

Safe Streets and Communities Act: the Omnibus Anti-Crime Package

Introduction

In 2011 the Federal government introduced into law its first significant foray into omnibus criminal law with its *Get Tough on Crime* legislation. This was a series of new crime legislation bearing platitudinous titles such as the *Truth in Sentencing Act*, or, *Standing Up for Victims of White Collar Crime Act*. This writer, in a weak moment of sentimental liberalism, described the *Get Tough on Crime* agenda as having the unclean odour of politics all over it. The agenda played to the public's irrational fears and did so in the face of an ever-developing and now overwhelming body of literature going to suggest that harsher sentences lead, if anywhere, to the same or more crime, not less. It was further suggested that the agenda was contrary to the accumulated wisdom of our finest judges, who were being told, in unmistakable terms, that they could not be trusted to exercise their discretion reasonably, competently, and compassionately. These legislative amendments appeared to represent the government, like the crayfish, crawling backwards into the future.

On the 13th day of March, 2012 at 3:32 p.m. the Speaker of the House announced proudly that the Right Honourable David Johnston, Governor General of Canada, signified royal assent by written declaration to Bill C-10, an omnibus crime bill. As of that moment the Conservative government transformed the country's legal landscape, particularly for those practicing in the field of criminal law. And, the transformation occurred within the first 100 sitting days of the new government, as promised. With this declaration all the ideological arguments offered in opposition to this legislation were swept aside and rendered exotically ornamental rather than practical. While

considered by many to mimic the failed U.S. experiment into “tough love” for its nation’s criminals, the arguments against these get tough provisions crashed and burned like an old house devoured by hungry flames. So, this year, no more philosophizing on what should be; instead let us focus on what is.

This wide-ranging legislation presents mandatory minimum sentences for drug crimes, eliminates house arrest for violent offenders, stiffens jail terms for child predators, eliminates pardons for serious crimes and limits judicial discretion in the treatment of offenders. What follows is a summary of our new legislative regime, focusing primarily on the amendments to the *Criminal Code* and the *Controlled Drug and Substances Act*.

***Criminal Code* Amendments**

A. Sexual Offences

The amendments increase and sometimes impose mandatory minimum penalties for certain sexual offences involving children. They also create two new offences: making sexually explicit material available to a child and agreeing or arranging to commit a sexual offence against a child¹. The amendments add sections 171.1 and 172.2 to the *Code*. These sections make it an offence to provide sexually explicit material to a person who is under the age of 14, 16 or 18 for the purpose of facilitating the commission of a sexual offence against a young person. They also make it an offence to use any means of telecommunications, including a computer system to agree or make arrangements with another person for the purpose of committing a sexual offence against a person who is under the age of 14, 16 or 18.

¹ Subsections 171.1(1) and 172.2 (1) CCC

These new hybrid offences carry mandatory minimum prison sentences. In the case of providing sexually explicit material to a child, the minimum mandatory sentence is 30 days on summary conviction and 90 days on indictment. In the case of agreeing or making arrangements with another person via telecommunications to commit a sexual offence against a child, the minimum mandatory sentence on summary conviction is 90 days and on indictment 1 year. The burden is placed upon the accused to demonstrate that she took reasonable steps to ascertain the age of the person in order to advance a defence that she believed that the person in question was at least 18, 16 or 14 years of age as required for each respective offence.

The amendments extend the deeming provisions of subsection 7 (4.1) of the *Code* to include new sexual offences created by these amendments. Subsection 7 (4.1) the provision that allows for a trial of certain sexual offences when committed outside Canada by Canadian citizens or permanent residents by deeming the offences to have been committed in Canada, is amended and extended by replacing section “171” with sections “171, 171.1, 172.1, 172.2”.

Sexual Interference

Former Section 151:

151. Every person who, for a sexual purpose, touches, directly or indirectly, with a part of the body or with an object, any part of the body of a person under the age of 16 years

(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years and to a minimum punishment of imprisonment for a term of forty-five days; or

(b) is guilty of an offence punishable on summary conviction and liable to imprisonment for a term not exceeding eighteen months and to a minimum punishment of imprisonment for a term of fourteen days.

Paragraphs (a) and (b) are replaced by the following:

(a) is guilty of an indictable offence and is liable to imprisonment for a term of not more than 10 years and to a minimum punishment of imprisonment for a term of one year; or

(b) is guilty of an offence punishable on summary conviction and is liable to imprisonment for a term of not more than 18 months and to a minimum punishment of imprisonment for a term of 90 days.

Invitation to Sexual Touching

Former Section 152:

152. Every person who, for a sexual purpose, invites, counsels or incites a person under the age of 16 years to touch, directly or indirectly, with a part of the body or with an object, the body of any person, including the body of the person who so invites, counsels or incites and the body of the person under the age of 16 years,

(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years and to a minimum punishment of imprisonment for a term of forty-five days; or

(b) is guilty of an offence punishable on summary conviction and liable to imprisonment for a term not exceeding eighteen months and to a minimum punishment of imprisonment for a term of fourteen days.

Paragraphs (a) and (b) are replaced by the following:

(a) is guilty of an indictable offence and is liable to imprisonment for a term of not more than 10 years and to a minimum punishment of imprisonment for a term of one year; or

(b) is guilty of an offence punishable on summary conviction and is liable to imprisonment for a term of not more than 18 months and to a minimum punishment of imprisonment for a term of 90 days.

Sexual Exploitation

Former Section 153:

153. (1) Every person commits an offence who is in a position of trust or authority towards a young person, who is a person with whom the young person is in a relationship of dependency or who is in a relationship with a young person that is exploitative of the young person, and who

(a) for a sexual purpose, touches, directly or indirectly, with a part of the body or with an object, any part of the body of the young person; or

(b) for a sexual purpose, invites, counsels or incites a young person to touch, directly or indirectly, with a part of the body or with an object, the body of any person, including the body of the person who so invites, counsels or incites and the body of the young person.

Punishment

153(1.1) Every person who commits an offence under subsection (1)

(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years and to a minimum punishment of imprisonment for a term of forty-five days; or

(b) is guilty of an offence punishable on summary conviction and liable to imprisonment for a term not exceeding eighteen months and to a minimum punishment of imprisonment for a term of fourteen days.

Paragraphs (1.1) (a) and (b) are replaced by the following:

(a) is guilty of an indictable offence and is liable to imprisonment for a term of not more than 10 years and to a minimum punishment of imprisonment for a term of one year; or

(b) is guilty of an offence punishable on summary conviction and is liable to imprisonment for a term of not more than 18 months and to a minimum punishment of imprisonment for a term of 90 days.

Incest

Former Section 155:

155. (1) Every one commits incest who, knowing that another person is by blood relationship his or her parent, child, brother, sister, grandparent or grandchild, as the case may be, has sexual intercourse with that person.

Punishment

(2) Every one who commits incest is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

Subsection (2) is replaced by the following:

(2) Everyone who commits incest is guilty of an indictable offence and is liable to imprisonment for a term of not more than 14 years and, if the other person is under the age of 16 years, to a minimum punishment of imprisonment for a term of five years.

Bestiality

Former Subsection 160 (3):

160(3) Notwithstanding subsection (1), every person who, in the presence of a person under the age of 16 years, commits bestiality or who incites a person under the age of 16 years to commit bestiality is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years or is guilty of an offence punishable on summary conviction.

Subsection (3) is replaced by the following:

160(3) Despite subsection (1), every person who commits bestiality in the presence of a person under the age of 16 years, or who incites a person under the age of 16 years to commit bestiality,

(a) is guilty of an indictable offence and is liable to imprisonment for a term of not more than 10 years and to a minimum punishment of imprisonment for a term of one year; or

(b) is guilty of an offence punishable on summary conviction and is liable to imprisonment for a term of not more than two years less a day and to a minimum punishment of imprisonment for a term of six months.

Section 161 of the *Code*, the provision that permits the court to make an order prohibiting an offender from attending near certain public places and other facilities where persons under 16 years of age may be present and from obtaining employment that may involve the offender being in a position of trust or authority over persons under 16 years of age, is amended. The amendment to the section permits the sentencing court to make an order prohibiting the offender from having any unsupervised contact with a person under the age of 16 years or from having unsupervised use of the Internet or other digital network.

Several new offences are added to the list of offences that may attract a section 161 order. The list of offences for which a section 161 order may be made include:

- a. facilitating the commission of abduction of a person under 14 (section 281);
- b. facilitating the commission of sexual interference (section 151);
- c. invitation to sexual touching (section 152);
- d. bestiality in the presence of a person under 16 years of age (subsection 160 (3));
- e. exposure to a person under 16 years of age (subsection 173(2));
- f. sexual assault (section 271);
- g. sexual assault with a weapon (section 272);
- h. aggravated sexual assault (section 273);
- i. abduction of a person under 16 years of age (section 280);

- j. facilitating the commission of sexual exploitation with a young person (subsection 153 (1));
- k. incest (section 155);
- l. child pornography (section 163.1)
- m. parent or guardian procuring sexual activity (section 170);
- n. householder permitting sexual activity (section 171); or
- o. any of the procuring offences referred to in subsections 212 (1); (2); (2.1); or (4).

Former Section 161:

161.(1) When an offender is convicted, or is discharged on the conditions prescribed in a probation order under section 730, of an offence referred to in subsection (1.1) in respect of a person who is under the age of 16 years, the court that sentences the offender or directs that the accused be discharged, as the case may be, in addition to any other punishment that may be imposed for that offence or any other condition prescribed in the order of discharge, shall consider making and may make, subject to the conditions or exemptions that the court directs, an order prohibiting the offender from

(a) attending a public park or public swimming area where persons under the age of 16 years are present or can reasonably be expected to be present, or a daycare centre, school ground, playground or community centre;

(b) seeking, obtaining or continuing any employment, whether or not the employment is remunerated, or becoming or being a volunteer in a capacity, that involves being in a position of trust or authority towards persons under the age of 16 years; or

(c) using a computer system within the meaning of subsection 342.1(2) for the purpose of communicating with a person under the age of 16 years.

Subsection (1) is amended by striking out “or” at the end of paragraph (b) and by replacing paragraph (c) with the following:

(c) having any contact — including communicating by any means — with a person who is under the age of 16 years, unless the offender does so under the supervision of a person whom the court considers appropriate; or

(d) using the Internet or other digital network, unless the offender does so in accordance with conditions set by the court.

Making Child Pornography

Former Section 163.1:

163.1(2) Every person who makes, prints, publishes or possesses for the purpose of publication any child pornography is guilty of

(a) an indictable offence and liable to imprisonment for a term not exceeding ten years and to a minimum punishment of imprisonment for a term of one year; or

(b) an offence punishable on summary conviction and liable to imprisonment for a term not exceeding eighteen months and to a minimum punishment of imprisonment for a term of ninety days.

Paragraph (2) (b) is replaced by the following:

(b) an offence punishable on summary conviction and is liable to imprisonment for a term not exceeding two years less a day and to a minimum punishment of imprisonment for a term of six months.

Distribution transmitting selling etc. of Child Pornography

Former Subsection 163.1 (3):

163.1(3) Every person who transmits, makes available, distributes, sells, advertises, imports, exports or possesses for the purpose of transmission, making available, distribution, sale, advertising or exportation any child pornography is guilty of

(a) an indictable offence and liable to imprisonment for a term not exceeding ten years and to a minimum punishment of imprisonment for a term of one year; or

(b) an offence punishable on summary conviction and liable to imprisonment for a term not exceeding eighteen months and to a minimum punishment of imprisonment for a term of ninety days.

Paragraph (3) (b) is replaced by the following:

163.1(b) an offence punishable on summary conviction and is liable to imprisonment for a term not exceeding two years less a day and to a minimum punishment of imprisonment for a term of six months.

Possession of Child Pornography

Former subsection 163.1 (4):

163.1(4) Every person who possesses any child pornography is guilty of

(a) an indictable offence and liable to imprisonment for a term not exceeding five years and to a minimum punishment of imprisonment for a term of forty-five days; or

(b) an offence punishable on summary conviction and liable to imprisonment for a term not exceeding eighteen months and to a minimum punishment of imprisonment for a term of fourteen days.

Paragraphs (4) (a) and (b) are replaced by the following

(a) an indictable offence and is liable to imprisonment for a term of not more than five years and to a minimum punishment of imprisonment for a term of six months; or

(b) an offence punishable on summary conviction and is liable to imprisonment for a term of not more than 18 months and to a minimum punishment of imprisonment for a term of 90 days.

Accessing Child Pornography

Former Section Subsection 163.1 (4):

163.1(4) Every person who possesses any child pornography is guilty of

(a) an indictable offence and liable to imprisonment for a term not exceeding five years and to a minimum punishment of imprisonment for a term of forty-five days; or

(b) an offence punishable on summary conviction and liable to imprisonment for a term not exceeding eighteen months and to a minimum punishment of imprisonment for a term of fourteen days.

Subsections (4) (a) and (b) are replaced by the following:

(a) an indictable offence and is liable to imprisonment for a term of not more than five years and to a minimum punishment of imprisonment for a term of six months; or

(b) an offence punishable on summary conviction and is liable to imprisonment for a term of not more than 18 months and to a minimum punishment of imprisonment for a term of 90 days.

The decision of the Court of Appeal for Ontario delivered on Monday March 26, 2012 in Canada (*Atty. Gen.*) *v. Bedford*² ruling aspects of “procuring” related to “common bawdy-houses” unconstitutional, may have impact upon that term as used in section 212 and presently defined in section 197 of the *Code*. The appeal court suspended the immediate implementation of striking down the bawdy-house law for a year to allow the government an opportunity to amend the *Criminal Code*.

Parent or Guardian Procuring Sexual Activity

Former Section 170:

170. Every parent or guardian of a person under the age of eighteen years who procures the person for the purpose of engaging in any sexual activity prohibited by this Act with a person other

² *Canada (Attorney General) v. Bedford*, 2012 ONCA 186

than the parent or guardian is guilty of an indictable offence and liable

(a) to imprisonment for a term not exceeding five years and to a minimum punishment of imprisonment for a term of six months if the person procured is under the age of 16 years; or

(b) to imprisonment for a term not exceeding two years and to a minimum punishment of imprisonment for a term of forty-five days if the person procured is 16 years of age or more but under the age of 18 years.

Subsections (a) and (b) are replaced by the following:

a) to imprisonment for a term of not more than ten years and to a minimum punishment of imprisonment for a term of one year if the person procured is under the age of 16 years; or

(b) to imprisonment for a term of not more than five years and to a minimum punishment of imprisonment for a term of 6 months if the person procured is 16 years of age or more but under the age of 18 years.

Householder Permitting Sexual Activity

Former Section 171:

171. Every owner, occupier or manager of premises, or any other person who has control of premises or assists in the management or control of premises, who knowingly permits a person under the age of eighteen years to resort to or to be in or on the premises for the purpose of engaging in any sexual activity prohibited by this Act is guilty of an indictable offence and liable

(a) to imprisonment for a term not exceeding five years and to a minimum punishment of imprisonment for a term of six months if the person in question is under the age of 16 years; or

(b) to imprisonment for a term not exceeding two years and to a minimum punishment of imprisonment for a term of forty-five days if the person is 16 years of age or more but under the age of eighteen years.

Paragraph (b) is replaced by the following:

(b) to imprisonment for a term not exceeding two years and to a minimum punishment of imprisonment for a term of 90 days if the person is 16 years of age or more but under the age of 18 years.

Luring a Child

Former Section 172.1:

172.1 (1) Every person commits an offence who, by means of a computer system within the meaning of subsection 342.1(2), communicates with

(a) a person who is, or who the accused believes is, under the age of eighteen years, for the purpose of facilitating the commission of an offence under subsection 153(1), section 155 or 163.1, subsection 212(1) or (4) or section 271, 272 or 273 with respect to that person;

(b) a person who is, or who the accused believes is, under the age of 16 years, for the purpose of facilitating the commission of an offence under section 151 or 152, subsection 160(3) or 173(2) or section 280 with respect to that person; or

(c) a person who is, or who the accused believes is, under the age of 14 years, for the purpose of facilitating the commission of an offence under section 281 with respect to that person.

Paragraphs (a) and (b) are amended as follows:

172.1 (1) Every person commits an offence who, by a means of telecommunication, communicates with

(a) a person who is, or who the accused believes is, under the age of 18 years, for the purpose of facilitating the commission of an offence under subsection 153(1), section 155, 163.1, 170 or 171 or subsection 212(1), (2), (2.1) or (4) with respect to that person;

(b) a person who is, or who the accused believes is, under the age of 16 years, for the purpose of facilitating the commission of an offence under section 151 or 152, subsection 160(3) or 173(2) or section 271, 272, 273 or 280 with respect to that person;

And Section 172.1 (2) is replaced with:

(2) Every person who commits an offence under subsection (1)

(a) is guilty of an indictable offence and is liable to imprisonment for a term of not more than 10 years and to a minimum punishment of imprisonment for a term of one year; or

(b) is guilty of an offence punishable on summary conviction and is liable to imprisonment for a term of not more than 18 months and to a minimum punishment of imprisonment for a term of 90 days.

Section 173 is replaced with:

172.2 (1) Every person commits an offence who, by a means of telecommunication, agrees with a person, or makes an arrangement with a person, to commit an offence

(a) under subsection 153(1), section 155, 163.1, 170 or 171 or subsection 212(1), (2), (2.1) or (4) with respect to another person who is, or who the accused believes is, under the age of 18 years;

(b) under section 151 or 152, subsection 160(3) or 173(2) or section 271, 272, 273 or 280 with respect to another person who is, or who the accused believes is, under the age of 16 years; or

(c) under section 281 with respect to another person who is, or who the accused believes is, under the age of 14 years.

Punishment

(2) Every person who commits an offence under subsection (1)

(a) is guilty of an indictable offence and is liable to imprisonment for a term of not more than 10 years and to a minimum punishment of imprisonment for a term of one year; or

(b) is guilty of an offence punishable on summary conviction and is liable to imprisonment for a term of not more than 18 months and to a minimum punishment of imprisonment for a term of 90 days.

(3) Evidence that the person referred to in paragraph (1)(a), (b) or (c) was represented to the accused as being under the age of 18, 16 or 14 years, as the case may be, is, in the absence of evidence to the contrary, proof that the accused believed that the person was under that age.

(4) It is not a defence to a charge under paragraph (1)(a), (b) or (c) that the accused believed that the person referred to in that paragraph was at least 18, 16 or 14 years of age, as the case may be, unless the accused took reasonable steps to ascertain the age of the person.

(5) It is not a defence to a charge under paragraph (1)(a), (b) or (c) that the person with whom the accused agreed or made an arrangement was a peace officer or a person acting under the direction of a peace officer; or

(a) that the person with whom the accused agreed or made an arrangement was a peace officer or a person acting under the direction of a peace officer; or

(b) that, if the person with whom the accused agreed or made an arrangement was a peace officer or a person acting under the direction of a peace officer, the person referred to in paragraph (1)(a), (b) or (c) did not exist.

Sexual Assault

Former Section 271:

271. (1) Every one who commits a sexual assault is guilty of

(a) an indictable offence and is liable to imprisonment for a term not exceeding ten years; or

(b) an offence punishable on summary conviction and liable to imprisonment for a term not exceeding eighteen months.

Section 271 is replaced by:

271. Everyone who commits a sexual assault is guilty of

(a) an indictable offence and is liable to imprisonment for a term not exceeding 10 years and, if the complainant is under the age of 16 years, to a minimum punishment of imprisonment for a term of one year; or

(b) an offence punishable on summary conviction and is liable to imprisonment for a term not exceeding 18 months and, if the complainant is under the age of 16 years, to a minimum punishment of imprisonment for a term of 90 days.

Sexual assault with a Weapon Threats etc.

Former Subsection 272 (2):

272(2) Every person who commits an offence under subsection (1) is guilty of an indictable offence and liable

(a) if a restricted firearm or prohibited firearm is used in the commission of the offence or if any firearm is used in the commission of the offence and the offence is committed for the benefit of, at the direction of, or in association with, a criminal organization, to imprisonment for a term not exceeding 14 years and to a minimum punishment of imprisonment for a term of

(i) in the case of a first offence, five years, and

(ii) in the case of a second or subsequent offence, seven years;

(a.1) in any other case where a firearm is used in the commission of the offence, to imprisonment for a term not exceeding 14 years and to a minimum punishment of imprisonment for a term of four years; and

(b) in any other case, to imprisonment for a term not exceeding fourteen years.

Subsection (2) is amended by striking out “and” at the end of (a.1) and adding:

(a.2) if the complainant is under the age of 16 years, to imprisonment for life and to a minimum punishment of imprisonment for a term of five years;

The amendments also add to the list of sexual offences that may be addressed by a section 810.1 order. Section 810.1 orders are made whenever anyone is able to convince the court that the defendant should be ordered to enter into a recognizance that she not engage in activity that involves contact with persons under 16 years of age and/or prohibiting her from attending certain places where persons under 16 years of age are likely to be present. The basis of such an order requires establishing fear based on reasonable grounds that the defendant will commit one of the specified sexual offences in respect of children under 16 years of age. Now added to that list is providing sexually explicit material pursuant to section 171.1 and using any means of telecommunications to make arrangements with another person for the purpose of committing sexual offences against that person pursuant to 172.2 of the *Code*.

New mandatory minimum sentences are provided for several sexual offences. These include:

- a. 5 years for incest against a person less than 16 years of age if by indictment (155);
- b. 6 months on summary conviction and 1-year on indictment for bestiality in the presence of a person less than 16 years of age (160);
- c. 3 months on summary conviction and one year on indictment for Internet luring (172.1);
- d. 1 month on summary conviction and 3 months on indictment for an indecent act in the

- presence of a person less than 16 years of age (173);
- e. 3 months on summary conviction and 1 year on indictment for sexual assault against a person less than 16 years of age (271);
- f. 5 years on indictment for sexual assault with a weapon against a person under 16 years of age (272);
- g. 5 years on indictment for aggravated sexual assault against a person less than 16 years of age (273).

Old mandatory minimum sentences in some instances have been increased. These include:

- a. 14 days increased to 90 days on summary conviction, and, 45 days increased to 1 year on indictment for sexual interference (151);
- b. 14 days increased to 90 days on summary conviction, and, 45 days increased to 1 year on indictment for invitation to sexual touching (152);
- c. 14 days increased to 90 days on summary conviction, and, 45 days increase to 1 year on indictment for sexual exploitation (153);
- d. 90 days increased to 180 days on summary conviction for publishing child pornography (163.1 (2));
- e. 90 days increased to 180 days on summary conviction for distribution of child pornography (163.1 (3));
- f. 14 days increased to 90 days on summary conviction, and, 45 days increased to 180 days on indictment for possession of child pornography (163.1 (4)) and,
- g. 14 days increased to 90 days on summary conviction, and, 45 days increased to 180 days on indictment for accessing child photography (163.1 (4.1)).

B. Other Code Amendments

(i) Conditional Sentences

Section 742.1 previously authorized the court to make an order for a conditional sentence if a person was convicted of an offence “other than the serious personal injury offence as defined in section 752, a terrorism offence or a criminal organization offence prosecuted by way of indictment for which the maximum term of imprisonment is 10 years or more or an offence punishable by a minimum term of imprisonment”. Section 742.1 is amended to eliminate the reference to “serious personal injury”. The section is also amended to restrict the availability of conditional sentences for all offences for which the maximum term of imprisonment is 14 years or life and for specified offences, prosecuted on indictment for which the maximum term of imprisonment is 10 years. Generally then, the amendments seek to remove the possibility of conditional sentences for crimes viewed as serious crimes of violence, sexual assault and related offences. These crimes of violence include driving offences involving death or serious bodily harm and offences committed in the context of a breach of trust.

The amendments not only eliminate the reference to serious personal injury offences, but they place greater emphasis upon the maximum term of imprisonment that is available for any particular offence. As a result of these amendments conditional sentences will not be permissible for the following offences if prosecuted by way of indictment:

- a. Criminal harassment (264)
- b. Sexual assault (271)
- c. Trafficking in persons (279.02)
- d. Prison breach (144)

- e. Kidnapping (279)
- f. Theft of a motor vehicle (333.1)
- g. Theft over \$5000 (334 (a))
- h. Breaking and entering (348)
- i. Unlawfully in a dwelling house (349)
- j. Arson for fraudulent purpose (435)

Offences that carry minimum mandatory sentences are also ineligible for a conditional sentence.

Former Section 742.1:

742.1 If a person is convicted of an offence, other than a serious personal injury offence as defined in section 752, a terrorism offence or a criminal organization offence prosecuted by way of indictment for which the maximum term of imprisonment is ten years or more or an offence punishable by a minimum term of imprisonment, and the court imposes a sentence of imprisonment of less than two years and is satisfied that the service of the sentence in the community would not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing set out in sections 718 to 718.2, the court may, for the purpose of supervising the offender's behaviour in the community, order that the offender serve the sentence in the community, subject to the offender's compliance with the conditions imposed under section 742.3.

Section 742.1 is replaced by:

742.1 If a person is convicted of an offence and the court imposes a sentence of imprisonment of less than two years, the court may, for the purpose of supervising the offender's behaviour in the community, order that the offender serve the sentence in the community, subject to the conditions imposed under section 742.3, if

- (a) the court is satisfied that the service of the sentence in the community would not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing set out in sections 718 to 718.2;
- (b) the offence is not an offence punishable by a minimum term of imprisonment;
- (c) the offence is not an offence, prosecuted by way of indictment, for which the maximum term of imprisonment is 14 years or life;
- (d) the offence is not a terrorism offence, or a criminal organization offence, prosecuted by way of indictment, for which the maximum term of imprisonment is 10 years or more;
- (e) the offence is not an offence, prosecuted by way of indictment, for which the maximum term of imprisonment is 10 years, that
 - (i) resulted in bodily harm,
 - (ii) involved the import, export, trafficking or production of drugs, or
 - (iii) involved the use of a weapon; and
- (f) the offence is not an offence, prosecuted by way of indictment, under any of the following provisions:
 - (i) section 144 (prison breach),

- (ii) section 264 (criminal harassment),
- (iii) section 271 (sexual assault),
- (iv) section 279 (kidnapping),
- (v) section 279.02 (trafficking in persons — material benefit),
- (vi) section 281 (abduction of person under fourteen),
- (vii) section 333.1 (motor vehicle theft),
- (viii) paragraph 334(a) (theft over \$5000),
- (ix) paragraph 348(1)(e) (breaking and entering a place other than a dwelling-house),
- (x) section 349 (being unlawfully in a dwelling-house), and
- (xi) section 435 (arson for fraudulent purpose).

(ii) Firearms

Amendments to the *Code* increasing the minimum terms of imprisonment that must be imposed for certain firearm offences were introduced prior to the proclamation Bill C-10 in March. The increases are most significant where the offence has been committed with a restricted or a prohibited firearm, in connection with a criminal organization, or, by an individual with a previous conviction for a firearm-related offence. The amendments also create two new offences, one for breaking and entering to steal a firearm (section 98) and robbery to steal a firearm (section 98.1). In the case of a break and enter to steal a firearm the person must commit the offence with the intent to steal a firearm, whether or not she actually does obtain a firearm as a result of the break and enter.

Robbery to steal a firearm includes a person who commits robbery with intent to steal a firearm, or,

in the course of a robbery the person does in fact steal a firearm, even if the original intent was not to obtain a firearm. As a result of these two new offences subsection 662 (6) of the *Code* is also amended to provide that a person charged with stealing a firearm during a break and enter, and in circumstances where the actual stealing of the firearm cannot be established, that person may still be convicted of break and enter with intent to steal. Section 183 of the *Code* is amended to also authorize wiretaps in the case of these new offences.

The increased mandatory minimum jail sentences for firearms convictions are as follows:

- a. Increased from 1 year, if on indictment, to 3 years for a 1st offence and 5 years for a 2nd or subsequent offence, unauthorized possession of a prohibited or restricted firearm that is loaded or near readily accessible ammunition (95).
- b. Increased from 1 year to 3 years for a 1st offence and 5 years for a 2nd or subsequent offence for trafficking in or possession for the purpose of trafficking in a firearm, prohibited weapon, restricted weapon, prohibited device, any ammunition or prohibited ammunition (sections 99 and 100)
- c. Increased from 1 year to 3 years for a 1st offence and 5 years for a 2nd or subsequent offence for importing or exporting a firearm, prohibited weapon, restricted weapon, prohibited device, prohibited ammunition or component or part for an automatic firearm knowing that it is unauthorized (103)
- d. Increased from 4 years (which minimum includes the punishment for the underlying offence) to 5 years for a 1st offence and 7 years for a 2nd or subsequent offence for use of a firearm in the commission of attempted murder, discharging a firearm with intent, sexual assault with a weapon, aggravated assault, kidnapping, hostage-taking, robbery

and extortion where a restricted or prohibited firearm is used or any firearm is used in connection with a criminal organization.

C. Other Legislative Changes

Corrections and Conditional Release (“the CCRA”)

The amendments to the *CCRA* are designed firstly to coincide with the amendments to the *Code* and secondly to tighten the rules governing the conditional release of federal prisoners. On March 23, 2011 accelerated parole reviews were abolished. Apart from some relatively minor linguistic modifications to the legislation, there are 2 significant categories of changes to the legislation since the amendments of 2011. They are:

As To Release and Privileges

- Added requirements that federal prisoners actively participate in a correctional plans to allow for proper evaluation of their progress or lack of progress in determining their conditional release, or, for any other privileges that might be available in a federal institution;
- Expanded categories of offenders ineligible for statutory release upon serving two thirds of their sentence, including those convicted of child pornography, luring, breaking and entering to steal a firearm, or aggravated assault of a police officer;
- Increased waiting period from 6 months to 12 months following a refusal by the Parole Board to release a prisoner for day parole or for full parole prior to permitting a further or subsequent application for parole.

Expanded Public Protection

- Expanded powers of search of prisoners and/or visitors attending or leaving penitentiary facilities;
- Expanded use of monitoring devices as a condition of release;
- Authorization of arrest without arrest warrant for breach of a condition of release;
- Expanding the definition of “victim” to include anyone who has custody of, or, is responsible for a dependant of the main victim if the main victim is dead, ill or otherwise incapacitated;
- Permitting “victims” the right to be present, provide a statement, or otherwise participate, in parole hearings.

The *CCRA* amendments provide for more fulsome information to be disclosed to victims by the Correctional Service of Canada and the Parole Board. This includes information on the reasons for a prisoner’s transfer whenever possible and advance notice of transfers to minimum-security institutions. The amendments also permit disclosing information on offender program participation and any convictions for serious disciplinary offences while incarcerated. Information may be provided as to the reasons for permitting a prisoner temporary absence from a correctional facility. Victims may be provided with information on a prisoner’s waiver of a parole hearing. And, the Parole Board may proceed with a review and decision even if a prisoner seeks to withdraw from participating in the hearing 14 days or less prior to the scheduled date. This amendment seeks to avoid the likelihood of victims traveling great distances to attend a parole hearing that is canceled just prior to the scheduled date.

Controlled Drug and Substances Act (“the CDSA”)

The amendments to this Act provide mandatory minimum penalties in relation to “serious drug offences” defined as production, trafficking, possession for the purpose of trafficking, importing and exporting and possession for the purpose of exporting drugs listed in Schedule I (such as heroin, cocaine and methamphetamines), and, in Schedule II (such as marijuana and now including the “date-rape drugs” such as GHB and flunitrazepam, and amphetamines that have been moved from Schedule III to Schedule I to increase the potential penalties for offences involving these drugs). In addition to mandatory minimum penalties, the maximum sentence for production of Schedule II drugs such as marijuana is increased from 7 to 14 years.

Aggravating Factors

Mandatory minimum penalties generally apply where there is an aggravating factor. The potential aggravating factors usually relate to health, safety or security. Aggravating factors relate to drug crimes that are committed for the benefit of organized crime, committed while using or threatening the use of violence and involving the use of or threat to use weapons. An additional aggravating factor is the commission of a drug offence by a person who has been previously convicted in the past 10 years of a serious drug offence.

Aggravating factors also include drug offences committed in a prison, drug offences committed by abusing a position of authority or access to a restricted area, drug offences in or near a school, or in or near an area normally frequented by young persons, or, in the presence of a young person. It is also considered aggravating if the offence is committed in circumstances involving a young person in the commission of the offence or in relation to the young person, as for example, selling drugs to

a young person.

Aggravating Factors List A

The aggravating factors include offences committed:

- for the benefit of organized crime;
- involving use or threat of violence;
- involving use or threat of use of weapons;
- by someone who was previously convicted of a designated drug offence or has served a term of imprisonment for a designated substance offence in the previous 10 years; and
- through the abuse of authority or position or by abusing access to restricted area to commit the offence of importation/exportation and possession to export.

Aggravating Factors List B

The aggravating factors include offences committed:

- in a prison;
- in or near a school, in or near an area normally frequented by youth or in the presence of youth;
- in concert with a youth; and
- in relation to a youth (e.g. selling to a youth).

Aggravating Health and Safety Factors are:

- the offender used real property that belongs to a 3rd party to commit the offence;
- the production constituted a potential security, health or safety hazard to persons under the

age of 18 years who were in the location where the offence was committed or in the immediate area;

- the production constituted a potential public safety hazard in a residential area; or
- the accused placed or set a trap that is likely to cause death or bodily harm to another person in the location where the offence was committed.

Mandatory Minimum Penalties for Serious Drug Offences Schedule I (cocaine, heroin and methamphetamines, etc.)

- a. Production: 2 years increased to 3 years if Health and Safety Factors present;
- b. Importing and Exporting: 1 year, increased to 2 years if more than 1 kg;
- c. Possession for the Purpose of Exporting: 1 year, increased to 2 years if more than 1 kg.

Mandatory Minimum Penalties for Serious Drug Offences Schedule II (cannabis marijuana or cannabis resin)

- a. Trafficking: 1 year with Aggravating Factor List A; 2 years with Aggravating Factor List B provided the offence involves more than 3 kg of cannabis marijuana or cannabis resin;
- b. PFPT: 1 year with Aggravating Factor List A; 2 years with Aggravating Factor List B provided the offence involves more than 3 kg;
- c. Importing/Exporting: Mandatory 1 year where offence is committed for the purpose of trafficking;
- d. PFP Exporting: Mandatory 1 year;
- e. Production: 6-200 plants: Mandatory 6 months provided offences committed for the purpose of trafficking. Maximum sentence is increased to 14 years imprisonment;

- f. Production: 201-500 plants: Mandatory 1 year provided offences committed for the purpose of trafficking. Maximum sentence is increased to 14 years in prison;
- g. Production: > 500 plants: Mandatory 2 years; maximum sentence is increased to 14 years in prison;
- h. Production: of Oil or Resin: Mandatory 1 year provided the offence is committed for the purpose of trafficking.

Trafficking

Former Section 5

5. (1) No person shall traffic in a substance included in Schedule I, II, III or IV or in any substance represented or held out by that person to be such a substance.

(2) No person shall, for the purpose of trafficking, possess a substance included in Schedule I, II, III or IV.

(3) Every person who contravenes subsection (1) or (2)

(a) subject to subsection (4), where the subject-matter of the offence is a substance included in Schedule I or II, is guilty of an indictable offence and liable to imprisonment for life;

5. (3) (a) is replaced by the following:

(a) subject to paragraph (a.1), if the subject matter of the offence is a substance included in Schedule I or II, is guilty of an indictable offence and liable to imprisonment for life, and

- (i) to a minimum punishment of imprisonment for a term of one year if
 - (a) the person committed the offence for the benefit of, at the direction of or in association with a criminal organization, as defined in subsection 467.1(1) of the *Criminal Code*,
 - (b) the person used or threatened to use violence in committing the offence,
 - (c) the person carried, used or threatened to use a weapon in committing the offence, or
 - (d) the person was convicted of a designated substance offence, or had served a term of imprisonment for a designated substance offence, within the previous 10 years, or

- (ii) to a minimum punishment of imprisonment for a term of two years if
 - (a) the person committed the offence in or near a school, on or near school grounds or in or near any other public place usually frequented by persons under the age of 18 years,
 - (b) the person committed the offence in a prison, as defined in section 2 of the *Criminal Code*, or on its grounds, or
 - (c) the person used the services of a person under the age of 18 years, or involved such a person, in committing the offence;

- (a.1) if the subject matter of the offence is a substance included in Schedule II in an amount that is not more than the amount set out for that substance in Schedule VII, is guilty of an indictable offence and liable to imprisonment for a term of not more than five years less a day;

Punishment

Former Section 5

5(4) Every person who contravenes subsection (1) or (2), where the subject-matter of the offence is a substance included in Schedule II in an amount that does not exceed the amount set out for that substance in Schedule VII, is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years less a day.

Interpretation

(5) For the purposes of applying subsection (3) or (4) in respect of an offence under subsection (1), a reference to a substance included in Schedule I, II, III or IV includes a reference to any substance represented or held out to be a substance included in that Schedule.

Interpretation

(6) For the purposes of subsection (4) and Schedule VII, the amount of the substance means the entire amount of any mixture or substance, or the whole of any plant, that contains a detectable amount of the substance.

Subsections (4) to (6) are replaced by the following:

(5) For the purposes of applying subsection (3) in respect of an offence under subsection (1), a reference to a substance included in Schedule I, II, III or IV includes a reference to any substance represented or held out to be a substance included in that Schedule.

(6) For the purposes of paragraph (3)(a.1) and Schedule VII, the amount of the substance means the entire amount of any mixture or substance, or the whole of any plant, that contains a detectable amount of the substance.

Importing and exporting

Former Section 6

6. (1) Except as authorized under the regulations, no person shall import into Canada or export from Canada a substance included in Schedule I, II, III, IV, V or VI.

Possession for the purpose of exporting

(2) Except as authorized under the regulations, no person shall possess a substance included in Schedule I, II, III, IV, V or VI for the purpose of exporting it from Canada.

Punishment

(3) Every person who contravenes subsection (1) or (2)

(a) where the subject-matter of the offence is a substance included in Schedule I or II, is guilty of an indictable offence and liable to imprisonment for life;

Paragraph 6 (3) (a) is replaced by the following:

(a) if the subject matter of the offence is a substance included in Schedule I in an amount that is not more than one kilogram, or in Schedule II, is guilty of an indictable offence and liable to imprisonment for life, and to a minimum punishment of imprisonment for a term of one year if

- (i) the offence is committed for the purposes of trafficking,
- (ii) the person, while committing the offence, abused a position of trust or authority, or
- (iii) the person had access to an area that is restricted to authorized persons and used that access to commit the offence;

(a.1) if the subject matter of the offence is a substance included in Schedule I in an amount that is more than one kilogram, is guilty of an indictable offence and liable to imprisonment for life and to a minimum punishment of imprisonment for a term of two years;

Production

Former Section 7

7. (1) Except as authorized under the regulations, no person shall produce a substance included in Schedule I, II, III or IV.

Punishment

(2) Every person who contravenes subsection (1)

(a) where the subject-matter of the offence is a substance included in Schedule I or II, other than cannabis (marihuana), is guilty of an indictable offence and liable to imprisonment for life;

(b) where the subject-matter of the offence is cannabis (marihuana), is guilty of an indictable offence and liable to imprisonment for a term not exceeding seven years;

Subsections (2) (a) and (b) are replaced by the following:

(a) if the subject matter of the offence is a substance included in Schedule I, is guilty of an indictable offence and liable to imprisonment for life and to a minimum punishment of imprisonment for a term of three years if any of the factors set out in subsection (3) apply and for a term of two years in any other case;

(a.1) if the subject matter of the offence is a substance included in Schedule II, other than cannabis (marijuana), is guilty of an indictable offence and liable to imprisonment for life, and to a minimum punishment of imprisonment

(i) for a term of one year if the production is for the purpose of trafficking, or

(ii) for a term of 18 months if the production is for the purpose of trafficking and any of the factors set out in subsection (3) apply;

(b) if the subject matter of the offence is cannabis (marijuana), is guilty of an indictable offence and liable to imprisonment for a term of not more than 14 years, and to a minimum punishment of

(i) imprisonment for a term of six months if the number of plants produced is less than 201 and more than five, and the production is for the purpose of trafficking,

(ii) imprisonment for a term of nine months if the number of plants produced is less than 201 and more than five, the production is for the purpose of trafficking and any of the factors set out in subsection (3) apply,

(iii) imprisonment for a term of one year if the number of plants produced is more than 200 and less than 501,

(iv) imprisonment for a term of 18 months if the number of plants produced is more than 200 and less than 501 and any of the factors set out in subsection (3) apply,

(v) imprisonment for a term of two years if the number of plants produced is more than 500,
or

(vi) imprisonment for a term of three years if the number of plants produced is more than 500 and any of the factors set out in subsection (3) apply;

Subsection (2) is amended by adding the following at the end of the subsection:

(3) The following factors must be taken into account in applying paragraphs (2)(a) to (b):

(a) the person used real property that belongs to a third party in committing the offence;

(b) the production constituted a potential security, health or safety hazard to persons under the age of 18 years who were in the location where the offence was committed or in the immediate area;

(c) the production constituted a potential public safety hazard in a residential area; or

(d) the person set or placed a trap, device or other thing that is likely to cause death or bodily harm to another person in the location where the offence was committed or in the immediate area, or permitted such a trap, device or other thing to remain or be placed in that location or area.

Purpose of Sentencing

Former Subsection 10(2) provided:

(2) If a person is convicted of a designated substance offence, the court imposing sentence on the person shall consider any relevant aggravating factors including that the person...

That subsection is replaced by the following:

(2) If a person is convicted of a designated substance offence for which the court is not required to impose a minimum punishment, the court imposing sentence on the person shall consider any relevant aggravating factors including that the person

a) In relation to the commission of the offence,

(i) carried, used or threatened to use a weapon,

(ii) used or threatened to use violence,

(iii) trafficking the substance included in the Schedule I,II,III, or IV or possess such as substance for the purpose of trafficking, in or near a school, on or near school grounds or in or near any other public place usually frequented by persons under the age of 18 years, or

(iv) traffic in a substance included in Schedule I,II,III, or IV, or possess such a substance for the purpose of trafficking to a person under the age of 18 years;

(b) was previously convicted of a designated substance offence; or

(c) used the services of a person under the age of 18 years to commit, or involve such a person in the commission of a designated substance offence.

Section 10 is amended by adding the following after subsection (3):

(4) A court sentencing a person who is convicted of an offence under this Part may delay sentencing to enable the offender

(a) to participate in a drug treatment court program approved by the Attorney General; or

(b) to attend a treatment program under subsection 720(2) of the *Criminal Code*.

(5) If the offender successfully completes a program under subsection (4), the court is not required to impose the minimum punishment for the offence for which the person was convicted.

Drug Treatment Programs

Subsection 720 (2) of the *Code* allows a sentencing court to delay sentencing with the consent of the Attorney General and the offender to permit the offender to attend a treatment program approved by the Province under the supervision of the court. This subsection gives the court authority to continue a practice that has developed at least in the Province of Ontario to provide Drug Rehabilitation/Treatment Courts. The aim of these courts is to break the cycle of drug use and criminal recidivism by treatment rather than incarceration. Most have operated in the Province of Ontario as “pilot projects” gathering information and statistics with a view to determining whether or not recidivism is reduced by treatment. While these courts continue to exist their usefulness may be limited in the face of minimum mandatory periods of incarceration.

Within 5 years the legislation provides for a comprehensive review of the provisions and

operations of the Act, including a cost-benefit analysis of the mandatory minimum sentences by a committee of the Senate, House of Commons or both. The committee will be required to submit a report to Parliament including a statement of any changes that the committee recommends within one year after the review was undertaken.

Pardons

The change in wording from “pardon” to “record suspension” reflects the government's view that this process is not about “forgiveness”. In the legislative debates that led to this amendment it was clear that the government felt that it was inappropriate that the state play a role in forgiveness of crime. Instead, the government adopts the role as “assisting in the rehabilitation of convicted individuals”.

The *Criminal Records Act* (“the *CRA*”) dealt only with the Parole Board’s jurisdiction to grant or refuse or to revoke a pardon. The amendments provide that the board will also have discretion to order, refuse to order, or revoke a record of suspension to reflect the government's position that the grant of a record suspension is not automatic. The not very subtle suggestion is that the Board has been given even greater powers to refuse to order a record suspension. The increased waiting periods for the ability to apply for a record suspension also reflect this approach. The longer waiting periods of 10 years in the case of a serious personal injury offence within the meaning of section 752 of the Code, including manslaughter if the accused was sentenced to imprisonment of 2 years or greater, or, 5 years in the case of other offences prosecuted by indictment, and, 3 years in the case of summary conviction offences signals not only that record suspensions will not be automatic, but also, that they may be significantly more difficult to obtain.

Indeed, in some instances record suspensions may be impossible to obtain because the amendments make certain persons ineligible to apply for record suspension. These include persons convicted of sexual offences in relation to minors or more than 3 offences provided each was prosecuted by indictment and the person was sentenced to imprisonment for 2 years or more. The amendments do, however, provide for an exception to the ineligibility to apply for record suspension. Even persons convicted of an offence referred to in Schedule 1 of the *Act* may prove eligible to apply if the applicant establishes:

- she was not in a position of trust or authority towards the victim of the offence, and, the victim was not in a relationship of dependency with her;
- she did not use, threaten to use or attempt to use violence, intimidation or coercion in relation to the victim; and
- she was less than 5 years older than the victim.

The *CRA* now permits the Board to make inquiries to ascertain whether the applicant is eligible to make the application. Only after the Board determines that the applicant is eligible will the Board then inquire into the applicant's conduct since the date of the conviction. The Board is also required now to submit to the Minister of Public Safety and Emergency Preparedness a report within 3 months of the end of each fiscal year advising us to the number of applications for record suspensions made, the number refused and granted and “any other information required by the Minister.

Possible Challenges

Justice Anne Molloy of the Ontario Superior Court appeared to express what might be described as a rising tide of judicial anger over mandatory minimum sentences by striking down a minimum mandatory sentence as “cruel and unusual punishment”.³ The judge concluded that a 30-year-old Toronto man with no previous record had merely been “showing off” by striking a cool pose to present over the Internet when police happened to burst into an apartment searching for another man. But this view of minimum mandatory sentences is not universally held. In another case of recent vintage⁴ the judge refused to strike down a minimum mandatory sentence on the basis of cruel and unusual punishment. These two cases may prove interesting fodder for the inevitable climb to the Supreme Court of Canada seeking a determination of whether or not some or all of the minimum mandatory sentences imposed in this new regime of crime legislation will pass constitutional scrutiny.

The revamped “*Get Tough on Crime*” legislation has significantly added to minimum mandatory sentences involving firearms, drugs and sexual offences. This part of the government’s agenda includes everything from mandatory prison sentences to restricting bail, parole and pardons.

Conclusion

The Federal government apparently attracted the Canadian public with its tough on crime approach. How else can one explain the overwhelming majority that ensured the enactment of these provisions? The final cost of this omnibus crime law is yet to be tallied. Small ‘c’ conservative estimates of the cost of implementation range in the area of 80 million over the next 5 years. Less

³ *R. v. Smickle*, 2012 ONSC 602

⁴ *R. v. Nur*, 2011 ONSC 4874

conservative estimates are multiples of that figure. In the final analysis it may be that these provisions face a tougher task of winning the hearts and minds of the premiers of the provinces who will have to pay for their implementation and the judges of our courts who will be left to interpret their constitutional validity.