Bill C-5
International Transfer of Offenders Act amendments

NATIONAL CRIMINAL JUSTICE SECTION
CANADIAN BAR ASSOCIATION

November 2010

500-865 Carling Avenue, Ottawa, ON, Canada K1S 5S8
tel/tél : 613.237.2925 | **toll free/sans frais** : 1.800.267.8860 | **fax/téléc :** 613.237.0185 | **info@cba.org** | **www.cba.org**

PREFACE

The Canadian Bar Association is a national association representing 37,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the National Criminal Justice Section of the Canadian Bar Association, with assistance from the Legislation and Law Reform Directorate at the National Office. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement of the National Criminal Justice Section of the Canadian Bar Association.

TABLE OF CONTENTS

Bill C-5
International Transfer of Offenders Act amendments

Bill C-5
International Transfer of Offenders Act amendments

I. INTRODUCTION

The Canadian Bar Association National Criminal Justice Section (CBA Section) appreciates the opportunity to comment on Bill C-5, *International Transfer of Offenders Act* (ITOA).

The ITOA is domestic legislation that implements international treaties between Canada and other countries for the purpose of repatriating offenders to or from Canada, to enable their rehabilitation and reintegration into their home community. For the same purpose, Canada has entered into bilateral treaties with countries such as the United States, as well as a multilateral convention through the Council of Europe, and various administrative arrangements (for example, with Japan) under authority of the current ITOA.[1]

Under the Strasbourg Treaty (*Convention of the Transfer of Sentenced Persons*),[2] the Managua Treaty (*Inter-American Convention on Serving Criminal Sentences Abroad*),[3] and the current ITOA, offenders transferred to Canada continue to serve their sentences according to Canadian law. They are subject to Canadian prison and parole restrictions, including suspension and revocation of conditional release. They are subject to corrective and rehabilitative programs as required by Canadian prison or parole authorities, under the authority of Public Safety Canada through the administration of the *Corrections and Conditional Release Act* (CCRA).

While Bill C-5 promises to "enhance public safety", we believe that the Bill does not reflect that solid foundation. Instead, it would generate uncertainty in dealing with transfers, reduce Canadian control over offenders, and so ultimately reduce public safety. Further, the existing

---

1 *International Transfer of Offenders Act*, S.C. 2004, C-21, s. 13 - 29.

2 See Articles VIII – XV.

3 See Article VII.

ITOA has proven effective, and we are not aware of any public safety problem as a result of the current law. The CBC recently reported Public Safety Canada's own statements on the relatively low rate of recidivism by offenders transferred back to Canada. Of the "hundreds of offenders transferred back who made it through parole without any problems, less than one per cent re-offended within the next two years".[4]

Under Bill C-5, offenders could more readily be refused transfer back, so would more often instead return to Canada by way of deportation after completing their sentence in a foreign prison. They would then return without the consequences, assessments, restrictions and follow-up involved when an offender is formally transferred to Canada during the course of a sentence.

The CCRA governs treatment of all federal prisoners in Canada.[5] Decades of research and statistics show that the public is best protected through the reformation and rehabilitation of the prisoner.[6] Under the CCRA, "accessibility to the person's home community and family, a compatible cultural environment and a compatible linguistic environment" are factors that must be taken into account in determining the place of confinement. This is inconsistent with the direction now proposed by Bill C-5.

Finally, the Bill relies excessively on the exercise of discretion by the Public Safety Minister, in a manner inconsistent with Canada's international obligations to enable and facilitate transfers (which remains the purpose of the ITOA under Bill C-5), and with the Rule of Law.

All Treaties, Conventions and arrangements currently in place are premised on the knowledge that it is in the "best interests of the offender" to enable or facilitate such transfers where the incarcerating or sending country agrees to the transfer and the offender applies for it. The underlying message in the Bill is that the offender's interests in returning to Canada are contrary to the Canadian public's interest. That is, in our view, simply incorrect. We believe that the offender's interest and the public interest are congruent.

---

4 "Recidivism rate low for repatriated offenders". See, http://www.cbc.ca/canada/story/2010/10/28/prison-trasfer-recidivism-figure-briefing-note

5 CCRA section 28.

6 M. Jackson and G. Stewart, *A Flawed Compass* (Vancouver: M. Jackson, 2009) at, for e.g., 49 or 199.

II. ACHIEVING PUBLIC SAFETY

Bill C-5 lacks the substance to support its short title of "Keeping Canadians Safe". Before explaining the basis for this conclusion in more detail, we reiterate the CBA Section's ongoing objections to the use of short titles for proposed legislation to apparently "market" legislative proposals to Canadians. We suggest instead that short titles, when used, simply describe, in a neutral way, the contents of the proposal.

Parliament has mandated sentencing goals for consideration in section 718 of the *Criminal Code*, and elsewhere in the Code. Section 718 states that "the fundamental purpose of sentencing is to contribute...to... a just, peaceful and safe society...". Section 718(d) says rehabilitating offenders is one of the objectives of a safe society.

Canadian courts, at all levels, have also recognized that rehabilitation of offenders is the best guarantee of public safety. If rehabilitated while in custody, an offender is less inclined to commit criminal acts once returned to society[7], and can instead contribute to the community as a productive citizen. The same holds true of people who have committed crimes abroad. Public safety is best served by doing whatever possible so offenders will ultimately contribute to the well being of our society, not present an ongoing threat to it.

Neither in the news release accompanying the Bill, nor in remarks made in the House of Commons[8] has any explanation been offered as to how Bill C-5 would enhance public safety. Nor have any comments been offered as to how existing legislation has failed to meet that objective, or precisely what problems are to be addressed by the Bill.

According to the news release, the Bill will make "the protection of society the guiding principle in decisions affecting the correctional system".[9] Section 3 of the Bill would add the words "to enhance public safety" to the original purpose of the *Act*, which is "to contribute to the administration of justice and the rehabilitation of offenders and their reintegration into the

---

7 *Ibid.*

8 40:2 *Hansard* - 118 (2009/11/26) 1445.

9 Public Safety Canada *News Releases*, 2009-11-26. Note that this is already in section 4(a) of the CCRA regarding Correctional Service of Canada and section 101(a) of the CCRA regarding the National Parole Board.

community by enabling offenders to serve their sentences in the country of which they are citizens or nationals".

However, the current legislation works well and does enhance public safety. It facilitates the return of offenders to Canadian correctional institutions, and by doing so, ensures that they will be subject to Canada's system of corrections and conditional release. That system is known to work well both nationally and internationally. It is built on sound principles and experience as to what best advances Canadian sentencing purposes and principles, including rehabilitation and reintegration of offenders.

A person returning to Canada only after a foreign sentence has been completed would not be subject to any state control in Canada, and would arrive without any criminal record for offences abroad showing on the Canadian Police Information Centre (CPIC) data base. Canadian authorities are unlikely to have much, if any, information about programs aimed at reformation, rehabilitation or planned reintegration that the person had access to while in custody. Many foreign countries, including the US, consider "aliens" ineligible for any programs available to citizens of that country. As such, they may be held in the most restrictive circumstances, ineligible to, for example, participate in drug treatment programs.[10] The unrehabilitated offender will inevitably become Canada's problem.

On the other hand, if the offender is returned to Canada to serve a sentence,[11] the transfer will show up on CPIC. The offender will be processed through a Correctional Service Canada (CSC) Reception Centre and be subject to the same ongoing assessments as any other person sentenced to a federal prison in Canada.[12] Once the transferred sentence is converted to a Canadian sentence, the person will be classified according to Canadian criteria (as maximum, medium or minimum security risks) and have a correctional plan to address reformation and rehabilitation goals. Most importantly, that person's eventual release and reintegration into Canadian society will be monitored through a form of conditional release, in a setting where

---

10 In the US, a Canadian is considered an "alien" and ineligible for minimum camp or any significant programming. The US also abandoned "rehabilitation" as an aim of imprisonment through passage of the *Sentencing Reform Act* (1984).

11 Dual criminality is a condition precedent, just as in the case of extradition.

12 If the sentence is less than 2 years, the provincial/territorial reception and assessment process will instead take place.

family, social ties and community supports are more likely to exist. In sum, the offender becomes a "known quantity" in Canada when transferred back to serve a sentence.

Further, should the offender re-offend and receive another federal sentence, the system will recognize that person as a second time federal offender and therefore ineligible for Accelerated Parole (APR). In contrast, an offender who returns to Canada after the sentence was served elsewhere would appear as a first time offender in Canada and so be eligible for APR.[13]

Where an offender is transferred back to Canada to serve a sentence, authorities will also know whether that person requires continued intervention or monitoring by the state after sentence expiry.[14] Alternatively, an offender may require transfer to provincial mental health authorities.[15] If released back into the community, correctional authorities can also alert relevant police forces of the person's whereabouts and allow for any required monitoring.

All of these safeguards would be lacking for offenders refused transfer during the course of a sentence because of Bill C-5. Those offenders would arrive back in Canada following sentence expiry, without legal restriction of any kind. In fact, the proposed approach is quite likely to diminish public safety, rather than enhance it.

III. THE RIGHT OF RETURN

Under section 6 of the *Canadian Charter of Rights and Freedoms*, every citizen has a constitutional right to enter, remain in and leave Canada.[16] In *Cotroni,*[17] the Supreme Court of Canada (SCC) held that extradition engages section 6 of the *Charter* as it involves the right "to remain in Canada", but that the *Extradition Act* constitutes a "reasonable limit" on that right under section 1 of the *Charter*. Investigating, prosecuting and suppressing crimes, and maintaining peace and public order are all important goals of organized societies, and a country's commitment to those goals cannot realistically be confined to its national boundaries. Consequently the SCC held that the first branch of the *Oakes* test, namely that the legislation pertains to "a pressing and substantial object", was met.

---

13 Note that this will depend on the particular offence and the offender's history of violence.

14 This can be accomplished using a peace bond under sections 810, 810.01, 810.1, 810.2 of the *Criminal Code*.

15 See, for example, Part II of Ontario's *Mental Health Act*, R.S.O. 1990, c- M 7.

16 Section 6(1) of the *Canadian Charter of Rights and Freedoms*.

17 *United States of America v. Cotroni; United States of America v. El Zein* [1989] 1 SCR 1469.

The weight of Canadian judicial authority appears to hold that while the "right to enter" Canada under section 6 of the *Charter* is engaged in transfer circumstances, that right is suspended because of the other country's sentence until that country allows the offender to return to Canada. Recent cases have held that the ITOA provides a "reasonable limit" on that right under section 1 of the *Charter*. However, a section 1 analysis has not been fully explored to date, especially in relation to the factors the Minister should consider in making transfer decisions. As such, it is unclear whether the "right to enter" under section 6 of the *Charter* is engaged when a Canadian citizen is under the legal authority of another country, particularly if the incarcerating country has agreed that the offender can return to Canada to serve a sentence.[18] Also undetermined is whether legislation purporting to limit a citizen's right of return is a "reasonable limit" under section 1 of the *Charter*. However, section 6 does guarantee that a citizen cannot be stopped from returning to Canada after serving a foreign sentence, or if deported back at an earlier time by the foreign country.[19]

Certainly, section 6 offers important context. The right of return plays a critical part in rehabilitation and reintegration for Canadians imprisoned abroad, as without transfer back under the ITOA, they will likely instead be deported to Canada after their sentences are served, without any record or consequences.[20] The SCC has taken a broad, purposive approach[21] in interpreting *Charter* rights. Following that approach, we suggest that legislation should continue to enable and facilitate citizens' return to Canada, and avoid any arbitrary state action that would impede that return. Transfer back and conversion of the conviction and sentence to Canadian requirements, including a criminal record in Canada, better serves the Canadian public interest.

IV. MINISTERIAL DISCRETION

Bill C-5 would give the Minister of Public Safety broad and unconstrained power to deny Canadian offenders return to their home country to serve their sentences. Mandatory

---

18 Consider the apparent conflict in the Federal Court Trial Division between the *Van Vlyman* case on one hand (section 6 is engaged but section 1 need not be considered, on the facts of that case), and *Kozarov/ Da Vito* and *Getkate* on the other (section 6 is not engaged, but if it is, the ITOA is a section 1 reasonable limit), and then the *Curtis* and *Dudas* cases (it is engaged, but a section 1 reasonable limit applies).

19 See *Cotroni*, *supra* note 17.

20 While it is the prerogative of each country to determine whether a person will be deported to their home state after serving a sentence, it is difficult to imagine another country allowing a foreign national, particularly a convicted criminal, to remain in that country.

21 *Sauvé v. Canada* (Chief Electoral Officer), [2002] 3 S.C.R. 519.

considerations that currently *must* be applied in determining offender transfer requests would be replaced by optional criteria that the Minister *may* consider. The Minister would also be permitted to consider any other factor believed to be relevant.[22] With such open-ended discretion, these critical decisions would be determined according to the opinion of the Minister in each case.[23] It remains to be seen whether Canada's courts will interpret this broad discretion as a "reasonable limit" demonstrably justified under section 1 of the *Charter*.[24]

In our view, Bill C-5 would offer less certainty as to what the Minister would or should consider in each case, and the weight to be assigned to particular factors. It could allow the Minister's decisions to be immunized from scrutiny, and in particular judicial review. The decision of the Federal Court in *Van Vlyman*[25] and more recently *Getkate v. Canada (Minister of Public Safety and Emergency Preparedness)*[26] illustrate that Canadian courts have already recognized the importance of a right of review of Ministerial decisions, especially when based on the exercise of discretion.

While Bill C-5's proposed criteria to guide Ministerial decisions appear to be aimed at ensuring public safety, we believe that practically speaking they will not have that effect. For example, one reason to deny a transfer under Bill C-5 would be if a person "is a danger to a member of his or her family". Because an offender will be able to return to Canada at some point, if only after completing a sentence, any perceived danger to family will be exacerbated if the transfer back is unaccompanied by restrictions. It would be better to have the offender participate in Canadian rehabilitation programs or subject to Canadian preventative measures and conditions of release than to allow the offender to return without supervision.[27] If the offender is in Canada, the family may even have input into these decisions.[28]

---

22 Bill C-5, section 10 amendments.

23 *Ibid*. The CBA has previously objected to this type of open-ended decision making in the context of when Canada chooses to intervene in death penalty cases. See, 2008 letter from CBA President, Bernard Amyot to Justice Minister Nicholson and Public Safety Minister Day (Ottawa: CBA, 2008).

24 Problems in the exercise of discretion have already begun to emerge. The treatment of Brenda Martin, whose prison transfer from Mexico after conviction for fraud was suspended allowing for her return to Canadian custody, is hard to explain in light of the increased number of denials of other Canadians citizens over the past several years. The recent situation has reversed a 30 year trend towards increased and more efficient approvals.

25 *Van Vlymen v. Canada* (Solicitor General) (F.C.), [2005] 1 F.C.R. 617 .

26 [2009] 3 F.C.R. 26, 2008 FC 965.

27 As noted above, it is not realistic to expect other countries to be able to provide information to Canadian authorities of a quality equal to that which Canada itself can obtain through the correctional system. If a person is returned to Canada by the other state, it would be more difficult for Canadian authorities to gather the information required to place the person under a restraining order if the person has not been

Other proposed criteria under section 10 that warrant comment include:

a) whether in the Minister's opinion the offender's return to Canada will constitute a threat to the security of Canada

The Federal Court (Trial Division) in *Getkate*[29] found the Minister's interpretation of a generalized risk to Canadians to be unreasonable, and set aside his decision. The Court held that there must be an actual threat to the security of Canada.

b) whether in the Minister's opinion the offender's return to Canada will endanger public safety, including (i) The safety of any person who is a victim, as defined in subsection 2(1) of the *Corrections and Conditional Release Act*, of an offence committed by the offender

Suggesting that victims are better protected by allowing offenders to be deported back to Canada with no gradual release nor any restrictions or supervision by Canadian authorities is unreasonable.

c) whether, in the Minister's opinion, the offender is likely to continue to engage in criminal activity after the transfer

This appears to suggest that the Minister take on the role of "parole board" for Canadians held abroad. If so, the Minister's office would need to gather all the information that the parole board now gathers to make its decisions (correctional reports, etc). Certainly, full and appropriate information should guide such decisions.

d) whether, in the Minister's opinion, the offender left or remained outside Canada with the intention of abandoning Canada as their place of permanent residence

The issue of intention was considered by the Federal Court (Trial Division) in *Kozarov*[30] where the Court upheld the Minister's denial. With respect, our view is that citizenship must trump

---

subject to Canadian supervision already. All such information would be within the control of the other state. This could require translation, legal review of the material and additional resources. One must be cognizant of the practical difficulties of gathering such evidence and using it in support of a Canadian restraining order application. It is much easier to use materials gathered in Canada for this purpose.

28 For example, a probation and parole officer could assist in family re-integration and counseling, or in monitoring an offender to ensure no contact with family members if that is the wish of family members. By being in Canada, the offender is subject to supervision and the supervisor of the offender will be able to contact family, or victim/witness assistance programs in order to better devise a plan for the rehabilitation of the offender. Equally, the supervisor will be able to contact the police if any danger to the family becomes known or suspected.

29 *Supra*, note 26.

30 *Kozarov v. Canada* (Minister of Public Safety and Emergency Preparedness) (F.C.), [2008] 2 F.C.R. 377.

residency, not the other way around. The *Charter* does not suggest that section 6 rights are time limited, or lost when a person sets up long term residence abroad.

e) whether, in the Minister's opinion, the foreign entity or its prison system presents a serious threat to the offender's security or human rights

This consideration is in the current ITOA, but would be changed so that the Minister's opinion would control the outcome, rather than the facts concerning the foreign entity or its prison system.

f) whether the offender has social or family ties in Canada

In *Kozarov,*[31] the federal government argued that the individual's ties to Canada were insufficient. However, the proposed legislation does not speak to sufficiency, but only the existence of such ties. If a person's friends and relatives die, it does not make that person less of a citizen. Again, this does not seem a reasonable limit on the section 6 right to enter Canada.

g) whether the offender has refused to participate in a rehabilitation or reintegration program

If an offender refuses to participate in a foreign rehabilitation or reintegration program, that person presumably represents a greater danger to the Canadian public when deported back, free of legal restrictions. If transferred, the offender comes into the Canadian system, is assessed for security and placement, becomes a "known", and either participates in programs here or is denied conditional release until determined by a parole board not to be an "undue risk" to the public. If kept in custody until the end of the court imposed sentence, offenders may even be subjected to a peace bond that keeps them in prison after their warrant expires.

h) whether the offender has accepted responsibility for the offence for which they have been convicted, including by acknowledging the harm done to victims and to the community

A requirement that convicted people must accept responsibility for the offence as charged is problematic. While appropriate in some cases, it is a sad reality that people are wrongly convicted, even in Canada's justice system dedicated to ensuring the innocent are not found

---

31 *Ibid*.

guilty.[32] Many justice systems do not meet Canada's standards, so precluding transfer because an offender maintains innocence could well work further injustice.

i) the manner in which the offender will be supervised, after the transfer, while they are serving their sentence

Again, once deported after sentence expiry, there will be no supervision. In contrast, if transferred during the sentence, the offender will be supervised by the CSC on a federal sentence.

j) any other factor that the Minister considers relevant.

As noted elsewhere in this submission, untrammeled ministerial discretion is not consistent with democratic principles.[33] Bill C-5 would amend section 10(2) of the ITOA to replace the word 'shall' with 'may', so that the Minister no longer is required to consider the existing factors in the *Act*, but could instead choose to consider those factors.

Section10(1)(a), whether, in the Minister's opinion, the offender will commit a terrorism or criminal organization offence after transfer, is the most common basis for denial of transfer. Several cases regarding this factor are pending in the Federal Court.[34] We believe that courts' ability to review Ministerial decisions is vital to the Rule of Law. Elected officials, like Ministers, should not have unlimited discretion.[35] Indeed, even Crown prerogatives are subject to judicial review in certain cases.[36] Soundly based ministerial decisions will not be readily overturned by the courts. Only decisions incorrect in law or otherwise unreasonable, such as those made without regard to the evidence or in an arbitrary manner, are likely to attract serious scrutiny. The courts are generally reluctant to substitute their views for those of the Minister, but will consider whether the Minister's decision complies with the *Charter* and laws passed by Parliament.

---

32 The cases of Donald Marshall, David Milgaard and Guy Paul Morin are examples of this. There are many others. In the US, 249 post-conviction exonerations have resulted from DNA testing alone, including 17 people sentenced to death. See, http://www.innocenceproject.org/know/. The Death Penalty Information Centre indicates that at least 138 people sentenced to death in the US have been exonerated http://www.deathpenaltyinfo.org/home.

33 In certain cases, it is even the subject of abusive conduct. See, *Roncarelli v. Duplessis*, [1959] S.C.R. 121.

34 The recent case of *Grant* (March 4th,2010 T-1414-09 FCTD) set aside the Minster's decision on this ground and ordered the Minster to reconsider within 45 days.

35 *Roncarelli v. Duplessis*, [1959] S.C.R. 121; *C.U.P.E. v. Ontario* (Minister of Labour) 2003 SCC 29.

36 *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441; *Canada v. Kamel* 2009 FCA 21; *Abdelrazik v Canada* 2009 FC 580; *Black v. Chretien* (2001), 54 O. R. (3rd) 215 (C.A.).

Bill C-5's proposed criteria for Ministerial decision-making would justify virtually any refusal to transfer an offender to Canada, unrelated to promoting reformation, rehabilitation, reintegration or public safety. While this may result in a temporary delay in an offender's return to Canada until the sentence is served, it will not contribute to long term public safety here.

V. CANADA'S INTERNATIONAL OBLIGATIONS

Laws and Ministerial actions should be in accordance with Canada's international commitments. This rationale is often cited as the reason why Canadians are subject to extradition to foreign states.[37] CSC has articulated the purpose of offender transfers[38] in a manner consistent with its mandate for offenders in Canadian federal facilities. It recognizes the difficulties faced by Canadians incarcerated abroad, similar to others away from home, family, and compatible linguistic and cultural environments. "Canadians incarcerated in foreign countries often find themselves facing serious problems coping with local conditions. The most common problems involve culture shock, isolation, language barriers, poor diets, inadequate medical care, disease and inability to contact friends and family".[39] The impact of transfer denial on a family at home, as well as on the offender, is often devastating to the relationship, resulting in greater instability upon return.

Canada has entered into 14 bilateral treaties and acceded to three multilateral conventions on transfer, dealing with more than 60 other states. The "best interests of offenders" is the guiding principle behind these treaties. Canada's international obligations are reflected in the preamble to the *Convention on the Transfer of Sentenced Persons*,[40] in force in this country since September 1, 1985. The stated goals of the Convention include "developing international co-operation in the field of criminal law" and it sets out a comprehensive agreement for transferring offenders between the state where sentenced and their own nation. Similarly, the *Inter-American Convention on Serving Criminal Sentences Abroad*[41] states that the signatories "desire to cooperate to ensure improved administration of justice through the social rehabilitation of the sentenced persons" and "that to attain these ends, it is advisable that the

---

37 See, for example, *Lake v. Canada* (Minister of Justice), 2008 SCC 23.

38 Correctional Service Canada - Programs International Transfer of Offenders, found at http://www.csc-scc.gc.ca/test/prgrm/inttranser/trans-eng.shtml.

39 *Ibid*.

40 E104447 - CTS 1985 No. 9.

41 E102891 - CTS 1996 No. 23.

sentenced person be given an opportunity to serve the sentence in the country of which the sentenced person is a national".

Canada and many other nations have committed themselves to the transfer of offenders back to their home country to encourage rehabilitation and ultimately reduce crime. Bill C-5 is inconsistent with these goals. Instead, it would allow Canadians, based upon loosely defined discretion by the Minister, to be denied entry and return to Canada and forced to remain in custody in another country. CSC has recognized the conditions in many of those countries as undesirable or improper.

The issue of reciprocity between states should also be considered. If Canada refuses the transfer of its own citizens from other countries, it is equally possible that other states will refuse the transfer of their nationals from Canadian prisons. Rather than encouraging cooperation in the administration of justice between states, this could lead to international problems. Foreign offenders serving sentences in Canada do so at Canadian taxpayers' expense. As those offenders are likely to be deported after their sentence is served,[42] any benefit to Canada from programs aimed at rehabilitating foreign offenders is unlikely to ensue.

VI. OTHER CONCERNS

In addition to the concerns outlined above, delay in processing applications has already become a serious problem.[43] Delay occurs primarily at the Ministerial stage, rather than in the processing time by the CSC International Transfer Unit. Lawyers practicing in this area find it increasingly difficult to obtain information about the status of a file from the Minister's office, particularly as to when it was transferred from the CSC office for the Minister's consideration.

Generally, these decisions should not require significant time. The current lack of transparency, coupled with delays of over a year at the Minister's office alone, suggest that problems are not because of deficiencies in the legislation, but rather operational or resource problems.

---

42 IRPA, S.C. 2001, C-27.

43 In the 2005 case of David Van Vlyman, *supra* note 25, the Federal Court found 9 ¼ years of bad faith on the part of the then Solicitor General. Specifically, the Court held that the Solicitor General had willfully violated a citizen's constitutional rights under section 6 and 7 of the *Charter* by failing to make a decision on his transfer application.

Bill C-5 would encourage more litigation. Offenders denied transfer can look only to the courts for redress, which results in additional and unnecessary cost to taxpayers. The proposed amendments would make "public safety" the primary consideration for transfer determinations, but the current purpose of the *Act* would remain as it now is, to "enable" transfers in the interest of the reformation and rehabilitation of the offender." This is likely to generate confusion. Limiting legislative criteria for consideration simply to dual criminality and Canadian citizenship would be a better use of limited resources.

VII. CONCLUSION

Canadians who commit crimes in other jurisdictions are subject to that state's laws until their sentence is served. However, Canadians in that situation will likely return to Canada, either by transfer during the sentence, or by way of deportation at the end of it.

Goals of reintegration, reformation and rehabilitation of offenders are promoted when offenders return to Canada to finish their sentences. The current CCRA recognizes that accessibility to one's home community and family, as well as a compatible cultural and linguistic environment are important factors in that regard.[44] Leaving a person in custody far away from family, community and other supports does not contribute to any correctional purpose and is contrary to achieving reintegration and rehabilitation to Canada.[45] To protect the public, provide reintegration and rehabilitation to offenders, and meet its international obligations, we believe that Canada should generally pursue the repatriation of offenders to ensure they are subject to Canada's correctional practices and processes before they complete their sentences.

Bill C-5 would not meet these goals. The Ministerial discretion it provides would allow for arbitrary and inconsistent refusals to transfer Canadian offenders back to Canada. Instead, limiting the criteria for consideration to dual criminality and citizenship would eliminate political considerations, arbitrariness and inconsistency, and give appropriate weight to the citizen's right of return, the *Charter* and the Rule of Law.

Contrary to what the Bill is purported to represent, it would be more likely to endanger the

---

44 See section 28 CCRA.

45 See, for example, *Effects of Long Term Incarceration* (Edmonton: John Howard Society of Alberta, 1999), and studies cited therein.

Canadian public, than to protect it. Rehabilitating offenders in a manner consistent with the values of Canadian society is the key to the safety of our communities. The proposed legislation fails to recognize this practical reality.