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LEGISLATIVE SUMMARY

Bill C-23B:
Eliminating Pardons for Serious Crimes Act

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Legislative Summary of Bill C-23B

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Notice: For clarity of exposition, the legislative proposals set out in the bill described in this Legislative Summary are stated as if they had already been adopted or were in force. It is important to note, however, that bills may be amended during their consideration by the House of Commons and Senate, and have no force or effect unless and until they are passed by both houses of Parliament, receive Royal Assent, and come into force.

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-23B: ELIMINATING PARDONS FOR SERIOUS CRIMES ACT

1 BACKGROUND

Bill C-23B, An Act to amend the Criminal Records Act and to make consequential amendments to other Acts (short title: Eliminating Pardons for Serious Crimes Act) was introduced and received first reading in the House of Commons on 11 May 2010. This bill passed second reading and was referred to the Standing Committee on Public Safety and National Security on 14 June 2010 under the number C-23, but on 17 June 2010, the following motion was adopted by the House of Commons:

> That, notwithstanding any Standing Order or usual practice of the House, it be an instruction to the Standing Committee on Public Safety and National Security that it divide Bill C-23, An Act to amend the Criminal Records Act and to make consequential amendments to other Acts, into two bills, namely Bill C-23A, An Act to amend the Criminal Records Act, and Bill C-23B, An Act to amend the Criminal Records Act and to make consequential amendments to other Acts.[1]

The motion then set out the specific wording of Bill C-23A and the contents of Bill C-23B. Bill C-23A, An Act to amend the Criminal Records Act (short title: Limiting Pardons for Serious Crimes Act), was then unanimously deemed to have been reported from the committee without amendment, concurred in at report stage, and read a third time and passed. This bill was then adopted by the Senate without amendment on 28 June 2010. It was given Royal Assent on 29 June 2010 and entered into force as S.C. 2010, c. 5.

The remaining aspects of the original Bill C-23, now called Bill C-23B, amend the *Criminal Records Act* [2] to substitute the term “record suspension” for the term “pardon.” It extends the ineligibility periods for applications for a record suspension to five years for summary conviction offences and to 10 years for indictable offences. It also makes those convicted of sexual offences against minors and those who have been convicted of more than three indictable offences ineligible for a record suspension. The bill also enables the National Parole Board (also known as the Parole Board of Canada) to consider additional factors when deciding whether to order a record suspension.

1.1 PARDONS LAW

In his remarks before the Standing Senate Committee on Legal and Constitutional Affairs, the head of the National Parole Board stated that the pardons system has a dual benefit: to assist the individual with a criminal record in moving forward in his or her rehabilitation, and to enhance the safety of communities by motivating the individual to remain crime-free and to maintain good conduct.[3] A person may apply for a pardon if he or she was convicted of an offence under a federal Act or regulation. A person may apply even if he or she is not a Canadian citizen or a resident of Canada.[4] A person may also apply if he or she was convicted in another country and transferred to Canada under the *International Transfer of Offenders Act*.[5]

Prior to the entry into force of Bill C-23A, a person could apply to the National Parole Board for a pardon three years after the expiry of a sentence for a summary conviction offence and five years after the expiry of a sentence for an indictable offence, under the *Criminal Records Act*. These time periods also applied to service offences under the *National Defence Act*,[6] with the amount of time that was required to elapse depending upon the punishment imposed for the offence. The following provisions continue to apply: A sentence is completed when a person has paid all fines, surcharges, costs, restitution and compensation orders in full; when that person has served all of his or her time, including parole or statutory release; and when that person has satisfied his or her probation order.[7] Because their sentences never expire, those serving life or indeterminate sentences are not eligible for a pardon under the *Criminal Records Act*.

A person does not need to apply for a pardon if his or her criminal record consists only of absolute or conditional discharges. Absolute or conditional discharges handed down after 24 July 1992 will automatically be removed from the criminal records system one year (for absolute discharges) or three years (for conditional discharges) after the court decision. Discharges handed down prior to 24 July 1992 can be removed by contacting the Pardon and Purge Services of the Royal Canadian Mounted Police (RCMP).[8]

Before the adoption of Bill C-23A, the National Parole Board could grant a pardon if it was satisfied that the applicant had, for an indictable offence, been of good conduct and had not been convicted of an offence under an Act of Parliament or a regulation made under an Act of Parliament.[9] The Board defines “good conduct” as meaning behaviour that is consistent with and demonstrates a law-abiding lifestyle.[10] For the purpose of determining good conduct in decision-making, the Board will consider information about an incident that resulted in a charge that was subsequently withdrawn, stayed, or dismissed, or that resulted in a peace bond, in the use of alternative measures or in the acquittal of the applicant; any record of absolute or conditional discharges; information about convictions under provincial statutes; information provided by law enforcement agencies about suspected or alleged criminal behaviour; representations provided by, or on behalf of, the applicant; any information submitted to the board by others with knowledge of the case; and, with respect to applicants convicted of a sex offence prosecuted by way of indictment, any information received from law enforcement agencies further to enquiries made by the Board.[11] Under the previous pardons procedure, a pardon for a summary conviction offence had to be issued if the applicant had not been convicted of another offence during the three-year period.

If a pardon is refused, the applicant must wait one year before applying again. If a pardon is granted, the *Criminal Records Act* states that the conviction for which it has been granted “should no longer reflect adversely on the applicant’s character.”[12] A pardon also requires that the record of conviction held in the federal database known as the Canadian Police Information Centre (CPIC) be kept separate and apart from other criminal records; in other words, a search for criminal records should not reveal one when a pardon has been granted. A pardon, however, does not erase a conviction. It does not allow a person to say that they do not have a criminal record but rather permits them to say that they have received a pardon for that record.

The *Canadian Human Rights Act* [13] forbids discrimination based on a conviction for which a pardon has been granted. The prohibition against discrimination applies to the provision of services a person needs, accommodation or matters related to employment. The *Criminal Records Act* states that no employment application form within the federal public service may ask any question that would require an applicant to disclose a pardoned conviction. This restriction also applies to a Crown corporation, the Canadian Forces, or any federally regulated business.

There are limitations to the impact of a pardon, perhaps the most significant of which is that an exception is made in the case of certain sexual offences, when the offender's name will be flagged in the CPIC database. Should this person apply to work or volunteer with children or other vulnerable persons, he or she will be asked to let a potential employer see his or her record. A pardon also does not cancel various prohibition orders, such as that forbidding the possession of firearms pursuant to sections 109 or 110 of the *Criminal Code* [14] or a driving prohibition made pursuant to section 259 of the *Criminal Code*. Furthermore, a pardon does not cancel certain legal obligations, such as the requirement under sections 490.012 or 490.019 of the *Criminal Code* to register under the *Sex Offender Information Registration Act*.[15]

A pardon does not guarantee entry or visa privileges to another country, and if foreign authorities have information about a person's criminal record in their databases, this information will not be removed by virtue of the granting of a pardon. In addition, Canadian courts and police services (other than the RCMP) are under provincial and municipal legislation and so are not legally obliged to keep records of convictions separate and apart from other criminal records. Finally, the name, date of birth, and last known address of a person who has received a pardon or a discharge may be disclosed to a police force if a fingerprint, identified as that of the person, is found at the scene of a crime during an investigation of the crime or during an attempt to identify a deceased person or a person suffering from amnesia.[16]

Pardons may be subject to revocation. A pardon may be revoked by the National Parole Board if the person to whom it was granted is subsequently convicted of an offence punishable on summary conviction under an Act of Parliament or a regulation made under an Act of Parliament; on evidence establishing to the satisfaction of the Board that the person to whom it was granted is no longer of good conduct; or on evidence establishing to the satisfaction of the Board that the person to whom it was granted knowingly made a false or deceptive statement in relation to the application for the pardon, or knowingly concealed some material particular to that application.[17] When determining whether to revoke a pardon where the individual is subsequently convicted of an offence punishable on summary conviction under a federal Act or its regulations, the Board will consider all relevant information, including information that suggests a significant disregard for public safety and order and laws and regulations, or both, given the offender's criminal history; whether the offence is consistent with the offence for which the pardon was received; and the time period since the satisfaction of all sentences.[18]

A pardon ceases to have effect if the following conditions exist:

> (*a*) the person is subsequently convicted of
>
> (i) an indictable offence under an Act of Parliament or a regulation made under an Act of Parliament,
>
> (ii) an offence under the *Criminal Code*, except subsection 255(1) [impaired driving], or under the *Controlled Drugs and Substances Act*, the *Firearms Act*, Part III or IV of the *Food and Drugs Act* or the *Narcotic Control Act*, chapter N-1 of the Revised Statutes of Canada, 1985, that is punishable either on conviction on indictment or on summary conviction, or
>
> (iii) a service offence referred to in paragraph 4(*a*) of the *Criminal Records Act* [an offence that is a service offence within the meaning of the *National Defence Act* for which the offender was punished by 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 a punishment that is greater than imprisonment for less than two years in the scale of punishments set out in subsection 139(1) of that Act]; or
>
> (*b*) the Board is convinced by new information that the person was not eligible for a pardon at the time it was granted or issued.[19]

1.2 Clemency Law

Should a pardon not be obtained or be unavailable, the individual in question may choose to seek clemency. The royal prerogative of mercy originates in the ancient power vested in the British monarch who had the absolute right to exercise mercy on any subject. In Canada, similar powers of executive clemency have been vested in the Governor General who, as the Queen's representative, may exercise the royal prerogative of mercy. It is largely an unfettered discretionary power to apply exceptional remedies, under exceptional circumstances, in deserving cases.[20]

In practice, requests for executive clemency are processed under the Letters Patent constituting the Office of the Governor General of Canada only when it is not legally possible to proceed under the *Criminal Code*. Therefore, with a few exceptions, all clemency questions are forwarded to the federal Cabinet for a decision under the provisions of the *Criminal Code*, rather than to the Governor General of Canada.[21]

Section 748 of the *Criminal Code* authorizes the Governor in Council to grant free or conditional pardons. A free pardon is a formal recognition that a person was erroneously convicted of an offence. Any consequences resulting from the conviction, such as fines, prohibitions or forfeitures will be cancelled upon the grant of a free pardon. In addition, any record of the conviction will be erased from the police and court records, and from any other official databanks. The sole criterion upon which an application for a free pardon may be entertained is that of the innocence of the convicted person. In order for a free pardon to be considered, the applicant must have exhausted all appeal mechanisms available under the *Criminal Code*, or other pertinent legislation. In addition, the applicant must provide new evidence, which was not available to the courts at the time the conviction was registered, or at the time the appeal was processed, to clearly establish innocence.

A conditional pardon in advance of eligibility under the *Criminal Records Act* has the same meaning and effect as a pardon granted under the provisions of that Act. In order for a conditional pardon to be granted in advance of the eligibility under the *Criminal Records Act*, the applicant must be currently ineligible for a pardon under that statute. In addition, such a pardon may be considered only when there is evidence of good conduct, within the meaning of the *Criminal Records Act*, and consistent with the policies of the National Parole Board in these matters. Finally, there must be substantial evidence of undue hardship, out of proportion to the nature of the offence and more severe than for other individuals in similar situations.

Section 748.1 of the *Criminal Code* allows the Governor in Council to order the remission, in whole or in part, of a fine or forfeiture under an Act of Parliament. A remission of a fine or forfeiture amounts to the erasing of all, or part of, the penalty imposed by the court. In order for such penalties to be remitted, there must exist substantial evidence of undue hardship, due to circumstances or factors unknown to the court that imposed the sanction, or which occurred subsequent to the imposition of the sanction by the court. In addition, consideration will be given to whether the grant of a remission would result in hardship to another person.

Section 749 of the *Criminal Code* states that Her Majesty's royal prerogative of mercy is not limited in any way. The royal prerogative of mercy is exercised according to general principles which are meant to provide for a fair and equitable process, while ensuring that it is granted only in very exceptional and truly deserving cases. Section 110 of the *Corrections and Conditional Release Act* [22] states:

> The [National Parole] Board shall, when so directed by the Minister [of Public Safety and Emergency Preparedness], make or cause to be made any investigation or inquiry desired by the Minister in connection with any request made to the Minister for the exercise of the royal prerogative of mercy.

In reviewing clemency applications, conducting investigations and making recommendations, the National Parole Board is guided by the following principles:

- There must be evidence of substantial injustice or undue hardship.

  Neither the Governor General nor the Governor in Council intervenes on technical grounds. Therefore, in order for executive clemency to be invoked on the basis of an injustice, there must be clear evidence of a substantial injustice.

  Similarly, undue hardship, which includes suffering of a mental, physical and/or financial nature, must be out of proportion to the nature and the seriousness of the offence and the resulting consequences, and must be more severe than for other individuals in similar situations.

  In general terms, the notions of injustice and hardship imply that the suffering which is being experienced could not be foreseen at the time the sentence was imposed. In addition, there must be clear evidence that the injustice and/or the hardship exceed the normal consequences of a conviction and sentence.
- The exercise of the royal prerogative of mercy is concerned solely with the applicant.

  Each application will be examined on its own merits, taking into consideration the circumstances of the individual applicant. Consideration will not be given to the hardship of anyone else who may be affected by the applicant's situation, nor will it be considered posthumously.

- The exercise of the royal prerogative of mercy is not intended to circumvent other existing legislation.

  In order for the royal prerogative of mercy to be invoked, the applicant must have exhausted all other avenues available under the *Criminal Code*, or other pertinent legislation.

  In addition, an act of executive clemency will not be considered where the difficulties experienced by an individual applicant result from the normal consequences of the application of the law.

  Furthermore, the royal prerogative of mercy will not be considered as a mechanism to review the merits of existing legislation, or those of the justice system in general.

- The independence of the judiciary shall be respected.

  The exercise of the royal prerogative of mercy will not interfere with a court's decision when to do so would result in the mere substitution of the discretion of the Governor General, or the Governor in Council, for that of the courts. There must exist clear and strong evidence of an error in law, of excessive hardship and/or inequity, beyond that which could have been foreseen at the time of the conviction and sentencing.

- The royal prerogative of mercy should be applied in exceptional circumstances only.

  The royal prerogative of mercy is intended only for rare cases in which considerations of justice, humanity and compassion override the normal administration of justice. It should be applied only where there exist no other remedies, where remedies are not lawfully available in a particular case, or where recourse to them would result in greater hardship.

- The exercise of the royal prerogative of mercy, by its very nature, should not result in an increased penalty.

  When considering the merits of an individual case, the decision should not, in any way, increase the penalty for the applicant.[23]

The role of the National Parole Board in clemency cases is to review applications, conduct investigations at the direction of the Minister of Public Safety and Emergency Preparedness, and to make recommendations to the Minister regarding whether to grant the request for clemency. All of the remedies described above are subject to cancellation if the application was granted on the basis of information which is subsequently found to have been fraudulent. All remedies, with the exception of free pardons, may be cancelled if any condition under which they are granted is subsequently breached.[24]

1.3 Statistics on the Pardon System

The Criminal Records Information Management Services of the RCMP manages the information of roughly 2.8 million criminal records held in the central repository in Ottawa. This service analyzes, creates, and updates over 540,000 criminal records submitted by contributing law enforcement agencies each year.[25]

Since 1970, more than 400,000 Canadians have received a pardon. Approximately 96% of all pardons remain in force. In 2008–2009, 39,628 pardons were granted, while in the last five years, 111,769 pardons were granted.[26]

In the 2009–2010 fiscal year, the National Parole Board received 32,105 applications for a pardon. Over 7,000 of these were ineligible, incomplete or were withdrawn. The Board processed 24,559 applications. Ultimately, 7,887 pardons were issued for summary conviction offences, the vast majority of which were for drinking and driving, assault, theft, and drug-related crimes. The Board granted 16,247 pardons to individuals with criminal records for indictable offences. The vast majority of these offences were for drinking and driving, assault, theft, and drug-related crimes. The Board denied 425 applications for a pardon for indictable offences on the grounds that the applicants were found not to be of good conduct.[27]

Over the past five years, 35.5% of the offences pardoned were for summary offence cases only (pardon issued), while 64.5% were for cases that had at least one indictable offence (pardon granted). In the last two years that "sexual offences" have been tracked as a separate category, 2.4% of all offences pardoned fit into this category, including offences such as sexual assault, sexual interference, rape, incest, child pornography, and gross indecency.[28]

In 2008–2009, 21 requests for the royal prerogative of mercy were received and four were granted. As of the end of 2008, there were 28 active clemency cases.[29]

1.4 BILL C-23A

Bill C-23A amended provisions of the *Criminal Records Act* to place restrictions on an application for a pardon. Bill C-23A extended the waiting period before application may be made for a pardon to 10 years in the case of a serious personal injury offence within the meaning of section 752 of the *Criminal Code*,[30] including manslaughter, for which the applicant was sentenced to imprisonment for a period of two years or more, or an offence referred to in Schedule 1 of the bill that was prosecuted by indictment.[31] The waiting period was made five years in the case of any other offence prosecuted by indictment, an offence referred to in Schedule 1 of the bill that is punishable on summary conviction or a service offence within the meaning of the *National Defence Act* that meets a certain punishment threshold. The waiting period remained three years for offences not already mentioned that are punishable on summary conviction and service offences within the meaning of the *National Defence Act* that do not meet the punishment threshold.

The bill also added new criteria to the determination of whether a pardon should be granted. For all offences, during the applicable waiting period, the applicant must have been of good conduct and not have been convicted of an offence under an Act of Parliament.[32]

For serious personal injury offences (including manslaughter) where the applicant was sentenced to imprisonment for two years or more, Schedule 1 offences (prosecuted by indictment or summary conviction), other offences prosecuted by indictment, and applicable service offences under the *National Defence Act*, the criteria to be applied by the National Parole Board are that granting a pardon would provide a measurable benefit to the applicant, would sustain his or her rehabilitation in society as a law-abiding citizen, and would not bring the administration of justice into disrepute. The onus is on the applicant to satisfy the Board that a pardon would provide him or her with a measurable benefit and sustain his or her rehabilitation as a law-abiding citizen.

In determining whether the granting of a pardon would bring the administration of justice into disrepute, the National Parole Board may consider the nature, gravity and duration of the offence, the circumstances surrounding the commission of the offence, any information relating to the applicant's criminal or service offence history, and any other factor that is prescribed by regulation.

Bill C-23A also renumbered the existing Schedule to the *Criminal Records Act* as Schedule 2. This schedule sets out the offences for which a notation may be made in the automated criminal conviction records retrieval system indicating that a pardon has been granted for certain sexual offences. This "flagging" of a record will enable searches to be carried out should someone apply to work with, or volunteer to work with, vulnerable persons. A new Schedule 1 was added to the *Criminal Records Act*, which set out offences involving sexual activity relating to a minor. These offences are referred to in the restrictions on applying for a pardon set out in section 4 of the Act.

The provisions of Bill C-23A are not retroactive. They were given Royal Assent on 29 June 2010 and took effect immediately as follows:

- new applications for pardons received on or after 29 June 2010 will be disposed of under the new measures; and
- applications for pardons received prior to 29 June 2010, and not disposed of, will be dealt with under the previous provisions of the *Criminal Records Act*.[33]

2 DESCRIPTION AND ANALYSIS

Bill C-23B contains 48 clauses. The following description highlights selected aspects of the bill; it does not review every clause.

2.1 LONG TITLE OF THE *CRIMINAL RECORDS ACT* (CLAUSE 2)

The current long title of the *Criminal Records Act* is: *An Act to provide for the relief of persons who have been convicted of offences and have subsequently rehabilitated themselves*. Clause 2 of Bill C-23B changes this long title to the following: An Act to provide for the suspension of the records of persons who have been convicted of offences and have subsequently rehabilitated themselves. This new title refers to the suspension of records, rather than the "relief" of persons convicted of offences. Pardons will not be issued or granted in the future.

2.2 DISCRETION OF THE NATIONAL PAROLE BOARD (CLAUSE 4)

The current wording of section 2.1 of the *Criminal Records Act* states that the National Parole Board has exclusive jurisdiction to grant or refuse to grant or to revoke a pardon. Clause 4 of Bill C-23B will amend this section to specify that the Board will also have absolute discretion to order, refuse to order, or revoke a record suspension. This change in wording places a greater emphasis on the decision-making role of the Board and the fact that the grant of a record suspension is not automatic. The discretion as to whether a record suspension is merited rests with the Board.

2.3 Record Suspensions (Clause 9)

Under section 4 of the *Criminal Records Act*, the current waiting period before an application for a pardon may be made is 10 years in the case of a serious personal injury offence within the meaning of section 752 of the *Criminal Code*, including manslaughter, for which the applicant was sentenced to imprisonment for a period of two years or more or an offence referred to in Schedule 1 of the bill that was prosecuted by indictment. The waiting period is five years in the case of any other offence prosecuted by indictment, an offence referred to in Schedule 1 of the *Criminal Records Act* that is punishable on summary conviction or a service offence within the meaning of the *National Defence Act* that meets a certain punishment threshold. The waiting period is three years for offences not already mentioned that are punishable on summary conviction and service offences within the meaning of the *National Defence Act* that do not meet the punishment threshold.

Bill C-23B will create only two waiting periods. The period of ineligibility to apply for a record suspension will be 10 years in the case of an offence that is prosecuted by indictment or is a service offence within the meaning of the *National Defence Act* that meets a certain punishment threshold. The period of ineligibility to apply for a record suspension will be five years in the case of an offence that is punishable on summary conviction or is a service offence other than one that meets the punishment threshold.

The bill will also make certain persons ineligible to apply for a record suspension. Those who have been convicted of an offence referred to in Schedule 1 (sexual offences in relation to minors), which was added to the *Criminal Records Act* by Bill C-23A, or of more than three offences, each of which either was prosecuted by indictment or is a service offence that is subject to a maximum punishment of imprisonment for life and for which the person was sentenced to imprisonment for two years or more, are not eligible to apply for a record suspension.

An exception to the ineligibility to apply for a record suspension is made in the case of persons who have been convicted of historical sexual offences contained in a previous version of the *Criminal Code* that are listed in item 3 of Schedule 1 of the *Criminal Records Act*. These offences were sexual intercourse with a female under 14, sexual intercourse with a female 14 or more but under 16, and seduction of a female 16 or more but under 18. Another exception is made for these historical offences under the *National Defence Act*. A person who has been convicted of these offences may apply for a record suspension if the National Parole Board is satisfied that:

- the person was not in a position of trust or authority towards the victim of the offence and the victim was not in a relationship of dependency with him or her;
- the person did not use, threaten to use or attempt to use violence, intimidation or coercion in relation to the victim; and
- the person was less than five years older than the victim.

The onus of proving these conditions is on the applicant.

2.4 INQUIRIES (CLAUSE 10)

Under the current section 4.2 of the *Criminal Records Act*, when an application for a pardon is received, the National Parole Board shall cause inquiries to be made to ascertain the conduct of the applicant since the date of the conviction and may, in the case of serious offences, cause inquiries to be made into whether granting the pardon would bring the administration of justice into disrepute. Clause 10 of Bill C-23B amends this section such that the Board, on receipt of an application for a record suspension, shall also cause inquiries to be made to ascertain whether the applicant is eligible to make the application. Once it is determined that the applicant is eligible, the Board will then inquire into the applicant's conduct since the date of the conviction. It remains an option for the Board to inquire into whether granting the pardon would bring the administration of justice into disrepute, but this will only be the case for indictable offences and serious service offences under the *National Defence Act*.

2.5 DISCLOSURE OF DECISIONS (CLAUSE 21)

Clause 21 adds section 9.01 to the *Criminal Records Act.* Under this new section, the National Parole Board may disclose decisions that order or refuse to order record suspensions, though it may not disclose information that could reasonably be expected to identify an individual. Such disclosure is permitted if the individual authorizes the disclosure in writing.

2.6 REPORT TO PARLIAMENT (CLAUSE 23)

BILL C-23B adds a requirement that the National Parole Board submit to the Minister of Public Safety and Emergency Preparedness a report within three months of the end of each fiscal year. This report is to contain the following information:

- the number of applications for record suspensions made in respect of indictable, summary, and service offences;
- the number of record suspensions that the Board ordered or refused to order, in respect of each of these types of offences;
- the number of record suspensions ordered, categorized by the offence to which they relate and, if applicable, the province of residence of the applicant; and
- any other information required by the Minister.

The Minister is then to lay this report before each House of Parliament.

2.7 SCHEDULE 2 (CLAUSE 24)

Bill C-23B replaces Schedule 2 to the *Criminal Records Act* with a new, much shorter, list of offences. These are the offences that will be "flagged" so that a search of these offences can be made, even if a record suspension has been ordered, should the person who committed the offence(s) apply to work with, or volunteer to work with, vulnerable persons. Many offences, such as against section 151 of the *Criminal Code* (sexual interference with a person under 16) are not found in the new Schedule 2. This

offence, however, can be found in Schedule 1. By the terms of new subsection 4(2) of the *Criminal Records Act*, a person is ineligible to apply for a record suspension if he or she has been convicted of an offence referred to in Schedule 1. There will be no need to perform a vulnerable persons search of these Schedule 1 offences, therefore, since no record suspension can be ordered.

2.8 Consequential Amendments (Clauses 25 to 45)

Clauses 25 to 45 of the bill amend various statutes to change the reference to a "pardon" to that of a "record suspension." Some amendments also add the term "record suspension" to provisions that refer to a "pardon" where both provisions may continue in effect.

One example of a statute where both a pardon and a record suspension are referred to is the *Canadian Human Rights Act*, which is amended by clauses 25 through 27. Section 3 of this Act will be amended to say that the prohibited grounds of discrimination are, amongst others, conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered.

Another example of a statute where both a pardon and a record suspension are referred to is the *Criminal Code*, which is amended by clauses 29 through 34. Currently, under subsection 490.015(3) or subsection 490.026(4) of the *Criminal Code*, a person may apply for a termination order of an obligation to comply with the *Sex Offender Information Registration Act* if the person has received a pardon. One of the amendments to the *Criminal Code* will extend the ability to apply for the termination of an order to comply with the sex offender registry to those for whom a record suspension has been ordered. Similar amendments are made to the *National Defence Act* in clauses 38 through 41 of the bill. Bill C-23B amends subsections 227.03(3) and 227.12(4) of the *National Defence Act* so that members of the armed forces may apply for a termination of an order to comply with the sex offender registry once they receive a pardon or once a record suspension is ordered.

An example of a statute where a reference to a pardon is replaced with that of a record suspension is the *DNA Identification Act*,[34] which is amended by clause 35 of the bill. Subsection 10(8) of this statute will be amended to state that the stored bodily substances of a person in respect of whom a record suspension is in effect shall be kept separate and apart from other stored bodily substances. No such bodily substance shall be used for forensic DNA analysis, nor shall the existence of such a bodily substance be communicated to any person. Similarly, paragraph 36(3)(*b*) of the *Immigration and Refugee Protection Act* [35] is being amended by clause 36 of the bill to state that inadmissibility to Canada may not be based on a conviction in respect of which a record suspension has been ordered, as opposed to a pardon having been granted.

The *Youth Criminal Justice Act* [36] is amended by clauses 42 through 45 of the bill. The current paragraph 82(1)(*d*) of the Act states that, if a young person is found guilty of an offence, and a youth justice court directs under paragraph 42(2)(*b*) that the young person be discharged absolutely, or the youth sentence has ceased to have

effect, the young person is deemed not to have been found guilty or convicted of the offence except that the National Parole Board or any provincial parole board may consider the finding of guilt in considering an application for conditional release or pardon. Clause 42 of the bill will amend this so that the finding of guilt can be considered by the Board or any provincial parole board in an application for conditional release or for a record suspension under the *Criminal Records Act*.

Section 119 of the *Youth Criminal Justice Act* concerns those persons who have access to the records of young persons. By the terms of subparagraph 119(1)(*n*)(iii), a member of a department or agency of a government in Canada, or of an organization that is an agent of, or under contract with, the department or agency, who is considering an application for conditional release or pardon made by the young person, whether as a young person or an adult, can have such access. Clause 43 of the bill will amend this subparagraph to change the reference to a pardon to a record suspension. Clause 44 of the bill makes a similar amendment to subparagraph 120(4)(*c*)(iii) of the Act when considering an application for a record suspension after the young person becomes an adult.

Section 128 of the *Youth Criminal Justice Act* concerns the effect of the end of the period of access to youth records. While such records can be purged, subsection 128(5) of the Act states that an entry that is contained in a system maintained by the RCMP to match crime scene information and that relates to an offence committed or alleged to have been committed by a young person shall be dealt with in the same manner as information that relates to an offence committed by an adult for which a pardon granted under the *Criminal Records Act* is in effect. Clause 45 of the bill will amend this subsection so that such a potential match shall be treated in the same manner as information that relates to an offence committed by an adult for which a record suspension ordered under the *Criminal Records Act* is in effect. Section 6.2 of the *Criminal Records Act* will state that the name, date of birth and last known address of a person whose record is suspended or who has received a discharge may be disclosed to a police force if a fingerprint, identified as that of the person, is found at the scene of a crime during an investigation of the crime or during an attempt to identify a deceased person or a person suffering from amnesia.

2.9 Transitional Provisions (Clauses 46 to 48)

No coming into force provision is set out in Bill C-23B, which means that it will come into force on the day that it receives Royal Assent.[37] Clause 46 refers to new applications for a pardon for an offence that is referred to in the current *Criminal Records Act* and is committed before the day on which Bill C-23B comes into force. This application will be dealt with under the terms of the amended *Criminal Records Act* and treated as though it were an application for a record suspension.

By the terms of clause 47, an application for a pardon that is received prior to the coming into force of the bill shall be dealt with and disposed of in accordance with the *Criminal Records Act* as it read when the National Parole Board received the application. In other words, the new provisions of the Act will not apply retroactively. This will be the case if the waiting periods currently set out in the *Criminal Records Act* have elapsed and the application has not been finally disposed of on the day

Bill C-23B comes into force. The waiting periods referred to, however, are only those found in paragraph 4(*a*) of the *Criminal Records Act*. This omits the summary conviction offences referred to in paragraph 4(*b*).

Clause 48 of the bill indicates that the unamended *Criminal Records Act* will apply to a pardon that was granted or issued before the day on which Bill C-23B comes into force and that has not been revoked or ceased to have effect. This clause also states that a reference to a record suspension in the following statutes is deemed also to be a reference to a pardon that is granted or issued under the *Criminal Records Act* before the day on which Bill C-23B comes into force:

- the definition "conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered" in section 25 of the *Canadian Human Rights Act*;
- the definition "record suspension" in subsection 490.011(1) of the *Criminal Code* (the definitions section for the sex offender information part of the *Criminal Code*);
- subsection 10(8) of the *DNA Identification Act* (separate storage of bodily substances where there is a record suspension);
- paragraphs 36(3)(*b*) (inadmissibility to Canada cannot be based on an offence for which a record suspension has been ordered) and 53(*f*) (regulations may include provisions relating to the effect of a record suspension on the status of permanent residents and foreign nationals and removal orders made against them) of the *Immigration and Refugee Protection Act*;
- the definition "record suspension" in section 227 of the *National Defence Act* (the definitions section for the sex offender information part of the *National Defence Act*); and
- subsection 128(5) of the *Youth Criminal Justice Act* (information in purged youth records can be related to crime scene evidence, just as it can for adults for whom a record suspension has been ordered).

3 COMMENTARY

Vigorous debate has surrounded Bill C-23B and the related Bill C-23 and Bill C-23A concerning the proposed changes to the pardon or record suspension system. This section of the legislative summary attempts to present the points of view on these matters as they have been expressed, with particular emphasis on media reports.

According to an editorial in the *Guelph Mercury*, among the wiser parts of the proposal to amend the pardons regime is the changing of the word "pardon" to "record suspension." This is said to more accurately reflect what the government is trying to do: it is not excusing someone who has committed an offence, nor is it forgiving them, as the state lacks the moral authority to do these things; such forgiveness can only be expressed by the victim. The editorial asserts that the role of the state is to help a repentant criminal become a productive, law-abiding citizen with a secure place in the community. It says that the setting aside of a criminal record makes it easier to get a job or travel and this is good for the offender and good for society.[38]

An editorial in the *Edmonton Journal* has commented that it is not unrealistic to place the onus on offenders to show why a suspended record would contribute to their rehabilitation or to refuse to grant this privilege to those who have been convicted of three serious indictable offences or have sexually assaulted children. The one aspect of Bill C-23 that was criticized in this editorial was the extension of the wait times to five and 10 years. This editorial suggested that, given the hardships and unfairness that may ensue, with people perhaps unable to study or work abroad, the government's "tough on crime" image was being put ahead of the greater social good.[39] While another *Edmonton Journal* editorial found that the proposed changes to the pardons system strike the "right balance," it was less clear whether the editorial supported the imposition of longer wait times. It asserted that longer wait times might ensure a commitment to obeying the law in the long term, but that five years is a very long time for offenders to wait before they can apply for a job without confessing to a minor criminal history. This editorial contended that, if the goal is to help reformed offenders reintegrate into society, five or 10 years might be too long to wait before giving them that second chance.[40]

The Globe and Mail, in an editorial, noted that it would be counterproductive to be so stingy with pardons or record suspensions that convicted criminals are denied productive work and are, in effect, driven back to crime. It stated that record suspensions are of value when they remove the stigma of a criminal record from those who have paid their debt to society and have demonstrated a commitment to obeying the law. This editorial commended the bill's approach of ending the era of near-automatic forgiveness, but cautioned that it goes too far in discouraging rehabilitation.[41]

A *Winnipeg Sun* editorial, though, maintained that increasing the time a criminal must be of good behaviour is "just common sense."[42] The *Winnipeg Free Press* editorialists expressed the opinion that the current system that permits pardons for serious offences after five years does not provide a long enough waiting period to determine if a person has "shed his or her old ways."[43]

The all-party cooperation that resulted in the speedy passage of Bill C-23A has been praised. In *The Windsor Star*, an editorial said that there was no question MPs were in sync with their constituents in acting to prevent Karla Homolka from receiving a pardon. For this newspaper, the Karla Homolka situation was simply the most shocking example of how the law did not take into consideration the fact that some people have committed acts that should not be forgiven.[44]

The speed with which the legislation concerning pardons has been considered has come in for criticism from Craig Jones, Executive Director of the John Howard Society. He has called this a rush to judgement. While there may be a case for a review of pardons, it should be done slowly and carefully, by panels of experts, not by "short-term-oriented opportunists."[45] *Winnipeg Free Press* columnist Mia Rabson agreed that the pardons system needs an overhaul but also lamented that the bill changing the system was not introduced in a timely and thoughtful manner. According to Rabson, government policy that is pushed through without thorough scrutiny because of one case is not the way to legislate. She concludes that the government owes it to victims to give these issues the time and attention they deserve.[46]

Lydia Bardak, the Executive Director of the John Howard Society in the Northwest Territories, has commented that the current system is working because, according to the figures supplied by the National Parole Board, out of more than 400,000 pardons issued or granted in Canada over the past 40 years, only four per cent of those persons have committed another crime and had the pardon revoked. Ms. Bardak has stated that the proposed bill is "not recognizing the uniqueness of the circumstances" associated with each case. She is concerned that a person may be condemned to not getting a pardon for one incident in their life and will always find difficulty in getting employment.[47]

The Canadian Resource Centre for Victims of Crime commented that Bill C-23A made some reasonable and necessary changes to the *Criminal Records Act* in order to increase the scrutiny that offenders face throughout the pardon process. The centre believes that pardons may not be appropriate for some offenders. It maintains that the suffering of victims of violence does not end when an offender's sentence expires and adds that justice is not served when offenders are quickly and quietly granted pardons for their crimes and nor is public safety.[48]

The issue of the increased fee to obtain a pardon was raised by the Elizabeth Fry Society. Testimony before the Standing Senate Committee on Legal and Constitutional Affairs on Bill C-23A indicated that the fee for obtaining a pardon may increase to approximately $500. According to the Society, this could raise a barrier to obtaining a pardon for those on social assistance who need a pardon in order to obtain employment.[49]

In its brief on Bill C-23, the Canadian Criminal Justice Association stated that it was in favour of replacing the term "pardon" with the term "record suspension." It estimated that the law was not put in place so much as an act of forgiveness, but as a way of enabling rehabilitated offenders to reduce the stigma associated with a criminal record, thereby providing a better opportunity to reintegrate into society. The association noted the negative "optics" that the media have attached to the term "pardon."[50]

The Criminal Justice Association, however, opposes the banning of "three strikes" offenders from receiving a record suspension. The association states that, if the criminal justice system believes in its capacity to assist in the rehabilitation of offenders, then such persons should be permitted to prove that they have corrected their behaviour, reintegrated into society, and are leading crime-free lives. The association is also opposed to the extension of the wait times before one may apply for a record suspension. According to the association, the National Parole Board statistics show that the current wait times are sufficient, given that such a high proportion of those receiving record suspensions remain crime-free.

NOTES

1. House of Commons, *Debates*, 3rd Session, 40th Parliament, 17 June 2010, 1505.
2. *Criminal Records Act*, R.S.C. 1985, c. C-47.

3. Senate, Standing Committee on Legal and Constitutional Affairs, *Evidence*, 3rd Session, 40th Parliament, 22 June 2010 (Harvey Cenaiko, Chairperson, National Parole Board).
4. Parole Board of Canada, *Fact Sheet*, "Pardons."
5. *International Transfer of Offenders Act*, S.C. 2004, c. 21.
6. *National Defence Act*, R.S.C. 1985, c. N-5.
7. Parole Board of Canada, *Fact Sheet*, "Pardons."
8. Ibid.
9. *Criminal Records Act*, s. 4.1 (as of 28 May 2010).
10. Parole Board of Canada, *Policy Manual*, "14. Clemency and Pardons."
11. Ibid.
12. *Criminal Records Act*, subpara. 5(*a*)(ii).
13. *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, subsection 3(1).
14. *Criminal Code*, R.S.C. 1985, c. C-46.
15. *Sex Offender Information Registration Act*, S.C. 2004, c. 10.
16. *Criminal Records Act*, s. 6.2.
17. Ibid., s. 7.
18. Parole Board of Canada, *Policy Manual*, "14. Clemency and Pardons."
19. *Criminal Records Act*, s. 7.2.
20. The power to grant either a free or conditional pardon or respite from the execution of sentence and to remit any fines, penalties, or forfeitures is vested in the Governor General by Part XII of the *Letters Patent Constituting the Office of Governor General of Canada*, effective 1 October 1947. The Governor General, however, is not to pardon or reprieve any offender without first receiving the advice of at least one of his or her Ministers.
21. Parole Board of Canada, *Policy Manual*, "14. Clemency and Pardons."
22. *Corrections and Conditional Release Act*, S.C. 1992, c. 20.
23. Parole Board of Canada, *Policy Manual*, "14. Clemency and Pardons."
24. Ibid.
25. Royal Canadian Mounted Police, *Assistance to Law Enforcement*, "Canadian Criminal Real Time Identification Services."
26. Parole Board of Canada, *PBC QuickStats*, "Parole, Pardons and Clemency."
27. Senate, Standing Committee on Legal and Constitutional Affairs (22 June 2010) (Harvey Cenaiko, Chairperson, National Parole Board).
28. "Pardons Outcomes," information supplied to the Standing Senate Committee on Legal and Constitutional Affairs by Harvey Cenaiko, Chairperson, National Parole Board, pursuant to his testimony before the committee on, 22 June 2010.
29. Parole Board of Canada, *PBC QuickStats*, "Parole, Pardons and Clemency."
30. A "serious personal injury offence" is defined in the *Criminal Code* as:

> (*a*) an indictable offence, other than high treason, treason, first degree murder or second degree murder, involving
>
> (i) the use or attempted use of violence against another person, or

> (ii) conduct endangering or likely to endanger the life or safety of another person or inflicting or likely to inflict severe psychological damage on another person,
>
> and for which the offender may be sentenced to imprisonment for ten years or more, or
>
> (*b*) 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).

31. Schedule 1 offences are generally sexual offences involving young persons.

32. Under the previous version of the *Criminal Records Act*, the applicant must not have been convicted of an offence under an Act of Parliament or a regulation made under an Act of Parliament. In addition, under the current version of the *Criminal Records Act*, a pardon may be revoked by the National Parole Board if the person to whom it is granted is subsequently convicted of an offence punishable on summary conviction under an Act of Parliament or a regulation made under an Act of Parliament, and a pardon ceases to have effect if the person is subsequently convicted of an indictable offence under an Act of Parliament or a regulation made under an Act of Parliament.

33. Public Safety Canada, Clause-By-Clause Review, Bill C-23A, June 2010.

34. *DNA Identification Act*, S.C. 1998, c. 37.

35. *Immigration and Refugee Protection Act*, S.C. 2001, c. 27.

36. *Youth Criminal Justice Act*, S.C. 2002, c. 1.

37. *Interpretation Act*, R.S.C. 1985, c. I-21, subsection 5(2).

38. “Rethinking pardons,” Editorial, *Guelph Mercury*, 15 May 2010, p. A4.

39. “Pardons and pandering,” Editorial, *Edmonton Journal*, 15 May 2010, p. A18.

40. “Better name, better rules,” Editorial, *Edmonton Journal*, 13 May 2010, p. A16.

41. “Pardons: When forgiveness is by rote,” Editorial, *The Globe and Mail* [Toronto], 12 May 2010, p. A16.

42. “Criminal pardons are inexcusable,” Editorial, *Winnipeg Sun*, 13 May 2010, p. 10.

43. “Pardon system needs work,” Editorial, *Winnipeg Free Press*, 13 May 2010, p. A14.

44. “Homolka’s ‘pardon’: Co-operation prevailed,” Editorial, *The Windsor Star*, 6 July 2010, p. A6.

45. John Ward, “Government tables new legislation to do away with pardons process,” *Guelph Mercury*, 12 May 2010, p. A6.

46. Mia Rabson, “Real debate on pardons needed – Panic over Homolka issue meant lack of proper scrutiny,” *Winnipeg Free Press*, 21 June 2010, p. A8.

47. Tim Edwards, “Tougher pardon rules panned: New bill could impose lifelong punishment for minor crimes: John Howard Society,” *Yellowknifer*, 2 July 2010.

48. Senate, Standing Committee on Legal and Constitutional Affairs (22 June 2010) (Heidi Illingworth, Executive Director, Canadian Resource Centre for Victims of Crime).

49. Senate, Standing Committee on Legal and Constitutional Affairs (22 June 2010) (Kim Pate, Executive Director, Canadian Association of Elizabeth Fry Societies).

50. Canadian Criminal Justice Association, “Bill C-23: An Act to Amend the Criminal Records Act,” Brief to the House of Commons Standing Committee on Justice and Human Rights, 3rd Session, 40th Parliament, 9 June 2010.