Submission on

Corrections and Conditional Release Regulations amendments

NATIONAL CRIMINAL JUSTICE SECTION
CANADIAN BAR ASSOCIATION

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PREFACE

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.

This submission was prepared by the Committee on Imprisonment and Release of the National Criminal Justice Section of the Canadian Bar Association with assistance from the Legislation and Law Reform Directorate at the National Office. The Committee has been involved in numerous federal government consultations and has formally responded to several legislative initiatives pertaining to sentencing, detention and conditional release.

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.

Submission on *Corrections and Conditional Release Regulations* amendments

I. INTRODUCTION

The National Parole Board's Consultation Document on proposals to amend the *Corrections and Conditional Release Regulations* (the Consultation Document) have been carefully considered by the Committee on Imprisonment and Release (the Committee) of the National Criminal Justice Section (the Section) of the Canadian Bar Association (CBA). The Committee is comprised of legal academics and practising lawyers with many years of specialization in the area of imprisonment and release. We appreciate being consulted about possible amendments to the regulations of the *Corrections and Conditional Release Act (CCRA)*.

For several years, the Committee was involved in a comprehensive examination of a proposed draft of the 1992 *CCRA*. In June 1988, the CBA released the Committee's *Justice Behind the Walls*.[1] This report, along with its companion reports, formed the basis for several resolutions pertaining to corrections and conditional release adopted by the CBA at its 1988 Annual Meeting. As CBA policy, those resolutions provide the ongoing orientation for CBA comments about Canada's corrections and conditional release regime. In addition to our input prior to the enactment of the *CCRA*, we have commented on subsequent amendments to the *Act* in a 1996 submission on Bill C-45 (*CCRA* amendments), a 1997 submission on Bill C-55 (*Criminal Code* amendments - High Risk Offenders), and a 1999

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1 Professor Michael Jackson, *Justice Behind the Walls*: A Report of the Canadian Bar Association Committee on Imprisonment and Release (Ottawa: CBA, 1988).

submission for the government's five year review of the *CCRA*.[2] We have consistently stressed adherence to fundamental principles and increased implementation of the Rule of Law in disciplinary, segregation and parole proceedings. This commitment continues to guide our remarks concerning the proposals contained in the Consultation Document.

In this submission, we will comment on the nature and extent of each of the current proposals. First, however, we must generally object to the stated objective and primary motivation underlying the current proposed amendments, that is cost savings.

The process for determining the discretionary release of penitentiary prisoners entails the exercise of a statutory mandate that implicates liberty, the rule of law, principles of fundamental justice and the duty to act fairly. The Consultation Document says that the proposals will effect cost savings "without increasing the risk to the public." However, no mention whatsoever is made of any possible diminution in fairness as a result of the proposals. While public safety must be a central concern to the National Parole Board, the Board's statutory mandate also requires that its internal processes provide an effective opportunity for all applicants to have their cases fairly assessed. Surely, fairness is a principal hallmark of justice, rather than a commodity to compromise when the cost seems too high.

II. THE PROPOSALS

A. Proposal I.1: Reduced Quorums

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[2] Bill C-45, Submission to the Standing Committee on Justice and Legal Affairs (Ottawa: Canadian Bar Association, 1994); Bill C-55, Submission to the Standing Committee on Justice and Legal Affairs (Ottawa: Canadian Bar Association, 1996), and; *Corrections & Conditional Release Act* Review, Submission to the Standing Committee on Justice and Human Rights (Ottawa: Canadian Bar Association, 1999).

i) Detention and section 743.6 cases

Currently, sections 148 and 150 of the Regulations require three-person panels to hear cases concerning the detention and review of those offenders whose parole eligibility date has been set at half the sentence. This is consistent with the liberty interests at stake. Both sections pertain to offenders who have already been subject to an official decision that places them in an extraordinary group. Section 743.6 cases are those where a judge has decided that the offender is unsuitable for ordinary parole eligibility. Detention cases arise after a referral by the Corrections Service of Canada or Commissioner based on an opinion that release will result in death, serious harm, or a sexual offence involving children.

In these cases, the National Parole Board is faced with an individual who has already been the subject of an adverse opinion in relation to conditional release. Starting from that position of disadvantage, it is imperative to a fair process that the offender have the fullest opportunity to make his or her case. Two-person panels generate enormous pressure for agreement since disagreement requires another hearing with additional cost and time implications. Two-person hearings may often not save money and may in fact be akin to a one-person hearing, given the inherent pressure to compromise. They will always reduce the offender's opportunity to find a receptive decision-maker.

RECOMMENDATION:

1. **The National Criminal Justice Section of the Canadian Bar Association recommends that National Parole Board panels hearing detention and section 743.6 cases not be reduced from three to two members.**

ii) Changing conditions

Currently, the function of amending, adding or deleting conditions of release for offenders is governed by section 153 of the Regulations and requires a two-person

panel. While it is sensible to permit one Parole Board member to amend a condition without a hearing if the offender concurs, it must be noted that these special conditions of release often have a profound impact on the liberty interest of the offender. For example, a condition for residence under paragraph 133(3)(a)(ii) could include a community-based residential facility, psychiatric hospital, or even a specially designated penitentiary. Surely, if the continued reasonableness of such a serious condition is in question, the case should not be determined by a single Board member.

RECOMMENDATION:

2. **The National Criminal Justice Section of the Canadian Bar Association recommends that panels considering amendments, additions or deletions of condition of release continue to consist of two members.**

B. Proposal I.2: Timing of First Review

The proposed amendment to subsection 158(2) of the Regulations to increase the time period before the parole eligibility date within which the Board is required to conduct the first review for full parole is reasonable. It allows for savings and increased efficiency without compromising fairness, and as such, is a change that we support.

C. Proposal I.3: In-person Hearing for Temporary Absence for Offenders Serving Life Sentences

We are opposed to the proposal to remove the obligation to conduct an in-person hearing in cases for first and subsequent reviews considering temporary absences for offenders serving life sentences. This proposal illustrates our observation that focussing only on efficiency and risk to the public can result in distortions to other elements of the conditional release process.

For a person serving a life sentence, a temporary absence is the first step in the long process toward ultimate release. Given the lengthy confinement the offender has already served by the time a temporary absence would be considered, being unsuccessful at the first opportunity is a setback and a serious disappointment. It also presents a new hurdle for the offender to surmount through participation in programming or treatment and compliance with the institutional regime. Notwithstanding such efforts, and even significant progress by the offender, there is no guarantee that the case management team will support subsequent requests for temporary absence.

In our view, offenders are entitled to have their situation addressed in-person at a hearing. Without such a hearing, the views of the case management team will always be determinative and will usurp the Parole Board's function. Again, if the offender consents, there is no reason why a decision cannot be effected by a paper review.

RECOMMENDATION:

3. The National Criminal Justice Section of the Canadian Bar Association recommends that first and subsequent reviews for temporary absences for offenders serving life sentences continue to require a hearing.

D. Proposal II.1: Amending Subsection 158(2) of Regulations

It is difficult to understand how the Parole Board might be forced to conduct another full parole review within one year, as suggested by this proposal. Subsection 123(5) of the *CCRA* guarantees an offender another hearing within two years. That is the clear statutory obligation.

Our biggest concern about this proposal is the reference on page 3 of the Consultation Document to the Board's policy in a way suggesting it overrides the statute. In our view, entitlements and obligations should be clearly set out in either the *CCRA* or the Regulations, not left to be developed behind closed doors by policy.

E. Proposal II.1: Accelerated Day Parole Review

We agree that moving the time for accelerated day parole review ahead is a good idea. It is a principled amendment consistent with effective, fair and timely decision-making.

F. Proposal II.2: Removing Paragraphs 165(a) and (b) from Regulations

We see no problem with this proposal.

G. Proposal II.3: Long-Term Offender Supervision

Without further specific details, we cannot address this proposal to amend the regulations to address conditions in a long-term supervision order. Long-term offender orders raise many complex issues arising from the legislative intention underlying their addition to the sentencing arsenal.

H. Proposal III.1: Amending Paragraph 160(2)(a) of the Regulations

We believe that the more notice an offender receives, the better. Obviously, it is difficult to make plans when one does not know the result of a detention referral, even though the detention rate is extremely high. Also, it must be disturbing to wait right to the last moment to know whether you will be going on statutory release or not, and cannot be consistent with either optimum re-integration prospects or public safety. The proposed amendment to require the Board to review a case for detention no later than two months prior to statutory release is good, although a three month requirement would be preferable.

I. Proposal III.2: Amending Subsection160(3) of the Regulations

We have no objection to this proposal.

III. CONCLUSION

Ensuring consistency between the governing statute, its consequential regulations and internal policy is an important and worthwhile objective. Further, the purpose of conditional release as set out in section 100 of the *CCRA* makes it clear that Parliament appreciates the connection between the timely release of offenders, effective re-integration of offenders into society and promoting public safety.

In our experience, there is already too much material which goes to Board members untested and from extraneous sources, and too little opportunity for prisoners to challenge the veracity or accuracy of such material. That situation would be exacerbated by further reducing quorums and opportunities for hearings. At the heart of effective decision-making is the fair and unbiased consideration of accurate material by National Parole Board members acting within their statutory mandate. We believe that this must be the primary objective of any revisions to the *CCRA*,

rather than cost savings possibly achieved by diminishing opportunities for prisoners to present their cases in-person to Board members.

IV. SUMMARY OF RECOMMENDATIONS

The National Criminal Justice Section of the Canadian Bar Association recommends that:

1. **National Parole Board panels hearing detention and section 743.6 cases not be reduced from three to two members.**

2. **panels considering amendments, additions or deletions of condition of release continue to consist of two members.**

3. **first and subsequent reviews for temporary absences for offenders serving life sentences continue to require a hearing.**