December 13, 1999

The Honorable Lorna Milne
Chair
Senate Committee on
Legal and Constitutional Affairs
Parliament Buildings Wellington Street
Ottawa, ON K1A 0A4

Dear Senator Milne,

I am writing on behalf of the National Criminal Justice Section of the Canadian Bar Association (the Section), to express our strong opposition to Bill C-247. In the spring, the Section presented a submission on the bill, then known as Bill C-251, to the Commons Standing Committee on Justice and Human Rights. We believe that the bill is unsound constitutionally, an example of regressive, inconsistent and unjustified penal policy, and not representative of a responsible approach to legislating penal reform. We are confident that after the Senate Committee on Legal and Constitutional Affairs subjects the bill to careful scrutiny, you too will conclude that it should not become law. We respectfully suggest that it is precisely in situations like this, where the House has sanctioned an unsound bill, that Senators must exercise sober second thought and ensure that the matter is rectified.

Constitutionality of the Length of Sentence

Proponents of the bill argue that the current sentencing scheme is too lenient. In fact, the *Criminal Code* already provides a very stringent sentencing regime for both murder and sexual assault. Canada's record of confining first degree murderers for an average of 28.4 years ranks us more punitive than virtually all western countries, including the United States.

Bill C-247 would presume that two consecutive life sentences should be imposed on multiple murderers, resulting in no possibility of parole for fifty years. For most offenders, a fifty year period of parole ineligibility means death in prison. The Supreme Court of Canada has held that the possibility of parole is essential to the constitutional validity of any indeterminate sentence. When the SCC upheld the constitutional validity of a twenty-five year sentence for first degree murder, the potential for a fifteen year review was a critical feature in that it allowed the punishment to be tailored to the particular circumstances and the individual offender.[1] A fifty year sentence would almost certainly be struck down by the Court as cruel and unusual punishment.

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[1] See, *R. v. Luxton* (1990), 79 C.R. (3d) 193 (S.C.C.).

The amendments proposed by Bill C-247 are unsupported by evidence or sound arguments of principle that demonstrate their necessity. In our view, any constitutional violation would therefore not be justified under section 1 of the *Charter*. Our criminal justice system needs a safety valve to permit reconsideration of individual change after long periods of incarceration have been served. This reflects our indefatigable confidence in the possibilities of the human spirit and our view of ourselves as Canadians as a fair and compassionate people.

Constitutionality of the Reverse Onus

The sexual assault amendments in Bill C-247 would impose a presumption of consecutive sentences with an onus on the offender to rebut that presumption. This contradicts the ruling of the SCC in *Gardiner*[2], that the Crown must establish aggravating factors. Consequently, this proposal may violate section 7 of the *Charter*. The factors to be considered under the proposed section 271(3) are skewed and again ignore other important considerations in determining constitutionality, especially the circumstances of the offender.

Moreover, the proposed amendments to section 271 could cause unanticipated harm. Firstly, the amendments would result in fewer guilty pleas and more trials, given the increased penalties. As a result, more victims of sexual assault will be required to testify and suffer through a trial. Secondly, the reverse onus provision will adversely affect impoverished accused who have more limited access to legal representation. Disadvantaged offenders would be likely to serve aggregate sentences of unprecedented length because they were unable to satisfy the judge that theirs was a case where cumulative sentences should not apply. Given that our current system is already dealing sternly and seriously with sexual assaults, this move to a harsher and potentially discriminatory regime is simply unjustified.

Principles of Sentencing

In 1996, Parliament amended the *Criminal Code* sentencing provisions to insert, for the first time, a statement of purpose and principles.[3] This bill would contravene the principles of restraint, totality and proportionality. There is no evidence to suggest that longer, harsher sentences will deter crime, or cause victims to recover from the tragic loss of a loved one more quickly. Certainly, victims need more and better support than they currently receive, but fifty year sentences for offenders will not provide that support.

The proposed C-247 would establish a new penal benchmark by substantially raising the most severe sentence in the *Criminal Code*. This is not a minor refinement but a significant change to make our system more punitive. Surely, this is only warranted after extremely thorough public and Parliamentary

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2 (1982), 30 C.R. (3d) 289.

3 *Criminal Code* section 718.

debate, accompanied by careful consideration of data, policies, arguments, comparisons, penal philosophy, and constitutionality. These changes would then only be justified if such careful consideration confirmed that current sentences are insufficient and that longer sentences would address that insufficiency.

Once again, we urge you to see this bill as one of the rare cases that absolutely requires a senatorial remedy. We would appreciate an opportunity to address the Legal and Constitutional Affairs Committee when it holds hearings concerning the bill, to explain and expand on the arguments made in this brief letter.

Yours truly,

Isabel Schurman
Chair, National Criminal Justice Section

cc. Members and Clerk, Senate Legal and Constitutional Affairs Committee
The Hon. Bernard J. Boudreau, P.C., Leader of the Government in Senate
The Hon. Anne McLellan, P.C., MP, Minister of Justice
Albina Guarnieri, MP