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# Law Enforcement and Criminal Liability

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White Paper

June 2000

KE  
8833  
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2000

Canada

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8833  
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1998

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# Law Enforcement and Criminal Liability

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White Paper,

June 2000

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# Table of Contents

<b>Foreword</b> .....	1
<b>Organized Crime in Canada</b> .....	3
<b>The Supreme Court of Canada ruling in <i>Campbell and Shirose v. The Queen</i></b> .....	4
<b>Impact of the Ruling</b> .....	5
<b>The Government's Proposal</b> .....	5
<b>Precedents</b> .....	8
<b>Comments</b> .....	9

## Foreword

The Government of Canada is seeking the views of Canadians on proposed legislation that would respond to the April 1999 ruling of the Supreme Court of Canada in *John Campbell and Salvatore Shirose v. The Queen*.<sup>1</sup>

In that case, the Court held that under existing law, police are not immune from criminal liability for committing acts during an investigation which, in ordinary circumstances would be illegal, unless authorized by Parliament through legislation. However, the Court also recognized that Parliament has the authority to give law enforcement officers some form of statutory exemption from criminal liability and to define the nature and scope of such an exemption and the circumstances in which it is available. As a result of the ruling, the legality of some long-accepted and valuable law enforcement techniques is now in doubt.

The Government believes it is in the public interest to create a limited exemption from criminal liability for law enforcement officers so they may carry out their duties in accordance with the rule of law.

Since the ruling, the Government has consulted law enforcement organizations, provincial and territorial governments, the legal community and civil liberties groups. Based on those consultations, the Government has developed a proposal for legislative change which it believes will provide law enforcement officers with the tools they need to effectively fight crime within clear and constitutionally acceptable limits.

In view of the importance of this law enforcement issue, especially in the fight against organized crime, the Government is inviting Canadians to provide their comments and suggestions on the proposed approach, including the draft legislation.

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<sup>1</sup> [1999] 1 S.C.R. 565



## Organized Crime in Canada

Organized crime has profound social and economic impacts. Insidious and pervasive, it affects the lives of all Canadians, directly or indirectly. Examples of organized criminal activity in Canada include drug, alcohol and tobacco smuggling, telemarketing and credit card fraud, money laundering, prostitution, people smuggling, and the illegal dumping of hazardous waste.

In today's world, it is essential to provide law enforcement officers with the tools they need to combat local, national and global crime and protect Canadian interests and Canadians themselves.

In many cases, the most effective way to investigate a criminal organization is to use an undercover officer or to engage someone who is already a member of that organization as a covert agent. In the process, it may be necessary for the officers or their agents to involve themselves in activities that would be illegal in ordinary circumstances. For example, undercover officers or agents may be required to traffic in drugs or other contraband in order to "play along" with their criminal targets to maintain their cover. Similarly, as part of criminal probes, they may be required to communicate for the purpose of prostitution, knowingly give a false name, or place illegal bets in gaming houses. As former Supreme Court of Canada Chief Justice Antonio Lamer remarked in *Rothman v. R.*<sup>2</sup>, the investigation of crime and the detection of "shrewd and often sophisticated" criminals "is not a game to be governed by the Marquess of Queensbury rules." The Alberta Court of Appeal noted in *R. v. Bond*<sup>3</sup>:

Police involve themselves in high-speed chases, travelling beyond posted speed limits. Police pose as prostitutes and communicate for that purpose in order to gather evidence. Police buy, possess and transport illegal drugs on a daily basis during undercover operations. In a perfect world this would not be necessary, but patently illegal drug commerce is neither successfully investigated, nor resisted, by uniformed police peering through hotel room transoms and keyholes or waiting patiently at police headquarters to receive confessions.

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<sup>2</sup> (1981), 59 C.C.C. (2d) 30 at 74

<sup>3</sup> (1993), 135 A.R. 329 (C.A.) at 333

## **The Supreme Court of Canada ruling in *Campbell and Shirose v. The Queen***

In 1991, the RCMP carried out a “reverse sting” operation in which undercover officers portrayed themselves as potential drug suppliers and offered to sell a large quantity of cannabis resin (hashish) to the accused, two alleged “senior executives” in a drug-trafficking ring. When the accused allegedly brought in money to pay for the promised shipment of hashish, they were arrested. Both were convicted at trial of conspiracy to traffic and conspiracy to possess for the purpose of trafficking hashish.

At their trial, the accused argued that the police conduct was illegal because the undercover officers had, in effect, breached the *Narcotic Control Act* by committing the offence of trafficking themselves. Accordingly, they argued this amounted to an “abuse of process” and, as a result, they were entitled to have the case against them stayed.

On April 22, 1999, the Supreme Court of Canada released its unanimous decision in *John Campbell and Salvatore Shirose v. The Queen*. The Supreme Court concluded that the reverse sting operation constituted illegal conduct that was not sanctioned by law. Although the *Narcotic Control Act* permitted police to *possess* narcotics that came to them from sting operations, there was no corresponding regulation giving police immunity when offering to *sell* a narcotic. However, the Court did acknowledge that the reverse sting could be an effective technique in law enforcement efforts against illegal drugs.

The Court ruled that, under existing law, police are not immune from criminal liability for criminal activities committed in the course of a *bona fide* investigation, unless authorized by Parliament through legislation. The Court also noted that “police officers gain nothing personally from conduct committed in good-faith efforts to suppress crime that incidentally violates the law the police are attempting to enforce,” and said the illegality of police conduct should not automatically lead to the staying of charges against the accused.

The Court observed that everyone “from the highest officers of the state to the constable on the beat is subject to the ordinary law of the land.” However, the Court explicitly recognized that Parliament has the authority to give law enforcement officers some form of public-interest exemption and define its nature and scope and the circumstances in which it is available.

The Supreme Court noted further that “in this country it is accepted that it is for Parliament to determine when in the context of law enforcement the end justifies the means that would otherwise be unlawful.”

### **Impact of the Ruling**

The reverse sting technique used by the RCMP in *Campbell and Shirose* is now permitted through regulations enacted under the *Controlled Drugs and Substances Act*, which replaced the *Narcotic Control Act* in 1997.

Nonetheless, the Supreme Court decision has had a significant impact on law enforcement in Canada, especially in undercover operations targeting organized crime. While law enforcement officers continue to diligently pursue organized crime, some long-accepted and valuable law enforcement techniques have been called into question by the ruling. For example, the legality of routine purchases by law enforcement officers of some types of contraband to gather evidence for prosecutions is now in doubt.

As a result, some law enforcement investigations have been suspended, substantially modified, or stopped altogether to avoid placing officers or persons who act under their direction and control in violation of the law. The types of operations conducted by police and other law enforcement officers affected include investigations into the smuggling of people, illegal traffic in firearms, hate crimes, cross-border smuggling of contraband such as tobacco and alcohol, international counter-terrorism investigations, the use of counterfeit payment cards, and offences related to fisheries and environmental protection.

### **The Government's Proposal**

The Government believes that it is in the public interest to create a limited exemption from criminal liability for law enforcement officers so that they may effectively carry out their duties. The challenge lies in designing a statutory scheme that provides law enforcement officers with the tools they need to fight crime, while at the same time acknowledging that Canadians have the right to expect that the officers will act within the rule of law. The scheme must be effective, allowing law enforcement officers to investigate criminal operations. At the same time, it must be clear so that the limits of the protection are understood. Above all, the scheme must be constitutional.

The Government's proposal would amend the *Criminal Code* to provide law enforcement officers, and those persons acting under their direction and control ("police agents"), with protection from criminal liability for certain otherwise illegal acts committed during the course of a *bona fide* investigation or other law enforcement duties, as long as certain conditions are met.

This proposal would not put persons involved in law enforcement above the law or give them blanket or unlimited immunity from the law. In all cases, the scope of the exemption would be restricted to reasonable and proportional acts undertaken only for legitimate law enforcement purposes. It would still be possible to bring criminal sanctions against law enforcement officers if they operate outside of the limits of the proposed scheme.

The proposed legislation would operate in the following manner:

- The scheme would apply to "public officers" engaged in the enforcement of federal law who are part of a group designated by the appropriate Minister of the Crown or his or her Deputy Minister. "Public officer" means a peace officer or a public officer who has the powers of a peace officer under an Act of Parliament.
- Some otherwise illegal acts or omissions have less serious consequences, such as the purchase of contraband or counterfeit currency. Designated public officers would be permitted to commit such an act or omission without prior approval, if the officer reasonably believes it is reasonable and proportional to the criminal activity being investigated. Among the factors to be considered by the officer in making this decision are the nature of the act or omission, the nature of the investigation and the reasonable availability of other means for carrying out the law enforcement duty (**See Section 25.1(3) in the draft legislation**).
- For acts or omissions of a more serious nature (i.e., likely to cause bodily harm to a person or result in serious loss or damage to property), it is prudent to require public officers to also obtain prior authorization from a senior law enforcement official. Such senior officials would have to be personally designated by the appropriate Minister or his or her Deputy Minister, and authorization to commit otherwise illegal acts would be

permitted only if the senior officer reasonably believes that the preceding conditions have been met (**Section 25.1(4)**).

- In addition to the preceding conditions, the intentional use of force likely to cause bodily harm to another person would not be permitted unless the public officer and senior official believe on reasonable grounds that it is necessary to preserve the life or safety of any person, or to prevent the compromise of the identity of a public officer acting in an undercover capacity, a confidential informant or a person acting covertly under an officer's direction, or the loss or destruction of evidence of an indictable offence (**Section 25.1(7)(b)**).
- Recognizing that the law must anticipate emergency situations, an exception to the requirement of authorization by a senior official would be created for circumstances in which the public officer reasonably believes that the grounds for the required authorization exist, but that obtaining the authorization is not feasible. However, in these circumstances, the officer may act without prior authorization only if he or she reasonably believes that the act or omission is necessary to preserve the life or safety of any person, or to prevent the compromise of the identity of an undercover officer, confidential informant or person acting covertly under the direction of an officer, or the imminent loss or destruction of evidence of an indictable offence (**Section 25.1(5)**).
- **Certain offences, such as the intentional or reckless causing of death or grievous bodily harm to another person or the commission of a sexual offence, would be completely excluded from the exemption scheme (Section 25.1(7)).**
- Nothing in the legislation would protect an officer from criminal liability for failing to comply with the requirements that govern the collection of evidence, such as wiretaps or DNA warrants (**Section 25.1(9)**).
- In some cases, the most effective way to investigate a criminal organization is to engage someone who is already a member of that organization as a covert agent, rather than using a police officer. The proposed legislation would give such agents limited exemption from criminal liability if they commit an act or omission that would otherwise constitute an offence under the direction and control of an officer, and

believing on reasonable grounds that it is for the purpose of assisting the officer in law enforcement duties (**Section 25.1(6)**).

## **Precedents**

The Government of Canada's proposal would enable those persons involved in the investigation of offences under federal laws such as the *Criminal Code* to engage in certain reasonable and proportional activities that might otherwise constitute a criminal offence. Giving law enforcement officers some exemption from prosecution is not without precedent, either in Canada or in other democratic societies.

### *Canada*

As noted above, regulations under the *Controlled Drugs and Substance Act* now include provisions that permit certain police officers to buy, sell, import and export drugs in defined circumstances in their efforts to combat drug trafficking. Judicial authorization is not required under these regulations. Other provisions in the *Criminal Code* and in customs and excise laws set out exemptions from criminal liability for those engaged in law enforcement for specific activities relating to money laundering, possession of the proceeds of crime, and possession of prohibited or restricted weapons.

Federal legislation also creates a number of legal schemes under which peace officers may engage in otherwise unlawful conduct if that conduct has been approved in advance by a judicial officer. Examples of such schemes include wiretap authorizations and DNA warrants.

### *Other Countries*

Several other countries have also addressed the issue of whether a law enforcement officer acting within the reasonable execution of his or her duties in trying to investigate criminal activity or prevent it can engage in the commission of acts or omissions that would otherwise constitute a criminal offence.

In the United Kingdom there is no legislative equivalent to the Government of Canada's proposal. However, the common law, as expressed in *R. v.*

*Waterfield*<sup>4</sup>, recognizes certain powers inherent in the execution of a police officer's duty. These powers would, depending on the circumstances, permit the police to engage in acts necessary to the fulfillment of their duties even though they might involve an otherwise unlawful interference with a person's liberty or property.

In the United States, at the federal level, the defence of "law enforcement justification" provides law enforcement officers with a certain degree of immunity if the conduct is within the reasonable exercise of the officer's duty and the officer's acts in violation of state law are carefully circumscribed so as to do no more than is necessary and proper. In addition, more than half of the individual states have enacted statutory general public authority immunity schemes.

In Australia, there is federal legislation exempting police and law enforcement officers from liability for "controlled operations" to investigate the importation of narcotics. Several Australian states have enacted broad legislative exemption schemes for undercover police.

## **Comments**

The Government of Canada welcomes your comments on this proposal. Please send written submissions by **September 15, 2000** to:

LAW ENFORCEMENT CRIMINAL LIABILITY CONSULTATION  
Criminal Law Policy Section  
Department of Justice  
284 Wellington Street, 5<sup>th</sup> Floor  
Ottawa, Ontario  
K1A 0H8

Fax- 613-941-4122

This paper is also available on the Department of Justice website at the following address: <http://www.justice.gc.ca>

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<sup>4</sup> [1963] 3 All E.R. 659

Proposal to amend the Criminal Code (protection  
from criminal liability for public officers)

Proposition visant à modifier le Code criminel  
(immunité des fonctionnaires publics en matière  
pénale)

Proposal to amend the Criminal Code (protection from criminal liability for public officers)

Proposition visant à modifier le Code criminel (immunité des fonctionnaires publics en matière pénale)

R.S., c. C-46

CRIMINAL CODE

CODE CRIMINEL

L.R., ch. C-46

1. The *Criminal Code* is amended by adding the following after section 25:

1. Le *Code criminel* est modifié par adjonction, après l'article 25, de ce qui suit :

Definitions

25.1 (1) The definitions in this subsection apply in this section.

25.1 (1) Les définitions qui suivent s'appliquent au présent article.

Définitions

"competent authority"  
« autorité compétente »

"competent authority" means, with respect to the designation of a public officer under paragraph (3)(b) or of a senior official who may authorize a public officer under paragraph (4)(a),

5 « autorité compétente » S'agissant de la désignation d'un fonctionnaire public au titre de l'alinéa (3)b) ou de celle d'un fonctionnaire supérieur au titre de l'alinéa (4)a) :

5 « autorité compétente »  
"competent authority"

(a) in the case of a member of the Royal Canadian Mounted Police, the Solicitor General of Canada or the Deputy Solicitor General;

a) dans le cas d'un membre de la Gendarmerie royale du Canada, le solliciteur général du Canada ou le sous-solliciteur général du Canada;

(b) in the case of a member of a police service constituted under the laws of a province, the Minister responsible for policing in the province or his or her Deputy Minister; and

b) dans le cas d'un membre d'une force policière constituée sous le régime d'une loi provinciale, le ministre responsable de la sécurité publique dans la province ou son sous-ministre;

(c) in the case of any other public officer, the Minister who has responsibility for the Act of Parliament that the officer has power to enforce or his or her Deputy Minister.

c) dans le cas de tout autre fonctionnaire public, le ministre responsable de la loi que le fonctionnaire est chargé de faire appliquer ou son sous-ministre.

"public officer"  
« fonctionnaire public »

"public officer" means a peace officer, or a public officer who has the powers of a peace officer under an Act of Parliament.

« fonctionnaire public » Agent de la paix ou fonctionnaire public disposant des pouvoirs d'un agent de la paix au titre d'une loi fédérale.

« fonctionnaire public »  
"public officer"

Principle

(2) It is in the public interest to ensure that public officers may effectively carry out their duties and, to that end, to expressly create a limited exemption from criminal liability for public officers and other persons acting under their direction and control so that the public officers may effectively carry out their law enforcement duties in accordance with the rule of law.

(2) Il est d'intérêt public de veiller à ce que les fonctionnaires publics puissent s'acquitter de leurs fonctions et, à cette fin, d'accorder à ces fonctionnaires et aux personnes qui agissent sous leur direction et leur autorité une immunité limitée en matière pénale pour permettre à ces fonctionnaires de s'acquitter effectivement de leurs fonctions de contrôle d'application de la loi conformément au principe de la primauté du droit.

Principe

When no criminal liability

(3) A public officer is justified in committing an act or omission, or in directing the commission of an act or omission under sub-

(3) Le fonctionnaire public est justifié de commettre un acte ou une omission qui constituerait par ailleurs une infraction, ou d'en

Circonstances donnant lieu à l'immunité

section (6), that would otherwise constitute an offence if the public officer

(a) is engaged in the investigation of an offence under, or the enforcement of, an Act of Parliament or in the investigation of criminal activity;

(b) is either designated or is a member of a group designated by the competent authority personally for the purposes of this section; and

(c) believes on reasonable grounds that the commission of the act or omission, as compared to the nature of the offence or criminal activity being investigated, is reasonable and proportional in the circumstances, having regard to such matters as the nature of the act or omission, the nature of the investigation and the reasonable availability of other means for carrying out the public officer's law enforcement duties.

(4) In the case of an act or omission by a public officer that would otherwise constitute an offence and that would be likely to cause bodily harm to a person or result in serious loss of or damage to property, the public officer shall not commit the act or omission or direct the commission of the act or omission under subsection (6), unless, in addition to meeting the conditions set out in paragraphs (3)(a) to (c), she or he

(a) is authorized by a senior official responsible for law enforcement who is designated by the competent authority personally and who believes on reasonable grounds that committing the act or omission, as compared to the nature of the offence or criminal activity being investigated, is reasonable and proportional in the circumstances, having regard to such matters as the nature of the act or omission, the nature of the investigation and the reasonable availability of other means for carrying out the public officer's law enforcement duties; or

(b) believes on reasonable grounds that the grounds for obtaining an authorization

ordonner la commission au titre du paragraphe (6), si, à la fois :

a) il agit dans le cadre soit d'une enquête relative à des activités criminelles ou à une infraction à une loi fédérale, soit du contrôle d'application d'une telle loi;

b) il est désigné par l'autorité compétente personnellement, à titre individuel ou au titre de son appartenance à une catégorie de personnes, pour l'application du présent article;

c) il croit, pour des motifs raisonnables, que la commission de l'acte ou de l'omission est, par rapport à la nature de l'infraction ou des activités criminelles faisant l'objet de l'enquête, juste et proportionnelle dans les circonstances, compte tenu notamment de la nature de l'acte ou de l'omission, de la nature de l'enquête ainsi que des solutions de rechange acceptables pour s'acquitter de ses fonctions de contrôle d'application.

(4) Le fonctionnaire public ne peut commettre un acte ou une omission qui constituerait par ailleurs une infraction et qui causerait vraisemblablement des lésions corporelles à une personne ou entraînerait vraisemblablement des dommages importants à des biens, ou en ordonner la commission au titre du paragraphe (6), que si les conditions prévues aux alinéas (3)a) à c) sont remplies et que si, selon le cas :

a) il y est autorisé par un fonctionnaire supérieur chargé du contrôle d'application de la loi qui a été désigné par l'autorité compétente personnellement et qui croit, pour des motifs raisonnables, que la commission de l'acte ou de l'omission est, par rapport à la nature de l'infraction ou des activités criminelles faisant l'objet de l'enquête, juste et proportionnelle dans les circonstances, compte tenu notamment de la nature de l'acte ou de l'omission, de la nature de l'enquête ainsi que des solutions de rechange acceptables pour l'exercice des fonctions de contrôle d'application;

b) il croit, pour des motifs raisonnables, que les conditions pour obtenir l'autorisa-

Authorization of senior official required for certain acts

Autorisation d'un fonctionnaire supérieur nécessaire dans certains cas

Exceptional circumstances

under paragraph (a) exist but that it is not feasible in the circumstances to obtain the authorization.

(5) For the purposes of paragraph (4)(b), the public officer may commit an act or omission without obtaining an authorization under paragraph (4)(a) where the public officer has reasonable grounds to believe that the act or omission is necessary to

(a) preserve the life or safety of any person;

(b) prevent the compromise of the identity of a public officer acting in an undercover capacity, of a confidential informant or of a person acting covertly under the direction and control of a public officer; or

(c) prevent the imminent loss or destruction of evidence of an indictable offence.

Person acting under direction and control of public officer

(6) A person committing an act or omission that would otherwise constitute an offence is justified in committing it if he or she

(a) commits it under the direction and control of a public officer; and

(b) believes on reasonable grounds that its commission is for the purpose of assisting the public officer in the public officer's law enforcement duties.

Limitation

(7) Nothing in this section justifies

(a) the intentional or reckless causing of death or grievous bodily harm to another person or the commission of an offence contrary to section 151, 152, 153, 153.1, 271, 272 or 273; and

(b) the intentional use of force that is likely to cause bodily harm to another person unless the public officer and the senior official, in the case of subsection (4), believe on reasonable grounds that it is necessary to preserve the life or safety of any person, to prevent the compromise of the identity of a public officer acting in an undercover capacity, of a confidential informant or of a person acting covertly under the direction and control of a public officer or to prevent the loss or destruction of evidence of an indictable offence.

tion prévue à l'alinéa a) sont réunies mais que son obtention est difficilement réalisable.

(5) Pour l'application de l'alinéa (4)b), le fonctionnaire public peut commettre un acte ou une omission sans l'autorisation prévue à l'alinéa (4)a) s'il a des motifs raisonnables de croire que l'acte ou l'omission est nécessaire afin :

a) soit de préserver la vie ou la sécurité d'une personne;

b) soit d'éviter de compromettre la confidentialité de l'identité d'un fonctionnaire public ou d'un informateur ou celle d'une personne agissant sous la direction et l'autorité d'un fonctionnaire public;

c) soit de prévenir la perte ou la destruction imminentes d'éléments de preuve d'un acte criminel.

(6) Une personne est justifiée de commettre un acte ou une omission qui constituerait par ailleurs une infraction si elle agit sous la direction et l'autorité d'un fonctionnaire public et croit, pour des motifs raisonnables, l'aider ainsi à s'acquitter de ses fonctions de contrôle d'application.

(7) Le présent article n'a pas pour effet :

a) d'autoriser une personne à causer, volontairement ou par imprudence grave, des lésions corporelles graves à une autre personne ou la mort de celle-ci, ou à commettre les infractions créées aux articles 151, 152, 153, 153.1, 271, 272 ou 273;

b) d'autoriser l'usage contre une personne d'une force de nature à causer des lésions corporelles, sauf si le fonctionnaire public et le fonctionnaire supérieur, dans les cas visés au paragraphe (4), croient, pour des motifs raisonnables, que l'usage de cette force est nécessaire pour préserver la vie ou la sécurité d'une personne, pour éviter de compromettre la confidentialité de l'identité d'un fonctionnaire public ou d'un informateur ou celle d'une personne agissant sous la direction et l'autorité d'un

Situation exceptionnelle

Personne agissant sous la direction et l'autorité d'un fonctionnaire public

Réserve

Other protection, defences and immunities unaffected

(8) Nothing in this section affects the protection, defences and immunities of peace officers and other persons recognized under the law of Canada.

fonctionnaire public ou pour prévenir la perte ou la destruction d'éléments de preuve d'un acte criminel.

(8) Le présent article ne porte nullement atteinte à la protection et aux défenses et immunités dont jouissent les agents de la paix et d'autres personnes sous le régime des lois du Canada.

Maintien des autres immunités ou défenses

Compliance with statutory requirements

(9) Nothing in this section relieves a public officer of criminal liability for failing to comply with any other requirements that govern the collection of evidence.

(9) Le présent article n'a pas pour effet de conférer aux fonctionnaires publics une immunité en matière pénale pour toute inobservation des autres exigences applicables à l'obtention d'éléments de preuve.

Observation des lois

COMING INTO FORCE

ENTRÉE EN VIGUEUR

Coming into force

2. This Act comes into force on a day to be fixed by order of the Governor in Council.

2. La présente loi entre en vigueur à la date fixée par décret.

Entrée en vigueur

15

