Bill C-2, *An Act to amend the Criminal Code and to make consequential amendments to other Acts (Tackling Violent Crime Act)*

Senate Committee on Legal and Constitutional Affairs
160-S Centre Block

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INTRODUCTION

The Canadian Resource Centre for Victims of Crime (CRCVC) is a non-government, non-profit advocacy group for victims of crime. We provide direct assistance and support to crime victims in their dealings with the criminal justice system, as well as advocating for justice reform to better protect their rights and prevent victimization.

The CRCVC is pleased to appear today before the Senate Committee on Legal and Constitutional Affairs to take part in the debate over Bill C-2, known as the *Tackling Violent Crime Act*[1]. On a daily basis, we assist Canadians whose lives have been horrifically impacted by serious, violent crime. These victims and survivors want more than anything to prevent what happened to them or to their loved one from happening to anyone else. We believe that Bill C-2 will better protect Canadians from those who repeatedly commit serious personal injury offences.

As you are well aware, Bill C-2 will:

- Part 1 – Create two new firearm offences and provide escalating Minimum Mandatory Sentences for Serious Firearms Offences;
- Part 2 – Increase the Age of Consent for sexual activity from 14 to 16 years;
- Part 3 – Introduce a new regime for the detection and investigation of drug-impaired driving and increase the penalties for impaired driving;
- Part 4 – Reverse the onus on those seeking bail when accused of serious offences involving firearms and other regulated weapons; and
- Part 5 – Ensure that high-risk and dangerous offenders face tougher consequences when they are sentenced and are better monitored post-release to prevent them from offending again and again.

[1] Bill C-2, *An Act to amend the Criminal Code and to make consequential amendments to other Acts,* was introduced and received first reading in the House of Commons on 18 October 2007. The *Tackling Violent Crime Act* – groups

Although we are supportive of the proposed changes to the *Criminal Code*, we will restrict our comments to Parts 2 and 5 of the legislation only, as it is very broad. We will allow our esteemed colleagues in the policing community and those in the fight against impaired driving to speak on the remaining amendments.

PART 2 – INCREASING THE AGE OF CONSENT FOR SEXUAL ACTIVITY

As an organization dedicated to public safety, the Canadian Resource Centre for Victims of Crime feels the protection of all children is of the utmost importance. We have long supported increasing the age of consent for sexual activity in order to prevent the exploitation of young persons by predators. Canada's low age of sexual consent, currently 14, makes our children vulnerable to sexual exploitation from adults and especially from sexual predators who may use the Internet to lure children.

The CRCVC supports the amendments as written and believes it is important to immediately increase the age of protection to 16 years of age. The *Criminal Code* already rightly recognizes the vulnerability of children, with specific sections offering special protections to persons under 18 years of age, including Section 153 (sexual exploitation involving people in positions of trust or authority which defines a young person as fourteen years or more of age but under the age of 18), Section 163 (child pornography), and Section 212 (concerning living off the avails of a prostitute under the age of 18 and forcing someone under that age to engage in prostitution). The *Criminal Code* also allows young people under the age of 18 to testify behind a screen or outside of the courtroom.

Increasing the age of consent from 14 to 16 years is long overdue. Police point out that Canada's low age of consent is often known by sexual predators and encourages them to target

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together five bills that had been dealt with separately in the first session of the 39th Parliament.

Canada in search of younger victims who would not be able to consent in countries with a higher age of consent. Many countries around the world have ages of consent of 16 years or higher, including Belgium, Hong Kong, Finland, the Netherlands, New Zealand, Norway, Russia, Singapore, Ukraine and the United Kingdom. Most of the states in the United States and Australia also have an age of consent of 16 years or higher. As Bill C-2 proposes, most of the countries listed above have "similar in age" provisions, which allow for consensual sexual relations between young people who are close in age.

We believe the focus of this Part is correctly placed on the protection of vulnerable young persons from the exploitive or coercive behaviour of adults.

We therefore support the following amendments to the existing law which are covered by this Bill:

- Changing the age at which youths can consent to non-exploitative sexual activity from 14 to 16 years of age;

- Maintaining the existing age of protection of 18 years for *exploitative* sexual activity (i.e. sexual activity involving prostitution, pornography, or where there is a relationship of trust, authority or dependency).

- Including a close-in-age exception, which would permit 14 and 15-year old youths to engage in consensual, non-exploitative sexual activity with a partner who is less than five years older. Another exception would be available for marriages and equivalent relationships.

PART 5 – DANGEROUS OFFENDERS, LONG-TERM OFFENDERS AND RECOGNIZANCES TO KEEP THE PEACE

Since our inception in 1993, the Canadian Resource Centre for Victims of Crime has

been very concerned with high-risk offenders and how to manage them properly. We participated in the committee hearings for Bill C-55 in 1995, which made important changes to the Dangerous Offender provisions including lengthening parole eligibility from 3 years to 7 years and the creation of the Long-Term Offender designation.

We continue to see, on average of once a week, police across the country issuing a public warning about the release of a high-risk offender, usually sex offenders and usually offenders who have served their entire sentences. Police are using recognizances more often, but these are only so effective. As a society, we are too often forced to open the prison doors and simply wait for a new victim.

The current Dangerous Offender provisions are rarely used. Between 1978 and 2006, there were 403 offenders declared Dangerous Offenders, an average of only 14 a year. The average has increased slightly during the last 10 years (1995-2004), to 22 offenders a year. Of those declared Dangerous Offenders:

- All are male;
- 45% had 15 or more previous convictions on their adult record;
- 80% of dangerous offenders with prior convictions have had 3 or more victims, (predominately females);
- 49% have victimized children; and
- 98% are classified as a high-risk to re-offend.[2]

The Supreme Court of Canada has upheld the Dangerous Offender provisions. In *Jones*, the Supreme Court said:

> "The overriding aim is not the punishment of the offender but the prevention of future violence...the offender faces incarceration only for the time of period he poses a serious risk...To release a dangerous offender while he remains unable to control his actions serves neither the interest of the offender nor those of society."[3]

[2] Library of Parliament, *Bill C-2 Legislative Summary*. For full text, visit: http://www.parl.gc.ca/LEGISINFO/index.asp?List=ls&Query=5273&Session=15&Language=e#ltdgroup

[3] R. v. Jones, [1994] 2 S.C.R. 229

In *Lyons*, the Supreme Court said the law was aimed at a "very small group of offenders whose personal characteristics and particular circumstances militate strenuously in favour of preventive incarceration."[4]

In our opinion, Part 5 of Bill C-2 is a measured, focused approach which attempts to capture those offenders who have shown by their past behaviour that they either do not want to be rehabilitated or cannot be rehabilitated. It is about public safety and ensuring we do not allow these individuals to prey on more innocent victims. We do not believe C-2 should be compared to the "three strikes" law found in the U.S., nor will it result in hundreds more offenders being declared dangerous every year.

Under Bill C-2, offenders convicted of three of the serious, violent offences, for which ***they received federal sentences***, would presumptively be declared Dangerous Offenders and jailed indefinitely. This may sound harsh to some, but committee Members will know that judges in Canada do not hand out federal sentences lightly. Most sex offenders receive provincial sentences and usually only repeat sex offenders enter the federal system.

Under Bill C-2, the Crown is still required to submit an application to have the offender declared a Dangerous Offender. This means the Crown, after considering all the facts, may decide not to pursue a Dangerous Offender even if the offender is convicted of the third applicable offence.

A Dangerous Offender designation is not equivalent to simply locking someone up and throwing away the key. They can apply to be considered for day parole after four years and full parole after seven years. After reaching full parole eligibility, the National Parole Board must review the offender's file every two years.

A lot of the criticism of the bill has focused on the reverse onus provisions of Bill C-2. Subclause 42(2) of the bill introduces a reversal of the onus of proof: after the prosecutor has

proven that the offender has been convicted of a third primary designated offence (the underlying offence and the prior offences, for each of which a term of imprisonment of at least two years was imposed), the onus shifts to the offender, who must prove, on a balance of probabilities, that he or she does not present a threat to the life, safety or physical or mental well-being of other persons (see paragraph 753(1)(*a*) of the Code), or, if the third primary designated offence is a sexual assault, that the offender is able to control his or her sexual impulses and there is no likelihood of causing injury, pain or other evil to other persons (see paragraph 753(1)(*b*) of the Code). In this case, the bill applies to people who have already been convicted. It therefore seems that the presumption of innocence could not be used to challenge the reverse onus that operates at the dangerous offender finding stage. In *Lyons*, the majority of the Supreme Court of Canada was of the opinion that the right to be presumed innocent did not apply in the context of a dangerous offender application.[5]

At the end of the day, whether the onus is on the Crown or upon the offender, the sentencing judge must be satisfied that the offender is so dangerous that he/she should be jailed indefinitely. That is not an easy standard to meet. The provisions of the *Criminal Code* are very stringent and judges do not take them lightly.

Lastly, we support subclause 42(1) of the bill, which provides that the court "shall" (replacing "may" in the current subsection 753(1) of the Code) make a dangerous offender finding if it is satisfied that the statutory conditions are met. The court retains the discretion *not to sentence a dangerous offender to detention for an indeterminate period* in a case where another sentence would adequately protect the public *against the commission by the offender of murder or a serious personal injury offence* (subclause 42(4) of the bill, amending subsection 753(4) and (4.1) of the Code). Accordingly, even if the court makes a dangerous offender finding, it may decide to impose a less severe sentence; that is, it may:

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[4] R. v. Lyons, [1987] 2 S.C.R. 309

- impose a minimum punishment of two years' imprisonment and order that the offender be subject to a LTSO; or
- impose a sentence for the underlying offence (subclause 42(4) of the bill, amending subsection 753(4) of the Code).

LONG-TERM OFFENDERS

From August 1997 to April 2006, 384 criminals were designated long-term offenders, an average of some 43 a year. There are 4 women in this group.[6] At the time they were designated, 26% of long-term offenders had 15 or more previous convictions on their adult record.[7] Studies show that the majority of long-term offenders (61%) have victimized children[8] and since the factor most predictive of sex offence recidivism is a preference for children[9], it is not surprising to learn that 90% of long-term offenders are classified as at high risk to re-offend.[10]

In the spring of 2005, several Canadian experts testified before the Standing Committee on Justice and Human Rights on Bill C-2, *An Act to amend the Criminal Code (protection of children).* One of them was Dr. Ron Langevin who spoke about a study he conducted at the University of Toronto in which they followed 350 sex offenders for a 25-year period. They found that the official statistics indicated 58% of the offenders had committed a second sexual offence. However, they knew that many sex crimes may be disguised (i.e. break and enter) or be pleaded down to a non-sexual offence or go undetected and they estimate the rate is closer to 90%.[11]

Dr. Marnie Rice, Scientific Director for the Penetanguishene Mental Hospital in Ontario told the same Committee that "sex offenders have a high rate of serious recidivism and they continue to recidivate over a long period of time."[12] In one study she participated in**,** 60% of the

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[5] Library of Parliament, Bill C-2 Legislative Summary. For full text, visit: http://www.parl.gc.ca/LEGISINFO/index.asp?List=ls&Query=5273&Session=15&Language=e#ltdgroup
[6] Ibid.
[7] Ibid.
[8] Ibid.
[9] Ibid.
[10] Ibid.
[11] Dr. Ron Langevin et al. "Lifetime Sex Offender Recidivism – A 25 Year Follow Up Study," in the *Canadian Journal of Criminology and Criminal Justice*, October 2004.
[12] Standing Committee on Justice and Human Rights, April 2, 2005.

offenders had re-offended after five years. In ten years, it rose to 78% and after 15 years, 98% of offenders had re-offended. In Dr. Karl Hansen's testimony, he estimated that the recidivism rate overall is about 35% and although Dr. Rice and Dr. Hansen did not agree on the rates, they did agree there is a population of high-risk sex offenders that have very high recidivism rates and that the longer you wait, the higher the rates are.

Dr. Rice said there is "general agreement that if there is an effect of treatment, it is small and cannot turn a high-risk sex offender into a low-risk offender." Dr. Rice told the committee that, "there is no evidence that any treatments reduce recidivism of sex offenders."[13] Even those who agree treatment can work are cautious about its effectiveness for high-risk sex offenders, especially in the long-term. But even if treatment worked perfectly, Dr. Langevin told the committee that only half of offenders want treatment and only 14% complete it.[14]

The CRCVC supports a sentence of an indeterminate period of detention in the case of an offender who has breached a long-term supervision order. In such instances, if an offender who is found to be a dangerous offender is later convicted of a serious personal injury offence or a breach of a LTSO, he or she must be, on application by the prosecutor, assessed by experts in corrections and mental health (clause 43 of the bill, adding new subsection 753.01(1) to the Code). After the assessment report is filed and on application by the prosecutor, the court must, if it is necessary to protect the public against the commission by the offender of murder or a serious personal injury offence:

- impose a sentence of detention for an indeterminate period (clause 43 of the bill, adding new subsection 753.01(5) to the Code); or
- impose a new period of long-term supervision in addition to any other sentence that may be imposed for the offence (clause 43 of the bill, adding new subsection 753.01(6) to the Code).

RECOGNIZANCES TO KEEP THE PEACE

[13] Ibid.

Another important aspect of Bill C-2 is the amendments to recognizances, which would allow a court to impose an order for up to two years and expand the conditions, which may be imposed upon an offender. Bill C-2 deals only with recognizances relating to sexual offences in respect of a person under the age of 14 years (clause 52 of the bill) and serious personal injury offences (clause 53 of the bill). The bill allows a judge to impose any "reasonable" condition that he/she considers desirable, for example:

- participation in a treatment program;
- wearing an electronic monitoring device;
- remaining within a specified geographic area;
- observing a curfew;
- abstaining from the consumption of drugs or alcohol;
- not possessing firearms or other weapons; and
- reporting to the correctional authority of the province or an appropriate police authority.

These orders have proven to be one of the few tools law enforcement have to deal with high-risk offenders who have served their entire sentences and are being released from prison despite their risk.

The Committee should be aware of the Inquest into the Death of Sarah Dawn Kelly, a thirteen year old who was murdered in September 1994 by Robert Arthurson, an identified pedophile. The Kelly Inquest found that the 1-year time limit on s.810.1 was insufficient and recommended it should be amended to extend it beyond the 1-year limit.[15] In fact, the CRCVC recommended (in 1995) that it be amended to five years.

Therefore, we strongly support the amendments to extend the maximum period for a recognizance for these offences to 2 years and expand the scope of conditions that may be imposed by a judge in these cases.

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[14] Ibid.

POST-SENTENCE DETENTION

The reality is that despite the positive changes made in Bill C-55 and those contemplated by Bill C-2, neither addresses the problem of an offender who was not declared a Dangerous Offender and is regarded as likely to commit a violent crime upon release.

Bill C-254, which was based on a bill introduced in 1993 by the former Progressive Conservative government, would have allowed the use of Dangerous Offender provisions at the end of an offender's sentence.

There is probably no better case example of why such a change in the law is necessary than the murder of Christopher Stephenson. Christopher was abducted and murdered by Joseph Fredericks, a man who had a long history of raping children. The Crown did not attempt to have him declared a DO. In 1988, Fredericks was paroled despite the fact that everyone involved knew he would re-offend against a child. Frederick's parole officer said, "When I dropped him off in Brampton, I crossed my fingers." True to form, Fredericks did re-offend, and Christopher paid with his life for the shortcomings of our system.

The top recommendation of the jury in the Stephenson Inquest was to create a Sexual Predator Law in Canada, based on the Washington State law. In 1989, a man took a 7-year-old boy into the woods near Tacoma, Washington. He was raped, stabbed and the man cut his penis off. Somehow, the brave little boy survived and was able to identify his attacker as Earl Shriner, a violent sex offender who was released from prison at the end of his sentence. Before he was released, Shriner told a cellmate about his fantasy to murder children. Washington State acted quickly and introduced a law that would allow the civil commitment in a mental institution of a dangerous sexual predator even if he had served his entire sentence. In the first 8 years after the law was passed, 41 offenders (an average of 5 per year) were committed. The U.S. Supreme

[15]Report on an Inquest [under the Manitoba *Fatality Inquiries Act*] into the Death of Sarah Dawn Kelly by the Hon. Judge Howard Collerman, March 28, 1996, at p. 252.

Court upheld a similar Kansas law in 1997, in essence, ruling that states could detain sexual predators beyond their sentence if professionals deemed them dangerous. The court found that civil commitment was not related to punishment and therefore it was constitutional.

In 1993, the Mulroney government appointed a Task Force to review the problem of high-risk offenders. The committee was headed by Jane Pepino and included victim advocate and founder of CAVEAT, Priscilla de Villiers. De Villers understood the stakes better than most – her own daughter, Nina, was murdered by a sexual predator in 1992.[16]

The committee wrote that the primary function of the criminal justice system should be "to protect the public. Where it can do so through the re-motivation and rehabilitation of an offender, society clearly gains; however, the system must recognize that it is not always so. To continue to ignore the clear and obvious danger posed by those who commit anti-social acts over and over again is simply irresponsible."

The Pepino Task Force report came to the same conclusion that the jury at the Christopher Stephenson Inquiry came to – that when it comes to high-risk offenders like Joseph Fredericks, the rights of high-risk predators must not take precedence over the rights of society. The committee wrote, "The right of the vulnerable members of the public to enjoy society's protection should be considered before the expectations of persons reliably considered dangerous eventually to be free…What is required is the moral courage to assert and ensure the balance between the individual rights we all claim and the public responsibility."

The Pepino Committee also found that many high-risk offenders are not "identified as posing a substantial risk to re-offend until shortly before release." They made the following recommendation,

> "An offender who is serving a determinate sentence, but who is considered to meet the criteria set out in sections 752 and 753 of the *Criminal Code* for a declaration that he is a Dangerous Offender, should be referred to a court consisting of a judge sitting with a jury, before the expiration of his sentence, for

[16] There was also an inquest into this case after the killer committed suicide.

> a determination as to whether or not he should be declared a Dangerous Offender."

Post-sentence detention makes sense because we are better able to predict someone's level of risk at the end of his sentence than we are ten years prior. A fuller picture of the offender's criminal history may come to light after admission including the likelihood of another serious offence.[17] The 1993 Task Force on High Risk Offenders found that "Many high-risk offenders are not identified as posing a substantial threat to re-offend until shortly before release."

Christopher Stephenson had a right to life, liberty and security of the person but we allowed his rights to be violated when we released Joseph Fredericks. Trina Campbell is another victim who had the same rights but we let Douglas Worth violate her rights when we released him from prison, despite his own warnings about making Clifford Olson look like a choirboy. He murdered Trina. We believe this debate cannot only focus on the Charter rights of a few proven high-risk offenders but must also include the protection of the rights of the innocent.

Finally, if the only barrier to a law that will save lives is the Charter, perhaps it is time we revisited the Charter and reassessed how our priorities have changed since its inception. If we have this magnificent piece of legislation, which prohibits us from protecting ourselves, what good is it? That is not to say we should throw it out the window and abandon the protection it provides us all, including criminals. If the Charter will allow another child to be murdered, something is seriously wrong, and as Parliamentarians, it is your responsibility to fix it.

CONCLUSION

Bill C-2 is a fair and justifiable measure to protect Canadians and especially the most vulnerable among us, our children. The Canadian Resource Centre for Victims of Crime urges the Senate to pass this important legislation without further delay.

As an agency that assists survivors of serious, violent crime on a daily basis, we support

the proposed amendments to the *Criminal Code* with respect to increasing the age of consent to better protect children from sexual predators, as well as the amendments to strengthen provisions dealing with Dangerous Offenders and Long-Term Offenders. We cannot continue to allow innocent Canadians, especially our children, to fall prey to these offenders whom experts know will eventually cause serious and devastating harm. We recognize the importance of closely supervising such offenders at the end of their sentences, thus we strongly support the amendments pertaining to recognizances to keep the peace. In fact, we believe that Parliament also needs to act with respect to post-sentence detention, and create legislation to ensure the rights of proven high-risk offenders no longer come before the rights of innocent citizens to be protected from harm.

[17] Managing High-Risk Offenders: A Post Sentence Follow-Up, 1995, p.4.