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LEGISLATIVE SUMMARY

Bill S-10:

An Act to Amend the Controlled Drugs and Substances Act and to Make Related and Consequential Amendments to Other Acts

Publication No. 40-3-S10-E
17 May 2010
Revised 31 March 2011

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Legislative Summary of Bill S-10

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

Publication No. 40-3-S10-E
Ottawa, Canada, Library of Parliament (2011)

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LEGISLATIVE SUMMARY OF BILL S-10: AN ACT TO AMEND THE CONTROLLED DRUGS AND SUBSTANCES ACT AND TO MAKE RELATED AND CONSEQUENTIAL AMENDMENTS TO OTHER ACTS

1 BACKGROUND

1.1 GENERAL

Bill S-10, An Act to amend the Controlled Drugs and Substances Act and to make related and consequential amendments to other Acts (short title: Penalties for Organized Drug Crime Act), was introduced in the Senate on 5 May 2010 by the Leader of the Government in the Senate, the Honourable Marjory LeBreton. **It died on the *Order Paper* when the 40th Parliament was dissolved on 26 March 2011.**

A similar predecessor bill – Bill C-15 – was introduced during the 2nd Session of the 40th Parliament. Although Bill C-15 passed the House of Commons and the Senate, with certain amendments, it died on the *Order Paper* on 30 December 2009 when Parliament was prorogued, thereby ending the 2nd Session of the 40th Parliament. It is almost identical to Bill C-26, which received second reading during the 2nd Session of the 39th Parliament, but which died on the *Order Paper* when Parliament was dissolved on 7 September 2008.

Bill S-10 seeks to amend the *Controlled Drugs and Substances Act*[1] (CDSA) to provide for minimum penalties for serious drug offences, such as dealing drugs for organized crime purposes or when a weapon or violence is involved. Currently, there are no mandatory minimum penalties under the CDSA. The bill also increases the maximum penalty for cannabis (marihuana) production and reschedules certain substances from Schedule III of the Act to Schedule I.

The bill contains an exception that allows courts not to impose a mandatory sentence if an offender successfully completes a Drug Treatment Court (DTC) program or a treatment program, under subsection 720(2) of the *Criminal Code*, that is approved by a province and under the supervision of a court. These programs are designed to assist certain individuals who are charged with drug-related offences (should they meet certain eligibility criteria) to overcome their drug addictions and avoid future conflict with the law. The DTC program involves a mix of judicial supervision, social services support, incentives for refraining from drug use, and sanctions for failure to comply with the orders of the court.

1.2 DRUG USE IN CANADA

The Canadian Addiction Survey (CAS) was a collaborative initiative sponsored by Health Canada, the Canadian Executive Council on Addictions – which includes the Canadian Centre on Substance Abuse, among others – as well as a number of provinces.[2] Published in November 2004, it was the first national general population survey specifically dedicated to alcohol and other drug use in Canada since the

1994 study – Canada's Alcohol and Other Drugs Survey. The Canadian Addiction Survey questioned almost 14,000 Canadians aged 15 and over on a variety of topics related to drug use. The survey focused on the impact that alcohol and drug use has on physical, mental and social well-being. It also questioned Canadians about their attitudes toward measures to control drug use, and on their beliefs about the availability of drugs and the risks associated with their use.

The results of the CAS showed an increase in the self-reported rates of use of illicit drugs such as cannabis over the decade from 1994 to 2004. Overall, 44.5% of Canadians reported using cannabis at least once in their lifetime, and 14.1% reported using cannabis in the previous year, nearly double the rate reported in 1994 (7.4%). Cannabis use, however, was generally infrequent, with 45.7% of previous-year users reporting use two or fewer times during the previous three months. In addition, most users did not report experiencing serious harm due to their cannabis use. The authors of the CAS did note that an area worth investigating further was the use of cannabis by youth. The peak rate of use was among 18- and 19-year-olds (47.2% for previous-year use) and then began a downward trend. Cannabis use also varied by marital status, educational level, and income. Finally, there were significant provincial differences in cannabis use, yet little is known about the nature and underlying determinants of these differences.

Excluding cannabis, the most commonly reported drugs used during one's lifetime were hallucinogens, used by 11.4%, cocaine (10.6%), speed (6.4%), and ecstasy (4.1%). The lifetime use of inhalants, heroin, steroids and drugs by injection was about 1% or less. Although approximately one in six Canadians had used an illicit drug other than cannabis in his or her lifetime, few had used these drugs during the year preceding the survey. Rates of drug use during the previous 12 months were generally 1% or less, with the exception of cocaine use (1.9%). For the general population of Canadians, the use of illicit drugs was usually limited to cannabis only. About 28.7% of Canadians reported using only cannabis during their lifetime, and 11.5% used only cannabis during the previous year. Still, approximately 2.6% of cannabis users used drugs other than cannabis in the year preceding the survey. Once again, caveats concerning the data need to be raised, including the substantial variation in drug use according to province, varying from 8.3% to 23% for lifetime use of an illicit drug excluding cannabis.

Although comparisons are difficult when factors such as methodologies, the questions asked and the sample group vary, drug use rates across surveys suggest that the prevalence of use has risen over time. This is particularly true for cannabis, for which the rates of use, both past-year and lifetime, essentially doubled from 1989 to 2004. The data indicate that the number of Canadians reporting use of an injectable drug at some point in their life increased from 1.7 million in 1994 to a little more than 4.1 million in 2004. Of those, 7.7% (132,000) reported previous-year use of a drug by injection in 1994 compared with 6.5% (269,000) in 2004. Most Canadians, though, who had used an illicit drug in their lifetime reported that they no longer continued use. In addition, the authors of the CAS noted that the higher rates of use of most illicit drugs did not seem to translate into higher rates of reported harms.

Since the publication of the CAS, some regions of Canada have reported on drug use rates. Yukon and the Northwest Territories, which were excluded from the CAS, have each reported on surveys of their populations. The Yukon Addictions Survey, released in June 2005, reported that illicit drug use in Yukon was generally similar to the rest of Canada except for cannabis use. Twenty-one percent of Yukoners over the age of 15 reported using cannabis in the previous 12 months, compared to 14% of Canadians overall. During the previous 12 months, the rates of illicit drug use by Yukoners were 3% for cocaine, 1% for hallucinogenic drugs and 1% for ecstasy.[3] The Northwest Territories reported a similar level of past-year cannabis use (20.7%). An estimated 2.7% of residents of the Northwest Territories 15 years of age and older reported using at least one of the following five drugs in the year preceding the survey: cocaine, hallucinogens, speed, ecstasy, or heroin.[4]

In 2007, l'Institut de la statistique du Québec released a study indicating that drug use among secondary school students had declined. The study indicated that in 2006, 30.2% of adolescents had consumed an illicit substance at least once in the previous year, while in 2000 the figure was 42.9%.[5] Furthermore, the average age at which students started to experiment with drugs increased to 13.2 years from approximately 13 years of age in 2004.[6]

The Canadian Centre on Substance Abuse published *The Costs of Substance Abuse in Canada 2002*.[7] This study estimated the impact in terms of death, illness and economic costs caused in whole or in part by the abuse of tobacco, alcohol and illegal drugs for the year 2002. In economic terms, abuse occurs when substance use imposes costs on society that exceed the costs to the user of obtaining the substance. These costs are designated as "social" costs. Measured in terms of the burden on services such as health care and law enforcement, and the loss of productivity in the workplace or at home resulting from premature death and disability, the overall cost of substance abuse in Canada in 2002 was estimated to be $39.8 billion. This represents a cost of $1,267 for every man, woman, and child in Canada. Tobacco accounted for about $17 billion or 42.7% of that total estimate, alcohol accounted for about $14.6 billion (36.6%) and illegal drugs for about $8.2 billion (20.7%). Productivity losses amounted to $24.3 billion or 61% of the total, while health care costs were $8.8 billion (22.1%). The third highest contributor to total substance-related costs was law enforcement, with a cost of $5.4 billion or 13.6% of the total.

In 2002, a total of 1,695 Canadians died as a result of illegal drug use, accounting for 0.8% of all deaths. This can be compared to 37,209 Canadians who died from tobacco use (16.6% of all deaths) and 4,258 from alcohol use (1.9% of all deaths). The leading causes of death linked to illegal drug use were overdose (958), drug-attributable suicide (295), drug-attributable hepatitis C infection (165), and HIV infection (87). Deaths linked to illegal drugs resulted in 62,110 potential years of life lost. Illegal drug-attributed illness accounted for 352,121 days of acute care in hospital.

The Canadian Centre on Substance Abuse (CCSA) has also published a document outlining the relationship between the perceived seriousness and the actual costs of substance abuse in Canada.[8] The study found that, while the total social costs

associated with alcohol are more than twice those for all other illicit drugs, the public consistently rated the overall seriousness of illicit drugs as higher in the Canadian Addiction Survey. The reasons for this misperception may relate to the fact that alcohol is a legal, socially accepted product that is regularly used by the vast majority of Canadians. While over 90% of Canadians have direct, personal experience with alcohol, only 3% of CAS respondents reported past-year use of the five most popular illicit drugs, so perceptions of risk will likely be inflated for these substances due to the unfamiliarity factor. The CCSA also points to the police, concerned citizen groups, political leaders and policy makers as those involved in amplifying the perceptions of the risks associated with illicit drug abuse. One example of this is methamphetamine which, while a dangerous drug, is used much less frequently than alcohol, cannabis, and cocaine. This finding raises questions about the appropriateness of using a drug like methamphetamine as a primary driver for substance abuse policy.

1.3 Canada's Drug Strategy

Canada's first federal drug strategy was introduced in 1987 under the title "National Drug Strategy." It acknowledged that substance abuse was primarily a health issue but continued the enforcement-based approach that Canada has adopted since enacting the *Opium Act* in 1908, which made it illegal to import, manufacture or sell opium. Efforts to control and regulate psychoactive substances have subsequently relied on legislation to ban the production, distribution and use of illicit drugs. The legislation used has included the *Opium and Drug Act*, the *Narcotic Control Act*, the *Food and Drug Act* and the current *Controlled Drugs and Substances Act*. In 1988, Parliament created the Canadian Centre on Substance Abuse as Canada's national non-government organization on addictions. Its primary responsibility is to provide objective information on addiction.

In 1992, Parliament approved Canada's Drug Strategy, a coordinated effort to reduce the harm caused by alcohol and other drugs. This strategy called for a balanced approach to reducing both the demand for drugs and their supply through such activities as control and enforcement, prevention, treatment and rehabilitation, and harm reduction. In 1997, the *Controlled Drugs and Substances Act* was introduced and remains the current legislation for controlling the use of illicit drugs. In 2001, the Auditor General published a report on the federal government's role in the area of illicit drugs.[9] The Auditor General noted that there was no comprehensive public reporting on illicit drugs. Until the government provided comprehensive public reporting at the national level, it would be impossible to measure the net effectiveness of Canada's Drug Strategy.

Canada's Drug Strategy was renewed in 2003. It was described as an initiative to reduce the harm associated with the use of narcotics and controlled substances and the abuse of alcohol and prescription drugs. The Strategy was said to address underlying factors associated with substance use and abuse. It included education, prevention and health promotion initiatives as well as enhanced enforcement measures. Part of the Strategy involved a commitment to report to Parliament and Canadians every two years on the Strategy's direction and progress.[10] Yet it was

reported in a December 2006 article that no reports or evaluations of the renewed Strategy had been made available.[11]

On 4 October 2007, the Government of Canada introduced its National Anti-Drug Strategy. At that time, funding in the amount of approximately $64 million was provided in three areas: prevention ($10 million), treatment ($32 million), and enforcement ($22 million). As a complement to drug prevention and treatment efforts, the Enforcement Action Plan is said to bolster law enforcement efforts and the capacity to combat effectively marihuana grow operations and synthetic drug production and distribution operations. One part of the plan is ensuring that strong and adequate penalties are in place for serious drug crimes.[12] Bill S-10 can be seen as an implementation of the enforcement aspect of the Anti-Drug Strategy in legislative form.

The goal of the National Anti-Drug Strategy (which has funding of $578.5 million allocated from 2007–2008 to 2011–2012) is stated to be the reduction of the supply and demand for illicit drugs.[13] The three key priorities of the Strategy are to prevent illicit drug use, treat illicit drug addiction, and combat illicit drug production and distribution. Where the destination of the funding for the National Anti-Drug Strategy is indicated, 22% of it is allocated to the Prevention Action Plan, 31% to the Treatment Action Plan and 47% to the Enforcement Action Plan. This latter figure includes $67.7 million which will be released should Bill S-10 receive Royal Assent.[14] Bill S-10 is seen by the Government of Canada as part of its National Anti-Drug Strategy's effort to combat illicit drug production and distribution. The proposed changes to the legislation are intended to help disrupt criminal enterprises by targeting drug suppliers.[15]

1.4 The Current Law

The *Controlled Drugs and Substances Act* (CDSA) regulates certain types of drugs and associated substances. The drugs and substances are listed in Schedules I to VIII of the CDSA. There are currently no mandatory prison terms under the CDSA, but the most serious drug offences have a maximum penalty of life imprisonment. The offences in the Act include possession, "double doctoring," trafficking, importing and exporting, and production of substances included in the schedules to the CDSA. The punishment for the offences will depend upon which schedule applies to the drug in question. Schedule I includes the drugs that are commonly thought of as the most "dangerous," e.g., cocaine and methamphetamine. Schedule II lists cannabis and its derivatives, while Schedule III includes amphetamines and lysergic acid diethylamide (LSD). Schedule IV includes barbiturates.

The CDSA fulfills obligations under several international protocols and covers offences relating to property and the proceeds of drug offences. Three international conventions on illicit drugs cover cannabis, cocaine, heroin, other psychoactive substances and their precursors: the Single Convention on Narcotic Drugs, 1961,[16] the Convention on Psychotropic Substances, 1971,[17] and the United Nations Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988 (Vienna Convention).[18] The Single Convention limits the production and trade in prohibited substances to the quantity needed to meet the medical and scientific

needs of the state parties. Each state creates the necessary legislative and regulatory measures for establishing the controls within its own territory to fulfill the commitments of the Convention. Under the 1971 Convention, psychoactive substances (such as THC found in marihuana) are to be subjected to controls similar to those that apply under the 1961 Convention. Under the 1988 Convention, parties must take cooperative action to control the illicit cultivation, production and distribution of drugs of abuse.

Canada's drug laws do not prohibit all possession or use of illicit drugs.[19] Thus, the *Narcotic Control Regulations*[20] allow for the distribution of controlled drugs and substances by pharmacists, medical practitioners and hospitals and outline the records that must be kept to account for the distribution of these drugs. Pursuant to section 53(3) of the *Regulations*, a medical practitioner may administer methadone, for example, if the practitioner has an exemption under section 56 of the CDSA with respect to methadone. Section 56 of the CDSA gives the power to the Minister of Health to exempt any person or controlled substance from the application of the CDSA if the exemption is necessary for a medical or scientific purpose or is otherwise in the public interest. The minister may also issue a licence to cultivate, gather or produce opium poppy or marihuana for scientific purposes.[21]

In addition, the *Marihuana Medical Access Regulations*[22] allow for authorizations to possess marihuana to be issued to those persons who can prove a medical need for it. A holder of a personal-use production licence is also authorized to produce and keep marihuana for the medical purpose of the holder.[23] A specific limitation on the lawful source of supply of dried marihuana was declared invalid as contrary to section 7 of the *Canadian Charter of Rights and Freedoms* in 2008.[24] The one-grower-to-one-user ratio was held to unjustifiably limit the ability of authorized persons to access their marihuana for medical purposes. This decision was confirmed by the Federal Court of Appeal.[25] In response, the government published in the *Canada Gazette* on 27 May 2009 *Regulations Amending the Marihuana Medical Access Regulations*.[26] These changes doubled the current ratio, making it one grower to two users. The explanation accompanying the amendments stated that a full review of the access to medical marihuana is required given that the program was never intended to facilitate the widespread, potentially large-scale production of marihuana for medical purposes.

A recently published article in Statistics Canada's justice-related periodical, *Juristat*,[27] used data from the Uniform Crime Reporting Survey[28] to examine the incidence and nature of police-reported drug offences in Canada. It explored the long-term trends in possession, trafficking, production, importing and exporting of cannabis, cocaine, heroin and a catch-all category of "other" drugs, including methamphetamine (crystal meth) and ecstasy. It also presented information from the Adult Criminal Court Survey[29] and the Youth Court Survey[30] on the decisions and sentencing outcomes for those charged with drug offences. Given that not all crimes come to the attention of police, the data likely under-represent the total number of drug offences that occur in Canada. The full extent of drug crime, therefore, is unknown.

The results of the *Juristat* survey show that the police-reported rate of drug offences in Canada in 2007 reached its highest point in 30 years (just over 100,000 offences).

This is in contrast to a generally decreasing overall crime rate. The explanation for this difference may lie in police policies, charging practices, and available resources. Most drug offences continued to involve cannabis (6 in 10), although the rate of cannabis offences has generally declined in recent years. In contrast, the rates of offences involving cocaine and "other" types of drugs, such as crystal meth and ecstasy, have risen. Part of the increase in the overall rate of drug crime can be attributed to an increase in the rate of youth accused of drug offences, which has doubled over the past decade. In recent years, most youth accused of a drug offence have been cleared by means other than formal charging by police, such as police discretion or referral to a diversion program.

In 2006–2007, about half of all drug-related court cases were stayed, withdrawn, dismissed or discharged, due to resolution discussions, lack of evidence, or a referral to court-sponsored diversion programs. If convicted, youth were most often sentenced to probation. Probation was also the most common sentence for adults convicted of drug possession; however, adults convicted of drug trafficking were more often sentenced to custody.

1.5 Drug Treatment Courts

1.5.1 The Creation of the Drug Treatment Courts in Canada

One part of the effort to break the cycle of drug use and criminal recidivism has been the creation of the Drug Treatment Courts (DTCs). The objective of Drug Treatment Courts is to reduce substance abuse, crime and recidivism through the rehabilitation of persons who commit crimes to support their substance dependency.[31] Canada's first Drug Treatment Court was established in Toronto, on 1 December 1998, as part of a four-year pilot project.[32] It was initiated by Justice Paul Bentley of the Ontario Court of Justice. According to Public Safety Canada, the Drug Treatment Court in Toronto was designed specifically to address the unique needs of non-violent offenders who abused cocaine or opiates.[33]

In February 2001, the Department of Justice announced that the governments of Canada and British Columbia had reached an agreement to develop a new DTC in the city of Vancouver. The Vancouver pilot program would modify the Toronto model in order to meet the specific needs of the community and expand the scope of the drug treatment court models in Canada.[34] The goal was to build upon the experience gained in Toronto and establish a successful made-in-BC program.

As part of the renewal of Canada's Drug Strategy, the federal government made a further commitment to expand the use of drug treatment courts in Canada. In December 2004, a call was made for funding proposals. The proposal review committee included officials from the Department of Justice Canada, Health Canada and the Canadian Centre for Substance Abuse.[35] The review was also carried out by treatment experts in the field of addictions. Each proposal was further subjected to a comprehensive assessment based on objective criteria and the demonstrated need for a treatment court in that community.

In June 2005, the government of Canada announced that it would provide additional funding in order to establish four new drug treatment courts. It would give $13.3 million over a period of four years.[36] As a result, there are now six federally funded DTCs in Canada. They are located in Toronto (December 1998), Vancouver (December 2001), Edmonton (December 2005), Winnipeg (January 2006), Ottawa (March 2006) and Regina (October 2006).[37] It is recognized that each of the drug treatment courts is unique, having its own set of partners to reflect the community in which it operates. Furthermore, each program is designed to meet the multiple and highly complex needs of its community.

1.5.2 The Purpose of the Drug Treatment Courts

One of the main goals of the Drug Treatment Court Program is to facilitate the treatment of drug offenders by providing an intensive, court-monitored alternative to incarceration. It is said that drug treatment courts have a more humane approach to addressing minor drug crimes than incarceration.[38] According to the Department of Justice, the DTCs take a comprehensive approach "intended to reduce the number of crimes committed to support drug dependence through judicial supervision, comprehensive substance abuse treatment, random and frequent drug testing, incentives and sanctions, clinical case management, and social services support."[39]

Another purpose of DTCs is to reduce the social and economic costs of illicit substance abuse. In 2005, the then Minister of Health, Ujjal Dosanjh, said that the expansion of the DTCs underscored the government's commitment to helping drug offenders overcome their addictions. He further stated that the benefits of these new courts would extend not only to participants but to all Canadians by helping to reduce the staggering health, social and economic costs associated with substance abuse.[40]

1.5.3 Evaluation and Funding of the Drug Treatment Courts

Funding is provided through the Drug Treatment Court Funding Program and is managed by the Department of Justice Canada, in partnership with Health Canada.[41] All of the treatment programs, "as a condition of their funding, are responsible for developing site-specific results-based evaluation/accountability frameworks, as well contributing to the national evaluation/accountability framework."[42] The funding recipients are therefore required to complete reports of their activities annually.[43] The DTC Funding Program is responsible for collecting data on the effectiveness of the drug treatment courts and promoting and establishing standards that are consistent from region to region.[44] The compiled results are used to support annual reports to Parliament and the Canadian public.[45]

It is said that the success of the DTCs can be measured not only in terms of dramatic reductions in criminal behaviour by those engaged in the program but also by a significant reduction in drug use.[46] The positive effects may not only have an impact on the criminal justice system, but may also spill over into the health system. Most of the participants in the drug treatment programs demonstrate a significant improvement in their physical and mental health. In August 2006, a meta-analytic examination of drug treatment courts was done by the Department of Justice Canada in order to determine whether or not the DTCs reduce recidivism. It was determined

that the results provide clear support for the use of drug treatment courts as a method of reducing crime among offenders with substance abuse problems.[47] The study, however, did not examine the cost-effectiveness of the program.

According to Health Canada, early evaluations of the Toronto DTC showed that there were high rates of retention of drug abusers and program participation. The ongoing evaluations have recognized this Canadian program as a promising form of drug intervention.[48] The National Crime Prevention Centre has published some evaluations of DTCs. The evaluation of the Vancouver DTC concludes that, although many participants maintained patterns of criminal behaviour and substance use after the program, the data suggests that there is a modest but significant decrease in drug use and drug-related crimes for those who complete the program. Only 14% of participants, however, completed the program. The evaluation concluded that, for the model to be successful, strategies are needed to encourage participants to complete the program.[49]

1.5.4 The Drug Treatment Court Program

Participation in the DTC program is voluntary. The accused who has been charged with a non-violent criminal offence or an offence under the *Controlled Drugs and Substances Act* must apply for admission into the program. Individuals who are charged with violent offences or have a history of violent offences generally do not qualify for the DTC program.[50]

The participants in the DTC are most commonly charged with non-violent *Criminal Code* offences, such as theft, possession of stolen property, non-residential break and enter, mischief and communication for the purpose of prostitution. With respect to drug offences, the more frequent offences are those of simple possession, possession for the purpose of trafficking and trafficking (at the street level). The above-noted offences are generally known to be committed by individuals who are trying to feed an addiction.

An application form must be completed and then reviewed by the DTC team. The applicant's eligibility is determined by the Crown Attorney, who acts as the gatekeeper. The prosecutor has final discretion with respect to the nature of the offence and/or the applicant's criminal record.[51] Eligibility is determined on a case-by-case basis. Therefore, a criminal record will not necessarily keep an applicant from being considered for the program. Offenders who are gang members or who used a weapon in the commission of their offence may not be eligible for the DTC.[52]

A common condition for admission into the DTC is a plea of guilt. The participant is assessed in order to create a treatment plan that is tailored to his or her specific needs. He or she will be stabilized and receive medical attention. If necessary, the methadone program will be administered. Drug treatment court staff will help ensure that the participant has safe housing, stable employment and/or an education. If required, job training will also be provided. The length of the program is approximately one year. As it is considered an outpatient program, the offender will be required to attend both individual and group counselling. Each participant is subject

to random urine screening. The participant will be required to appear personally in court on a regular basis. It is expected that the participant will be honest and disclose any high-risk activities and information on whether or not he or she has relapsed. The judge will review his or her progress and can either impose sanctions or provide rewards.[53]

As the program is designed to assist individuals who have severe and long-term addictions, a relapse will not necessarily lead to expulsion from the program. This being said, persistent non-compliance with the treatment program, such as the continued use of substances, could lead to the individual's removal from the program.

Once the participant has met the minimum participation requirement, he or she may apply for graduation. Participants who successfully graduate from the DTC may receive a non-custodial sentence. The sentence may include a period of probation, restitution and/or fines.[54]

1.5.5 Other Drug Treatment Courts in the World

Drug treatment courts also exist in the United States, the United Kingdom, Jamaica, Bermuda, Brazil, Ireland, Scotland and Australia. DTCs in the United States have been in existence since 1969. There are well over 1,000 drug treatment courts in that country, where follow-up studies indicate that only a very small percentage of program graduates reoffend.[55]

1.5.6 Women in the Drug Treatment Court Program

According to Public Safety Canada,[56] one of the lessons learned in the Toronto Drug Treatment Court project was that when planning the program, more attention needed to be given to women and young people under the age of 25. It was observed that a significant number of people in these groups would not return to the project after their initial assessment or would often drop out in the early stages of the program. It was further recommended that monitoring techniques be used to assess and address the needs of women.

Dawn Moore, a professor of criminology at Carleton University, is conducting a nationwide study of women in treatment programs. She is interested in knowing why there is such a high rate of females who drop out of the programs. She has observed that the programs are largely designed without accounting for the specific needs of women.[57]

2 DESCRIPTION AND ANALYSIS

Bill S-10 consists of 16 clauses. The following discussion highlights selected aspects of the bill and does not review every clause.

2.1 Clauses 2 to 4: Mandatory Minimum Sentences

Sections 5 to 7 of the CDSA deal with, respectively, the offences of trafficking in a controlled substance, importing and exporting such a substance, and the production of a controlled substance. Clauses 2 to 4 of Bill S-10 amend each of these sections.

The current section 5(3)(*a*) of the CDSA makes trafficking in a substance included in Schedule I or II an indictable offence. The maximum punishment for this offence is imprisonment for life. This measure reflects the seriousness with which these substances are viewed, particularly the opiates and coca and its derivatives found in Schedule I. One exception is found in section 5(4) of the Act and concerns trafficking in Schedule II substances, mainly cannabis and its derivatives. Should the amount trafficked not exceed the amounts set out in Schedule VII to the Act (3 kg of cannabis resin or cannabis [marihuana]), the maximum possible punishment is imprisonment for a term not exceeding five years less a day.

Clause 2 of Bill S-10 amends section 5(3)(*a*) of the CDSA to provide in certain circumstances for mandatory minimum terms of imprisonment for the offence of trafficking in a substance included in Schedule I or in Schedule II if the amount of the Schedule II substance exceeds the amount for that substance set out in Schedule VII. There will be a minimum punishment of imprisonment for one year if certain aggravating factors apply: the offence was committed for a criminal organization, as that term is defined in section 467.1(1) of the *Criminal Code* (a group of three or more people whose purpose is to commit serious offences for material benefit); there was the use or threat of the use of violence in the commission of the offence; a weapon was carried, used or threatened to be used in the commission of the offence; or the offender had been convicted of a designated substance offence, or had served a term of imprisonment for such an offence, within the previous 10 years. A "designated substance offence" is defined in section 2 of the CDSA to mean any of the offences in sections 4 to 10 of the CDSA, except the offence of possession of a substance found in Schedule I, II, or III to the Act, as set out in subsection 4(1).

Clause 2 amends the CDSA to impose a minimum punishment of imprisonment for a term of two years if certain other aggravating factors apply, including that the offence was committed in or near a school, on or near school grounds, or in or near any other public place usually frequented by persons under the age of 18 years. Defining such places may prove to be difficult. The use of the terms "school ground, playground, public park or bathing area" in subsection 179(1)(*b*) as a restriction on the movements of those who may commit a sexual offence against a child was found to be overly broad and, therefore, a violation of section 7 of the *Canadian Charter of Rights and Freedoms*.[58] The minimum two-year punishment will also be imposed if the offender used the services of a person who is under 18 years of age, or involved such a person, in committing the offence or committed the offence in a prison, or on its grounds. The term "prison" is defined in section 2 of the *Criminal Code* to include a penitentiary, common jail, public or reformatory prison, lock-up, guardroom or other place in which persons who are charged with or convicted of offences are usually kept in custody.

New section 5(3)(*a.1*) of the CDSA reenacts the current section 5(4) of the CDSA and imposes a maximum punishment of imprisonment for five years less a day if the trafficking offence is for a small amount of cannabis or its derivatives, as listed in Schedule II.

The current section 6(3)(*a*) of the CDSA makes the importing into Canada or exporting from Canada of a substance included in Schedule I or II of the Act or the possession of such a substance for the purpose of exporting it from Canada an indictable offence. The maximum punishment for this offence is imprisonment for life. Lesser maximum punishments apply if the offence is committed in relation to substances in the other schedules.

Clause 3 of Bill S-10 imposes a mandatory minimum punishment of imprisonment for one year if the offence is committed for the purpose of trafficking and the substance involved is included in Schedule I and is in an amount that does not exceed one kilogram, or is listed in Schedule II. The minimum punishment will also apply if the offender, while committing the offence, abused a position of trust or authority or had access to an area that is restricted to authorized persons (such as in an airport) and used that access to commit the offence. As in clauses 2 and 4, the maximum punishment of imprisonment for life is retained. Under new section 6(3)(*a.1*), the mandatory minimum punishment increases to two years' imprisonment if the Schedule I substance that is trafficked is in an amount that exceeds one kilogram.

The current section 7(2)(*a*) of the CDSA makes the production of a substance included in Schedule I or II of the Act, other than cannabis (marihuana), an indictable offence with a maximum punishment of imprisonment for life. Subsection 7(2)(*b*) of the CDSA makes the production of cannabis (marihuana) an indictable offence with a maximum punishment of seven years' imprisonment.

Clause 4 of Bill S-10 imposes a mandatory minimum punishment of imprisonment for two years if the subject matter of the production offence is a substance included in Schedule I, with a maximum punishment of imprisonment for life. The mandatory minimum punishment is increased to three years if any of the health and safety factors listed in new section 7(3) apply. These health and safety factors are:

- the offender used real property that belongs to a third party to commit the offence;
- the production constituted a potential security, health or safety hazard to persons under the age of 18 years who were in the location where the offence was committed or in the immediate area;
- the production constituted a potential public safety hazard in a residential area; or
- the accused placed or set a trap that is likely to cause death or bodily harm to another person in the location where the offence was committed.

If the substance produced is one listed in Schedule II, other than cannabis (marihuana), new section 7(2)(*a.1*) imposes a mandatory minimum punishment of imprisonment for one year if the production is for the purpose of trafficking, or for a term of 18 months if the production is for the purpose of trafficking and any of the

health and safety factors listed above apply. If the subject matter of the production offence is cannabis (marihuana), subsection 7(2)(*b*) will double the maximum possible term of imprisonment from 7 to 14 years.

Mandatory minimum punishments will also be introduced for the production of cannabis (marihuana), with their length depending upon the number of marihuana plants produced. The minimum penalty is six months where the number of plants produced is fewer than 201 and more than five and the production is for the purpose of trafficking, while the minimum penalty is nine months where the number of plants produced is fewer than 201, the production is for the purpose of trafficking, and any of the health and safety factors also apply. If the number of plants produced is more than 200 and fewer than 501, the minimum term of imprisonment is one year, which increases to 18 months if any of the health and safety factors apply. The minimum term of imprisonment will be two years if the number of plants produced is more than 500, which will increase to three years if any of the health and safety factors apply. There is no mention of the production being for the purposes of trafficking when the number of plants is more than 200.

2.2 Clause 5: Report to Parliament

Clause 5 of the bill adds sections 8 and 8.1 to the CDSA. New section 8 requires that, before a plea is entered, notice be given of the possible imposition of a minimum punishment. New section 8.1 requires that, within **five** years after the section comes into force, a comprehensive review of the CDSA will be undertaken by a committee designated by Parliament. This review is to include a cost-benefit analysis of mandatory minimum sentences. A report concerning the committee's review, including a statement of any changes the committee recommends, is to be submitted to Parliament within one year of its being undertaken.

2.3 Clause 6: Drug Treatment Courts and Treatment Programs

Section 10 of the CDSA sets out the aggravating factors to be considered by a court imposing a sentence. Many of these factors have been included in the amended section 5 of the CDSA. The new wording of section 10(2) of the CDSA, as set out in clause 6(1) of Bill S-10, distinguishes between the aggravating factors that lead to the imposition of a mandatory minimum punishment and the aggravating factors that should be considered by a sentencing court when no minimum punishment is specified.

The key part of clause 6 is that a sentencing court may delay sentencing to enable the offender to participate in a Drug Treatment Court Program approved by the Attorney General of Canada or attend a treatment program under subsection 720(2) of the *Criminal Code*. If the offender successfully completes either of these programs, the court is not required to impose the minimum punishment for the offence for which the person was convicted.

The suspension of the imposition of a sentence while an addicted accused person takes an approved treatment program is intended to encourage the accused person to deal with the addiction that motivates his or her criminal behaviour. If the person

successfully completes the program, the court normally imposes a suspended or reduced sentence. It should be kept in mind that the Drug Treatment Court Program operates (as of May 2010) in only six cities and so will not be available to large numbers of offenders. Because subsection 720(2) of the *Criminal Code*, came into force very recently, on 1 October 2008, it is difficult to determine at this stage what effect the treatment programs offered under that subsection will have on sentencing.

2.4 Clauses 7 to 9: Amendments to the Schedules of the CDSA

The schedules to the CDSA are amended by Bill S-10. Clause 7 of the bill transfers items 1, 25, and 26 of Schedule III to become items 19, 20, and 21 of Schedule I. The first item encompasses the amphetamines, their salts, derivatives, isomers and analogues and salts of derivatives, isomers and analogues. Methamphetamine had earlier been transferred to Schedule I. The other two items transferred are flunitrazepam and any salts or derivatives thereof and 4-hydroxybutanoic acid (GHB) and any salt thereof. Flunitrazepam is a benzodiazepine (sedative) readily soluble in ethanol and also known as Rohypnol. Gamma-hydroxybutyrate (GHB) has sedative effects that are very similar to those of alcohol. Both of these substances are commonly referred to as “date rape drugs.” The effect of this change will be to ensure that, when the offences addressed in the bill concern amphetamines or the date rape drugs, the mandatory minimum punishments will apply. Furthermore, possession of Schedule I substances in contravention of section 4 of the CDSA is more harshly punished than is possession of substances listed in the other schedules. Clauses 8 and 9 of the bill remove these three items from Schedule III.

2.5 Clause 11: Related Amendment

A reverse onus is placed on an accused person to show cause why he or she should be released on bail under subsection 515(6)(*d*) of the *Criminal Code* if charged with certain offences under the CDSA. Clause 11 of Bill S-10 will expand this subsection so that all of the newly amended sections 5 to 7 of the CDSA will be considered when eligibility for release on bail is being considered.

2.6 Clauses 13 to 15: Consequential Amendments

Clause 13 will clarify that any of the offences listed in sections 5 to 7 of the CDSA will lead to a firearm prohibition, unless the justice granting release on bail feels it is not required. The broader language in this subsection will take account of additions to the CDSA, such as the new subsection 7(3). Clause 15 does the same for the portion of the *National Defence Act* that deals with firearms prohibitions.

Clause 14 takes into account the fact that the current section 5(4) of the CDSA has been replaced by the new subsection 5(3)(*a.1*). New subsection 553(*c*)(xi) of the *Criminal Code* will mean that a provincial court judge has absolute jurisdiction to try an accused charged with trafficking in small amounts of substances included in Schedule II of the CDSA (cannabis and its derivatives).

3 COMMENTARY

Vigorous debate has surrounded Bill S-10 and its predecessor bills, C-15 and C-26, concerning drug-related issues and the legislative measures that should be applied in this area. This paper attempts to present the points of view on these matters as they have been expressed, with particular emphasis on media reports.

Support for the measures proposed in Bill S-10, Bill C-15 and Bill C-26 is seen by some as an expression of the anger felt toward the "revolving-door" justice system and the perception that sentencing for drug crimes is treated as a minor cost of doing business.[59] The status quo is seen as making a mockery of the law, which must show strength or remain a laughing stock. According to this view, the judiciary has for too long seen rehabilitation of offenders as more important than crime deterrence and the right of law-abiding citizens to go about their lives without fear in an orderly society.

The 2007 National Justice Survey would seem to reinforce the view that Canadians perceive the sentences imposed in Canada as being too lenient. Two thirds of those surveyed said that they support the strengthening of sentencing laws and tougher penalties for serious drug offenders. Approximately one quarter of Canadians endorse mandatory minimum sentences even for relatively minor crimes, while about half back them depending on the circumstances of the crime and the offender.[60] Yet a survey on public attitudes to sentencing published in January 2007 found that the strongest public support lay with the restorative sentencing objectives of promoting a sense of responsibility in the offender and securing reparation for the crime victim. There was less support for what might be termed the more traditional purposes of sentencing, namely deterrence and incapacitation. There was also strong public support for mandatory sentencing legislation that also permits a limited degree of judicial discretion. The public appear to support mandatory sentences in which courts may impose a lesser sentence where exceptional circumstances exist.[61]

Mandatory minimum sentences have the support of Barry McKnight, who heads the drug abuse committee at the Canadian Association of Chiefs of Police. He says that, in order to build safe and healthy communities, we must deal with the demand reduction as well as the supply management side of the drug abuse equation. The CACP drug policy, adopted in August 2007, said that police chiefs are committed to destroying the criminal infrastructure that keeps the crime cycle going and victimizes communities. Vancouver police spokesman Constable Tim Fanning also supports anything that will reduce the drug problem in his city as at least 80% of the city's property crime is linked to drugs.[62]

The option of going through a Drug Treatment Court Program in order to have a sentence reduced or suspended has been applauded by Ottawa Chief of Police Vernon White. He notes that many drug addicts turn to crime to feed their habits. According to Chief White, if they face mandatory jail time, some of those addicts may choose treatment programs to avoid going to prison. Since many addicts are involved in criminal behaviour, the Drug Treatment Court Programs will become a crime prevention tool.[63] Paul Welsh, the Director of the Rideauwood Addiction and

Family Services Centre in Ottawa, also welcomed the emphasis on treatment for addiction as an alternative to incarceration.[64]

Much of the negative reaction to the measures in the drug bills centres on opposition to the expansion in the use of mandatory minimum sentences. Mark Ertel, president of the Defence Counsel Association of Ottawa, has said that the measures would strip judges of the ability to apply discretion for mitigating circumstances and could turn Canadian correctional institutions and penitentiaries into U.S.-style inmate warehouses.[65] Mr. Ertel argues that automatic jail sentences, with no allowance for mitigating considerations, will inevitably prompt the kind of appeal that led to a 1987 Supreme Court of Canada decision (*R.* v. *Smith*) striking down a seven-year mandatory minimum sentence under the now-repealed *Narcotic Control Act* as cruel and unusual punishment. He also argues that the bill targets the wrong problem as almost all violent crime is alcohol-related, yet liquor manufacturers will not be prosecuted.[66]

Some opponents of the mandatory sentencing that is a feature of the drug bills have noted that the increase in costs to operate prisons will draw funds away from social programs, like those addressing improved education, health care and child poverty, which reduce crime.[67] Incarceration is seen as poor stewardship of both money and human resources.

Other opponents of mandatory minimum sentencing have taken note of the fact that the United States, which has championed the use of such sentences for many years, is, in some cases, moving away from them. The thinking is that by depriving judges of discretion and forcing them to apply rigid and arbitrary sentencing rules, the United States built irrationality into its justice system.[68] Yet, even though American courts mete out sentences that are double that of British and three times that of Canadian courts, the U.S. violent crime rate is higher than in those two countries.[69] In addition, while crime rates in both Canada and the United States have fallen by almost the same amount in recent years, the incarceration rates in the two countries have followed different patterns: in Canada, unlike in the U.S., there has been no substantial increase in the size of the prison population.[70] One editorial has noted that, despite 25 years of harsh mandatory minimums, disproportionate numbers of the poor, the young, minorities and the drug addicted have been thrown in U.S. jails with no impact on the drug business itself, which has flourished.[71] Opponents of mandatory minimum sentences point to two Department of Justice studies that conclude that such laws are not effective and are increasingly unpopular as crime-fighting measures in other countries. A 2005 study concluded: “There is some indication that minimum sentences are not an effective sentencing tool: that is, they constrain judicial discretion without offering any increased crime prevention benefits.”[72] A 2002 study,[73] meanwhile, found that mandatory minimum sentences do not appear to deter crime. The reasons for this lack of deterrence include the fact that they bar judges from using their discretion to sentence individuals. As a result, prosecutors and police take up the discretionary role, often choosing not to charge people with offences that would automatically lead to a prison term. Mandatory minimum sentences also sometimes lower conviction rates, as juries refuse to convict accused people facing automatic but seemingly unfair prison terms.

Furthermore, while these types of sentences show success in deterring firearms or drunk driving crimes, they appear to have no impact on drug crime.[74]

Those who support mandatory minimum sentences argue, in part, that there can never be positive proof that sentencing policies have an impact on the rate of crime – the variables involved are simply too complex. They contend that mandatory miniimum sentences are imposed in any event because society believes in denouncing certain crimes and holding people responsible for them. They argue, in addition, that "common sense" dictates that such sentences have at least some deterrence value, even if it is not possible to prove how much, and that deterrence and denunciation remain very important sentencing principles.[75] This deterrence is both general (directed at the population as a whole) and specific (directed at those contemplating criminal activity). They also assert that mandatory sentences are needed because the judiciary cannot be trusted to impose appropriate sentences, so Parliament must do the job for them. Research has shown that public perceptions of fairness and justice provided by the criminal justice system through the imposition of just responses to offenders and offending is a fundamental cornerstone in the preservation of the legitimacy of the law as well as the promotion of respect for it.[76]

A main argument in favour of mandatory minimum sentences is that of "incapacitation." The idea behind incapacitation is that separating offenders from society prevents them from re-offending. It holds out the promise of guaranteeing that the person will not commit crimes against the public while in custody: the longer violent, repeat offenders spend behind bars, the fewer crimes they commit.[77] This incapacitation is, therefore, thought to contribute to public safety. The counter-argument is that even the most careful selective incapacitation model shows high rates of false positives (around 50%). In other words, only a certain percentage of those who are predicted to be high-rate offenders actually turn out to be high-rate offenders, while a certain percentage of the high-rate offenders are not identified as such.[78]

Concerns have been raised by some regarding the impact of the measures contained in the drug bills on prison capacity and costs. In British Columbia, for example, it has been suggested that the province will need to find space in its already crowded jails for approximately 700 more marihuana growers each year. According to Darryl Plecas, a criminologist at the University of the Fraser Valley, the measures will make necessary the construction of a new prison, and BC Corrections spokesperson Lisa Lapointe has stated that provincial correctional centres, where most of the marihuana growers will end up, are at capacity.[79] Former Solicitor General John Les, however, has said the province will not let capacity issues stand in the way of appropriately dealing with those who break the law.[80]

The cost of housing a prisoner is about $57,000 a year in a provincial jail and $88,000 a year in the federal system.[81] Concern has been expressed that the true cost of crime legislation – who will pay and how such payment will affect other programs – has not yet been acknowledged.[82] In addition to the financial cost of a larger prison population, the Canadian HIV/AIDS Legal Network has noted that higher incarceration rates lead to higher rates of infection with blood-borne diseases such as HIV and Hepatitis C.[83] Since most incarcerated people are released from

prison, protecting public health necessarily includes protecting prisoners' health. Howard Sapers, the Correctional Investigator of Canada, has called for additional prison capacity to relieve the overcrowding that can lead to violence. He has also pointed to growing wait lists for rehabilitation programs as a factor leading to an increased risk of reoffending upon release.[84]

Finally, the entire criminal law approach to drug use taken by the *Controlled Drugs and Substances Act* has been called into question by those who assert that politicians and the public have ignored the lessons of Prohibition in formulating drug policy.[85] When the attempt was made to stop people from drinking alcohol in the early part of the 20th century, revenues from selling alcohol illegally swelled the coffers of organized crime and magnified levels of corruption in local governments. Violence flourished as efforts were made to control the lucrative market for illegal liquor. Many died from drinking alcohol put on the market without quality control. For critics of the current policies of governments in the United States and Canada, the parallels with the prohibition of certain drugs are also clear. An alternative approach has been advocated by Craig Jones, Director of the John Howard Society. He has suggested that legalization and regulation of street drugs would reduce crime in the same way that the lifting of prohibition against alcohol did decades ago.[86]

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