

**THE CANADIAN RESOURCE CENTRE FOR  
VICTIMS OF CRIME**

**BRIEF TO THE STANDING COMMITTEE ON JUSTICE  
AND HUMAN RIGHTS**

**BILL C-23 - THE SEX OFFENDER INFORMATION  
REGISTRATION ACT**

**Steve Sullivan, President  
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## **BILL 23 – THE SEX OFFENDER REGISTRATION ACT**

“If members of the public knew how many sex offenders could be found living within a few blocks in a typical North American neighbourhood, they might be quite concerned for the safety of their sisters and wives - and even more protective of their children.”<sup>1</sup>

This excerpt is from a book about the 1975 abduction of BC teen Abby Drover. Police were questioning known sex offenders in the area where Abby was abducted. She was found alive in a makeshift cell under her neighbour’s garage. He was a convicted sex offender and police had questioned him about Abby’s disappearance.<sup>2</sup>

Recently, Toronto police have applied the same investigative techniques in the tragic murder of Holly Jones their colleagues did almost 30 years ago. Their task has been made easier because Ontario has a sex offender registry. The registry may or may not assist them in their investigation, but it makes the task of interviewing sex offenders in the surrounding area has gone much quicker and is more inclusive. Eliminating suspects is a major part of an investigation.

In 1993, the Inquest into the 1988 murder of 11-year-old Christopher Stephenson recommended that:

*“the Solicitor General of Canada in conjunction with the Ontario Ministry of the Solicitor General and other appropriate bodies establish a registry for convicted, dangerous, high-risk sexual offenders and require each such offender to register with police in the jurisdiction where the offender will reside or is residing. In addition, it is recommended that the Ontario Provincial Police establish a central registry of dangerous, high-risk sexual offenders required to register with the local police.”<sup>3</sup>*

### **REGISTRATION**

A sex offender registry can help to police identify suspects who may live in an area where an offence took place and who have a history of committing similar crimes. When police have a crime and no suspect, among the first places they may check are halfway houses, prisons, mental hospitals, parole offices, etc.

In Toronto, a man was exposing himself to children in bookstores. Victims described him as having a goatee. Police searched the registry based on the description, who had a history for similar offences and who live in the Toronto area. The registry identified three potential suspects, one of which turned out to be the offender.

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<sup>1</sup> *Resurrection: The Kidnapping of Abby Drover*. John Griffiths. 1999.

<sup>2</sup> Police were familiar with him not because of his past sex crimes, which were committed in another province, but because they had been called out months before on a domestic and when they checked his history, they found he was a sex offender. Otherwise, they would not have known.

<sup>3</sup> Recommendation #44, The Inquest into the Death of Christopher Stephenson, 1993.

A 15-year follow-up study of California's registry revealed that the registry was helpful in enabling police in identifying and apprehending suspects and solving crimes earlier.<sup>4</sup> Another evaluation found that registration has been found to be useful in apprehending repeat offenders.<sup>5</sup>

Given that the rate of re-offending for some types of sex offenders is quite high and the importance society places on the safety of its children, sex offender registries can be useful to police.<sup>6</sup>

According to research released by the Solicitor General of Canada, 42% of child molesters "were reconvicted of a sexual or violent crime during the 15-30 year follow-up period."<sup>7</sup> The research concluded, "Special provisions may be required for the long-term supervision of certain high risk child molesters in the community."<sup>8</sup>

Dr. Howard Barbaree, representing the Centre for Addiction and Mental Health and the Department of Psychiatry at the University of Toronto, testified in support of the Ontario sex offender registry. He argued that the registry would be an important component of a comprehensive approach to the prevention of sexual assault, in addition to proper treatment and supervision and risk-assessment.

Registries create legal mechanisms to deal with sex offenders who have not registered and are engaging in concerning, but not illegal behaviour. For example, if police are notified of a suspicious person hanging around a schoolyard and find he is a convicted sex offender who has not registered, there is a legal mechanism to deal with him.

Critics also argue that compliance with registration will be low. In 1996, Washington's compliance rate was over 80%.<sup>9</sup> Alaska, Illinois and Texas report registration rates between 71 and 85% where North Carolina and Oregon reported rates between 86 and 100%.<sup>10</sup> In Ontario, the compliance rate is as high as 90%.

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<sup>4</sup> *Sex Offender Community Notification*. National Institute of Justice. February/1997. p.1.

<sup>5</sup> *National Conference on Sex Offender Registries* (US Department of Justice). 1998. p.32.

<sup>6</sup> Not all offenders present the same risk. Most sex offenders are known to victims and are either acquaintances or family members. These offenders have fairly low recidivism rates. Other kinds of sex offenders, like rapists and pedophiles, have higher recidivism rates. Sex offenders are not a homogenous group, thereby painting all sex offenders as high risk or all sex offenders as low risk. Studies that are quoted to argue low recidivism rates are often for short periods of time (i.e. 3 years). The longer you track someone, the higher the rates are. And most studies do not consider self-reporting, which limits their reliance.

<sup>7</sup> *Research Summary – Corrections Research and Development (Solicitor General), Vol.1, No.2, July/96.*

<sup>8</sup> *Research Summary – Corrections Research and Development (Solicitor General), Vol.1, No.2, July/96..*

<sup>9</sup> National Criminal Justice Association. *Sex offender registration and notification: problem avoidance and barriers to implementation*. August 1999. p.44.

<sup>10</sup> National Criminal Justice Association. *Sex offender registration and notification: problem avoidance and barriers to implementation*. August 1999. p.44.

Concerns have also been raised that sex offender registries drive offenders underground. For example, in the US, authorities have lost track of over 70,000 sex offenders. One must be careful in making direct comparisons, since most US registries are also combined with some kind of community notification program (for example, over 30 states have websites). In Ontario, police found sex offenders were not concerned about simply registering their address as long as the information was not made public (which is in part the reason for their high registration rate).

### **BILL C-23**

In 2000, Ontario passed *Christopher's Law*, creating the first sex offender registry in Canada.<sup>11</sup>

In March 2001, the Canadian Alliance introduced a motion in the House of Commons regarding the creation of a national sex offender registry and there was unanimous support. The government supported the motion but the former Solicitor General said:

*“We already have a credible and comprehensive national registry. It is called CPIC. It is a national registry of all convicted offenders, including sex offenders. We clearly already have a sex offender registry on a national scale. It is an important public safety tool that will remain effective in the future. We have a proven and reliable sex offender registry. We have already complied with the opposition's motion.”*

He also said that sex offender registries have not prevented crime. *“Despite their heavy cost, they are easily defeated when offenders simply fail to register or provide false information.”*

In February 2002, the Solicitor General announced the government would incorporate a sex offender registry into CPIC and was working with the provinces to create legislation to require sex offenders to register with police. Bill C-23 was introduced in the House of Commons in December 2002.

Bill C-23 will allow police to search a database of sex offenders. The database would include the name of offender, address, offence and tattoos/scars/marks.

In contrast, Ontario's registry allows police access to 93 different search engines plus combinations. For example, Ontario has photographs, allows radius searches (i.e. where police can do a search based on a physical description and offence information within a specific area), provincial searches, jurisdictional searches, extensive physical descriptors, geographic profiling, GIS mapping/coding and searches based on text (i.e. offender has an interest in urine, uses common phrase), phonetic, etc.

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<sup>11</sup> Alberta and Manitoba have created websites for high-risk sex offenders that have been subject of police community notifications. Manitoba's includes offenders released as far back as 1996.

The process for registration would require a Crown to apply for a registration order following a conviction and sentencing for one of the designated offences (i.e. sexual assault, child pornography). For designated offences, section 490.03(1) says registration shall occur. However, subsection (4) gives judges discretion to deny an order if the offender can establish that the impact (specifically on their privacy or liberty) of the order would be grossly disproportionate to the public interest in protecting society. This process is similar to that used to collect DNA samples for the databank.

Section 490.03(2) allows a court to make an order if the Crown can prove beyond a reasonable doubt that the offence was committed with the intent to commit one of the designated 'sexual' offences. If, for example, someone is convicted of break and enter and the Crown can show that he was intent on sexually assaulting the occupant, he/she may apply for an order.

Requirements to register can occur only by a judge's order and the offender has the right to counsel and the right to be heard. A judge will have discretion to refuse Crown applications for all registration orders and offenders ordered to register will have the right to appeal.

Offenders must register at a police agency within 15 days after the order is made or release from custody. The length of time for registration varies depending on the sentences and prior convictions, i.e. 10 years for summary conviction offences and offences with 2 and 5 year maximums. Offenders will be able to apply for a judicial review after a pre-determined time period (i.e. 5 years for situation above) to determine if they must register for the remainder of the registration period. Registration will continue after a pardon is granted, but the offender can apply to a judge requesting that his or her obligation to register be lifted. Failure to comply with a registration order is a hybrid offence.

The proposed registry would only include offenders convicted after the bill came into effect. In other words, the thousands of sex offenders currently in federal prisons, provincial institutions, on parole or probation, will not be in the federal sex offender registry.

**RETROACTIVITY** - Ontario's registry applied to those serving a sentence at the time the bill was passed, therefore including offenders on probation, in prison and on parole. Ontario's model captures thousands of sex offenders who will not be captured in the federal registry. If one accepts the value of the registry is in providing police access to immediate information about all sex offenders living in a certain area, the federal registry will be virtually useless. It will take years before there is anything for police to search, and in many cases, offenders will have to re-offend before we put them on the registry. The proposed sex offender registry will be of little use to police forces in Canada.

The government's argument, that retroactivity is a violation of the Charter, is inconsistent with the government's approach to the DNA Databank. The *Criminal Code* allows authorities to retroactively take samples from certain offenders (i.e. Dangerous Offenders) who were convicted of their crimes prior to the Databank law being passed. The following is an excerpt taken from the federal government's 2002 DNA Data Bank Legislation Discussion Paper:

"Any retroactive legislative scheme would confront one of the fundamental principles of our criminal justice system: that once a person is finally sentenced, the state cannot continue to impose further consequences based on that conviction. This type of scheme could be justified where there was a heightened risk that an individual would re-offend by committing a serious violent offence and, as a result, there existed an over-riding societal interest in the protection of the public from that individual.

The present legislation enables the courts to retroactively authorize the collection of DNA samples from those offenders who represent the greatest risk to society: "dangerous offenders," whose status has been determined by the court after a conviction; serial killers, who have high recidivism rates; and serial sex offenders--who, according to the Correctional Service of Canada, have the highest recidivism rates. The three categories of offenders currently included in the retroactive scheme present an elevated risk of recidivism justifying the need for special measures to protect the public (p.11)."

Canadian courts have found that the ordering of a DNA sample is not punishment within the meaning of section 11(i) of the *Charter*. Its impact on the offender is not comparable to the control central to imprisonment or house arrest. "It does not constitute a deprivation or hardship such as that which accompanies a restitution order, a fine or even a firearms prohibition."<sup>12</sup>

The Solicitor General has stated he is considering linking the federal registry with Ontario's registry and including all of Ontario's offenders, even those convicted before the bill comes into force. This also seems inconsistent with the government's Charter concerns.

Several US state courts have found that registration does not constitute punishment, as registration is regulatory rather than punitive.<sup>13</sup> The courts seem more concerned with the community notification aspects of state legislation and the public access to the registries. In March, the U.S. Supreme Court upheld the constitutionality of retroactive aspect of sex offender registries.<sup>14</sup> The court ruled that Alaska's version of Megan's law did not create an

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<sup>12</sup> *R. v. Murrins*. [2002] N.S.J. No.21. p.23.

<sup>13</sup> National Criminal Justice Association. *Sex offender registration and notification: problem avoidance and barriers to implementation*. August 1999. p.6.

<sup>14</sup> *Smith v. Doe* (012-729) 259 F. 3d 979.

unconstitutional extra punishment for offenders who already have served their sentences because registration is non-punitive.

In 2000, convicted sex offender Wray Budreo challenged the constitutionality of the *Criminal Code* pedophile peace bond provisions (s.810.1). Mr. Justice John Laskin of the Ontario court said a, “law that aims to prevent future harm is as valid as a law aimed at punishing an offender... If the preventive aspect of the federal criminal law power is going to be used anywhere, I cannot think of a more important use than the protection of young children from likely sexual predators...The state should not be obliged to wait until children are victimized before it acts.”<sup>15</sup>

The court ruled section 810.1 orders were not punitive. “A true penal consequence, according to the Supreme Court of Canada in *R. v. Wigglesworth* is imprisonment or a fine which by its magnitude would appear to be imposed for the purpose of redressing the wrong to society at large.”<sup>16</sup>

Registration is not onerous; it simply requires offenders convicted of sexual offences to attend a police station once a year, or after a move, and register their address. However, if the government refuses to amend Bill C-23 to make it retroactive, it should consider:

- make the registry partially retroactive similar to the DNA Databank legislation;
- create a mechanism where a Crown can apply for a registration order for offenders convicted before the bill comes into effect;
- pass Bill C-23 and refer the retroactivity question to the Supreme Court;
- amend section 810.1 to allow a court to order a condition of a pedophile peace bond include a registration order (which would have to be longer than 1 year which is the maximum time a peace bond can be ordered for).

**PROCESS** - In Ontario, if an offender is convicted of a designated offence, he shall register. Crowns do not have to apply for an order from the court as they would under Bill C-23.

The proposed process in Bill C-23 is essentially the same used for the DNA Databank and the 2002 annual report notes samples are being ordered in less than 50% of primary designated offences (which are supposed to be virtually automatic) and less for secondary offences. This means that the number of sex offenders ordered to register could be quite low.

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<sup>15</sup> *R. v. Budreo* [2000] O.J. No.72. p.9-11.

<sup>16</sup> *R. v. Budreo* [2000] O.J. No.72. p.8.

Therefore, the government should amend Bill C-23 to remove the requirement for a Crown to apply for a registration order and for judicial discretion to deny a registration order for a designated offence.

**SEARCH CAPABILITIES** - Ontario's sex offender registry has superior search capabilities. It is a much more useful tool to law enforcement officers than the federal registry will be. For example, Ontario's registry has geo-mapping, more detailed information about an offender and his crimes, such as sound of his voice, phrases he might use, unusual things he does with victims, etc. They can search within a 3 km radius of where an offence is committed. The federal registry only has basic information about the offence, an address and some identifying marks.

Therefore, the federal government should expand the search capabilities of the proposed registry to include geo-mapping, photographs and radius searches.

#### **OTHER RECOMMENDATIONS**

- i. Amend Bill C-23 to include young offenders. Currently, young offenders are only included if they have been sentenced as adults. Given the fact that the purpose is to provide police information about sex offenders in the community, there is no logical reason for youths not to be included.
- ii. Add the new offence of voyeurism to the primary designated list. Bill C-20 requires a sexual element to the offence of voyeurism and there is no reason that offence should not be on the primary list. Voyeurism is a sexual disorder in which someone derives sexual gratification from secretly observing others undress or engage in sexual disorder. At least twenty percent go on to commit more serious sexual assault offences (and this number is probably higher).
- iii. Lower the standard of proof required under s.490.03(2) from "beyond a reasonable doubt" to "a balance of probabilities." The reasonable doubt standard is the highest known in our law and it will be difficult for Crowns to be able to meet this standard.
- iv. Amend Preamble to make it clear registration is not intended for punitive purposes, but for the protection of society.
- v. Clarify that Bill C-23 will require offenders released on temporary absences, work releases day parole, parole, statutory release and all other forms of conditional release.