



# **The Fiscal Impact of Changes to Eligibility for Conditional Sentences of Imprisonment in Canada**

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**Ottawa, Canada  
February 28, 2012  
[www.parl.gc.ca/pbo-dpb](http://www.parl.gc.ca/pbo-dpb)**



The *Parliament of Canada Act*, RSC 1985, c. P-1, mandates the Parliamentary Budget Officer (PBO) to provide independent analysis to the Senate and House of Commons on the state of the nation's finances, the government's estimates and trends in the national economy.

The cost estimates and observations presented in this report represent a preliminary set of data for discussion and may change subject to the provision of detailed financial and non-financial data made available to the PBO by the Correctional Service of Canada (CSC), the Department of Justice, and provincial and territorial correctional and justice departments. The cost estimates and observations included reflect a point-in-time set of observations based on limited and high level data obtained from publicly available documents including surveys and analysis undertaken by Statistics Canada (StatCan). These high-level cost estimates and observations are not to be viewed as conclusions in relation to the policy merits of the legislation nor as a view to future costs.

The authors would like to thank the members of the independent peer review panel for their comments and guidance. Any errors or omissions are that of the author. Totals may not add up due to rounding.

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The authors would like to thank Statistics Canada and its dedicated staff for their support, analysis, and data, and Mostafa Askari, Russell Barnett, Jeff Danforth, Michael Hargadon, Sahir Khan, and Peter Weltman for their comments and support, and Erin Barkel, Michelle Bloodworth, Patricia Brown, and Jocelyne Scrim for their assistance in preparation. The responsibility for any errors or omissions lies solely with the authors.

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## List of Abbreviations

CCPA - Canadian Centre for Policy Alternatives

*CDSA- Controlled Drugs and Substances Act, SC 1996, c 19*

CQLC - Commission québécoise des libérations conditionnelles

CSI - Conditional sentence of imprisonment

CSC - Correctional Service of Canada

FTE – Full-time employee

IRIS - Québec Institute for Socio-economic Research and Information

ODPP - Office of the Director of Public Prosecutions

OPB - Ontario Parole Board

PBC - Parole Board of Canada

PBO – Parliamentary Budget Officer

PPSC- Public Prosecution Service of Canada

PROC - Committee on Procedure and House Affairs

StatCan - Statistics Canada





## Key Messages and Highlights

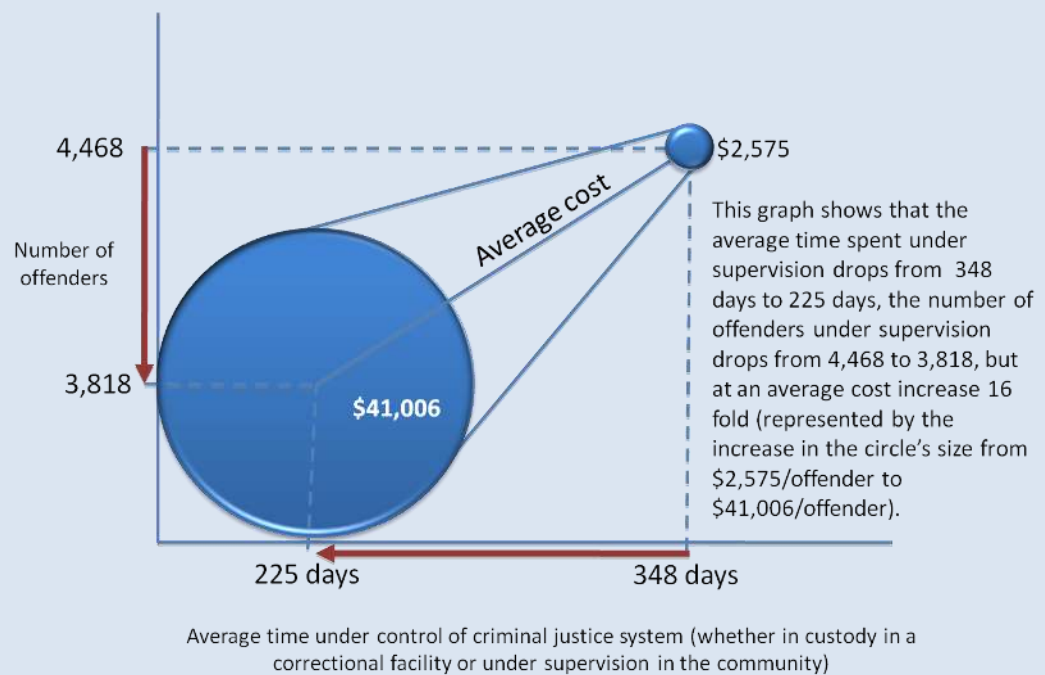
### PBO Analysis of Change to Eligibility for CSIs in Bill C-10

PBO analysis is based on a simple model (involving no behavioural changes) asking: *What would the fiscal impact of the changes to eligibility for CSIs be had Bill C-10 been in force in 2008-2009?*

#### PBO analysis indicates that as a consequence of the change:

1. approx. 4,500 offenders would no longer be eligible for a CSI and, as such, face the threat of a prison sentence;
2. 650 of that 4,500 will be acquitted, meaning fewer offenders under correctional supervision;
3. offenders who are punished will, on average, be under supervision for a shorter amount of time (225 days instead of 348 days); and
4. the average cost per offender will rise significantly, from approx. \$2,600 to approx. \$41,000—representing about a 16 fold increase.

**Figure 1: Changes in average cost per offender**



**As a result, the PBO estimates that:**

- The **federal government** would bear additional costs of about **\$8 million**, reflecting the cost of increases in parole reviews by the Parole Board of Canada (PBC) and criminal prosecutions by the Public Prosecution Service of Canada (PPSC).

*The government indicated no additional federal costs.*

- The **provincial and territorial governments** would bear additional costs totalling about **\$137 million**, reflecting the cost of increases in criminal prosecutions (except in the territories), court cases, incarceration, and parole reviews (in the case of Ontario and Québec).

*The government has not indicated additional provincial and territorial government costs.*

**It should also be noted:**

- PBO figures are based on two key assumptions:
  1. 50% of offenders who pled guilty for a CSI will opt for trial.
  2. Offenders who opt for trial may be acquitted.
- PBO analysis is primarily based on:
  1. data obtained from Statistics Canada;
  2. correctional data obtained from some provinces;
  3. average costs of prosecution obtained from the PPSC; and
  4. data obtained from Department of Justice reports and government documents provided to parliamentary committees.

PBO figures are likely underestimates. While they include no behavioural impacts, they also include no additional capital costs related to the building of new prisons.

## Executive Summary

On September 20, 2011, the Minister of Justice introduced Bill C-10, the “Safe Streets and Communities Act”, in the House of Commons. This omnibus bill is an amalgam of nine bills—parts of which were originally introduced in the 40<sup>th</sup> Parliament and, in some cases, in prior legislative sessions—that failed to receive Royal Assent before Parliament was dissolved on March 26, 2011.

On September 29, 2011, the PBO received a request from the Member for Windsor-Tecumseh to assess the fiscal impact of the proposed legislative changes to s 741.2 of the *Criminal Code*, RSC 1985, c C-46, altering the eligibility criteria for conditional sentences of imprisonment. The following report responds to this request.

As it currently stands, s 742.1 provides the sentencing judge with the power to order a conditional sentence of imprisonment (CSI) where the court imposes a period of incarceration of less than two years, the offence is not a serious personal injury offence, a terrorism offence, or a criminal organization offence prosecuted by way of indictment for which the maximum term of imprisonment is ten years or more, or an offence punishable by a minimum term of imprisonment, and the court is satisfied the individual does not pose an undue threat to the community, such that the offender may serve the term of imprisonment in the community under supervision.

**Figure 2: Simplified continuum of sentencing options *before* amendment:**



The proposed amendments would change s 742.1, removing the serious personal injury offence exception and adding three new exceptions to eligibility for a CSI. The amendments would render ineligible, where prosecuted by way of indictment:

- offences where the maximum term of imprisonment for the offence is 14 years or life;
- offences where the maximum term of imprisonment for the offence is 10 years and the offence resulted in bodily harm, involved the

trafficking, import/export, or production of drugs, or involved the use of a weapon; and

- a number of specifically enumerated offences.

**Figure 3: Simplified continuum of sentencing options *after* amendment:**



In 2008-2009, 4,468 cases that received a CSI would not, because of the changes in the law, be eligible for a CSI ( $TG_B + PG_B$ —see graph on following page). The challenge the PBO faces is estimating the change, if any, in the cost of the unavailability of a CSI for these cases. In order to do this, the PBO must first provide a cost for the before amendment status quo (i.e. the existing cost with CSIs available) and then provide a cost for the after amendment state (i.e. the new cost with CSIs unavailable). The difference between these two figures is the change in cost.

The PBO has included three cost categories within its analysis:

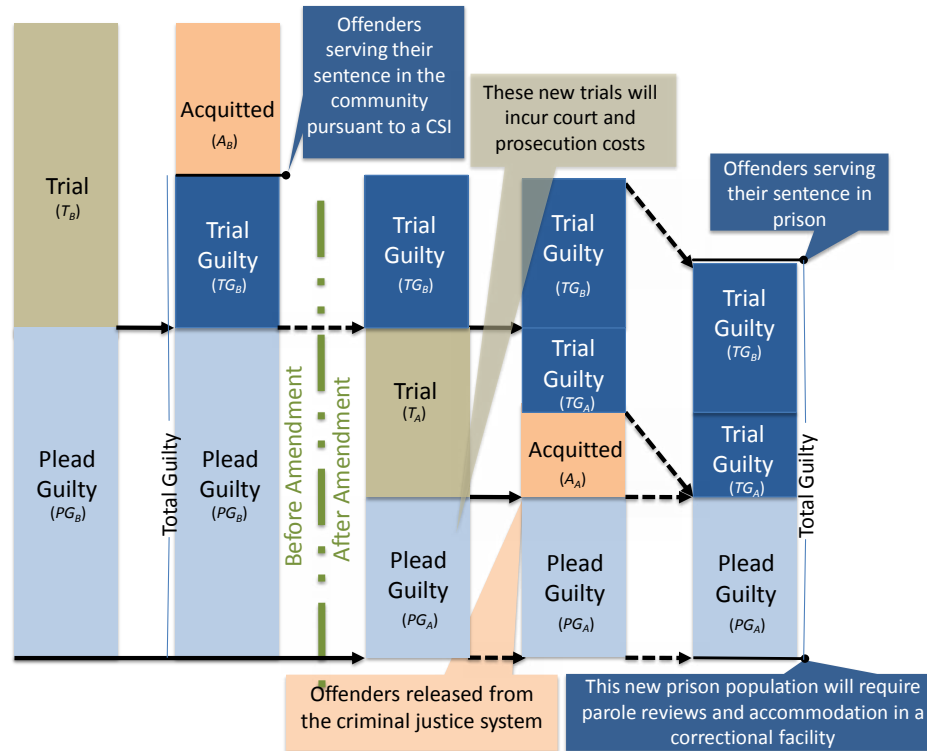
1. **Trial costs** (i.e. court and criminal prosecution) driven by number of trials
2. **Corrections costs** (i.e. incarceration and supervision) driven by days served
3. **Parole costs** (i.e. parole reviews) driven by inmate populations.

Before amendment, costs consist of **trial** and **corrections** costs. **Trial** costs would be incurred for those offenders who opted for trial and were sentenced to a CSI ( $T_B$ ). **Corrections** costs would be incurred supervising each of the 4,468 offenders in the community subject to a CSI ( $T_B + PG_B$ ). Since there is no parole, remission, and statutory release for a CSI, the period of supervision necessary is the length of the sentence.<sup>1</sup>

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<sup>1</sup> Because of lack of data, the PBO has had to assume that none of these 4,468 cases were breached and, thereby, sentenced to serve some portion of the remaining sentence in prison.

**Figure 4: Before and after amendment changes**



After amendment, cost consists of **trial**, **corrections**, and **parole** costs.

**Trial** costs after amendment would be incurred trying offenders who opted for trial and were sentenced to a CSI before amendment ( $T_B$ ) and pled guilty before amendment but would opt for trial after amendment ( $T_A$ ). Those offenders that opt for trial must be prosecuted, incurring prosecution costs, either for the Crown prosecutor or the Public Prosecution Service of Canada (PPSC), and court costs.

After amendment, the unavailability of a CSI reduces the incentive to plead guilty. Pleas are primarily made to obtain the advantage of a lesser sentence. As a result, a number of those offenders who pled guilty before the amendment would likely take their chances and opt for trial ( $T_A$ ) in the hope to be acquitted ( $A_A$ ).

**Corrections** costs after amendment would be incurred for incarcerating guilty offenders ( $TG_B + TG_A + PG_A$ ). Offenders who can no longer receive a CSI must be sentenced to a period of incarceration.

According to the law, the recipient of a CSI would otherwise be at risk of a prison sentence.<sup>2</sup> This means that other forms of punishment, such as probation, are, by definition, inappropriate and not available. Thus, the elimination of eligibility for a CSI means that guilty offenders will be sentenced to prison.<sup>3</sup>

The PBO must estimate the number of cases and lengths of normal prison sentences that would be served, taking into account the decrease in the number of guilty offenders. This is done by deducting the acquittals after amendment ( $A_A$ ) from the pre-amendment guilty population ( $TG_B + PG_B$ ). Once this has been done, the PBO has assumed that the distribution of this new population by reference to sentence length is the same as the before amendment CSI population. Thus, sentences received by the before amendment population are assumed to be the same as the period of incarceration that would otherwise be appropriate for each case after amendment.<sup>4</sup> The PBO must then estimate the lengths of the prison sentences that would be actually served taking into account credit for time served on remand and earned remission. After, it must estimate the costs associated with the change in days served.

**Parole** costs would be incurred for preparing and reviewing applications for day and full parole and temporary absences. The PBO must estimate this cost for those new inmates entering custody ( $TG_B + TG_A + PG_A$ ).

Changes in policy or the behaviour of actors within the criminal justice system that are not explicitly mentioned in this report are not considered. Such changes contain the potential to somewhat or entirely mollify the effects of the proposed changes to the law. As an example of a material change in policy, the suspension of CSC's single bunking policy significantly impacts the PBO's forecast on the costs associated with Bill C-25: Truth in Sentencing, which is based on a one bunk, one offender assumption.<sup>5</sup> Furthermore, these changes do not necessarily come without

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<sup>2</sup> By definition, the sentences affected by this change are all less than two years, and therefore, those offenders no longer eligible for a CSI will be sentenced to a period of incarceration in a provincial or territorial correctional facility.

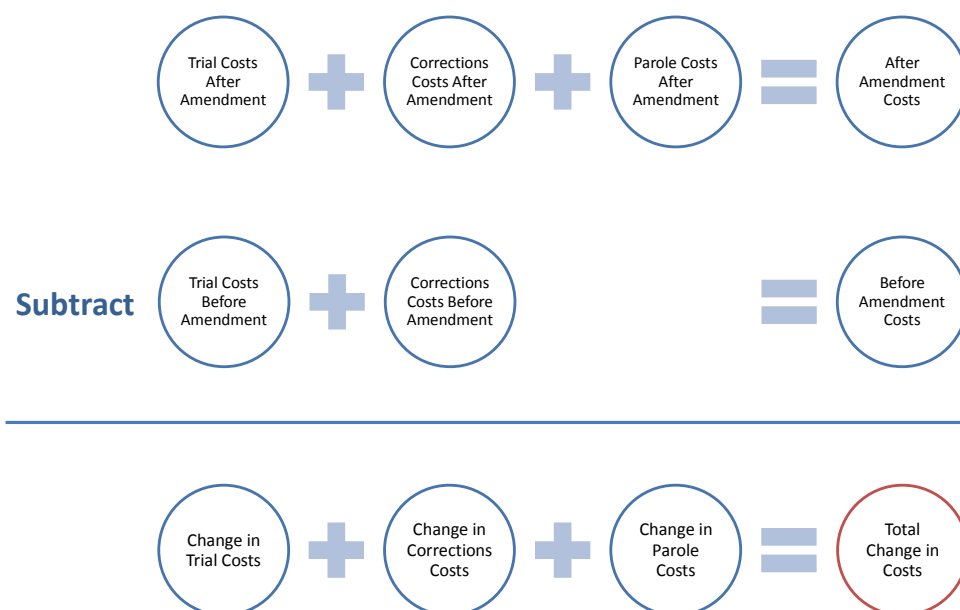
<sup>3</sup> This report makes no attempt to analyze the behavioural responses of actors in the criminal justice system. While they may act in such a way that the system tends towards equilibrium, the degree to which this will be the case is impossible to predict and, furthermore, is not necessarily without other costs; the exercise of greater arbitrary discretion has often been a cause for concern for policy makers and comes with its own costs.

<sup>4</sup> See 5 in assumptions.

<sup>5</sup> In estimating the costs of the *Truth in Sentencing Act* (TISA), the PBO forecasted new capital expenditures because the PBO assumed an increase in the inmate population based on Correctional Service Canada's (CSC) policy of single bunking. CSC has noted that TISA, other relevant legislation (e.g. C-2), and normal growth projections will contribute to significant inmate population increases

their own costs—financial or otherwise. The PBO makes no attempt to estimate such changes or their effects.

**Figure 5: Changes in cost**



In modeling these costs, the PBO uses the fiscal year 2008-2009 as a base. Drawing on data provided by Statistics Canada (StatCan), it is possible to estimate the increase in the number of trials as a result of removing the option of a CSI, the increase in days served in prison by those offenders who would no longer serve their sentence in the community pursuant to a CSI, and the increase in the prison population requiring parole reviews.

which will “exert significant pressure on current capacities to accommodate inmates” (*Correctional Service Canada*, “Policy Bulletin: Commissioner’s Directive (Cd) 550 - Inmate Accommodation” (1 August 2010) online: Correctional Service Canada <<http://www.csc-scc.gc.ca/text/plcy/cdshtm/b315-550-eng.shtml>>). Consequently, CSC has suspended the single bunking policy and has opted for double bunking, which may reduce capital expenditures. Given the PBO did not create its estimates on this Commissioner’s Directive, the forecast ostensibly became an overestimate.

### IMPORTANT NOTES

This is a **static estimate for fiscal year 2008-2009**.

It **does not** provide a view as to future costs.

It **does not** include capital costs such as those associated with building new prisons.

It **does not** estimate behavioural impacts.

It costs **only one** aspect of **one part** of Bill C-10.

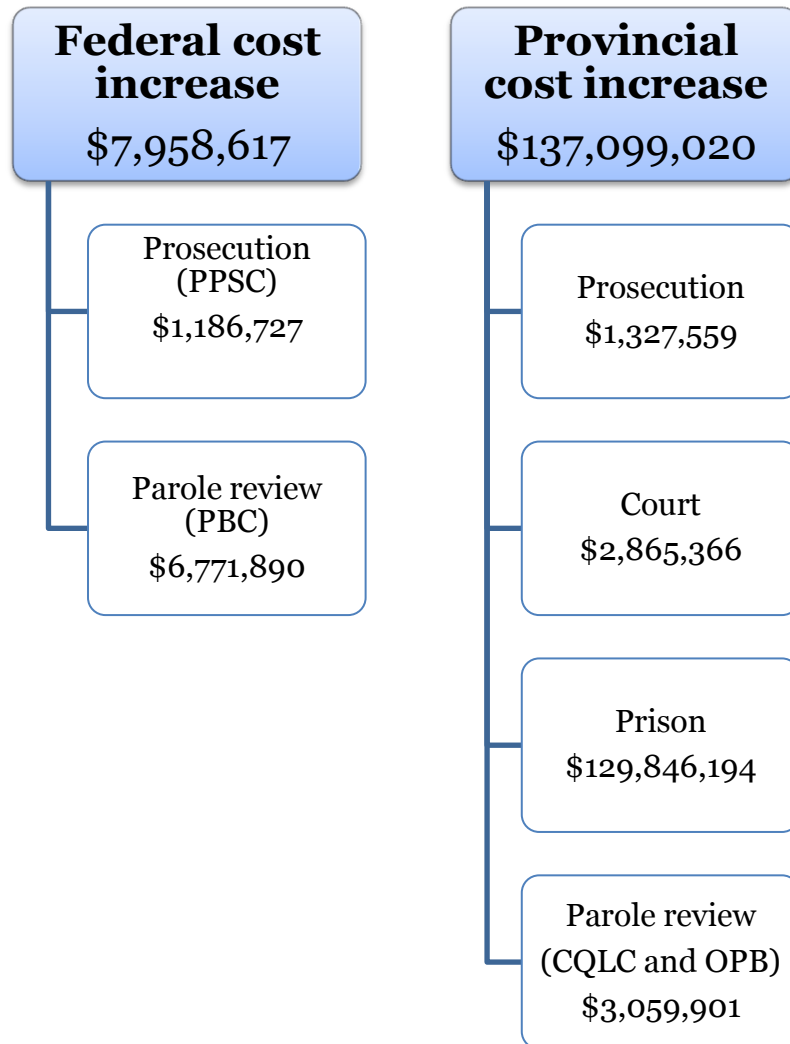
In details provided to the House of Commons on October 6, 2011, the government announced that the portion of Bill C-10 relating to changes to s 742.1 would have “no federal costs”. The basis of the government’s assertion, however, is difficult to discern; eliminating eligibility for CSIs will place upward pressure on the number of trials and offenders incarcerated as shown in the chart above. These increases translate into a respective increase in prosecution and parole review costs for the federal government.<sup>6</sup> Changes in the number of trials does not alter the fact that there will be more federal costs than there otherwise would, for the trial and parole costs tend to work against each other. If, on the one hand, all offenders who would have pled out continue to plead out and, hence, are incarcerated, parole review costs rise, as there are more inmates to review. If, on the other hand, all offenders who would have pled out opt for trial, prosecution costs rise, as there are more matters for prosecutors to prosecute.

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<sup>6</sup> More specifically, there will be federal costs provided increases in the number of trials translate into more full prosecutions of *CDSA* offences in all provinces and territories except New Brunswick and Québec and *Criminal Code* offences in the territories and more parole hearings conducted by the Parole Board of Canada, which is responsible for parole hearings for all provincial offenders except those in Ontario and Québec.

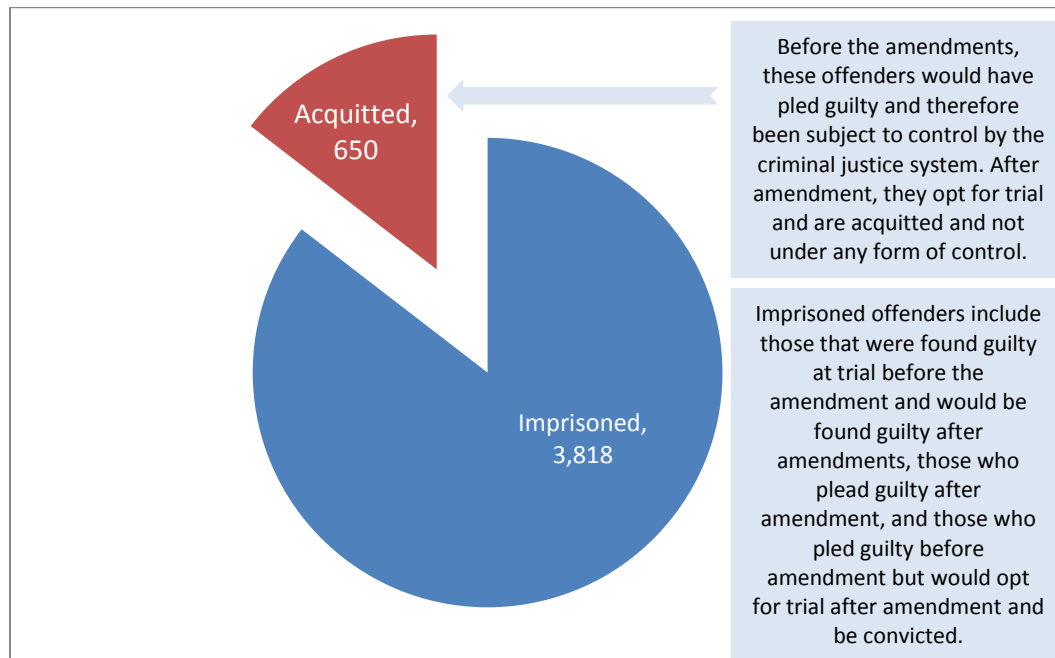


**Figure 6: Cost increases for 2008-2009:**



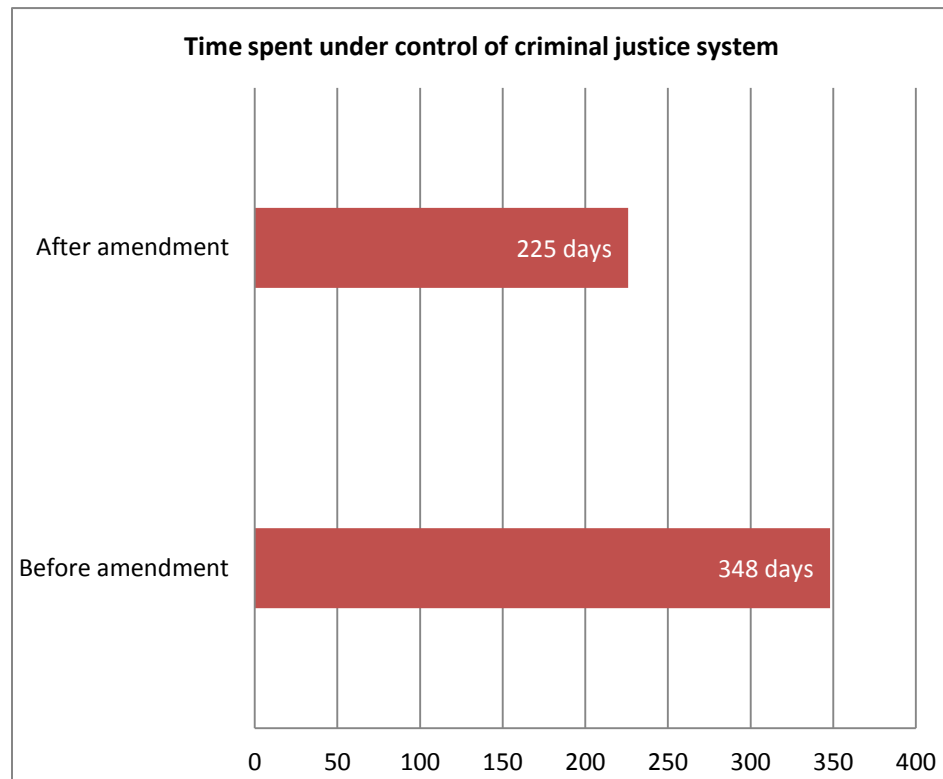
In addition to these cost increases, as a result of the changes, and elimination of this intermediate form of punishment, more offenders will likely opt for trial. Offenders not convicted at trial will be acquitted. Thus, offenders who previously would have pled guilty before the amendments and are acquitted will be released into the community without any form of supervision by the criminal justice system.

**Figure 7: Offenders acquitted after amendment for 2008-2009**



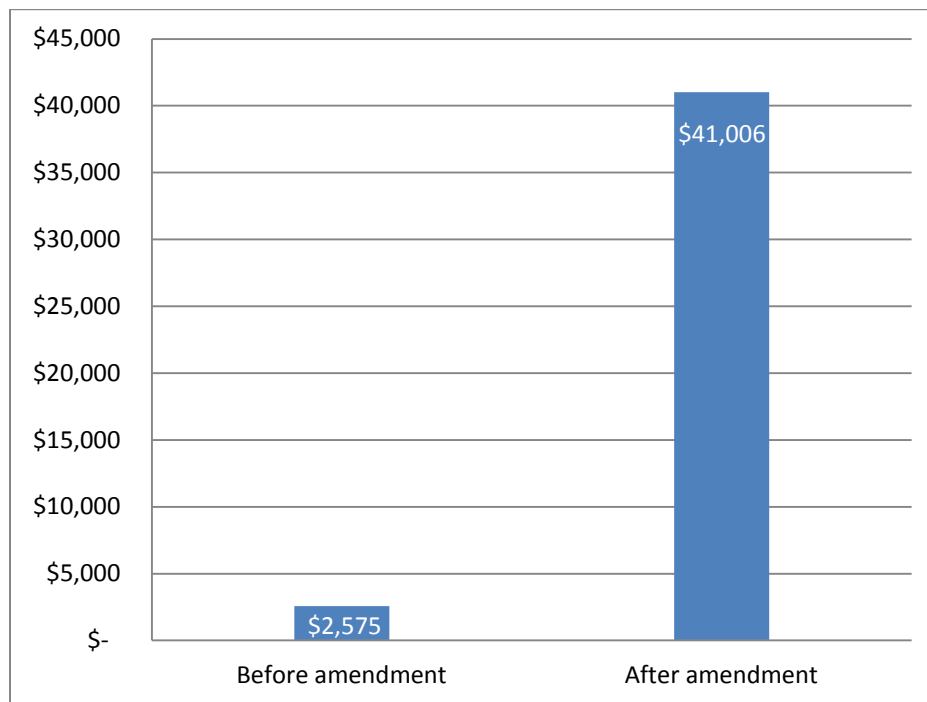
Those offenders who are imprisoned, will be imprisoned for a period of time that is shorter than the CSI they would have otherwise received. This is on account of credit for time served in remand and earned remission.

**Figure 8: Duration of control exercised over average offender**



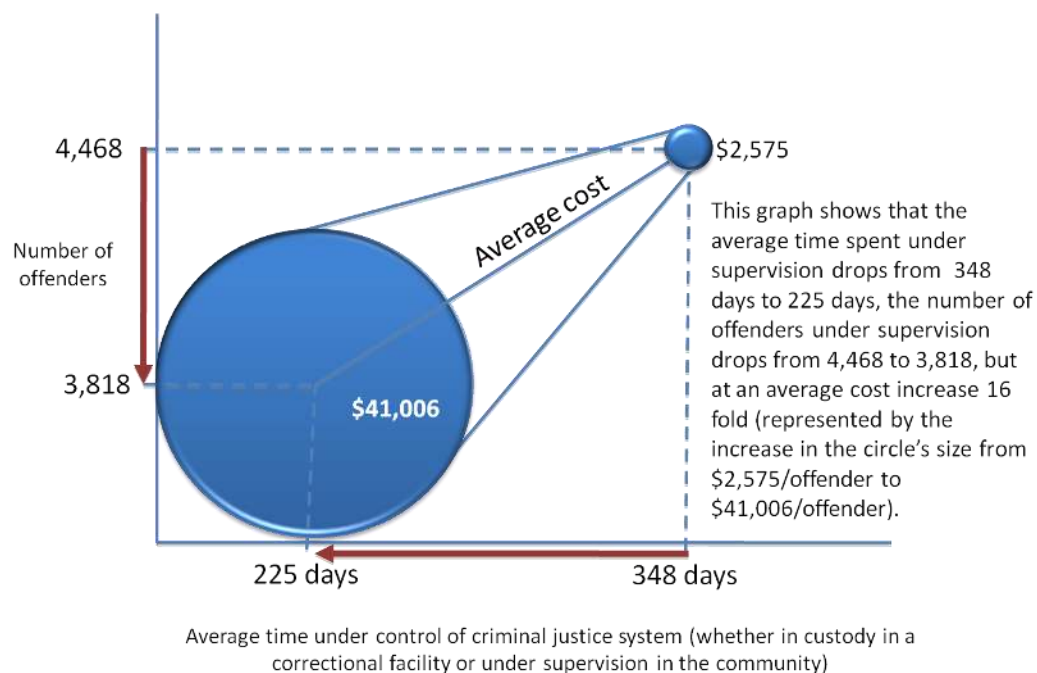
Those offenders that are incarcerated will cost more on an average per offender basis.

**Figure 9: Changes in cost per offender**



In effect, fewer offenders will be punished for shorter amounts of time, at a greater expense, but in provincial correctional facilities rather than in the community.

**Figure 10: Changes in average cost per offender**



The PBO's findings above are based on some key assumptions. The PBO is assuming a 50% trial rate, meaning that 50% of offenders who pled out prior will now opt for trial. The PBO is of the view that this number is conservative, given the government's estimates for S-10 of a trial rate of 80–90%. The PBO is also assuming acquittal rates in accordance with the offence category in question. Actual acquittal rates for those offences that would have otherwise gone to trial will likely be higher, given that a common factor influencing the prosecution's agreement to a plea is evidentiary weakness in a case. This would mean that more prisoners would be released into the community without any form of supervision by the criminal justice system.

In conducting its research, PBO analysis was hampered by a lack of data. Actual data was not forthcoming from Public Safety Canada. This meant that the PBO lacked corrections and parole data at the federal level. The PBO was also unsuccessful in its attempt to obtain average costs of prosecution from the Public Prosecution Service of Canada and average costs of incarceration and community supervision from some provinces. Because of this, the PBO was highly dependent on reports and analysis provided by StatCan and global figures released by the Department of Justice in various reports.

## Background

On September 20, 2011, the Minister of Justice introduced Bill C-10, the “Safe Streets and Communities Act” in the House of Commons. This omnibus bill is an amalgam of nine bills—parts of which were originally introduced in the 40<sup>th</sup> Parliament and, in some cases, in prior legislative sessions—that failed to receive Royal Assent before Parliament was dissolved on March 26, 2011.

Bill C-10 seeks to amend various pieces of federal legislation and create one new act to make changes to the Canadian criminal justice system:

### Part 1

- Creates the *Justice for Victims of Terrorism Act*, establishing a cause of action allowing victims of terrorism to sue the perpetrators.
- Amends the *State Immunity Act*, RSC, 1985, c S-18, creating a new exception to state immunity where a state has supported terrorism.

### Part 2

- Amends the *Criminal Code*, RSC 1985, c C-46, imposing and increasing mandatory minimum sentences for certain sexual offences, creating new offences, and restricting the availability of conditional sentences of imprisonment.
- Amends the *Controlled Drugs and Substances Act (CDSA)*, SC 1996, c 19, creating new mandatory minimum sentences for certain drug offences, increasing maximum sentences for some offences, and changing the classification of some substances.

### Part 3

- Amends the *Corrections and Conditional Release Act*, SC 1992, c 20, establishing a right for victims to make statements at parole hearings and allows the disclosure to victims of some information about an offender.
- Amends the *Criminal Records Act*, RSC, 1985, c C-47, by extending the period of ineligibility to apply for a pardon and rendering certain offences ineligible for a pardon.

- Amends the *International Transfer of Offenders Act*, SC 2004, c 21, giving the Minister of Public Safety more latitude in deciding whether to allow the international transfer of prisoners to Canada<sup>7</sup> and modifying the factors guiding the transfer of Canadian offenders to a foreign jurisdiction.

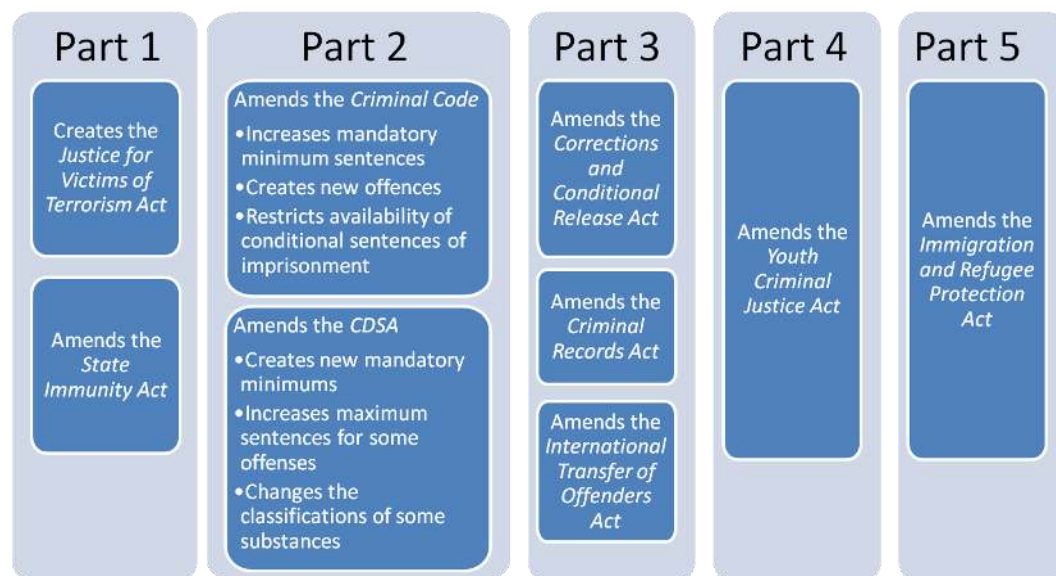
#### Part 4

- Amends the *Youth Criminal Justice Act*, SC 2002, c 1, emphasizing the protection of society and facilitating the incarceration of young persons who re-offend.

#### Part 5

- Amends the *Immigration and Refugee Protection Act*, SC 2001, c 27, allowing immigration officers to refuse to allow a foreign national to work in Canada where there is a risk that that individual may be a victim of abuse or exploitation.

**Figure 11: Constituent parts of Bill C-10**



<sup>7</sup> The proposed amendments would make the list of factors to which the Minister of Public Safety refers when deciding whether to allow the international transfer of prisoners to Canada permissive rather than obligatory.

On September 29, 2011, the PBO received a request from the Member for Windsor-Tecumseh to assess the fiscal impact of the proposed legislative changes. The request focused specifically on the proposed amendments to:

1. the *CDSA*, imposing new mandatory minimums and increasing minimum terms of imprisonment for some drug offences; and
2. s 741.2 of the *Criminal Code*, changing the eligibility criteria for conditional sentences of imprisonment.

After receiving the request, the PBO began to examine exclusively the changes requested. Upon closer analysis, the data limitations associated with analyzing the impact of point 1, above, were found to be too significant, rendering analysis unfeasible.<sup>8</sup> Point 2—the changes to the eligibility criteria for CSIs—lent itself better to analysis; StatCan collects detailed information on the number and duration of conditional sentences handed down by reference to offence section. As this information was available, it made analyzing the changes to the conditional sentencing regime possible. Given the data limitations, the PBO’s analysis focussed on the fiscal impact of former Bill C-16; it does not examine any other aspect of Bill C-10. In this sense, it might reflect only a small portion of the financial implications of the entire bill.

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<sup>8</sup> Former Bill S-10 proposes amendments to ss 5, 6, and 7 of the *CDSA*, imposing new mandatory minimums for drug offences. The data necessary for forecasting the impact of such changes, however, is not available. For example, amendments to s 7(2)(a.1) propose a new mandatory minimum of 18 months for production for Schedule II substances (other than cannabis) if the offender used real property of a third party to commit the offence, the production constituted a security, health, or safety hazard to minors, the production constituted a public safety hazard in a residential area, or the person set a trap or device likely to cause bodily harm. While some general policing data on location of the commission of offences is available, information on the other three, linking the criteria to a specific offence, is not available. While some solutions are available, such as identifying provisions in the *Criminal Code* that indicate satisfaction of one of the criteria—i.e. setting traps, this approach is piecemeal and ineffective at providing the sufficiently robust results necessary to estimate cost.



On October 6, 2011 the Government announced to the House of Commons that Bill C-10 would cost taxpayers a total of \$78.6 million dollars over five years. The details on the costs provided were as follows:

| Former Bill  | Cost   |
|--|--|
| S-7 (Justice for Victims of Terrorism)   | No federal costs.  |
| C-54 (Protecting Children from Sexual Predators)                                   | Imposition of Mandatory Minimum Penalties for incest and sexual exploitation will result in increased correctional costs. Funding over 2 years will be \$10.9 million, with additional funding to be approved after 2 years. |
| C-56 (Preventing the Trafficking, Abuse and Exploitation of Vulnerable Immigrants) | No federal costs.  |
| C-4 (Sébastien's Law)  | No federal costs.  |
| C-5 (International Transfer of Offenders)  | No new funding requirements.   |
| C-16 (Ending House Arrest for Property and Other Serious Crimes)                   | No federal costs.  |
| C-23B (Eliminating Pardons for Serious Crimes)                                     | No federal costs.  |
| C-39 (Ending Early Release for Criminals and Increasing Offender Accountability)   | No federal costs.  |
| S-10 (Penalties for Organized Drug Crime)  | Projected federal costs are approximately \$67.7 million over 5 years.   |

The information provided by the government reflects federal and not provincial costs. The absence of the latter, however, does not mean that there will be no provincial costs. In fact, provincial costs could be significant, as the provinces are responsible for performing a number of functions in Canada's criminal justice system.<sup>9</sup> In federal documents obtained by *The Globe and Mail*, the government has suggested that it may be willing, in relation to some parts of the bill, to share costs with the provinces.<sup>10</sup> So, while there may be direct federal costs associated with the changes, there may also be indirect federal costs as a result of sharing the provincial costs.

Part 2 of Bill C-10 contains the potential for significant, direct costs for federal, provincial, and territorial governments. Given the fact that Part 2

<sup>9</sup> For more background on the distribution of federal and provincial powers in relation to Canada's criminal justice system, see Appendix A.

<sup>10</sup> Kim Mackrael, "Huge price tag for provinces attached to crime bill" *The Globe and Mail* (14 December 2011), online: The Globe and Mail <<http://www.theglobeandmail.com>>.

provides for changes to the eligibility criteria for conditional sentences of imprisonment, the imposition of mandatory minimums and increases in maximum penalties for certain drug offences, there is a likelihood that it will affect inmate populations.

The former Bill C-16 proposed changes to the eligibility of offences for conditional sentences of imprisonment, and the former Bill S-10 proposed changes to the mandatory minimum and maximum terms of imprisonment for drug offences. The information provided by the government to the House of Commons Standing Committee on Procedure and House Affairs (PROC) in March 2011, contains information on both C-16 and S-10.<sup>11</sup> The information provided on C-16 was limited, as the government was of the view that the changes would not result in federal costs. The information provided on Bill S-10, however, was more robust. The \$67.7 million indicated consisted of costs associated with the Office of the Director of Public Prosecutions (ODPP) and the former National Parole Board, now the Parole Board of Canada. The government expects increased costs for the ODPP, who is responsible for prosecuting infractions under the *CDSA*, and the Parole Board of Canada, who, in every province but Ontario and Québec, conducts parole reviews. The government expects an increase in prosecution costs for the ODPP because mandatory minimums will result in fewer plea bargains; as the prosecution will no longer be able to offer offenders a sentence below the mandatory minimum as an inducement to plead guilty, the incidence of trials will increase. The government also expects that the changes will result in more prisoners actually going to prison, and, as such, the Parole Board of Canada will have to conduct more parole hearings.

Since the government's release of information, there has been some public analysis on the costs. In November 2010, the Canadian Centre for Policy Alternatives (CCPA), an independent, non-partisan research institute, released a study entitled "The Fear Factor: Stephen Harper's "Tough on Crime" Agenda". This study includes several initiatives not included in Bill C-10, such as the abolition of statutory release and the introduction of mandatory minimums for certain crimes such as fraud over \$1 million, arson, counterfeiting, and extortion. The study also includes the costs of the abolition of 2-for-1 credit for time in remand in the *Truth and Sentencing Act*, which came into effect in February 2010. While the CCPA

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<sup>11</sup> House of Commons, Standing Committee on Procedure and House Affairs (PROC), *Bill S-10 - An Act to amend the Controlled Drugs and Substances Act and to make related and consequential amendments to other Acts (Penalties for Organized Drug Crime Act)* (March 2011) online: Parliamentary Budget Office <[http://www.parl.gc.ca/PBO-DPB/documents/UsefulLinks/Bill\\_S-10\\_en.pdf](http://www.parl.gc.ca/PBO-DPB/documents/UsefulLinks/Bill_S-10_en.pdf)>.

does not provide an exact figure for the total cost, using data from the Correctional Service of Canada, the Parliamentary Budget Officer, Statistics Canada, the Library of Parliament's Parliamentary Information and Research Service, as well as media and academic sources, it cautions that the proposed legislation will have "extraordinary financial costs".<sup>12</sup>

On December 14, 2011, an independent study was released by the Québec Institute for Socio-economic Research and Information (IRIS). IRIS was unable to calculate the federal costs for the former bills C-16 and S-10 and therefore could not confirm or deny the government's claims that there will be no federal costs associated with them. However, IRIS's research suggested that the provincial costs, which it was able to calculate, would be greater than any federal costs.<sup>13</sup>

IRIS foresees that the changes to the conditional sentencing regime and the introduction of mandatory minimum penalties will result in an increase in the prison population. The provincial costs associated with this increase are approximately \$1,676 million: \$1,383 million in construction costs for new prisons, annual additional operations and management costs of \$202 million, and additional capital expenditure and life cycle costs forecasted totalling \$91 million.<sup>14</sup> The IRIS report thus provides an approximation of the costs associated with these sub-bills, but without the accompanying federal costs and comprehensive methodology, this picture is incomplete.

In an article published on December 14, 2011, after reviewing the documents tabled by the Justice and Public Safety Ministers in the House of Commons in October 2011, *The Globe and Mail* suggests that the costs of Bill C-10 will be significantly greater than the government had disclosed. For example, those documents suggest that amendments to the *Youth Criminal Justice Act* (formerly Bill C-4) would cost approximately \$717 million over five-years, with the federal government paying the majority of that amount. In its disclosure to the House of Commons, the

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<sup>12</sup> Paula Mallea, "The Fear Factor: Stephen Harper's "Tough on Crime" Agenda" *Canadian Centre for Policy Alternatives* (November 2010), online: Canadian Centre for Policy Alternatives <<http://www.policyalternatives.ca/sites/default/files/uploads/publications/National%20Office/2010/11/Tough%20on%20Crime.pdf>>.

<sup>13</sup> See "Coûts et efficacité des politiques correctionnelles fédérales" *Institut de recherche et d'informations socio-économiques (IRIS)* (December 2011), online: Institut de recherche et d'informations socio-économiques <<http://www.iris-recherche.qc.ca/wp-content/uploads/2011/12/Note-Crime-web2.pdf>>.

<sup>14</sup> Note IRIS was not able to calculate the associated federal costs for these amendments.

government announced that there were no anticipated federal costs associated with this portion of Bill C-10.<sup>15</sup>

On January 23, 2012, the Ontario provincial government announced that Bill C-10 would cost the province approximately \$1 billion.<sup>16</sup> Details of how this figure was arrived at, however, were not publicly available. Similar figures have been released by the media about other provinces: New Brunswick estimated the cost at \$2 million<sup>17</sup> and Québec \$600 million.<sup>18</sup>

This PBO estimate is **not** comparable to the above estimates. This is so for two reasons. First, the PBO base year is 2008-2009; as such, it does not seek to project costs in future fiscal years. Second, the PBO analysis does not take into account capital costs; as such, the figure provided by the PBO is likely to be an underestimate.

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<sup>15</sup> Mackrael, *supra* note 10.

<sup>16</sup> “Federal Crime Bill Will Cost Ontario Taxpayers More Than \$1 Billion”, *Government of Ontario* (23 Jan 2012), online: Ontario.ca <<http://news.ontario.ca/mcscs/en/2012/01/federal-crime-bill-will-cost-ontario-taxpayers-more-than-1-billion.html>>.

<sup>17</sup> “National crime bill adds \$2M to N.B. budget”, *CBC News* (31 January 2012) online: CBC News <<http://www.cbc.ca/news/>>.

<sup>18</sup> “Quebec to demand crime bill reimbursement”, *CBC News* (27 January 2012) online: CBC News <<http://www.cbc.ca/news/>>.

## Conditional Sentencing Regime

When a court finds an offender guilty of an offence, it may make a number of orders. These range in gravity from an absolute discharge, where the offender is found guilty but no conviction is entered, to life in prison. Upon finding an offender guilty, the court has a number of options at its disposal the following of which may generally be viewed in a continuum of least to most severe: an absolute or conditional discharge, restitution to victims, fines and/or community service, probation, or custody.<sup>19</sup>

Custody is the most intensive form of supervision. It typically involves removing the offender from society into either a provincial correctional facility or federal penitentiary. Where, however, the offender qualifies for a CSI pursuant to s 742.1, instead of placing an offender in prison, the sentence may be served in the community subject to conditions.<sup>20</sup>

### Legislative history

The CSI was introduced in 1996. At the time of its introduction, a judge could only order a CSI if certain requirements were satisfied. First, the period of incarceration that the judge would have otherwise ordered and the CSI that is imposed must both be less than two years. Second, the judge must be satisfied that the presence of the offender in the community would not endanger the safety of others. Third, the offence must not have been an offence punishable by a minimum term of imprisonment.

In 1997, s 742.1 was amended to provide that the judge, in imposing a CSI, must ensure that the sentence is consistent with the purposes and principles of sentencing as outlined in s 718.2 of the *Criminal Code*,

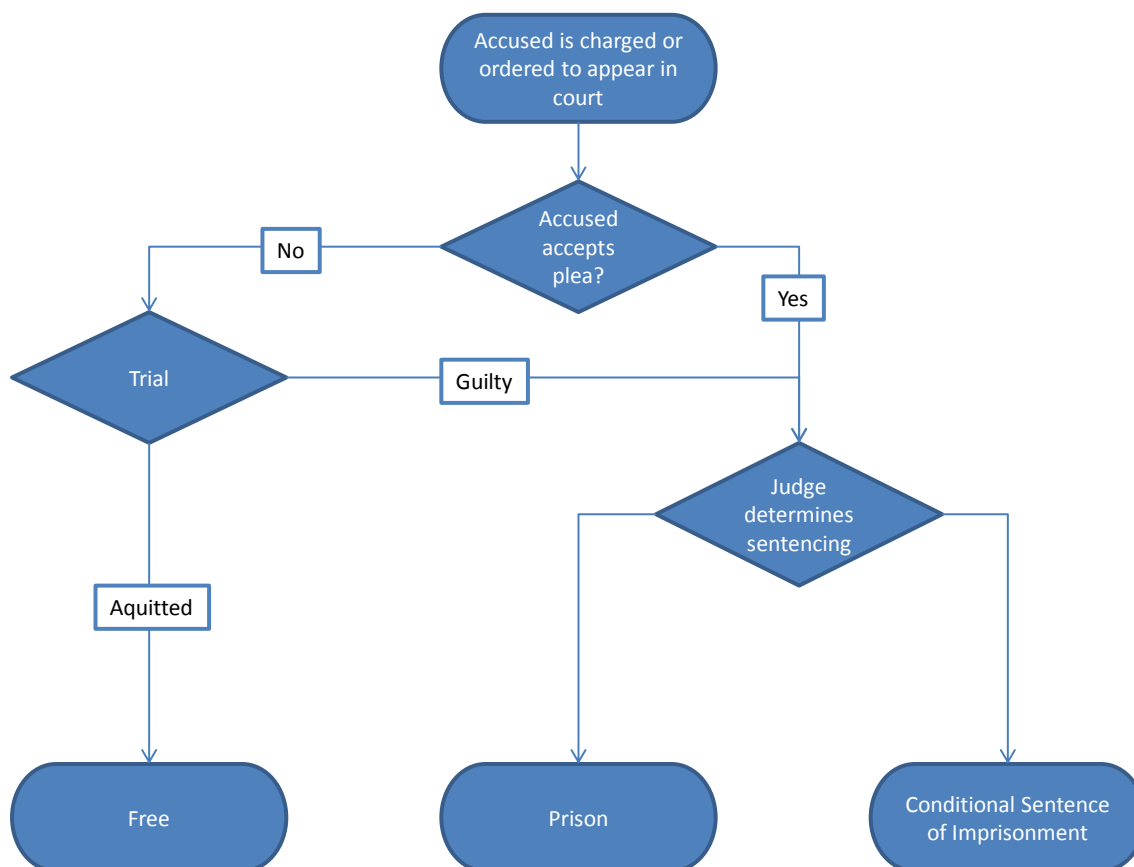
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<sup>19</sup> For an overview of sentencing see Appendix B, The Criminal Justice Process.

<sup>20</sup> Service in the community, however, does not mean that the conditional sentence of imprisonment is not punitive; rather, it resembles both probation and incarceration, as it is “both punitive and rehabilitative”; like probation, offenders serving a conditional sentence of imprisonment are subject to conditions that ought to facilitate rehabilitation, but like incarceration, conditions are also punitive and “restrictive of the offender’s liberty ... such as house arrest or strict curfews ...” *R v Proulx*, 2000 SCC 5, [2000] 1 SCR 61 at para 127 [*Proulx*]. Unlike incarceration, offenders serving conditional sentences of imprisonment are not eligible for parole, as they are already serving their sentence in the community; this is confirmed by the *Corrections and Conditional Release Act*, SC 1992, c 20, and the *Prisons and Reformatories Act*, RSC, 1985, c P-20. Those two acts govern parole and parole eligibility and do not apply to offenders serving a conditional sentence of imprisonment. As a result, conditional sentences of imprisonment are always served to completion unless an offender breaches one of the conditions, and the sentence is altered. See *Hunt v Calgary Correctional Centre*, 2003 ABCA 200, 330 AR 157 [*Hunt*], and *Lakeman v Alouette River Correctional Centre*, [1998] BCJ No 827 [*Lakeman*]. Breach of the conditions of a conditional sentence of imprisonment is not a *Criminal Code* offence, however.

including the fact that “all available sanctions other than imprisonment that are reasonable in the circumstances be considered for all offenders”.<sup>21</sup>

**Figure 12: Before amendment decision tree**



In 2007, s 742.1 was amended yet again to restrict the circumstances in which a judge could impose a CSI. These amendments further excluded offenders convicted of a serious personal injury offence, a terrorism offence or a criminal organization offence prosecuted by way of indictment for which the maximum term of imprisonment is ten years or more, or an offence punishable by a minimum term of imprisonment.

Currently, s 742.1 of the *Criminal Code* provides the sentencing judge with the power to order a CSI where:<sup>22</sup>

<sup>21</sup> *Criminal Code*, RSC 1985, c C-46, s 718.2(e).

- the period of incarceration that would have been ordered is less than two years;
- the judge is satisfied that the presence of the offender in the community would not endanger the safety of others;
- the ordering of the CSI is consistent with the purpose and principles of sentencing embodied in ss 718 and 718.2 of the *Criminal Code*; and
- the offence is not:
  1. a serious personal injury offence;
  2. a terrorism offence or a criminal organization offence prosecuted by way of indictment for which the maximum term of imprisonment is ten years or more; or
  3. an offence punishable by a minimum term of imprisonment.

## Proposed Amendment

Bill C-10 proposes a number of amendments to further restrict the use of conditional sentences of imprisonment. The current version of s 742.1 is provided below with the proposed eliminated parts struck out and the proposed added text underlined.

### Proposed amendments to *Criminal Code*, 1985

#### **Imposing of conditional sentence**

742.1 If a person is convicted of an offence, ~~other than a serious personal injury offence as defined in section 752,~~ and the court imposes a sentence of imprisonment of less than two years, the court may, for the purpose of supervising the offender's behaviour in the community, order that the offender serve the sentence in the community, subject to ~~the offender's compliance with~~ the conditions imposed under section 742.3, if:

(a) the court is satisfied that the service of the sentence in the community would not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing set out in sections 718 to 718.2;<sup>23</sup>

(b) the offence is not an offence punishable by a minimum term of imprisonment;<sup>24</sup>

(c) the offence is not an offence, prosecuted by way of indictment, for which the maximum term of imprisonment is 14 years or life;

<sup>22</sup> See Appendix B for s 742.1 of the *Criminal Code*.

<sup>23</sup> Note that in the current version of s 742.1, this subsection exists within the paragraph itself and is not set off. The amendments merely move it out of the main paragraph into the position of a list item.

<sup>24</sup> *Ibid.*

(d) the offence is not a terrorism offence, or a criminal organization offence, prosecuted by way of indictment, for which the maximum term of imprisonment is 10 years or more;<sup>25</sup> and

(e) the offence is not an offence, prosecuted by way of indictment, for which the maximum term of imprisonment is 10 years, that

(i) resulted in bodily harm,

(ii) involved the import, export, trafficking or production of drugs, or

(iii) involved the use of a weapon; and

(f) the offence is not an offence, prosecuted by way of indictment, under any of the following provisions:

(i) section 144 (prison breach),

(ii) section 264 (criminal harassment),

(iii) section 271 (sexual assault),

(iv) section 279 (kidnapping),

(v) section 279.02 (trafficking in persons — material benefit),

(vi) section 281 (abduction of person under fourteen),

(vii) section 333.1 (motor vehicle theft),

(viii) paragraph 334(a) (theft over \$5000),

(ix) paragraph 348(1)(e) (breaking and entering a place other than a dwelling-house),

(x) section 349 (being unlawfully in a dwelling-house), and

(xi) section 435 (arson for fraudulent purpose).

As shown above, the proposed amendments introduce changes to the power of a judge to grant a CSI under s 742.1. They would:

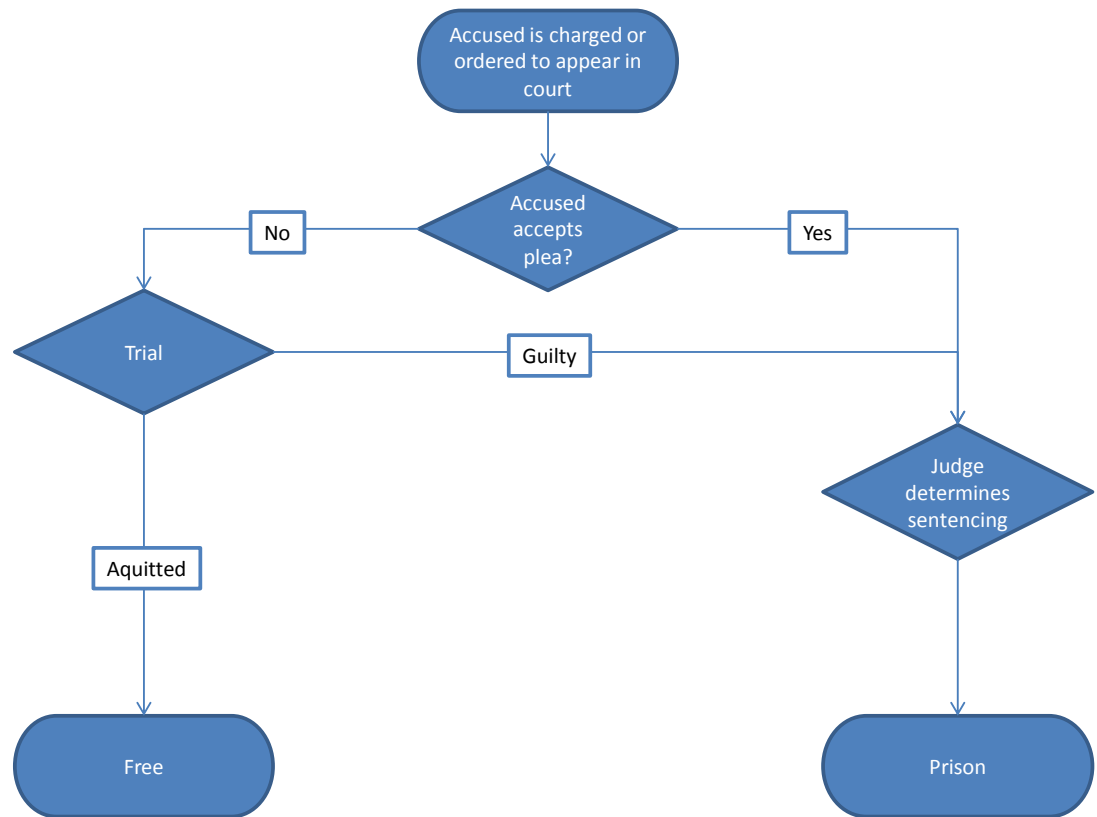
- **add** an exception to the power to grant a CSI where the maximum term of imprisonment for the offence is 14 years or life and the offence was prosecuted by way of indictment;
- **add** an exception to the power to grant a CSI where the maximum term of imprisonment for the offence is 10 years, the offence was prosecuted by way of indictment, and the offence also resulted in bodily harm, involved the trafficking, import/export, or production of drugs, or involved the use of a weapon;
- **add** an exception to the power to grant a CSI where the offence falls within a number of specifically enumerated offences; and
- **remove** the prohibition to grant a CSI where the offence is a serious personal injury offence.

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<sup>25</sup> *Ibid.*



**Figure 13: After amendment decision tree**



## Effect of the proposed amendments

As outlined above, the proposed amendments have two broad impacts. First, they create a number of new exceptions to the power of a judge to order a CSI. These exceptions apply to a number of offences that carry a maximum sentence of 14 years or life, a number of offences that carry a maximum penalty of 10 years, and a number of specifically enumerated offences. Second, the amendments remove a pre-existing exception to the power of a judge to order a CSI for serious personal injury offences.

Other amendments to federal law contained in Bill C-10, imposing mandatory minimum terms of imprisonment, would further restrict the use of CSIs. Those changes, however, are not considered in this report.<sup>26</sup>

### ***Offences where the maximum term of imprisonment is 14 years or life***

The amendments would render all offences where the maximum term of imprisonment is 14 years or life ineligible for a CSI where the offence in question has been prosecuted by way of indictment.

### **Indictable, hybrid, and summary offences**

Whether or not an offence is prosecuted by way of indictment is determined by reference to its provisions. The relevant provisions will specify whether the Crown can prosecute summarily, by way of indictment, or can choose to proceed by either method. Summary offences are generally less serious; the accused is usually not arrested, but instead given a notice to appear; the accused need not appear in court but can be represented by an advocate; and charges must be laid within six months of the offence.<sup>27</sup> Indictable offences, on the other hand, are more serious; if the police have a warrant, the accused can be arrested; the offender must attend court; and charges do not have to be laid within six months of the offence. If an offence can be prosecuted either by way of indictment or summarily, it is known as a “hybrid” offence. Where the offence is hybrid, the decision to prosecute either way is a matter of Crown discretion. Where the Crown is of the view that the offence is not sufficiently serious and the charge is laid within six months from the commission of the offence, the Crown may opt to proceed summarily. Where, however, six months have passed from the date on which the offence occurred, or the Crown perceives the offence to be sufficiently serious, the Crown can prosecute by way of indictment.

In the case of offences where the maximum sentence is 14 years or life, the proviso that the offence be prosecuted by way of indictment to be ineligible adds nothing; for all such offences in the *Criminal Code* and *Controlled*

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<sup>26</sup> Bill C-4 also imposes new mandatory minimums for drug offences and sexual offences. This analysis does not include these new offences that would no longer be eligible for a conditional sentence of imprisonment given the fact that they are accompanied by a mandatory minimum.

<sup>27</sup> *Criminal Code*, *supra* note 21 at s 786(2). There is an exception for this in circumstances where both the prosecutor and defendant agree.

*Drug and Substances Act*, prosecution by way of indictment is the only option.

The proposed amendments would render 32 previously eligible offences under the *Criminal Code* and *Controlled Drugs and Substances Act* ineligible.<sup>28</sup>

| Legislation                             | Section    | Offence   | Maximum Sentence |
|---|------------|---|------------------|
| <i>Criminal Code</i> , RSC 1985, c C-46 | 57 (1)     | Forge passport or use forged passport   | 14 years         |
|   | 76         | Hijacking   | Life             |
|   | 119        | Bribery of judicial officers  | 14 years         |
|   | 120        | Bribery of officers   | 14 years         |
|   | 131 & 132  | Perjury   | 14 years         |
|   | 136        | Contradictory evidence with intent to mislead   | 14 years         |
|   | 137        | Fabricating evidence  | 14 years         |
|   | 155        | Incest  | 14 years         |
|   | 240        | Accessory after fact, murder  | Life             |
|   | 246        | Overcoming resistance to commission of offence  | Life             |
|   | 252 (1.3)  | Fail to stop at scene of accident knowing person is dead; or reckless whether death results | Life             |
|   | 336        | Criminal breach of trust  | 14 years         |
|   | 337        | Public servant, refuse to deliver property  | 14 years         |
|   | 345        | Stop mail with intent   | Life             |
|   | 348        | Break and enter with intent, committing indictable offence re: dwelling house               | Life             |
|   | 374        | Draw document without authority   | 14 years         |
|   | 375        | Obtaining, etc., based on forged document   | 14 years         |
|   | 380 (1)(a) | Fraud over \$5000 or re: testament instrument   | 14 years         |

<sup>28</sup> Of the 75 offences with a maximum sentence of 14 years or life imprisonment contained in the *Criminal Code*, 43 are currently ineligible for a conditional sentence, either because they have a mandatory minimum prison sentence, falling under the category of a “serious personal injury offence” outlined in s 752 of the *Criminal Code*, or because they are terrorism or criminal organization offences. This leaves 32 *Criminal Code* offences affected by Bill C-10, including both violent and non-violent offences, as well as personal and property offences.

In addition to offences under the *Criminal Code* and *CDSA*, there are 30 offences found in other federal statutes that would be rendered ineligible by the amendments. Historical data on the frequency and duration of conditional sentences of imprisonment handed down for these offences is not available.

| Legislation   | Section    | Offence  | Maximum Sentence |
|---|------------|--|------------------|
|   | 423.1      | Intimidation of justice system participant or journalist   | 14 years         |
|   | 431        | Attack internationally protected premises  | 14 years         |
|   | 431.1      | Attack on UN premises  | 14 years         |
|   | 434        | Arson, damage to property  | 14 years         |
|   | 434.1      | Arson, own property  | 14 years         |
|   | 449        | Make counterfeit money   | 14 years         |
|   | 450        | Possession, etc., of counterfeit money   | 14 years         |
|   | 452        | Uttering, etc., of counterfeit money   | 14 years         |
|   | 463 (a)    | Attempts and accessories, indictable, punishment by life   | 14 years         |
|   | 465 (1)(a) | Conspiracy, murder   | Life             |
|   | 465 (1)(c) | Conspiracy to commit other indictable offences   | Life             |
| <i>Controlled Drugs and Substances Act, SC 1996, c 19</i> | 5(3)(a)    | Trafficking in substance, substance included in Schedule I or II                                 | Life             |
|   | 6(3)(a)    | Possession for the purpose of exporting, substance included in Schedule I or II                  | Life             |
|   | 7(2)(a)    | Production of substance, substance included in Schedule I or II, other than cannabis (marihuana) | Life             |

### Offences where the maximum term of imprisonment is 10 years

The *Criminal Code* and *CDSA* contain a number of offences that carry a maximum term of imprisonment of 10 years. Under the proposed amendments, for these offences to be ineligible, they must be prosecuted by way of indictment and have resulted in bodily harm, involved the trafficking, import/export, or production of drugs, or involved the use of a weapon.

While all offences where the maximum term of imprisonment is 14 years or life can only be prosecuted by way of indictment, offences with a maximum term of imprisonment of 10 years are either indictable-only or hybrid. These offences include:

| Legislation                             | Section   | Offence   | Type       |
|---|-----------|---|------------|
| <i>Criminal Code</i> , RSC 1985, c C-46 | 52 (1)    | Sabotage  | Indictable |
|   | 88        | Possession of weapon for dangerous purpose                          | Hybrid     |
|   | 94 (2)    | Unauthorized possession in motor vehicle (firearm)                  | Hybrid     |
|   | 212 (1)   | Procuring   | Indictable |
|   | 218       | Abandoning child  | Hybrid     |
|   | 221       | Causing bodily harm by criminal negligence                          | Indictable |
|   | 247 (2)   | Traps likely to cause bodily harm, causing bodily harm              | Indictable |
|   | 247 (3)   | Traps likely to cause bodily harm, in an offence-related place      | Indictable |
|   | 252 (1.2) | Failure to stop at scene of accident, Offence involving bodily harm | Indictable |
|   | 262       | Impeding attempt to save life                                       | Indictable |
|   | 279 (2)   | Forcible confinement  | Hybrid     |
|   | 282 (1)   | Abduction in contravention of custody order                         | Hybrid     |
|   | 283 (1)   | Abduction   | Hybrid     |
|   | 334 (b)   | Theft less than \$5000 <sup>29</sup>                                | Hybrid     |
|   | 338 (2)   | Theft of cattle   | Indictable |
|   | 340       | Destroying documents of title                                       | Indictable |
|   | 342 (1)   | Theft, forgery, etc., of credit card                                | Hybrid     |
|   | 342 (3)   | Unauthorized use of credit card data                                | Hybrid     |

<sup>29</sup> Where the value of what is stolen does not exceed five thousand dollars.

| Legislation | Section     | Offence  | Type       |
|-------------|-------------|--|------------|
|             | 342.01 (1)  | Instruments for copying credit card data or forging or falsifying credit cards   | Hybrid     |
|             | 342.1       | Unauthorized use of computer   | Hybrid     |
|             | 348 (1)     | Breaking and entering with intent, committing offence or breaking out  | Hybrid     |
|             | 351 (1)     | Possession of break-in instrument  | Hybrid     |
|             | 351 (2)     | Disguise with intent   | Indictable |
|             | 355         | Possession of property obtained by crime greater than \$5000 <sup>30</sup>   | Indictable |
|             | 356 (3)     | Theft from mail  | Hybrid     |
|             | 357         | Bringing into Canada property obtained by crime  | Indictable |
|             | 362 (2)     | False pretence or false statement where property testamentary instrument or greater than \$5000 <sup>31</sup>          | Indictable |
|             | 362 (3)     | False pretence or false statement (s 361 (b), (c), or (d))   | Indictable |
|             | 367         | Forgery  | Hybrid     |
|             | 368 (1.1)   | Use, trafficking or possession of forged document  | Hybrid     |
|             | 382         | Fraudulent manipulation of stock exchange transactions   | Indictable |
|             | 382.1       | Prohibited insider trading   | Indictable |
|             | 396         | Offences in relation to mines  | Indictable |
|             | 400 (1)     | False prospectus, etc.   | Indictable |
|             | 403 (3)     | Identity fraud   | Hybrid     |
|             | 424.1       | Threat against United Nations or associated personnel  | Indictable |
|             | 430 (3)     | Mischief in relation to property that is a testamentary instrument or the value of which exceeds five thousand dollars | Hybrid     |
|             | 430 (4.1)   | Mischief relating to religious property  | Hybrid     |
|             | 430 (4.2)   | Mischief in relation to cultural property  | Hybrid     |
|             | 430 (5)     | Mischief in relation to data   | Hybrid     |
|             | 439 (2)     | Interfering with marine signal, etc.   | Indictable |
|             | 462.31 (2)  | Laundering proceeds of crime   | Hybrid     |
|             | 465 (1) (b) | Conspiracy <sup>32</sup>   | Indictable |

<sup>30</sup> Where the subject-matter of the offence is a testamentary instrument or the value of the subject-matter of the offence exceeds five thousand dollars.

<sup>31</sup> Where the property obtained is a testamentary instrument or the value of what is obtained exceeds five thousand dollars.

| Legislation  | Section     | Offence   | Type   |
|--|-------------|---|--------|
| <i>Controlled Drugs and Substances Act</i> , SC 1996, c 19 | 5(1),(3)(b) | Trafficking in substance, substance included in Schedule III              | Hybrid |
|  | 5(2),(3)(b) | Possession for purpose of trafficking, substance included in Schedule III | Hybrid |
|  | 6(3)(b)     | Import or export of substance included in Schedule III or VI              | Hybrid |
|  | 7(2)(c)     | Production of substance, substance included in Schedule III               | Hybrid |

For one of the offences in the list above to be ineligible, the Crown must prosecute by way of indictment and the offence must have:

- A) resulted in bodily harm;
- B) involved the trafficking, import/export or production of drugs; or
- C) involved the use of a weapon.

Where one of these characteristics is an element of the offence, it will already have been proven as a condition precedent to a guilty verdict. Under the proposed amendments, such offences will always be ineligible for a CSI. This is because these offences, by their very nature, result in bodily harm, involve the trafficking, import/export or production of drugs, or involve the use of a weapon. For example, s 247(2) makes it a criminal offence to set traps causing bodily harm. Bodily harm, therefore, is implicit in a guilty finding under s 247(2) as one of the constituent elements of that offence. As a result, an offence under s 247(2) will always be ineligible for a CSI.

The newly ineligible offences listed below are those for which bodily harm, the trafficking, import/export or production of drugs, or the use of a weapon is a required element of the offence. These offences, when prosecuted by way of indictment, will always be ineligible for a CSI.

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<sup>32</sup> Prosecution, if the alleged offence is one for which, on conviction, that person would be liable to be sentenced to imprisonment for life or for a term not exceeding fourteen years.

| Legislation  | Section     | Offence   | Type       |
|--|-------------|---|------------|
| <i>Criminal Code</i> , RSC 1985, c C-46                      | 247 (2)     | Traps likely to cause bodily harm, causing bodily harm                    | Indictable |
|  | 247 (3)     | Traps likely to cause bodily harm, in an offence-related place            | Indictable |
|  | 249 (3)     | Dangerous operation causing bodily harm (motor vehicle)                   | Indictable |
|  | 252 (1.2)   | Failure to stop at scene of accident, Offence involving bodily harm       | Indictable |
| <i>Controlled Drugs and Substances Act</i> , SC 1996, c C-19 | 5(1),(3)(b) | Trafficking in substance, substance included in Schedule III              | Hybrid     |
|  | 7(2)(c)     | Production of substance, substance included in Schedule III               | Hybrid     |
|  | 5(2),(3)(b) | Possession for purpose of trafficking, substance included in Schedule III | Hybrid     |
|  | 6(3)(b)     | Import or export of substance included in Schedule III or VI              | Hybrid     |

In estimating changes associated with this offence category, the PBO has only taking into account those offences that will always be ineligible.



### ***Specifically enumerated offences***

In addition to the offences mentioned above, Bill C-10 lays out a number of offences that, if prosecuted by way of indictment, would be ineligible for a CSI.

| Legislation                             | Section   | Offence   | Type       |
|---|-----------|---|------------|
| <i>Criminal Code</i> , RSC 1985, c C-46 | 144       | Prison breach   | Indictable |
|   | 264       | Criminal harassment                                       | Hybrid     |
|   | 271       | Sexual assault  | Hybrid     |
|   | 279       | Kidnapping  | Indictable |
|   | 279.02    | Trafficking in persons—material benefit                   | Indictable |
|   | 283       | Abduction   | Hybrid     |
|   | 348(1)(e) | Breaking and entering a place other than a dwelling-house | Hybrid     |
|   | 349       | Being unlawfully in a dwelling-house                      | Indictable |
|   | 435       | Arson for fraudulent purpose                              | Indictable |

### ***Serious personal injury exception***

In addition to creating new exceptions to the power of a judge to order a CSI, the amendments propose the removal of a current exception. Offences that fall within the definition of a “serious personal injury offence” are currently ineligible for a CSI. The proposed amendments remove this exception.

The definition of “serious personal injury offence” is set out in s 752 of the *Criminal Code*:

“serious personal injury offence” means

(a) an indictable offence, other than high treason, treason, first degree murder or second degree murder, involving

(i) the use or attempted use of violence against another person, or

(ii) conduct endangering or likely to endanger the life or safety of another person or inflicting or likely to inflict severe psychological damage on another person,

and for which the offender may be sentenced to imprisonment for ten years or more, or

(b) an offence or attempt to commit an offence mentioned in section 271 (sexual assault), 272 (sexual assault with a weapon, threats to a third party or causing bodily harm) or 273 (aggravated sexual assault).

Whilst at first blush it might seem that the removal of the serious personal injury exception would render a number of previously ineligible offences eligible for a CSI, the effect is likely limited. Most “serious personal injury offences” carry either a maximum term of imprisonment of 14 years or a maximum term of imprisonment of 10 years and involve bodily harm or the use of a weapon.<sup>33</sup>

There will, however, be some offences that fall within the serious personal injury exception that will not result in bodily harm or the use of a weapon.

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<sup>33</sup> Note that an “indictable offence” includes a hybrid offence prosecuted by way of indictment. *R v White*, [1998] BCJ No 329. It is unclear whether a hybrid offence prosecuted summarily would also be included.

This is because bodily harm does not include the “attempted use of violence against another person” or conduct “likely to endanger the life or safety of another person ... or likely to inflict severe psychological damage on another person” (as per the definition of “serious personal injury offence” in s 752(a)(i-ii) of the *Criminal Code*). It is therefore possible that some offenders currently excluded from obtaining a CSI because their conduct was, for example, likely to inflict harm but did not actually do so, will now be eligible for a CSI since no bodily harm resulted.

It should be noted that even the use of violence may not necessarily result in bodily harm. The Ontario Court of Appeal in *R v Lebar* confirmed that the term “violence” in the definition of a serious personal injury offence should be interpreted widely. In that case, holding a knife to someone’s throat was considered a use of violence and thus met the definition of a serious personal injury offence.<sup>34</sup> Leaving aside the possibility of psychological bodily harm, no actual, physical bodily harm resulted. Thus, in some circumstances, Bill C-10 would, rather than restrict, increase the availability of conditional sentences of imprisonment. With respect to these specific facts, it is clear that a CSI would not have been available, however, because of the use of a weapon in the commission of the offence.

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<sup>34</sup> *R v Lebar*, 2010 ONCA 220.

## Part I: Changes to Inmate Populations, Days Served, and Trials

The proposed amendments eliminate eligibility for a CSI for a number of offences. Should the proposed amendments become law, offenders who would have, in the past, been eligible for and received a CSI would no longer have this sentencing option open to them. In other words, while prior to the proposed amendments, these individuals received CSIs, after, they would not due to their ineligibility. The new ineligibilities outlined in the proposed amendments include, when prosecuted by way of indictment:

1. offences that carry a maximum term of imprisonment of 14 years or life;
2. offences that carry a maximum term of imprisonment of 10 years; and
3. a number of specifically enumerated offences.

In carrying out its analysis, the PBO has only included those offences for which a CSI would definitely be ineligible. Thus, those offences that will potentially be ineligible have not been included. The figures provided by the PBO, therefore, are by definition underestimates.

Those cases with new mandatory minimum sentences that come into effect as a result of other parts of Bill C-10 (e.g., the new mandatory minimum sentences for new marijuana cultivation offences) **are not included** within this analysis.

### Summary

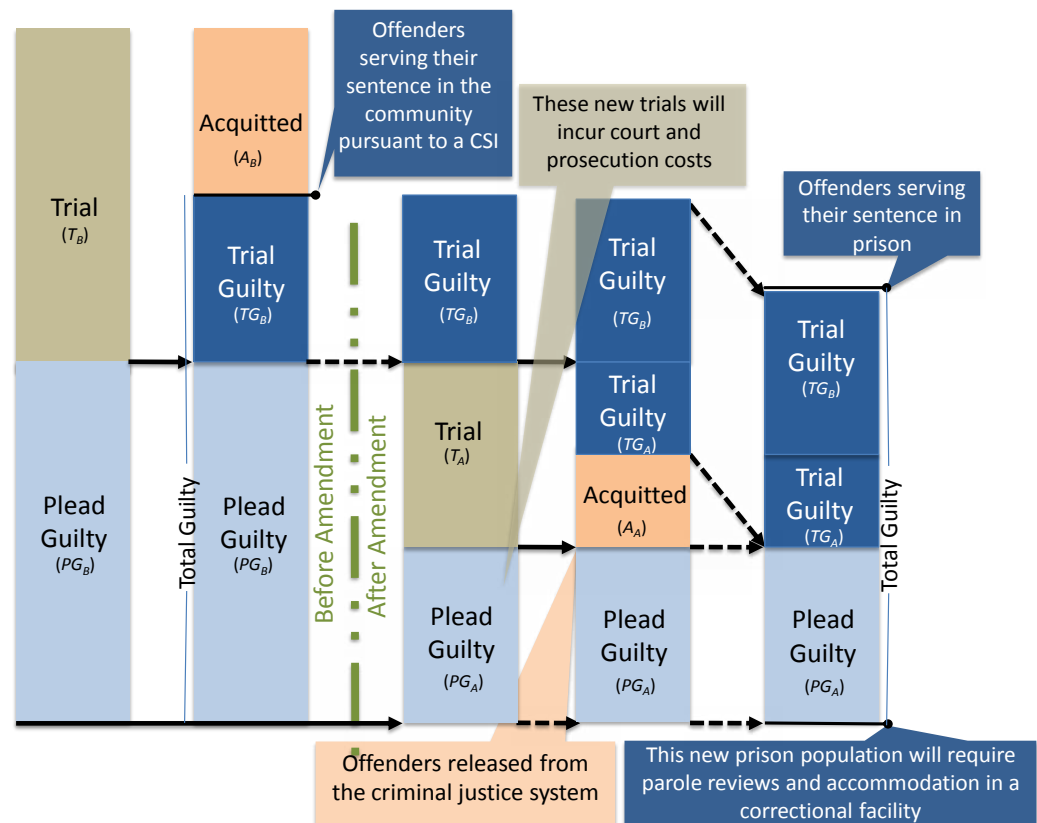
In 2008-2009, 4,468 cases that received a CSI would not, because of the changes in the law, be eligible for a CSI ( $TG_B + PG_B$ ). The challenge the PBO faces is estimating the change, if any, in the cost of the unavailability of a CSI for these cases. In order to do this, the PBO must first provide a cost for the before amendment status quo (i.e. the existing cost with CSIs available) and then provide a cost for the after amendment state (i.e. the new cost with CSIs unavailable). The difference between these two figures is the change in cost.

The PBO has included three cost categories within its analysis:

1. **Trial costs** (i.e. court and criminal prosecution) driven by number of trials
2. **Corrections costs** (i.e. incarceration and supervision) driven by days served
3. **Parole costs** (i.e. parole reviews) driven by inmate populations.

Before amendment, costs consist of trial and corrections costs. Trial costs would be incurred for those offenders who opted for trial and were sentenced to a CSI ( $T_B$ ). Corrections costs would be incurred supervising each of the 4,468 offenders in the community subject to a CSI ( $T_B + PG_B$ ). Since there is no parole, remission, and statutory release for a CSI, the period of supervision necessary is the length of the sentence.<sup>35</sup>

**Figure 14: Before and after amendment changes**



<sup>35</sup> Because of lack of data, the PBO has had to assume that none of these 4,468 cases were breached and, thereby, sentenced to serve some portion of the remaining sentence in prison.

After amendment, cost consists of **trial**, **corrections**, and **parole** costs.

Trial costs after amendment would be incurred trying offenders who opted for trial and were sentenced to a CSI before amendment ( $T_B$ ) and pled guilty before amendment but would opt for trial after amendment ( $T_A$ ). Those offenders that opt for trial must be prosecuted, incurring prosecution costs, either for the Crown prosecutor or the Public Prosecution Service of Canada (PPSC), and court costs.

After amendment, the unavailability of a CSI reduces the incentive to plead guilty. As a result, a number of offenders who pled guilty before the amendment would likely opt for trial ( $T_A$ ) in the hope to be acquitted ( $A_A$ ).

**Corrections** costs after amendment would be incurred for incarcerating guilty offenders ( $TG_B + TG_A + PG_A$ ). Offenders who can no longer receive a CSI must be sentenced to a period of incarceration.

According to the law, the recipient of a CSI would otherwise be at risk of a prison sentence.<sup>36</sup> This means that other forms of punishment, such as probation, are, by definition, inappropriate and not available. Thus, the elimination of eligibility for a CSI means that guilty offenders will be sentenced to prison.<sup>37</sup>

The PBO must estimate the number of cases and lengths of normal prison sentences that would be served, taking into account the decrease in the number of guilty offenders. This is done by deducting the acquittals post-amendment ( $A_A$ ) from the pre-amendment guilty population ( $TG_B + PG_B$ ). Once this has been done, the PBO has assumed that the distribution of this new population by reference to sentence length is the same as the before amendment CSI population. Thus, sentences received by the before amendment population are assumed to be the same as the period of incarceration that would otherwise be appropriate for each case after amendment.<sup>38</sup> The PBO must then estimate the lengths of the prison sentences that would be actually served taking into account credit for time

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<sup>36</sup> By definition, the sentences affected by this change are all less than two years, and therefore, those offenders no longer eligible for a CSI will be sentenced to a period of incarceration in a provincial or territorial correctional facility.

<sup>37</sup> This report makes no attempt to analyze the behavioural responses of actors in the criminal justice system. While they may act in such a way that the system tends towards equilibrium, the degree to which this will be the case is impossible to predict and, furthermore, is not necessarily without other costs; the exercise of greater arbitrary discretion has often been a cause for concern for policy makers and comes with its own costs.

<sup>38</sup> See point 5 in assumptions.

served on remand and earned remission. After, it must estimate the costs associated with the change in days served.

**Parole** costs would be incurred for preparing and reviewing applications for day and full parole and temporary absences. The PBO must estimate this cost for those new inmates entering custody ( $TG_B + TG_A + PG_A$ ).

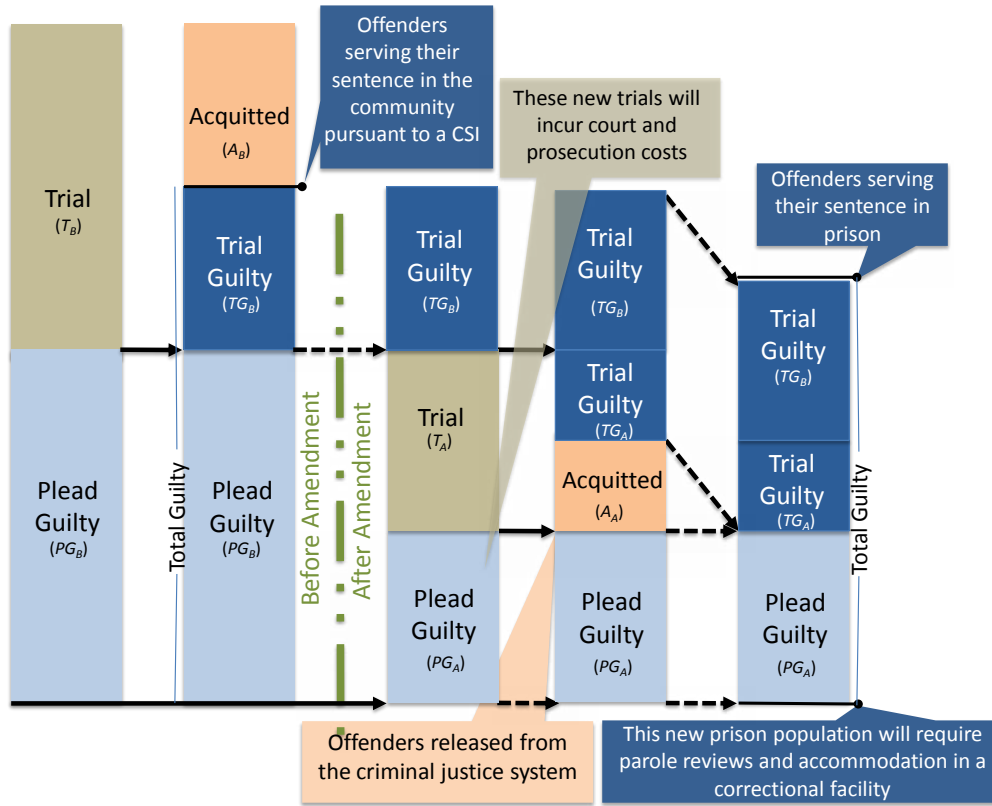
## Method

The following method outlines how the PBO estimates the

- number of trials; and
- population of offenders serving and total days served pursuant to:
  - a CSI, before amendment and
  - a prison sentence, post-amendment,for the newly ineligible offences listed above.

The analysis only contains those cases that were eligible for a CSI before amendment but would not be after. In order to find how many of these cases would have been subject to a prison sentence, the number of cases that would have pled out but now opt for trial and be acquitted must be deducted from the before amendment population. This post amendment population would serve their sentence in prison.

**Figure 15: Before and after amendment changes**



## Before amendment

### Number of trials before amendment

The number of trials before amendment is represented as:<sup>39</sup>

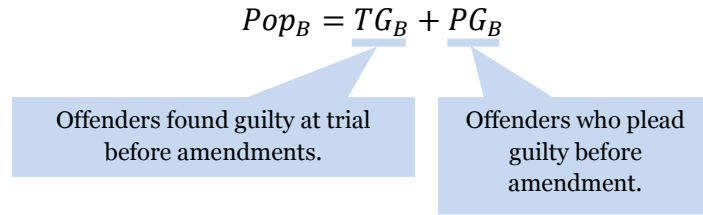
$$T_B$$

<sup>39</sup> The populations for Québec and the Northwest Territories are estimated prior to estimating the populations serving CSIs before amendment.



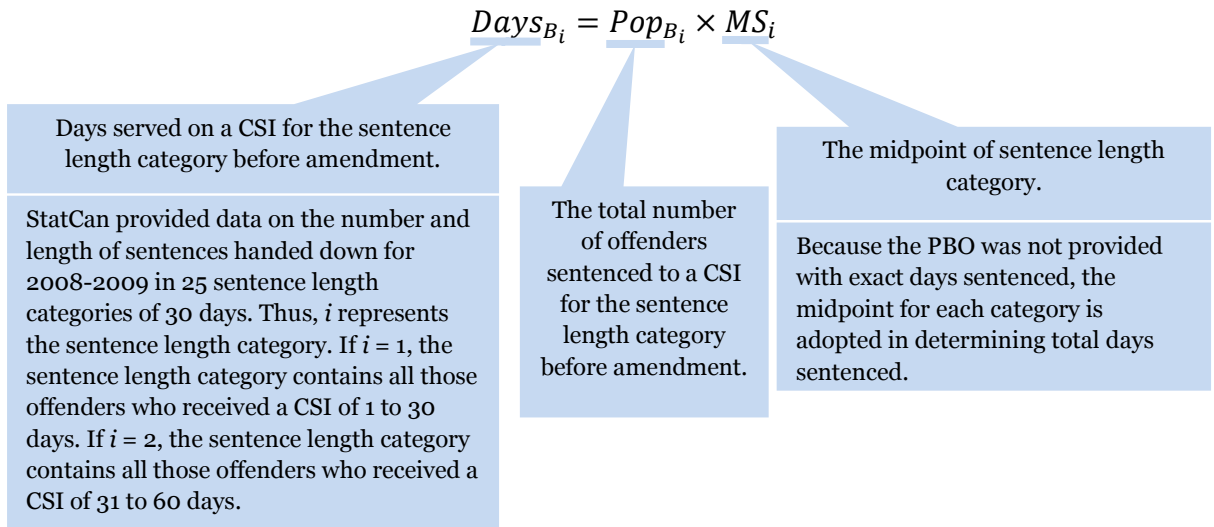
### Population before amendment

The population serving a CSI before amendment is represented as:



### Days served before amendment

Days served under supervision in the community pursuant to a CSI is represented as:



In order to arrive at a number reflecting the total days served on a CSI, the  $Days_{B_i}$  for each sentence length category must be summed.

Thus

$$\sum_{i=1}^{25} Days_{B_i}$$

or

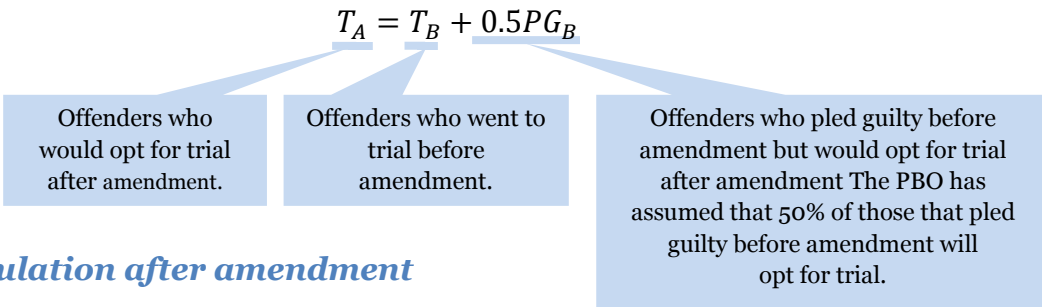
$$(Pop_{B_1} \times MS_1) + (Pop_{B_2} \times MS_2) + \dots (Pop_{B_{25}} \times MS_{25})$$

## After amendment

After amendment, CSIs are not available for the offenders in question.

### *Number of trials after amendment*

Eliminating eligibility for a CSI will reduce the incentive to plead guilty; a number of offenders who had pled out in exchange for a CSI will likely opt for trial. This will impact both the prison population and the total days served in provincial correctional facilities. Fifty percent of the cases that previously pled out are assumed to now go to trial. Therefore, the number of trials post amendment is represented by the following formula:

$$T_A = T_B + 0.5PG_B$$


Offenders who would opt for trial after amendment.

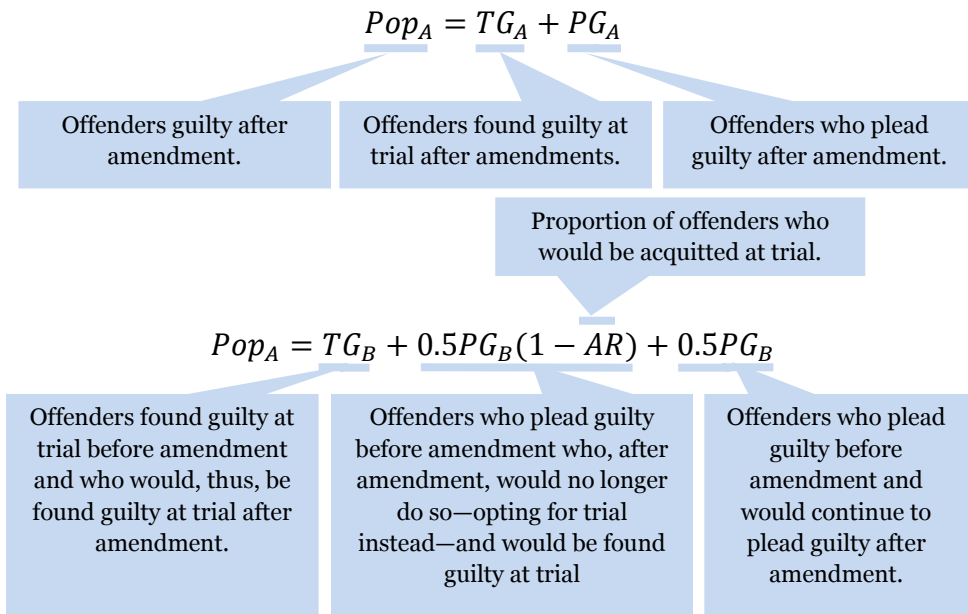
Offenders who went to trial before amendment.

Offenders who pled guilty before amendment but would opt for trial after amendment. The PBO has assumed that 50% of those that pled guilty before amendment will opt for trial.

### *Population after amendment*

A certain proportion of those who opt for trial will be acquitted, i.e. the offender who otherwise would have pled guilty will be released without charge. Offenders so released will be subject to neither custody nor supervision by the correctional system.

After amendment, the formula that gives the total number of offenders sentenced for any given sentence length category is:

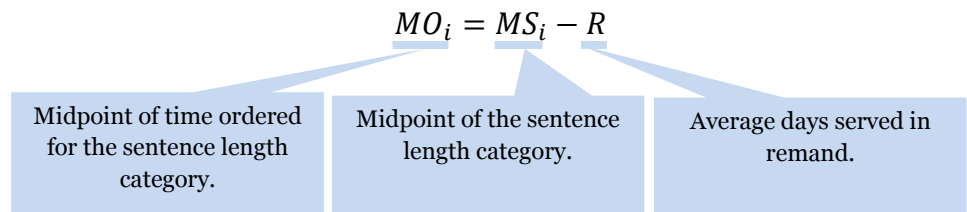


### *Days served after amendment*

In order to determine days served, the after amendment population ( $Pop_A$ ) derived above must be distributed across sentence length categories. This is done according to the provincial distribution for CSIs before amendment and, where this is not available, the national distribution for CSIs before amendment. After that, the after amendment total days served in correctional facilities must be adjusted for:

- credit for time served on remand; and
- early release for earned remission.

Where an offender has been held on remand prior to sentencing, the sentence imposed will often be reduced. This reduction is determined by reference to the time spent on remand and is known as credit for time served on remand. The time ordered will, therefore, be the sentence of imprisonment less credit for time served on remand. Taking into account credit for time served on remand, the time actually ordered by a court for any given sentence length category will be:



The following formula represents the number of days served by offenders for each sentence length category:

$$Days_{A_i} = Pop_{A_i} \frac{MO_i}{1.5}$$

Days spent in correctional facility for the sentence length category after amendment.

Note that, as outlined above,  $MO_i$  is divided by 1.5 to account for earned remission. For the earned remission formula, see Appendix C.

Once the  $Days_{A_i}$  for each sentence length category is calculated, their sum produce the total number of days served in a correctional facility:

$$\sum_{i=1}^{25} Days_{A_i}$$

or

$$\left( Pop_{A_1} \times \frac{MO_1}{1.5} \right) + \left( Pop_{A_2} \times \frac{MO_2}{1.5} \right) + \dots + \left( Pop_{A_{25}} \times \frac{MO_{25}}{1.5} \right)$$

## Data

The PBO has obtained data sets from StatCan providing:

- the number of CSIs by prosecution type, handed down for 2008-2009, for all provinces and territories except Québec and the Northwest Territories;<sup>40</sup> and
- the duration of these CSIs (sentence length categories), presented in 30 day increments, for all provinces and territories except for Manitoba;<sup>41</sup>
- the total number of guilty findings by offence category regardless of sentence,

<sup>40</sup> Neither Québec nor the Northwest Territories report these data at this time.

<sup>41</sup> Manitoba does report on the number of CSIs handed down but not duration.

for aggregate categories of:

- newly ineligible offences carrying a maximum term of imprisonment of 14 years;
- newly ineligible offences carrying a maximum term of imprisonment of 10 years; and
- newly ineligible specifically enumerated offences,

prosecuted by way of indictment, separated by reference to whether the offence is contained within the:

- *Criminal Code*; or
- *CDSA*, and

whether or not the prosecution was:

- by trial; or
- the result of a plea.

StatCan derived these data from the Integrated Criminal Court Survey. Details on this survey can be found on StatCan's website.<sup>42</sup>

By and large, most of the data provided by StatCan are complete. However, some data for some provinces and territories are either incomplete or missing entirely. Data may be incomplete because information on any number of cases is lacking as to:

- whether or not the guilty finding was arrived at by way of plea or trial ("trial-plea");
- whether or not the prosecution was by indictment or summary ("prosecution type"); and/or
- the length of the sentence ("sentence length").

A case may also include a guilty finding under both the *Criminal Code* and *CDSA* and, hence, not separate neatly into a single category.

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<sup>42</sup> Statistics Canada, *Adult Criminal Court Survey (ACCS)*, online: Statistics Canada <<http://www.statcan.gc.ca/>> [ACCS].

These above deficiencies have been dealt with as follows. Cases:

1. containing both a *Criminal Code* and *CDSA* offences are separated according to the national ratio of *Criminal Code* to *CDSA* offences for the offence category;<sup>43</sup>
2. where the sentence length is unknown are distributed according to the provincial distribution for the offence category, treating *Criminal Code* and *CDSA* offences separately;
3. where the prosecution type is unknown are allocated as indictable or summary based on the national ratio of indictable to summary offences for the offence category;
4. where the trial-plea is unknown are allocated on the basis of the provincial ratio pertaining to indictable offences for the offence category, treating *Criminal Code* and *CDSA* offences separately, and where this is not possible, on the basis of the national ratio (the necessary changes having been made).

Within each offence category, there are a few cases where the sentence lengths are unknown.<sup>44</sup> These unknowns have been deleted.

There are missing data that could not be dealt with by analysis or assumption: The superior courts in PEI, Québec, Ontario, Manitoba and Saskatchewan did not report to the survey. In addition, information from Québec's municipal courts (which account for approximately 25% of criminal code charges in the province) was not collected. As a result, the number of CSIs returned will be by an underestimate and result in a lower than actual total cost.

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<sup>43</sup> Those offences for which the prosecution type is unknown and that contain a *Criminal Code* and *CDSA* offence are separated according to the provincial ratio of *Criminal Code* to *CDSA* offences for that offence category and then classified as indictable or summary based on the national ratio of indictable to summary offences.

<sup>44</sup> Missing data included for 14 year offences: 1 in Ontario and 1 in BC; 10 year ineligible: 1 in BC, 1 in New Brunswick, 1 in Ontario, and 1 in Saskatchewan; 10 year potentially ineligible depending on criminal transaction: 1 in New Brunswick and 1 in Ontario; and enumerated offences: 4 in New Brunswick and 1 in Ontario.

## Québec and the Northwest Territories

Data on Québec and the Northwest Territories are missing entirely and, as such, posed a unique challenge. As a result, it was necessary to project:

- population; and
- days served

pursuant to a:

- CSI, before amendment; and
- prison sentence, after amendment.

To estimate the before amendment population, StatCan provided the total number of guilty findings for the four offence categories for Québec, the Northwest Territories, and Canada in 2008-2009.

These data for Québec and the Northwest Territories, however, do not include:

- CDSA offences; and
- prosecution type.

In order to estimate the number of CSIs for Québec and the Northwest Territories, the PBO first calculates the national proportion of CSI to guilty findings for *Criminal Code* offences for the offence category:

$$\frac{\text{Number of CSIs for Criminal Code offences}}{\text{Number of Criminal Code offences}}$$

The enumerated offences category contains only *Criminal Code* offences. As a result, the number of CSIs handed down in this category is arrived at by multiplying this proportion for the offence category by the number of guilty findings under the *Criminal Code* for the offence category for Québec and the Northwest territories.

The other two offence categories, however, contain both *Criminal Code* and CDSA offences. For these categories, the number of CDSA offences must first be calculated. This is done by multiplying the national ratio of CDSA to *Criminal Code* offences for that offence category by the number of *Criminal Code* offences for Québec and the Northwest Territories. This

provides the projected number of *CDSA* offences. Once this number is derived, it is multiplied by the ratio of *CDSA* to *CDSA* offences that received a *CSI*.

To model the days that would have been served by these offenders on *CSIs* before amendment, the cases for each offence category are then distributed across sentence length categories based on the provincial distribution.

To estimate the after amendment population for Québec and the Northwest Territories, the PBO must estimate the reduction in the prison population occasioned as a result of an increase in trials. In order to do this, the number of pleas must be estimated. Pleas in Québec and the Northwest Territories are estimated using the national proportion; that is, the number of trials divided by the sum of trials and pleas nationwide is applied to determine the number of pleas. Once the number of pleas for Québec and the Northwest Territories is found, this number is multiplied by the national acquittal rate for each offence category. This number is then subtracted from the previous population, and the new population—that is, the population that would now be incarcerated—is distributed across sentence length categories according to the national distribution.

## Manitoba

Data on Manitoba are incomplete for each offence category as they do not include information on plea-trial, prosecution type, and sentence length; the data only provides the number of *CSIs* handed down. Thus, while the before amendment population is known, the days served under *CSIs* are not. The latter is arrived at by distributing this before amendment population according to the national distributions for each offence category.

To estimate the after amendment population for Manitoba, the number of pleas for Manitoba must be estimated. The national proportion is used to estimate; that is, the number of trials divided by the sum of trials and pleas nationwide is applied to determine the number of pleas. Once the number of pleas in Manitoba is estimated, this number is multiplied by the national acquittal rate for each offence category. This number is then subtracted from the previous population, and the new population—the population that would now receive a sentence of incarceration—is



distributed across sentence length categories according to the national distribution.

## Assumptions

In order to carry out the method outlined above, it is necessary to adopt the following assumptions:

**1. All offenders who received a CSI successfully completed their sentence.**

To estimate the costs of CSIs, the PBO is adopting the assumption that all offenders who receive a CSI successfully complete their sentence in the community and were not returned to prison for a violation of their conditions or the commission of a new offence. While the PBO is aware this is not the case, calculating costs associated with court appearances and incarceration for those returned to prison was not possible because the PBO was unable to obtain the necessary data (i.e. days spent in the community before revocation). As a result, PBO analysis may be an underestimate.

**2. 50% of offenders who pled guilty for a CSI will opt for trial.**

For newly ineligible offences, plea bargains resulting in CSIs will no longer be possible. This means that offenders who previously pled out—for a now unavailable CSI—will be more likely to opt for trial, resulting in more trials and fewer offenders being found guilty.

In the past, the government has made similar assumptions. In a report provided to PROC summarizing the cost associated with former Bill S-10, the government stated that:

It is expected that mandatory minimums will have a significant impact on the percentage of guilty pleas. Guilty pleas are primarily made in order to obtain the advantage of a lesser sentence. Since, with a mandatory minimum, there would be no advantage in pleading guilty, *it is expected that between 80% and 90% of those who would normally plead guilty under the serious drug offences that would be affected by mandatory minimums, will now elect a trial.* (emphasis added)<sup>45</sup>

While the current changes are to the eligibility for CSIs rather than the imposition of a mandatory minimum, the same logic would seem to apply.

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<sup>45</sup> PROC, *supra* note 11.

Given that actual data is not available on the expected change in the trial rate, the PBO has adopted an assumption of 50%. This is conservative, given the government's estimate of 80–90%.

**3. Offenders who opt for trial may be acquitted.**

Not all offenders who opt for trial will be convicted; in fact, a certain proportion will be acquitted and released from the criminal justice system with no further supervision or oversight. The PBO has assumed that the acquittal rates for those offenders who now opt for trial will be the same as the acquittal rate for all offences within the offence category in question for the year 2008-2009.<sup>46</sup> This assumption may result in an overestimate of the after amendment population and days served as the fact that the cases being considered were pled out could relate to evidentiary weaknesses. As such, it is likely that acquittal rates for those offences would be higher than the average. And, as a result, it is likely that the PBO analysis is an overestimate of the prison population.

**4. Offenders who pled out are distributed according to the national distribution of cases in the sentence length categories.**

The PBO does not have data on the sentence lengths for those that pled out. As a result, it is assumed that those offenders who pled out are distributed according to the national distribution of cases in the sentence length categories.

**5. Offenders who, prior to the amendments, received a CSI would have, under the amendments, received a custodial sentence of imprisonment.**

This assumption is reasonable given the wording and the Supreme Court of Canada's interpretation of s 742.1 of the *Criminal Code*. In *R v Proulx*, Lamer CJ formulated a two-step approach to determining whether a CSI should be ordered.

First, the judge must determine that a sentence of incarceration of less than two years is appropriate over a probationary or penitentiary term.<sup>47</sup>

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<sup>46</sup> 14 year offence category, 44%; 10 year indictable, 22%; 10 year indictable (potentially ineligible), 30%, specifically enumerated offences, 54%.

<sup>47</sup> "Penitentiary" here refers to term served in a federal penitentiary. This, by definition, means any sentences of imprisonment that are two years or more.

Thus, the judge must be satisfied that the appropriate punishment is a sentence of incarceration of less than two years.<sup>48</sup>

Second, once the judge is satisfied that a sentence of incarceration of less than two years is appropriate, consideration of whether service of a sentence in the community is more appropriate follows. Service of a sentence in the community—otherwise known as a CSI—will only be appropriate where the requirements in s 742.1 are satisfied.<sup>49</sup>

The judge will then impose the appropriate duration of the sentence depending on the venue selected and/or conditions that are imposed in accordance with the principles of sentencing found in the s 718 of the *Criminal Code*.

If Bill C-10 becomes law, the second step of this process will no longer be open to judges when dealing with certain offences. The offender will therefore be sentenced to a period of incarceration.

**6. The custodial sentence of imprisonment that would have been ordered is of the same length as the CSI that was ordered.**

Lamer CJ held that it is impractical to interpret s 742.1 as requiring courts to decide on a fixed term of imprisonment before considering whether to allow the offender to serve in the community. Lamer CJ reasoned that the fitness of a sentence's duration under s 718 necessarily depends on the venue in which it is served.<sup>50</sup> Likewise, the duration of a sentence of incarceration—due to its higher degree of severity—may differ in length from a CSI.

Given this, the CSI ordered may be greater than or less than the sentence of incarceration that would have otherwise been imposed. However, the CSI imposed must also be under two years. As it is impossible to know what the sentence of incarceration that would have otherwise been

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<sup>48</sup> Proulx, *supra* note 20 at para 58; CED (4<sup>th</sup>), "Sentencing; IV — Types of Sentence; 1 — Imprisonment; (i) — Conditional Sentences" at §613-614, online: Westlaw Canada.

<sup>49</sup> This requires the satisfaction of a number of criteria, including an assessment conducted by the judge as to "(1) the risk of the offender re-offending; and (2) the gravity of the damage that could ensue in the event of reoffence." Proulx, *supra* note 20 at para 127.

<sup>50</sup> *Ibid* at para 52.

appropriate to impose but for the CSI, the assumption is adopted that these two sentences share the same duration.<sup>51</sup>

## **7. There is no trial penalty effect.**

Offenders who are convicted at trial are often thought to receive harsher sentences than they might have negotiated by way of a plea bargain. This is what is commonly known as the trial penalty. While logically compelling, empirical studies assessing the impact and existence of trial penalties are inconclusive. For this reason, it is assumed that in the cases examined, the trial penalty will not play a role in changing sentence length.

## **8. Credit for time served in remand will be at a ratio of 1:1.**

In 2010, Bill C-25: Truth in Sentencing Act changed the method by which time ordered is adjusted to account for time served in remand. Prior to Bill C-25, credit for time served in remand was a matter of judicial discretion. Post Bill C-25, credit for time served in remand is set at a ratio of 1:1. The maximum credit that might be granted is capped at 1:1.5. A ratio of 1:1 can only be exceeded where special circumstances warrant it. The actual sentencing practice of judges is unclear.<sup>52</sup> Given this legislation has only been in place for a limited amount of time, the PBO was unable to obtain data on the ratios with which credit is granted. Consequently, the PBO is assuming that, consistent with the spirit of the legislation, credit for time served is granted at a ratio of 1:1.

## **9. Days served on remand is the median for offence category**

Average time served on remand varies. The PBO has assumed days served on remand is, where available, the median for the jurisdiction in question and where not, the national median.<sup>53</sup>

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<sup>51</sup> See Julian Burrows, “Discovering the Sphinx: Conditional Sentencing After the Supreme Court Judgement in *R. v. Proulx*” (Paper delivered at the Faculty of Law, University of Ottawa, 27 May 2000 as part of the Department of Justice symposium, “The Changing Face of Conditional Sentencing”), (Ottawa: Department of Justice, 2000) at 42: “In many, perhaps most cases, the conditional sentence order will remain in the range that would have been imposed had the offender been sentenced to custody.”

<sup>52</sup> For example, while some argue that these changes will result in longer periods of time ordered, the opposite may in fact be true. The changes might result in fewer people being held on remand, driven by the lack of credit that can ultimately be awarded. This could have the effect of mollifying the changes implemented by Bill C-25, thereby, lengthening sentences.

<sup>53</sup> Average days served on remand were not available for Alberta, Prince Edward Island, and Nunavut.

**10. Offenders do not receive parole.**

Offenders sentenced to less than six months' incarceration are not automatically eligible for parole and rarely receive it.<sup>54</sup> Furthermore, the actual in counts for provincial parole are so low that including a diminution in days served on account of parole may be misleading. For example, in 2008-2009, the average monthly counts on provincial parole for Ontario were 190. This should be contrasted with the "actual in" for sentenced offenders (thus, excluding remanded and other) of 2,802. For the same year, in Ontario, 31,370 prisoners entered sentenced custody and, in 2009/10 only 342 were granted parole. That works out to approximately 1% of offenders. Similar numbers obtain for Québec and the PBC. For this reason, the PBO has excluded parole from its calculation for population and days served.

**11. Offenders who do not receive parole are released based on earned remission of 15 days for every 30 days served.**

Offenders are entitled to 15 days earned remission on every 30 days spent incarcerated for good behaviour.<sup>55</sup> The assumption means that all offenders receive the maximum earned remission to which they are entitled.

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<sup>54</sup> *Corrections and Conditional Release Act*, *supra* note 20 at s 123(3.1).

<sup>55</sup> *Prisons and Reformatories Act*, *supra* note 20.

## Results

For 2008-2009, the following table provides the trials ( $T$ ), population ( $Pop$ ) and days served ( $Days$ ) before and after amendment. The population and days served before amendment ( $Pop_B$  and  $Days_B$ ) will be in the community pursuant to a CSI. The population and days served after amendment ( $Pop_A$  and  $Days_A$ ) will be in a provincial correctional facility.

| Jurisdiction              | Before amendment |           | After amendment |         |          |
|---------------------------|------------------|-----------|-----------------|---------|----------|
|                           | $Pop_B$          | $Days_B$  | $T_A$           | $Pop_A$ | $Days_A$ |
| Federal                   | N/A              | N/A       | 825             | N/A     | N/A      |
| Alberta                   | 367              | 174,980   | 61              | 287     | 88,445   |
| British Columbia          | 739              | 225,848   | 97              | 674     | 131,549  |
| Manitoba                  | 192              | 66,664    | 26              | 168     | 37,997   |
| New Brunswick             | 86               | 25,124    | 28              | 79      | 15,002   |
| Newfoundland and Labrador | 40               | 10,471    | 6               | 35      | 5,660    |
| Northwest Territories     | 11               | 3,771     | N/A             | 10      | 2,095    |
| Nova Scotia               | 114              | 44,881    | 20              | 105     | 27,118   |
| Nunavut                   | 8                | 2,808     | N/A             | 7       | 1,698    |
| Ontario                   | 1,256            | 410,536   | 258             | 1,170   | 248,533  |
| Prince Edward Island      | 2                | 361       | 0               | 2       | 221      |
| Québec                    | 1,412            | 493,336   | 652             | 1,069   | 245,377  |
| Saskatchewan              | 235              | 94,318    | 44              | 206     | 54,062   |
| Yukon                     | 6                | 1,473     | N/A             | 6       | 922      |
| Total                     | 4,468            | 1,554,571 | 2,017           | 3,818   | 858,679  |

## Part II: Trial Costs

An increase in the number of trials will result in increases in the costs associated with court and criminal prosecution costs. In modelling the cost associated with this increase, the PBO has identified court and criminal prosecution costs.<sup>56</sup>

### Data

In calculating the prosecution costs, the PBO has relied exclusively on averages that may be influenced by outliers; a summary prosecution may cost very little relative to a so-called “mega-trial”.

### Prosecution costs

All criminal prosecutions in Canada are undertaken either by the Public Prosecution Service of Canada (PPSC) or a provincial prosecution service:

- In the territories (Northwest Territories, Nunavut, and Yukon), the PPSC is responsible for the prosecution of all offences under the *Criminal Code* and the *CDSA*.
- In New Brunswick and Québec, the Director of Public Prosecutions (Directeur provincial des poursuites publiques) and the Directeur

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<sup>56</sup> The government has explicitly acknowledged the effect that changes in the availability of intermediate forms of punishment can have on the frequency with which defendants elect for trial rather than plead guilty; in information provided to PROC with respect to mandatory minimum sentences, the government states:

The main impact that is anticipated on the Office of the Director of Public Prosecutions as a result of changes to the Mandatory Minimum Punishments for serious drug offences is expected to be from the increased number of cases in which the accused will elect to have a trial rather than plead guilty, thereby increasing prosecution workloads and costs.

Since many accused persons will be facing potentially longer prison terms, the incentive for them to plead guilty will be reduced, and additionally, the incentive to challenge the constitutionally validity of the provisions will increase. These developments would likely result in more and longer trials, increased complexity and increased costs for prosecutions. Based on an analysis of ODPP files for 2005–2006, it was estimated that almost 10,000 new files annually over the next five years would involve accused who would be subject to MMPs if convicted. In the past, about 56% of these cases resulted in guilty pleas. It is expected that this percentage will drop to 10–15%.

[...]

The Office of the Director of Public Prosecutions estimated that the number of court cases resulting from implementation of mandatory minimum penalties will increase by 1,904 cases/year due to more “not guilty pleas”.

PROC, *supra* note 11.

des poursuites criminelles et pénales, respectively, prosecute all *Criminal Code* and most *CDSA* offences.<sup>57</sup>

- In all the other provinces, the PPSC prosecutes *CDSA* offences and provincial prosecutors prosecute *Criminal Code* offences.

### ***Public Prosecution Service of Canada***

The PPSC provided the average cost of prosecution for 2008-2009 for *CDSA* offences and *Criminal Code* offences in the territories.

| Province/Territory    | Average cost per file     |                      |
|-----------------------|---------------------------|----------------------|
|                       | <i>CDSA</i> <sup>58</sup> | <i>Criminal Code</i> |
| Alberta               | \$1,733                   | N/A                  |
| Atlantic (NB)         | \$1,522                   | N/A                  |
| Atlantic (NS and PEI) | \$2,554                   | N/A                  |
| Atlantic (NFLD)       | \$2,070                   | N/A                  |
| British Columbia      | \$1,558                   | N/A                  |
| Manitoba              | \$1,502                   | N/A                  |
| National Capital      | \$1,814                   | N/A                  |
| Northwest Territories | \$2,655                   | \$1,884              |
| Nunavut               | \$1,642                   | \$1,884              |
| Ontario               | \$1,249                   | N/A                  |
| Québec                | \$2,650                   | N/A                  |
| Saskatchewan          | \$1,093                   | N/A                  |
| Yukon                 | \$1,798                   | \$1,362              |
| National average      | \$1,467                   | N/A                  |

These figures do not include travel costs.

<sup>57</sup> In New Brunswick and Québec, the PPSC prosecutes those offences charged by the RCMP and the provincial prosecutorial authorities prosecute all those offences charged by provincial or municipal police forces.

<sup>58</sup> Note that these figures exclude simple possession files.



### ***Provincial prosecution services***

Provincial and territorial governments were contacted to obtain detailed information on the average cost of criminal prosecutions for indictable offences. Responses indicated that this information was not available. Upon further discussions with the Ministry of Attorney General of British Columbia, the PBO became aware that there are significant issues of comparability of prosecution costs between the provinces. This was confirmed by discussions with representatives from StatCan regarding the eventual termination of the Prosecutions, Personnel, and Expenditures Survey 2002-2003.

The Department of Justice's report on the cost of the criminal justice system provides the average cost of prosecution in 2008 to be \$1,114.<sup>59</sup> It is important to note that the Department of Justice average excludes British Columbia, and, despite StatCan's best efforts to ensure uniform reporting across the provinces and territories, the data may suffer from differential reporting.

<sup>59</sup> For an explanation of how these numbers were arrived at, see Ting Zhang, "The Cost of Crime in Canada, 2008" *Department of Justice Canada* [nd], online: Department of Justice Canada <<http://www.justice.gc.ca/>>. For details on the Prosecution Personnel and Expenditure survey, see Statistics Canada, Canadian Centre for Justice Statistics, *Overview of the Prosecutions Personnel and Expenditures Survey*, online: Statistics Canada <[http://www.statcan.gc.ca/imdb-bmdi/document/3322\\_D2\\_T9\\_V1-eng.pdf](http://www.statcan.gc.ca/imdb-bmdi/document/3322_D2_T9_V1-eng.pdf)> [*Prosecutions Survey*]. For details on the Adult Criminal Court Survey see: *ACCS*, *supra* note 42.

|   |                |
|---|----------------|
| Criminal prosecution expenditures (excluding BC) 2002-2003          | \$352,139,000  |
| Number of criminal cases (adult + youth) (excluding BC) 2002-2003   | 443,268        |
| Average prosecution cost per case 2002-2003 (\$352,139,000/443,268) | \$794          |
| Average prosecution cost per case 2008 (inflation adjustment)       | \$906          |
| <b>Average prosecution cost per case 2008 (\$906 * 1.23)</b>        | <b>\$1,114</b> |

## Court costs

The Department of Justice's report on the cost of the criminal justice system provides the cost per court case in 2008 to be \$1,418.<sup>60</sup>

## Method

### Prosecution costs

#### *Public Prosecution Service of Canada*

As outlined above, the PPSC is responsible for prosecuting:

- *CDSA* offences except most in New Brunswick and Québec;<sup>61</sup> and
- *Criminal Code* offence in the territories.

The total for each province and territory (except New Brunswick and Québec) are calculated according to the averages obtained for that province or territory and statute. For provinces, this involves *CDSA* offences only. For the territories, this involves both *CDSA* and *Criminal Code* offences.

#### *Provincial prosecution services*

As outlined above, the provincial prosecution service in:

- New Brunswick and Québec are responsible for prosecuting *Criminal Code* and most *CDSA* offences; and
- all other provinces are responsible for prosecuting *Criminal Code* offences.

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<sup>60</sup> StatCan's Courts Personnel and Expenditures Survey collected data on court costs up until 2002-2003. The survey included costs of court operations for criminal and civil proceedings across the provinces, territories, and various federal courts. Relying upon these data, the Department of Justice provides the following figures:

|   |                 |
|---|-----------------|
| Estimated number of active civil cases 2002-2003                | 648,499         |
| Number of criminal cases (adult + youth)                        | 469,663         |
| Total cases process in courts 2002-2003 (648,499+496,663)       | 1,145,162       |
| Total court expenditures 2002-2003                              | \$1,151,885,000 |
| Average court cost per case 2002-2003 (1,151,885,000/1,145,162) | \$1,006         |
| Average court cost per case 2008-2009 (inflation adjustment)    | \$1,153         |
| <b>Average court cost per case 2008 (\$1,153 * 1.23)</b>        | <b>\$1,418</b>  |

<sup>61</sup> The PPSC does handle *CDSA* offences in Québec that are investigated by the RCMP, but given that Québec has its own police force, such cases are far and few between.

The PBO uses the average cost per prosecution to calculate prosecution costs for *Criminal Code* offences in the provinces and CDSA offences in New Brunswick and Québec.

## Court costs

Court costs are arrived at by multiplying the average cost of a criminal court case outlined above by the total increase in trials.

## Results

The following table provides the after amendment prosecution, court, and combined costs for fiscal year 2008-2009.

| Jurisdiction              | After amendment |             |             |
|---------------------------|-----------------|-------------|-------------|
|                           | Prosecution     | Court       | Combined    |
| Federal                   | \$1,186,727     | N/A         | \$1,186,727 |
| Alberta                   | \$67,903        | \$254,567   | \$322,470   |
| British Columbia          | \$108,258       | \$424,471   | \$532,729   |
| Manitoba                  | \$28,519        | \$114,444   | \$142,963   |
| New Brunswick             | \$30,937        | \$39,380    | \$70,317    |
| Newfoundland and Labrador | \$6,240         | \$24,906    | \$31,146    |
| Northwest Territories     | \$ -            | \$ 5,865    | \$5,865     |
| Nova Scotia               | \$22,522        | \$70,236    | \$92,758    |
| Nunavut                   | \$ -            | \$5,347     | \$5,347     |
| Ontario                   | \$ 287,611      | \$845,017   | \$1,132,628 |
| Prince Edward Island      | \$ -            | \$709       | \$709       |
| Québec                    | \$ 726,292      | \$924,490   | \$1,650,782 |
| Saskatchewan              | \$ 49,277       | \$152,389   | \$201,666   |
| Yukon                     | \$ -            | \$3,545     | \$3,545     |
| Total                     | \$2,514,286     | \$2,865,366 | \$5,379,652 |

These costs do not take into account legal aid<sup>62</sup> or trial costs<sup>63</sup> associated with pleading out.

<sup>62</sup> In 2008-2009, approximately 62% of criminal cases were represented by legal aid counsel. If the amendments to the conditional sentencing regime result in an increase in trials where offenders would have previously pled out, one of two things or a combination of both must happen: legal aid costs will increase and/or resources will be reallocated. The PBO does not, however, have the data that would be necessary to model the fiscal impact of these effects.

<sup>63</sup> While it is likely that there will be some court and criminal prosecution costs before amendment, the PBO has not included this cost within its analysis.

## Part III: Corrections Costs

An increase in days served in correctional facilities will result in increased costs to provincial and territorial correctional services. In calculating these costs, the PBO does not account for offenders released on full or day parole or for temporary absences.

### Data

In calculating the daily costs of supervision, the “actual-in”—the number of offenders in the community under supervision in any given month—is used as the denominator. However, in these data, this count was missing for Nova Scotia. As such, the average daily cost of supervision for the Atlantic provinces was adopted. Similarly, actual in data were missing for Nunavut, but community expenditures were known. Consequently, the average “actual in” for the other two territories is used to populate Nunavut’s “actual in”.

### Cost of incarceration

The PBO has obtained data on the average cost of housing a provincial or territorial inmate from StatCan and some provinces.

According to StatCan, in 2008-2009, the average cost of housing a provincial or territorial inmate is \$162 per day. This figure was arrived at:

... by dividing the operational expenditures by the “total days stayed”. “Total days stay” is based on average daily (actual-in) counts of inmates [cases as described above] multiplied by the number of days in the year. Custodial services operating costs constitute total operating expenditures for government facilities as well as purchased services related to institutional activities.

Thus

$$DCI = \frac{OE}{TDI}$$

The costs associated with holding a prisoner for one day in a provincial or territorial correctional facility for the province or territory.

The operating expenditures for incarceration for the respective province or territory.

The average “actual in” on any given day in the year × 365 for the province or territory.

The following provinces provided their average daily cost of incarceration per offender for 2008-2009 directly to the PBO:

- Alberta at \$123.40
- British Columbia at \$192.00
- Prince Edward Island at \$252.00
- Québec at \$168.00
- New Brunswick at \$144.04
- Nova Scotia at \$184.00

For calculating costs, where actual figures are reported back from the provinces, they are relied upon. In their absence, StatCan’s averages are used.

## Cost of supervision

StatCan does not provide an average daily cost of community supervision;<sup>64</sup> as such, the PBO adopted an analogous calculation to that of incarceration costs to determine the daily cost of community supervision:

$$DCS = \frac{OE}{TDS}$$

The costs associated with supervising a prisoner for one day in the community for the province or territory.

The operating expenditures for community supervision for the province or territory.

The average “actual in” on any given day in the year × 365 for the province or territory.

<sup>64</sup> In previous iterations of these surveys and reports, StatCan provided the daily costs of supervision by province, however, they were asked by respondents to stop providing daily cost per offender on community supervision due to data limitations. As such, the calculation adopted herein is similar to the one previously used by StatCan.

Once the daily cost is calculated, the total costs of community supervision for the respective province/territory may be calculated.

The following provinces provided their average daily cost of supervision per offender for 2008-2009 directly to the PBO:

- Alberta at \$7.10
- British Columbia at \$7.52
- Prince Edward Island at \$8.00
- Québec at \$10.51
- New Brunswick at \$5.68

For calculating costs, where actual figures are reported back from the provinces, they are relied upon. In their absence, the average derived from StatCan data is relied upon.

## Method

### Before amendment

Before amendment, there are, by definition, no incarceration costs. Costs are limited to the cost of community supervision of conditional sentences of imprisonment.

$$TC_B = DCS \sum_{i=1}^{25} Days_{B_i}$$

The diagram shows the equation  $TC_B = DCS \sum_{i=1}^{25} Days_{B_i}$ . Below the equation, there are two blue boxes. The first box, on the left, has a callout line pointing to  $TC_B$  and contains the text "Total corrections cost before amendment." The second box, on the right, has a callout line pointing to  $DCS$  and contains the text "Daily cost of supervision in the community."

## After amendment

After amendment, there are, by definition, no community supervision costs. Costs are limited to the cost of incarceration.

$$TC_A = DCI \sum_{i=1}^{25} Days_{A_i}$$

The diagram shows the equation  $TC_A = DCI \sum_{i=1}^{25} Days_{A_i}$ . A blue callout box points to  $TC_A$  with the text "Total corrections cost after amendment." Another blue callout box points to  $DCI$  with the text "Daily cost of incarceration."

## Results

Corrections cost for 2008-2009 are estimated to be as follows:

| Province/territory        | Before amendment  | After amendment       |
|---------------------------|-------------------|-----------------------|
|                           | Cost of community | Cost of incarceration |
| Alberta                   | \$1,242,355       | \$10,914,066          |
| British Columbia          | \$1,698,380       | \$25,257,336          |
| Manitoba                  | \$519,314         | \$6,155,571           |
| New Brunswick             | \$141,451         | \$2,160,825           |
| Newfoundland and Labrador | \$26,195          | \$916,942             |
| Northwest Territories     | \$36,996          | \$339,364             |
| Nova Scotia               | \$276,094         | \$4,883,235           |
| Nunavut                   | \$35,887          | \$275,017             |
| Ontario                   | \$2,192,260       | \$40,262,326          |
| Prince Edward Island      | \$2,888           | \$55,608              |
| Québec                    | \$4,614,770       | \$41,223,283          |
| Saskatchewan              | \$694,178         | \$8,758,079           |
| Yukon                     | \$24,054          | \$149,364             |
| Total                     | \$11,504,822      | \$141,351,016         |

## Part IV: Parole Board Costs

An increase in the inmate population will result in increased costs to the Parole Board of Canada (PBC), the Ontario Parole Board (OPB), and the Commission québécoise des libérations conditionnelles (CQLC).

- The PBC is responsible for the release decisions for full and day parole for all provincial and territorial offenders outside of Ontario and Québec.<sup>65</sup>
- The OPB is responsible for the release decisions for full and day parole and temporary absences for all provincial offenders in Ontario.
- The CQLC is responsible for the release decisions for full and day parole and temporary absences for all provincial offenders in Québec.

The costs of the various parole boards include those associated with case preparation. The PBO accounts for the cost of parole review and does not reduce time served based on parole because the costs of parole review include full and day parole, with the latter constituting the majority of costs.

### Data

#### Parole Board of Canada

Public Safety Canada was contacted directly for the PBC's average costs of review. This information, however, was not forthcoming.

As a result, the PBO has relied on the information provided by the government to PROC.<sup>66</sup> This information results in a per review cost of \$4,289.

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<sup>65</sup> The PBC is also responsible for the release decisions for full and day parole for all federal offenders.

<sup>66</sup> In the documents provided, the government stated that the "average time to prepare one provincial offender for their first PBC review is 920.9 minutes" or approximately 15.35 hours. This number was then multiplied by the annual reviews to be prepared, divided by the number of hours worked by a full time employee (FTE) in one year (1,309 hours). This provided the number of FTEs that would be necessary. In 2008-2009, the PBC estimated this number to be 10 FTEs. On subsequent pages of the report to PROC, in Annex B: Costings, the government provides a detailed



## Ontario Parole Board

The PBO contacted the OPB directly to obtain parole expenditures.

The OPB estimates the average cost per parole hearing in 2008-2009 at \$571.90. This includes the reviews associated with day and full parole. The OPB indicated that it does not track the average number of parole hearings per offender.

## Commission québécoise des libérations conditionnelles

The PBO contacted the CQLC directly to obtain parole expenditures.

The CLQC estimates the average cost per parole decision in 2008-2009 at \$854.<sup>67</sup> The CLQC indicated that there were, on average, 2.62 hearings per inmate in 2008-2009. These figures include the reviews associated with day and full parole.

## Assumptions

In order to carry out the method outlined below, it is necessary to adopt the following assumptions:

### **1. Each offender, other than those in Québec, receives one parole review.**

Each offender will, in the normal course of events, receive at least one parole review. It is possible, however, that offenders will receive more than one review. This may occur as a result of having reviews for both day and full parole or not being released upon first review. As a result, insofar as number of reviews is concerned, this assumption will result in an underestimate. The way in which parole costs were arrived at differs for each of the three parole boards because of the nature of the data obtained.

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breakdown of this workload and the associated costs that, when aggregated, result in a cost of \$365,734 per FTE involved in preparing reviews. PROC, *supra* note 11.

<sup>67</sup> This cost is derived by dividing the total budget for 2008-2009 (\$4,554,700) by the total number of decisions for that fiscal year (5,333). In this case, decisions include any decision made by the CLQC, such as applications for temporary absences, day parole, full parole, case review and the like.

## **2. The PBC's cost structure provided by the government for former S-10 is applicable to former C-16.**

On January 10, 2012, the PBO requested Public Safety Canada to provide average cost of a review by the Parole Board of Canada for provincial offenders.<sup>68</sup> This information, however, was not forthcoming. As a result, the PBO has relied on information provided to PROC by the government on the cost implications of increased hearings resulting from S-10. In doing so, the PBO is assuming that the CDSA cost structure for provincial offenders reflected in this document is the same as the cost structure for provincial offenders for all criminal offences insofar as PBC costs are concerned.<sup>69</sup>

## **Method**

### **Before amendment**

Before amendment, the costs of parole are nil. Since none of the offenders served their term of custody in a correctional facility, none is reviewed for parole.

### **After amendment**

#### ***Parole Board of Canada***

The following formula provides the total cost to the PBC.

#### **All provinces and territories less Ontario and Québec**

$$\$4,289 \times Pop_A$$

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<sup>68</sup> Kevin Page, Information Request sent to Mr. William V. Baker, *Office of the Parliamentary Budget Officer* (10 January 2012), online: Parliament of Canada <[http://www.parl.gc.ca/PBO-DPB/documents/InformationRequests/Requests/IR0062\\_PSC\\_Bill\\_C10.pdf](http://www.parl.gc.ca/PBO-DPB/documents/InformationRequests/Requests/IR0062_PSC_Bill_C10.pdf)>.

<sup>69</sup> For a detailed explanation regarding why these data were not provided to the PBO, please see William V. Baker, Response to 10 January 2012 Information Request Sent by Kevin Page, *Public Safety Canada* (30 January 2012), online: Parliament of Canada <[http://www.parl.gc.ca/PBO-DPB/documents/InformationRequests/Responses/Response\\_IR0062\\_PSC\\_Bill\\_C10.pdf](http://www.parl.gc.ca/PBO-DPB/documents/InformationRequests/Responses/Response_IR0062_PSC_Bill_C10.pdf)>.

### ***Ontario Parole Board***

The following formula provides the total cost to the OPB.

#### **Ontario**

$$\$572.90 \times Pop_A$$

### ***Commission québécoise des libérations conditionnelles***

The following formula provides the total cost to the CQLC:

#### **Québec**

$$\$854 \times 2.62 \times Pop_A$$

## **Results**

For 2008-2009, the number of new offenders and cost is as follows:

| <b>Parole Board</b> | <b>After amendment</b>        |             |
|---------------------|-------------------------------|-------------|
|                     | <b><i>Pop<sub>A</sub></i></b> | <b>Cost</b> |
| PBC                 | 1579                          | \$6,771,890 |
| OPB                 | 1171                          | \$670,933   |
| CQLC                | 1068                          | \$2,388,968 |
| Total               | 3818                          | \$9,831,791 |

## Part V: Federal, Provincial, and Territorial Aggregate Costs

The analysis contained in this report is a model grounded in a number of explicit assumptions. It is based on data received for fiscal year 2008-2009. It is not a view to future costs, nor does it estimate the impact of behavioural effects it does not explicitly mention.

As a result of the aggregation of the costs, the costs for the federal government, provinces, and territories for 2008-2009 before and after amendment are as follows:

|                           | Before amendment | After amendment |               |             |
|---------------------------|------------------|-----------------|---------------|-------------|
| Jurisdiction              | Corrections      | Trial           | Corrections   | Parole      |
| Federal                   | N/A              | \$1,186,727     | N/A           | \$6,771,890 |
| Alberta                   | \$1,242,355      | \$322,470       | \$10,914,066  | N/A         |
| British Columbia          | \$1,698,380      | \$532,729       | \$25,257,336  | N/A         |
| Manitoba                  | \$519,314        | \$142,963       | \$6,155,571   | N/A         |
| New Brunswick             | \$141,451        | \$70,317        | \$2,160,825   | N/A         |
| Newfoundland and Labrador | \$26,195         | \$31,146        | \$916,942     | N/A         |
| Northwest Territories     | \$36,996         | \$5,865         | \$339,364     | N/A         |
| Nova Scotia               | \$276,094        | \$92,758        | \$4,883,235   | N/A         |
| Nunavut                   | \$35,887         | \$5,347         | \$275,017     | N/A         |
| Ontario                   | \$2,192,260      | \$1,132,628     | \$40,262,326  | \$670,933   |
| Prince Edward Island      | \$2,888          | \$709           | \$55,608      | N/A         |
| Québec                    | \$4,614,770      | \$1,650,782     | \$41,223,283  | \$2,388,968 |
| Saskatchewan              | \$694,178        | \$201,666       | \$8,758,079   | N/A         |
| Yukon                     | \$24,054         | \$3,545         | \$149,364     | N/A         |
| Total                     | \$11,504,822     | \$5,379,652     | \$141,351,016 | \$9,831,791 |

This results in a total cost as follows:

| <b>Jurisdiction</b>              | <b>Before amendment</b> | <b>After amendment</b> |
|----------------------------------|-------------------------|------------------------|
| <b>Federal</b>                   | \$ 0                    | \$7,958,617            |
| <b>Alberta</b>                   | \$1,242,355             | \$11,236,535           |
| <b>British Columbia</b>          | \$1,698,380             | \$25,790,065           |
| <b>Manitoba</b>                  | \$519,314               | \$6,298,534            |
| <b>New Brunswick</b>             | \$141,451               | \$2,231,142            |
| <b>Newfoundland and Labrador</b> | \$26,195                | \$948,088              |
| <b>Northwest Territories</b>     | \$36,996                | \$345,229              |
| <b>Nova Scotia</b>               | \$276,094               | \$4,975,994            |
| <b>Nunavut</b>                   | \$35,887                | \$280,364              |
| <b>Ontario</b>                   | \$2,192,260             | \$42,065,888           |
| <b>Prince Edward Island</b>      | \$2,888                 | \$56,317               |
| <b>Québec</b>                    | \$4,614,770             | \$45,263,032           |
| <b>Saskatchewan</b>              | \$694,178               | \$8,959,745            |
| <b>Yukon</b>                     | \$24,054                | \$152,909              |
| <b>Total</b>                     | \$11,504,822            | \$156,562,459          |

National figures are as follows:

|                                  | <b>Before amendment</b> | <b>After amendment</b> | <b>Change</b> |
|----------------------------------|-------------------------|------------------------|---------------|
| <b>T (Number of trials)</b>      | N/A                     | 2,017                  | ↑2,017        |
| <b>Pop (Offender population)</b> | 4,468                   | 3,818                  | ↓650          |
| <b>Days (Days served)</b>        | 1,554,571               | 858,679                | ↓695,892      |
| <b>Trial costs</b>               | N/A                     | \$5,379,652            | ↑\$5,379,65   |
| <b>Corrections costs</b>         | \$11,504,822            | \$141,351,016          | ↑\$129,846,1  |
| <b>Parole costs</b>              | \$0                     | \$9,831,791            | ↑\$9,831,791  |
| <b>Total cost</b>                | \$11,504,822            | \$156,562,459          | ↑\$145,057,6  |
| <b>Average cost per offender</b> | \$2,575                 | \$41,006               | ↑\$38,431     |
| <b>Average days per offender</b> | 348                     | 225                    | ↓123          |

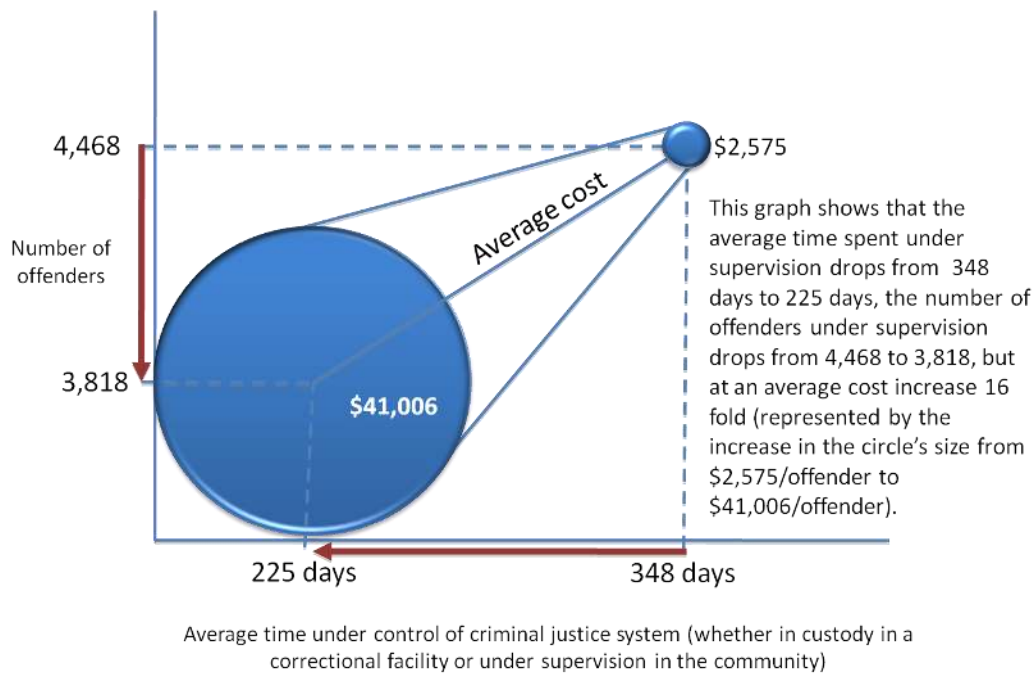
This means that, according to the PBO's model, as a result of the amendments, in 2008-2009:

- offenders would spend, on average, one-third less time under control of the criminal justice system;

- 650 offenders who would have otherwise been serving a CSI will go free when acquitted at trial; and
- the average cost per offender will increase by 16 fold from \$2,575 to \$41,006.

In effect, fewer offenders will be punished for shorter amounts of time, at a greater expense, but in provincial correctional facilities rather than in the community.

**Figure 16: Changes in average cost per offender**



It should be recalled that those offenders who are released are, according to the method adopted in this paper, not subject to any form of supervision.

The foregoing analysis is an underestimate. The PBO has not included those newly potentially ineligible offences within the calculations provided. If it were to, the figures would be significantly higher.

In addition to financial costs, changes in the law related to sentencing can have other significant behavioural or sociological impacts. Some of these effects may be foreseeable; others may not. For example, Aboriginal populations make up 20% of those on CSIs.<sup>70</sup> Elimination of eligibility, therefore, contains the very real possibility of having a disproportionate impact on aboriginal offenders who are already over represented in prisons. Furthermore, CSIs were introduced in 1996 with the explicit parliamentary intent to reduce the negative impacts of prison on eligible offenders.<sup>71</sup> Expanding ineligibility in the way that the amendments do may, thus, lead to unforeseen results the kind of which CSIs were originally introduced to prevent.

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<sup>70</sup> Statistics Canada, *Adult Correctional Services in Canada, 2008/2009* by Donna Calverley, Juristat, online: Statistics Canada <<http://www.statcan.gc.ca>>. PBO is not taking into account the possibility that actors within the criminal justice system may alter their behaviour in such a way that, for example, the projected changes in prison population would be ameliorated. See for example, Anthony N. Doob and Cheryl Marie Webster, "Countering Punitiveness: Understanding Stability in Canada's Rate of Imprisonment" (2006) 40:2 *Law and Society Review*, 325-368.

<sup>71</sup> Julian V. Roberts & David P. Cole, eds., *Making Sense of Sentencing* (Toronto: University of Toronto Press, 1999) at 69.

## Appendix A—The Division of Powers in the Canadian Criminal Justice System

Responsibility for the Canadian criminal justice system is divided between the federal and provincial governments. The *Constitution Act, 1867* grants the federal Parliament exclusive authority to legislate on “the Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters”, as well as “the Establishment, Maintenance, and Management of Penitentiaries”.<sup>72</sup> Provincial legislatures, on the other hand, have the authority to legislate on “the Establishment, Maintenance, and Management of Public and Reformatory Prisons in and for the Province”, “the Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts”, and “the Imposition of Punishment by Fine, Penalty, or Imprisonment for Enforcing any Law of the Province made in relation to any Matter coming within any of the Classes of Subjects enumerated in this Section”.<sup>73</sup> No definition of the terms “penitentiaries” and “reformatory prisons” is found in the *Constitution Act, 1867*, but s 743.1 of the *Criminal Code* specifies that sentences of imprisonment for life or for two years or more are to be served in federal penitentiaries, while sentences of less than two years are to be served in provincial prisons. Section 742.1 of the *Criminal Code* allows judges to impose a CSI only when an offender has received a sentence of imprisonment of less than two years; therefore, any resulting change in the prison population will be found primarily in provincial facilities.<sup>74</sup>

Most of the general administration of the criminal justice system is done by provincial governments. This includes most policing, the

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<sup>72</sup> *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 91(27-28), reprinted in RSC 1985, App II, No 5.

<sup>73</sup> *Ibid* at s 92 (6, 14-15).

<sup>74</sup> That said, it is possible, through administrative arrangements between the Correctional Service of Canada and provincial corrections agencies, for an offender granted a sentence of less than two years to be serving that time in a federal institution. The typical case where this might occur is if the offender requests a transfer. Where a transfer occurs, the provincial agency pays the Correctional Service of Canada for housing that offender. Such transfers, however, are relatively infrequent, compared with transfers from federal to provincial institutions. Transfers will likely result in little to no impact to the population of federal penitentiaries. “Commissioner’s Directives: Interjurisdictional Exchange of Services Agreements”, *Correctional Service Canada* (9 May 2011), online: Correctional Service Canada <<http://www.csc-scc.gc.ca/text/plcy/cdshtm/541-gl-eng.shtml>>.



administration of provincial and superior courts, the appointment of provincial court justices, supervision of offenders on probation, and prosecution of most criminal offences. The federal government, for its part, is responsible for criminal law in Canada (primarily through the *Criminal Code*), appointing superior court and provincial courts of appeal justices (as well as justices of the Federal Court, the Tax Court, military courts, and the Supreme Court of Canada), prosecuting criminal law offences that fall under federal jurisdiction (such as drug, terrorism, organized crime, and tax offences), setting criminal trial procedure in Canada, and federal policing through the Royal Canadian Mounted Police (which enforces Canadian laws against illicit drugs, organized crime, firearms violations, human trafficking, etc). The result is a system marked by cooperation—and sometimes conflict—between the two levels of government.

## Appendix B—The Criminal Justice Process

There is a significant degree of variation in the ways that an accused can interact with the criminal justice system, but the following is meant to outline some of the main steps and possibilities.

### **First Contact with the Criminal Justice System**

The first contact that an accused will have with the criminal justice system can come in two forms. An arrest warrant can be issued by a judge or justice of the peace, with the accused then being arrested by the police. In the alternative, an individual could be arrested without a warrant if caught in the commission of an offence or if attempting to escape after having committed an offence.<sup>75</sup> Another option is that the accused may receive an appearance notice or a summons directing appearance in court at a specific time. Generally, these latter options should be used unless there is a need for an arrest (e.g. the accused is likely not to appear in court or the arrest is necessary to prevent another offence). If the accused is charged with an offence, the accused will be asked to plead. If the accused enters a guilty plea, the matter will proceed directly to sentencing. If the accused pleads not guilty, there will be a trial to determine whether the individual is guilty beyond a reasonable doubt of the offence(s) charged.

### **Prosecutorial Jurisdiction in Canada**

Those accused of committing a criminal offence in Canada may find that their case is being prosecuted either federally or provincially, depending on the nature of the offence. Provincial Attorneys General have responsibility for most proceedings under the *Criminal Code*, the *Youth Criminal Justice Act*, and provincial statutes.<sup>76</sup> As a result, provincial prosecutors prosecute the majority of criminal cases in Canada. The Public Prosecution Service of Canada (PPSC) prosecutes criminal offences under federal jurisdiction. These include violations of federal statutes, such as the *Income Tax Act*, the *Excise Act*, the *Customs Act*, the *Canada Elections Act*, the *Canadian Environmental Protection Act*, and the *Competition Act*, as well as conspiracies and attempts to violate these

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<sup>75</sup> *Criminal Code*, *supra* note 21 at ss 494-495.

<sup>76</sup> *Government of Alberta: Justice*, “Prosecutors’ roles and responsibilities” (2012), online: Government of Alberta: Justice <<http://justice.alberta.ca/>>.

statutes. Offences involving drugs, organized crime, terrorism, tax law, money laundering and proceeds of crime, crimes against humanity and war crimes, and *Criminal Code* offences in the territories are also under federal jurisdiction.

The jurisdiction of federal and provincial prosecutors varies somewhat by province and territory. The PPSC prosecutes all drug offences under the *Controlled Drugs and Substances Act*, in every province and territory except for Quebec and New Brunswick. In Quebec and New Brunswick, the PPSC only has responsibility for those drug offences investigated by the RCMP; provincial Attorneys General in those provinces prosecute alleged drug offences investigated by local or provincial police forces. The PPSC prosecutes all *Criminal Code* offences and offences under other federal statutes in the three territories.<sup>77</sup>

Under arrangements between the PPSC and provincial prosecution services, an offence under provincial jurisdiction may sometimes be prosecuted by a federal prosecutor and vice versa. Thus, the PPSC may prosecute a *Criminal Code* offence within provincial jurisdiction with the consent and on behalf of a provincial attorney general where that offence is related to a federal charge. Conversely, provincial prosecutors may prosecute a federal offence that arises in relation to a primary offence under the *Criminal Code*. However, the prosecution service delegating the prosecution retains ultimate control over it.<sup>78</sup>

### **Crown Election for Hybrid Offences**

Criminal trials in Canada can be prosecuted by indictment or summarily. Some *Criminal Code* offences are hybrid: the Crown can prosecute by either means. In such cases, the Crown must decide which route to take. Generally, prosecutors prefer to prosecute summarily in nearly all instances. Prosecuting by indictment permits the accused to have a preliminary inquiry, which most prosecutors prefer to avoid, and to elect to be tried by judge and jury or by judge alone in superior court, etc. The Crown will only prosecute by indictment where the offence falls outside the summary conviction statute of limitations (six months) or where it

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<sup>77</sup> *Public Prosecution Service of Canada*, “About the Public Prosecution Service of Canada” (28 March 2011), online: Public Prosecution Service of Canada <<http://www.ppsc-sppc.gc.ca/>>; *Public Prosecution Service of Canada*, “Annual Report 2009-2010: I. The Public Prosecution Service of Canada – An Overview” (18 August 2010), online: Public Prosecution Service of Canada <<http://www.sppc-ppsc.gc.ca/eng/>>.

<sup>78</sup> *Ibid.*

seeks access to enhanced penalties, typically above eighteen months for super-summary offences, i.e. it is seeking penitentiary time.

Consequently, there should be no uptick in prosecutions by indictment as a result of the winnowing of the conditional sentence regime, but instead an uptick in the trial rate generally.

Election occurs in two stages. After an information alleging a hybrid offence has been laid and after all of the issues surrounding judicial interim release have occurred, the accused is placed into remand court until trial or resolution. At one of these remand appearances, the Crown will either choose to elect or, as is more common, be pushed to elect by the defence. The Crown can decline to elect, and some prosecutors do, but typically by the second or third appearance, i.e. after retainer is in place, the Crown has elected. If the Crown elects to proceed by summary conviction, the accused has no choice over mode of trial: trial will be in a provincial court (e.g. the Ontario Court of Justice or the Provincial Court of New Brunswick) by a judge sitting alone. Appeals are heard by superior courts (e.g. the Court of Queen's Bench of Alberta or the Supreme Court of Newfoundland and Labrador). Likewise, if the offence falls within the absolute jurisdiction of a provincial court judge (see s 553), the accused must be tried by that court regardless of the mode of prosecution chosen by the Crown.

If the Crown elects to proceed by way of indictment, the accused is then put to election and is offered the option of trial by a judge of the provincial court, by a superior court judge sitting alone, or by a superior court judge sitting with a jury, and the accused may also choose to have a preliminary inquiry (see s 536 for the procedure). Also, note that while the leading cases on disclosure (*R v Stinchcombe*,<sup>79</sup> etc) from the Supreme Court of Canada say that disclosure should be complete before the accused is put to his election, in reality disclosure comes in fits and starts, and the accused elects by the second or third appearance. Most prosecutions are by summary conviction anyways, so where the tactical importance of election when tried on indictment (i.e. whether to have a preliminary or not, whether to have a jury) is unclear, the defence elects judge and jury and then re-elects later via s 561.

Once the Crown has elected, it cannot go back. Once a prisoner is in jeopardy, a withdrawn information cannot be re-laid. A stayed information

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<sup>79</sup> *R v Stinchcombe*, [1991] 3 SCR 326, [1992] 1 WWR 97.

can, but re-initiating a prosecution in such a manner rarely happens and would never occur in order to make a CSI available.

## **Criminal Sentences**

At the sentencing stage of a trial, judges generally have a significant degree of discretion in imposing custodial or non-custodial sentences, taking into account the sentencing principles and purposes in ss 718–718.21 of the *Criminal Code*. In sentencing, a judge will consider the circumstances of the crime, taking into account any mitigating and aggravating factors, such as spousal or child abuse, contravention of an existing restraining order, remorse, an early guilty plea, or a previous criminal record.<sup>80</sup> Sentences imposed for the same offence can therefore vary considerably depending on the circumstances.

There are several sentencing options open to judges. At the lower end of the severity scale, an offender may receive an absolute or conditional discharge. These are not considered convictions, only findings of guilt, and are purged after one and three years, respectively. A suspended sentence involves probation of up to three years. This sentence can be revoked if the offender fails to respect the terms of his or her probation. A judge may also order that an offender pay a fine of up to \$2000 for summary offences or of any amount for indictable offences, with a range of civil remedies available if the offender defaults. The offender can be sentenced to serve a conditional sentence, which, like probation, is served in the community, but generally with harsher conditions. The individual could be sentenced to serve time in custody. If the sentence is for less than 90 days, the judge may allow it to be served on non-consecutive days (e.g. the individual would be in prison on the weekend but at home on probation during the week). Otherwise, the offender will serve the sentence, until parole, statutory release, or the end of the sentence, in a correctional institution.

### Probation

Probation is a court disposition that allows an individual to remain in the community subject to certain conditions. If a judge is of the view that a sentence of imprisonment is inappropriate, probation may be ordered. As per the BC Court of Appeal:

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<sup>80</sup>“Fair and Effective Sentencing – A Canadian Approach to Sentencing Policy”, *Department of Justice* (October 2005), online: Department of Justice <<http://www.justice.gc.ca/>>.

The availability of a probation order depends on different factors. Probation is not intended to punish the offender so much as to rehabilitate the offender. Regardless of the gravity of the offence and the degree of responsibility of the offender, it may be that a particular offender who has spent time in pre-sentence custody and deserves a sentence of imprisonment of two years may still benefit from the rehabilitative aspects of probation.<sup>81</sup>

Probation may be imposed for offenders who have received a conditional discharge, suspended sentence, or intermittent sentence, and may be included with a sentence of a fine, imprisonment for two years or less, or a CSI. A term of probation may be ordered for up to three years and failure to comply without a reasonable excuse is a *Criminal Code* offence.<sup>82</sup> Additionally, if an individual on probation with a suspended sentence or conditional discharge is convicted of another offence, the probation order may be revoked and the court can impose the sentence that would otherwise have been imposed had the sentence not been suspended or the discharge granted.<sup>83</sup>

The authority to impose conditions in a probation order is found in ss 731(1)(b) and 732(1)(b) of the *Criminal Code*. Section 732.1 presents a list of what judges may or may not compel an offender to do. Where a condition may potentially pose a risk to the offender, be it personal (e.g., participation in medical treatment) or penal (e.g., participating in a program in which one makes admissions or being subjected to random drug testing), the consent of the offender is required.<sup>84</sup>

### Conditional Sentence of Imprisonment: Additional Details

CSI is designed to “include both punitive and rehabilitative aspects”.<sup>85</sup> In *R v Proulx*, Chief Justice Lamer, as he then was, stated that judges, when deciding the appropriateness of a CSI, must take into account two key factors: “(1) the risk of the offender re-offending; and (2) the gravity of the

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<sup>81</sup> *R v Goejjon*, 2006 BCCA 261, 209 CCC (3d) 61, cited with approval by the Supreme Court of Canada in *R v Mathieu*, 2008 SCC 21, [2008] 1 SCR 723 at para 20.

<sup>82</sup> *Criminal Code*, *supra* note 21 at s 733.1.

<sup>83</sup> “Correctional Services, Community Corrections, Probation”, *Ontario Ministry of Community Safety and Correctional Services* (27 March 2009), online: Ontario Ministry of Community Safety and Correctional Services <[http://www.mcscs.jus.gov.on.ca/english/corr\\_serv/comm\\_corr/probation/probation.html](http://www.mcscs.jus.gov.on.ca/english/corr_serv/comm_corr/probation/probation.html)>.

<sup>84</sup> *R v Shoker*, 2006 SCC 44, [2006] 2 SCR 399.

<sup>85</sup> *Proulx*, *supra* note 20 at para 127.

damage that could ensue in the event of reoffence”. As general rule, judges ought to consider when handing down a CSI, “the more serious the offence, the longer and more onerous the conditional sentence should be”.<sup>86</sup>

Conditional sentences of imprisonment, unlike conventional imprisonment, are always served to completion unless an offender breaches one of its conditions and the sentence is altered.<sup>87</sup> Offenders conditionally sentenced are not eligible for parole or statutory release because they are already serving their sentence in the community subject to conditions. This is confirmed by the *Corrections and Conditional Release Act* and the *Prisons and Reformatories Act*.<sup>88</sup> Those two acts govern parole and parole eligibility and do not apply to offenders serving a CSI.

#### *Criminal Code*, RSC 1985, c C-46

##### Imposing of conditional sentence

742.1 If a person is convicted of an offence, other than a serious personal injury offence as defined in section 752, a terrorism offence or a criminal organization offence prosecuted by way of indictment for which the maximum term of imprisonment is ten years or more or an offence punishable by a minimum term of imprisonment, and the court imposes a sentence of imprisonment of less than two years and is satisfied that the service of the sentence in the community would not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing set out in sections 718 to 718.2, the court may, for the purpose of supervising the offender’s behaviour in the community, order that the offender serve the sentence in the community, subject to the offender’s compliance with the conditions imposed under section 742.3.

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<sup>86</sup> *Ibid.*

<sup>87</sup> See *Hunt*, *supra* note 20, and *Lakeman*, *supra* note 20. Breach of the conditions of a conditional sentence is not a *Criminal Code* offence, however.

<sup>88</sup> *Corrections and Conditional Release Act*, *supra* note 20; *Prisons and Reformatories Act*, *supra* note 20.

### Conditional Sentence vs. Probation

The CSI perhaps appears more similar to probation than it does actual imprisonment. Like probation, a conditional sentence is accompanied by conditions. Also like probation, the judge's power to impose conditions are outlined in the *Criminal Code*: s 742.3 delineates what judges may or may not order as conditions for a CSI, subject to a residual discretion clause at s 742.3(2)(f).

One marked difference between probation and CSI is the ability of a judge to prescribe rehabilitative conditions. Whilst s 742.2(e) allows judges ordering a CSI to compel an offender to attend treatment programs, a judge ordering probation needs the consent of the offender as per s 732.1(2).

Perhaps the most notable difference between these two sentences is found in their functions; while probation is viewed as rehabilitative in nature, CSI is punitive. Taking note of this distinction, the Supreme Court of Canada in *R v Proulx* emphasized that:

... conditional sentences should generally include punitive conditions that are restrictive of the offender's liberty. Conditions such as house arrest or strict curfews should be the norm, not the exception.<sup>89</sup>

The validity of conditions for probation and CSI is typically a matter of constitutional significance; section 7 of the *Canadian Charter of Rights and Freedoms* limits what courts can do with either. Any condition that interferes with the offender's life, liberty, or security of the person must do so only in accordance with the principles of fundamental justice.

Should an offender breach a conditional sentence order, the procedure to be followed and remedies available are set out in s 742.6 of the *Criminal Code*. A court may take no action, change the optional conditions, suspend the CSI and direct the offender to custody for a portion of the sentence, or suspend the CSI completely. In cases of a breach of probation, the courts have the same options at their disposal; however, if an inexcusable breach occurs, the breach constitutes a new offence that may be prosecuted

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<sup>89</sup> *Proulx*, *supra* note 20 at paras 35, 36.



summarily or by way of indictment subject to a fine or incarceration of up to 18 months.<sup>90</sup>

### Imprisonment

Imprisonment, also known as a custodial sentence, is served in either a federal penitentiary or provincial correctional facility. Imprisonment can be intermittent (e.g. the offender may be in prison only on weekends or part of the week) or continuous, and in the most serious cases, an offender may also be designated a long term offender or a dangerous offender, resulting in extended or indefinite periods of supervision or incarceration.<sup>91</sup>

Most prisoners, other than dangerous offenders<sup>92</sup>, are eligible for parole after having served one third of their sentence. Prisoners who are serving time in a federal penitentiary are eligible for statutory release after serving two thirds of their global sentence.<sup>93</sup> While parole may only be granted if the relevant board approves, a prisoner in a federal penitentiary is entitled to statutory release in the absence of specified risk factors.

### Possible Substitution of Probation for a Conditional Sentence

There are many factors that could influence the length of an offender's sentence. For instance, one possible effect of expanding the number of accused who will be ineligible for a CSI is that judges could hypothetically exhibit a tendency to impose probation instead of a custodial sentence in borderline cases. If the offence has no mandatory minimum sentence, a judge is free to grant probation, "having regard to the age and character of the offender, the nature of the offence and the circumstances surrounding its commission".<sup>94</sup> At first blush, this gives judges much greater discretion in awarding probation than they have with respect to CSI. As a result, it might be suggested that some judges may decide to impose the less restrictive sentence of probation instead of incarceration when an intermediate sentence is not available. The Ontario Court of Appeal commented on this incongruity in *R v Peters* (2010 ONCA 30). In that case, the court was reviewing the suspended sentence plus three years probation imposed by a Superior Court Justice on Ms. Peters, an

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<sup>90</sup> *Criminal Code*, *supra* note 21 at s 733.1.

<sup>91</sup> "Sentencing in Canada", *John Howard Society of Alberta* (1999), online: John Howard Society of Alberta <<http://www.johnhoward.ab.ca/pub/pdf/C33.pdf>>.

<sup>92</sup> Dangerous offenders are eligible after 7 years and every 2 subsequent years.

<sup>93</sup> *Corrections and Conditional Release Act*, *supra* note 20 at s 127.

<sup>94</sup> *Criminal Code*, *supra* note 21 at s 731(1).

aboriginal offender who pled guilty to aggravated assault. Justice Watt of the Court of Appeal, writing in dissent, remarked that “the unavailability of a conditional sentence of imprisonment as a sentencing alternative seems to have driven the sentencing judge down to suspend the passing of sentence and impose a period of probation” (para 55).

Despite Justice Watt’s comments in *R v Peters*, by and large, individuals representative of the criminal bar and bench confirmed that while the circumscription of discretion is not necessarily welcomed, judges would undoubtedly sentence in accordance with the *Criminal Code*. In determining whether a conditional sentence is available, a judge must be convinced that a prison sentence of less than two years is within the range of sentencing options open for this particular offender. As prison is not appropriate when a sentence of probation would serve the fundamental purpose and principles of sentencing set out in ss 718 to 718.2 of the *Criminal Code*, a judge should never grant probation where a conditional sentence would have been the appropriate penalty: a custodial sentence must be imposed instead.

### **Sentence lengths**

It is important to distinguish between “sentence of imprisonment”, “time ordered”, “parole”, and “statutory release”. The sentence of imprisonment is the time an offender receives for committing a crime. This is often longer than the time a prisoner serves in a correctional facility or penitentiary because of credit earned for time served on remand. The judge makes allowances for credit for time served on remand and indicates “time ordered”. Parole and statutory release are then available at 1/3 and 2/3 of the sentence of imprisonment, respectively. Therefore, if a judge orders a sentence of imprisonment of one year and deducts credit for time served on remand of one month, the offender would be ordered to spend 11 months in prison and would be eligible for parole after spending three months in prison and entitled to statutory release after spending seven months in prison.

### **Concurrent and consecutive sentences**

A finding of guilt for multiple offences can impact the length of an offender’s sentence. As described in Public Safety Canada’s “Sentence Calculation: A handbook for judges, lawyers and correctional officials”, multiple sentences in Canada are normally served concurrently. It is only

if a judge orders that the sentences be served consecutively that the individual offender will spend more time in a correctional facility.<sup>95</sup>

Concurrent sentences are served at the same time. Consecutive sentences are served one after another. The difference is best illustrated by an example. An offender commits three offences: *x*, *y*, and *z*. The offender receives a sentence of 4 years for *x*, 6 years for *y*, and 8 years for *z*. If the sentences are served concurrently, after being in prison for 4 years, the prisoner would have served the sentence for *x*; after being in prison for 6 years, the prisoner would have served the sentence for *y*; after being in prison for 8 years, the prisoner would have served the sentence for *z*. Thus, the total amount of time served in prison (leaving aside the prospect of parole or statutory release) would be 8 years. If the sentences are served consecutively, after being in prison for 4 years, the prisoner would have served the sentence for *x*; after being in prison for 10 years, the prisoner would have served the sentence for *y*; after being in prison for 18 years, the prisoner would have served the sentence for *z*. Thus, the total amount of time served in prison (again, leaving aside the prospect of parole or statutory release) would be 18 years.

In *R v Davies*, the Ontario Court of Appeal ruled that “sentence” refers to the global sentence i.e. the actual total time that the offender has been ordered to serve.<sup>96</sup> Thus, should an offender receive two concurrent sentences of 1.5 years, his or her global sentence would be 1.5 years, not 3 years. A conditional sentence should still be available to this hypothetical offender. If, however, those sentences had been consecutive, they would have resulted in a global sentence of 3 years, and, therefore, the offender would be ineligible for a conditional sentence. Because the global sentence for conditional sentences cannot exceed two years, changes to the conditional sentencing regime should only affect provincial inmate populations.

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<sup>95</sup> “Sentence Calculation - How does it work?”, *Public Safety Canada* (9 October 2008), online: Public Safety Canada <<http://www.publicsafety.gc.ca/>>; “Research – Sentencing”, *Victims of Violence* (16 February 2011), online: Victims of Violence <<http://www.victimsofviolence.on.ca/>>; “Sentence Calculation: A Handbook for Judges, Lawyers and Correctional Officials”, *Public Safety Canada* (9 October 2008), online: Public Safety Canada <<http://www.publicsafety.gc.ca/>>. Section 718.3(4) of the *Criminal Code* describes the circumstances under which consecutive sentences may be imposed.

<sup>96</sup> *R v Davies* (2005), 199 CCC (3d) 389 (Ont CA).

## **Time spent on remand**

The amount of time spent in custodial remand can have an impact on an offender's sentence. Remand is the custody of individuals who are awaiting a further court appearance prior to trial or resolution. Most individuals on remand are awaiting trial, but they also include offenders who have been tried and found guilty and are awaiting sentencing. An individual may also be in remand awaiting a decision on bail or because bail has been denied and, absent judicial review, will be in remand until either release or sentencing. Remand is a provincial and territorial responsibility: all remanded prisoners are in provincial detention centres or jails.<sup>97</sup>

Time spent in remand may be taken into account by judges in sentencing, although the amount of credit is usually limited to a ratio of 1 to 1 by the *Truth in Sentencing Act*, which came into force in February 2010 (see sub-sections 719(3) and (4) of the *Criminal Code*).<sup>98</sup> Where circumstances justify it, and the judge provides reasons to explain these circumstances, the court may grant credit for time served up to a ratio of 1.5 to 1. This means that an offender sentenced to serve a particular amount of time in custody may find that his or her sentence is completed sooner, depending on the time spent in remand and the credit awarded by the sentencing judge. Note that the cap on credit for pre-sentencing custody came into effect on March 1, 2010 and does not apply to accused persons who committed the offence in question before that date.<sup>99</sup>

## **Parole and statutory release**

After serving a prescribed portion of a custodial sentence, the offender may be eligible for parole. The Parole Board of Canada or relevant provincial parole board makes decisions relating to day parole and full parole (conditional release), and determinations as to whether certain offenders remain in prison until the end of their sentence (detention during the period of statutory release). The Parole Board of Canada (PBC) makes such decisions for federal and provincial offenders in all provinces except Québec and Ontario, which have their own parole boards. Federal offenders as well as provincial offenders serving a sentence of six months

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<sup>97</sup> "Remand in Ontario: A Background", *John Howard Society* (September 2005), online: John Howard Society <<http://www.johnhoward.on.ca/pdfs/remand.pdf>>.

<sup>98</sup> *Truth in Sentencing Act*, SC 2009, ch 29, s 3.

<sup>99</sup> *Criminal Code*, *supra* note 21 at ss 719 (3-3.3); "Backgrounder: Credit for time served in pre-sentencing custody", *Department of Justice* (1 December 2011), online: Department of Justice <<http://www.justice.gc.ca/>>.

or more are eligible to apply to the PBC for day and/or full parole.<sup>100</sup> Conditional release is granted at the discretion of the parole board. In all provinces other than Ontario and Québec, applications for temporary absences are handled by provincial corrections.

Most offenders, other than those serving life sentences for murder, can apply for full parole after serving the lesser of one-third of their sentence or seven years. In exceptional cases, the PBC may grant parole at any time. Such cases include, for example, where an offender is terminally ill or where an offender's physical or mental health is likely to suffer serious damage if kept in confinement.<sup>101</sup> A sentencing judge may order that an offender serve the lesser of one-half of their sentence or ten years before the offender may apply for parole.<sup>102</sup> Inmates under the jurisdiction of the PBC serving sentences of less than six months generally serve their sentence to completion in custody (except for day parole and temporary absences), absent exceptional circumstances.

Parole eligibility for provincial offenders in Ontario and Quebec is somewhat different than in the rest of Canada, since these two provinces have their own parole regime. The Ontario Parole Board must automatically consider inmates serving sentences of six months or more for parole unless the inmate waives the right to a hearing. Inmates serving sentences of less than 6 months may apply for parole consideration. Inmates normally may be released on parole after serving one-third of their total sentence, but may apply for early consideration where there are compelling or exceptional circumstances.<sup>103</sup> The *Commission québécoise des libérations conditionnelles* considers parole requests from offenders serving sentences of six months or more and offenders are eligible to apply after serving one third of their sentence.<sup>104</sup> In these provinces, applications for temporary absences are handled by the provincial parole boards.

Statutory release requires federal offenders to serve the final third of their sentence in the community, under supervision and conditions similar to full parole, unless the PBC determines that the offender will likely commit

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<sup>100</sup> "Commissioner's Directive: Provincial Offenders Pre-Release Case Preparation", *Correctional Service Canada* (15 August, 2008), online: Correctional Service Canada <<http://www.csc-scc.gc.ca/>>.

<sup>101</sup> *Corrections and Conditional Release Act*, *supra* note 20 at s 121.

<sup>102</sup> *Criminal Code*, *supra* note 21 at s 743.6. This option is only open for offenders receiving a sentence of imprisonment of two years or more for certain offences listed in Schedule I or II of the *Corrections and Conditional Release Act* prosecuted by way of indictment.

<sup>103</sup> "Parole Information: Eligibility", *Ontario Parole Board* (2011), online: Ontario Parole Board <[http://www.opb.gov.on.ca/english/parole/eligibility/parole\\_elig.html](http://www.opb.gov.on.ca/english/parole/eligibility/parole_elig.html)>.

<sup>104</sup> *Loi sur le système correctionnel du Québec*, LRQ c S-40.1, s 143, 145.

an offence causing serious harm or death, a sexual offence involving a child, or a serious drug offence. Offenders serving life or indeterminate sentences are not eligible and there is no statutory release for offenders serving a sentence of less than two years.<sup>105</sup> Consequently, some offenders might spend only one third of their sentence incarcerated, while others could spend their entire sentence in a correctional institution.

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<sup>105</sup> “Parole and Community Corrections”, *Correctional Service Canada* (2 November 2011), online: Correctional Service Canada <<http://www.csc-scc.gc.ca/text/faits/o3-eng.shtml>>; “Fact Sheet - Types of Release”, *Parole Board of Canada* (7 September 2010), online: Parole Board of Canada <<http://pbc-clcc.gc.ca/infocntr/factsh/rls-eng.shtml>> [Fact Sheet - Types of Release]; *Corrections and Conditional Release Act*, *supra* note 20 at s 127.

## **Appendix C—Responsibility for Parole, Probation, Statutory Release, and Conditional Sentence Supervision in Canada**

Many individuals convicted of crimes in Canada find themselves in the community under supervision, either instead of incarceration or in addition to it. Depending on the nature of the regime at play, this supervision is conducted by the relevant provincial government or the federal government. The federal government supervises offenders on parole or statutory release, while provincial governments are responsible for supervising offenders on probation or supervising conditional sentence.

Parole applies only to offenders in custody who, for a number of reasons, may be released into the community to serve the remainder of their sentence. The Parole Board of Canada (PBC) makes decisions on parole for federal inmates. It may decide to grant, deny, cancel, terminate, or revoke day parole and full parole. The PBC may also order detention during the period of statutory release, where offenders are held in custody until the end of their sentence instead of the typical practice of releasing offenders under supervision when two-thirds of their sentence has been served. The Board also makes these decisions for offenders in provinces and territories that do not have their own parole board. At this time, only Ontario and Quebec have their own parole boards that can grant conditional release to offenders serving sentences of less than two years.<sup>106</sup> While inmates of provincial institutions can apply for parole, and are eligible after one sixth of their sentence is served, there are no mandatory parole hearings for these individuals as there are for federal inmates.<sup>107</sup>

Full parole occurs where an offender serves the remainder of his or her sentence under supervision in the community. The offender must report to a parole supervisor on a regular basis and notify that person of any changes in employment or personal circumstances. Most offenders, other

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<sup>106</sup> “Overview: Mandate and Organization”, *Parole Board of Canada* (7 June 2011), online: Parole Board of Canada <<http://pbc-clcc.gc.ca/>>; *Corrections and Conditional release Act*, *supra* note 20 at s 120(1).

<sup>107</sup> “The Justice System and Aboriginal People”, *The Aboriginal Justice: Implementation Commission*, online: The Aboriginal Justice: Implementation, Government of Manitoba <<http://www.ajic.mb.ca/volume1/chapter12.html>>.

than those serving life sentences for murder, are eligible to apply for full parole after they have served the lesser of one-third of their sentence or seven years.<sup>108</sup>

Statutory release applies only to federal inmates; section 127 of the *Corrections and Conditional Release Act* SC 1992, c 20 provides that most federal inmates, if not already released on parole, are automatically released into the community after serving two-thirds of their sentence. The decision for release is not made by the PBC but in certain circumstances, the Board may order the offender be detained until the end of his or her sentence. The Correctional Service of Canada (CSC) can recommend that statutory release be denied if they believe an offender is likely to commit an offence causing death or serious harm to another person, commit a sexual offence involving a child, or commit a serious drug offence before the end of the sentence. Offenders serving life or indeterminate sentences are not eligible for statutory release.<sup>109</sup>

Although provincial offenders are not entitled to statutory release, they are entitled to earned remission for good behaviour pursuant to the *Prisons and Reformatories Act*, RSC 1985, c P-20. Earned remission is applied against the inmate's sentence resulting in early release. Prisoners earn a remission credit of 15 days for every month served in a provincial correctional facility. The cumulative remission credit is then applied against the prisoner's sentence. The following formula determines time served if maximum remission is earned:<sup>110</sup>

$$DS = \frac{MO}{1.5}$$

Months (or days) actually spent in a provincial correctional facility

Months (or days) ordered to be spent in a provincial correctional facility

<sup>108</sup> Fact Sheet: Types of release, *supra* note 106.

<sup>109</sup> *Ibid.*

<sup>110</sup> This equation was derived as follows:

$$DS = MO - \frac{15}{30} DS$$

$$DS = MO - 0.5DS$$

$$1.5DS = MO$$

$$DS = \frac{MO}{1.5}$$



Thus, if an offender is sentenced to 4 months in prison (or 120 days),

$$DS = \frac{120}{1.5}$$

$$DS = 80$$

This means that an offender who is ordered to spend 4 months (or 120 days) will actually spend 2 months and 20 days (or 80 days) in prison.

The federal government, via parole officers employed by the CSC, is responsible for supervising offenders on parole and during statutory release. Should an offender breach the conditions, the PBC can revoke the release. The CSC can also return an offender to prison if they believe that an offender presents an undue risk to the public.<sup>111</sup>

Probation, unlike parole or statutory release, is a sentencing option available to judges whereby an offender may remain in the community subject to certain conditions for up to three years. Offenders with a conditional discharge or suspended sentence must be placed on probation. Those serving an intermittent sentence must also be placed on probation, usually during the period when they are not incarcerated. Offenders receiving a fine, incarceration, or a conditional sentence may also be placed on probation. Conditional release is another sentence that may be imposed by a judge where the offender remains in the community, although the conditions are meant to be more restrictive than those for probation. An offender may be sentenced to a conditional sentence as well as to a period of probation.

Responsibility for supervising these probation and conditional sentences falls to provincial governments. With respect to conditional sentences, this is because such a sentence is only to be imposed where the judge would otherwise have imposed a custodial sentence of less than two years, making the individual a provincial offender. Both probation and conditional release also fall under the heading of “the administration of justice”, a provincial legislative power as per s 92(14) of the *Constitution Act, 1867*.

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<sup>111</sup> *Ibid.*