

**An Easy Reference Guide to Bill C-2
Amendments to the Criminal Code
and Canada Evidence Act**

**An Act for the Protection of Children
and Other Vulnerable Witnesses**

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**BC Association of Specialized Victim
Assistance and Counselling Programs**

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REFERRALS FOR COURT SUPPORT

Those who use this guide should be aware that victim service programs are trained in supporting survivors and witnesses in preparing for court. For violence in relationship and sexual assault or child abuse cases, survivors should be referred to the closest Community-Based Victim Service Program, if one exists in your area. These programs have specialized training in working with survivors of sex crimes and violence in relationships (power-based crime). For other crimes, the referral should be made to the nearest Police-Based Victim Service Program.

For a complete listing of Victim Service Programs in B.C., call:

Victim Link: 1-800-563-0808

Or go online to the Ministry of Public Safety and Solicitor General:

www.pssg.gov.bc.ca/victim_services/index.htm

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OVERVIEW

The mandate of the criminal justice system can be described as one that seeks to:

- Protect the public by holding persons responsible for violating the law, and,
- Ensure an accused person is treated fairly and according to principles of due process.

These two principles are sometimes in conflict, and victims of crime often feel left out of the system which focuses on the accused's rights.

In the recent past, both the Supreme Court of Canada and Parliament have emphasized the importance of integrating the rights of victims into the criminal justice process. Consistent with this general trend, in 2005 and 2006 Parliament passed Bill C-2 amending the *Criminal Code of Canada (Code)* and amending the *Canada Evidence Act (C.E.A.)*. With this legislation, the law makers sought to address specific victims' concerns, namely children and youth victims/witnesses who experience sexual exploitation, abuse and neglect and other vulnerable witnesses, including victims of criminal harassment and other crimes, who are called upon to testify.

The BC Association of Specialized Victim Assistance and Counselling Programs applauds the Canadian law makers in their efforts in developing this legislation. We encourage public acknowledgment of the vulnerability of those who are coping with sexual and relationship violence and the strengthening of access to aids to facilitate testimony.

We also applaud the formal recognition of the barriers victims experience in their attempt to give evidence freely in court. This is reflected in the increased powers for judges to order an accused NOT to cross-examine a victim and to appoint counsel to do so. (See "unrepresented accused, page 8). The knowledge of these changes may well encourage women to report in cases where they may not have done so in the past. There is still tremendous room for improvement but the legislation helps pave the way to offering the criminal justice system as a viable response to violence, harassment and intimidation of vulnerable persons.

The strengthening of laws against child pornography and the implementation of minimum sentences for sexual offences against children are also clear statements by Parliament and positive steps towards holding offenders who commit sexual crimes against children and youth seriously accountable.

We hope that the implementation of this legislation, along with the other

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provisions of Bill C-2 outlined in the following guide, will help facilitate survivors to

step forward and seek assistance from the criminal justice system. We know that crimes such as child sexual abuse, sexual assault and violence in relationships incur immeasurable costs to our society and are dramatically under-reported. Any steps we take to facilitate participation in the criminal justice system send a message that our society will not tolerate these criminal behaviours. Together we are working towards ending violence.

Implementation

This legislation is another step toward improving justice system responses to victims of crime. However, legislation is not effective if it is not implemented as intended.

Communities are encouraged to develop local protocols that include practices and policies to ensure aids to testimony are available and used as part of regular courthouse practice.

If there are systemic issues that interfere with implementation, these should be referred to the Inter-Ministerial Working Group on the Implementation of Bill C-2.

Contact information is as follows:

Criminal Justice Branch: Lee Porteous 250-387-3840

Victim Services Division: Taryn Walsh 604-660-5199

1. YOUTHFUL WITNESS'S STATUS IN CRIMINAL COURT:

Under the *C.E.A.*, children under 14 are now presumed to be competent to testify and are permitted to testify upon promising to tell the truth, without an inquiry unless counsel for the defense satisfies the court that there are grounds to challenge the child's competency. Any inquiry will focus on the child's ability to understand and respond to questions. This eliminates the previous mandatory competency and oath inquiry and prohibits questions related to "truth" and "promise".

2. FACILITATING TESTIMONY:

A major objective of Bill C-2 is to provide measures to facilitate young persons under 18 or other vulnerable witnesses testifying in court. There is no set definition for "vulnerable person" but the legislation provides guidelines where witnesses for one reason or another should be considered as requiring help for effective testimony.

Before this legislation, the onus was on Crown Counsel and/or the witness to demonstrate the need for aids to testimony. Now s. 486 of the *Code* articulates a presumption in favour of witnesses under 18 having the aids made available to them upon application. The onus shifts to the defense to demonstrate that the aids should not be used because they would interfere with the administration of justice. The presumption of vulnerability also exists for persons with mental or physical disabilities and victims of criminal harassment for certain accommodations (see below for details). The goal is to make it easier and less traumatic for children and other vulnerable witnesses to testify in court.

2.1 Closed circuit television and other devices:

The following examples of "accommodations" are provided for in the Bill: (These accommodations are found in the *Code* Sec. 486.2 (1), (2) and (3).

The Witness may testify:

- Behind a screen
- From a different room (closed circuit TV.)
- From behind an other device that protects the witness from seeing the accused

The criteria for determining to whom these aids are available is outlined in the *Code* s. 486.2 (1):

"...a witness who is under the age of eighteen years or a witness who is able to communicate evidence but may have difficulty doing

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so by reason of a mental or physical disability...”

and Code s. 486.2(2)

If a witness is 18 or over the aid may be permitted if “... the order is necessary to obtain a full and candid account from the witness.”

It is important to note that for witnesses under 18, or those with a disability (as described above in s.486.2(1)) the law states that a judge “**shall**” on application order that the witness testify outside the courtroom or behind a screen or other device. However, with applications for witnesses over 18 and without a disability that affects their ability to testify, the judge “**may**” order an accommodation if it is needed. The court will look to the age of the witness, whether there is a disability, the nature of the offence, the nature of the relationship with the accused, and other relevant circumstances in deciding whether the aid is necessary.

In cases where accommodations are required, it is helpful if the victim service worker or counsellor can support the witness in communicating the need to Crown Counsel. Crown can then prepare an application for an order for accommodations. See “Procedure” page 8.

<p style="text-align: center;">Judge <u>shall</u> order</p> <p style="text-align: center;">It is presumed that the accommodation is necessary to obtain a full and candid account from the witness</p>	<p style="text-align: center;">Judge <u>may</u> order</p> <p style="text-align: center;">The Crown must show that the accommodation is necessary to obtain a full and candid account from the witness</p>
<p>Witnesses under 18, any offence</p>	<p>Witnesses 18 and over, any offence</p>
<p>Witnesses with mental or physical disabilities that affect the witness’ ability to testify.</p>	<p>Cases where there is a high risk to the witness or a high level of fear exists.</p>

2.2 Support Person Present – Code s. 486.1

Under Section 486.1 (1) witnesses may be able to testify with a support person of their own choice. Previously this option was only available to witnesses under 14 years of age where the specific charges were being tried and where the court felt it was necessary for the proper administration of justice.

It’s important to note that for witnesses under 18, or with a disability, the law

states that a judge “**shall**” on application order that they have a support person present and close to them. However, with applications for other witnesses the judge “**may**” order that they have a support person present and close by if it is required to receive a full and candid account. Again, it is important that workers discuss this with Crown Counsel when supporting clients.

2.3 Previously Recorded Statement - Code s. 715.1 (1) (2)

A victim or witness under the age of 18 or who has a physical or mental disability which affects their ability to communicate, may be able to use a previously recorded video statement as part of their evidence when they testify. This has been the case since 1988 but was specific to certain crimes. It is now available in any criminal court proceedings.

This does not mean the young person would not have to testify. They would still have to take the stand (with a screen, etc. if requested) and “adopt” their videotaped statement. They may also be cross-examined upon their videotaped statement. However it may prevent them from having to tell their entire story once again on the witness stand in examination in chief.

2.4 Procedure for Applying for Accommodations

The Crown prosecutor needs to apply to the judge for an order to allow the witness to use aids to testimony. Workers and counsellors can assist by communicating with Crown when they see the need for the use of aids and by providing information on the witness’s disability or level of fear. Witnesses can also apply to the judge on their own behalf.

In some cases, the presumption is in favour of the witness being able to use the aid. This means that the onus is on the defense to prove that the use of aids to testimony would “interfere with the proper administration of justice” rather than the Crown needing to prove that they are necessary.

Crown will still require evidence of:

- The age of the witness if under 18
- The nature of the disability
- That the disability affects the witness’ ability to give evidence

In other cases, as already stated, aids to testimony are made available if the judge is:

“...Of the opinion that the order is necessary to obtain a full and candid account from the witness of the acts complained of.”

In these cases, Crown will be required to gather and introduce evidence that shows:

- The age of the witness
- The relationship of the witness to the accused
- Any disability of the witness
- The testimony will not be forthcoming from the witness unless the accommodation is provided.

2.5 Unrepresented Accused *Code s. 486.2(1):*

In cases where the accused does not have a lawyer, the judge can order that the accused not cross examine the witness and appoint a lawyer to do so.

This applies in the following cases:

- Children under eighteen
- Witnesses with mental or physical disabilities
- Victims of criminal harassment. This reform reflects the serious nature of criminal harassment, including its impact on the safety and well being of victims and prevents the victim from having to endure further harassment by a self-represented accused.
- Other cases upon application by the Crown or witness, where in the opinion of the judge, it is necessary to obtain a full and candid account. In making a determination the judge would take into account the nature of the offence, the nature of any relationship between the witness and the accused, and any other circumstances the judge considers relevant.

This is another situation where the counsellor or victim service worker could assist in communicating the witness's needs to Crown Counsel.

3. BREACHES

Disobeying Order of the Court: *Code s. 127*

The offence of disobeying a court order is now a hybrid or dual-procedure offence¹. This change was intended to simplify the enforcement of conditions in

¹ For some offence types, the *Code* permits Crown Counsel to decide whether the case will proceed summarily or by indictment. The summary procedure means that the case will go to trial in provincial court and that the maximum sentence that can be imposed would be less than if the indictable procedure was chosen.

If the Crown chooses to proceed by indictment, the accused has the option of having the trial in provincial

civil orders (for example; restraining orders) designed to protect victims of domestic violence.

This section of the *Code* only applies if no other method of prosecution is available. In BC, under the *Family Relations Act (FRA)* an offence already exists regarding breaches of orders. This means that section 127 would not be used.

In BC, the orders most likely to be affected would be orders made through the Supreme Court of British Columbia, not those made in Provincial Court.

4. PRINCIPLES OF SENTENCING: *Code* Sec. 718

These principles steer judges in determining the sentences. Parliament amended these principles as part of the Bill C-2 reforms.

The *Code* states:

“The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

- a) To denounce unlawful conduct;
- b) To deter the offender and other persons from committing offences;
- c) To separate the offenders from society, where necessary;
- d) To assist in rehabilitating offenders;
- e) To provide reparations for harm done to victims or to the community; and
- f) To promote a sense of responsibility in offenders, and acknowledgment of harm done to victims and to the community.”

Other factors include:

- Sentences must be proportionate to the gravity of the offence and the degree of responsibility of the offender.
- Aggravating and mitigating circumstances must be considered when increasing or reducing sentences and, specifically, the following are deemed aggravating factors:
 - a. evidence the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin and/or physical disability, sexual orientation, or other similar factors

court or of having the trial in Supreme Court, after a preliminary hearing is held in provincial court.

- b. evidence the offender abused a child²; or
- c. evidence the offender abused a position of trust in relation to the victim

- Sentences should be similar to sentences imposed on similar offenders, for similar offences committed in similar circumstances.
- The total of consecutive sentences should not be unduly harsh.
- An offender should not be deprived of liberty if less restrictive measures are appropriate. (This does not apply where minimum sentences have been imposed).
- All available sanctions other than imprisonment should be considered, with particular attention to the circumstances of Aboriginal offenders.

Under the new legislation the predominant factors that are to be taken into account when sentencing crimes involving the abuse of children are deterrence and denunciation of such conduct. In addition, as stated above, the abuse of any child is considered an aggravating factor upon determining sentence.

5. MINIMUM AND MAXIMUM SENTENCES:

Minimum sentences take away the discretion of the sentencing judge to impose conditional sentences or “house arrest” measures that would allow the offender to serve time in the community. This ensures that a custodial sentence (jail time) is given. Bill C-2 amends the *Code* so that most of the sexual offenses against children and youth have a minimum penalty which was not the case before November 1, 2005. While some of the sentences may seem low they effect a major change in the way that sentences are imposed on sexual offences.

In the past, house arrest or probation orders have been imposed on offenders convicted of charges such as sexual interference, invitation to touching, sexual exploitation and child pornography. With the introduction of Bill C-2, it will now be mandatory for offenders to serve at least part of their sentence in jail. This will not prohibit the addition of probation time, or conditions attached to release, but will ensure that offenders are taken out of the public realm and given the message that this charge is taken seriously. In addition, child specific prostitution offences, including procuring related offences involving children, are now subject to a mandatory minimum sentence of imprisonment.

Maximum sentences have been increased for child pornography and other child-related offences including sexual offences against children, failure to provide the necessities of life, and abandonment of a child.

In addition, of particular note is the increase of minimum penalties for certain summary conviction offences such as sexual interference, invitation to touch and

² Before Bill C-2 this was limited to the offender’s child

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sexual exploitation. This should encourage Crown Counsel to proceed summarily knowing a higher penalty is now possible. Proceeding summarily avoids Supreme Court with its possibility of a preliminary hearing as well as a trial, which would mean the child or youth witness would have to testify twice.

Sentences have been amended in the following sections of the Code:

Sexual Interference *Code s. 151* (Prior to Bill C-2 there was no minimum sentence for this crime.)

Every person who, for a sexual purpose, touches, directly or indirectly, with a part of the body or with an object, any part of the body of a person under the age of 14 years...

Summary:³ Minimum fourteen days
Maximum eighteen months (prior to Bill C-2 max was 6 months)

Indictable: Minimum forty-five days
Maximum ten years

Invitation to Touching *Code s. 152* (Prior to Bill C-2 there was no minimum sentence for this crime.)

Every person who, for a sexual purpose, invites, counsels or incites a person under the age of fourteen years to touch, directly or indirectly with a part of the body or with an object, the body of any person who so invites, counsels or incites and the body of the person under the age of fourteen years,

Summary: Minimum fourteen days.
Maximum eighteen months (prior to Bill C-2 max was 6 months)

Indictable: Minimum forty-five days
Maximum ten years

Sexual Exploitation: *Code s. 153(1)* (Prior to Bill C-2 there was no minimum sentence for this crime.)

Summary: Minimum fourteen days.
Maximum eighteen months (prior to Bill C-2 max was 6 months)

Indictable: Minimum forty-five days
Maximum ten years

Corrupting Morals: *Code s. 163.1*

This section covers child pornography. (See section on "Pornography"). If a person is convicted of any of the offenses listed under this section the fact that the person committed the offence with the intent to make a profit will now be considered by the judge as an aggravating factor when determining the sentence. This means that it will be counted against the accused when

³ See footnote 1.

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weighting the decision of how long of a sentence will be declared.
The following sections under this heading have minimum sentences imposed:

**Making, Printing, Publishing Or Possessing For The Purpose Of
Publication Any Child Pornography:** *Code s. 163.1 (2)*

Summary: Minimum ninety days.
Maximum eighteen months
Indictable: Minimum one year
Maximum ten years

Possession For The Purposes Of Distribution Of Child Pornography: *Code
s. 163.1 (3)*

The word “advertise” has been added to this section of the Criminal Code.

Summary: Minimum ninety days
Maximum eighteen months
Indictable: Minimum one year
Maximum ten years

Possession Of Child Pornography: *Code s. 163.1 (4)*

Summary: Minimum fourteen days
Maximum eighteen months
Indictable: Minimum forty-five days
Maximum ten years

Accessing Child Pornography: *Code s. 163.1 (4.1)*

Summary: Minimum fourteen days
Maximum eighteen months
Indictable: Minimum forty-five days
Maximum five years

Parent or Guardian Procuring Sexual Activity: *Code s. 170*

If the child is under 14 years old:
This is an indictable offence, which now carries a maximum sentence of five years and a minimum of six months.

If the child is over 14 years old and under 18:
This is an indictable offence, which now carries a maximum sentence of two years and a minimum of 45 days.

Householder Permitting Sexual Activity: *Code s. 171*

Every owner, occupier or manager of a premises, or any other person who has

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control of premises or assists in the management or control of premises, who knowingly permits a person under the age of 18 years to resort to or to be in or on the premises for the purpose of engaging in any sexual activity prohibited by this Act:

If the child is under 14 years old:

This is an indictable offence and carries a maximum sentence of five years and minimum of six months

If the child is over 14 and under 18 years old:

This is an indictable offence and carries a maximum sentence of two years and minimum of forty-five days.

Procuring: *Code s. 212*

The imposition of a minimum sentence of two years sends a very clear message about this crime.

Living on the Avails: *Code s. 212 (2)*

This section states that “every person who lives wholly or in part on the avails of prostitution of another person who is under the age of 18 years is guilty of an indictable offence...”

The maximum sentence for this is fourteen years. The minimum sentence is now two years (emphasis by author). Prior to Bill C-2 there was no minimum sentence for this.

Those Who Purchase Sexual Services of a Minor: *Code s. 212 (4)*

“Every person who, in any place, obtains for consideration, or communicates with anyone for the purpose of consideration, the sexual services of a person who is under the age of eighteen years...”

This encompasses anyone who pays for sexual services, or attempts to pay for sexual services, from a person under 18 years of age.

This is an indictable offence with a maximum sentence of five years and now carries a minimum sentence of six months. Prior to Bill C-2 there was no minimum sentence for this.

6. PORNOGRAPHY:

Corrupting Morals: *Code s. 163.1(1)*

This section covers child pornography and now includes two new definitions of child pornography: Other changes are outlined in the “minimum sentences” section of this guide.

- 1) The addition of audio recording: As well as written material that counsels or advocates sexual activity with a person under the age of eighteen, audio recordings have been added.
- 2) Addition of the “description” of sexual activity. Written material and audio recordings that are created for the purpose of describing, presenting or representing, for a sexual purpose, sexual activity with a person under the age of eighteen are now included under the definition of child pornography. Prior to this, the legislation only provided for written material, or visual representation that advocated or counseled sexual activity with a person under 18.

7. PUBLICATION BANS:

It is standard practice in sexual assault or sexual abuse cases for Crown Counsel to apply for a publication ban under section 486 (4.1) of the *Criminal Code*. This is to prevent the publication of the name of, or any identifying information, regarding, the victim or witness in the case. Under the new legislation the definition of publication has been expanded to include publish in any document or transmit in any way. (Emphasis by author). This is to cover publication on the Internet or other technology that may be developed in the future.

Another critical change is that a ban on publication can now be ordered in cases of pornography, voyeurism or luring a child to protect the identity of the person targeted.

The *Code* states that where the offence falls under the sections that a Ban on Publication applies, the judge may;

- a) “at the first reasonable opportunity, inform any witness under the age of eighteen years and the complainant of the right to make an application...” for the order.
- b) “...on application made by the complainant, the prosecutor or any such witness, make the order.”

This is to ensure that the witness is aware of the right to have a ban imposed.

8. NEW OFFENCES AND DEFINITIONS:

8.1 Exploitative Relationship:

There is a new definition of exploitative relationship under *Code* s. 153(1.2) (Sexual Exploitation), which states:

“A judge may infer that a person is in a relationship with a young person that is exploitative of the young person from the nature and circumstances of the relationship, including

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- a) the age of the young person
- b) the age difference between the person and the young person
- c) the evolution of the relationship⁴; and
- d) the degree of control or influence by the person over the young person.

If the judge determines that the relationship is exploitative, then there is no consent in law.

8.2 Voyeurism: Code s.162(1)

This is a new section under the *Code*. The new wording includes surreptitiously observing or making a visual recording of a person who would reasonably expect privacy in the situation. This has been developed to cover the use of hidden cameras or camera phones in places such as washrooms and change rooms.

The criteria for this section of the *Code* include:

- the person is in a place in which a person can reasonably be expected to be nude, to expose his or her genitals or breasts, or to be engaged in explicit sexual activity;
- the person is nude, is exposing his or her genital organs or anal region or her breasts, or is engaged in explicit sexual activity, and the observation or recording is done for the purpose of observing or recording a person in such a state or engaged in such an activity: or
- the observation is done for a sexual purpose.

In addition, *Code* s.162 (4) states that it is an offence: whereby anyone who, knowing that a recording was obtained by the commission of an offence, prints, copies, publishes, distributes, circulates, sells, advertises or makes available the recording. This includes anyone having the recording in their possession for the purpose of printing, publishing, etc.

The Act goes on to say, in section 162 (6), that no one shall be convicted under this section if the acts committed serve the public good and do not extend beyond what serves the public good.

⁴ The wording "evolution of the relationship" has been developed to include situations such as secretive Internet communication.

9. DATES PROCLAIMED / EFFECTIVE

The proclamation took place in two parts. The first part became law on November 1st, 2005. These are the amendments creating new offences and sentences and can only be applied to crimes that occur after that date. An accused cannot be tried for a crime, or given a sentence that did not exist at the time the crime was committed.

The second part became law on January 2nd, 2006. These amendments change a child witness' status in court and expand the use of aids to facilitate testimony. These are available in any matter in court proceedings after January 2nd, 2006 no matter when the crime occurred.

Change	Date proclaimed	Retroactive?
• Aids for Testifying (screens.)	Jan. 2/06	Yes
• Breaches (<i>Code</i> s. 127)	Nov. 1/05	No
• New offenses: "exploitative relationship"	Nov. 1/05	No
• Minimum and Maximum Sentences	Nov. 1/05	No
• Pornography	Nov. 1/05	No
• Pre-recorded video statements	Jan. 2/06	Yes
• Sentencing Amendments	Nov. 1/05	No
• Voyeurism	Nov. 1/05	No
• Youthful witness' status in criminal court	Jan. 2/06	Yes