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**LS-345E**

## **BILL C-7: AN ACT TO AMEND THE CRIMINAL RECORDS ACT**

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### **LEGISLATIVE HISTORY OF BILL C-7**

<b>HOUSE OF COMMONS</b>		<b>SENATE</b>	
<b>Bill Stage</b>	<b>Date</b>	<b>Bill Stage</b>	<b>Date</b>
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**Statutes of Canada 2000, c.1**

N.B. Any substantive changes in this Legislative Summary which have been made since the preceding issue are indicated in **bold print**.

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## BILL C-7: AN ACT TO AMEND THE CRIMINAL RECORDS ACT\*

### BACKGROUND

Bill C-7, proposes amendments to the *Criminal Records Act*, R.S.C. 1985, c. C-47. The *Criminal Records Act* enables persons who have been convicted of a criminal offence to obtain a pardon after a minimum conviction-free period of good behaviour (three years, where the person was convicted summarily and five years, where the person was convicted on an indictment) following completion of sentence. A person seeking a pardon under the *Criminal Records Act* must make an application to the National Parole Board. If the application is in respect of a conviction that was prosecuted summarily, the Board will automatically issue the pardon, once it is satisfied that the applicant has not had a further conviction since completion of the sentence. In the case of a conviction on an indictment, the Board will make inquiries in order to ascertain the applicant's conduct since the date of the conviction.

A pardon issued or granted by the National Parole Board under the *Criminal Records Act* reflects a determination that a criminal conviction should no longer reflect adversely on the applicant's character. These pardons are intended to contribute to the rehabilitation of offenders by enabling them to put their past misdeeds behind them

and reestablish themselves as law-abiding and productive members of the community.

Obtaining a pardon removes a number of disadvantages for persons with criminal convictions, particularly in relation to employment and travel. Pursuant to the *Criminal Records Act*, a pardon removes certain legal disqualifications that arise from a criminal conviction; requires federal departments and agencies to keep pardoned records separate and apart from other criminal records; and precludes disclosure of the existence of such records, except where authorized by the Solicitor General in the interests of the administration of justice or national security, or in order to confirm a person's identity from fingerprints found at a crime scene or to attempt to identify a deceased person or a person suffering from amnesia. While the Act applies only to federal departments and agencies, many of the provincial and municipal law enforcement agencies cooperate by restricting access to their criminal records in cases where a pardon has been awarded. The Act also precludes the use in the federal public sector or in federally regulated industries of any employment application that requires an applicant to disclose a criminal conviction in respect of which a pardon has been awarded. Moreover, federal and provincial human rights legislation prohibits discrimination in services and employment on the basis of a criminal conviction for which a pardon has been awarded.

A pardon under the *Criminal Records Act* automatically ceases to have effect when its recipient is subsequently convicted of a federal offence prosecuted by indictment. In addition, the National Parole Board may revoke a pardon if the person is subsequently convicted of an offence punishable on summary conviction, or if the Board is satisfied that the person is no longer of good character or was not honest in the application for the pardon.

The key changes proposed in Bill C-7 are:

- the imposition of a one-year waiting period for persons reapplying for a pardon after one has been denied;
- provision for the automatic revocation of a pardon upon a subsequent conviction for a hybrid offence (i.e., an offence that may be prosecuted either summarily or by indictment), subject to certain exceptions; and
- provision for indicating in the national automated criminal records retrieval system the existence of certain pardoned records so as to allow for such records to be disclosed in order to be used in screening individuals for positions of trust or authority in relation to children or other vulnerable persons.

In addition to those granted under the *Criminal Records Act*, pardons in respect of criminal convictions or sentences are also available from the Governor General and the Governor in Council under section 748 of the *Criminal Code*, R.S.C. 1985, c. C-46, and pursuant to the royal prerogative of mercy. With the exception of the obligation of segregation and non-disclosure of pardoned records and the prohibition on employment applications that require disclosure of a pardoned conviction, the *Criminal Records Act* does not apply to these other pardons. Nothing in Bill C-7 would affect pardons under the *Criminal Code* or the royal prerogative.

## DESCRIPTION AND ANALYSIS

### A. National Parole Board Procedure

#### 1. Clarification of Refusal and Revocation Procedures

In cases where the National Parole Board proposes either to refuse to grant or issue a pardon or to revoke a pardon, the Act affords the affected person certain rights of due process. In both cases, the Act provides that he or she must receive notification of the proposed refusal or revocation, as the case may be, and must be informed of the right to make such representations to the Board as the person believes to be relevant (sections 4.2(2) and 7.1(1)). The Act also requires that the Board consider any oral or written representations made by the person concerned before it decides on the refusal or revocation of a pardon (sections 4.2(3) and 7.1(2)).

In a case where the Board proposes to refuse a pardon, the Act does not now specifically require that the notice to the applicant be in writing. Clause 2 would amend section 4.2(2) of the Act to require that the notice would have to be in writing. Section 7.1(1) of the Act already specifies that written notice is required where the Board proposes to revoke a pardon. Clauses 2 and 7 would also amend sections 4.2(2) and 7.1(1), respectively, in order to specifically provide, with regard to both proposed refusals and revocations, that representations to the Board could be made by someone other than the person concerned (e.g., by a friend, family member, agent, or legal counsel).<sup>(1)</sup> Clauses 2 and 7 would also amend sections 4.2(2) and 7.1(1), respectively, to stipulate that, while the Board would still be able to receive representations made orally or in writing, it would be for the Board to decide whether it would receive oral representations in a given case. Currently, the wording of the Act indicates that the affected person may determine the nature of his or her representations to the Board.

#### 2. Restriction on Re-Applying

Currently, there is nothing in the Act to prevent an unsuccessful applicant for a pardon from immediately re-applying. Moreover, whenever a valid application is received, the National Parole Board is required by section 4.2 of the Act to take certain steps. Where a pardon is sought in respect of a conviction on an indictment, the Board must cause inquiries to be made into the conduct of the applicant since the date of conviction. In all cases, the Board must notify the applicant if it proposes to refuse the application and, prior to making its decision, must provide such the applicant with the opportunity to make representations. Thus, a certain amount of time and effort is involved in handling every application. Clause 2 would add a new section 4.2(4) to provide that an unsuccessful pardon applicant would be precluded from re-applying within one year from the date of the Board's refusal.

### B. Effect of a Pardon

#### 1. The Current Law: Section 5

Section 5 of the Act describes the inherent effects and meaning of a pardon under the

Act. Section 5(a) states that such a pardon is evidence of the fact that the conviction to which it applies should no longer reflect adversely on the person's character. A pardon granted in respect of a conviction for an offence prosecuted by indictment signifies that, after making inquiries, the National Parole Board is satisfied that the person has been of good conduct. Section 5(b) of the Act further provides that, unless it is subsequently revoked or ceases to have effect, a pardon "vacates the conviction in respect of which it is granted and, without restricting the generality of the foregoing, removes any disqualification to which the person so convicted is, by reason of the conviction, subject by virtue of the provisions of any Act of Parliament". However, section 5 preserves certain prohibition orders that the sentencing court may have made in certain cases with respect to the possession of firearms and other weapons and related items;(2) particular activities that bring a person into frequent contact with children;(3) and operation of a motor vehicle.(4)

## 2. The Effect of Clause 4

Clause 4 of the bill would remove from section 5(b) of the Act the words describing a pardon as having the effect of vacating the conviction in respect of which it has been granted or issued. The term "vacates" in section 5(b) has caused a certain amount of confusion as to the precise effect of a *Criminal Records Act* pardon on the relevant criminal conviction.

The position of the National Parole Board and the Department of the Solicitor General is that, while a pardon requires a criminal record to be sealed, it does not erase the fact that a person was convicted of an offence.(5) The normal meaning of the word "vacate" in relation to a legal judgment, however, is to annul, set aside, cancel, rescind or to render void.(6) In other words, Parliament's use of the word "vacates" tended to suggest that, so long as it remained in effect and subject to the need to access a pardoned record in certain limited circumstances, a pardon under the Act would have the same effect on a conviction as an appellate court's decision to quash it. In a number of cases, courts appear to have interpreted section 5(b) of the Act in this manner.(7) Moreover, this interpretation of a pardon as "vacating" a conviction seems to be consistent with the recommendations of the 1969 *Report of the Canadian Committee on Corrections*, on which the *Criminal Records Act* was originally based.(8) However, in other cases, the courts have ruled that a pardon as defined by section 5(b) of the Act does not actually disturb the underlying conviction.(9) The situation is further confused by the French version of section 5(b), which had originally said (consistent with the English version) that, absent revocation or nullification, a pardon "*annule la condamnation...*" (i.e., vacates, nullifies, voids or quashes the conviction). In the 1985 Revised Statutes, however, this phrase was changed to read that: a pardon "*efface les conséquences de la condamnation...*" (i.e., erases *the consequences* of the conviction).

The new wording for section 5(b) of the Act proposed in clause 4 of the bill would eliminate any reference to a pardon's effect on the conviction *per se* and would instead simply indicate that a pardon "requires the judicial record of the conviction to be kept separate and apart from other criminal records"; this would reflect the existing obligation imposed in section 6(2) of the Act on all federal departments and agencies in respect of the pardoned records in their custody.

### C. Disclosure of Conviction in Certain Circumstances

Once a pardon in respect of a criminal conviction has been issued or granted under the Act, section 6(1) authorizes the Solicitor General to order any person having custody or control of a judicial record of the conviction to deliver it into the custody of the Commissioner of the R.C.M.P. Section 6(2) prohibits the R.C.M.P. and any other federal department or agency with custody of a pardoned record from disclosing that record or its existence, or the fact of the conviction. The exceptions to this prohibition are set out in sections 6(3) and 6.2 of the Act. Section 6(3) permits disclosure of a pardoned record where the Solicitor General is satisfied that disclosure is desirable in the interests of the administration of justice or for any purpose related to the safety or security of Canada or of any state allied or associated with Canada. Section 6.2 permits the disclosure to police of the name, date of birth and last known address of a person in order to confirm the identity of a person whose fingerprints are found at the scene of a crime or in attempts to identify a deceased person or a person suffering from amnesia.

Clause 6 of the bill would create a new exception to the general rule of non-disclosure of pardoned records as set out in section 6(2) of the Act. Where an individual was seeking a position of trust or authority in relation to children or other vulnerable persons (on either a paid or volunteer basis), new section 6.3 would permit information pertaining to pardoned records for **sex-related** offences to be made available to people or organizations responsible for the well-being of those persons. The relevant offences **are** set out in **the schedule to the bill, which could be amended** by the Governor in Council **by order under proposed new section 6.3(9). For the purposes of clause 6, "children" would be defined as persons under 18 years of age. "Vulnerable persons" would be defined as persons in a position of dependence, or otherwise at a greater risk of harm from persons in a position of trust or authority relative to them, because of their age, a disability, or other circumstances (whether temporary or permanent).**

Proposed section 6.3(1) would require the Commissioner of the R.C.M.P. to have notations made in the automated criminal conviction records retrieval system that would enable police or other authorized bodies to determine whether an individual had a pardoned record in respect of an offence listed in the regulations. Clause 8 (see proposed section 9.1(b)) would authorize the Governor in Council to make regulations concerning the proposed notations.

Before a police force or other authorized body could verify whether a person was the subject of a notation indicating a pardoned record in respect of a designated offence, an individual or organization responsible for the well-being of children or other vulnerable persons would have to have requested such verification in respect of an applicant for a position of trust or authority in relation to vulnerable persons and the applicant would have to have given written consent (proposed section 6.3(2)). The precise nature of the consent to such a verification, and the information to be given to applicants prior to obtaining it, would be set out in regulations made under proposed section 9.1(d) of the Act (clause 8). Proposed section 6.3(3), read with section 10 of the Act, would make it an offence punishable on summary conviction to make use of the proposed verification process other than in the circumstances set out above (proposed section 6.3(2)).(10)

A police force or other authorized body that identified an applicant as being the subject of a notation indicating a pardoned record in respect of a designated offence, would then request the Commissioner of the R.C.M.P. to transmit that record to the Solicitor General (proposed section 6.3(4)). The R.C.M.P. Commissioner would then have to send the pardoned record to the Solicitor General who would be responsible for disclosing all or any part of such a record to the requesting police force or authorized body (proposed sections 6.3(4) and 6.3(5)). Regulations made under proposed section 9.1(c.1) (clause 8) would prescribe the factors that the Solicitor General would have to consider in deciding whether to disclose a pardoned record. The police force or authorized body would then disclose this information to the person or organization that had requested it, provided that the applicant had consented in writing to the disclosure (proposed section 6.3(6)). The precise nature of the consent to such disclosure, and the information to be given to an applicant prior to obtaining his or her consent, would be set out in regulations made under proposed section 9.1(d) of the Act (clause 8).

Proposed section 6.3(7), read with section 10 of the Act, would make it an offence punishable on summary conviction for anyone to make use of, or communicate, the information disclosed under proposed section 6.3(6), other than in relation to the assessment of the applicant for the position.(11)

Clause 6 of the bill would also add a section 6.4 to stipulate that proposed section 6.3 would apply to pardoned records regardless of either the date of the conviction or the date of the pardon. This would ensure that the foregoing notation and disclosure process for pardoned records for designated offences would apply to existing pardoned records and not just to those created after the coming into force of the bill.

#### D. Pardon Ceasing to Have Effect in Certain Cases

In addition to situations where a pardon is revoked as a result of a discretionary decision by the National Parole Board (i.e., subsequent conviction for a summary conviction offence under federal law; or where the Board is satisfied that the person is no longer of good conduct or had lied, been deceptive or concealed material information in relation to the pardon application), the *Criminal Records Act* also envisions situations where a pardon under the Act will automatically cease to have effect without any action by the Board. Currently, section 7.2 of the Act provides that this is the case upon a person's subsequent conviction for a federal offence prosecuted by indictment.

Clause 7 would amend section 7.2 of the Act in order to extend the automatic cessation of pardons to situations where a person was subsequently convicted of hybrid offences (i.e., offences punishable on conviction on an indictment or on summary conviction) under the following Acts of Parliament, even when prosecuted summarily:

- the *Criminal Code*, except for the offences in section 255(1) (impaired driving, driving with a blood-alcohol content in excess of 80 mg per 100 ml, and refusal to comply with a demand for a breath or blood sample);
- the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19;

- the *Firearms Act*, S.C. 1995, c. 39;
- Parts III and IV of the *Food and Drugs Act*, R.S.C. 1985, c. F-27 (Parts III and IV deal with various offences in relation to "controlled" and "restricted" drugs); and
- the *Narcotic Control Act*, R.S.C. 1985, c. N-1.

Clause 7 would also extend the Act's provision for automatic cessation of a pardon to situations where:

- a person was subsequently convicted of a service offence under the *National Defence Act*, R.S.C. 1985, c. N-5, and punished with a fine of more than \$2,000, detention for more than six months, dismissal from Her Majesty's service, imprisonment for more than six months, or dismissal with disgrace from Her Majesty's service;
- the National Parole Board was convinced by new information that the person had not been eligible for a pardon in the first place.

#### E. Miscellaneous

Clause 1 would make a minor editorial change to the French version of section 4. Clauses 3, 5 and 9 would amend the Act and section 750(4) of the *Criminal Code* in order to add references to "issued" as well as "granted" pardons. This set of changes would ensure consistency with the terminological distinction in section 4.1 of the Act between pardons for offences prosecuted summarily, which the National Parole Board "issues," and pardons for offences prosecuted by indictment, which the Board "grants." Clause 10 would provide for the coming into force of any or all of the bill's provisions on a day or days (as the case might be) to be fixed by Governor in Council.

#### COMMENTARY

As included in Bill C-69 of the previous session, the provisions of Bill C-7 have been commented upon by various interested groups. The focus of this commentary has been the proposal in clause 6 for flagging the existence of certain pardoned records and permitting disclosure of those records for use in the screening of individuals for certain kinds of employment. This initiative is supported by victims' rights groups, such as Victims of Violence - Centre for Missing Children and the Resource Centre for Victims of Crime, as well as by police organizations, such as the Canadian Police Association and the Canadian Association of Chiefs of Police, and by other groups, such as the Churchill Park Family Care Society (an Alberta organization of early childhood educators and caregivers), the Canada Family Action Coalition, and Scouts Canada.<sup>(12)</sup>

On the other hand, groups primarily concerned with offender rehabilitation and reintegration, such as the John Howard Society, the Elizabeth Fry Society and the St. Leonard Society, have emphasized the need to preserve the integrity and value of pardons.<sup>(13)</sup> This concern is shared by the Criminal Lawyers' Association and



Volunteer Canada.<sup>(14)</sup> Of these groups, however, it seems that only the Elizabeth Fry Society and the Criminal Lawyers' Association actually oppose the proposed provisions for disclosure of pardoned records. These two groups suggest that further opportunities for disclosing pardoned records would compromise the rehabilitation and reintegration of offenders and that there is insufficient evidence that the current law is inadequate to protect society.<sup>(15)</sup>

Volunteer Canada, while more or less supportive of the bill, has nonetheless expressed its concern that an emphasis on access to pardoned records could create a false sense of security and detract from other key elements of personnel screening for positions of trust in relation to vulnerable persons.<sup>(16)</sup> The John Howard Society and the Elizabeth Fry Society share this concern.<sup>(17)</sup>

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\* The bill was originally introduced in the first session of the 36th Parliament as Bill C-69. By motion adopted 14 October 1999, the House of Commons provided for the reintroduction in the second session of legislation that had not received Royal Assent.

(1) The Act already envisions this possibility. Section 4.2(3) requires the Board to consider any oral or written submissions made to it "by or on behalf of the applicant," prior to making a decision on an application where it has given notice that it proposes to refuse the application.

(2) *Criminal Code* sections 109 and 110 and *National Defence Act*, R.S.C. 1985, c. N-5, as amended, section 147.1(1).

(3) *Criminal Code* section 161.

(4) *Criminal Code* section 259.

(5) National Parole Board, *Facts: Pardons*, p. 1; and Solicitor General Canada, "Federal Government to Close Gap in Screening System for Pardoned Sex Offenders," Backgrounder, Ottawa, March 1999.

(6) Henry Campbell Black, *Black's Law Dictionary*, 6th ed., West Publishing Co., St. Paul, Minn., 1990, p. 1548.

(7) *Silver v. Silver* (1980), 15 R.F.L. (2d) 142 (Alta. C.A.); *Canada (Minister of Employment and Immigration) v. Burgon*, [1991] 3 F.C. 44 (C.A.), at p. 59-60; and *Lui v. Canada (Minister of Employment and Immigration)* (1997), 39 Imm. L.R. (2d) 60, 134 F.T.R. 308.

(8) Chapter 23, at p. 409 of the Report: "The Committee recommends that, save as provided in this report with respect to the investigation of crime and subject to the safeguards and restrictions specified, a conviction which has been annulled or vacated shall be deemed never to have taken place in respect of all matters over which Parliament has jurisdiction..."

(9) *Smith v. Canada (Minister of Citizenship and Immigration)*, [1998] 3 F.C. 144 (T.D.); and *C.(J.) v. B.C. (Director of Child, Family and Community Services)* (1997), 42 B.C.L.R. (3d) 178 (S.C.).

(10) Since the Act does not specify the punishment to which someone convicted of an offence under section 10 is liable, such offences fall under the general summary conviction offence penalty provision of the *Criminal Code* (section 787(1)), which provides that a person so convicted is liable to a fine of up to \$2,000 and/or imprisonment for up to six months.

(11) See footnote 10.

(12) House of Commons, Standing Committee on Justice and Human Rights, *Minutes of Proceedings and Evidence*, 1st Session, 36th Parliament, 18 March 1999, and 23 March 1999; Canadian Resource Centre for Victims of Crime letter of 10 June 1999; and Senate, Legal and Constitutional Affairs, 14 June 1999.

(13) H. of C., Justice and Human Rights, 18 March 1999 (Christine Leonard), and 23 March 1999 (Kim Pate); and St. Leonard's Society letter of 17 March 1999.

(14) Criminal Lawyers' Association letter of 18 March 1999; and H. of C., Justice and Human Rights, 23 March 1999 (Paddy Bowen).

(15) Criminal Lawyers' Association letter of 18 March 1999; and H. of C., Justice and Human Rights, 23 March 1999 (Kim Pate).

(16) H. of C., Justice and Human Rights, 23 March 1999 (Paddy Bowen); and Senate, Legal and Constitutional Affairs, 14 June 1999 (Paddy Bowen).

(17) H. of C., Justice and Human Rights, 18 March 1999 (Christine Leonard), and 23 March 1999 (Kim Pate).