



BULLETIN!
October 21, 2009

LEGISLATIVE UPDATE

GOVERNMENT OF CANADA TO INTRODUCE LEGISLATION TO TACKLE WHITE COLLAR CRIME

The Honourable Rob Nicholson, Minister of Justice and Attorney General of Canada, yesterday announced the Government will introduce legislation to provide tougher sentences for fraud, to help combat white-collar crime.

The government is committed to creating a two-year mandatory jail sentence for fraud over \$1 million and adding new aggravating factors that can be considered when handing down sentences in fraud cases. These aggravating factors would include:

- the financial and psychological impact of the fraud on the victim, given the victim's particular circumstances, including their age, health and financial situation;
- if the offender failed to comply with applicable licensing rules or professional standards; and
- the magnitude, complexity, and duration of the fraud and the degree of planning that went into it.

The proposed legislation would also require judges to consider requiring offenders to make restitution to victims in all fraud cases. It would permit the court to order the offender not to take employment or do volunteer work involving authority over other people's money. The court would also be permitted to receive a Community Impact Statement that would describe the losses suffered as a result of a fraud perpetrated against a particular community, such as a neighbourhood, a seniors' centre or a club.

BACKGROUND

Fraud can include securities-related frauds such as Ponzi schemes, insider trading, and accounting frauds that overstate the value of securities. It also includes mass marketing fraud, mortgage and real estate fraud, and many other deceptive practices. There are always two elements that characterize fraud - deception or some other form of dishonest conduct, and depriving another person of their property or putting their property at risk.

Fraud can have a devastating impact on the lives of its victims, including loss of life savings and feelings of humiliation for having been deceived into voluntarily handing over their property. The Government of Canada is proposing to amend the fraud provisions of the *Criminal Code* in

order to better respond to victims of economic crime by providing tougher sentences for those who victimize honest citizens.

Sentencing-related measures have been proposed to better ensure that sentencing for large-scale fraud reflects the serious nature of the crime. These measures are aimed directly at shaping the sentence that can be imposed on the offender. These include:

- a two-year mandatory minimum sentence for fraud over \$1 million regardless of the number of victims involved;
- additional statutory aggravating factors that can be applied to sentencing in fraud cases such as:
 - the financial and psychological impact of the fraud on the victim, given the victim's particular circumstances, including their age, health and financial situation;
 - the offender concealing or destroying records relating to the fraud or the disbursement of proceeds of the fraud;
 - the offender failing to comply with applicable licensing rules or professional standards; and,
 - the magnitude, complexity, and duration of the fraud and the degree of planning that went into it.
- requiring the court to indicate which statutory aggravating and non-mitigating factors it considered in determining the sentence, and;
- allowing the court to impose a prohibition order to prevent the offender having employment or working in a volunteer capacity that involves having authority over other people's money.

Additional proposed measures are aimed at improving the responsiveness of the justice system to the needs of victims of fraud through restitution and community impact statements. These amendments are intended to increase the use of restitution orders in fraud cases by:

- requiring judges to consider restitution from the offender in all cases of fraud involving an identified victim with ascertainable losses. Judges would also be required to provide reasons if restitution is not ordered.
- requiring the Crown to advise the court what steps have been taken to allow victims to set out their readily ascertainable and quantified losses to the court so that restitution can be considered. This would ensure that sentencing does not proceed without any consideration of restitution or without any opportunity for victims to indicate to the Crown that they wish to seek restitution.
- developing a standard form for victims to indicate that they want the Crown to seek restitution from the offender and to set out their ascertainable losses.

A final measure proposed is with respect to Community Impact Statements. Currently, the *Criminal Code* requires the court to consider a Victim Impact Statement of an individual. This is a written statement made by the victim of a crime that describes the harm done to the victim and, more generally, the effect that the crime has had on his or her life. The statement is considered by the judge who is sentencing the offender.

In some fraud cases however, where a group of people have been targeted for fraud, direct victims and even others not financially affected may still suffer other impacts. The proposed amendments will include a provision to permit the court to receive a Community Impact

Statement that would describe the losses suffered as a result of the fraud perpetrated against a particular community, such as a neighbourhood, an association or a seniors' group.

BILL C-14 – NEW LAWS TARGETING GANGS AND ORGANIZED CRIME COMES INTO FORCE on OCTOBER 2, 2009

On October 2, 2009, Bill C-14, *An Act to amend the Criminal Code (organized crime and protection of justice system participants)* came into force, providing police and justice officials with important new tools in the fight against organized crime.

The Bill, which received Royal Assent on June 23, 2009:

- Makes murders connected to organized crime automatically first-degree and therefore subject to a mandatory sentence of life imprisonment without eligibility for parole for 25 years;
- Creates a new offence addressing drive-by and other reckless shootings. This offence carries a mandatory minimum sentence of four years in prison, with a maximum of 14 years. The minimum sentence increases if the offence was committed for a criminal organization or with a prohibited or restricted firearm such as a handgun; and,
- Creates two new offences of aggravated assault against a peace or public officer and assault with a weapon on a peace or public officer. These are punishable by maximum penalties of 14 and 10 years respectively.

Background:

Bill C-14 introduces amendments to target gang violence and other serious crime. It provides law enforcement officials and the justice system with better means to address organized crime-related activities, in particular gang murders and drive-by shootings.

Organized crime presents a serious threat to Canadian communities, as it is linked to a wide range of criminal activity, including murder, drug trafficking, auto theft, the illicit movement of firearms, human beings and vehicles, and identity theft. The number of gang-related homicides has been increasing, and now accounts for 20% of all homicides in Canada.

It is estimated that 900 organized crime groups operate in Canada, in both rural and urban areas. Characteristically, organized crime resorts to violence and intimidation to achieve its criminal objectives, putting the safety and security of Canadian communities and their residents at risk.

The organized crime Bill strengthens the *Criminal Code* in the following ways:

- Specifying that murder is automatically first-degree when it is committed in connection with a criminal organization. First-degree murder is subject to a mandatory sentence of life imprisonment without eligibility for parole for 25 years.
- Creating a new broad-based offence to target drive-by and other intentional shootings involving reckless disregard for the life or safety of others. This offence would include a mandatory minimum sentence of four years in prison with a maximum period of imprisonment of 14 years. The minimum sentence would increase to five years if the offence was committed for the benefit of, at the direction of, or in association with a

criminal organization or with a restricted or prohibited firearm such as a handgun or automatic weapon.

- Creating two new offences of assault against a peace officer that causes bodily harm and aggravated assault against a peace officer. These new offences would be punishable by a maximum of 10 and 14 years imprisonment respectively.
- Clarifying that when courts impose sentences for certain offences against justice system participants, including peace officers, they must give primary consideration to the objectives of denunciation and deterrence.
- Strengthening and lengthening “gang peace bonds” (preventive court orders requiring an individual to agree to specific conditions to govern their behaviour). The peace bond could be issued for up to 24 months (as opposed to the usual 12 months) against a defendant who has been previously convicted of intimidating justice system participants, or of committing an organized crime or terrorist offence. This reform to the *Criminal Code* would make it clear that a judge has broad discretion to impose any reasonable condition necessary to protect the public in that particular case.

BILLS REFERRED TO COMMITTEES

BILL C-36 An Act to amend the Criminal Code (Serious Time for the Most Serious Crime Act)

Backgrounder: Legislation to repeal the “faint hope” clause (section 745.6) of the Criminal Code

A repeal of the faint hope clause means that offenders who commit murder on or after the day that this proposed legislation comes into force will no longer be eligible to apply for early parole.

- Those who will serve a life sentence for first degree murder will not be eligible to apply to the National Parole Board (NPB) for parole until they have served **at least 25 years**.
- Those who will serve a life sentence for second degree murder will not be eligible to apply to the NPB for parole until their parole ineligibility period is served, which could be **up to 25 years**.

The faint hope regime would, however, still apply to those offenders who are currently serving or awaiting sentencing for murder, but the legislation would make it more difficult for those offenders to apply under the faint hope clause by setting the following conditions:

- a judge would have to be satisfied that there is a substantial likelihood that a jury would agree unanimously to reduce the applicant’s Parole Eligibility Date;
- after serving at least 15 years of their sentence, an offender would have only three months in which to apply or re-apply to be considered for the faint hope regime;
- if the offender did not apply within the three-month period, he or she would have to wait a minimum of five years before they get another chance to apply; and,
- unsuccessful applicants would have to wait a minimum of five years before they could re-apply. Again, an offender would only have a three-month period to re-apply.

The longer waiting period to re-apply after an initial rejection will bring more peace of mind to victim’s loved ones because unsuccessful applicants will be able to apply only two times: once when they become eligible at the 15-year mark of their life sentence, and once more at the 20-

year mark. Currently, unsuccessful applicants may apply a total of five times: at the 15-, 17-, 19-, 21- and 23-year marks.

The changes proposed will affect the crime of high treason in the same way as they affect the crime of first-degree murder.

Current legislation

Under the current legislation offenders sentenced to life imprisonment for committing first- or second-degree murder can apply to a Chief Justice or a Superior Court Justice to have their parole eligibility period reviewed by a jury. They can only apply after serving 15 years of their sentence.

Upon application, the offender must first convince a justice they would have a reasonable prospect of success with a jury that must unanimously decide to reduce the number of years of imprisonment the offender must serve without eligibility for parole. The offender must then convince the jury that they should have the right to make an early application for parole to the NPB. Finally, the offender must convince the NPB that they are unlikely to endanger public safety if released.

If parole is granted, the offender remains under supervision for their entire life unless parole is revoked, in which case the person would be returned to prison. Any breach of the offender's parole conditions or a conviction for a new offence may also result in the return of that person to prison.

BILL C-34 An Act to amend the Criminal Code and other Acts (Protecting Victims From Sex Offenders Act)

Executive Summary: A legislative summary is currently being prepared for this bill by the Parliamentary Information and Research Service of the Library of Parliament. Meanwhile, the following executive summary is available. On 1 June 2009, the Minister of Public Safety introduced Bill C-34, An Act to amend the Criminal Code and other Acts (Protecting Victims From Sex Offenders Act), in the House of Commons and it was given first reading. Bill C-34 amends the Sex Offender Information Registration Act, the Criminal Code, the National Defence Act and the International Transfer of Offenders Act. Among other things, it • requires that sexual offence convictions would result in an automatic inclusion in the Sex Offender Registry; • makes DNA sampling mandatory for all convicted sex offenders; • provides police access to the Sex Offenders Registry; • establish an administrative process to enable registration of Canadians convicted abroad of sex offences and returning to Canada under the International Transfer of Offenders Act; • notifications to other police jurisdictions when high-risk registered offenders travel; and • amendments to the National Defence Act to ensure that reforms apply to the military justice system.

Backgrounder

Proposed amendments include:

- Automatic inclusion of all convicted sex offenders in the Registry - as opposed to the current scheme where prosecutors must apply and a judge has discretion whether to include a convicted sex offender in the registry.

- Offenders convicted of a designated sexual offence under the *Sex Offender Information Registration Act* will also now be subject to a mandatory order to provide a DNA sample for the National DNA Databank;
- Police will be empowered to use the Registry to prevent sexual offences, unlike now where they can only use the registry to investigate crimes after they are committed;
- People who are convicted and jailed for sex crimes in another country who return to Canada under the *International Transfers of Offenders Act* to serve the remainder of their sentence will now be registered in the Sex Offender Registry;
- Canadians convicted abroad of sex crimes and returning to Canada at the end of sentence must report their conviction to police within 7 days of arriving in Canada or face criminal prosecution;
- Police to notify foreign or other Canadian police when high-risk registered sex offenders are travelling to that area; and,
- Amendments to the *National Defence Act* to ensure that reforms also apply to the military justice system.

In addition, several administrative and operational enhancements are proposed. For example, registered sex offenders must report the name of their employer, the type of employment as well as any volunteer organizations they are associated with. They will also be required to provide notice in advance of absences from their residence of seven days or more.

Correctional authorities would also be permitted to notify the registration centre of the sex offender's address where a registered sex offender is serving the custodial portion of a sentence temporarily in the community for a period of 7 days or more.

The Sex Offender Information Registration Act that established a national sex offender database was proclaimed as law and came into force on December 15, 2004. The database is administered by the RCMP.

SENATE GOVERNMENT BILLS

Bill S-4: An Act to amend the Criminal Code (identity theft and related misconduct)

Third Reading in the House of Commons, October 20, 2009

Bill S-4, An Act to amend the Criminal Code (identity theft and related misconduct) was introduced in the Senate on 31 March 2009. The bill will create several new *Criminal Code* offences specifically targeting those aspects of identity theft that are not already covered by existing provisions. Essentially, Bill S-4 will focus on the preparatory stages of identity theft by making it an offence to obtain, possess, transfer or sell the identity documents of another person. The bill contains essentially the same provisions as former Bill C-27,⁽¹⁾ with the addition of new offences that can lead to electronic surveillance.

Backgrounder: Identity Theft

The term "identity theft" can refer to the preliminary steps of collecting, possessing and trafficking in identity information for the purpose of eventual use in existing crimes such as personation, fraud or misuse of debit card or credit card data. Identity theft in this sense is different from "identity fraud", i.e., the subsequent *actual deceptive use* of the identity

information of another person in connection with various crimes. Identity theft takes place in advance of and in preparation for identity fraud.

Identity theft is serious criminal activity that is becoming increasingly lucrative and easily crosses borders. In 2007, more than 10,000 Canadian victims reported losses of more than \$6 million to PhoneBusters, the Canadian anti-fraud call centre. Between January 1, 2008 and October 31, 2008, more than 9000 Canadian victims of identity theft reported losses of more than \$8 million to PhoneBusters. The Canadian Council of Better Business Bureaus has estimated that identity theft may cost Canadian consumers, banks and credit card firms, stores and other businesses more than \$2 billion annually.

Proposed Amendments to the Criminal Code

The actual fraudulent and deceptive uses of other people's identities are already subject to strict criminal prohibitions. The proposed legislation would create three new "core" identity theft offences targeting the early stages of identity-related crime, all subject to 5-year maximum prison sentences:

- **Obtaining and possessing identity information** with the intent to use the information deceptively, dishonestly or fraudulently in the commission of a crime;
- **Trafficking in identity information**, an offence that targets those who transfer or sell information to another person with knowledge of or recklessness as to the possible criminal use of the information; and,
- **Unlawfully possessing or trafficking in government-issued identity documents** that contain information of another person.

Additional amendments include:

- Complementing existing mail offences with two new offences of fraudulently redirecting or causing redirection of a person's mail and possessing a counterfeit Canada Post mail key;
- Creating complementary forgery offences such as trafficking in forged documents, or possessing forged documents with the intent to use them; and
- Clarifying that certain acts in relation to PIN numbers and the possession of skimming devices (used to extract and copy debit card information) are prohibited.

Moreover, a new power would also be added permitting the court to order, as part of a sentence, that an offender be required to pay restitution to a victim of identity theft or identity fraud for costs associated with their efforts to rehabilitate their identity, e.g., the cost of replacement cards, documents and correcting their credit history. This provision would complement existing provisions which permit restitution to be ordered for actual economic or other property losses.

Exemptions

The legislation includes two exemptions to address potential negative impacts on the undercover work of law enforcement. The exemptions ensure that those who make false documents for covert government operations can do so without fear of prosecution for forgery, and that public officers (i.e., law enforcement personnel) can create and use covert identities in furtherance of their duties.