there is a need for that person to be called back. The amendment adds that another reason for such a direction would be for maintaining “public confidence in the administration of justice.” While time will tell how such a broad phrase might be interpreted by the courts, it is possible that it could provide an opportunity for a judge to consider whether a jury appears to sufficiently representative or appropriately empanelled to promote a just outcome, perhaps even considering whether racial bias could be a factor.

Clause 272 amends section 640 of the Code and the procedures for dealing with challenges for cause. The current provisions create a process in which sworn jurors may decide on the validity of a challenge in some instances. Under the new procedure, only judges can determine whether the grounds for the challenge are true.

2.1.7 PROCEEDINGS AND EVIDENCE: CASE MANAGEMENT, JURISDICTION OF THE ATTORNEY GENERAL, EXECUTION OF WARRANTS, LANGUAGE AND APPEARANCE OF THE ACCUSED, AND EVIDENCE

2.1.7.1 CASE MANAGEMENT AND RULES OF THE COURT

2.1.7.1.1 BACKGROUND

As noted by the Supreme Court of Canada in the *Jordan* decision, a key element of addressing the problems causing delays in criminal proceedings is prompting a cultural shift among all participants in the justice system, including lawyers, legislators, judges and court administration officials, toward prioritizing fair and efficient trials. For the judiciary, the Supreme Court emphasized that

[t]rial courts may wish to review their case management regimes to ensure that they provide the tools for parties to collaborate and conduct cases efficiently. Trial judges should make reasonable efforts to control and manage the conduct of trials. Appellate courts must support these efforts by affording deference to case management choices made by courts below.⁴⁶

In its report, *Delaying Justice Is Denying Justice*, the Standing Senate Committee on Legal and Constitutional Affairs stated its view that “[t]he lack of robust case and case flow management by the judiciary is perhaps the most significant factor contributing to delays.”⁴⁷ The Committee emphasized the important role that judges must fulfill in ensuring that criminal proceedings are managed efficiently. Court administration officials, judges and chief judges perform many tasks to ensure the proper administration of the many cases passing through the system. The Committee felt that, given its independence, the judiciary is well positioned to improve case management, for example, by imposing deadlines and challenging unnecessary adjournments. That said, judges must nonetheless interpret legislation to apply criminal law, and the Governor in Council can take steps to ensure the uniformity of the rules of court. The Committee accordingly recommended that the Minister of Justice “consider making amendments to the Code to support better case management as necessary.”⁴⁸

There are various ways that courts and individual judges can promote efficient case management.⁴⁹ Section 482 of the Code permits courts to make and publish rules of court so long as these are consistent with the Code or other federal legislation. These can include rules that regulate the sittings of judges and pleadings, practices and procedures – including pre-hearing conferences – in criminal matters.

Part XVIII.1 of the Code (sections 551.1 to 551.7) allows a Chief Justice or Chief Judge to appoint a case management judge to a criminal case whose role is to promote a fair and efficient trial and to ensure that the evidence is presented with the least possible interruption. Section 551.3 details the powers a case management judge “may” exercise prior to the presentation of the evidence. These powers are the same that a trial judge would have at this stage and include the following:

- assisting the parties to identify witnesses and determine the issues to be dealt with;
- encouraging the parties to make admissions and reach agreements;
- establishing schedules and imposing deadlines on the parties;
- hearing guilty pleas and imposing sentences; and
- ruling on such matters as the disclosure and admissibility of evidence, Charter issues, and the severance of counts.

Special considerations apply under section 551.7 where joint hearings are considered for issues to be adjudicated in related trials.

The case management judge’s decisions are binding, whether that judge is the trial judge or not, and matters can be referred to the case management judge by the trial judge at any stage of the trial.

The Code also provides various powers and tools for judges to manage certain elements of criminal cases concerning evidence, witness testimony, preliminary inquiries and voir dres, for example.⁵⁰

2.1.7.1.2 AMENDMENTS

Bill C-75 includes several amendments to the Code that could assist courts and judges in managing cases and ensuring their efficiency.

Clauses 186 and 187 remove the requirement in sections 482(2) and 482.1(5) for the rules of court and the case management rules to be “subject to the approval of the lieutenant governor in council of the relevant province.” Clause 186 also removes the requirement that such rules be published in the *Canada Gazette*, so that they simply need to be publicly available.

Clause 251 amends section 551.3 to state that a case management judge “exercises the powers that a trial judge has before that stage [presentation of the evidence on the merits] in order to assist in promoting a fair and efficient trial,” rather than “may exercise” the powers of a trial judge. How this change will be interpreted by the courts is yet to be determined, but the amendment does appear to emphasize the point that case management judges must exercise the power of trial judges with the purpose of ensuring trial fairness and efficiency, rather than considering this as optional. It could also serve to underscore that trial and appellate court judges should respect the case management judge’s decisions in these matters.

One other change is to section 599(1)(a), which allows a judge to change a trial venue to another courthouse in another territorial division in the same province if “it appears expedient to the ends of justice.” Clause 267 stipulates that such a move is justified to “promote a fair and efficient trial” or to ensure the safety or protect the interests of victims, witnesses or society.

Bill C-75 also amends various provisions pertaining to the admission of evidence in order to increase efficiencies in criminal proceedings and give judges additional tools for efficient case management, such as the expanded use of videoconferencing and of police affidavits (see sections 2.1.7.5 and 2.1.7.6 below).

2.1.7.2 JURISDICTION OF THE ATTORNEY GENERAL (CLAUSES 1, 2, 4, 28, 29, 179, 185 AND 265)

In criminal matters, the prerogative to prosecute criminal offences is generally delegated to provincial prosecutors. For some offences (such as terrorism, organized crime and the proceeds of crime, and offences outside Canada), jurisdiction is shared between the provinces and the federal government.

In short, the bill consolidates in new section 2.3 all shared jurisdiction provisions currently scattered throughout the Code.

2.1.7.3 EXECUTION OF WARRANTS THROUGHOUT CANADA (CLAUSES 19, 66, 152, 180, 181, 191, 192, 195 TO 197, 201, 207, 208 AND 385)

Traditionally, territorial jurisdiction is an important aspect of criminal law in Canada. Generally, the Code requires warrants that are to be executed in another province to be endorsed (i.e., the warrant is authorized by a judge in another province by making an endorsement on it).

In order to streamline the execution process, Bill C-75 provides that the following warrants and orders may be executed anywhere in Canada without the need to have them endorsed:

- wiretap authorizations (section 188.1);⁵¹
- search warrants (sections 395 and 487);
- restraint orders (section 462.33);⁵²
- general warrants (section 487.01);
- assistance orders (section 487.02);
- DNA warrants (section 487.05);
- warrants for bodily impressions (section 487.092);
- tracking device warrants (section 492.1);
- transmission data recorder warrants (section 492.2); and
- drug search warrants (section 11 of the *Controlled Drugs and Substances Act*).

The peace officer who executes the warrant must be empowered to act in the place where the warrant is executed (section 83.13(11), as amended).

2.1.7.4 LANGUAGE OF ACCUSED (CLAUSE 237)

Currently, the timing at which the accused may decide to be tried in English or in French depends on the offence. The bill standardizes the timing for all types of offences: the time of the appearance of the accused at which their trial date is set (new sections 530(1) and 530(2) of the Code).

2.1.7.5 REMOTE APPEARANCE BY ACCUSED, WITNESSES AND OTHER PERSONS (CLAUSES 41, 188, 198, 199, 203, 216, 242, 274, 275, 277, 281, 283, 285, 290 AND 292)

The Code currently allows courts to hear the accused, witnesses and prosecutor remotely by “means of technology that permits the parties and the court to hear” or “any other means that allows the court and the person to engage in simultaneous visual and oral communication.” This wording comes from amendments made in 1999 and 2007, respectively.

Bill C-75 modernizes this wording by replacing it with “videoconference” in most cases and “audioconference” in others, and adds the definitions of both terms to section 2 of the Code.

Clause 292 also creates a new part in the Code dedicated entirely to this issue (Part XXII.01, “Remote Attendance by Certain Persons,” sections 715.21 to 715.26 of the Code). The purpose of these new sections is to ensure fair and efficient proceedings while enhancing access to justice (new section 715.22).

New Part XXII.01 begins by establishing that the general rule in criminal matters is that individuals are to appear in person (new section 715.21). However, the Code provides for the use of videoconferences and audioconferences. Part XXII.01 sets out general rules allowing the accused, the judge and participants to attend the proceeding remotely. Remote witness testimony is addressed in sections 714.1 to 714.8 of the Code (amended by clause 290).

When deciding to authorize the use of telecommunication as part of the proceeding, the judge must consider a list of factors, such as the following (new sections 715.23, 715.25 and 715.26):

- the person's location;
- the nature of the anticipated evidence;
- the costs that would be incurred by appearing in person;
- the nature and seriousness of the offence; and
- the accused's right to a fair and public hearing.

This last factor will probably be the one most argued before the court to ensure that the rights of the accused to cross-examine witnesses and to communicate with counsel are preserved.

If the accused is in prison and does not have access to legal advice, the court shall be satisfied that the accused understands the proceedings and that the accused's decisions are voluntary (new section 715.24).

The bill provides rules elsewhere in the Code specifically governing the use of videoconferences for certain proceedings, such as hearings related to orders for taking DNA samples of offenders (clauses 198 and 199), appearances (clause 216), trials (clauses 274 and 275) and appeals (clause 281).

2.1.7.6 ADMISSION IN EVIDENCE OF ROUTINE POLICE EVIDENCE BY AFFIDAVIT (FORMER CLAUSE 278 AND **CLAUSE 291**)

Had it not been removed from the bill further to the amendments adopted by the House of Commons, former clause 278 would have introduced new section 657.01 in the Code to allow "routine police evidence, if otherwise admissible through testimony, to be received in evidence by affidavit or solemn declaration of a police officer." Routine police evidence was defined in new section 657.01(7). Had it not been removed, this new provision would have allowed judges to require (upon request or on the judge's own motion) the police officer to appear in court for the purposes of examination or cross-examination.

Clause 291 introduces new section 715.01 to allow in evidence the transcript of testimony given by a police officer, in the presence of an accused, during a voir dire or preliminary inquiry. The judge may require the police officer to appear in court for the purposes of examination or cross-examination.

2.1.8 VICTIM SURCHARGE

In its first reading version, **Bill C-75 reproduced** the proposed amendments to the existing victim surcharge regime that were contained in Bill C-28, An Act to amend the Criminal Code (victim surcharge).⁵³ However, between the introduction of Bill C-75 on 29 March 2018 and the date on which it received Royal Assent on 21 June 2019, the Supreme Court of Canada, on 14 December 2018, issued its decision in *R. v. Boudreault*,⁵⁴ striking down the existing victim surcharge regime as unconstitutional. This required adjusting the proposed amendments to bring the victim surcharge regime into compliance with the ruling.⁵⁵

The victim surcharge is a monetary amount imposed by sentencing courts on offenders at the time of sentencing. It is automatically added to any other penalty ordered by the court when an offender is discharged (section 730 of the Code) or when the offender is convicted of an offence under the Code or under the *Controlled Drugs and Substances Act*.

These provisions amend the Code with respect to victim surcharges in order to:

- reinstate judicial discretion by allowing an exemption **or allowing the court to order that the amount be reduced if it is satisfied** that the payment of the victim surcharge would cause undue hardship **to the offender (as this type of hardship is defined in new section 737(2.2) of the Code) or that the victim surcharge would be disproportionate to the gravity of the offence or the degree of responsibility of the offender (new section 737(2.1));** and
- require the court to provide reasons for the exercise of its discretion to grant an exception to the surcharge (new section 737(2.4)).

2.1.9 UNCONSTITUTIONAL PROVISIONS

Several clauses of Bill C-75 reproduce the proposed amendments in Bill C-39, An Act to amend the Criminal Code (unconstitutional provisions) and to make consequential amendments to other Acts,⁵⁶ which itself reproduced the proposed amendments in Bill C-32, An Act related to the repeal of section 159 of the Criminal Code.⁵⁷ Table 3 is a concordance table identifying the various provisions of the three bills.

Table 3 – Concordance Table, Bills C-75, C-39 and C-32

Bill C-75	Bill C-39	Bill C-32
<i>Amendments to the Criminal Code</i>		
Clause 4(2)	Clause 1	Clause 2
Clause 51	Clause 2	Clause 3
Clause 53	Clause 3	Clause 4
Clause 54	Clause 4	Clause 1
Clause 55	Clause 5	Clause 5
Clause 60	Clause 6	
Clause 62	Clause 7	
Clauses 77 and 78	Clauses 8 and 9	

LEGISLATIVE SUMMARY OF BILL C-75

Bill C-75	Bill C-39	Bill C-32
Clause 89	Clause 10	
Clauses 98 to 102	Clauses 11 to 15	Clauses 6 to 10
Clause 111	Clause 16	
Clauses 189 and 190	Clauses 17 and 18	Clauses 11 and 12
Clause 202	Clause 19	
Clause 295*	Clause 20	
Clause 320	Clause 21	Clause 13
Amendments to the <i>Corrections and Conditional Release Act</i>		
Clauses 394 and 395	Clauses 22 and 23	Clauses 14 and 15
Amendments to the <i>Youth Criminal Justice Act</i>		
Clause 383	Clause 24	Clause 16

Note: * Clause 295 of Bill C-75 does not reproduce the same wording as was proposed in clause 20 of Bill C-39, but rather the wording proposed in clause 66 of Bill C-51.

Source: Table prepared by the authors using information obtained from the bills.

These provisions amend the Code to remove passages and repeal provisions that have been ruled unconstitutional by the Supreme Court of Canada, as well as a provision that has been ruled unconstitutional by four provincial courts of appeal. In addition, the bill makes consequential amendments to the *Corrections and Conditional Release Act* and the YCJA.

In response to these appeal court decisions, Bill C-75 repeals or amends the following provisions of the Code:

- section 159 (anal intercourse), found unconstitutional in *R. v. C.M.*,⁵⁸ in 1995, and *R. c. Roy*,⁵⁹ in 1998;
- section 179(1)(b) (vagrancy), found unconstitutional in *R. v. Heywood*,⁶⁰ in 1994 – further to an amendment adopted by the House of Commons Standing Committee on Justice and Human Rights, section 179 is repealed in its entirety;
- section 181 (spreading false news), found unconstitutional in *R. v. Zundel*,⁶¹ in 1992;
- section 229(c) (unlawful object murder), which was found unconstitutional in *R. v. Martineau*,⁶² in 1990;
- section 230 (murder in the commission of offences), found unconstitutional in *R. v. Martineau*;
- sections 258(1)(c) and 258(1)(d) (impaired driving – presumption of accuracy and of identity of breath or blood samples), parts of which were found unconstitutional in *R. v. St-Onge Lamoureux*,⁶³ in 2012;
- section 287 (abortion), found unconstitutional in *R. v. Morgentaler*,⁶⁴ in 1988; and
- section 719(3.1) (credit for time spent in pre-sentence custody when determining a sentence), part of which was found unconstitutional in *R. v. Safarzadeh-Markhali*,⁶⁵ in 2016.

These amendments are necessary because it is not enough for the courts to declare a law to be inconsistent with the Charter for it to be removed from the statute books; amending or repealing a federal law can only be done through an Act of Parliament. One of the basic foundations of the rule of law is that laws be “clear, publicized, [and] stable.”⁶⁶ The public should feel confident that the law as stated in the Code, whether online or in a printed version, is current, valid law.

2.2 AMENDMENTS TO THE *YOUTH CRIMINAL JUSTICE ACT* (CLAUSES 361 TO 384)

2.2.1 ADMINISTRATION OF JUSTICE OFFENCES (CLAUSES 361 TO 363 AND 372)

Sections 4 to 12 of the *Youth Criminal Justice Act* (YCJA) provide measures that police officers and Crown prosecutors may take instead of instituting legal proceedings. These extrajudicial measures may involve taking no further action, issuing a warning or administering a caution, or referring the young person to a program in the community or an extrajudicial sanctions program.

Under the YCJA, whenever a young person has committed a non-violent offence and has not previously been convicted of an offence, it is *presumed* that extrajudicial measures are an appropriate response to hold the young person accountable.

Bill C-75 goes further in cases of administration of justice offences. When a young person who committed an offence under section 137 of the YCJA (failure to comply with sentence or disposition) or section 496 of the Code (failure to comply with a summons, notice, promise or order), extrajudicial measures are *deemed* to be adequate, with exceptions (new section 4.1 of the YCJA).

In cases where charges are withdrawn, dismissed or stayed with respect to primary offences, the Attorney General must decide whether to proceed with the prosecution of charges pending for administration of justice offences (i.e., charges laid under sections 145(2) to 145(5) of the Code (new section 24.1 of the YCJA)).

Lastly, the bill limits the circumstances in which a custodial sentence may be imposed for an administration of justice offence. It adds the requirement that in committing the offence in question, the young person must have caused harm, or risk of harm, to the safety of the public (new section 39(1)(b) of the YCJA).

2.2.2 FACTORS TO BE CONSIDERED WHEN IMPOSING CONDITIONS (CLAUSES 368, 371 AND 373 TO 375)

The bill states that a judge imposing certain conditions (e.g., not to communicate with a certain individual or not to consume drugs or alcohol) in respect of bail or as part of a youth sentence must consider certain factors, such as whether the young person will reasonably be able to comply with the condition (new sections 29(1)(c) and 38(2)(e.1)(ii) of the YCJA).

In the case of a youth sentence, the condition must also promote the young person's rehabilitation and reintegration into society, as well as the long-term protection of the public (new section 38(2)(e.1)(i) of the YCJA).

2.2.3 ADULT SENTENCES (CLAUSE 376)

In 2012, the *Safe Streets and Communities Act*⁶⁷ required the Attorney General to consider whether it would be appropriate to make an application for an order that a young person is liable to an adult sentence if the young person committed a "serious violent offence" and was 14 years of age or older at the time of the offence (section 64(1.1) of the YCJA). Clause 376 of Bill C-75 removes this requirement.

2.2.4 PUBLICATION OF THE NAMES OF YOUNG PERSONS (CLAUSES 377 AND 379)

The *Safe Streets and Communities Act* also reversed the burden of proof (from the young person to the Attorney General) regarding the publication ban. Therefore, the onus of satisfying the court that the ban should be lifted is on the Attorney General when an application has been made to have the young person liable to an adult sentence for certain offences (section 75 of the YCJA).

Clauses 377 and 379 of Bill C-75 remove the option of lifting the publication ban in this case.

2.3 AMENDMENT TO AN ACT TO AMEND THE CRIMINAL CODE (EXPLOITATION AND TRAFFICKING IN PERSONS) (CLAUSE 386)

Clause 386 of Bill C-75 reproduces the proposed amendments in Bill C-38, An Act to amend An Act to amend the Criminal Code (exploitation and trafficking in persons).⁶⁸ Thus, Bill C-75 implements most of the provisions contained in former Bill C-452, An Act to amend the Criminal Code (exploitation and trafficking in persons), a private member's bill introduced in the House of Commons on 16 October 2012 by Maria Mourani, MP. Bill C-452 received Royal Assent in June 2015 and was, as a result, enacted as *An Act to amend the Criminal Code (exploitation and trafficking in persons)*,⁶⁹ but it has not yet been brought into force.

In an effort to bolster the Code provisions dealing with trafficking in persons, Bill C-75 brings into force (on different dates) the provisions of the former Bill C-452 that:

- create a presumption with respect to the exploitation of one person by another, easing the burden of proof for prosecutors (will come into force on the day Bill C-75 receives Royal Assent);
- add the offence of trafficking in persons to the list of offences to which the reverse onus forfeiture of proceeds of crime provisions apply (will come into force on the day Bill C-75 receives Royal Assent); and
- create a consecutive sentencing regime (will come into force on a day to be fixed by order of the Governor in Council).

2.4 COMING INTO FORCE
(CLAUSES 405 TO 407)

The bill sets four coming into force dates: upon Royal Assent of the bill, and on the 30th, 90th and 180th days after Royal Assent. Table 4 presents these different coming into force dates.

Table 4 – Coming into Force Dates

Date Coming into Force	Provisions
Upon Royal Assent	Clauses 4(2), 51, 53, 54, 55(1), 60, 62, 63.1, 69.1, 69.2, 73, 77, 78, 89, 98–102, 111, 189, 190, 202, 251.1, 320, 354–360.1, 383, 384, 386, 394, 395
30 th day after Royal Assent	Clauses 278, 301, 314
90 th day after Royal Assent	Clauses 1(1), 1(2), 2, 3, 4(1), 6–23, 25–29, 33–46, 48–50, 52, 55(2), 56–59, 61, 63, 64–69, 70–72, 74–76, 79–88, 90, 92–97, 103–110, 112–156, 157(1), 158–181, 183–186, 187(2), 188, 191–201, 203–208, 216, 225(2), 237–244, 245(1)–245(3), 246, 247, 250, 251, 252, 253, 254(1), 254(4), 254(5), 255(1), 255(2), 255(4), 255(5), 256–259, 260(1), 261–263, 265, 267–275, 277, 281(1), 281(2), 282–286, 289–294, 298, 299, 302, 305–307, 315–319, 321, 322, 329–333, 334(1), 334(2), 336(1), 338–344, 345(1), 346, 347, 348(1), 348(2), 349(1), 349(2), 350–353, 370(1), 376–379, 382, 385, 388(1) , 399, 400.1
180 th day after Royal Assent	Clauses 1(3), 5, 24, 30–32, 47, 91, 157(2), 182, 187(1), 209–215, 217–224, 225(1), 225(3)–225(7), 226–236, 245(4), 248, 249, 254(2), 254(3), 255(3), 260(2), 264, 266, 276, 279, 280, 281(3), 281(4), 287, 288, 295, 296, 297, 300, 303, 304, 308–313, 323–328, 334(3), 335, 336(2), 337, 345(2), 348(3), 349(3), 361–369, 370(2), 371–375, 380, 381, 387, 388(2) , 389 –393, 396–398, 400

Source: Table prepared by the authors using information obtained from Bill C-75.

NOTES

1. [Bill C-75, An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts](#), 1st Session, 42nd Parliament (S.C. 2019, c. 25).
2. House of Commons, Standing Committee on Justice and Human Rights, [Twenty-second Report](#), 1st Session, 42nd Parliament, 29 October 2018.
3. House of Commons, [Debates](#), 1st Session, 42nd Parliament, 20 November 2018.
4. Senate, Standing Committee on Legal and Constitutional Affairs [LCJC], [Thirty-second Report](#), 1st Session, 42nd Parliament, 4 June 2019.
5. House of Commons, [Debates](#), 1st Session, 42nd Parliament, 17 June 2019, 2150.
6. Department of Justice, [Charter Statement – Bill C-75: An Act to Amend the Criminal Code, Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts](#), 29 March 2018.

7. [R. v. Jordan](#), 2016 SCC 27; and [R. v. Cody](#), 2017 SCC 31. For more information, see Maxime Charron-Tousignant, [Unreasonable Delays in Criminal Trials: the Impact of the Jordan Decision](#), HillNotes, Library of Parliament, 11 December 2017; and Maxime Charron-Tousignant, [Unreasonable Delays in Criminal Trials: New Legal Framework](#), HillNotes, Library of Parliament, 17 August 2016.
8. LCJC, [Delaying Justice Is Denying Justice: An Urgent Need to Address Lengthy Court Delays in Canada](#), Final Report, June 2017.
9. Department of Justice Canada, "[Canada tables legislation to modernize the criminal justice system and reduce court delays](#)," News release, 29 March 2018.
10. [Youth Criminal Justice Act](#), S.C. 2002, c. 1.
11. Department of Justice (2018), *Charter Statement*.
12. **For more details, see section 2.1.8 of this Legislative Summary.**
13. New clauses 69.1 and 69.2, as well as amended clause 73 of Bill C-75 (and to a lesser extent, new clause 63.1 and amended clauses 102, 190 and 251 of Bill C-75) repeal or amend the common bawdy-house provisions and offences found mainly in sections 197(1), 210 and 211 of the Code. Over the past few decades, these offences have been increasingly restricted, particularly since [R. v. Labaye](#), 2005 SCC 80 and [Canada \(Attorney General\) v. Bedford](#), 2013 SCC 72 were rendered.
14. [R. v. Hynes](#), 2001 SCC 82, para. 30.
15. Ashley Maxwell, "[Adult criminal court processing times, Canada, 2015/2016](#)," *Juristat*, Catalogue no. 85-002-X, Canadian Centre for Justice Statistics, Statistics Canada, 13 February 2018. As Maxwell indicates in endnote 5, there are limits to these statistics:

[Integrated Criminal Court Survey] data are currently not able to distinguish between preliminary inquiries which are scheduled and held, as opposed to those which may be scheduled, but are not held. For example, an accused's court appearance may have initially been for a preliminary inquiry, however the accused decides to plead guilty before the preliminary inquiry takes place.

The author also notes (in endnote 19) that the number of preliminary inquiries may be underestimated in provinces and territories that do not report superior court data (Prince Edward Island, Ontario, Manitoba, Saskatchewan and Nunavut).
16. [R. v. Jordan](#), para. 140.
17. Department of Justice, [Reducing Delays and Modernizing the Criminal Justice System](#).
18. LCJC (2017), Priority recommendation 11, p. 8; and *Ibid.*, Recommendation 7, p. 48.
19. [Criminal Law Amendment Act, 2001](#), S.C. 2002, c. 13.
20. For more information, see Department of Justice, [Family Violence Laws](#).
21. *Ibid.*
22. See "Section 3: Police-reported intimate partner violence," in Marta Burczykca and Shana Conroy, "[Family violence in Canada: A statistical profile, 2016](#)," *Juristat*, Catalogue no. 85-002-X, Canadian Centre for Justice Statistics, Statistics Canada, 17 January 2018.
23. The definitions of "spouse" and "common-law partner" in section 718.2(a)(ii) (aggravating circumstances) had been broadened by some courts to include ex-spouses and ex-common-law partners in some instances ([Cook c. R.](#), 2009 QCCA 2423, paras. 74–85; [R. v. Pakoo](#), 2004 MBCA 157; and [R. v. Denkers](#), 1994 CanLII 2660 (ON CA)) and non-cohabitating intimate partners ([R. v. McLeod](#), 2003 CanLII 4393 (ON CA)), paras. 12–17.

24. House of Commons (17 June 2019), 2205; National Inquiry into Missing and Murdered Indigenous Women and Girls, [Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls](#), Vol. 1b, Ottawa, 2019; and [R. v. Barton](#), 2019 SCC 33.
25. [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.
26. *Criminal Code*, s. 503(2).
27. *Criminal Code*, ss. 515(6), 515(11) and 522. The Supreme Court examined the constitutionality of the reverse onus provision regarding drug trafficking in [R. v. Pearson](#), [1992] 3 SCR 665.
28. According to the distribution of legislative powers in Canada's Constitution, the federal legislature has authority over the "Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters," and the provincial legislatures have authority over the "Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts." See [Constitution Act, 1867](#), 30 & 31 Victoria, c. 3 (U.K.), ss. 91(27) and 92(14).
29. The seven provinces and territories (and their remand populations as a proportion of total custodial populations) are as follows: Alberta (70%), Ontario (67%), Manitoba (66%), Yukon (62%), British Columbia (61%), Nova Scotia (58%) and the Northwest Territories (51%). See Julie Reitano, "[Adult correctional statistics in Canada, 2015/2016](#)," *Juristat*, Catalogue no. 85-002-X, Canadian Centre for Justice Statistics, Statistics Canada.
30. See, for example, Abby Deshman and Nicole Myers, [Set Up to Fail: Bail and the Revolving Door of Pre-trial Detention](#), Canadian Civil Liberties Association and Education Trust, July 2014; and *Bail Reform Act*, S.C. 1970-71-72, c. 37.
31. Cheryl Marie Webster, "[Broken Bail](#)" in *Canada: How We Might Go About Fixing It*, Department of Justice Canada, Research and Statistics Division, June 2015, p. 6.
32. *Ibid.*, p. 12.
33. LCJC (2017), Recommendation 31, p. 138.
34. Department of Justice (2018), *Charter Statement*.
35. The interpretation of this provision has been appealed to the Supreme Court of Canada in [Corey Lee James Myers v. Her Majesty the Queen](#), SCC, No. 37869, was heard on 18 October 2018, and is currently pending.
36. For a list of offences against the administration of justice under the *Criminal Code* that are included in the Uniform Crime Reporting Survey and the Integrated Criminal Court Survey, see Marta Burczykca and Christopher Munch, "[Trends in offences against the administration of justice](#)," *Juristat*, Catalogue no. 85-002-X, Canadian Centre for Justice Statistics, Statistics Canada, 15 October 2015, Appendices 1 and 2.
37. Ashley Maxwell (2018), "[Table 6: Charges completed in adult criminal provincial court, by type of offence and decision, Canada, 2015/2016](#)."
38. Ashley Maxwell, "[Adult criminal court statistics in Canada, 2014/2015](#)," *Juristat*, Catalogue no. 85-002-X, Canadian Centre for Justice Statistics, Statistics Canada, 21 February 2017, p. 6.
39. LCJC (2017), p. 1.
40. *Ibid.*, Priority recommendation 6, p. 4; and *Ibid.*, Recommendation 33, p. 141.

41. See, for example, "[The problems with jury selection, explained](#)," *Maclean's*, Video segment; Geordon Omand, "[Les proches du jeune Colten Boushie rencontrent des ministres à Ottawa](#)," *Le Devoir* [Montréal], 6 March 2018; Joe Friesen, "[Government proposes changes to jury-selection process after the Colten Boushie case](#)," *Globe and Mail*, 29 March 2018; The Canadian Press, "[After all-white jury acquits farmer who shot Colten Boushie, Liberals expected to overhaul selection system](#)," *National Post*, Video segment, 29 March 2018; Chris Purdy, The Canadian Press, "[Gerald Stanley acquittal: What are peremptory challenges and why are they so controversial?](#)," *National Post*, 9 February 2018; and Bill Graveland, The Canadian Press, "'We're going to fight back': Rallies across Canada following shooting death acquittal," *Hamilton Spectator*, 10 February 2018.
42. [R. v. Sherratt](#), [1991] 1 SCR 509.
43. In addition to those included in this document, see Law Reform Commission of Canada, *The Jury in Criminal Trials*, Working Paper 27, Ottawa, 1980.
44. Government of Manitoba, "[Chapter 9 – Juries](#)," in *The Justice System and Aboriginal People*, Report of the Aboriginal Justice Inquiry of Manitoba, 1991.
45. Frank Iacobucci, [First Nations Representation on Ontario Juries](#), Report of the Independent Review Conducted by the Honourable Frank Iacobucci, February 2013, Recommendation 15.
46. *R. v. Jordan*, para. 139.
47. LCJC (2017), p. 5.
48. *Ibid.*, Recommendation 13, p. 83.
49. For further information, see Department of Justice, "[Guiding Principles For Effective Case Management](#)," *Justice Efficiencies and Access to the Justice System*.
50. A "voir dire" may be described as a trial within a trial. It is a hearing conducted without the jury present to determine the admissibility of evidence, or the competency of a witness or a juror. See, for example, [Erven v. The Queen](#), [1979] 1 SCR 926.
51. Currently, wiretap authorizations are valid throughout Canada, *except when their execution requires physical entry into or on a property in another province*. In that case, the authorization must be endorsed. Bill C-75 eliminates the endorsement requirement in this case. Once the bill is adopted, wiretap authorizations will be valid throughout Canada *in all cases*.
52. Currently, restraint orders are valid throughout Canada, *except when their execution requires physical entry into or on a property in another province*. In that case, the authorization must be endorsed. Bill C-75 eliminates the endorsement requirement in this case. Once the bill is adopted, restraint orders will be valid throughout Canada *in all cases*.
53. [Bill C-28, An Act to amend the Criminal Code \(victim surcharge\)](#), 1st Session, 42nd Parliament. For more information, see Tanya Dupuis, [Legislative Summary of Bill C-28: An Act to amend the Criminal Code \(victim surcharge\)](#), Publication no. 42-1-C28-E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 25 July 2017.
54. [R. v. Boudreault](#), 2018 SCC 58.
55. **For the amendments proposed by the Standing Senate Committee on Legal and Constitutional Affairs, see LCJC (4 June 2019), para. 8.**

56. [Bill C-39, An Act to amend the Criminal Code \(unconstitutional provisions\) and to make consequential amendments to other Acts](#), 1st Session, 42nd Parliament. For more information, see Maxime Charron-Tousignant, Robin MacKay and Julia Nicol, [Legislative Summary of Bill C-39: An Act to amend the Criminal Code \(unconstitutional provisions\) and to make consequential amendments to other Acts](#), Publication no. 42-1-C39-E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 5 June 2017.
57. [Bill C-32, An Act related to the repeal of section 159 of the Criminal Code](#), 1st Session, 42nd Parliament. For more information, see Julia Nicol, [Legislative Summary of Bill C-32: An Act related to the repeal of section 159 of the Criminal Code](#), Publication no. 42-1-C32-E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 11 January 2017.
58. [R. v. C.M.](#), 1995 CanLII 8924 (ON CA).
59. [R. c. Roy](#), 1998 CanLII 12775 (QC CA). [Available in French only]
60. [R. v. Heywood](#), [1994] 3 SCR 761.
61. [R. v. Zundel](#), [1992] 2 SCR 731.
62. [R. v. Martineau](#), [1990] 2 SCR 633.
63. [R. v. St-Onge Lamoureux](#), 2012 SCC 57.
64. [R. v. Morgentaler](#), [1988] 1 SCR 30.
65. [R. v. Safarzadeh-Markhali](#), 2016 SCC 14.
66. World Justice Project, [What is the Rule of Law?](#)
67. [Safe Streets and Communities Act](#), S.C. 2012, c. 1.
68. [Bill C-38, An Act to amend An Act to amend the Criminal Code \(exploitation and trafficking in persons\)](#), 1st Session, 42nd Parliament. For more information, see Laura Barnett, [Legislative Summary of Bill C-38: An Act to amend An Act to amend the Criminal Code \(exploitation and trafficking in persons\)](#), Publication no. 42-1-C38-E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 1 March 2017.
69. [An Act to amend the Criminal Code \(exploitation and trafficking in persons\)](#), S.C. 2015, c. 16.