

**Standing Senate Committee on Legal and Constitutional Affairs<sup>i</sup>**  
**Bill C-10**  
**Tuesday, February 21, 2012**

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**Senator John D. Wallace** (*Chair*): ... Part 2 of Bill C-10 proposes to amend the Criminal Code to increase or impose new mandatory minimum sentences for certain sexual offences against young people, as well as increasing mandatory penalties.

This bill creates two new offences, namely, those of making sexually explicit material available to a child and of agreeing or arranging to commit a sexual offence against a child. This bill will also expand the list of specific conditions that may be added to prohibition and recognizance orders to include prohibitions concerning contact with a person under the age of 16 and use of the Internet or other digital network, and expand the list of enumerated offences that may give rise to such orders and prohibitions.

**Mr. David Matas**, Legal Team Member, Beyond Borders

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**David Matas, Legal Team Member, Beyond Borders:** Good morning. Thank you very much for having us here today.

I am making this statement on behalf of Beyond Borders. My name is David Matas.

Child sexual abuse is a crime of the present against the future. Attacking the most vulnerable means that they are unable to protect themselves. Attacking the youngest means the consequences last the longest. The sexual abuse of children impacts the victims for the rest of their lives. Adults have to act in the best interests of children, not just their parents but the whole community. That means doing everything we can to prevent and combat child sexual abuse.

As the Convention on the Rights of the Child states, in all actions concerning children taken by legislative bodies, the best interests of the child must be a primary consideration. That tells us that as our first consideration when addressing this bill, a component of which criminalizes child sexual abuse, we must look at that from the perspective of what works best for children.

Both criminalization and sentencing are important components of combat against child sexual abuse. Both have been lacking. Child sexual abuse has historically been a crime to which society has turned a blind eye. Offences did not exist. Those that did exist were not enforced. What little enforcement there was led to derisive sentences. Only recently are we seeing significant efforts to combat this neglect.

Since sentences have been so low as to amount to effective impunity, there has been a need to increase sentences. It is sometimes argued against increased sentencing, which of course has a cost to the taxpayer, that the money is better spent on detection since detection is a more effective deterrence to crime than increased sentencing.

Whatever one can say of that argument generally, it is less persuasive for this sort of offence. A child sexual abuse is a private, undercover crime. Its victims are often not able to speak for themselves until many years after the fact. To do that, to overcome a sense of shame and complicity, they need some encouragement. When they see perpetrators they identify walking the streets shortly after conviction and

sentence, the substantial personal efforts they have made to bring the perpetrators to justice do not seem worthwhile.

In this area, detection and sentences are linked. Significant sentencing increases detection because it encourages victims to come forward. Minimal sentencing has the opposite effect, telling victims that the efforts they would have to make to bring the perpetrators to justice will not result in much happening against the crime.

In general, when sentences increase and the incidence of crime decreases, one can say that the increased sentencing has been successful. In this area, though, one measure of the success of increased sentencing is increased reporting of the crime. The incidences of the crime may well have decreased, but what we will see in the courts, at least initially, is an increase as more victims come forward.

The question then becomes not whether to increase sentences in this area but how. The bill has two approaches, increasing minimums and increasing conditions on probations and recognizance. Increasing minimums, we realize, is controversial constitutionally, criminologically and politically. We must not lose sight, though, as we sort out that controversy, of the overall goal and the needed increased sentencing in this area.

Moreover, minimum sentencing is not the only way to do this. One way is more specific sentencing guidelines. The current Criminal Code sentencing guidelines have something specific about children but nothing specific about the sexual abuse of children. In that is the contrast with the Convention on the Rights of the Child, which does not just stand out against abuse of children generally but is specific and detailed about sexual abuse.

Another way of increasing sentencing is through judicial education. In the 84-page *Judicial Education Course Calendar and Education Resources* put out by the National Judicial Institute, I see nothing specific about addressing sexual abuse of children in a criminal law context.

The third way of addressing sentencing is a sentencing commission, which can do research on the effect that changes in sentences have on the increase of reporting of these sorts of crimes. The United States has a sentencing commission, but Canada does not.

A fourth way of dealing with sentencing is allowing interveners to make victim impact statements on behalf of children. The Criminal Code allows victim impact statements to be considered in sentencing; however, children are ill-placed to make statements. The law does not allow others to make these statements for them.

Beyond Borders has been active as an intervener in a number of court cases, including some I have been involved in, such as the constitutional challenge of pornography laws and the polygamy reference. In both cases, we argued for constitutionality.

Beyond Borders has made several victim impact statements in court with the consent of the accused. However, where the accused does not consent, which is often the case, the court is left without such a statement when addressing sentencing. Finally, the Crown could be more aggressive than it has been in seeking significant sentencing in appealing court judgments where sentences are unreasonably low.

The bill addresses a real problem. In addressing this problem, we must invoke every viable solution.

**The Chair:** Thank you, Mr. Matas.

## **QUESTIONS**

**Senator Fraser:** Good morning, everybody. Thank you all for being here. We heard very interesting presentations. I will turn to Mr. Matas.

It is nice to have you back. It has been a while since you have been before this committee. Welcome back. I will ask you to put on your lawyer's green eyeshade and spectacles.

In the case of the two new offences that are being created in this bill, I am unclear as to whether there exists in the law as it will stand, if this bill passes as written, a close-in-age exemption. If you look at proposed section 171.1, for example, it is about making sexually explicit material available to a child. It says you commit an offence if you facilitate the commission of this offence or an offence under a series of other sections of the Criminal Code.

Most of them, as I read it, have a close-in-age exemption, so indirectly I would assume a close-in-age exemption would apply here, but does it? I do not know. Later on, we get into subsections that talk about age. It is not a defence to say you believed the person was older than the person actually is, for example. They do not talk about the close-in-age exemption.

Clearly, I am worried about a 19-year-old or an 18-year-old who engages in what they call "sexting" with his girlfriend who is underage, but she is his real girlfriend, and young people apparently do this these days. Would those young people be caught here, or would they be exempt, as you read the code?

**Mr. Matas:** I am inclined to read the bill the way you do because it refers to these other sections that do have close-in-age exemptions. Of course, the matter may not come up depending on how the Crown prosecutes because if the Crown is not prosecuting close-in-age cases, the issue will never arise in the courts. However, if the Crown does start prosecuting close-in-age cases, it will have to be dealt with.

If you are at all uncertain about it, deal with it now rather than leaving it to the courts. If the courts deal with it, they may well end up coming to the same conclusion you have, that that was the intent. While it is going through legislation, it is preferable to dispel any doubts through specifics.

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**Mr. Matas:** I was involved in, as I indicated in my opening statement, the issue of the constitutionality of the child pornography laws in the Criminal Code. We argued for the constitutionality. The British Columbia Supreme Court said they were unconstitutional. The Supreme Court of Canada upheld them. One of the reasons it upheld them was the linkage between pornography and child sexual abuse of other forms, the non-pornographic forms of child sexual abuse. I do not think you can divide the two. The Internet pornography is linked to all the non-Internet child sexual abuse.

**Senator Angus:** With your green eyeshade you are reading my mind. That is exactly where I was coming from. I do not see how you can de-link them.

...

**Mr. Matas:** Of course that is a difficult question. How do you put the best interests of children first? There is not one way of doing it. I think it is kind of a principle you have to keep in mind in going about your daily work as parliamentarians. One thing that concerned me about this bill was that it was not only about children. It is an omnibus bill. I appreciate that there are parliamentary reasons for doing that, which have nothing to do with the subjects we are addressing today.

I would like to see, sometime in the future, legislation proposed that deals only and specifically with this problem, so that it is highlighted as a particular problem and given particular focus and attention.

**The Chair:** I believe the senator's second question was directed to you as well, Mr. Matas.

**Senator Jaffer:** I was interested in what you said, that this bill does cover child abuse but does not go as far as the Convention on the Rights of the Child.

**Mr. Matas:** I mentioned that in the context of sentencing guidelines. There are sentencing guidelines set out in the Criminal Code that talk about abuse of children but not about sexual abuse of children. Of course, abuse of children can take non-sexual forms. However, the Convention on the Rights of the Child talks about abuse of children but also specifically about sexual abuse of children.

My view is that there could be much more particularity in the sentencing guidelines generally, and in this area especially, so that the judiciary, in dealing with offences of the sexual abuse of children, would have guidelines that direct them to that issue.

**Senator Frum:** Mr. Matas, I want to ask you about a well-known case in Canada. The sentence just came down for one defendant last week, and this is the case of the rave in British Columbia where there was a gang rape and then there was also videotaping and photography. The photography and videotape ended up on the Internet. The judgment for the young person who took the videotape was one year probation and a 1,500-word essay.

I wanted to ask you what you thought about this judgment and whether, if Bill C-10 were in place, the judge would have been obliged to sentence differently.

**Mr. Matas:** I would say the case is an example of a problem with sentencing. It is very difficult to go into a particular case, because whatever facts you marshal, there is always someone on the other side to marshal some other facts you have not mentioned.

Within our own organization we were dismayed by that sentence. One of the encouragements I got in coming here to make a submission was to say something about that case as an example. I was reluctant to say this is an example, because you then just get into the facts of case. I would say it is easy enough to pull up, whether it is this case or another, lots of examples where sentencing is inappropriate.

Would this bill have an impact? I hope so. It is impossible for me to say what will happen with the issue of minimum sentencing, because it is already under constitutional challenge, and who knows what will happen with that. The bill sends a message that these crimes have to be treated more seriously. Regardless of the constitutionality of minimum sentencing in individual offences, in individual cases, that message, I believe, will get across to the legal community and judiciary.

The general notion that there is under-sentencing and that there needs to be higher sentencing in this area is a positive message that comes out of this bill.

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<sup>i</sup> Excerpt : [http://www.parl.gc.ca/Content/SEN/Committee/411/lcj/12ev-49344-e.htm?Language=E&Parl=41&Ses=1&comm\\_id=11](http://www.parl.gc.ca/Content/SEN/Committee/411/lcj/12ev-49344-e.htm?Language=E&Parl=41&Ses=1&comm_id=11)