June 14, 2001

Richard G. Mosley, Q.C.
Assistant Deputy Minister
Criminal Law and Community Justice Branch
Justice Headquarters
284 Wellington Street, Room 5119
Ottawa, Ontario
K1A 0H8

Dear Mr. Mosley,

**RE: Reforms to Defence of Provocation**

I am writing in response to a letter we received on January 9, 2001, requesting the views of the Canadian Bar Association's National Criminal Justice Section on possible options for reform of the defence of provocation. The Canadian Bar Association is a national association representing over 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. The National Criminal Justice Section consists of both prosecutors and defence counsel from across the country.

In your letter, you indicate that you are especially interested in any practical comments about the anticipated operation of the various proposals. While we have provided brief comments on the three options presented, we are concerned that none of the options appear to deal with the more fundamental underlying problem, the definition of provocation.

Before responding to the specific provocation options which you have raised, we want to stress our position that it is a misguided and dangerous approach to criminal law reform to make piecemeal amendments to fundamental *Criminal Code* provisions. We have earlier said that "this type of incremental approach is inherently problematic. It serves to perpetuate a *Criminal Code* which is archaic, incomplete, poorly organized and difficult to understand."[1] In the context of provocation, we believe that all related defences should be re-thought and re-cast into a clear and coherent framework. In our view, it is imprudent to address provocation without also considering self-defence, duress and

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[1] National Criminal Justice Section, *Submission on Reforming Criminal Code Defences* (Ottawa: CBA, 1998) at 2.

necessity.

For some time, lawyers and judges have expressed serious concerns about the statutory framework for self-defence, which is both internally irreconcilable and virtually inexplicable. In *R.* v. *Pintar*, Moldaver, J.A. commented:

> It is no secret that many trial judges consider their instructions on the law of self-defence to be little more than a source of bewilderment and confusion to the jury. Regardless of their efforts to be clear, trial judges often report glazed eyes and blank stares on the faces of the jury in the course of their instructions on self-defence.[2]

He described the usual and accepted charge as "so complex and confusing that it may well have diverted the jury's attention away from the real issue upon which the claim of self- defence rests."[3] Similar comments were made by then Chief Justice Lamer in *R.* v. *McIntosh,* where section 34(2) was interpreted to apply even to aggressors, inviting speculation as to what role remained for section 35.[4]

Aside from this judicial ruling on the applicability of section 34(2), appellate courts have been forced to "read in" language to give comprehensible meaning to the practical scope of the section. As a result, the law is applied differently in Ontario and British Columbia. Ontario follows *R.* v. *Baxter*[5] and inserts the words "even though he intentionally causes death or grievous bodily harm" to the section. British Columbia applies the recent decision in *R.* v. *Pawliuk*[6] and uses "apprehension of death" as the distinction between the role of section 34(1) and section 34(2). Surely, this absence of clarity and uniformity across the country is unacceptable.

The defences of duress and necessity also support the need for a comprehensive review. Both issues have been recently addressed by the Supreme Court of Canada. Their common origin is the concept of "normative involuntariness." The Supreme Court in *R.* v. *Ruzic*[7] has "read down" section 17 to remove the elements of immediacy and presence which conflict with the *Charter*'s recognition of moral

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2 (1996) 2 C.R. (5th) 151 (Ont.C.A.).

3 *Ibid.*

4 (1995) 36 C.R. (4th) 171 (S.C.C.).

5 (1975) 27 C.C.C. (2d) 96 (Ont.C.A.).

6 (2001) B.C.C.A. 13.

7 [2001] S.C.C. 24 File No.: 26930.

involuntariness as a principle of fundamental justice but leave unanswered the question of the statutorily excluded offences. Rulings about duress[8] and necessity[9] must be integrated into a framework of defences based on consistent and coherent principles, appearing in the *Criminal Code* in clear, accessible and understandable language.

Again, we urge your Department to conduct a principled and comprehensive re-examination of the defences of provocation, duress and self-defence after consultation with the relevant stakeholders.

We now offer brief comments on the proposals raised in your letter.

**OPTION #1**
**New category of manslaughter with special sentencing regime**

The first option suggests re-characterizing an offence that would otherwise be considered murder as a type of manslaughter, if the act were committed under provocation. We note that option #1 is a variation of option #2, which proposes a new category of murder with a special sentencing regime when a murder is committed under provocation. The point of this variation appears to be that it would allow the latitude for the application of the less "stigmatizing" title of manslaughter to the act that would otherwise be murder.

We see no advantage to this option. While it may appear to take a "tough" approach, in reality it would do little other than possibly lead to imposing a minimum sentence.

**OPTION #2**
**New category of murder with special sentencing regime**

In our view, option #2 is preferable, both logically and on a principled basis. To use the defence of provocation, it must first be established that the person had the requisite intent for murder, not simply the general intent to commit an unlawful act in which death ensued. It can be visualized as going up the ladder to establish all the elements of murder and then coming back down a rung if provocation is proved. The prerequisite element is that the trier of fact is satisfied that the charge of murder is substantiated. Without a murder in the first place, the defence of provocation is unavailable.

Logically, the best approach is for Parliament to create a new category of murder with a special sentencing regime that would make allowances in appropriate circumstances. It should be kept in mind

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8 *Ibid*.

9 *R.* v. *Latimer*, [2001] S.C.C. 1 File No.: 26980.

that the defence of provocation was developed to make an allowance for human frailty, avoid the assumption of malice on the offender's part and so, avoid the death penalty.[10] The creation of what would be a "third degree murder" acknowledges the intentional element that must be established for murder, but at the same time makes such an allowance for human weakness.

As for the suggested penalties under this option, proposed (a), which would use the same general regime as for manslaughter, simply makes a cosmetic change, signaling to the courts that there is no need to change its sentencing approach to these types of cases. In our view, proposed (b), which uses the same regime as for murder with a reduced parole ineligibility, leaves too much discretion in the hands of parole authorities as to whether or not parole should be granted or continued. Proposed (c), which takes a hybrid approach allowing a maximum life sentence with a mandatory minimum penalty is preferable. It reflects the fact that a serious offence has been committed, stigmatizes it appropriately, yet makes allowance for human frailties.

**OPTION #3**
**Special sentencing procedures after second degree murder conviction**

Option #3 appears to be a further variation on option #2. It recognizes that provocation is still murder, but also acknowledges extenuating circumstances or circumstances that should allow for human frailties to be considered.

However, it is unclear how the proposal would work on a practical level. For example, would evidence of provocation still be called at trial but not change the issue of murder to manslaughter? It could also be compromising in that it leaves open the possibility that the jury decide on provocation because they are uneasy about convicting the accused of murder. How binding would the jury's recommendation be on the trial judge? What would allow a trial judge to reject the recommendation for leniency on the basis of provocation?

We are concerned that this option would unnecessarily bifurcate the trial process and potentially create two different triers of fact on significant issues of culpability. Further, how would the judge explain the process to the jury, who, having delivered a verdict of murder, would then presumably be asked to do one further task that had not been identified earlier. As a result of its findings that a murder had occurred, the jury would then be asked to recall all the evidence raised during the trial concerning provocation to assess whether the accused should be shown some leniency as a result. A juror would reasonably consider their role to be concluded with the guilty verdict. It would seem somewhat

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[10] See, Department of Justice Consultation Paper, *Reforming Criminal Code Defences: Provocation, Self-Defence and Defence of Property* (Ottawa: DOJ, 1998) for a more detailed explanation of the historical context for this defence.

disingenuous to then say that as a result of that verdict, the juror should go back and engage in a second level of deliberations on a fairly technical and difficult issue.

We trust that these comments will be helpful in refining the best approach to dealing with the defence of provocation. Again, though, we must firmly reiterate our view that a peacemeal approach to reform the *Criminal Code* must be avoided and replaced by comprehensive and principled approach to resolving these difficult and complex aspects of the criminal law.

Yours truly,

Heather Perkins-McVey
Chair, National Criminal Justice Section

c.c. Criminal Law Policy Section - Department of Justice; Attention: Ms. Joanne Klineberg