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Bill C-54: Protecting Children from Sexual Predators Act

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Legislative Summary of Bill C-54

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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-54: PROTECTING CHILDREN FROM SEXUAL PREDATORS ACT

1 BACKGROUND

Bill C-54, An Act to amend the Criminal Code (sexual offences against children) (short title: Protecting Children from Sexual Predators Act), was introduced and received first reading in the House of Commons on 4 November 2010. The bill amends the *Criminal Code*¹ to increase or impose mandatory minimum penalties for certain sexual offences involving children. The bill also creates two new offences, namely that of making sexually explicit material available to a child and of agreeing or arranging to commit a sexual offence against a child. Finally, the bill expands the list of specified conditions that may be added to prohibition and recognizance orders² to include prohibitions concerning contact with a person under the age of 16 and use of the Internet or other digital network, and to expand the list of enumerated offences that may give rise to such orders and prohibitions.

1.1 THE CURRENT LAW

Part V of the *Criminal Code* is entitled “Sexual Offences, Public Morals and Disorderly Conduct.” This part of the Code contains a number of sexual offences, some of which may be committed against a person under the age of 16 years (the age of consent to sexual activity in Canada), and others where the relevant age is 18. Section 150.1 of the Code does set out some exceptions to the general rule regarding the age of consent. These exceptions apply in cases where the complainant consented to the activity that forms the subject-matter of the charge if the accused is close in age to the complainant and is not in a position of trust or authority towards the complainant. Other exceptions may apply, such as the accused and complainant being common-law partners, but a necessary condition for all of these exceptions to apply is that the complainant have consented to the activity that forms the subject-matter of the charge.

Sexual offences that may be committed against someone under the age of 16 include sexual interference (section 151), invitation to sexual touching (section 152), bestiality (subsection 160(3)), parent or guardian procuring sexual activity (paragraph 170(a)), householder permitting sexual activity (paragraph 171(a)), luring a child (paragraph 172.1(1)(b)), indecent act (subsection 173(2)), and abduction of person under 16 (section 280). Sexual interference, invitation to sexual touching, parent or guardian procuring sexual activity, and householder permitting sexual activity all have mandatory minimum sentences when the offence is committed against someone under 16 years of age.

A number of sexual offences may be committed against someone under the age of 18, including sexual exploitation (section 153), child pornography (section 163.1), parent or guardian procuring sexual activity (paragraph 170(b)), householder permitting sexual activity (paragraph 171(b)), luring a child (paragraph 172.1(1)(a)), living off the avails of a prostitute under the age of 18 years (subsection 212(2)),

aggravated living off the avails of a prostitute under the age of 18 years (subsection 212(2.1)), and obtaining prostitution of person under the age of 18 years (subsection 212(4)). All of these offences, except for luring a child, have mandatory minimum penalties. Section 273.3 of the *Criminal Code* makes it an offence to remove a child from Canada who is under the age of either 16 or 18 for the purpose of committing one of the enumerated sexual offences.

Part VIII of the *Criminal Code* is entitled “Offences Against the Person and Reputation.” This part contains the offences of sexual assault (section 271), sexual assault with a weapon, threats to a third party or causing bodily harm (section 272), and aggravated sexual assault (section 273). None of these offences mentions the age of the victim. There are mandatory minimum penalties attached to section 272 and 273 offences if a firearm is used in the commission of the offence. If no firearm is used, upon conviction as an indictable offence, there are only maximum sentences of 10 years’ imprisonment (section 271), 14 years’ imprisonment (section 272), and life imprisonment (section 273).

When an offender is convicted of a specified sexual offence in respect of a person who is under the age of 16 years, the court that sentences the offender may impose an order of prohibition under section 161 of the Code. This order prohibits the offender from attending near certain public places and other facilities where persons under 16 years of age may be present, from obtaining employment or a voluntary position which may involve the offender’s being in a position of trust or authority over persons under 16 years of age, or from using a computer system for the purpose of communicating with a person under the age of 16 years. The order may be for life or some shorter period and its terms may be varied upon application of the offender or the prosecutor. Failure to comply with the order is a hybrid offence.³

Section 810.1 of the *Criminal Code* applies when there is a reasonable fear that another person will commit a specified sexual offence in respect of one or more persons who are under the age of 16 years. This section allows anyone to lay an information⁴ before a provincial court judge for the purpose of having the defendant enter into a recognizance,⁵ which may include conditions that the person not engage in activity that involves contact with persons under 16 years of age or that the defendant be prohibited from attending certain places where persons under 16 years of age are likely to be present. The judge will grant such an order where there are reasonable grounds to fear that the defendant will commit one of the specified sexual offences in respect of a person under 16 years of age. The maximum duration of the order is 12 months, except if the defendant was previously convicted of a sexual offence in respect of a child under the age of 16 years, in which case the recognizance may be for a period of up to two years. Subsection 810.1(3.02) also provides a non-exhaustive list of conditions that may be imposed to secure the good conduct of the defendant.

1.2 CONDITIONAL SENTENCES AND PRINCIPLES OF SENTENCING

In the press release and the backgrounder that accompanied the introduction of Bill C-54, mention is made that the proposed legislation would establish mandatory prison sentences for seven existing *Criminal Code* offences and, as a result, conditional sentences would no longer be available for any of these offences.⁶

Conditional sentencing, introduced in September 1996, allows for sentences of imprisonment to be served in the community, rather than in a correctional facility. This is a midway point between incarceration and sanctions such as probation or fines. The primary goal of conditional sentencing is to reduce the reliance upon incarceration by providing the courts with an alternative sentencing mechanism.

The provisions governing conditional sentences are set out in sections 742 to 742.7 of the *Criminal Code*. Several criteria must be met before the sentencing judge may impose a conditional sentence, including that the offence in question not be punishable by a minimum term of imprisonment or be an offence or attempt to commit an offence mentioned in section 271 (sexual assault), 272 (sexual assault with a weapon, threats to a third party or causing bodily harm) or 273 (aggravated sexual assault). The sentencing judge must also have determined that the offence should be subject to a term of imprisonment of less than two years and be satisfied that serving the sentence in the community would not endanger the safety of the community.

Before imposing a conditional sentence, the sentencing judge must be satisfied that the conditional sentence would be consistent with the fundamental purpose and principles of sentencing set out in sections 718 to 718.2 of the *Criminal Code*. Among the objectives of sentencing are:

- the denunciation of unlawful conduct;
- the deterrence of the offender and others from committing offences;
- the separation of the offender from the community when necessary;
- the rehabilitation of the offender;
- the provision of reparation to victims or the community; and
- the promotion of a sense of responsibility in the offender, and acknowledgement of the harm done to victims and to the community.

The fundamental principle underlying sentencing, as set out in section 718.1 of the *Criminal Code*, is proportionality – the sentence imposed by the court must be proportionate to the gravity of the offence and the degree of responsibility of the offender. Among the other sentencing principles are that aggravating and mitigating factors be taken into account, that there be similarity of sentences for similar offences, that the totality of consecutive sentences should not be unduly long or harsh, and that the least restrictive sanction short of incarceration should be resorted to whenever possible, with particular attention to the circumstances of Aboriginal offenders.

1.3 MANDATORY MINIMUM SENTENCES

Mandatory minimum sentences (MMSs) have been part of the *Criminal Code* since it was codified in 1892. At that time, there were six offences with these types of sentences for such things as committing frauds upon the government and corruption in municipal affairs.⁷ Since then, mandatory minimums have not evolved in any systematic fashion. Rather, each new MMS has responded to what was perceived at the time to be a serious issue of criminal law. Many of these sentences were introduced in 1995 with the enactment of a package of firearms-related legislation. Apart from life imprisonment for high treason and murder, the other main areas in which MMSs can be found are for sexual offences involving young people and impaired driving.

Today, there are approximately 40 criminal offences for which a minimum sentence must be imposed on conviction. The application of a minimum mandatory sentence may depend on factors other than just the type of offence that was committed, such as whether an offence is prosecuted by indictment or summarily, or whether it is a first, second or subsequent conviction for an offence. In the area of sexual offences, the imposition of a MMS may depend upon the age of the victim.

Those in favour of mandatory minimums say that they:

- act as a deterrent;
- prevent future crime by incapacitating the offender or removing the offender from society;
- serve an educational purpose by clearly communicating society's disapproval;
- reduce sentence disparity by giving clear guidelines to the judiciary so all offenders in all parts of Canada will receive at least a specified minimum time in prison; and
- respond to public concern that people should be held accountable for criminal convictions through imprisonment.

Those opposed to mandatory minimums say that they:

- have little or no deterrent effect, as deterrence arises from the fear of being caught, not from the length of sentence;
- are an inflexible penalty structure that limits judicial discretion, leading to sentences out of proportion to the blameworthiness of the individual offender or the seriousness of the offence;
- shift decisions on appropriate punishment from the judiciary to the prosecutor, who can determine whether to stay or withdraw a charge, or enter into plea negotiations to avoid an MMS;
- may compel someone who is not guilty of any offence to plead guilty to an offence that carries no mandatory minimum penalty to avoid a harsher sentence; and

- may increase costs, including the burden on prosecutorial resources (due to the decrease in guilty pleas by people facing mandatory imprisonment), and increase prison populations.

There has been little Canadian research on MMSs, including on how they are implemented or the level of public knowledge about them. Canada lacks a sentencing commission, such as that found in the United States, which can collect data on the length of sentences imposed, on sentencing changes over time, and on what, if any, effect the changes have had on the incidence of those crimes for which they are imposed.

Mandatory minimum sentences would appear to be inconsistent with the fundamental principle of sentencing set out in section 718.1 of the *Criminal Code* – namely, a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. The manner in which mandatory sentences have been used in Canada does not allow a judge to make any exception in an appropriate case. This does not necessarily mean, however, that a minimum sentence is unconstitutional. It may constitute cruel and unusual punishment, in violation of section 12 of the *Canadian Charter of Rights and Freedoms*,⁸ only if it is possible for the mandatory punishment, in a specific matter or a reasonable hypothetical case, to be “grossly disproportionate,” given the gravity of the offence or the personal circumstances of the offender.

The Supreme Court of Canada has, in some cases, struck down mandatory sentences that were considered too severe. One example is the case of *R. v. Smith*⁹ in which a mandatory seven-year term of imprisonment for importing narcotics was struck down as being disproportionate. The drug importing offence was found to have covered many substances of varying degrees of danger, totally disregarded the quantity imported, and treated as irrelevant the reason for importing and the existence of any previous convictions. In a more recent case, though, the Supreme Court has held that sentencing judges cannot override a clear statement of legislative intent and reduce a sentence below a statutory mandated minimum, absent exceptional circumstances.¹⁰ In this case, the Court said that for some “particularly egregious” forms of state misconduct, sentence reduction below a mandatory minimum may be appropriate under section 24(1) of the Charter, which states that anyone whose Charter rights have been violated may apply to the court for a remedy. In the usual case, however, the MMS set out by Parliament must be applied.

2 DESCRIPTION AND ANALYSIS

Bill C-54 contains 30 clauses. The following description highlights selected aspects of the bill; it does not review every clause.

2.1 INCREASED MINIMUM MANDATORY SENTENCES (CLAUSES 3, 4, 5, 9, 11, AND 12)

MMSs are already attached to a number of offences in the *Criminal Code* concerning sexual offences against children. These offences are sexual interference (section 151

of the Code), invitation to sexual touching (section 152), sexual exploitation (section 153), offences related to child pornography (section 163.1), parent or guardian procuring sexual activity (section 170), and householder permitting sexual activity (section 171). For each of these offences, the length of the existing MMS will be increased by Bill C-54.

The increases in minimum mandatory sentences are summarized in Table 1.

Table 1 – Increased Minimum Mandatory Sentences (MMSs)^a

Offence	Criminal Code Section	On Summary Conviction		On Indictment	
		Current Penalty	Proposed Increased MMSs	Current Penalty	Proposed Increased MMSs
Sexual interference (hybrid offence)	151	MMS 14 days and max. 18 months	90 days	MMS 45 days and max. 10 years	1 year
Invitation to sexual touching (hybrid offence)	152	MMS 14 days and max. 18 months	90 days	MMS 45 days and max. 10 years	1 year
Sexual exploitation (hybrid offence)	153	MMS 14 days and max. 18 months	90 days	MMS 45 days and max. 10 years	1 year
Possession of child pornography (hybrid offence)	163.1(4)	MMS 14 days and max. 18 months	90 days	MMS 45 days and max. 5 years	6 months
Accessing child pornography (hybrid offence)	163.1(4.1)	MMS 14 days and max. 18 months	90 days	MMS 45 days and max. 5 years	6 months
Parent/guardian procuring sexual activity (indictable offence)	170(b)	N/a		MMS 45 days and max. 2 years ^b	90 days
Householder permitting sexual activity (indictable offence)	171(b)	N/a		MMS 45 days and max. 2 years ^b	90 days

- a. All of the maximum penalties in this chart will remain unchanged under Bill C-54.
- b. These penalties apply when the victim is 16 years of age or older, but under 18. An MMS of six months applies if the victim is under the age of 16 years, but this MMS is not amended by Bill C-54.

2.2 NEW MINIMUM MANDATORY SENTENCES (CLAUSES 6, 7, 14, 15, 17, 18, AND 19)

A number of offences in the *Criminal Code* address sexual misconduct, but not all discuss it in terms of the age of the victim, and some that do address the age of the victim do not impose an MMS. Bill C-54 will specify the age of the victim for a number of offences and specify that an MMS will apply when the victim of the offence is under either 18 or 16 years of age, depending upon the offence. Thus, there will be

an MMS for incest with someone under 16 (subsection 155(2)), for bestiality in the presence of someone under 16 (subsection 160(3)), for using a means of telecommunication to lure a child under either 18 or 16 years of age (section 172.1), for exposure to a person under the age of 16 years (subsection 173(2)), for sexual assault against a person under 16 years of age (section 271), for sexual assault with a weapon against a person under 16 years of age (section 272), and for aggravated sexual assault against a person under 16 years of age (section 273).

The new minimum mandatory sentences are summarized in Table 2.

Table 2 – New Minimum Mandatory Sentences (MMS)

Offence	Criminal Code Section	Current Maximum Penalty		Proposed Mandatory Minimum Sentences	
		On Summary Conviction	On Indictment	On Summary Conviction	On Indictment
Incest against a person under 16 years of age (indictable offence)	155	N/a	14 years	N/a	5 years
Bestiality in the presence of a person under 16 years of age (hybrid offence)	160 (3)	6 months	10 years	30 days	1 year
Internet luring (hybrid offence)	172.1	18 months	10 years	90 days	1 year
Indecent act in the presence of a person under 16 years of age (hybrid offence)	173(2)	6 months	N/a	30 days	90 days
Sexual assault against a person under 16 years of age (hybrid offence)	271	18 months	10 years	90 days	1 year
Sexual assault with a weapon ^a against a person under 16 years of age (indictable offence)	272	N/a	14 years	N/a	5 years
Aggravated sexual assault against a person under 16 years of age (indictable offence)	273	N/a	Life imprisonment	N/a	5 years

- a. There is a mandatory prison sentence for this offence and a section 273 offence if a restricted or prohibited firearm is used in the commission of the offence or if any firearm is used in the commission of the offence in connection with organized crime (5 years for first offence; 7 years for second or subsequent offence). In any other case where a firearm is used in the commission of this offence and a section 273 offence, there is a mandatory minimum prison sentence of four years.

2.3 NEW OFFENCES (CLAUSES 13 AND 15)

Clause 13 of the bill will add section 171.1 to the *Criminal Code*. This section will 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 that young person. The different ages will apply to the facilitation of the following offences:

- Under 14 years of age – Facilitating the commission of abduction of a person under 14 (section 281)
- Under 16 years of age – Facilitating the commission of sexual interference (section 151), invitation to sexual touching (section 152), bestiality in the presence of a person under 16 years of age (subsection 160(3)), exposure to a person under 16 years of age (subsection 173(2)), sexual assault (section 271), sexual assault with a weapon (section 272), aggravated sexual assault (section 273), or abduction of person under 16 (section 280)
- Under 18 years of age – Facilitating the commission of sexual exploitation (subsection 153(1)), incest (section 155), child pornography (section 163.1), parent or guardian procuring sexual activity (section 170), householder permitting sexual activity (section 171), or procuring (subsection 212(1), 212(2), 212(2.1), or 212(4))

This new hybrid offence will have a mandatory minimum prison sentence of 30 days' imprisonment on summary conviction and 90 days' imprisonment following conviction as an indictable offence. The maximum penalties will be six months' imprisonment following summary conviction and two years' imprisonment following conviction as an indictable offence. It will not be a defence to a charge under section 171.1 that the accused believed that the person in question 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.

Clause 15 will add section 172.2 to the *Criminal Code*. This section will 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. The list of offences based on the age of the young person is the same as for proposed section 171.1.

This new hybrid offence will have a mandatory minimum prison sentence of 90 days' imprisonment on summary conviction and one years' imprisonment following conviction as an indictable offence. The maximum penalties will be 18 months' imprisonment following summary conviction and 10 years' imprisonment following conviction as an indictable offence. As with section 171.1, it will not be a defence to a charge under section 171.1 that the accused believed that the person in question 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. In addition, it will not be a defence to a charge under section 172.2 that the person with whom the accused made an arrangement was a peace officer or was acting under the direction of a peace officer or, if such was the case, the young person in question did not, in fact, exist.

The proposed new offences are summarized in Table 3.

Table 3 – Proposed New Offences

Offence	Criminal Code Section	Proposed Maximum Penalty		Proposed Minimum Mandatory Sentences	
		On Summary Conviction	On Indictment	On Summary Conviction	On Indictment
Providing sexually explicit material to a child (hybrid offence)	171.1	6 months	2 years	30 days	90 days
Agreeing/making arrangements with another person, via telecommunication, to commit a sexual offence against a child (hybrid offence)	172.2	18 months	10 years	90 days	1 year

2.4 NEW CONDITIONS (CLAUSES 8 AND 26)

Section 161 of the *Criminal Code* permits the court to make an order prohibiting, among other things, an offender from using a computer system for the purpose of communicating with a person under 16 years of age. The order may be made where the offender is found guilty of a specified sexual offence and the complainant was under 16 years of age. Clause 8 of Bill C-54 will amend this part of section 161 so that the court sentencing the offender shall consider making and may 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. Clause 8 also adds to the list of offences for which a conviction is a prerequisite for an order of prohibition. This list of offences includes the two new offences created by Bill C-54 (see section 2.3 above).

Section 810.1 of the *Criminal Code* allows anyone to lay an information before a provincial court judge for the purpose of having the defendant enter into a recognizance, including conditions that the person not engage in activity that involves contact with persons under 16 years of age and prohibiting the defendant from attending certain places where persons under 16 years of age are likely to be present. The judge will grant such an order where there are reasonable grounds to fear that the defendant will commit one of the specified sexual offences in respect of a person under 16 years of age. Subsection 810.1(3.02) provides a non-exhaustive list of conditions that may be imposed to secure the good conduct of the defendant.

Clause 26 will expand the list of sexual offences that may be addressed by a section 810.1 order, including the two new offences created by Bill C-54 (see section 2.3 above). It will also amend this section to allow judges to consider prohibiting suspected or convicted child sex offenders from having any unsupervised contact with a young person under the age of 16 years or from having any unsupervised use of the Internet.

2.5 ADDING NEW OFFENCES TO EXISTING PROVISIONS
(CLAUSES 2, 8, 10, 14, 20, 21, 22, 23, 24, 25 AND 26)

Bill C-54 will add the two new offences created by the bill (see section 2.3 above) and, in some cases, existing *Criminal Code* offences to certain Code provisions in the following manner:

- Clause 2 will add the two new offences created by Bill C-54, along with luring a child (section 172.1), to the list of offences that, if committed outside Canada, are deemed to be committed in Canada if the person committing the offence is a Canadian citizen or permanent resident (subsection 7(4.1)).
- Clause 8 will add new offences to the list of those following conviction for which an order prohibiting an offender from attending public places where young people can be found may be granted (section 161).
- Clause 10 will add the new offence of agreeing or making an arrangement with a person, by means of telecommunication, to commit a sexual offence against a young person (section 172.2) to those for which an order of forfeiture may be made of any thing, other than real property, used in the commission of the offence (section 164.2).
- Clause 14 will add offences such as parent or guardian procuring sexual activity and householder permitting sexual activity to those that can be facilitated by luring a young person over the Internet (section 172.1).
- Clause 20 will add, among other things, the two new offences created by Bill C-54 to the section that allows for the exclusion of the public from court proceedings. If an accused is charged with one of the new offences and the prosecutor or the accused applies for an exclusion order, the judge shall, if no such order is made, state the reason for not making an order (section 486).
- Clause 21 will add, among other things, the two new offences created by Bill C-54 to the section which provides that, when an accused is charged with certain offences, the court may make an order directing that the identity of, or information that would identify, the complainant or another witness not be published, broadcasted or transmitted in any way (section 486.4).
- Clause 22 will add the two new offences created by Bill C-54 to the list of designated offences under the forensic DNA analysis section of the *Criminal Code* (sections 487.04 to 487.0911). Specifically, the section 172.2 offence (agreement or arrangement – sexual offence against child) will be added to the definition of “primary designated offence,” meaning that the taking of a bodily substance for forensic DNA analysis is obligatory (with certain exceptions), while the section 171.1 offence (making sexually explicit material available to child) will be added to the definition of “secondary designated offence,” meaning that the taking of a bodily substance for forensic DNA analysis is possible, but not mandatory (section 487.04).
- Clause 23 will add the two new offences created by Bill C-54 to the list of designated offences under the sex offender information section of the *Criminal Code* (sections 490.011 to 490.032). Upon application of the prosecutor, the court sentencing an offender for a designated offence shall make an order requiring the person to comply with the *Sex Offender Information Registration Act*¹¹ (section 490.011).

- Clause 24 will add the new offence of agreement or arrangement – sexual offence against child (section 172.2) as well as procuring (subsection 212(1)) and living on the avails of prostitution of person under 18 (subsection 212(2)) to the list of designated offences in the dangerous and long-term offenders section of the *Criminal Code* (sections 752 to 761). Conviction for a designated offence can lead to a designation as a dangerous or long-term offender (section 752).
- Clause 25 adds the new offences created by Bill C-54 and many other sexual offences in relation to young persons to the list of those that may indicate the offender will reoffend and, therefore, may be designated a long-term offender (section 753.1).
- Clause 26 will add the new offences, along with other offences committed against young persons, to those which can give rise to an order that the defendant enter into a recognizance to not engage in activity that involves contact with persons under 16 years of age or attending certain places where persons under 16 years of age are likely to be present (section 810.1).

2.6 COORDINATING AMENDMENTS (CLAUSES 28 AND 29)

Bill S-2,¹² in part, amends the definition of “primary designated offence” in section 487.04 of the *Criminal Code*. That bill will add many of the sexual offences dealt with in Bill C-54 to the list of offences for which a forensic DNA analysis is mandatory. The coordinating amendments set out in clause 28 will ensure that the two new offences created by Bill C-54 will, following the entry into force of Bill S-2, be in the list of “primary designated offences” for which a forensic DNA analysis will be mandatory.

Bill C-16¹³ will restrict the availability of conditional sentences for all offences for which the maximum term of imprisonment is 14 years or life and for certain specified offences, prosecuted by way of indictment, for which the maximum term of imprisonment is 10 years. One of those specified offences is the section 172.1 offence of luring a child, because the maximum punishment for this offence is 10 years’ imprisonment. If it was not specifically singled out in Bill C-16, a conditional sentence would be available upon conviction for that offence. Since Bill C-54 will impose a mandatory sentence for a section 172.1 offence, a conditional sentence will no longer be available and, therefore, the special mention of this offence in Bill C-16 can be eliminated.

NOTES

1. *Criminal Code*, R.S.C. 1985, c. C-46.
2. An order of prohibition is set out in section 161 of the *Criminal Code*. This provision permits a court to make an order prohibiting an offender from attending near certain places where persons under 16 years of age may be present and from obtaining employment or a volunteer position which may involve the offender’s being in a position of trust or authority over persons under 16 years of age. The order of prohibition may be made where the offender is found guilty of a specified sexual offence and the complainant was under 16 years of age.

A recognizance is set out in section 810.1 of the *Criminal Code*. This section allows anyone to lay an information before a provincial court judge for the purpose of having the defendant enter into a recognizance, including conditions that he or she not engage in activity that involves contact with persons under 16 years of age and prohibiting him or her from attending certain places where persons under 16 years of age are likely to be present. The informant must fear, on reasonable grounds, that the defendant will commit one of the specified sexual offences in respect of children under 16 years of age.

3. Many offences can be prosecuted either by summary conviction or indictment. The Crown chooses or elects the mode of prosecution. Such offences are referred to as “hybrid” or “Crown option” or “dual procedure” offences. Hybrid offences are considered indictable until the Crown makes its election.

Summary conviction offences are considered to be less serious than indictable offences in the *Criminal Code*. The main difference between them is that the procedure for summary conviction offences is, as the name implies, more straightforward. Unless a different penalty is specified, summary conviction offences are punishable by a fine of up to \$5,000 or six months’ imprisonment, or both penalties, whereas the penalty for an indictable offence can be up to life imprisonment. An individual is not always fingerprinted for a summary conviction offence, but will be for an indictable offence. No prosecution of a summary offence can be undertaken more than six months after the commission of the offence, except with the agreement of the prosecutor and the defendant, while there is no limitation period for indictable offences. For the majority of indictable offences, the defendant can choose the type of trial: judge with jury or judge alone. For summary offences, the defendant cannot choose the type of trial: it takes place in summary conviction court, before a judge alone. Another difference between the two types of offences is that the waiting period before eligibility for a pardon for a summary conviction offence is three years, while for an indictable offence it is five years.

4. “Laying an information” usually refers to the formal means of laying a charge against an offender. The *Criminal Code* requires that a charge be brought in writing and under oath before a Justice of the Peace. In this instance, the information is laid before a provincial court judge and does not contain a formal charge, merely a fear that the defendant will commit one of the specified sexual offences in respect of persons under 16 years of age.
5. A “recognizance” refers to an obligation entered into before a judge by which the defendant must keep the peace and be of good behaviour. Under section 810.1 of the *Criminal Code*, the judge may add conditions to the recognizance, such as prohibiting the defendant from engaging in any activity that involves contact with persons under the age of 16 years.
6. Department of Justice, [“Backgrounder: Protecting Children from Sexual Predators,”](#) 4 November 2010.
7. Nicole Crutcher, “The Legislative History of Mandatory Minimum Penalties of Imprisonment in Canada,” *Osgoode Hall Law Journal*, Vol. 39, 2001, p. 273.
8. Section 12 states: “Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.”
9. *R. v. Smith*, [1987] 1 S.C.R. 1045.
10. *R. v. Nasogaluak*, [2010] 1 S.C.R. 206.
11. *Sex Offender Information Registration Act*, S.C. 2004, c. 10.
12. Bill S-2, An Act to amend the Criminal Code and other Acts (short title: Protecting Victims from Sex Offenders Act) (3rd Session, 40th Parliament), will allow police services to use the national sex offender database proactively to prevent crimes of a sexual nature. It also provides that those required to register as sex offenders are required to provide a sample for forensic DNA analysis.

13. Bill C-16, An Act to amend the Criminal Code (alternative title: Ending House Arrest for Property and Other Serious Crimes by Serious and Violent Offenders Act), 3rd Session, 40th Parliament.