



April 26, 2007

The Honourable Donald H. Oliver, Q.C.
Chair, Senate Committee on Legal and Constitutional Affairs
The Senate of Canada
Ottawa, ON K1A 0A4

Dear Senator Oliver,

Re: Bill C-9 *Criminal Code* amendments (conditional sentence of imprisonment)

I am writing on behalf of the National Criminal Justice Section of the Canadian Bar Association (the CBA Section) about Bill C-9, *Criminal Code* amendments (conditional sentence of imprisonment). The CBA is a national association representing 37,000 jurists across Canada. Among its primary objectives is improvement in the law and in the administration of justice. The CBA Section consists of both Crown and defence counsel from every province and territory in Canada.

Our submission addressing the original version of Bill C-9 is attached to this letter, for your ease of reference. When Bill C-9 was introduced, it was said to preclude the use of conditional sentences for serious violent offences. However, as the CBA Section and others pointed out, the mechanism proposed would have included many offences that did not fall into that category. In our view, the Bill is improved as amended. If Parliament determines it is necessary to further prohibit use of conditional sentences, we remain concerned about the scope of ineligible offences proposed by Bill C-9, and suggest additional clarification.

The CBA has long taken the position that incarceration should be considered a last resort, and only used if necessary to address sentencing goals in the particular circumstances at hand. We have supported the use of conditional sentences when those sentences adequately protect the public. While such orders are sometimes characterized as being less than punitive, our experience is that very significant limitations and controls can be imposed and incarceration is readily available for any breach.

As criminal lawyers, we are in court daily, and we know that Crown and defence counsel make appropriate submissions about why a conditional sentence is suitable or not suitable in any particular case. Judges in trial courts are best able to determine a fair, fit and appropriate sentence in each individual case, having regard to all factors at hand, including the circumstances of the offence, circumstances of the offender and all applicable law. Canadian judges are trusted to use their discretion to impose terms of imprisonment, the most restrictive and expensive sentence available, without consideration of resources such as the existence of jail space. Judges can also be trusted to determine when less restrictive and expensive alternatives will conform to all Canadian sentencing principles. The appellate process is an effective remedy for any perceived error.

The amended version of Bill C-9 would preclude consideration of a conditional sentence for a “serious personal injury offence as defined in section 752, a terrorism offence or a criminal organization offence prosecuted by way of indictment for which the maximum term of imprisonment is ten years or more or an offence punishable by a minimum term of imprisonment”. CBA Section members have raised potential ambiguities in interpreting this complex clause.

The term "indictable offence" includes hybrid offences, such as assault causing bodily harm or assault with a weapon. According to the *Interpretation Act*, hybrid offences are deemed to be indictable offences until the Crown formally elects how it will proceed.¹ If the Crown actually proceeds summarily on a hybrid offence, it may be exactly the type of crime for which a conditional sentence order with conditions to abstain from alcohol, for example, would be most appropriate. To clarify that conditional sentences remain available for less serious offenders, but unavailable where there has been an actual serious personal injury offence, a simple change may suffice:

..a serious personal injury offence as defined in section 752, a terrorism offence or a criminal organization offence, that is:

prosecuted by way of indictment for which the maximum term of imprisonment is ten years or more, or

an offence punishable by a minimum term of imprisonment.

The Crown can then exercise discretion as to whether to proceed summarily or by indictment, having regard to all factors, including the availability of a conditional sentencing order.

Thank you for the opportunity to contribute to your Committee’s discussions on Bill C-9.

Yours sincerely,

(original signed by Gaylene Schellenberg for Greg DelBigio)

Greg DelBigio
Chair, National Criminal Justice Section

¹ See, *Interpretation Act*, R.S.C. 1985, c.I-21, s. 34(1)(a),(b).



THE CANADIAN BAR ASSOCIATION
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Bill C-9 – *Criminal Code* amendments (conditional sentence of imprisonment)

NATIONAL CRIMINAL JUSTICE
SECTION CANADIAN BAR ASSOCIATION

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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-9 – *Criminal Code* amendments (conditional sentence of imprisonment)

I. INTRODUCTION

The Canadian Bar Association’s National Criminal Justice Section (CBA Section) appreciates the opportunity to comment on Bill C-9, *Criminal Code* amendments (conditional sentence of imprisonment). The CBA Section consists of defence lawyers, prosecutors and legal academics from every province and territory.

There have been numerous attempts at sentencing reform over the past several years, which have consumed significant financial and human resources both within the government and among private organizations. The CBA Section has actively participated in these endeavours and has made many submissions to government, Parliamentary Committees and independent commissions on the central, interrelated issues of sentencing, corrections and conditional release.¹ In our view, the process of reform requires a fact-based appraisal of the present situation, as well as a careful assessment of whether proposed reforms will enhance the goals and objectives of sentencing in the criminal justice system. Any reforms should reflect the available accumulated knowledge about sentencing, and attempt to achieve clearly articulated social objectives. Basic questions should be addressed, including;

- What are we trying to accomplish?
- Are the proposed reforms likely to make our communities safer? and
- What are the true costs of the proposed reforms?

The CBA Section will begin with a summary of our perspective on sentencing. With that orientation in mind, we will then address the specific proposals contained in Bill C-9. We will conclude that while the goal of restricting the availability of conditional sentences for serious violent crimes may be a partial by-product of Bill C-9, it would go much further to severely limit conditional sentences where

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For a few examples, see; CBA Committee on Imprisonment and Release, *Parole and Early Release* (Ottawa: CBA, 1988), National Criminal Justice Section, *Submission on Bill C-90* (Ottawa: CBA, 1993); National Criminal Justice Section, *Bill C-41, Criminal Code amendments (sentencing)* (Ottawa: CBA, 1994).

they are appropriate. We recommend that Bill C-9 not be enacted, and suggest a number of other alternatives that would actually limit conditional sentences for serious violent offences only.

II. OUR PERSPECTIVE ON SENTENCING

Some time ago, in a Consultation Paper prepared in advance of what was Bill C-90, the government of the day stated:

We instinctively look to long sentences to punish offenders, yet 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" and then return offenders to the streets at sentence expiry, unreformed and unsupervised.²

That paper and other documents and studies since have acknowledged Canada's over-reliance on incarceration, the need for alternative sanctions, the limited success of imprisonment in controlling or deterring crime, the impact of incarceration on particular populations, notably aboriginal people, and the extremely high cost of incarceration in both human and financial terms.

The CBA Section has generally agreed with these observations. We have urged the federal government to provide financial support to provinces and territories to encourage the use of alternatives at the front end of the sentencing process and to diminish the use of imprisonment. We have also urged legislative amendments to promote alternative options in appropriate circumstances, and encouraged reliance on the judiciary to decide the most appropriate sentence after hearing first hand the facts of each individual case. In our view, conditional sentences have helped to reduce the over-reliance on incarceration in Canada, and have gone a long way to ameliorating several previous problems.

Canadian judges are trusted to use their discretion to impose terms of imprisonment, the most restrictive and expensive sentence available, without consideration of resources such as the existence of jail space. Judges can also be trusted to determine when less restrictive and expensive alternatives will conform to all Canadian sentencing principles.

The CBA Section supports measures that will lead to a safer society, and we believe that goal requires more than relying only on incarceration. A safe and just society requires that the sentencing process be used carefully, with a view to finding the least intrusive sanction appropriate to the particular offence

and offender. Like the Law Reform Commission of Canada, the *Archambault Report*, and the *Daubney Report*³, the CBA Section supports principles of proportionality and restraint in imposing criminal sanctions. The *Criminal Code* also requires consideration of principles of restraint and proportionality when judges determine an appropriate sentence. On the principle of restraint, it has been said that:

1. Restraint must be applied in determining what behaviour should be prohibited by the criminal process.
2. Imprisonment, the "final coercive sanction", can only be imposed as a last resort.
3. Increasing the intensity of criminal sanctions does not increase compliance to social norms.⁴

III. ANALYSIS OF BILL C-9

The government's various communications concerning Bill C-9 have been clear that the intention is to limit conditional sentences so that they are unavailable for serious violent offences. Certainly, conditional sentences will generally not be an option for serious violent offences given that they may only be considered where the judge would otherwise impose a sentence of less than two years. In addition, appellate courts are available to correct any conditional sentences inappropriately awarded. However, we understand the government's goal to ensure that conditional sentences are only available for less serious violent or non-violent crimes, but not serious violent offences. We suggest a more targeted and direct approach is required than that suggested by Bill C-9.

A. Statutory Maximum

The mechanism proposed in Bill C-9 to determine when conditional sentences would be unavailable is extremely broad, and would capture much more than only serious violent crimes. It would eliminate from consideration any crime that permits a maximum sentence of over ten years. The result would be to eliminate this important alternative to incarceration for cases where it may well be appropriate. Maximum sentences of ten years or more are found for a wide range of *Criminal Code* offences, many of which may well be neither serious nor violent in the particular circumstances of a case. Sentencing ranges are designed to deal with a wide range of conduct, and a just sentencing regime must allow the

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

3 See Report of the Canadian Sentencing Commission, *Sentencing Reform - A Canadian Approach (the Archambault Report)* (Ottawa: Supply and Services Canada, 1987); Report of the Standing Committee on Justice and Solicitor General of its Review of Sentencing, Conditional Release and Related Aspects of Corrections, *Taking Responsibility (the Daubney Report)* (Ottawa: 1988).

4 M. Mauer, *Americans Behind Bars: The International Use of Incarceration 1992-1993* (The Sentencing Project, Sept. 1994).

judge sufficient flexibility to craft an appropriate response for individual offences along the continuum of that conduct. Statutory maximums as a threshold restricting the use of this sentencing option would not reflect this important reality. The mechanism proposed by Bill C-9 would result in restrictions that are far too broad, often arbitrary and inflexible, and could well result in sentences that are unjust.

A more refined tool is required to recognize the breadth and complexity of conduct captured under various *Criminal Code* offences, and to provide the necessary flexibility to craft a just and appropriate sentence in the circumstances of each case. All of the fundamental purposes and principles of sentencing set out in sections 718, 718.1 and 718.2 of the *Code* must be respected.

One such sentencing principle is proportionality, to reflect the necessary and delicate balance that must be achieved in fashioning a just sentence. This balance also contributes to the administration of a justice system that makes sense to the public it is intended to protect. Logic and fairness requires an individualized, proportionate sentence. We believe that this is why mandatory minimum sentences have been severely criticized in many important studies, including Canada's own 1987 Sentencing Commission Report.⁵ In our view, incarcerating individuals unnecessarily, which would result if Bill C-9 were enacted, does not and would not promote public safety, and would more likely lead to injustice and disrespect for the law.

B. Judicial Discretion

As drafted, Bill C-9 would unduly limit judicial discretion. The CBA Section trusts in judges' extensive legal and practical experience, and their independent role in the justice system. The judge at trial also has the opportunity to observe the accused, learn of the accused's history and current circumstances, hear all the facts of the particular case, and become aware of the prevailing conditions in the local community. A wide range of sentencing options enables trial judges to design a proportionate, just and appropriate sentence for each individual case. It is because a sentencing judge is best able to craft a sentence that addresses all relevant circumstances that appellate courts also recognize that deference is to be given to sentencing judges.⁶

5 *Supra*, note 3, Archambault Report.

6 See, for example, R. v. C.A.M., [1996] 1 S.C.R. 500.

Conditional sentences are one of these vital options. The CBA Section urges that they be retained for use in appropriate cases, particularly where public safety does not require actual incarceration. The current proposal to exclude all offences that have a maximum sentence of 10 years' imprisonment or more would severely curtail judicial discretion, and directly conflicts with established sentencing principles of proportionality, restraint and the obligation of imposing the least restrictive sanction appropriate to the circumstances.

IV. CONCLUSION AND RECOMMENDATION

All the actual costs and repercussions of the proposal in Bill C-9 must be considered. Harsher penalties have not been convincingly associated with reduced crime or reduced recidivism. Severely curtailing the availability of conditional sentences in favour of incarceration may well leave the public with a false impression of increased safety. In many cases, supervision and support in the community is more effective at reducing future criminal acts than incarceration and eventual release. The proposed limitation on conditional sentences is likely to diminish any focus on rehabilitation. Not only is there a risk that those who would previously have received a conditional sentence would instead go to jail, there is also the risk that sentences will be "diluted" if judges attempt to achieve a just result by avoiding the severe constraints the Bill would impose on their discretion. For example, a judge who sees an offender as on the borderline of a sentence of imprisonment may tip the balance in favour of probation if a conditional sentence is unavailable.

In its current form, the proposal will undoubtedly lead to more trials as a result of fewer guilty pleas. That factor alone will eliminate any perceived justice efficiencies, and certainly increase demands for legal aid funding. In addition to the huge costs of incarcerating people, particularly in circumstances where the offender and the offence committed do not represent a danger to the community, there will be enormous resulting social costs. For example, if a parent is incarcerated rather than serving a conditional sentence that allows them to continue to fulfill work and childcare responsibilities, it may perpetuate a cycle of child poverty with all associated risk factors. Further, the lack of judicial discretion to achieve a just result in the particular case will have a disproportionate impact on populations already over-represented in the justice system, notably the economically disadvantaged, Aboriginal people, members of visible minorities and the mentally ill.

The CBA Section recommends a proportionate and direct response to limit the availability of conditional sentences, to meet the stated objective of Bill C-9 of excluding only serious violent crimes.

We suggest consideration be given to the following alternatives:

- define in the *Criminal Code* a category to target only those types of offences that judges should not consider for conditional sentences
- create a schedule of offences ineligible for conditional sentences, with an exception to permit an offender to show, on a balance of probabilities, that a conditional sentence would not endanger the community or be contrary to the principles of sentencing
- define “serious violent offences”. We note that jurisprudence is developing on that topic under the *Youth Criminal Justice Act*.⁷

In *R. v. Proulx*⁸, the Supreme Court of Canada recognized that a conditional sentence can address both punitive and rehabilitative objectives in Canada’s sentencing principles, with a strong measure of public denunciation as well. It is a testament to the strength of the *Criminal Code* and to the individual and collective wisdom of the Canadian judiciary that Parliament provides a significant range in penalty, in line with the significant range of criminal behaviour that may fall under a certain section of the *Criminal Code*. Just because a sentencing range extends up to incarceration of ten years or more, not all criminal acts falling under that section will be serious or violent offences, inappropriate for a conditional sentence. For the less serious forms of the particular offence, a conditional sentence may well be the most appropriate sanction.

The use of statutory maximums to limit conditional sentences provides neither consistent nor coherent guidance. These maximums have evolved on an *ad hoc* basis, often bearing little or no discernable relationship to the elements of the offences themselves. In our view, they would be an unreliable and inappropriate guide for the exclusion of conditional sentences, and we recommend that Bill C-9 not be enacted into law.

7 See, for example, *R. v. D.P.*, [2006] B.C.C.A. 409.

8 [2000] 1 S.C.R. 61.