THE CANADIAN BAR ASSOCIATION
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Bill C-53 — *Criminal Code (proceeds of crime)* and *Controlled Drugs and Substances Act* amendments

NATIONAL CRIMINAL JUSTICE SECTION
CANADIAN BAR ASSOCIATION

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PREFACE

The Canadian Bar Association is a national association representing over 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-53 – *Criminal Code* (proceeds of crime) and *Controlled Drugs and Substances Act* amendments

I. INTRODUCTION

The Canadian Bar Association's National Criminal Justice Section (CBA Section) is pleased to have an opportunity to provide comments concerning Bill C-53, *Criminal Code (proceeds of crime)* and *Controlled Drugs and Substances Act* amendments. The CBA Section includes academics, prosecutors and defence lawyers from every province and territory in Canada.

The CBA Section recognizes that law enforcement agencies and courts need tools to help ensure that profit from crime is forfeited, and so to remove the financial incentive for committing crime. However, all proposed legislation should be clearly drafted and comport with constitutional standards within Canadian democracy. It is against that background that we make these comments and recommendations concerning Bill C-53.

II. ANALYSIS OF BILL C-53

A. Defining Designated Offence

The Bill would apply to a "designated offence", defined as "any offence that may be prosecuted as an indictable offence…" (emphasis added). This definition would include indictable and hybrid offences. With the increasing trend towards creating new hybrid offences, the definition is expansive, and will likely continue to grow as the number of hybrid offences increases. In our view, offences that fall within the definition of "designated

offence" should be closely monitored to ensure that the powerful seizure and forfeiture provisions are operating fairly, and are consistent with the broader objectives of this legislation.

RECOMMENDATION:

The CBA Section recommends that the list of "designated offences" be closely monitored to ensure that the powerful seizure and forfeiture provisions operate fairly, and achieve the objectives of this legislation.

B. Search Warrants

Section 462.32 allows a judge to issue a warrant to search "any building, receptacle or place" where there are reasonable grounds to believe that property subject to forfeiture may be present. The CBA has consistently and strongly emphasized that any law reform initiatives must respect the constitutional imperative of privilege between lawyers and their clients.[1] We have advocated for special rules to govern searches of any location where either privileged or confidential information might reasonably be expected to be located.[2]

RECOMMENDATION:

The CBA Section recommends that section 462.32 be amended to specifically exclude a location where information that is privileged and/or confidential might reasonably be expected to be located from the ambit of a search warrant. Alternatively, the section should be amended to specifically require a judge to impose rules and procedures to protect the privileged or confidential information when the target location of a search is a place where it might reasonably be expected that confidential or privileged information may be held.

While we realize the underlying objective of this section, protecting solicitor-client privilege is fundamental to a fair and just legal system.[3] However pressing the objectives of

1 For example, see the CBA's many submissions in regard to the inclusion of lawyers within the reporting requirements under the *Proceeds of Crime Act*.

2 See *Festing v. Canada (Attorney General)* 2003, BCCA 112.

3 See, for example, *Lavallee, Rackel and Heintz v. Canada (Attorney General)*, [2002] 3 SCR 209 at para. 36.

the Bill may be, they should not be advanced in a manner inconsistent with solicitor-client privilege and confidentiality.

C. Sentencing

The proposed sentencing amendments are of serious concern, as the penalty by forfeiture would not need to be linked to the crime for which the offender has been convicted. The sentencing scheme contemplated by section 462.37(2.02) would require a judge to order the forfeiture of any property identified by the Attorney General when the court is satisfied, on a balance of probabilities, that there has been a pattern of criminal activity within ten years of the proceedings, or the income of the offender from sources unrelated to the offences cannot reasonably account for the offender's property. This would apply to offences defined by section (2.02) and not to "designated offences". Section (2.03) provides that a forfeiture order shall not be made if the offender establishes, on a balance of probabilities, that the property is not the proceeds of crime. Finally, sections (2.04) and (2.05) set out considerations for determining whether there has been a pattern of criminal activity.

We have several concerns about the proposed sentencing scheme. The structure of the Bill is such that the forfeiture contemplated is part of the more general scheme of sentencing within the *Criminal Cod*e. Section 462.37 deals with forfeiture applications after conviction of any designated offences. For example, section 462.37(3) would enable a court to impose a fine, in lieu of forfeiture, when the property subject to forfeiture cannot be located or has been transferred. This demonstrates that forfeiture is directly tied to punishment. Also significant is that the operation of section 462.37(4) mandates a scheme of consecutive imprisonment when an individual is unable to pay a fine. Historically, the law has tended to recognize that a fine is a form of punishment, and that the financial ability of an accused to pay must be considered in determining the appropriate fine. Section 462.37(4) provides:

> Where a court orders an offender to pay a fine pursuant to subsection (3), the court shall
>
> (a) impose, in default of payment of that fine, a term of imprisonment
> (i) not exceeding six months, where the amount of the fine does not exceed ten thousand dollars,
> (ii) of not less than six months and not exceeding twelve months, where the amount of the fine exceeds ten thousand dollars but does not exceed twenty

thousand dollars,
(iii) of not less than twelve months and not exceeding eighteen months, where the amount of the fine exceeds twenty thousand dollars but does not exceed fifty thousand dollars,
(iv) of not less than eighteen months and not exceeding two years, where the amount of the fine exceeds fifty thousand dollars but does not exceed one hundred thousand dollars,
(v) of not less than two years and not exceeding three years, where the amount of the fine exceeds one hundred thousand dollars but does not exceed two hundred and fifty thousand dollars,
(vi) of not less than three years and not exceeding five years, where the amount of the fine exceeds two hundred and fifty thousand dollars but does not exceed one million dollars, or
(vii) of not less than five years and not exceeding ten years, where the amount of the fine exceeds one million dollars; and

(b) direct that the term of imprisonment imposed pursuant to paragraph (a) be served consecutively to any other term of imprisonment imposed on the offender or that the offender is then serving.

An individual may, therefore, be ordered to serve a consecutive term of imprisonment of up to ten years if unable to pay a fine ordered by the court. The fine and the corresponding term of imprisonment are not therefore connected to an offender's ability to pay.

The significance of this is compounded because Bill C-53 imposes a reverse onus. Under section (2.01), once the court has been satisfied that there has been a pattern of criminal activity or the property cannot be accounted for from legitimate sources, the offender must demonstrate that the property in question is not the proceeds of crime. If the offender is unable to satisfy that onus, then property will be ordered forfeited. If the property is unavailable for forfeiture, a fine will be imposed as punishment. If unable to pay the fine, the court must order a consecutive period of imprisonment.

The reverse onus under section (2.03) requires an offender to prove on a balance of probabilities that specifically identified property is not proceeds of crime. In contrast, a court must order forfeiture of specifically identified property after it has found a pattern if criminal activity or that the offender's income cannot reasonably account for the property. In other words, property may be forfeited though the Crown has not proven the specific property to be proceeds of crime.

Canadian criminal law is founded upon certain principles that include:

- an individual is presumed innocent until the Crown proves guilt;
- guilt must be proved beyond reasonable doubt; and
- each aggravating factor in sentencing must also be proved beyond a reasonable doubt.

This last proposition has been well established since the decision of *R. v. Gardiner*,[4] and more recently re-affirmed in *R. v. McDonnell*.[5] In *McDonnell*, the court held that, if an aggravating factor were to be presumed, the burden would be "improperly lifted from the Crown and shifted to the accused to disprove…".[6]

Certainly, forfeiture is a component of sentencing. A sentence is increased, or made more severe, through an order of forfeiture, the imposition of a fine in lieu of forfeiture, or imprisonment in default of payment of a fine.[7] It follows that an order of forfeiture combined with a sentence otherwise imposed for guilt in relation to a substantive offence, may significantly increase the sentence. This could occur though the Crown has not specifically proven that identified property is actually the proceeds of crime. This could also occur where an offender has been unable to prove, on the balance of probabilities, that property is not the proceeds of crime. It may cause an otherwise fit sentence to become unfit.

The CBA Section is concerned that these provisions of the Bill run contrary to well established principles in criminal law and therefore be subject to constitutional challenge.

D. Returning Documents, but Retaining Copies

Section 462.46 provides that the Attorney General may retain a copy of any document that a court might otherwise order returned. Such documents may come into the possession of the

4 [1982] 2 SCR 368.

5 (1997) 114 CCC (3d) 436 (SCC).

6 *Ibid*., at para. 37.

7 *R. v. Murrins* (2001), 162 CCC (3d) 412 at para.100 (NSCA), and *R. v. McGregor* (1956), 64 Man R 206 (Man QB).

Attorney General as a result of the arrest of an individual, the discovery of the documents pursuant to a search pursuant to arrest, or through the execution of a search warrant. A court might order the return of documents if an individual has been acquitted of charges, or if the arrest of the individual or execution of a search warrant has been found to violate constitutional standards of protection.

Certainly, documents may contain information of a highly personal or sensitive nature, and so involve a significant privacy interest. Section 462.46 would permit the Attorney General to copy documents and to retain those copies. Because there is no specified prohibition on use, the Attorney General would presumably be permitted to disseminate the documents to police or other investigative agencies.

The CBA Section believes that section 462.46 represents an unwarranted and unconstitutional attack upon privacy interests. It is quite extraordinary that a court might order documents to be returned on the basis that an individual has been acquitted of charges, or on the basis that a search has been found to be unconstitutional, yet the Attorney General continue to take advantage of the seizure of those documents by retaining copies. If a court were to order the return of seized documents as part of a remedy, the force of the remedy would be completely undone through the operation of section 462.46.

RECOMMENDATION:

The CBA Section recommends that Bill C-53 provide that the Attorney General, and any investigative agency that possessed documents or information contained in the documents that have been ordered returned, must return the documents and all copies, destroy any recordings of the information contained in the documents, and be prohibited from making any use whatsoever of the information contained in the documents. Further, where a court has ordered the return of documents, the Attorney General and any investigative agency that possessed the documents should provide an undertaking to the court that it will comply with these requirements.

In the context of our various submissions concerning the government's anti-terrorism initiatives, the CBA has expressed concerns about the growing acceptance of state collection of personal information without sufficient demonstrated need. We have stressed that limits should be zealously guarded to check the collection and retention of personal information.[8] In our view, the erosion of privacy, and the weakening of safeguards to protect individual privacy against the powers of the state, chips away at fundamental principles of Canadian democracy. As proposed, we believe that section 462.46 would represent another attack upon privacy interests.

E. Third Party Interests

Finally, this Bill's powerful and far-reaching forfeiture provisions may engage the property interests of innocent third parties, such as business partners and family members. However, we note the Bill's protections to address that risk, including the notice provision in clause 4(3), the fine instead of forfeiture provision under clause 6(2), and the application for relief from forfeiture provision in clause 9. Having regard to the importance of the interests of third parties and the complexity of the forfeiture scheme, the CBA Section notes that legal aid for such matters must be available to ensure that third parties are able to fully and effectively advance their rights and interests.

III. CONCLUSION

The CBA Section appreciates Bill C-53's apparent objective of removing the profit from criminal activity. However, we believe that the Bill should not be passed without amendments to address important flaws. We have stressed that the search warrant provisions in the Bill require change to adequately protect solicitor/client privilege and confidentiality. Further, documents that a judge orders returned following forfeiture should not be copied and retained before being returned. Finally, the list of "designated offences" should be closely monitored to ensure that the Bill's powerful seizure and forfeiture provisions operate fairly.

We trust that these comments will be of assistance in the Standing Committee's deliberations of Bill C-53, and would be pleased to elaborate further as required.

8 For example, see the CBA's "Submission on the Three Year Review of the *Anti-terrorism Act*" at 18 (Ottawa: CBA, 2005).