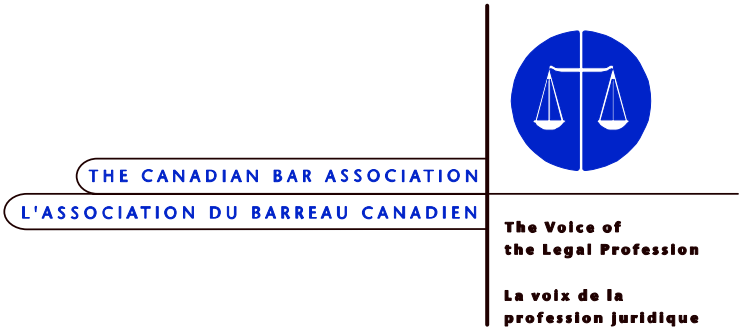

Bill C-215 – *Criminal Code* amendments (consecutive sentences)

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PREFACE

The Canadian Bar Association is a national association representing 36,000 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.

Bill C-215 – *Criminal Code* amendments (consecutive sentences)

I. INTRODUCTION

The Canadian Bar Association's National Criminal Justice Section and its Committee on Imprisonment and Release (CBA Section) appreciate the opportunity to comment on Bill C-215, *Criminal Code* amendments (consecutive sentences). The CBA Section consists of defence lawyers, prosecutors and legal academics from every province and territory.

In 1995, the *Firearms Act* added ten mandatory minimum sentences of four years to the *Criminal Code.* These apply to stipulated offences[1] when "a firearm is used in the commission of the offence". It appears that Bill C-215 is intended to broaden and duplicate the 1995 amendments, as it pertains to the same offences already subject to the four-year mandatory minimum sentence. The Bill proposes a significant new layer of penalties:

- possessing a firearm in the commission of the offence: 5 years minimum;
- discharging a firearm in the commission of the offence: 10 years minimum; and
- causing bodily harm through discharge of a firearm in the commission of the offence: 15 years minimum.

Like the *Firearms Act*, Bill C-215 would impose these lengthy penalties in addition to whatever sentence is imposed for the underlying offence. Perhaps most remarkable, the Bill proposes adding to sentences for murder, where the punishment is already a mandatory sentence of *life imprisonment*, with lengthy periods of parole ineligibility.

1 See *Firearms Act*, SC 1995, c.39, sections 141-150 re: criminal negligence causing death, manslaughter, attempted murder, causing bodily harm with intent, sexual assault with a weapon, aggravated sexual assault, kidnapping, hostage-taking, robbery, and extortion.

The CBA Section has consistently opposed the use of mandatory minimum penalties.[2] We recognize the importance of measures to deter the illegal use of firearms, but stress that such sanctions must be consistent with fundamental sentencing principles contained in the *Criminal Code* and constitutional guarantees, and follow the guidance well-established through Canada's common law. In summary, we believe that:

1. Mandatory minimum penalties do not advance the goal of deterrence. International social science research has made this clear.[3] Canada's own government has stated that:

   > The evidence shows that long periods served in prison increase the chance that the offender will offend again…In the end, public security is diminished, rather than increased, if we "throw away the key".[4]

2. Mandatory minimum penalties do not target the most egregious or dangerous offenders, who are already subject to stiff sentences. More often, it is less culpable offenders who are caught by mandatory sentences and subjected to extremely lengthy terms of imprisonment.

3. Mandatory minimum penalties have a disproportionate impact on minority groups who already suffer from poverty and deprivation. In Canada, this will affect aboriginal communities, a population already grossly over represented in penitentiaries, most harshly.[5]

4. Mandatory minimum penalties subvert important aspects of Canada's sentencing regime, including principles of proportionality and individualization.

II. ANALYSIS OF BILL C-215

A. Eliminating Judicial Discretion

The CBA Section has confidence in the important role of Canada's judges in the operation of the justice system. There are good reasons for conferring discretion on the judge charged with

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2 For example, see Submission on Bill C-68, *Firearms Act* (Ottawa: CBA, 1995) at 10-13; Letter to Senator Beaudoin from CBA President, G. Proudfoot (Ottawa: CBA, 1995); Submission on Bill C-41, An *Act to amend the Criminal Code (sentencing)* (Ottawa: CBA, 1994).

3 See, for example, Michael Tonry, "Mandatory Penalties" (1992), 16 Crime and Justice Review 243, which begins with the simple and succinct statement, "Mandatory penalties do not work".

4 Department of Justice, *A Framework for Sentencing, Corrections and Conditional Release: Directions for Reform* (Ottawa: DOJ, 1990) at 9.

5 Juristat: Canadian Centre for Justice Statistics, "Returning to Correctional Services after release: A profile of Aboriginal and non-Aboriginal adults involved in Saskatchewan Corrections from 1999/00 to 2003/04", Vol. 25: 2 (Ottawa: StatsCan, 2005).

imposing a fit sentence. That judge has heard the particular circumstances of the offence and the offender, and is able to craft a particular sentence that best achieves the various goals of sentencing. That judge is also best equipped to determine the appropriate sentence for the particular community where the offence took place.

The mandatory minimum sentences proposed in Bill C-215 would remove discretion from sentencing judges. Multiple mandatory minimum penitentiary terms would generally be served far from contact with communities and families, going against efforts to promote eventual reintegration or rehabilitation of offenders. Under Bill C-215, local judges would have no discretion but to sentence an offender from Nunavut, for example, to a very lengthy mandatory sentence in Bracebridge, Ontario, to the facility where offenders from the territory are routinely sent.

Bill C-215 would take away the ability of judges to effectively determine which sentence can best accomplish all fundamental objectives of sentencing. If the intention is to encourage harsher sentences, Canadian judges presently have sentencing tools to achieve that goal, when the offence and the offender warrant an unusually harsh response.

B. Fundamental Sentencing Principles

Sentencing judges take into account all fundamental sentencing principles, none of which exclude or override the others. That approach accords with a measured sentencing regime, and, in our view, common sense.

Certainly, deterrence is one important principle of sentencing. However, the consecutive sentences proposed by Bill C-215 are substantial, adding five, ten or fifteen years' imprisonment to the penalty imposed for the offence itself, plus the mandatory minimum already imposed for use of a firearm. The Bill's obvious emphasis on deterrence over all other sentencing principles is, in our view, misplaced. Even if it were true that deterrence is completely effective, which we know is incorrect, it does not follow that other principles of sentencing may be safely ignored.

A fundamental sentencing principle in *Criminal Code* section 718.1 is proportionality, i.e. that a "sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender". A serious problem with Bill C-215 is that it would directly contradict this fundamental principle. The same weighty mandatory minimum sentence would apply to all offenders, including those whose offence and degree of responsibility vary significantly.

Proportionality reflects the necessary and delicate balance that must be achieved in fashioning a just sentence. This balance is also necessary for the administration of a justice system that is explicable and responsive to its citizens. Logic and fairness requires an individualized, proportional sentence. We believe that this is why minimum sentences have been severely criticized in many important studies, including Canada's own 1987 Sentencing Commission Report.[6]

Our criticisms of this Bill are not purely theoretical. If it is acknowledged that even some offenders are good candidates for rehabilitation, mandatory minimum punishments will ensure those offenders remain incarcerated long after their detention acts as either a deterrent or to promote rehabilitative goals, at great cost to society. In our view, warehousing individuals for no legitimate purpose will only garner disrespect for the law generally, and this law specifically.

C. Social Science Research

In the United States and Australia, criminologists have given careful study to the effects of mandatory sentencing on attaining sentencing objectives. The state of Western Australia introduced two mandatory minimum sentencing schemes in 1992 and 1996, respectively, targeting high-speed vehicle chases and home burglaries. Subsequent sentencing data was used by Professor Neil Morgan of the Crime Research centre at the University of Western Australia in a study to examine the effects of these provisions. In the course of his study, Professor Morgan also examined recent literature in the United States. He stated that:

> The obvious conclusion is that the 1992 Act has no deterrent effect. This is fully in line with research from other jurisdictions.[7]

6 Report of the Canadian Sentencing Commission, *Sentencing Reform: A Canadian Approach* (the Archambault Report) (Ottawa: Supply and Services Canada, 1987).

7 Neil Morgan, "Capturing Crimes or Capturing Votes: The Aims and Effects of Mandatories" (1999), UNSW Law J. 267 at 272.

On incapacitation, Morgan concluded:

> The evidence is clear; as a strategy for selective incapacitation, mandatory sentences are ineffective.[8]

In a Canadian context, with the inordinately high level of incarceration of people of Aboriginal background,[9] Morgan's most important conclusions relate to the discriminatory impact of mandatory sentencing. He concludes:

> On the face of it, mandatories are not discriminatory. Indeed, they appear to be the very opposite; they allow for no differentiation according to race, sex or age. *However, it is clear that mandatories are discriminatory in effect.* Numerous examples can be given but they all boil down to one simple point - mandatories involve the policy choice to select certain types of criminal activity for special attention. These policies choices invariably involve the selections of offences... in which minority and lower socio-economic groups are over-represented.[10] (emphasis added)

In the United States, it is well documented that the so-called "war on drugs" has been principally an instrument used to justify the incarceration of young African-American men. Similarly, in Western Australia, the mandatory minimum penalties "disproportionately affected Aboriginal men".[11]

D. Coherence with Existing Law

Bill C-215 must also be analyzed in terms of how it fits in the context of other Canadian laws, including existing provisions of the *Criminal Code* and the Constitution. The Bill's consecutive sentences of five, ten and fifteen years are extremely substantial terms of incarceration. Section 718.3(2) of the *Criminal Code* provides:

> Where an enactment prescribes a punishment in respect of an offence, the punishment to be imposed is, subject to the limitations prescribed in the enactment, in the discretion of the Court that convicts a person who commits the offence, but no punishment is a minimum punishment unless it is declared to be a minimum punishment.

Section 718.2 of the *Criminal Code* states that "where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh." Bill C-215 would contradict that in many circumstances. Clearly, one provision of the *Criminal Code* should not contradict another.

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8 *Ibid*., at 275.

9 *Supra,* note 5.

10 *Supra,* note 7 at 277.

11 *Ibid*.

The sentences proposed by the Bill would, in our view, be subject to challenge under section 12 of the *Canadian Charter of Rights and Freedoms*. While minimum punishments have survived scrutiny in some narrow circumstances, we believe that it would be difficult to justify the substantial punishments imposed by this Bill, with no opportunity for judicial discretion.

It is important to remember that each offence to which this Bill applies already has a four-year minimum attached to it for the use of a firearm in its commission. In addition, sentencing judges have significant ranges of sentences available, so that the maximum allowed where circumstances warrant can guarantee a lengthy sentence. In our view, Bill C-215 purports to fill a gap in the law where none exists.

In addition to minimum punishments for use of firearms, the Bill provides for a minimum 15-year sentence in addition to a manslaughter sentence where a different individual is injured or killed by the use of a firearm. Obviously, this situation could already have been addressed through a separate charge on the indictment for that injury or death. Again, there is no gap in the law for this Bill to fill.

The Bill would apply to a variety of offences. It suggests a consecutive sentence to the punishment for murder, already a life sentence. Although we recognize that a possibility of parole exists after very lengthy periods of incarceration are served, it should be recalled that the sentence does continue, whether or not parole is granted, for the duration of the offender's life. This provision would disregard the advice of several courts, which have repeatedly held[12] that sentences impossible to fulfill ought not to be imposed. To do so only increases disrespect for the law. A prime example of a sentence that cannot be carried out is a sentence consecutive to life imprisonment.

III. CONCLUSION

The CBA Section strongly opposes passage of Bill C-215. It would eviscerate trial judges' discretion to impose an appropriate sentence that reflects the moral blameworthiness of the

12 For example, see *R. v. Sinclair* (1972) 6 CCC (2d) 523 (Ont. C.A.).

offender, while balancing principles of rehabilitation, deterrence and denunciation, and imposing the least restrictive sentence appropriate in the circumstances. The mandatory minimum sentences proposed by the Bill would serve no legitimate sentencing purpose, cast too broad a net and so capture those not intended to be captured, and have a disproportionate and unnecessary impact on groups that already suffer from unacceptable levels of poverty and deprivation. In Canada, the impact on Aboriginal communities would be particularly devastating.