



IN BRIEF

CRIMINAL LAW REFORMS DURING THE 42ND PARLIAMENT

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CRIMINAL LAW REFORMS DURING THE 42ND PARLIAMENT

1 INTRODUCTION

In accordance with the *Canadian Charter of Rights and Freedoms* (the Charter),¹ Canada's justice system ensures individuals charged in criminal cases are protected by important legal safeguards. These are necessary in part because of the significant consequences that actions by the state and court decisions can have on individual rights and freedoms. For the same reason, many decisions in criminal matters can be appealed as of right to appellate courts and the Supreme Court of Canada (i.e., without having to demonstrate an error in the lower court decision, or some other ground for appeal).² Thus, appellate courts are frequently called upon to interpret issues pertaining to evidence, procedure and law, particularly with a view to assessing their compliance with the Charter.³ This has created a large body of case law that represents an ongoing dialogue⁴ between the courts and Parliament whereby they seek to resolve these often complex issues.

The purpose of this publication is to identify links between certain criminal law bills introduced during the 42nd Parliament and their origins in the jurisprudence. To do this, all criminal law bills that received Royal Assent during the 42nd Parliament were reviewed and the key ones chosen for inclusion in this paper.⁵ However, this process did not involve systematically analyzing all the proposed amendments.

It would appear that the goal behind these legislative amendments is to ensure that the criminal law is Charter-compliant, so that persons charged with criminal offences can fully exercise their constitutional rights.

2 MEDICAL ASSISTANCE IN DYING (BILL C-14 AND CARTER V. CANADA (ATTORNEY GENERAL))

Bill C-14 was introduced in the House of Commons on 14 April 2016⁶ in direct response to the Supreme Court of Canada's *Carter* decision of 6 February 2015.⁷ In this case, the Supreme Court found that sections 241(b) and 14 of the *Criminal Code*, which made it illegal to aid or abet a person to commit suicide, violated section 7 of the Charter

insofar as they prohibit physician-assisted death for a competent adult person who (1) clearly consents to the termination of life; and (2) has a grievous and irremediable medical condition (including an illness, disease or disability) that causes enduring suffering that is intolerable to the individual in the circumstances of his or her condition.⁸

The Supreme Court's declaration of invalidity was initially suspended for 12 months, then extended until 6 June 2016, a few months after the start of the 42nd Parliament.⁹ As stated by the then Minister of Justice,

[f]rom the start, we have known from the Supreme Court of Canada's unanimous Carter decision, that it is not about whether or not to have medical assistance in dying; it is about how we will do it. ... With all of this in mind, and in appreciating the limited time frame we have had to respond to the Carter decision, our government has chosen an approach that respects both the charter and the needs and values of Canadians.¹⁰

Bill C-14 set out the requirements for providing medical assistance in dying (MAID) and established exemptions to various *Criminal Code* offences for physicians, nurse practitioners, pharmacists and certain other persons who provide or assist in the provision of MAID.¹¹ The bill received Royal Assent on 17 June 2016.

3 UNCONSTITUTIONAL PROVISIONS (BILLS C-51 AND C-75)

One of the effects of bills C-51 and C-75 (which reproduced the content of Bill C-39)¹² was to repeal and amend the *Criminal Code* provisions that had been declared unconstitutional by the Supreme Court of Canada and certain courts of appeal.¹³ These provisions included the repeal of section 287 (abortion), which was declared unconstitutional in *R. v. Morgentaler* in 1988, and section 159 (anal intercourse), which was declared unconstitutional in both *R. v. C.M.* in 1995 and *R. v. Roy* in 1998.¹⁴ As described in the Charter Statement for Bill C-39,

[p]arliamentary repeal or amendment of invalid legislation can be considered a final step that fully vindicates the rule of law, since it ensures that the law “on the books” reflects the actual state of the law in Canada.¹⁵

Failure to repeal or amend unconstitutional provisions in the consolidated Acts can have serious consequences. For example, in 2016, Travis Vader was convicted of second-degree murder under a provision that the Supreme Court had declared unconstitutional more than 25 years earlier.¹⁶ Bill C-51 received Royal Assent on 13 December 2018 and Bill C-75 on 21 June 2019.

4 **IMPAIRED DRIVING (BILL C-46)**

Bill C-46 was introduced in the House of Commons on 13 April 2017¹⁷ partly in response to certain Supreme Court of Canada decisions regarding impaired driving. As impaired driving is one of the areas of criminal law most frequently litigated before the courts, the *Criminal Code* has consequently been amended on several occasions over the years in response to rulings in this area.¹⁸ Specifically, Bill C-46

- restricted the defences available to the accused, such as the “two-beer defence,” in accordance with the Supreme Court decision in *R. v. St-Onge Lamoureux*;¹⁹
- made the opinion of an evaluating officer (or drug recognition expert) admissible as evidence without qualifying the evaluating officer as an expert, in accordance with the Supreme Court decision in *R. v. Bingley*;²⁰ and
- authorized peace officers to conduct random roadside testing for the presence of alcohol in the body without needing to have reasonable grounds to suspect that an offence has been committed. The Supreme Court considered similar issues (random stops) in *Dedman v. The Queen*, *R. v. Hufsky* and *R. v. Ladouceur*;²¹ however, these decisions did not address the ability of a peace officer to conduct random roadside testing without reasonable grounds.

However, it should be noted that the reforms introduced in Bill C-46 went beyond the codification of certain court decisions.²² Indeed, Part 2 of the bill (which came into force in December 2018) reformed the *Criminal Code* provisions governing offences in relation to modes of transportation to “create a new, modern, simplified, and more coherent system to better deter drug and alcohol-impaired driving.”²³ Bill C-46 received Royal Assent on 21 June 2018.

5 **UNREASONABLE DELAYS (BILL C-75, R. V. JORDAN AND R. V. CODY)**

Bill C-75 was introduced in the House of Commons on 29 March 2018 partly in response to the Supreme Court of Canada decisions in *Jordan* and *Cody* on 8 July 2016 and 16 June 2017, respectively.²⁴ In *Jordan*, the Supreme Court established a new analytical framework to determine whether the right of the accused to be tried within a reasonable time, pursuant to section 11(b) of the Charter, has been infringed.²⁵ This decision was subsequently confirmed unanimously in *Cody*. In *Jordan*, the Supreme Court found that

[a]s a result [of a culture of complacency], participants in the justice system – police, Crown counsel, defence counsel, courts, provincial legislatures, and Parliament – are not encouraged to take preventative measures to address inefficient practices and resourcing problems.²⁶

A number of times in their reasons for judgment in this case, the majority noted that Parliament and the provincial legislatures will have to act on this decision in order to take “a fresh look at rules, procedures, and other areas of the criminal law.”²⁷ Bill C-75 was intended to make the criminal justice system more modern and efficient and to thus reduce delays in criminal proceedings. It brought in numerous changes, such as reclassifying a number of criminal offences, restricting the availability of preliminary inquiries and modernizing bail procedures.²⁸ The bill received Royal Assent on 21 June 2019.

6 **BESTIALITY (BILL C-84 AND R. V. D.L.W.)**

Bill C-84 was introduced in the House of Commons on 18 October 2018,²⁹ partly in response to the Supreme Court of Canada decision in *D.L.W.* on 9 June 2016.³⁰ In this decision, the Supreme Court considered the fact that bestiality was undefined in section 160 of the *Criminal Code* and determined that sexual penetration was one of the essential elements of the offence and therefore did not capture other sexual acts. In this case, the accused was convicted of numerous sexual offences for acts he committed against his two stepdaughters. However, he was acquitted of the bestiality charge as penetration was not involved.

New section 160(7) of the *Criminal Code* (clause 1 of Bill C-84) defines “bestiality” as “any contact, for a sexual purpose, with an animal.”³¹ As a result of this new definition, the offence of bestiality now captures any sexual act involving an animal and a human, whether there is penetration or not. The bill received Royal Assent on 21 June 2019.

7 **ANALYSIS**

While there seems to be a renewed interest in criminal justice issues, particularly since *Jordan*, it appears that the primary purpose of many of the criminal law bills introduced during the 42nd Parliament was to implement court decisions. However, this conclusion must be tempered in light of bills C-46 and C-75, which brought in much broader reforms. That said, a number of reforms that had been announced and were therefore anticipated, including sentencing reform, have yet to be introduced.³²

As acknowledged by the Department of Justice in a recent report on the review of Canada’s criminal justice system,

[i]n summary, the review found widespread recognition that our criminal justice system needs comprehensive reform, including greater flexibility to respond to criminality – and those affected by it – in new and different ways.³³

The report also states that “our criminal justice system has become inefficient and, at times, crippled by delays. Some have described the *Criminal Code* as a patchwork of provisions that is out of touch with modern times.”³⁴ This is nothing new, however. During the 42nd Parliament, for example, the Standing Senate Committee on Legal and Constitutional Affairs twice recommended that the federal government establish “an independent body of experts with a mandate to undertake a comprehensive and impartial review of the *Criminal Code* and provide recommendations for the modernization and reform of this law.”³⁵ This call for reform was also made by nearly 50 criminal law professors from across the country in a December 2015 letter to the then Minister of Justice recommending that she conduct a comprehensive review of the *Criminal Code* and at the same time offering their cooperation. Among the signatories was Professor Coughlan, who believes it is critically important to undertake a “systematic, rather than piecemeal, reform” of criminal law.³⁶ Specifically, he takes issue with the fact that the *Criminal Code* lacks a general part setting out the required mental element for a given offence. As the Supreme Court pointed out in 2015,

[r]egrettably, the *Criminal Code* often provides no clear direction about the required mental element for a given offence. It is therefore left to judges to attempt to divine the required mental element (also referred to as the degree of fault).³⁷

A review of Supreme Court of Canada decisions shows that the criminal law is constantly evolving, in both common law and statutory law. Since the Supreme Court is frequently called upon to rule on complex issues, often involving individuals’ rights and freedoms, Parliament is constantly engaged in an ongoing dialogue with the courts. It is therefore in part to fulfill its responsibility to ensure that our laws are up to date and consistent with Charter rights that Parliament makes amendments to the *Criminal Code* in light of these court decisions, as it did during the 42nd Parliament.

NOTES

1. [Canadian Charter of Rights and Freedoms](#) [Charter], Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.
2. Sections 675 and 676 of the *Criminal Code* specify the conditions under which a person who is convicted in proceedings by indictment and under which the attorney general may appeal as of right to an appellate court. Sections 691 to 693 provide for cases in which it is possible to appeal to the Supreme Court (as of right and by leave).
3. In 2018, 50% of appeals heard by the Supreme Court of Canada were criminal law matters (14% of them also involved the Charter). As well, 25 of 26 appeals as of right were criminal cases. See Supreme Court of Canada, [Year in Review 2018](#), pp. 8–9.
4. This refers to the principle of “dialogue” between Parliament and the courts. See in particular Maxime Charron-Tousignant and Robin MacKay, [Parliament and the Courts: Balancing the Roles](#), HillNotes, Library of Parliament, 16 December 2015.

5. The following bills were not considered in preparing this publication: [Bill C-16, An Act to amend the Canadian Human Rights Act and the Criminal Code](#), 1st Session, 42nd Parliament (S.C. 2017, c. 13), which simply added the words “gender identity or expression” to two provisions of the *Canadian Human Rights Act* and the *Criminal Code*; [Bill C-45, An Act respecting cannabis and to amend the Controlled Drugs and Substances Act, the Criminal Code and other Acts](#), 1st Session, 42nd Parliament (S.C. 2018, c. 16), which regulates certain cannabis-related activities to protect public health and safety; and Division 20 of Part 6 of [Bill C-74, An Act to implement certain provisions of the budget tabled in Parliament on February 27, 2018 and other measures](#), 1st Session, 42nd Parliament (S.C. 2018, c. 12), which established a remediation agreement regime for organizations charged with certain economic offences.
6. [Bill C-14, An Act to amend the Criminal Code and to make related amendments to other Acts \(medical assistance in dying\)](#), 1st Session, 42nd Parliament (S.C. 2016, c. 3).
7. [Carter v. Canada \(Attorney General\)](#), 2015 SCC 5.
8. *Ibid.*, para. 127.
9. The 42nd Parliament opened following the general election of 19 October 2015.
10. House of Commons, [Debates](#), 1st Session, 42nd Parliament, 22 April 2016.
11. See Julia Nicol and Marlisa Tiedemann, [Legislative Summary of Bill C-14: An Act to amend the Criminal Code and to make related amendments to other Acts \(medical assistance in dying\)](#), Publication no. 42-1-C14-E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 27 September 2018.
12. [Bill C-51, An Act to amend the Criminal Code and the Department of Justice Act and to make consequential amendments to another Act](#), 1st Session, 42nd Parliament (S.C. 2018, c. 29); and [Bill C-75, An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts](#), 1st Session, 42nd Parliament (S.C. 2019, c. 25).
13. See Maxime Charron-Tousignant, Robin MacKay and Julia Nicol, [Legislative Summary of Bill C-39: An Act to amend the Criminal Code \(unconstitutional provisions\) and to make consequential amendments to other Acts](#), Publication no. 42-1-C39-E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 5 June 2017; and Lyne Casavant et al., [Legislative Summary of Bill C-51: An Act to amend the Criminal Code and the Department of Justice Act and to make consequential amendments to another Act](#), Publication no. 42-1-C51-E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 18 December 2018.
14. [R. v. Morgentaler](#), [1988] 1 SCR 30; [R. v. C.M.](#), 1995 CanLII 8924 (ON CA); and [R. c. Roy](#), 1998 CanLII 12775 (QC CA). [Available in French only]
15. Department of Justice, [Charter Statement – Bill C-39, An Act to amend the Criminal Code \(unconstitutional provisions\) and to make consequential amendments to other Acts](#).
16. Travis Vader was convicted of second-degree murder under section 230 of the *Criminal Code* (repealed since the coming into force of Bill C-75). This provision had been found to violate sections 7 and 11(d) of the Charter by the Supreme Court in [R. v. Vaillancourt](#), [1987] 2 SCR 636 (CanLII) (s. 230(d)); [R. v. Martineau](#), [1990] 2 SCR 633 (CanLII) (s. 230(a)); and [R. v. Sit](#), [1991] 3 SCR 124 (CanLII) (s. 230(c)). Acknowledging his error, the judge subsequently substituted a verdict of manslaughter. See [R. v. Vader](#), 2016 ABQB 625 (CanLII).
17. [Bill C-46, An Act to amend the Criminal Code \(offences relating to conveyances\) and to make consequential amendments to other Acts](#), 1st Session, 42nd Parliament (S.C. 2018, c. 21).
18. Senate, Standing Committee on Legal and Constitutional Affairs [LCJC], [Evidence](#), 1st Session, 42nd Parliament, 28 February 2018 (Kathryn Pentz, Secretary, Canadian Bar Association).
19. [R. v. St-Onge Lamoureux](#), 2012 SCC 57.
20. [R. v. Bingley](#), 2017 SCC 12.
21. [Dedman v. The Queen](#), [1985] 2 SCR 2; [R. v. Hufsky](#), [1988] 1 SCR 621; and [R. v. Ladouceur](#), [1990] 1 SCR 1257.
22. See Maxime Charron-Tousignant and Dominique Valiquet, [Legislative Summary of Bill C-46: An Act to amend the Criminal Code \(offences relating to conveyances\) and to make consequential amendments to other Acts](#), Publication no. 42-1-C46-E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 24 July 2018.

23. Health Canada, [Backgrounder: Changes to Impaired Driving Laws](#), Backgrounder, April 2017.
24. [R. v. Jordan](#), 2016 SCC 27; and [R. v. Cody](#), 2017 SCC 31. See also Department of Justice, [Charter Statement – Bill C-75: An Act to Amend the Criminal Code, Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts](#), 29 March 2018.
25. See Maxime Charron-Tousignant, [Unreasonable Delays in Criminal Trials: New Legal Framework](#), HillNotes, Library of Parliament, 17 August 2016; and Maxime Charron-Tousignant, [Unreasonable Delays in Criminal Trials: the Impact of the Jordan Decision](#), HillNotes, Library of Parliament, 11 December 2017.
26. [R. v. Jordan](#), para. 41.
27. *Ibid.*, para. 140.
28. See Laura Barnett et al., [Legislative Summary of Bill C-75: An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts](#), Publication no. 42-1-C75-E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 25 July 2019.
29. [Bill C-84, An Act to amend the Criminal Code \(bestiality and animal fighting\)](#), 1st Session, 42nd Parliament (S.C. 2019, c. 17).
30. [R. v. D.L.W.](#), 2016 SCC 22. See also Department of Justice, [Charter Statement – Bill C-84: An Act to amend the Criminal Code \(bestiality and animal fighting\)](#), 6 December 2018.
31. See Julian Walker, [Legislative Summary of Bill C-84: An Act to amend the Criminal Code \(bestiality and animal fighting\)](#), Publication no. 42-1-C84-E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 28 December 2018.
32. See the Honourable David Lametti, [Letter to the Standing Senate Committee on Legal and Constitutional Affairs](#), 10 May 2019. In his letter, the Minister of Justice and Attorney General of Canada referred to the fact that a “broad review of sentencing and sentencing reform that includes mandatory minimum penalties” was underway.
33. Department of Justice Canada, [Final Report on the Review of Canada’s Criminal Justice System](#), Ottawa, 2019, p. 10.
34. *Ibid.*, p. 5.
35. Senate, LCJC, [Thirty-Second Report](#), 4 June 2019, Observation 2; and Senate, LCJC, [Delaying Justice is Denying Justice: An Urgent Need to Address Lengthy Court Delays in Canada](#), Final Report, June 2017, APPENDIX A – List of Recommendations, Recommendation 5, p. 194.
36. Steve Coughlan, “Criminal Code Reform: Where Do We Stand?,” *Canadian Criminal Law Review*, Vol. 24, No. 1, March 2019, p. 111. The letter sent to the Minister of Justice on 2 December 2015 is mentioned on p. 121. See also Steve Coughlan, “Canada Needs a Criminal Code,” in *Réformer le droit criminel au Canada : défis et possibilités / Criminal Law Reform in Canada: Challenges and Possibilities*, ed. Julie Desrosiers, Magarida Garcia and Marie-Ève Sylvestre, Éditions Yvon Blais, Montréal, 6 June 2017.
37. [R. v. Tatton](#), 2015 SCC 33, para. 23. The Supreme Court also states that several academics and law reform bodies have long called for the *Criminal Code* to be amended to specify the mental element and fault required for each crime (para. 24).