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LEGISLATIVE SUMMARY

Bill C-5:
An Act to amend the International Transfer of Offenders Act

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Legislative Summary of Bill C-5

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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-5: AN ACT TO AMEND THE INTERNATIONAL TRANSFER OF OFFENDERS ACT

1 INTRODUCTION

Bill C-5, An Act to amend the International Transfer of Offenders Act (short title: Keeping Canadians Safe [International Transfer of Offenders] Act), was introduced in the House of Commons on 18 March 2010 by the Minister of Public Safety, the Honourable Vic Toews. It is almost identical to Bill C-59, which received first reading during the 2nd Session of the 40th Parliament but died on the *Order Paper* when Parliament was prorogued on 30 December 2009. Bill C-5 amends the purpose of the *International Transfer of Offenders Act*,[1] as well as the factors for the Minister's consideration in deciding whether to consent to an offender's transfer. **Bill C-5 was amended at committee stage in the House of Commons; however, it died on the *Order Paper* when Parliament was dissolved on 26 March 2011.**

2 BACKGROUND

2.1 LEGISLATIVE SCHEME

Canada has been a party to treaties relating to the transfer of offenders since 1978.[2] These agreements "enable offenders to serve their sentence in their country of citizenship, to alleviate undue hardships borne by offenders and their families and facilitate their eventual reintegration into society."[3] The problems Canadians incarcerated in foreign countries can face are said to include "culture shock, isolation, language barriers, poor diets, inadequate medical care, disease and inability to contact friends and family."[4] The transfer program is said to ensure "that offenders are gradually returned to society and that they have the opportunity to participate in programming that targets the factors that may have led to their offence."[5]

The *Transfer of Offenders Act*[6] came into force in Canada in 1978, and was modernized by the *International Transfer of Offenders Act* [the Act] in 2004.[7] The Act enables offenders to serve their sentences in the country of which they are citizens or nationals (section 3). Generally speaking, the principle of "dual criminality" applies, so that a transfer is not available unless the Canadian offender's conduct would have constituted a criminal offence in Canada as well (subsection 4(1)).[8] A transfer can take place only with the consent of the offender, the foreign entity, and Canada (subsection 8(1)). It is the Minister, currently defined as the Minister of Public Safety and Emergency Preparedness, who decides whether to consent to the transfer into Canada of a "Canadian offender" or the transfer out of Canada of a "foreign offender" **(sections 2 and 10)**. In making that decision, the Minister is currently required to consider certain factors, such as whether a Canadian offender's return to Canada would constitute a threat to the security of Canada, and whether that offender has social or family ties in Canada (section 10).

Once an offender is transferred, his or her sentence is administered in accordance with the laws of the receiving country.[9] The Correctional Service of Canada notes **that, "[w]ith very few exceptions, if offenders are not transferred, they will ultimately be deported to their country of citizenship, without correctional supervision/jurisdiction and without the benefit of programming."[10]**

2.2 Statistics

2.2.1 Transfers to Canada

According to the 2008–2009 *International Transfers Annual Report*, the most recent annual report available on the Correctional Service of Canada website as of the date of writing, a total of 1,504 Canadian offenders were transferred to Canada under the Act between 1978 and 2009. Of these, 1,185 (78.8%) were transferred from the United States.[11] The other countries from which the most Canadians were repatriated were Mexico (61 offenders, or 4.1% of transfers), the United Kingdom (36 offenders, or 2.4% of transfers), Peru (33 offenders, or 2.2% of transfers), Trinidad and Tobago (22 offenders, or 1.5% of transfers), Venezuela (19 offenders, or 1.3% of transfers), Costa Rica (18 offenders, or 1.2% of transfers), Thailand (18 offenders, or 1.2% of transfers), Cuba (17 offenders, or 1.1% of transfers), Japan (15 offenders, or 1.0% of transfers) and Panama (11 offenders, or 0.7% of transfers). Fewer than 10 offenders were repatriated from any other country. The number of offenders transferred to Canada in a fiscal year has ranged from a low of 7 in 1980–1981 to a high of 98 in 2003–2004.[12]

2.2.2 Transfers from Canada

According to the 2008–2009 *International Transfers Annual Report*, a total of 126 offenders have been transferred out of Canada under the Act since 1978. Of these, 107 offenders (84.9%) were American citizens.[13] Eight offenders (6.3%) were transferred to the Netherlands, 3 (2.4%) were transferred to "UK-England," and 3 (2.4%) were transferred to France. One offender (0.8%) was transferred to each of the following countries: Estonia, Ireland, Israel, Italy, and Poland. Ninety of the 126 transfers (71.4%) took place between 1978 and 1983. Since then, transfers from Canada have generally taken place at the rate of 1 or 2 offenders per year, although there were 3 transfers in 1990–1991 (all to the United States) and 4 in 2006–2007 (1 each to Estonia, France, Israel and Italy).[14]

2.2.3 Applications and Denials

According to the 2008–2009 *International Transfers Annual Report*, the International Transfers Unit of the Correctional Service of Canada received 1,318 new applications for transfer between 2004–2005 and 2008–2009. Of those, 296 applications (22.5%) resulted in a transfer and 556 applications (42.2%) were denied.[15] Of the 556 applications that were denied, the report notes that 85% were denied by the foreign country, based on factors such as "dual citizenship, law enforcement concerns, lack of a removal order (for

deportation), unpaid restitution, [and] divergence of parole eligibility."[16] The report further notes that, for the 15% of cases denied by Canada, the majority were based either on section 10(1)(*a*) of the Act, "whether the offender's return to Canada would constitute a threat to the security of Canada" (38%), and/or section 10(1)(*b*), "whether the offender left or remained outside Canada with the intention of abandoning Canada as their place of permanent residence" (27%).[17]

2.3 JURISPRUDENCE

Since the Act came into force in 2004, at least **10** offenders have applied for judicial review of the Minister's refusal to consent to a request for transfer made pursuant to it. **Several of the cases also address the issue of whether the Act violates the mobility rights that section 6 of the *Canadian Charter of Rights and Freedoms* guarantees to Canadian citizens.[18]**

2.3.1 JUDICIAL REVIEW OF THE MINISTER'S REFUSAL TO CONSENT TO A TRANSFER

In *Kozarov* v. *Canada (Minister of Public Safety and Emergency Preparedness)*,[19] although the offender and the United States consented to the transfer back to Canada, the Minister denied Mr. Kozarov's application on the grounds that he had spent the previous 10 years in the United States, the file information suggested he left Canada with no intention of returning, and the file information stated that there did not appear to be sufficient ties to Canada to warrant a transfer.[20] After stating that courts should not readily interfere with a discretionary decision of a minister, Justice Harrington of the Federal Court held that the Minister's findings with respect to Mr. Kozarov were not unreasonable.[21] Mr. Kozarov's appeal of this decision was dismissed as he had already been deported to Canada.[22]

The offender and the United States had also consented to a transfer to Canada in *Getkate* v. *Canada (Minister of Public Safety and Emergency Preparedness)*.[23] The Minister refused to consent because the offender's return to Canada would constitute a potential threat to the safety of Canadians and the security of Canada, and there was no evidence to suggest the offender's risk had been mitigated through treatment.[24] The Minister denied Mr. Getkate's second request for these same reasons and because there was evidence that the offender had abandoned Canada as his place of permanent residence.[25] On judicial review, Justice Kelen of the Federal Court stated that while the Minister's decision is discretionary and is entitled to the highest level of deference, the record clearly established that the decisions disregarded the evidence.[26] In particular, there was evidence that the offender had undertaken intensive treatment at his own expense,[27] and "clear and unambiguous evidence," including from the Correctional Service of Canada, that Mr. Getkate never abandoned or intended to abandon Canada as his place of permanent residence.[28] Finally, Justice Kelen noted that the use of the phrase "threat to the security of Canada" had traditionally been limited to threats of general terrorism and warfare against Canada, or threats to the security of Canadians *en masse*, and that if the phrase referred to the mere risk that the offender would reoffend, then such a consideration could be applied to every inmate seeking a transfer.[29] Since the

reasons articulated by the Minister were "contrary to the evidence and to the assessment and recommendations by his own Department," Mr. Getkate's request for a transfer was referred back to the Minister for redetermination.[30]

In *DiVito* v. *Canada (Minister of Public Safety and Emergency Preparedness)*,[31] the Minister refused a transfer request because "the offender has been identified as an organized crime member, convicted for an offence involving a significant quantity of drugs" and "[t]he nature of his offence and his affiliations suggest that the offender's return to Canada would constitute a potential threat to the safety of Canadians and the security of Canada."[32] On judicial review, Justice Harrington noted the existence of "information from the RCMP suggesting that Mr. DiVito was a member of traditional organized crime."[33] Although there was also conflicting evidence, namely that Mr. DiVito "did not constitute a threat to Canada's security," and although the report from the Correctional Service of Canada stated that "Mr. DiVito's transfer from the United States to Canada … would be extremely beneficial,"[34] Justice Harrington held that the Minister's decision was reasonable.[35]

Other recent judicial review decisions have also been divided between upholding the Minister's refusal to consent to a transfer[36] and sending the decision back to the Minister for redetermination because the Minister had made an error or had not provided sufficient reasons,[37] in particular where the Minister had not followed the advice of Correctional Service of Canada.[38]

2.3.2 Constitutional Arguments Relating to Mobility Rights

An argument that has repeatedly been raised is that the Act infringes subsection 6(1) of the *Charter of Rights and Freedoms*, which provides that "[e]very citizen of Canada has the right to enter, remain in and leave Canada."[39]

The most frequently cited case for this argument is *Van Vlymen* v. *Canada (Solicitor General)*,[40] which predates the current Act. Mr. Van Vlymen's application for transfer had been approved by the foreign entity, the United States, in January of 1991, but Canada only consented to the transfer in March of 2000, after Mr. Van Vlymen commenced legal proceedings.[41] Justice Russell of the Federal Court found that Canada had refused and/or delayed the transfer process, resulting in a denial of Mr. Van Vlymen's rights under section 6 of the Charter between January 1991 and March 2000.[42] Justice Russell also held that Canada's conduct represented "a clear breach of section 7 of the Charter ['the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice'] and the common law duty to act fairly in processing [Mr. Van Vlymen's] transfer application."[43]

Several subsequent Federal Court decisions have, however, distinguished this case and found that similarly challenged provisions in the current Act are not unconstitutional.[44]

In *Kozarov,* for example, Justice Harrington rejected the constitutional argument, noting that Mr. Kozarov had the absolute mobility right, as a Canadian citizen, to return to Canada *once his sentence was served*, and that, if the Minister had consented to the transfer, Mr. Kozarov could not on his arrival have immediately asserted his mobility right to leave Canada.[45] Mobility rights were not the issue, he said; rather "the transfer of supervision of a prison sentence" was.[46] Justice Harrington distinguished the *Van Vlymen* case on the basis that the "driving force of that decision was the failure to decide within a reasonable time frame," not the constitutionality of the legislative provisions themselves.[47]

Similarly, in *Getkate,* Justice Kelen stated that *Van Vlymen* was clearly "distinguishable on its facts," and that "the decision in *Kozarov* provides better guidance with respect to the interplay between section 6 of the Charter and the provisions of the Act."[48] Justice Kelen concluded that Mr. Getkate's right to enter and leave Canada was restricted while he was incarcerated either in the United States or in Canada, and that automatic consent would not respect Canada's international treaty agreements, "which only allow transfers to provide for the better rehabilitation of the prisoner."[49]

Federal Court judges have rejected the constitutional argument in more recent cases as well,[50] and the Federal Court of Appeal also recently ruled that the challenged provisions are constitutional.[51]

3 DESCRIPTION AND ANALYSIS

3.1 PURPOSE OF THE ACT (CLAUSE 2)

Currently, the purpose of the Act "is to contribute to the administration of Justice and the rehabilitation of offenders and their reintegration into the community by enabling offenders to serve their sentences in the country of which they are citizens or nationals" (section 3). Clause 2 of Bill C-5 amends this by adding the following reference to public safety: "The purpose of this Act is to *enhance public safety and to* contribute to the administration of Justice and the rehabilitation of offenders and their reintegration into the community by enabling offenders to serve their sentences in the country of which they are citizens or nationals." Some commentators, however, have questioned the rationale for this amendment, arguing that international transfers already enhance public security by helping to rehabilitate the worst offenders, who are likely to be deported back to the country after they complete their sentences.[52] **Similarly, the term "administration of justice" in the purpose section has been judicially interpreted as being sufficiently broad to include public safety and security considerations.[53]**

3.2 FACTORS FOR THE MINISTER TO CONSIDER (CLAUSE 3)

In determining whether to consent to the transfer of a Canadian offender back to Canada, the Minister is currently required, under subsection 10(1) of the Act, to consider the following factors:

> (*a*) whether the offender's return to Canada would constitute a threat to the security of Canada;
>
> (*b*) whether the offender left or remained outside Canada with the intention of abandoning Canada as their place of permanent residence;
>
> (*c*) whether the offender has social or family ties in Canada; and
>
> (*d*) whether the foreign entity or its prison system presents a serious threat to the offender's security or human rights.

The Minister is also required, under subsection 10(2), to consider the following factors with respect to the transfer of both Canadian and foreign offenders:

> (*a*) whether, in the Minister's opinion, the offender will, after the transfer, commit a terrorism offence or criminal organization offence within the meaning of section 2 of the *Criminal Code*; and
>
> (*b*) whether the offender was previously transferred under this Act or the *Transfer of Offenders Act*, chapter T-15 of the Revised Statutes of Canada, 1985.

Clause 3 of the bill makes the Minister's consideration of all factors under section 10 of the Act discretionary ("the Minister may consider"), rather than mandatory ("the Minister shall consider") as is currently the case.[54] As well, clause 3 amends paragraphs 10(1)(*a*), (*b*), and (*d*) by adding "whether, *in the Minister's opinion*" at the beginning of the paragraph. This would appear to allow for a subjective assessment by the Minister should he or she choose to consider one of those factors.[55] Paragraph 10(1)(*c*), "whether the offender has social or family ties in Canada," is not amended in this way, so it would appear to be a more objective factor.[56] **The House of Commons Standing Committee on Public Safety and National Security amended Bill C-5 to remove the three references to "in the Minister's opinion" from the proposed amendments to the factors set out in subsection 10(1). The Committee also amended the bill to make it mandatory for the Minister to consider the factors set out in subsection 10(1) ("shall consider"), although the factors under subsection 10(2), as amended, would be discretionary ("may consider").**

Finally, clause 3 adds to subsection 10(1) additional factors for the Minister to consider in determining whether to consent to the transfer of a Canadian offender:

- whether, in the Minister's opinion, the offender's return to Canada will endanger public safety, including
  - the safety of any person in Canada who is a victim, as defined in subsection 2(1) of the *Corrections and Conditional Release Act*, of an offence committed by the offender,
  - the safety of any member of the offender's family, in the case of an offender who has been convicted of an offence against a family member, and
  - the safety of any child, in the case of an offender who has been convicted of a sexual offence involving a child;

- whether, in the Minister's opinion, the offender is likely to continue to engage in criminal activity after the transfer;
- the offender's health;
- whether the offender has refused to participate in a rehabilitation or reintegration program;
- whether the offender has accepted responsibility for the offence for which he or she has been convicted, including by acknowledging the harm done to victims and to the community;
- the manner in which the offender will be supervised, after the transfer, while he or she is serving his or her sentence;
- whether the offender has cooperated, or has undertaken to cooperate, with a law enforcement agency; and
- any other factor that the Minister considers relevant.

With respect to the factor about accepting responsibility for the offence, concern has been expressed that this could result in innocent individuals pleading guilty "in order to avoid remaining in a foreign jail."[57]

The House of Commons Standing Committee on Public Safety and National Security amended Bill C-5 with respect to these factors as well. First, all references to "in the Minister's opinion" were removed from the new factors for consideration, and the factors relating to participation in rehabilitation programs, accepting responsibility for the offence, and "any other factor that the Minister considers relevant" were deleted from the bill. Finally, a "temporal" aspect was added to two of the new factors.[58] Bill C-5, as amended, would specify that the Minister is to consider "whether the offender's return to Canada, while they are serving their sentence, will endanger public safety," and "whether the offender is likely to continue to engage in criminal activity, after the transfer, while they are serving their sentence." In other words, the relevant time period for the Minister to consider with respect to public safety and criminal activity is while the offender is under sentence, not after the sentence has been served.

NOTES

1. *International Transfer of Offenders Act*, S.C. 2004, c. 21.
2. For a list of these treaties, see Correctional Service of Canada, *International Transfer Of Offenders – List of Countries acceding a Bilateral Treaty with Canada*, and *International Transfer Of Offenders – Multilateral Conventions*.
3. **Correctional Service of Canada, *International Transfer of Offenders*.**
4. Ibid.
5. Ibid.

6. *Transfer of Offenders Act*, R.S.C. 1985, c. T-15. The *Transfer of Offenders Act* came into force following a United Nations meeting at which member states agreed that the international transfer of offenders was desirable due to the increasing mobility of offenders and the need for countries to cooperate on criminal justice matters. The intent of the *Transfer of Offenders Act* was to authorize the implementation of treaties between Canada and other countries, including multilateral conventions, for the international transfer of offenders.

7. Public Safety Canada, "Keeping Canadians Safe (International Transfer of Offenders Act)," Backgrounder, 26 November 2009.

8. **Subsection 4(3) of the *International Transfer of Offenders Act* sets out an exception for a Canadian offender who, at the time the offence was committed, was a child within the meaning of the *Youth Criminal Justice Act*, S.C. 2002, c. 1.**

9. Correctional Service of Canada, *International Transfer Of Offenders*. For further description and analysis of the Act, see Robin MacKay, *Bill C-15: International Transfer of Offenders Act*, Publication no. LS-469E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 16 February 2004.

10. Correctional Service of Canada, *International Transfers: Annual Report 2008–2009*, p. 3.

11. Ibid., p. 4.

12. Ibid., "Annex 'A' – Transfers to Canada by Fiscal Year." Note that the table in the annex shows 36 transfers to Canada from "UK-England" and 1 from "UK-Bermuda."

13. Ibid., p. 5.

14. Ibid., "Annex 'B' – Transfers from Canada by Fiscal Year."

15. Ibid., p. 7. The report notes that "[t]he remainder of the applications are still in process or have been closed for a variety of reasons (offender's withdrawal, release from institution, ineligibility)."

16. Ibid.

17. Ibid., p. 9.

18. *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 [Charter], s. 6(1).

19. *Kozarov* v. *Canada (Minister of Public Safety & Emergency Preparedness)*, [2008] 2 F.C.R. 377, 2007 FC 866.

20. Ibid., para. 2.

21. Ibid., paras. 12 and 24.

22. *Kozarov* v. *Canada (Public Safety and Emergency Preparedness)*, 2008 FCA 185.

23. *Getkate* v. *Canada (Minister of Public Safety and Emergency Preparedness)*, [2009] 3 F.C.R. 26, 2008 FC 965.

24. Ibid., para. 6.

25. Ibid., para. 8.

26. Ibid., para. 33.

27. Ibid., para. 34.

28. Ibid., paras. **38**–40.

29. Ibid., para. 41.

30. Ibid., paras. 44–45.

31. *DiVito* v. *Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FC 983.

32. Ibid., para. 1.

33. Ibid., para. 21.

34. Ibid., paras. 20, 22 and 23.

35. Ibid., para. 26.

36. *Grant* v. *Canada (Minister of Public Safety and Emergency Preparedness)*, 2010 FC 958 (although an earlier decision with respect to the same offender had been sent back for redetermination on the basis that the Minister's reasons were insufficient (*Grant* v. *Canada (Minister of Public Safety and Emergency Preparedness)*, [2010] F.C.J. No. 386 (QL)); *Holmes* v. *Canada (Minister of Public Safety and Emergency Preparedness*), 2011 FC 112; *Markevich* v. *Canada (Minister of Public Safety and Emergency Preparedness*), 2011 FC 113.

37. *Dudas* v. *Canada (Minister of Public Safety and Emergency Preparedness)*, 2010 FC 942; *Curtis* v. *Canada (Minister of Public Safety and Emergency Preparedness)*, 2010 FC 943; *Downey* v. *Canada (Minister of Public Safety),* 2011 FC 116.

38. *Grant* v. *Canada (Minister of Public Safety and Emergency Preparedness)*, [2010] F.C.J. No. 386 (QL); *Vatani* v. *Canada (Minister of Public Safety and Emergency Preparedness)*, 2011 FC 114; *Singh* v. *Canada (Minister of Public Safety and Emergency Preparedness)*, 2011 FC 115.

39. **Charter, s. 6(1).**

40. *Van Vlymen* v. *Canada (Solicitor General)*, [2005] 1 F.C.R. 617, 2004 FC 1054. Mr. Van Vlymen had already been transferred by the time the case was heard.

41. Ibid., para. 86.

42. Ibid., para. 115.

43. Ibid., para. 116.

44. Note that some cases have held that there is no mobility rights infringement, while others have held that there is an infringement but that it is "saved" under section 1 of the *Charter*, which provides as follows: "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it *subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society*" [emphasis added].

45. *Kozarov*, para. 32 [emphasis added].

46. Ibid.

47. Ibid., paras. 35 and 36.

48. *Getkate*, para. 23.

49. Ibid., paras. 28 and 29.

50. *DiVito* v. *Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FC 983, para. 13; *Holmes*, paras. 28 and 41; *Dudas*, para. 28; *Curtis,* para. 33.

51. *DiVito* v. *Canada (Public Safety and Emergency Preparedness*), 2011 FCA 39, para. 68 (Justice Mainville, concurring, *prima facie* infringements that are reasonable limits on the mobility right) and para. 89 (Justice Nadon, Justice Trudel agreeing, no violation of section 6). It appears that a notice of application for leave to appeal to the Supreme Court of Canada has been filed (Supreme Court of Canada, SCC Case Information, Docket 34128).

52. The Canadian Press, "Feds to make it harder for prisoners abroad to return to Canada," *The Daily Gleaner* [Fredericton], 27 November 2009, p. A10, citing criminologist Neil Boyd; and Nathalie Des Rosiers, "Benign amendments or undermining of the rule of law?" Canadian Civil Liberties Association, 4 December 2009.

53. *Holmes*, para. 9. Justice Phelan stated at para. 10, however, that "[i]t is not for the Court to comment on proposed legislation even though it was raised by the parties."

54. Nathalie Des Rosiers, general counsel for the Canadian Civil Liberties Association, expressed concern that under the amendments, the Minister would no longer be *required* to consider factors including whether the conditions of foreign detention present a serious threat to the offender's security or human rights. (See Des Rosiers (2009).)

55. The phrase "in the Minister's opinion," as found in paragraph 10(2)(*a*) of the Act, was considered in *Grant* v. *Canada (Minister of Public Safety and Emergency Preparedness)*, 2010 FC 958, para. 37. It was held to "trump" or to "temper" aspects of the surrounding text.

56. Note also that the word "would" in paragraph 10(1)(*a*) is amended to "will," and the other existing factors are renumbered to accommodate the additional factors.

57. Des Rosiers (2009).

58. House of Commons, Standing Committee on Public Safety and National Security, *Evidence*, 3rd Session, 40th Parliament, 3 February 2011.