October 23rd, 2002

David Daubney
General Counsel
Sentencing Reform Team
Department of Justice Canada
284 Wellington Street, Room 5089
Ottawa, ON K1A 0H8

Dear Mr. Daubney,

Re: **Eleven Sentencing Papers from Department of Justice: Proposals for *Criminal Code* reform**

We write on behalf of the Canadian Bar Association National Criminal Justice Section (CBA Section) and its Committee on Imprisonment and Release. We are responding to a letter received on September 13th 2002, asking for our input on eleven proposals for *Criminal Code* reform by October 4th, 2002. Unfortunately, the suggested time frame does not permit the detailed response that we believe is warranted. However, we offer our initial input on each proposal and look forward to further opportunities to consider these proposals.

The CBA Section is comprised of both prosecutors and defence counsel from across Canada. The CBA's mandate includes seeking improvements in the law and in the administration of justice, and it is with that mandate and balanced perspective that we develop our responses to proposals for law reform.

Our comments on the eleven proposals follow in the order suggested in your letter.

1. FACTS OF A SEPARATE OFFENCE

The proposal to amend s.725 raises complex technical considerations. If, at sentencing, a person asks the court to also take into account circumstances that could amount to another charge and the prosecutor consents, there will be a bar to a subsequent prosecution related to that other charge. Given the way that outstanding charges are dealt with by s.725(1)(b) and (b.1), it makes sense to treat (c) the same way and give the Crown an opportunity to either consent or not. However, the "possible solution" suggested on page 3 of the paper would actually give the court a residual power to veto the use of the facts if it considers that a separate prosecution is "necessary in the interests of justice". This is not the court's function. We support amending s.725(1)(c) but oppose the suggested amendment.

If s.725(1)(c) were amended to add the requirement of prosecutorial consent, we expect that this would address potential problems with s.490.1. Other issues arising from the integration of s.490.1 and s.725(1) are not apparent at this point, and we do not support further amendment.

2. ENFORCEMENT OF PROBATION ORDERS

While we appreciate the basic problem addressed by the second proposal, we believe it is essential that an offender understand the terms and implications of a probation order and receive a copy of it with specific terms outlined. We have no objection to delegating the responsibility of ensuring that a copy is actually given to the offender. However, we believe that if a judge crafts optional conditions for a particular offender, the judge should explain those conditions to that offender. If the proposed amendment is seen as causing too much additional work for busy courts, a judge can delegate the duty of delivering the order and explaining probation to the registry.

We oppose the recommendation that a failure to provide a copy would not invalidate the order. If the system breaks down, the offender must have a defence to a charge of breaching the order. A solution would be to add the proposed subsection (6), as outlined on page 3. Under s.23(6) of the former *Young Offenders Act (YOA)*, now s.56 of the *Youth Criminal Justice Act (YCJA)*, a copy of the probation order is to be given to the young person, read to him or her and explained, but this is done by the "court", so the judge can delegate this administrative function to the registry. There is a provision in s.23(5) *YOA* and s.56(3) *YCJA* that requires the young person to endorse the order acknowledging receipt and explanation of it. This would be a reasonable way to accomplish the same objectives in this context.

3. CALCULATION OF TIME IN DEFAULT OF PAYMENT OF FINE FOR INDICTABLE OFFENCES

The CBA Section has previously expressed concern about imprisonment in default of payment of a fine. In our response to Bill C-41, *Criminal Code* amendments (Sentencing), we

commented on what are now the current provisions, specifically on the apparent removal of the judge's discretion not to order time in default and to replace that discretion with a formula.[1]

In earlier statements:

- we expressed general concern about imprisonment in default, except in cases where wilful refusal can be demonstrated;
- we suggested that s.734 be amended to re-insert judicial discretion to not impose time in default; and
- we recommended that any statutes with mandatory minimum fines be amended to permit judicial discretion with respect to both the size of the fine and imprisonment in default.

The *Code* already suggests other ways to collect on unpaid fines, such as license suspensions, and civil remedies are also available. If it is inappropriate to imprison a person, imprisonment should not become appropriate as a result of non-payment of a fine, especially if the person has limited means. If there is to be a default provision, it should not represent a more onerous penalty than would have been imposed in the first place.

4. ENFORCEMENT OF RESTITUTION ORDERS - S.741

In our view, it was not Parliament's intention to continue use of restitution as an adjunct of probation or conditional sentences. The intended enforcement mechanism for a restitution order under ss.738 or 739 is civil litigation. The necessary amendment should be to ensure that a person ordered to make restitution can do so according to a pre-arranged schedule. Instead of this proposal, we suggest an addition to s.740 permitting a payment schedule and providing that s.741 cannot be triggered until and unless such a schedule has been breached.

5. RECORDING PRE-SENTENCE CUSTODY ON THE RECORD - S.719 (3)

We believe that pre-sentence custody should count for more than actual time, but the proposed draft leaves to the court's discretion whether pre-sentence custody will be taken into account.[2] Requiring the court to give reasons for the value attributed to pre-sentence custody would clarify the effective sentence for both the offender and for any other court that deals with the offender in

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1 Ottawa: Canadian Bar Association, 1994 at 17.

2 We have previously recommended a statutory amendment so that any time served in custody on a charge would be credited toward any sentence later imposed on that charge: see, National Criminal Justice Section, Bill C-41, *Criminal Code* amendments (Sentencing) (Ottawa: Canadian Bar Association, 1994) 27.

subsequent proceedings. When the sentence on the record does not disclose pre-trial custody credit, it can happen that the offender may be dealt with more harshly in subsequent proceedings due to a mistaken perception that a lenient sentence was previously imposed. The usual practice is to give double, or even triple credit to pre-trial time, but this is discretionary. Requiring the judge to state what has or has not been credited as pre-trial custody and for what reason would clarify and simplify a whole area of appellate sentencing issues.

6. SUSPENSION OF ORDERS OF PROBATION OR CONDITIONAL SENTENCE PENDING APPEAL - S.683

The first proposal would simply streamline s.683(5)(e) to allow for suspension of conditions in a conditional sentence order and harmonize that section with what is currently done for conditions of a probation order. We support this amendment, provided there are no conditions of any sort placed on the offender during the interim, and so long as the offender consents.

We suggest that s.683(5) be amended:

- to say "upon application of the offender...."
- to add "conditional sentences to s.683(5)(e)."

The second proposal would come into play where the Crown launches a sentence appeal and the defence then files a last minute conviction appeal. It would create an obstacle to having the Crown sentence appeal heard in a timely fashion. In our experience, prosecutors must strictly adhere to statutory time limits to ensure the expeditious hearing of sentence appeals. Once a conviction appeal intervenes, the Crown sentence appeal is held in abeyance until the conviction appeal is heard, effectively rendering the sentence appeal moot.

It is difficult to believe that the Crown would seek to suspend the operation of a probation or conditional sentence order and have the offender in the community unsupervised without some way to bind the individual over by means of interim supervision by the court. Suspending the *order* would only be practicable if there were a provision for some form of interim supervision. Given that the penalty while awaiting determination of the appeal should not be more onerous than that imposed at first instance, the court would have to be able to consider the performance of an offender on interim supervision in relation to the appropriateness of the original sentence. This would be quite cumbersome and complicated, and in our view, would not address the problem.

7. USE OF CONDITIONAL SENTENCES FOR TIME SERVED IN DEFAULT OF FINE PAYMENT - S.734

We strongly oppose this proposal. In its 1994 submission, the CBA took the position that judicial discretion must be available when determining how to address default on fine payment.[3]

8. COMBINED SENTENCES OF FINE/PROBATION/PRISON - S.731(1)(b)

Arguably, the availability of sentences combining fines, probation and/or prison might serve to reduce the use of incarceration. The CBA has stressed on many previous occasions that incarceration should only be used as a last resort.[4] However, in the final analysis we do not believe that this proposal will be beneficial. Instead, it is likely to only add sanctions and unnecessarily extend the net of state control. The proposed amendment will inevitably lead to the over-sanctioning of some offenders, inconsistent with the principle of restraint.

9. DELAY OF SENTENCING FOR THERAPEUTIC REMANDS - S.720

Delays for therapeutic purposes can only serve to give real meaning to the codified "principles" of sentencing, including that incarceration should only be a last resort. If s.720 is being interpreted as a bar to therapeutic adjournments, in itself a controversial point, then it should be amended. However, the proposed amendment is too restrictive. Instead, we would suggest:

> Notwithstanding s.720, the court may, on application by the prosecutor, the offender, or on its own motion, adjourn the sentence proceedings for a curative, therapeutic or reparative purpose.

Our proposed wording would be sufficient, and would not run the risk of excluding appropriate cases. The amendment should not be restricted to specific categories, or a definite time period, but must allow creativity and a case-by-case approach to sentencing. Courts are competent to determine when a lengthy adjournment will be useful. It is also beneficial for the *Code* to recognize and legitimize what is already common in practice. Such adjournments should also not be contingent upon the proposed program being designated by the Attorney General or a delegate. Rather, the list of programs should be left open for the court to decide, based on evidence led by counsel to justify the requested adjournment.

10. FINE COLLECTION: USE OF BAIL MONEYS HELD BY THE COURT - S.734(6)

Many people who post cash for bail are only able to do so by borrowing the money from friends or family members. We suspect that those individuals would be significantly less likely to lend bail money if this proposal were to be implemented, and the money they posted as bail could be seized to pay a fine. There are other ways to collect fines. Also, there might be assignment of

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[3] *Ibid.* at 17.

[4] CBA's adoption of principles of proportionality and restraint in imposing criminal sanctions, in keeping with recommendations of the Law Reform Commission, the *Archambault Report* and the *Daubney Report*, as outlined *ibid*. at 5.

bail issues, such as where the offender assigns the bail to his defence counsel as the counsel's fees. Given these considerations, we oppose this proposal.

11. PROPOSED AMENDMENT TO SS.202 AND 203 TO REMOVE PROVISIONS FOR A MINIMUM PENALTY IN GAMING OFFENCES

This proposal is supported by the CBA Section. We have opposed mandatory minimum penalties in many previous submissions, as they too often result in injustice in individual cases.[5] The proposal should be encouraged for all of the reasons that would militate against minimum penalties, and to allow the possibility of a conditional sentence for such offenders in appropriate cases.

Thank you for this opportunity to provide you with our views. We would be pleased to consider the issues raised in more detail, should time allow for such consideration in future.

Yours truly,

"original signed per Gaylene Schellenberg"

Kate Ker
Chair
National Criminal Justice Section

Allan Manson
Chair
Committee on Imprisonment and Release

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[5] See discussion in CBA, Bill C-68, *Firearms Act* (Ottawa: Canadian Bar Association, 1995) at 10.