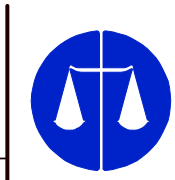

THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

The Voice of the Legal Profession

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Bill C-10 – *Criminal Code* amendments (minimum penalties for offences involving firearms)

NATIONAL CRIMINAL JUSTICE SECTION
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PREFACE

The Canadian Bar Association is a national association representing 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 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-10 – *Criminal Code* amendments (minimum penalties for offences involving firearms)

I. INTRODUCTION

The Canadian Bar Association's National Criminal Justice Section (CBA Section) appreciates the opportunity to comment on Bill C-10, *Criminal Code* amendments (minimum penalties for offences involving firearms). The CBA Section consists of defence lawyers, prosecutors and legal academics from every province and territory.

Canadians' demand that government leaders act to ensure their safety and security is legitimate and understandable. The CBA Section recognizes that the government must take measures to advance public safety and agrees that gun-related offences should be prosecuted and punished upon conviction. It is also important to remember that Canada's violent crime rate remains stable, and much lower than that of our closest neighbour, the United States.[1] The CBA Section believes that government leaders are obliged to respond to the call for action with fair measures most likely to be effective and those that are based on principles. In our view, failing to act in a principled manner is unlikely, ultimately, to engender respect for the administration of justice and, more practically, enhance public safety.

When Parliament debated the *Firearms Act* in 1995, which introduced ten mandatory minimum sentences of four years for firearms offences, many of the same arguments now used to justify Bill C-10 were made.[2] These existing mandatory minimum sentences apply to

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1 *Juristat*:: Canadian Centre for Justice Statistics, "Crime Statistics in Canada, 2005", Vol. 26: 4 (Ottawa: StatsCan, 2006).

2 See, for example, the Hansards debate on Bill C-68, *Firearms Act* at: http://www2.parl.gc.ca/HousePublications/Publication.aspx?pub=Hansard&doc=160&Language=E&Mode=1&Parl=35&Ses=1#10086

stipulated offences[3] when a firearm is used in the commission of the offence. Bill C-10 would add to the circumstances in which a mandatory minimum sentence must be imposed and increase the length of the 1995 mandatory minimums in certain specified circumstances.

We question whether simply increasing sentences is likely to reduce gun violence or make communities and streets safer. Over the years since the *Firearms Act* has been in effect, gun violence has clearly remained a problem. This might suggest that the mandatory minimum sentences for gun crimes introduced by that legislation have been less than effective in making our streets safer.

The CBA Section opposes passage of Bill C-10. We believe that it would too often create unjust and disproportionate sentences, would not achieve its intended goal of greater public safety, and in fact, would more likely elicit further disrespect for Canada's justice system.

II. MANDATORY MINIMUM SENTENCES

The CBA Section has consistently opposed the use of mandatory minimum penalties.[4] We support measures to deter the illegal use of firearms, but stress that such measures must be consistent with fundamental sentencing principles in the *Criminal Code* and with constitutional guarantees, and follow the well-established guidance offered by Canada's common law. In summary, we believe that:

3 See *Firearms Act*, SC 1995, c.39.

4 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); and, Submission on Bill C-215 (*Criminal Code* amendments (consecutive sentences) (Ottawa: CBA, 2005).

1. Mandatory minimum penalties do not advance the goal of deterrence. International social science research has made this clear.[5] 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".[6]

2. Mandatory minimum penalties do not target the most egregious or dangerous offenders, who will already be subject to very stiff sentences precisely because of the nature of the crimes they have committed. More often, the less culpable offenders are caught by mandatory sentences and subjected to extremely lengthy terms of imprisonment.

3. Mandatory minimum penalties have a disproportionate impact on those 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.[7]

4. Mandatory minimum penalties subvert important aspects of Canada's sentencing regime, including principles of proportionality and individualization, and reliance on judges to impose a just sentence after hearing all facts in the individual case.

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5 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". See also, Neil Morgan, "Capturing Crimes or Capturing Votes: The Aims and Effects of Mandatories" (1999) UNSWLJ 267 at 272 and the Crime Prevention Council of Northern Australia, "Mandatory Sentencing for Adult Property Offenders" (2003 presentation to the Australia and New Zealand Society of Criminology Conference (August 2003): http://www.nt.gov.au/justice/ocp/docs/mandatory_sentencing_nt_experience_20031201.pdf
Professor Morgan, of the Crime Research Centre at the University of Western Australia, notes that 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. Morgan used subsequent sentencing data in a study to examine the effects of these provisions. In the course of his study, he also examined recent literature in the United States. Morgan stated that:

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

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

7 *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). On the inordinately high level of arrest and incarceration of people of Aboriginal background, see also *Juristat* , "Adult correctional Services in Canada" 26:5 at 15, which states that: "Aboriginal people represent more than one in five admissions to correctional services."

III. COHERENCE WITH EXISTING LAW

The Bill would create three different and escalating minimum penalty schemes. These would be grafted on to the existing (and different yet) mandatory minimum sentences of four years for the commission of certain offences with a firearm. This complexity and lack of cohesion with existing principles developed in the jurisprudence will create significant practical problems.

Bill C-10 would require Crown counsel to prove many additional items to obtain the proposed mandatory minimum sentences. The Bill would also create new offences related to breaking and entering in order to steal firearms, which also involve difficulties of proof so significant that they may not be practical for prosecutors. We expect that it is more likely for prosecutors to use existing *Criminal Code* sections, relying on the fact that stealing firearms will properly be considered an aggravating factor by the sentencing judge. In short, we believe that the existing law already addresses the very problem that Bill C-10 purports to resolve.

This legislation would also not improve efficiency in justice system. It would be very difficult to bring the parties together on an acceptable plea to these particular offences, resulting in more time-consuming trials given the high stakes for the accused. Any added expense and delay in the administration of justice should be considered in assessing whether the Bill would lead to increased respect for the justice system.

In fact, an ironic and unintended consequence of Bill C-10 may be that sentences could end up somewhat diluted. If Crown and defence counsel recognize that injustice would result from an automatic application of the mandatory minimum in Bill C-10, they may agree to a plea to a lesser offence without a mandatory minimum sentence.

The Minister's News Release of May 4, 2006, states that "by ensuring that tougher mandatory minimum sentences are imposed for serious and repeat firearms crime, we will restore confidence in the justice system and make our streets safer." In our view, Bill C-10 would more likely add to the public's perception of a justice system that does not work, as

significantly more societal resources are spent prosecuting and incarcerating offenders, while inevitably crime continues to occur.

IV. ANALYSIS OF BILL C-10

Our analysis of Bill C-10 suggests that such a complicated regime is unlikely to operate as a deterrent to those unlikely to understand it.

Clause 1 of the Bill would amend *Criminal Code* section 84 to provide guidance to sentencing judges in determining whether an offender has committed a "subsequent offence" for the purpose of engaging a higher mandatory minimum. This is repeated in clauses 17 through 24 where changes are proposed to the mandatory minimum sentences of eight serious offences[8]. A subsequent offence would be determined simply by the date of conviction, with no reference to the date of the offence. Convictions more than 10 years past would not count in the assessment, unless part of that 10-year period included a custodial sentence. For example, if an offender was convicted for manslaughter using a firearm in 1995, received a 10 year sentence, served six years in custody, was released in 2001, and was then again convicted of a robbery with a firearm offence in 2007, the six years in custody would not be calculated as part of the 10 year break between offences.

The Bill does not appear to address pre-trial custody, which we believe would require specifically excluding *Criminal Code* section 719(3) from consideration by a sentencing judge. The CBA Section supports that approach, as in our view to do otherwise would contravene section 12 of the *Charter* and the Supreme Court of Canada's strong statements in *R. v. Wust*.[9]

Clause 7 would amend *Criminal Code* section 95(2)(a) (possession of a prohibited or restricted firearm) by increasing the mandatory minimum sentence to three years for a first offence and five years for subsequent offences. Most notably, it would remove the hybrid

8 These offences are attempted murder; discharging a firearm with intent; sex assault with a weapon or causing bodily harm; aggravated sex assault; kidnapping or confinement; hostage taking; robbery; and extortion.

9 *R. v. Wust,* [2000] 1 SCR 455.

aspect to this offence so that the Crown must proceed by indictment. Clause 12 would do the same for section 102 (making a firearm automatic) and increases the mandatory minimum sentence from one to three years for a first offence, and then five years for any subsequent offence.

Clause 9 would create two new offences: breaking and entering to steal a firearm and robbery to steal a firearm. Theft of firearms in the context of breaking and entering or robbery offences already constitutes an aggravating factor in sentencing, so we question what these new offences would accomplish. In our view, the proposed amendment would likely create further hurdles for the Crown to prove such offences.

Clauses 8, 9 and 14 in Bill C-10 propose changing the current mandatory minimum sentence from one year in all circumstances to the 1-3-5 year graduated system. Clauses 17 through 24 would then introduce what have been called the "serious crime/serious time" provisions, and would apply to eight offences[10]. The proposed amendments would:

(i) introduce the 5-7-10 year mandatory minimum sentence scheme where a prohibited or restricted firearm is used or where ANY firearm is used at the behest of a criminal organization

(ii) for any other case where a firearm is used, the mandatory minimum sentence would remain at four years.

The current provisions of the *Criminal Code* are quite simple — a sentence of four years is required if firearms are used in the commission of the enumerated offences. The CBA Section does not believe that increased sentences actually reduce crime, nor will making the *Criminal Code* more complex. We disagree that the tough new sentences in Bill C-10 would guarantee the Canadian public a safer society.

V. JUDICIAL DISCRETION

The mandatory minimum sentences proposed in Bill C-10 would remove discretion from sentencing judges and remove their ability to effectively determine which sentence can best

10 *Supra*, note 6.

accomplish all fundamental objectives of sentencing. The CBA Section has confidence in the important role of Canada's judges in the operation of the justice system. If the intent is to encourage harsher sentences, Canadian judges already have sentencing tools to achieve that goal, *if* the offence and the offender warrant an unusually harsh response. In our experience, repeat offenders using guns already receive significantly elevated sentences, even above the proposed mandatory minimum sentences.

Criticism of judges' use of discretion in sentencing is invariably anecdotal. We believe there are good reasons for conferring discretion on the judge charged with imposing a fit sentence. The judge has heard the particular circumstances of the offence and the offender, and is able to craft a particular sentence that best achieves all the goals of sentencing. The judge is also best equipped to determine the appropriate sentence for the particular community where the offence took place. If evidence demonstrates that an offender should be subject to the most severe sentence available, the Crown would have brought that fact to the judge's attention. Prohibiting judges from exercising discretion on determining an appropriate sentence for the offender before them is antithetical to the codified principles of sentencing contained in the *Criminal Code.* Moreover it will operate contrary to the spirit and letter of a large body of jurisprudence that recognizes the unique position of sentencing judges in assessing and determining the most appropriate sentence in the individual case.

At present, where the sentence is demonstrably unfit or an error of law has occurred, an appellate judge can adjust the sentence accordingly, taking into account the principles of sentencing. The proposals in Bill C-10 not only limit a judge in devising an appropriate sentence at the sentencing stage, they would also severely limit the scope of appellate review where a clearly unfit sentence has been imposed. In our view, the automatic formula approach in Bill C-10 would lead to real injustice in certain fact situations, yet judges would be unable to fulfill their role as judges and address that injustice.

VI. SENTENCING PRINCIPLES

The *Criminal Code* sets out a number of principles of sentencing, and asks a judge, at the time of sentencing, to weigh all competing considerations. That approach accords with a measured sentencing regime, and, in our view, with common sense.

Certainly, deterrence is one important principle of sentencing. However, Bill C-10's emphasis on deterrence over all other sentencing principles is, in our view, misplaced. A recent Canadian Safety Council study found that,

> There are few if any who deny a general deterrent effect of the criminal law, but recent studies confirm what has long been believed by most criminologists. There is little demonstrable correlation between the severity of sentences imposed and the volume of offences recorded. What has the greatest impact on patterns of offending is publicizing apprehension rates, or increasing the prospect of being caught.[11]

Even if it were true that deterrence is completely effective, which is not the case, it does not follow that other principles of sentencing should be ignored. In any case, Bill C-10 would create such a complicated regime that it cannot reasonably be suggested as a meaningful deterrent to the ordinary offender.

Criminal Code section 718.2(e) requires that the particular situation of aboriginal offenders be considered at sentencing. If a less restrictive sanction than that required under Bill C-10 would adequately protect society, or where the special circumstances of aboriginal offenders should be recognized, increased and mandatory minimum sentences would conflict with that section. The Supreme Court of Canada has also recognized that incarceration should be used as a penal sanction of last resort, and that it may well be less appropriate or useful in the case of aboriginal offenders in Canada[12]. Penitentiary terms would generally be served far from communities and families, going against efforts to promote eventual reintegration or rehabilitation of offenders. Under Bill C-10, local judges would have no option but to sentence

11 Professors David Paciocco and Julian Roberts, "Sentencing in Cases of Impaired Driving Causing Bodily Harm or Impaired Driving Cause Death" (Ottawa: Canada Safety Council, 2005) at 2.

12 *R. v. Gladue*, [1999] 1 SCR 207.

an offender from Nunavut, for example, to a lengthy mandatory sentence in Ontario, where offenders from the territory are routinely sent.

Section 718.1 of the *Criminal Code* states that the fundamental principle of sentencing is proportionality, requiring that "a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender". Bill C-10 would instead require the same mandatory minimum sentence to apply to all offenders, even though offences and degrees of responsibility vary significantly.

Proportionality reflects the delicate balance that must be achieved in fashioning a just sentence. Common sense and fairness requires an individualized, proportional sentence. We believe this is why minimum sentences have been severely criticized in many important studies, including Canada's own Sentencing Commission Report.[13] Further, the *Criminal Code* contains a statutory acknowledgment of the principle of restraint, stating that the purpose of sentencing is to separate offenders from society *where necessary*.

VII. CONCLUSION

The CBA Section is opposed to the passage of Bill C-10. Our criticisms of this Bill are not purely theoretical. Certainly, some offenders are good candidates for rehabilitation. Mandatory minimum sentences will ensure that even those offenders remain incarcerated long after their detention acts as either a deterrent, is required for public safety or promotes rehabilitative goals, and at great cost to society.

Bill C-10 would remove trial judges' discretion to impose an appropriate sentence that reflects the moral blameworthiness of the offender, while balancing all sentencing principles to impose the least restrictive sentence appropriate in the circumstances. The mandatory minimum sentences proposed by the Bill would focus on denunciation and deterrence to the exclusion of other legitimate sentencing principles, and too often lead to injustice. Ultimately,

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

it is unlikely to enhance public safety, but likely to instead further erode the public's confidence in the fairness and the efficacy of the Canadian justice system.