



May 9, 2007

Mr. Bernard Patry, M.P.
Chair
Legislative Committee on Bill C-35
House of Commons
Ottawa ON K1A 0A6

Dear Mr. Patry,

Re: Bill C-35, *Criminal Code* amendments (reverse onus in bail proceedings)

I am writing on behalf of the National Criminal Justice Section of the Canadian Bar Association (CBA Section) concerning Bill C-35, *Criminal Code* amendments (reverse onus in bail hearings for firearm-related offences). The CBA is a national association representing 37,000 jurists across Canada. Amongst its primary objectives is improvement in the law and in the administration of justice.

The CBA Section consists of practicing criminal lawyers, both Crowns and defence lawyers, from every part of the country. From our experiences in court on a daily basis, we know that prosecutors and defence lawyers will raise relevant considerations when determinations about bail are made. Trial judges are uniquely placed to hear the arguments made, consider the facts of the individual case, and fairly determine when bail should be granted. There is also a review process to ensure that reversible errors or significant changes in circumstance are properly addressed. In our experience, serious offenders are routinely denied bail.

The CBA Section recognizes the legitimate concern about firearms offences. The criminal law plays an important and fundamental role in protecting the public from the serious harm that is often a result when firearms are involved in criminal offences.

However, these concerns must be considered in light of the existing *Criminal Code* and the fundamental rights recognized by the *Charter*, including the presumption of innocence and the guarantee not to be denied reasonable bail without just cause. In our view, the *Criminal Code* should only be amended if there are clear gaps or deficiencies in the legislation. If so, amendments must be made in a way that respects fundamental rights and advances the law fairly and effectively.

We are concerned about two aspects of the approach proposed in Bill C-35. First, we question the gap or deficiency in the current law that Bill C-35 is intended to address. Existing provisions clearly permit pre-trial detention where shown to be necessary to secure attendance in court, to protect the safety of the public, or to maintain confidence in the administration of justice having regard to the all circumstances of the case. Given this, we assume that the proposed amendments are targeted at people who would be inappropriately released under the law now, if not for the proposed shift of the onus relating to these factors. However, it is difficult to envision circumstances where this would apply, given that the law is effective at present. The reality is that people charged with serious offences involving firearms are most frequently detained at first instance or upon review.

Second, expanding the list of offences where the onus for determining release shifts to the accused is significant and Bill C-35 proposes adding twelve new offences to the previous seven. This type of expansion is neither new nor unique, as we have noted that limited lists of offences introduced to the Code seem to be subject to inexorable pressure to expand over time.¹ Not only does the current proposal represent a significant expansion of the previous list, but it may incorporate offences of a significantly different character. In *R. v. Pearson*, when the Supreme Court of Canada upheld the constitutional validity of the reverse onus for offences involving narcotics, they noted that this narrow class of offences shared certain characteristics including the systematic, organized and commercially lucrative nature of the offences in question.² The creation of a narrow class of offences sharing significant common characteristics was central in determining the constitutional validity of the reverse onus provisions.

In our view, the significant expansion of the list of offences proposed in Bill C-35 could attract constitutional challenge, which means further delays and pressures on the judicial system. Because the actual improvement offered by the proposed changes is debateable, this systemic impact on the justice system should be a significant consideration.

¹ For example, we have expressed the same concerns in a number of CBA Section submissions related to the DNA data bank. See, National Criminal Justice Section, Submission on Obtaining and Banking DNA Forensic Evidence (Ottawa: CBA, 1995); National Criminal Justice Section, Submission on Bill C-104, *Criminal Code* and *Young Offenders Act* amendments (forensic DNA analysis) (Ottawa: CBA, 1995); National Criminal Justice Section, Submission on Solicitor General Consultation Document Establishing a DNA Data Bank (Ottawa: CBA, 1996); National Criminal Justice Section, Submission on Justice Canada Consultation Document DNA Data Bank Legislation Consultation Paper (Ottawa: CBA, 2002); National Criminal Justice Section, Submission on Bill C-13: *Criminal Code*, *DNA Identification Act* and *National Defence Act* amendments (Ottawa: CBA, 2005).

² *R. v. Pearson*, [1992] 3 S.C.R. 665.

Section 515(10) (c) provides grounds for denying bail to maintain confidence in the administration of justice. Bill C-35 would remove the words, "...on any other just cause being shown and, without limiting the generality of the foregoing", which would bring the section in line with the 2002 Supreme Court of Canada decision in *R. v. Hall*.³ Apart from that specific change, we believe that the section should not be amended. It is now clear that bail judges must objectively consider all circumstances surrounding the commission of an offence, including the alleged use of a firearm or any other weapon and the potential for the lengthy terms of imprisonment that most firearms offences attract. We are concerned that the proposed amendments would force the focus on the firearm in particular, and may dilute the requisite consideration of all circumstances surrounding an alleged offence.

Thank you for the opportunity to provide comments concerning Bill C-35.

Yours very truly,

(original signed by Gaylene Schellenberg for Greg DelBigio)

Greg DelBigio
Chair
National Criminal Justice Section

³ *R. v. Hall*, [2002] 3 S.C.R. 309.