Submission on Bill C-251

Criminal Code and *Corrections and Conditional Release Act* amendments (Cumulative Sentences)

NATIONAL CRIMINAL JUSTICE SECTION
CANADIAN BAR ASSOCIATION

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PREFACE

The Canadian Bar Association is a national association representing over 35,000 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 and the Committee on Imprisonment and Release of the Canadian Bar Association, with assistance from the Legislation and Law Reform Directorate at 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.

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I. INTRODUCTION

The Canadian Bar Association's National Criminal Justice Section (the Section) has often contributed its views to legislative initiatives relating to criminal law. We appreciate this opportunity to participate in the deliberations of the House of Commons Standing Committee on Justice and Human Rights in regard to Bill C-251.

The Section opposes the passage of Bill C-251, which would impose cumulative sentences on certain offenders. Our view is that no convincing justification has been offered for changing the current sentencing principles applicable to concurrent and consecutive sentences.

II. THE PREMISES OF BILL C-251

Two arguments are suggested to support the passage of Bill C-251. We believe that neither warrants the departure from principle and the potential for injustice presented by this proposed legislation.

First, its proponents argue that current sentencing practices represent a lenient response to crimes of violence, especially sexual assault and murder. Years of experience in the criminal justice system lead us to conclude that this is clearly wrong. First and second degree murder carry mandatory life sentences. Life sentences mean either incarceration or parole supervision for life. The period of

actual incarceration depends on parole eligibility and a graduated, positive exercise of discretion by the National Parole Board.

Parole eligibility for first degree murder is twenty-five years, subject to a possible review under section 745.6 after fifteen years. Data continue to show that only about one-third of prisoners who could apply for that review do so. This reluctance may be because prisoners appreciate that even if the Chief Judge concludes that there is the required reasonable prospect for success, the ultimate decision-maker will be twelve members from the community where the offence took place. There is every reason to assume that these people will scrutinize each case stringently.

The life sentence an offender serves before parole eligibility for second degree murder will be between ten and twenty-five years. In *R.v. Shropshire*[1], the Supreme Court of Canada rejected the need for "unusual circumstances" to justify increasing parole ineligibility beyond ten years. As a result, more judges set ineligibility periods in excess of ten years. Certainly, if there is brutality or more than one victim, the ineligibility period will be close to the maximum.[2] It is also important to note that section 745(b) provides that a second degree murder conviction for someone previously convicted of murder automatically results in a twenty-five year period of parole ineligibility.

A survey of any appellate court in Canada will indicate how seriously courts are responding to sexual assault offences. While the media will certainly highlight an apparently anomalous or inexplicable sentence, our courts are not reluctant to impose sentences of incarceration, including penitentiary sentences for these offences. This is especially true when the offender has inflicted harm on more

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1 (1995), 102 C.C.(3d) 193.

2 See, appendix to the Manitoba Court of Appeal decision in *R.v. Ly and Duong* (1992), 72 C.C.C.(3d) 57.

than one victim.[3] It is our experience that courts are acutely aware of the need to protect vulnerable people and to ensure that our sentencing system plays an appropriate role in that process. There is no need for a mandatory consecutive sentence provision to persuade judges to take these crimes very seriously.

Not only do our courts respond seriously to sexual offences, but so does the National Parole Board. The Board is now empowered to detain a person who has committed a Scheduled offence until warrant expiry date if it believes the person may commit an offence involving death or serious harm. In 1996/97, 422 men were referred for detention hearings. Only seven (1.5%) were released on ordinary statutory release and twenty-four others (5.3%) released on stringent conditions. 93.2% were detained in penitentiary. Again, the brutality of the crime and the number of victims carry significant weight in these determinations. The statistics clearly demonstrate that the Board is responding to concerns about public safety.

The second argument offered to justify passage of Bill C-251 is that only a mandatory consecutive sentencing provision responds adequately to the needs of victims. This suggests that every person victimized by a crime needs to see a discrete reaction to their own loss or pain and that victims cannot appreciate the imposition of a global punishment. We do not purport to speak for victims nor to tell anyone how they should experience grief or loss. We certainly do not wish to understate or undermine anyone's tragic loss or pain. Whether the objective of a sentence is the protection of the community, deterrence or denunciation, what is important is how the total sentence achieves those goals. Other than raw emotion and vengeance, we see no rationale for dividing a sentence into separate easily identifiable parts.

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3 For example, see *R. v. Earon Wayne Giles* (January 4, 1999) Vancouver Registry CA023391 (B.C.C.A.). Giles plead guilty to six counts of break and enter and commit sexual assault. He had served fifteen months "dead time", and was given a twenty-two year concurrent sentence. His co-accused was tried separately, was involved in five of the six offences, and received a total of eighteen years. The judge said that twenty was appropriate, but credited him with two years for the one year of "dead time" he had served: see *R.v. Mark Andrew Bush* (March 27, 1998) New Westminster Registry XO46611 (B.C.S.C.). See also *R.v. L.(J.J.)* (1998), 126 C.C.C.(3d) 235 (Que. C.A.) total sentence of four years for series of indecent assaults dating back seventeen years; and, *R.v. Poslowsky* (1998), 126 C.C.C.(3d) 475 (B.C.C.A.) ten years for aggravated sexual assault and attempted murder after giving credit for fifteen months pre-sentence custody.

III. PRINCIPLES OF SENTENCING

The underlying intent of Bill C-251 appears to be at odds with long-standing principles of sentencing, principles also explicitly set out in the *Criminal Code*. Section 718.3 stipulates that the fundamental principle of sentencing is proportionality. However, Bill C-251 would require that the least serious form of sexual assault would attract a consecutive sentence while the more serious forms, aggravated sexual assault, sexual assault with a weapon and sexual assault causing bodily harm, would not. While this inconsistency may be due to an oversight, it is peculiar, to say the least.

Bill C-251 would also conflict with the totality principle. In any multiple offence sentencing, the Court must take into account the total impact of the sentence on the offender. This principle has served us well for many years and is entrenched as a principle of sentencing in section 718.2(c) of the *Criminal Code*:

> Where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh.

The current practice has been to make some sentences concurrent to conform with section 718.2(c). This has the benefit of allowing a proportional sentence to be attached to each offence, while avoiding disproportionally long sentences. Often, where offences arise out of the same transaction, concurrent sentences are imposed and if different transactions are involved, consecutive sentences are imposed.[4] Bill C-251 appears to be a legislative statement of the opposite of this approach.

In our view, offences must be viewed both individually and as parts of whole events. Accordingly, consecutive sentences are appropriate for discrete offences which form part of an event or for offences which fall within separate transactions. The totality principle ensures that a sentencing judge can assess the severity of each element but finally move beyond a mechanical calculation of

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4 *R.v. Desmarest* (1986), 2 Q.A.C. 151.

elements to assess the global effect of a sentence. By simply adding the elements, the total may condemn an offender to a life of incarceration without any regard to the individual's circumstances, family obligations or rehabilitative prospects--all the issues we believe judges should consider. It is the judge's responsibility to shape the global sentence to avoid undue harshness or excessive length and to ensure that the sentence is fit.

We recognize that Bill C-251 relates only to murder and sexual assault. We can only repeat that our courts are sensitive to the gravity of these offences. Murderers receive life sentences. Multiple murderers are no longer eligible for section 745.6 hearings and, in any event, are usually seen as poor candidates for parole. Accordingly, they can anticipate very lengthy periods of incarceration. An attempt to mandate consecutive sentencing for sexual assault will either require a judge to demean a particular offence by reducing the sentence it attracts, or in some cases, impose an unduly harsh or excessive sentence. By mandating this kind of result, Bill C-251 would violate the totality principle; clearly a principle of fundamental justice. The *Charter of Rights and Freedoms* prohibits depriving people of their liberty in contravention of a principle of fundamental justice. Parliament should not consider passing legislation which goes against that constitutional mandate.

IV. CONSTITUTIONALITY

The issue of the constitutionality of Bill C-251 goes beyond its violation of the totality principle. When the Supreme Court of Canada considered the constitutional validity of the current first degree murder regime in *R.v. Luxton*,[5] it addressed whether a rational and fair sentencing system requires an individualized response to offences. The Court commented that a "sensitivity to the individual circumstances of each case" is apparent in Parliament's establishment of the opportunity for a fifteen year review under section 745.6. By subjecting people to longer mandatory periods of parole ineligibility, Bill C-251 will again raise the

5 (1990), 79 C.R.(3d) 193.

issue of constitutionality. The Supreme Court has held that it is the availability of some parole opportunity which insulates indeterminate sentences from attack under section 12 of the *Charter*.[6]

It must be kept in mind that being eligible for parole does not guarantee that the National Parole Board will release a prisoner. Dangerous people will continue to be confined. For others, however, parole provides the balance between blameworthiness and punishment. Once a prisoner is no longer dangerous, delaying parole only increases the possibility of a grossly disproportionate sentence. In our view, this Bill would once again raise *Charter* arguments in respect of the homicide sentencing regime.

V. TECHNICAL POINTS

We believe that the terminology of Bill C-251 is ambiguous. In referring to "the same event or series of events," the term "event" is undefined. In criminal pleadings, section 581 of the *Criminal Code* speaks of "transactions." The case law generally refers to either an "incident," "occurrence" or "act."[7] In *R.v. Cook*,[8] where there were a number of incidents sufficient to support a charge of sexual assault, the court concluded that each incident was not a "separate transaction" because the incidents were sufficiently connected by time, place and circumstance. While the term "event" is obviously similar in meaning, the Oxford Dictionary defines it as a "significant or noteworthy occurrence and normally is thought of in terms of a discrete incident...Each of a set of outcomes that are mutually exclusive." The use of the term "event" without further definition could lead to some uncertainty as to which act or actions on the part of the accused should be considered. The term "transaction" or even "proceeding" might be more helpful.

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6 *R.v. Lyons* (1987), 2 S.C.R. 309.

7 *R.v. Burke* (1988), Nfld. & P.E.I.R. 217; *R.v. Barnes* (1975), 2 C.R. (3d) 310; *R.v. Fischer* (1987), 31 C.C.C.(3d) 303.

8 46 (C.R.) (3d) 129.

Finally, if the sentence for sexual assault must be consecutive, how will that accommodate sentences other than for terms of incarceration, such as suspended sentences or fine orders? If the word "sentence" is to be interpreted as referring only to incarceration, it is difficult to understand what principle of sentencing is advanced by this amendment.

VI. CONCLUSION

The National Criminal Justice Section sees no pressing problem to be addressed by Bill C-251, and many principles of sentencing and constitutional guarantees that would be infringed by it. We conclude that the Bill should not be passed.