Submission on Bill C-20, *Criminal Code* Amendments (protection of children and other vulnerable persons)

NATIONAL CRIMINAL JUSTICE SECTION
CANADIAN BAR ASSOCIATION

August 2003

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PREFACE

The Canadian Bar Association is a national association representing 38,000 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 of the Canadian Bar Association, with assistance from the Legislation and Law Reform Directorate at the 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 (CBA Section) appreciates this opportunity to express its views on Bill C-20, *Criminal Code* and *Canada Evidence Act* amendments (protection of children and other vulnerable persons). We have previously considered some of the issues addressed by the Bill in our submissions in response to Justice Canada's consultation papers, *Child Victims and the Criminal Justice System* in 2000, and *Voyeurism as a Criminal Offence* in 2002.

II. PREAMBLE

The CBA Section supports the message conveyed by the Preamble to Bill C-20. It is difficult to overemphasize the importance of protecting one of the most vulnerable groups of society — our children. We appreciate this Bill's efforts to increase protection of children and young persons from offences through exploitative relationships, send a strong message by increasing the penalty for some offences, make further adjustments to alleviate some of the trauma associated with having to testify and recognize that children and young persons are generally, but not always, competent to testify.

III. SEXUAL INTERFERENCE

Proposed sections 151 and 152, contained in Clause 3 of Bill C-20, would change the sexual interference offences covered there to "super summary" conviction offences. As such, the available penalty would increase from six months to eighteen months imprisonment. We support this change, as it allows prosecutors and sentencing judges more flexibility and discretion to deal with the facts of a particular case.

IV. EXPLOITATIVE RELATIONSHIPS

Clause 4 of the Bill would amend section 153 of the *Criminal Code* to add a fourth category of prohibited sexual relationships with persons under the age of eighteen years, where a position of trust, authority or dependency is violated. This fourth category, the "exploitative relationship" offence, is likely a warranted addition and the factors to be considered under clause 4(2) could help to clarify what constitutes such a relationship. We also appreciate the proposal to make it a "super summary" offence, for reasons given above.

However, in our view, the section may well be considered too vague or broad to survive constitutional challenge. While the factors to be considered in determining whether a relationship is exploitative, enumerated in clause 4(2) of Bill C-20, are some of those outlined by LaForest J. in the Supreme Court of Canada's leading decision in *R.* v. *Audet*,[1] this may be insufficient to insulate against a challenge for vagueness. If an adult in a sexual relationship with a "consenting" young person does not know they have entered the forbidden territory of an "exploitative relationship" given the imprecise parameters of the offence, that adult may well be unaware they are committing an offence.

1 *R.* v. *Audet* (1996), 106 C.C.C. (3d) 381 (S.C.C.).

Existing concerns over the imprecision or lack of definition for terms such as "position of trust" and "relationship of dependency" are clear in the *Audet* decision and several related provincial appellate and lower court decisions show similar efforts to grapple with the issue.

V. CRIMINAL VOYEURISM

Clause 6 of the Bill would create the offence of criminal voyeurism. In the CBA Section's recent response to Justice Canada's consultation paper, *Voyeurism as a Criminal Offence*, we supported creating such an offence. We also noted that "as consumers fuel the market for voyeuristic material, we run a risk of making eradication of the practice difficult, if not impossible, by failing to criminalize simple possession of such material."[2]

In spite of our general support, though, we have serious concerns about section 162(7). We recognize that sections dealing with whether the act serves the public good and making the motives of the accused irrelevant closely resemble current sections 163(4) and (5) pertaining to obscenity. However, the obscenity sections do not contain a requirement like that contained in Bill C-20's section 162(1)(c), which specifies that the observation or recording is done "for a sexual purpose". Surely, if an accused is charged with surreptitiously observing or making a visual recording of a person "for a sexual purpose", then motives will be relevant to that person's defence. We are also opposed to section 162(7)(a), which would limit defence appeals and preclude Crown appeals on the pivotal issue of balancing whether the act in question does or does not extend beyond what serves the public good.

2 Submission on *Voyeurism as a Criminal Offence*, Ottawa: Canadian Bar Association, 2002, at 3.

VI. CHILD PORNOGRAPHY

Clause 7 of the Bill would add a new category of offending material to the definition of "child pornography" in section 163.1. It would include materials written for a sexual purpose that are primarily about sexual offences against children and young persons. This appears to be a legislative response to the public outcry over the acquittal in *R.* v. *Sharpe*[3] with respect to written materials the accused authored and possessed. While we appreciate the intent, the amendment may not achieve its goal. Authors of such materials are likely to simply adjust their writing to permit the argument that it is not "for a sexual purpose." The onus would then move back to the Crown to prove beyond a reasonable doubt that the defence does not apply.

The concerns we expressed above about the use of the phrase "for a sexual purpose" are again relevant to proposed section 163.1(1)(c). That section seems to require a sexual motive on the part of the accused, while section 163.1(7)(c) states that the motives of the accused are irrelevant. This inconsistency may attract constitutional scrutiny, and should be addressed. Our concerns about the Bill's limitations on appeals in the context of voyeurism are also applicable in the context of section 163.1(7)(b).

Clause 7 appears to respond to the second controversial issue raised by the *Sharpe* decision — the Supreme Court of Canada's modification and expansion of the "artistic merit" defence for the child pornography provisions and its rejection of incorporating the "community standards of tolerance" test from cases concerning obscenity into this area of the law.[4] Bill C-20 would amend the defence to bring it in line with the obscenity provisions in sections 163(3) and (4). Whether the

3 [2002] B.C.J. No. 610 (B.C.S.C.).

4 *Ibid*., at 61-67.

courts will reinterpret and incorporate the largely judicially created defence of "artistic merit" from obscenity cases remains to be seen.[5]

Clauses 8 and 9 of Bill C-20 would simply add materials from voyeurism offences into the mix with forfeiture orders, warrants of seizure and return of materials.

VII. FAILING TO PROVIDE / ABANDONMENT OFFENCES

Clauses 11 and 12 of Bill C-20 would increase the penalties for failing to provide the necessaries of life and abandonment offences. While the desire to send a clear message that such conduct will not be tolerated and will be dealt with severely is understandable, we question whether a symbolic increase in penalty will have any significant effect. Most of these cases involve parents who are unable to cope due to poverty, alcoholism, unemployment, lack of education, drug addiction and similar social problems. Given this reality, an increase in penalty is quite unlikely even to reduce the problem let alone eradicate it. Better social services and a more expansive social safety net are more liable to result in a real reduction of these types of offences. However, we again support the proposed change to "super summary" status for the added flexibility and discretion offered for summary conviction offences. By raising the maximum sentence available on indictment, the accused would also have the option of a jury trial.

VIII. PUBLICATION BAN

Clauses 13 and 14 would update the publication ban on prior sexual activity or therapeutic or third-party records of a complainant to include modern means of dissemination of information, such as the internet. While this is a worthwhile amendment, it does not appear to address the problem of foreign media publishing the information.

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5 *Ibid.*, at 67.

IX. WITNESS TESTIMONIAL AIDS

Clause 15 of Bill C-20 would repeal current section 486 and introduce new sections 486 through 486.6. Clarifying the current assortment of provisions to create specific sections for each issue relating to the presentation of evidence, particularly the evidence of children, is commendable.

1. Exclusion Orders

Section 486(2)(a) would expand the exclusion order power to encompass all offences where a child must testify, not just sexual offences and offences of violence. Under section 486(3), a judge who refuses to make an exclusion order would be required to give reasons for the refusal only if an offence mentioned in section 274 is involved. Orders may also be refused, for example, in cases involving sections 229 or 231, and it seems inconsistent to require reasons only in some cases. Further, if reasons are to be required for a refusal, it seems appropriate and balanced for them also to be required for granting such an order.

2. Witness Support Persons

Section 486.1 would create a code of procedure for persons providing witness support, and section (1) would increase the age for child witnesses eligible to have support to eighteen. This is commendable, but the following section would permit a support person for any witness at all if that is considered necessary for a full and candid account of the relevant acts. This is overly expansive, and should be confined to a complainant, rather than any witness. Witnesses with mental or physical disabilities would still be covered by section (1).

The language of proposed section 486.1(5) changes the prohibition against communication between the support person and witness from “during the testimony of the witness” to “while the witness testifies”. This arguably could permit communication between the support person and the witness while the

witness is still the subject of examination, though not on the witness stand, for example, during a break in the evidence or an adjournment. This change inadequately protects against influences on a witness's testimony, especially if the ability to have a support person present is widened by proposed section (2). We recommend changing the language to "during the testimony of the witness". To be consistent with the earlier provisions, it may also be appropriate to require the judge to supply reasons for permitting or denying the provision of a support person.

3. Alternative Forms of Testifying

Section 486.2 would create a code of procedure for testifying outside the courtroom or behind a screen or other identification-protecting device. Section (1) appropriately increases to eighteen the age for child witnesses to testify outside the courtroom or behind a screen. However, section (2) permits any witness to testify outside the courtroom or behind a screen if that is necessary to obtain a full and candid account of the relevant acts. Again, this is too expansive, and may well prejudice an accused's ability to make full answer and defence through effective cross-examination. Such a significant expansion may further impinge upon constitutional guarantees to a fair and public hearing and the right of an accused to face his or her accuser. This should also be confined to a complainant, rather than any witness, and again, witnesses with mental or physical disabilities would still be protected by section (1). Finally, to be consistent with the other provisions, the judge should give reasons for permitting or denying the witness to testify outside the courtroom or behind a screen.

4. Cross-Examination by Accused Personally

Proposed section 486.3 creates a code of procedure for cross-examination of various witnesses by the accused personally. It appropriately expands the range of offences for which witnesses under eighteen are not subject to personal cross-examination by an accused beyond those specified currently in section 486(2.3).

However, section (2) expands the group of witnesses eligible for protection from personal cross-examination by an accused to any witness at all. This casts the net too wide and could unduly delay proceedings while counsel is obtained solely for cross-examination. It may unfairly prejudice an accused left to conduct some aspects of the case alone, but not others. It also raises issues for legal counsel. What about disclosure? What about the lawyers' obligations? Will such a cross-examination be fair to the accused? What about the accused who refuses assistance, or who seeks it haphazardly and here-and-there during the trial? This provision should be restricted to complainants where the offence involves violence, or the threat of violence, physical or psychological injury, and the test should remain the same as for section (1). Limiting the proposed provision to criminal harassment offences in section (4) is illogical. Complainants in domestic violence, sexual and physical assault cases may be equally vulnerable. Section (4) should be deleted and section (2) confined to complainants of offences as outlined previously.

Overall, proposed section 486.3 is ambiguously worded, and needs further clarification. In addition, it is difficult to imagine circumstances in which an unrepresented accused could properly cross-examine a child witness, especially given the intent of this legislative proposal to guard against child exploitation. But, the section leaves open the possibility that the accused could actually be <u>required</u> to personally cross-examine a witness. Further, it requires an application by the prosecutor or witness for a direction that an accused not personally conduct the cross-examination. In our view, this is inappropriate. Few witnesses will be aware of this provision and, while every prosecutor should be alert to it, there may be times when it will be overlooked, even when the accused's personal conduct of a cross-examination is clearly inappropriate.

5. Videotaped Evidence

Both proposed replacement provisions for video-recorded evidence delete the term "complainant" and replace it with the term "victim". The term "victim" will often be inappropriate for use in the pre-verdict phase of criminal proceedings, given the presumption of innocence.

Section 715.2 would expand the range of offences where video-recorded evidence by the complainant or witness may be admitted, allowing the reception of such evidence from any complainant or witness for any offence, provided the statutory criteria are met. While it is important to allow the option to admit earlier video-recorded evidence of some witnesses in unusual circumstances, such as where the witness subsequently suffers a physical or mental impairment, the category of offences should be restricted to more serious personal injury and property offences, rather than the full panoply of *Criminal Code* offences. In our 2000 submission (at pp. 10 and 11), we stressed that competing concerns must be balanced to ensure that the right to a fair trial and to make full answer and defence is not unduly abrogated by too broad an admission of earlier video-recorded evidence without contemporaneous cross-examination of the witness. The proposed section creates a presumption in favour of admissibility, unless admission would, in the presiding judge's opinion, interfere with the proper administration of justice. Where the witness is not a child of tender years or a complainant, a more rigorous test for admissibility is appropriate.

X. CANADA EVIDENCE ACT

Clause 26 of Bill C-20 would amend section 16 of the *Canada Evidence Act* by reversing the presumption of testimonial incompetence of a witness under fourteen years of age. In our 2000 submission on child victims and witnesses, we recognized merits on both sides of the debate about abolishing competency requirements of child witnesses. However, we continue to believe, as we stated in that submission, "that further study into options for accepting testimony by

witnesses challenged by either youth or capacity, such as those being explored in the United States or the United Kingdom, should be undertaken before amending our laws."[6]

We are concerned about the outright abolition of the competency hearing for children under fourteen years of age. While some flexibility and judicial discretion should be permitted, proposed section 16.1 would presume that every witness under the age of fourteen has testimonial capacity. Children of any age group vary significantly, and there is a huge difference between a child just learning to speak and one almost fourteen. While a two-year old may be able to answer questions, how much weight can we safely attach to those answers? We suggest that Bill C-20 be amended to require the trier of fact to be satisfied of a witness' ability to answer questions, although age should not be the sole factor for consideration.

While we see the value of this amendment, it appears to create an inconsistency between proposed section 16.1 of the *Canada Evidence Act* and section 151 of the new *Youth Criminal Justice Act (YCJA*). Section 151 allows the evidence of a child to be taken only after the judge has instructed the child about the duty to speak the truth and the consequences of failing to do so, and, if necessary, instructed the child to speak the truth and the consequences of not doing so. If we are correct in this observation of inconsistency, a consequential amendment to the *YCJA* should be added to Bill C-20.

It is also unclear how an accused could meet the burden of establishing incapacity in section 16.1. Would the accused have to catch the witness in a lie or at least a state of confusion? Would the witness have to be in such a state all the time, or

6 Submission on *Child Victims and the Criminal Justice System*, Ottawa: Canadian Bar Association, 2000, at 9.

only at one point in time? The onus of establishing incapacity should not fall to the accused.

While Bill C-20 appears to be an attempt to alleviate the difficulties faced by child witnesses when they testify, the wholesale repeal of the competency inquiry may have unintended effects upon those witnesses. If the party challenging the competency of the witness must establish to the court's satisfaction that the child is unable to understand and respond to questions, the legislation could expose children to immediate cross-examination by an adverse party. The test, onus and procedure must be reviewed to protect vulnerable child witnesses from likely unfamiliar and potentially frightening initial inquiries about their ability to answer questions.

Under the current automatic competency inquiry, the hearing judge usually conducts the inquiry in the presence of both counsel and the matter is relatively non-adversarial. We question how this proposal would fit into the current framework. Would that inquiry still take place? The amendment also does not address whether any change is contemplated to the process of determining whether the child will be sworn or whether they will make a promise to tell the truth. In general, we are unclear about the effect section 16.1 would have on the current regime and what is hoped to be accomplished with this section.

XI. SENTENCING

We support the amendment to section 718.2(a)(ii) to make it an aggravating circumstance that the offence was committed against a common law partner or against a child (as opposed to just the offender's child). However, if the maximum penalty available for the offences targeted by Bill C-20 is to be increased, we must be wary of potential overuse of that maximum penalty. It is

very likely that all charges under this proposed legislation would already attract an aggravated penalty. All sentences should be imposed with proper consideration of the harm actually caused in the circumstances of each case.

XII. CONCLUSION

The CBA Section supports the stated objectives of Bill C-20 and appreciates this opportunity to provide our input toward improving the Bill. With the amendments we have suggested, we would support the passage of Bill C-20.