BRIEF

Bill S-208

An Act to amend the Criminal Records Act, to make consequential amendments to other Acts and to repeal a regulation

Submitted by

The Canadian Criminal Justice Association

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Background of the Canadian Criminal Justice Association (CCJA)

The CCJA is one of the longest serving non-governmental organizations of professionals and lay-persons interested in criminal justice issues in Canada, having begun its work in 1919 and having testified before various Parliamentary committees on numerous occasions. Our Association consists of approximately 400 members from across the country and publishes the *Canadian Journal of Criminology and Criminal Justice*, and the *Justice Report*. We also organize and host the Canadian Congress on Criminal Justice every two years.

Purpose of Brief

To provide an analysis of existing and proposed regimes for the suspension or expiration of criminal conviction records[1].

Purpose of Bill

Bill S-208 was introduced with First Reading in the Senate on 30 September 2020 by Senator Kim Pate. The previous Bill S-214 was introduced with First Reading on 18 February 2020, almost one year to the date of the First Reading of Bill S-258 introduced by Senator Pate on 20 February 2019. Bills S-258 and S-214 were the precursors to Bill S-208, but died on the Order

[1] This is particularly of interest since 19 March 2020 with the decision of the Federal Court of Canada in *P.H. v. Canada (Attorney General),* 2020 FC 393 (CanLII) (http://canlii.ca/t/j612g) which ruled that the *transitional provisions* with respect to the restrictions put in place by the former federal government in 2010 and 2012 to restrict the access to record suspensions (then pardons) are unconstitutional. As a result, the current government has now posted on its website dealing with record suspensions that, effective the date of this decision (19 March 2020**),** changes made to the *Criminal Records Act* (CRA) in both 2010 and 2012 are no longer being applied retroactively for applicants who committed their most recent offence prior to the coming into force of these changes. This means that applications are now being processed using the CRA eligibility criteria in place at the time of an applicant's most recent offence. Attached is an **Appendix** providing the relevant time frames that now apply to record suspension applications.

Paper with the dissolution of the previous Parliament and prorogation of the current Parliament, respectively.

Bill S-208 proposes four key changes to *The Criminal Records Act* (CRA) as follows:

1. Records will "expire" rather than just be suspended.

2. The process will be automatic as a function of the passage of time therefore eliminating the lengthy application to the Parole Board of Canada.

3. There would be no application fees thereby eliminating the current prohibitive cost to offenders.

4. The list of exclusions to the availability of a record expiry has been removed.

This new "expired conviction regime" proposes that the rehabilitation period post completion of sentence will be two years for a summary conviction offence and five years for an indictable offence, which is much more in line with the provisions of the *Criminal Records Act* prior to 2010. Once a record expiry occurs, the record shall be removed from the Canadian Police Information Centre (CPIC) with the exception that the name, date of birth and last known address of a person in respect of which a record expiry has occurred may be disclosed to a police force if a fingerprint, identified as that of the person, is found at the scene of a crime. It should be noted that there remains discretion with the Parole Board: when a CPIC search reveals that during the rehabilitation period "the person was convicted of an offence or that, at the end of that period, there were outstanding charges against the person or the person was under investigation for an office, the expiry of that person's record shall not occur until the date that the Board orders its expiry…"

To this, we can add the comments by Senator Pate to the Press:

> "Criminal records perpetuate stigma, poverty and marginalization, and prevent access to what people need for successful community integration, from housing and employment to education and volunteer opportunities. That punishes not only individuals with records but also their families-especially their children-and prevents these individuals from contributing meaningfully to their community" (Policy Options, 19 March 2019 - Kim Pate)

Strengths and Weaknesses of Bill S-208

Its fundamental strength lies in the utility of an expiry of a criminal conviction based upon the passage of time having regard to the nature of the offence. The provisions of the Bill live up to

the sentiments of Senator Pate expressed at Second Reading of Bill S-214 on February 20th, 2020:

> When we passed Bill C-93 last year, we did so knowing that our work on the Criminal Records Act was not over. As then Public Safety Minister Ralph Goodale acknowledged, Bill C-93 "… deals with only one small part of the pardon process that is in need of broader reform … " due to sweeping problems of punitive costs and inaccessibility.

In addition,

> … Bill S-214 sets out a single, less cumbersome system in which criminal convictions expire after a certain number of crime-free years in the community. Research demonstrates that after a few crime-free years, those with historical convictions are no more likely to be subsequently convicted of a crime than a person who has never been convicted of a criminal offence. Beyond this point, there is no use or no justice in continuing to punish them with a criminal record. By allowing records to expire based on the passage of time without subsequent convictions we can reduce costs and eliminate punitive application fees. We can also ensure that the reach and impact of criminal records do not interfere with the ability of people to find places to live, work to support themselves and their families and otherwise contribute to their communities, all of which lead to successful, crime-free community integration.

This is all the more persuasive when Bill S-208 is compared to international regimes that also rely upon the passage of time for an automatic removal of a conviction (see heading International Regimes, below).

Another strength of Senator Pate's Bill is its potential to redress systemic racism operating through the long-term use of criminal records. Research in Canada has for decades documented evidence of bias and discrimination against racialized individuals at various stages of the criminal justice system (Roberts and Doob, 1997; Owusu-Bempah and Wortley, 2013). For example, prior to legalization, while self-report studies showed that Black and White individuals engaged in cannabis possession at similar rates, Black individuals were more likely to report being stopped and searched by the police, and therefore, more likely to be arrested than White individuals on drug possession charges (Hayle, Wortley and Tanner, 2016). Canadian statistics show disproportionate levels of representation of Black individuals within the criminal justice system that are mirrored by comparable criminal justice data collected in the US, England, and New Zealand (Warde, 2012).

The John Howard Society's Centre for Research, Policy, and Program Development has concluded that, based on these numbers, a disproportionate number of racialized individuals

likely have some form of police record which presents significant challenges in obtaining employment (John Howard Society, 2017). Thus, the stigmatization, poverty, and marginalization that Senator Pate argues comes from a criminal record are amplified for racialized individuals coming from groups experiencing heightened social disadvantage because of racial and ethnic prejudice.

Indigenous populations are severely overrepresented in the criminal justice system, making up over 30% of the federally incarcerated population while comprising only 5% of the general population (OCI, 2020). Based on these numbers, we can conclude that they are also more likely to have some form of criminal record. Additionally, research shows that individuals are more likely to plead guilty (and hence, obtain a criminal record) if they are held in custody awaiting trial, and Indigenous persons are more likely to be held in pre-trial custody due to economic barriers they face when seeking bail (Rudin, 2006).

International Regimes

The United Kingdom has in place a "spent conviction scheme" with the enactment of The Rehabilitation of Offenders Act, 1974. Originally all persons found guilty of a crime and receiving a non-custodial sentence or a custodial sentence no longer than thirty months were eligible to benefit from the Act's provisions. The offender must have completed the rehabilitation period prescribed for the sentence without being convicted of an indictable offence during that period. If he/she was successful, the conviction became "spent." Rehabilitation periods ranged from six months to ten years. In essence, the rehabilitated offender did not have to disclose his or her spent conviction if questioned about it. Evidence of the spent conviction cannot be introduced in proceedings before a judicial authority, which includes civil trials and labour arbitrations but does not include criminal trials. Importantly, employers cannot discriminate against rehabilitated offenders on the basis of spent convictions.

However, the Secretary of State publishes an extensive list of professions and proceedings which stand as exceptions to the provisions of the spent regime. Offenders who apply for or engage in one of these excepted professions or proceedings do not have the right to seal the conviction. These exceptions tend to identify occupations that deal closely with young and vulnerable people, are involved with the administration of justice or national security, or where access to drugs is available.

There have been numerous amendments to the legislation since its enactment. The current provisions that exclude sentences from the availability of this rehabilitative scheme include a sentence of life imprisonment; a sentence of more than forty-eight months in custody; and a sentence of preventive detention. Within this regime a custodial sentence of six months or less has a rehabilitation period of twenty-four months after the completion of the sentence; a

custodial sentence of more than six months and up to thirty months has a rehabilitation period of forty-eight months after the completion of the sentence; and a custodial sentence of more than thirty months and up to and including forty-eight months has a rehabilitation period of seven years after the completion of the sentence.

In many other countries and some American states there is a staggered "good behaviour" spent regime linked to the length of the sentence. In New Zealand the eligibility period is seven years post sentence without further convictions although the eligible offences exclude any that attract a custodial sentence. The Australian federal scheme allows for a conviction to be spent if an offender was not sentenced to imprisonment for more than thirty months and it has been ten years from the date of the conviction [not the sentence]. California has now enacted legislation that has expunged over 8,000 cannabis related convictions without the necessity of an application. A Bill is currently working its way through the California state legislature that will likewise expunge the convictions automatically for a great many misdemeanor and lower-level felony records no matter what the nature of the crime. Again, the expungement will be automatic.

Conclusion

Once someone has completed all the terms of their sentence, how do we justify continuing their punishment and stigma with the burden of a criminal record? The CCJA thanks and commends Senator Pate for the enlightened approach to the expiry of criminal records set out in Bill S-208.

However, the CCJA also recognizes that there are some aspects of Bill S-208 that are regarded as controversial. Two examples of these more controversial proposals are:

- the repeal of the ineligibilities for record suspension as set out in subs. 4(2) and Schedule 1 of the CRA, which primarily involve convictions for sexual offences against children,

- the proposed length of the waiting periods, which could result in expired criminal records not being available to courts in sentencing proceedings for subsequent offences occurring from as little as 2 to 4 years for summary convictions, and 6 to 8 years for indictable matters, following the conviction for which the record expiry is proposed.

The concern about this latter proposal could be resolved by proposing longer waiting periods. Alternatively, it could also be resolved by proposing a limited exception to record expiration designed to allow use of the otherwise expired criminal record in any future criminal *sentencing* proceedings for a period of up to 10 years following the conviction.

Notwithstanding these concerns, we note that the Criminal Records Act (CRA) has undergone significant amendments over the course of the last two decades and these amendments have moved the CRA away from its original rehabilitative and reintegrative intent. We believe the original rehabilitative and reintegrative intent should be restored. We also believe the automatic record "expiration" model has much to commend it from an accessibility and efficiency perspective.

Recommendations

1. In order to capitalize on the philosophical basis of Bill S-208, while recognizing the concerns noted above, we submit that the appropriate action would be for the Government (or a Parliamentary Committee) to undertake a comprehensive review of the CRA with the explicit goal of significantly revising the existing legislation. This review must consider the progressive proposals of Bill S-208, as well as the effective elements of some of the schemes used in other western democracies, as noted above in this brief.

2. Pending this review, the CCJA strongly recommends that the Government re-implement the pardon regime in place before the amendments made to the CRA in 2010 and 2012, in order to restore a program that was widely regarded as successful.

Appendix

Rehabilitation Periods now in effect:

Before June 29, 2010:

Eligibility criteria: After the expiration of any sentence including imprisonment, probation and the payment of any fine(s), the waiting period is:

- **5 years** – an offence prosecuted by indictment.
- **3 years** – an offence punishable on summary conviction.

Between June 29, 2010 and March 12, 2012:

Eligibility criteria: After the expiration of any sentence including imprisonment, probation and the payment of any fine(s), the waiting period is:

- **10 years** – Serious personal injury offence (within the meaning of 752 of the Criminal Code), including manslaughter, for which the applicant was sentenced to a prison term of 2 years or more, or an offence referred to in Schedule 1 that was prosecuted by indictment.
- **5 years** – any other offence prosecuted by indictment and an offence referred to in Schedule 1 that is punishable on summary conviction.
- **3 years** – an offence other than the ones mentioned above, that is punishable on summary conviction.

On or after March 13, 2012:

Eligibility criteria: After the expiration of any sentence including imprisonment, probation and the payment of any fine(s), the waiting period is:

- **10 years** – an offence prosecuted by indictment.
- **5 years** – an offence that is punishable on summary conviction.

A person is **ineligible** if they:

- have been convicted of an offence referred to in Schedule 1;
- have been convicted of more than three offences prosecuted by indictment, each with a sentence of two years or more.