



THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

February 13, 2008

The Honourable Senator Joan Fraser
Chair
Senate Committee on Legal and Constitutional Affairs
The Senate of Canada
Ottawa, ON K1A 0A4

Dear Senator Fraser,

RE: **Bill C-2, *Criminal Code* amendments (*Tackling Violent Crime Act*)**

I am writing on behalf of the National Criminal Justice Section of the Canadian Bar Association (CBA Section) to convey our submission on Bill C-2, *Criminal Code* amendments (*Tackling Violent Crime Act*). We regret that we were unable to attend at an earlier hearing, and would be pleased if you can accommodate us later in your schedule.

We have concerns about many of the proposals in this weighty legislative initiative, particularly in light of the deletion of several positive amendments made in the House of Commons Committee review process in the last session.

We trust that our submissions will inform the Senate Committee's deliberations.

Yours truly,

(Original signed by Gaylene Schellenberg for Greg DelBigio)

Greg DelBigio
Chair, National Criminal Justice Section



THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

**Bill C-2 — *Tackling Violent
Crime Act***

**NATIONAL CRIMINAL JUSTICE SECTION
CANADIAN BAR ASSOCIATION**

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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-2 — *Tackling Violent Crime Act*

I. INTRODUCTION

The National Criminal Justice Section of the Canadian Bar Association (CBA Section) appreciates this opportunity to provide its views on Bill C-2, *Tackling Violent Crime Act*. The CBA Section's membership is balanced between prosecutors and defence counsel from every province and territory in Canada.

The CBA Section shares the government's objective of ensuring that Canadians are as safe from violent crime as possible. The CBA Section can contribute to this goal from our daily experience with the criminal law and in the criminal courts across the country. In our comments on government initiatives, we have consistently stressed basic principles we believe will lead to a safer society and constitutionally sound criminal law. Some of these principles, which are echoed throughout our response to the various proposals in Bill C-2, are:

- legislative change is necessary when there is a new or unaddressed development in society, for example the rise of problems related to identity theft, or when a serious omission or deficiency in the current law has been empirically demonstrated;
- available resources and the efficient operation of our courts are important considerations, and unnecessary litigation and constitutional challenges should be avoided;
- the public is protected when police and prosecutors have adequate resources to enforce current laws, and the resource implications of changing existing laws and adding complexity to them are considered;
- when crime does occur, a proportionate response that balances all sentencing goals in the *Criminal Code* will ultimately reduce further crime when offenders return to the community, and;
- trial judges are in the best position to determine an appropriate response to a particular crime, as they have the unique opportunity of observing all participants and hearing all the evidence firsthand.

Bill C-2 proposes amendments to several provisions in the *Code* on such diverse topics as age of protection, a reverse onus for bail in firearms offences, impaired driving, mandatory minimum sentences and dangerous offenders. The CBA Section has previously commented on four of those five topics, and our previous responses are appended to this submission. We provide a summary and comments about any important changes to the previous proposals below, followed by more detailed comments on the sections of Bill C-2 pertaining to dangerous offenders.

II. AGE OF PROTECTION

The CBA Section supports measures to protect children from sexual exploitation by adults. We support the intent of the proposal to raise the age of consent from 14 to 16 years of age, and recognize that the recent introduction of new “exploitative relationship” provisions to the *Criminal Code* may not cover situations where there is no pre-existing relationship between the parties involved.

We have previously stressed two points in regard to changing the age of consent to sexual activity in Canada.¹ First, the proposed higher age of consent is appropriately accompanied by a “close-in-age” exemption, which will help to avoid inadvertently criminalizing consensual sexual activity between young people. Second, any reform of the age of consent should address current inconsistencies for different forms of sexual activity, which have been found unconstitutional by courts in several jurisdictions. Bill C-2 provides the opportunity to bring these provisions in line with the *Canadian Charter of Rights and Freedoms*, and we strongly believe that lawmakers should not neglect that opportunity.

III. REVERSE ONUS IN BAIL PROCEEDINGS

CBA Section members are in court on a daily basis, and know that prosecutors and defence lawyers routinely raise all relevant considerations when determinations about bail are made.

¹ National Criminal Justice Section and SOGIC, Letter signed by G. DelBigio and R. Muir, Bill C-22, *Criminal Code* amendments (age of protection) to A. Hanger, Chair, Commons Committee on Justice and Human Rights (Ottawa: CBA, 2007) - see Appendix A.

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 a review process to ensure that reversible errors or significant changes in circumstance are properly addressed. Serious offenders are routinely denied bail, particularly if firearms are involved.²

The CBA Section questions the gap or deficiency in the current law that Bill C-2's proposals are 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 all circumstances of the case. The proposed amendments seem to be 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.

Second, expanding the list of offences where the onus for determining release shifts to the accused is a significant change. This expansion could attract constitutional challenge, which results in further delays and pressures on the judicial system. This systemic impact on the justice system should be a significant consideration.

IV. IMPAIRED DRIVING

Bill C-2 proposes changes to the alcohol impaired driving provisions of the *Criminal Code*, and would introduce a new legislative scheme for drug impaired driving. It would provide police with additional investigative tools, create several new offences, change the existing penalty and driving prohibition provisions, and significantly limit the scope of applicable defences. The CBA Section knows that impaired driving, whether by drugs or alcohol, is a significant problem, and too often results in serious injury or death. Any effective legislative response must comply with the *Charter*, and result in real and demonstrated progress to deal with this serious issue.

² National Criminal Justice Section, Letter signed by G. DelBigio, Bill C-35, *Criminal Code* amendments (reverse onus in bail proceedings) to B. Patry, Chair, Commons Committee on Bill C-35 (Ottawa: CBA, 2007) - see Appendix B.

Impaired driving is one of the most extensively litigated areas of the criminal law. Every aspect of the present legislative scheme has been subject to intense constitutional scrutiny, and impaired driving litigation accounts for a significant portion of the caseload in Canada's trial courts. Regardless of whether or not that litigation is ultimately successful, its volume alone has enormous implications in terms of cost, delay and uncertainty in the law while cases are pending. For this reason, reforms that raise new constitutional questions should be very carefully considered, and we have previously highlighted several issues raised by these proposals on impaired driving.³

Any new avenues for challenge may not only undermine the effectiveness of the specific proposals, but significantly increase both caseload and delay in trial and appellate courts across the country. All reasonable steps should be taken to avoid that result.

V. MANDATORY MINIMUMS FOR FIREARMS OFFENCES

The CBA Section recognizes the government's responsibility to advance public safety and agrees that gun-related offences should be prosecuted and punished upon conviction. Government can also reassure Canadians that our violent crime rate remains stable, and much lower than that of our closest neighbour, the United States.⁴ Leaders should respond to the call for action with fair measures most likely to be effective and based on solid principles.

In 1995, Parliament introduced ten mandatory minimum sentences of four years for firearms offences, advancing many of the same arguments as now offered in regard to Bill C-2. Existing mandatory minimum sentences apply to stipulated offences when a firearm is used in the commission of the offence. Bill C-2 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.

³ National Criminal Justice Section, Bill C-32, Submission on *Criminal Code* amendments (impaired driving) (Ottawa: CBA, 2007) - see Appendix C.

⁴ Juristat, *Crime Statistics in Canada, 2006*, 85-002-XPE, vol. 27, no.5 (Ottawa: Statistics Canada, 2007) at 3.

Over the years since the *Firearms Act* has been in effect, gun violence has clearly remained a problem, which could suggest the need for a different approach, such as increased resources for policing. The CBA Section notes that the Bill has changed since our previous comments, and the proposed mandatory minimum for third offences has been removed. However, this does not impact the main emphasis of our earlier submission, which is that we should rely on judges to exercise discretion given the facts of each case and the circumstances of each offender to avoid unjust and disproportionate sentences.⁵

VI. DANGEROUS OFFENDERS

The CBA Section supports government initiatives to clearly differentiate society's response to minor non-violent crimes such as property offences from its response to crimes involving serious violent crime. Clauses 39 to 51 of Bill C-2 propose changes to Part XXIV of the *Criminal Code* – the dangerous offender and long term offender provisions.

The definition and statutory criteria in the current dangerous offender provisions of the *Code* have remained largely unchanged since amendments made by Bill C-55 were enacted in 1997. Those provisions have since been subject to thorough constitutional scrutiny, and appear now to achieve the balance required by the *Canadian Charter of Rights and Freedoms*.⁶

The number of individuals determined to be dangerous offenders actually increased in 2006,⁷ suggesting that the existing legislation is being used and is effective. Over 80% of the individuals determined to be dangerous offenders have previous convictions, suggesting also that when offenders repeatedly endanger the community they can be classified as

⁵ National Criminal Justice Section, Bill C-10, Submission on *Criminal Code* amendments (mandatory minimums for offences involving firearms) (Ottawa: CBA, 2007) - see Appendix D.

⁶ For example, see *R. v. Lyons*, [1987] 2 S.C.R. 309, *R. v. Wormell* (2005), 198 C.C.C. (3d) 252 (B.C.C.A., leave to appeal refused (2006) 350 N.R. 196 (S.C.C.)), *R. v. F.E.D.*, [2007] O.J. No.1278 (Ont. C.A.), *R. v. Johnson*, 2006 S.C.C. 46 and *R. v. Edgar*, [2003] 2 S.C.R. 388.

⁷ Public Safety and Emergency Preparedness Canada, Corrections and Conditional Release Statistical Overview 2006 (Ottawa: Public Works and Government Services Canada, 2006).

dangerous offenders under the current provisions, even without the “three-strikes” approach of Bill C-2.

While Bill C-2 would offer, for example, increased options in sentences for dangerous offenders, we question the overall impact of the proposed amendments. Our practical experience is that the current system works very well and “jurisprudential uncertainty” about required evidence, who is captured and what options are available to judges have been resolved. Most important, the constitutionality of the current legislation is settled. Decisions from the Supreme Court of Canada in *R. v Edgar and Johnson et al.*,⁸ the British Columbia Court of Appeal in *R. v. Wormell*⁹ and the Ontario Court of Appeal in *F.E.D.*¹⁰ have clarified this area of the law. At present, most dangerous offender and long term offender hearings simply involve the application of settled principles to a particular case.

The CBA Section cautions that the proposed amendments in Bill C-2 could well result in a significant amount of renewed litigation on the constitutionality of the dangerous and long term offender sections of the *Code* and the meaning ascribed to the new provisions and terminology. The proposed changes could increase the number of cases set for trial, given the added repercussions of a conviction for a primary designated offence. This is bound to increase the strain on already scarce resources. While we provide comments on the Bill’s various proposals below, our view is that those resources could be better focused elsewhere to improve public safety, given our experience that the current law on dangerous offenders works well.

A. When is legislative change necessary?

In our 1997 submission on Bill C-55, we made the following observations about preventative detention aspects of that Bill, which are just as salient today:

Rather than responding to actual harm already caused, preventative detention imposes confinement and control based on a perception of risk or fear of future

⁸ *Supra*, note 6.

⁹ *Ibid.*

¹⁰ *Ibid.*

crimes. By its very nature, preventative detention raises "profound moral and legal questions." This has been evident since the concept of preventative detention was first introduced into Canadian law in 1947 with the enactment of the Habitual Offender provisions and, subsequently, the Criminal Sexual Psychopath provisions of the *Criminal Code*. These provisions were replaced by the current Dangerous Offender provisions in 1977, and provide some clear lessons on the potential abuse of preventative detention.¹¹

In approaching any significant legislative change in this area, the CBA Section believes that questions such as the following should be asked:

- What motivates the proposed changes?
- Are the changes necessary and justified?
- If so, what benefits would they achieve?
- Would any potential benefits of changing the law be accompanied by a volume of constitutional challenges or protracted litigation, adding instability and uncertainty to the finality of any dangerous offender hearing?¹²

B. General Comments

The proposed amendment to section 753(1) in clause 42(1) of the Bill would remove judicial discretion to not declare someone a dangerous offender once the Crown satisfies the dangerous offender criteria.¹³ However, section 753(4) in clause 42(4) would provide additional available sentencing options once someone is declared a dangerous offender. Instead of just an indeterminate sentence, the judge could impose a fixed sentence and long term supervision, or simply a fixed sentence, if the evidence establishes that either of those lesser measures would adequately protect the public.

In borderline cases under the current law, judges must wrestle with the fact that designating someone as a dangerous offender could mean that person will never again be released. By adding two other sentencing options for dangerous offenders, the indeterminate sentence

¹¹ National Criminal Justice Section, Submission on Bill C-55, *Criminal Code* amendments (high risk offenders) (Ottawa: CBA, 1997) at 1, citing also B.L. Bazelon, *Questioning Authority* (New York: Alfred Knopf, 1988) at 115. The late Judge Bazelon was one of the United States most respected judges and authorities on the limits of the criminal law. He sat on the U.S. Circuit Court of Appeal for thirty five years (1949-1985).

¹² This phenomena was observed with the case of *R. v. Johnson*, *supra*, note 6.

¹³ This is something that the Supreme Court specifically approved in *R. v. Johnson* and *R. v. Edgar*, *ibid*, as well as in *R. v. Lyons*, *ibid*.

could appropriately then be reserved for that very small population that should be preventatively detained indefinitely, as described in *R. v. Lyons*.¹⁴ A fixed sentence, with subsequent long term supervision if needed would be available when realistically based on the evidence it was shown that the protection of the public would not be compromised. However, we repeat our earlier caution that any legislative change must be weighed against the potential for renewed litigation and constitutional scrutiny, generating uncertainty in the law and strains on the justice system.

The proposed changes in Bill C-2 would result in two types of long term supervision orders. A dangerous offender not requiring an indeterminate sentence could now be subject to a determinate sentence with long term supervision once that sentence expired. In addition, someone designated as a long term offender can already be subject to long term supervision once a determinate sentence has expired.

Under clause 43, Bill C-2 would introduce section 753.01 to deal with dangerous offenders later convicted of a further serious personal injury offence or breach of a long term supervision order. This new provision would allow for another assessment remand application and a truncated dangerous offender “re-sentencing” hearing, if the Crown used its discretion to apply. This provides a mechanism for initiating a sentencing hearing to obtain a more severe sentence, such as an indeterminate sentence, in cases where a dangerous offender re-offends violently or fails to comply with a long term supervision order.

While the proposed section would again limit judicial discretion by presumptively requiring imposition of an indeterminate sentence following a further offence or a breach, it would permit judicial discretion not to impose an indeterminate sentence where the evidence establishes that a fixed sentence would adequately protect the public.

¹⁴ R. v. Lyons, *ibid.*

A dangerous offender's breach of a long term supervision order could be quite minor, such as failing to report to an appointment or failing to advise of a change of address. In such cases initiating a new dangerous offender assessment and hearing could well be too heavy handed a response. It is appropriate that the prosecutor retain a measure of discretion on whether to apply for a new more onerous sentence, as a mechanism to avoid an application for minor breaches. Discretion is also permitted as to possible remedies for which the Crown might apply in these circumstances.

The CBA Section notes that the Bill is not clear about who would bear the burden of showing that, based on the evidence, a lesser measure than an indeterminate sentence is not contrary to public safety. This is true both for the type of sentence a dangerous offender is to receive under proposed section 753(4.1) and for a repeat predicate offence for a dangerous offender under proposed section 753.01(5). Although it would certainly be in the offender's interests to adduce evidence to support a lesser measure, the evidence could also arise in cross-examination, for example. This proposal appears to incorporate the reasoning in the decisions in *R. v. Wormell*¹⁵ and *R. v. Proulx*.¹⁶

The proposals do not appear to change the current appellate remedy process other than under proposed section 759(3)(a)(ii), which would permit the court of appeal to order a new hearing with any directions it considers appropriate. This could limit the hearing to a particular issue and potentially alleviate the time and uncertainty of repeating the entire process,¹⁷ but again could open the door to new legal challenges.

¹⁵ *Supra*, note 6.

¹⁶ [2000] 1 S.C.R. 61.

¹⁷ This was suggested by the BC Court of Appeal in *R. v. Mitchell*, 2002 B.C.C.A. 48 at 80-81.

C. Specific Concerns

Retrospectivity

Bill C-2 would introduce “primary designated” and “designated offences” to Part XXIV of the *Code*.¹⁸ The absence of transition provisions to provide guidance on the retrospective versus the prospective application of the changes is significant.

The new definitions for dangerous offenders and an automatic dangerous offender designation for a third primary designated offence could not apply retrospectively, but would have to be prospective in nature by virtue of the principles of statutory interpretation.¹⁹ Offenders with a criminal record for serious personal injury offences, for example aggravated assault or sexual assault, would not be captured by the primary offence designation until they had convictions registered after the enactment of Bill C-2. In other words, offenders with significant criminal records would not face the reverse onus provisions in proposed section 753.01 until they received two new convictions for primary designated offences *after* the enactment of Bill C-2.

That does not mean that the Crown would be foreclosed from bringing an application to have the offender designated a dangerous offender under the current provisions. It simply means that the impact and availability of the reverse onus provisions under proposed section 753.01 would not come to fruition for several years. They would not capture offenders who may well fit the designation of dangerous offender now.

Reverse Onus

The reverse onus provision for the presumptive dangerous offender designation under proposed section 753(1.1) in clause 42(2) is also of concern. The Crown would be relieved of the burden of proving the dangerous offender criteria in section 753(1)(a) or (b) for the third primary designated offence. Instead, the Crown would only have to prove the record

¹⁸ Also see *R. v. LeSarge* (1975), 26 C.C.C. (2d) 388. We recognize that they are not totally new to the *Code*, however, as they exist in the DNA and *SOIRA* order provisions.

¹⁹ 36 Hals. 3rd ed. P. 425, para. 645 Maxwell, Interpretation of Statutes, 12th ed. (1969) p. 222 (cited in *R. v. Ali*, [1980] 1 S.C.R. 221 at para. 9.

of convictions for two prior primary designated offences with sentences of two years or more each, plus the fact of the predicate offence is a primary designated offence that would warrant a sentence of two years or more imprisonment. While we recognize that any presumption of innocence may be exhausted at this stage, we expect that the reverse onus provisions would attract vigorous constitutional challenge under section 7 of the *Charter*.

Impact on Court Administration and Resources

In addition to our general comments about the potential of Bill C-2 to lead to renewed constitutional challenges and other litigation, we believe that the presumptive “third strike” predicate offence would very likely result in many more cases at all stages going to trial to avoid a conviction. This would be the case for any primary designated offence, whether the offence in question was the offender’s first, second or third.

Delays in court administration and resulting increased demands on resources would be the inevitable result, and should be carefully considered. If Parliament adopts these legislative changes, sufficient new judicial, police, prosecutorial, legal aid and corrections resources must be allocated to effectively implement the underlying objectives.

Use of Discretion

As noted, proposed section 753(1) would also replace the permissive “may” with the directive “shall”, appearing to remove a trial judge’s discretion *not* to declare someone a dangerous offender even though the Crown satisfies all the criteria. The CBA Section cautions that this proposal may well attract constitutional challenge, given the comments in *R. v. Lyons* to the effect that trial judges’ discretion is an important component in preserving the constitutionality of the legislation. While the proposal might not ultimately be struck down as unconstitutional, it could still generate significant litigation and consequently lead to uncertainty in the law for the time it takes for the issue to wend its way to the Supreme Court of Canada.

The comments of the Supreme Court of Canada in *Johnson* about limiting the use of the dangerous offender provisions to only those circumstances where they are truly warranted are instructive:

Lyons held, at pp. 337-38, that a sentencing judge's discretion not to impose an indeterminate sentence, even where all of the statutory criteria are met, helped ensure proportionality between the goal of protecting the public on the one hand and the serious effect of indeterminate detention on the accused on the other. Consequently, the discretion helped ensure the dangerous offender provisions' constitutionality. In other words, as we state elsewhere in these reasons, the imposition of an indeterminate sentence is justifiable only insofar as it actually serves the objective of protecting society. Now that it is clear that a sentencing judge has but one discretion to exercise, prospective factors, including the possibility of eventual control of the risk in the community, must be considered at some point leading up to a dangerous offender designation. This is necessary to ensure that an indeterminate sentence is imposed only in those circumstances in which the objective of public protection truly requires indeterminate detention.²⁰

D. Amendments to the Recognizance Process

Bill C-2 also proposes amendments to other preventative justice provisions, sections 810.1 and 810.2 of the *Criminal Code*. Section 810.1 provides for a recognizance to be imposed on a person believed on reasonable grounds to pose a risk to commit a sexual offence to children under the age of 14. Section 810.2 provides for a recognizance to be issued against persons whom it is believed on reasonable grounds may commit a serious personal injury offence.

In *Heywood*,²¹ the Supreme Court of Canada addressed the issue of preventative justice in the context of an individual's *Charter* rights. The Court's analysis can be summarized as follows:

- preventative justice provisions are legitimate and can pass *Charter* scrutiny;
- the correct approach to determining the constitutionality of a preventative detention provision is to undertake a section 1 analysis. It is a given that

²⁰ *Supra*, note 5 at para 36.

²¹ *R. v. Heywood*, [1994] 3 S.C.R. 761.

such a provision would amount to a *prima facie* violation of a person's section 7 rights.

- to survive a section 1 analysis, the impugned provision must be sufficiently tailored toward an identifiable legislative intent so as not to be overbroad; and
- the impugned provision must achieve that legislative intent in a manner that least impairs the subject's liberty.

Some of the proposed amendments in this part of Bill C-2, such as the proposed amendments to duration which would allow for a recognizance of up to two years for persons previously convicted of a relevant underlying offence, are commendable. Proposed additions to section 810.1, in particular proposed section 810.1(3.02) prohibiting a defendant to engage in any activity involving contact with persons under the age of 14 including the use of a computer system represent an appropriate limit. The proposed section 810.1(3.02)(b) is also reasonable, though we suggest the following alternative wording:

- (b) prohibit the defendant from attending a public park, public swimming area, daycare centre, school ground or playground where persons under the age of 14 are present and can reasonable be expected to be present.

This amended wording would clarify that a reasonable expectation that children under the age of 14 would be present is applicable to all listed locations, and may also address concerns about the breadth of the section.

Other requirements may attract greater scrutiny, given that they seem somewhat removed from the purposes of sections 810.1 and 810.2. Some possible requirements now proposed to be specified are, for example, that a defendant participate in a treatment program, wear an electronic monitoring device as long as the Attorney General makes that request, remain within a specified geographic area unless written permission to leave that area is obtained from the provincial court judge and return to and remain at a place of residence at specified times. The Supreme Court of Canada's analysis in *Heywood*,²² and subsequently applied in *Budreo*,²³ caution that legislators must ensure statutory provisions are properly directed at legislative goals.

²² *Ibid.*

²³ (2000), 32 C.R. (5th) 127.

VII. CONCLUSION

The CBA Section has offered our comments on many of the broad range of proposals for legislative change in Bill C-2. We recognize that changing the law is one possible option to improve public safety. However, it can lead to more litigation, confusion and uncertainty in the law, and delays and demands on the administration of justice. Our suggestions are offered based on our combined experience of decades in Canada's criminal courts, and our commitment to criminal law reforms that we believe will best advance both public safety and fairness and efficiency in the criminal justice system.

APPENDIX A
Bill C-22, *Criminal Code* amendments
(age of protection)

March 28, 2007

Mr. Art Hanger, M.P.
Chair
Standing Committee on Justice and Human Rights
Sixth Floor, 180 Wellington Street
Wellington Building
House of Commons
Ottawa ON K1A 0A6

Dear Mr. Hanger,

RE: Bill C-22, *Criminal Code* amendments (age of protection)

We are writing on behalf of the Canadian Bar Association's National Criminal Justice Section and the Sexual Orientation and Gender Identity Conference (SOGIC), with respect to Bill C-22, *Criminal Code* amendments (age of protection).

The CBA is a national association of 37,000 lawyers, notaries, students and law teachers, with a mandate to seek improvements in the law and the administration of justice. The Criminal Justice Section members include represents both prosecutors and defence counsel from every province and territory in Canada, as well as legal academics specializing in criminal law. SOGIC is a forum for the exchange of information, ideas and action on legal issues relating to sexual orientation and gender identity.

Introduction

Canada currently has one of the lowest age of consent laws,¹ and it has been shown that children in Canada are vulnerable to sexual abuse and exploitation by adults.²

¹ National Centre for the Prosecution of Child Abuse, *Child Abuse Crimes: Sexual Offences* (current through July 25, 2006). Available at: www.ndaa.org/pdf/ncpca_statute_sexual_offnses_july_06.pdf; Matthew Waites, *The Age of Consent: Young People, Sexuality and Citizenship* (New York: Pargrave MacMillian, 2005) c.3.

² Public Health Agency of Canada, *Canadian Incidence Study of Reported Child Abuse and Neglect: Final Report* by N. Trocme, B. MacLaurin *et al* (Ottawa: Minister of Public Works and Government Services Canada, 2001) at 33.

The CBA supports measures to protect children from sexual exploitation by adults, and recognizes that a low age of consent may, in some cases, contribute to that sexual exploitation. We support the intent of the proposal to raise the age of consent from 14 to 16 years of age, and recognize that the recent introduction of new “exploitative relationship” provisions to the *Criminal Code*³ may not cover situations where there is no pre-existing relationship between the parties involved.

In this letter, we stress two points in regard to changing the age of consent to sexual activity in Canada. First, a higher age of consent must be accompanied by a larger “close-in-age” exemption, so that it does not inadvertently criminalize consensual sexual activity between young people. Second, any reform of the age of consent should address current inconsistencies in the law for different forms of sexual activity.

Close in Age Exemption

The CBA supports measures to prevent exploitation of young people by mature adults, but clearly the intent is not to criminalize sexual activity between consenting young people. If the age of consent is raised to 16, we applaud Bill C-22’s proposal for a larger close-in-age exception. The exception is required to achieve the objective of protecting young people, while ensuring that the law does not unjustifiably infringe upon young people’s sexual choices.

Consistency in Age of Consent

The *Criminal Code* currently singles out one sexual act, anal intercourse, and applies different standards to that act than to other sexual acts. Bill C-22 provides the opportunity to bring these provisions in line with the *Canadian Charter of Rights and Freedoms*, and we strongly believe that lawmakers should not neglect that opportunity.

Section 159 of the *Criminal Code* imposes an age of consent for anal intercourse of 18 years of age. This distinction has been found unconstitutional by courts in Ontario, Quebec, British Columbia, Alberta, and Nova Scotia, as well as the Federal Court of Canada.⁴ These courts have found that section 159 violates the *Charter* by discriminating on the basis of age, marital status and sexual orientation. In *R. v. CM*, Abella J.A. (as she then was) commented extensively on the discriminatory impact of section 159 on the constitutional rights of gay men.

Section 159 also criminalizes sexual activity between two people in the presence of other consenting adults. Like the age restriction, this restriction applies only to anal intercourse, and not to any other form of sexual activity. This was the particular aspect of the section at issue in *R. v. Roth*. This aspect of the section is clearly inconsistent with developments

³ Bill C-2, now S.C. 2005, c.32.

⁴ See, *R. v. C.M.* (1995), 41 C.R. (4th) 134 (Ont. C.A.); *R. v. Roy* (1998), 125 C.C.C. (4th) 442 (Que. C.A.); *R. v. Blake* (2003), 187 B.C.A.C. 255; *R. v. Roth*, 2004 AB.Q.B. 305; *R. v. Farler* (2006), 43 N.S.R. (2d) 237 (C.A.); *Halm v. Canada*, [1995] 2 F.C. 331 (T.D.).

in indecency law, reflected in the Supreme Court's decision in *R. v. Labaye*⁵, where the court held that group sexual activity that did not harm individuals or society did not meet the established test for criminal indecency or obscenity.⁶

During its consideration of Bill C-22, we urge the government to bring the *Code* in line with the *Charter* by repealing section 159 and treating all consensual sexual activity identically. Any other approach opens the door to discrimination on the basis of sexual orientation.

Thank you for the opportunity to express the CBA's views on Bill C-22.
Yours truly,

(original signed by Gaylene Schellenberg for Greg P. DelBigio)

Greg P. DelBigio
Chair, National Criminal Justice Section

(original signed by Gaylene Schellenberg for Robert Muir)

Robert Muir
Chair, Sexual Orientation and Gender Identity Conference

⁵ [2005] 3 S.C.R. 728.

⁶ *Ibid.*, para. 70.

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

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.

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

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.

³ *R. v. Hall*, [2002] 3 S.C.R. 309.

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

APPENDIX C
Bill C-32 – *Criminal Code*
amendments (impaired driving)

Bill C-32 – *Criminal Code*
amendments (impaired driving)

NATIONAL CRIMINAL JUSTICE SECTION
Canadian Bar Association

June 2007

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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-32 – *Criminal Code* amendments (impaired driving)

I. INTRODUCTION

The Canadian Bar Association’s National Criminal Justice Section (CBA Section) appreciates the opportunity to comment on Bill C-32, *Criminal Code* amendments (impaired driving). The CBA Section members include Crown and defence lawyers from every jurisdiction in Canada.

Bill C-32 would introduce a new legislative scheme for drug impaired driving to provide police with additional investigative tools, create several new offences, change the existing penalty and driving prohibition provisions, and significantly limit the scope of applicable defences. Impaired driving, whether by drugs or alcohol, is a significant problem, and too often results in serious injury or death. Any effective legislative response must comply with the *Charter*, and result in real and demonstrated progress to deal with this serious issue.

Impaired driving is one of the most extensively litigated areas of the criminal law. Every aspect of the present legislative scheme has been subject to intense constitutional scrutiny. Anecdotal evidence suggests that impaired driving litigation accounts for 30 to 40% of the caseload in Canada’s trial courts¹. Regardless of whether or not that litigation is ultimately successful, its volume alone has enormous implications in terms of cost, delay and uncertainty in the law while cases are pending. In our view, proposals that raise new

¹ Canadian Council of Motor Transport Administrators, “Eliminating the Impaired Driving: the Road Ahead” National Workshop Proceedings, May 2001, available at http://www.ccmta.ca/english/pdf/impaired_driving_workshop_proceedings_may01.pdf, page 55

constitutional questions should be very carefully considered, and we will highlight many such questions throughout our review of Bill C-32. Any new avenues for challenge may not only undermine the effectiveness of the specific proposals, but significantly increase both caseload and delay in trial and appellate courts across the country. All reasonable steps should be taken to avoid that result.

II. NEW INVESTIGATIVE POWERS

Bill C-32 would give police additional powers to investigate drug impaired driving. In 2003, the CBA Section responded to a similar proposal in a Justice Canada consultation document, and we again commented on the issue in response to Bill C-16 in 2005². We stressed that,

physical coordination tests and the taking of bodily samples clearly engage the constitutional interests of liberty, security of the person (section 7), the right to be secure against unreasonable search or seizure (section 8), and the right not to be arbitrarily detained (section 9). It is, therefore, essential that any proposed law operate so that detention is as brief as practical, so that dignity of a detained individual is preserved, so that an individual is compelled to participate in an investigation through participating in physical coordination tests or compelled to provide bodily samples only when the requisite constitutional standards exist, and that the privacy interests associated with the information compelled from an individual be protected.³

Regulations accompanying new legislation would describe the nature of the qualifications and training for drug evaluation officers, physical coordination and screening tests proposed at the roadside and tests to be conducted during the evaluation, presumably at the police station. A detailed analysis of any proposed regulations is critical to assess the efficacy of any new scheme and to determine if it would survive *Charter* scrutiny. Without the accompanying regulations, we are significantly limited in our ability to comment on vital aspects of the legislative scheme.

² National Criminal Justice Section, Submission on Drug Impaired Driving (Ottawa: CBA, 2003) and Submission on Bill C-16, Drug Impaired Driving (Ottawa: CBA, 2005).

³ *Ibid*, CBA Section (2005) at 3-4.

We also reiterate our reservations⁴ about the subjective interpretation of physical tests performed at the roadside, and later in the evaluation process. While not scientific experts, we are aware that proper interpretation and application of specified testing continues to be controversial. For example, a survey of scientific literature by the United States National Highway Traffic Safety Administration commented as follows:

The study indicated that the DREs' [Drug Recognition Experts] ability to distinguish between subjects who were impaired and subjects who were not impaired was, in the words of the authors, "moderate at best." The DREs' ability to identify the drug class causing the impairment varied from "moderate" (for alprazolam) to "lower" (for cannabis and codeine) to "not better than chance" (for amphetamine). Further, the DREs' relied on just one or two "pivotal" symptoms in making their diagnoses, rather than utilizing all of the information they had available as recommended by the DEC [Drug Evaluation and Classification] manual.⁵

One way to ameliorate the dangers associated with subjective interpretation would be to require video and audio recording of the testing, both at the roadside and later in the evaluation process.

While Bill C-32 would permit recording of tests, in our view, such recording should instead be mandatory. This would enable an objective review of both the testing process and the results.

RECOMMENDATION:

The CBA Section recommends mandatory video and audio recording of tests for drug impairment, both at the roadside and later in the evaluation process.

⁴ *Ibid.*

⁵ "State of Knowledge of Drug Impaired Driving", available at <http://www.nhtsa.dot.gov/PEOPLE/injury/research/StateofKwnlegeDrugs/StateofKwnlegeDrugs>

D. Shinar, E.Schechtman and R.P.Compton, *Signs and symptoms predictive of drug impairment* (2000), from 15th International Conference on Alcohol, Drugs & Traffic Safety (Stockholm, Sweden: May 22-26, 2000).

In many jurisdictions, police forces can now routinely videotape roadside interactions,⁶ providing a clear, compelling and objective record. This evidence can streamline the trial process by narrowing the issues and even obviate the need for a trial altogether.

Videotaped records have been recommended for other important interactions, such as recording out-of-court eyewitness identification or police interviews with suspects.⁷ The need for such a record is particularly compelling where the subjective evaluation of evidence by an officer is as critical as contemplated by Bill C-32. Regulations, rather than training materials or manuals, should establish detailed, explicit and binding guidance about the administration and interpretation of the tests, given the need to monitor compliance. This would help to ensure greater national consistency and transparency.

RECOMMENDATION:

The CBA Section recommends that given the need to monitor compliance, regulations, rather than training materials or manuals, should provide detailed, explicit and binding guidance about the proper administration and interpretation of the tests for drug impairment.

Proposed section 254(2)(a) stipulates that the physical coordination tests administered at the screening stage be "prescribed by regulation". No such restriction appears in section 254(3.1), which simply mandates that an individual submit to an evaluation as demanded by an evaluating officer. While the term "evaluating officer" is defined and proposed section 254.1(c) provides that the tests to be conducted and procedures followed during an evaluation are to be the subject of regulation, section 254.1(3.1) contains no explicit reference to the regulations. To be consistent throughout the legislative scheme, we suggest the same approach be employed in both subsections.

⁶ See for example, *R. v. Quon*, [2007] Carswell Ont 1031 (Ont. C.J.), *R. v. Sorenson*, [2006] Carswell BC 1491, (B.C.Prov. Ct.), *R. v. Winzer*, [2003] Carswell Yukon 72 (Y.T.T.C.).

⁷ See for example the recommendations contained in the F/P/T Heads of Prosecution Committee Report of the Working Group on the Prevention of Miscarriages of Justice, Chapters 5-6, available at <http://www.justice.gc.ca/en/dept/pub/hop/p6.html#s66>

RECOMMENDATION:

The CBA Section recommends that consistent language referencing the regulations should be used throughout the legislative proposals.

There are also unresolved technological limitations on the accuracy and suitability of screening devices used to measure the presence or absence of several drug metabolites. For example, a recent European Union sponsored international study of saliva based roadside testing devices in Belgium, Finland, Norway, Germany, Spain and the United States concluded that none of the devices met the criteria for specificity or accuracy specified in the first phase of that study.⁸

Technological limitations may have a significant impact on the ultimate efficacy and fairness of the proposed legislative scheme, not to mention its vulnerability to constitutional challenge.

At the roadside, threshold determinations for further investigation of drug impaired driving will depend on the subjective interpretation of physical tests. This is in contrast to the objective, approved screening devices used to investigate alcohol impairment. In our view, subjective evidence based on an individual officer's interpretation may be less compelling than instrument based testing, and would consume significantly more trial time to adduce and examine.

Bill C-32 may authorize more invasive or intrusive testing than presently used for alcohol impairment. For example, the techniques for drug evaluation described in Justice Canada's 2003 consultation document include physical examinations to check vital signs, pulse, blood pressure, muscle tone and an examination for injection sites⁹. The potential intrusiveness of such tests has significant *Charter* implications. Again, a careful *Charter* analysis is impossible without examining the proposed regulations clarifying the exact nature of the tests and the procedures to be used.

⁸ Alain Verstraete and Elke Raes, *Roadside Testing Assessment Study* (ROSITA – 2) - Project Final Report (March 2006), available at <http://www.rosita.org>

⁹ *Supra*, note 2.

For alcohol testing, section 254(3)(b) requires that an officer have reasonable and probable grounds to believe that, by reason of any physical condition, the individual may either be incapable of providing a breath sample, or it would be impracticable to do so before a blood sample can be taken. However, the proposed requirement for a blood sample pursuant to 254(3.3)(b) of Bill C-32 contains no such limitation.

The CBA Section shares concerns about drug-impaired driving, and recognizes that objective and scientifically credible evidence is required to enforce existing prohibitions. However, the subjective nature of many of the proposed physical tests and evaluations and the significant technological limitations of existing screening devices and instruments need to be thoroughly addressed. These factors would pose serious constraints on the effectiveness of the proposed measures for investigating drug impaired driving. Coupled with the need for careful constitutional scrutiny of the proposed testing qualifications, regimes and protocols as may be developed in subsequent regulations, we recommend a cautious approach to new legislative proposals. A new law that does not materially advance the legitimate objective of road safety but imposes significant and lasting burdens on courts across the country would clearly not be a positive development.

RECOMMENDATION

The CBA Section recommends careful review of any new legislative proposals pertaining to impaired driving, to ensure that the legitimate objective of road safety is advanced while new areas for litigation and the ensuing significant and lasting burdens on courts across the country are minimized.

III. NEW OFFENCES

A. Unlawful Possession of Drugs in a Motor Vehicle (s.253.1)

Bill C-32 would create a new offence prohibiting the unlawful possession of a drug in any part of a specified vehicle. Unlike analogous sections in provincial liquor or highway traffic legislation, there is no requirement that the prohibited substance be in the passenger area of the vehicle or otherwise accessible to the driver or passenger.¹⁰ Without that linkage, it is difficult to understand the relationship between this provision and the existing prohibition for possessing illegal drugs in section 4 of the *Controlled Drugs and Substances Act* (CDSA). Depending on the nature of the substance in question, penalties under the CDSA could actually be higher than those proposed in this Bill — maximum periods of incarceration ranging from six months to seven years, contrasting with a proposed maximum period of incarceration of not more than five years, or as an offence punishable by summary conviction.

Amendments to section 259(1) and (1.1) propose a mandatory driving prohibition for this offence. A driving prohibition where the elements of the proposed offence do not include language similar to that used for the provincial offences cited above would be problematic.

In the absence of an element of the offence giving rise to an increased risk of impaired driving, such as easy access to the unlawful substance by a driver or passenger, the rationale for a driving prohibition is unclear.

In addition, the proposed offence provides a lower penalty structure than available for the applicable possession offences under the CDSA. Further, transportation of such substances in a vehicle may be regarded as an aggravating factor in appropriate

¹⁰ See for example *Liquor License Act*, R.S.O. 1990, c. L-19, s. 32; *Liquor Control Act*, R.S.M. 1988, c. L 160, s.117.

circumstances.¹¹ For these reasons, we are of the view that the proposed new offence would not assist in combating drug impaired driving, and may instead undermine the efficacy of existing provisions in relation to drug possession.

RECOMMENDATION

The CBA Section recommends that the new offence for unlawful possession of drugs in a motor vehicle be deleted from Bill C-32.

B. BAC over .08 Causing Death or Bodily Harm

The Bill proposes two new offences for operating a motor or other specified vehicle with a blood alcohol level over the proscribed limit and causing an accident resulting in bodily harm or death. The maximum penalties for these offences would correspond to existing penalties for impaired driving causing bodily harm or death.

We have two concerns about the relationship of these offences to the current offences of the impaired driving causing bodily harm or death in sections 255(2) and (3). Under the current provisions, the element of causation has been interpreted as requiring that alcohol impairment must be a contributing cause in the resulting bodily harm or death. This causal relationship has been described in a variety of ways, including that the impaired driving was “a real factor” in the bodily harm or death, or that it be “at least a contributing cause outside the *de minimus* range”¹². Suggested jury instructions for these offences describe this element as “at least a contributing cause of what happened... it must be more than an insignificant or trivial cause”¹³. Evidence of elevated blood alcohol readings alone, without evidence linking those readings to the actual cause of the injury or death, has been insufficient.¹⁴

¹¹ Similar reservations were expressed at the committee hearings in relation to this proposal in Bill C-16 on November 3, 2005.

¹² *R. v. Ewart* (1989), 53 C.C.C. (3d) 153 (Alta. C.A.), *R. v. Andrew* (1994), 91 C.C.C. (3d) 97 (B.C.C.A.), *R. v. Laprise* (1996), 113 C.C.C. (3d) 97 (Que.C.A.).

¹³ Justice David Watt, *Watt's Manual of Criminal Jury Instructions*, Final 253(B) at 566-7.

¹⁴ See for example, *R. v. Fisher* (1992), 13 C.R. (4th) 222 (B.C.C.A.).

In contrast, the proposed offences appear to provide the same penalty as for impaired driving causing death or bodily harm where there is *no* evidence that the elevated blood alcohol levels actually contributed to the harm or death. In our view, such an approach is problematic.

In one case, an individual operating a motor vehicle with an elevated blood alcohol level tragically struck and killed an impaired pedestrian, who happened to be wearing dark clothing and lying in the middle of the road. The accused was convicted of the section 253(b) offence, but acquitted of impaired driving causing death,¹⁵ as even a sober driver would not have been able to avoid the pedestrian. If the proposed offence under section 255(2.2) would result in subjecting this driver to the same maximum punishment as a driver whose impairment is a contributing cause of death or bodily harm, it may be vulnerable to a *Charter* challenge, as the degree of moral fault or blameworthiness is clearly not equivalent. While an elevated penalty may be appropriate for an impaired driver who causes an accident where death or bodily harm results, an equivalent maximum penalty to that of a driver whose alcohol impairment plays a causative role in the death or bodily harm could well be disproportionate.

Further, in cases where there are elevated blood alcohol readings, the new offences will make little, if any, difference. There is a consensus among expert witnesses that impairment occurs for all individuals at blood alcohol levels over 100 mg in 100 mL of blood. At these levels, absent unusual circumstances, causation will be proven. As a result, the new offences would have little practical impact in such cases.

C. Refusal in Cases Involving Death or Bodily Harm

The Bill proposes two new offences if a person unlawfully refuses to provide a breath or blood sample in cases where the driver “*knows or ought to have known*” that the operation of the motor or other vehicle caused an accident resulting in death or bodily harm. The penalties for these offences would be equivalent to those for the existing offences of

¹⁵ *R. v. Giardin*, [1998] Carswell Ont 3136 (Ont. C.J.).

impaired driving causing bodily harm or death, and the proposed offences described above.

This proposal appears to be aimed at removing any incentive for unlawfully refusing to provide a sample in cases of death or bodily harm. The proposed approach must be considered in light of the existing adverse inference in such circumstances under section 258(3) of the *Criminal Code*. We suggest that there may be more proportionate responses to this problem, such as strengthening the inference against an accused refusing to provide a sample or increasing available penalties. However, equating the maximum penalties available for refusal with those where impairment actually plays a causative role in death or bodily harm may well elicit constitutional scrutiny.

Finally, we are concerned about the proposed mental element in the language, “knows *or ought to have known*”. The use of an objective mental element has already been the subject of extensive *Charter* challenge elsewhere in the *Criminal Code*. For example, use of this phrase in sections 21(2), and 22(2) where parties form a common intention to commit an offence, or who counsel the commission of an offence, was subject to challenge. In *R. v. Logan*, the Supreme Court of Canada declared that this phrase was inoperative in relation to offences with a constitutionally mandated subjective mental element¹⁶. We are of the view that the terminology proposed in Bill C-32 is likely to elicit *Charter* challenge, especially in situations where the parties may be injured or in shock as a result of the accident. While not every offence has a constitutionally required subjective mental element, it may be required in light of the proposed maximum penalty of life imprisonment.

D. Increased Penalties

Bill C-32 would increase the penalties for driving offences, including the mandatory minimum penalties for several offences. The CBA Section has frequently disputed the efficacy of mandatory minimum penalties. In our experience, trial judges are best placed

¹⁶ *R. v. Logan*, [1990] 2.S.C.R. 731, paras 17-34.

to fashion appropriate sentences considering all circumstances at hand.¹⁷ Requiring judges to impose mandatory minimum sentences without allowing the exercise of judicial discretion to balance all sentencing objectives in each individual case does not, in our view, promote justice, fairness or ultimately, public respect for the administration of justice.

IV. NEW RESTRICTIONS ON DEFENCES

Various evidentiary presumptions are used to assist in prosecuting cases of impaired driving and driving with a blood alcohol level over the proscribed limit. Since 1959, these presumptions, with varying formulations, have been used to bridge evidentiary gaps or other difficulties. In *R. v. Boucher*, the Supreme Court of Canada recently summarized the existing presumptions. To paraphrase:

- a. According to section 258(1)(g), where breath samples are taken pursuant to a demand under section 254(3), it is to be presumed that the results of the analysis of these samples are an accurate determination of the accused person's blood alcohol level at the time of testing.
- b. Section 258(1)(c) establishes that the accused person's blood alcohol level at the time of apprehension is the same as the level at the time of testing.
- c. Pursuant to section 258(1)(d.1) it is presumed that if the blood alcohol level exceeds 80 mg at the time of testing, it also exceeds 80 mg at the time of the alleged offence. The majority judgment of the Court described this as reinforcing the presumption of identity¹⁸.

¹⁷ See, for example, National Criminal Justice Section, Submission on Bill C-10, *Criminal Code* amendments (mandatory minimum sentences for firearm offences) (Ottawa: CBA, 2006).

¹⁸ *R. v. Boucher*, [2005] S.C.C. 72 at para. 22.

Each of these presumptions has been the subject of thorough constitutional scrutiny.¹⁹ The function and scope of what are referred to as "evidence to the contrary" defences has been a significant feature in that analysis. The interpretation and scope of these presumptions is presently before the Supreme Court of Canada.²⁰

A 1999 report from the Standing Committee on Justice and Human Rights concluded:

[It was] suggested that Parliament might consider placing limits on the interpretation of "evidence to the contrary," to eliminate some of the more "spurious arguments" that can arise under that heading.

On the other hand, the Criminal Lawyers Association of Ontario pointed out that it would hardly be within the capability of an accused person to demonstrate, several months after the fact, the accuracy or inaccuracy of a machine that is in the possession of the police. That argument is particularly persuasive in light of the fact that Criminal Code sections mandating the provision of a breath sample to the accused have never been proclaimed in force, due to the lack of an "approved container" for the purpose. This is in contrast to the presumption of accuracy for a blood alcohol reading, which requires that an additional sample be made available so that the accused can conduct his or her own analysis.

The Committee understands the frustration expressed by justice system personnel over time-consuming defenses that, at least on the surface, may appear frivolous. However, given that the accused would have no effective means of checking the accuracy of a breath analysis machine, the Committee agrees that limiting the interpretation of "evidence to the contrary" in such a manner as recommended could effectively amount to the creation of an absolute liability criminal offence. Such a result would run the risk of interfering with an accused person's rights guaranteed by the Canadian Charter of Rights and Freedoms. In present circumstances, therefore, the Committee does not support amendments to the Criminal Code that would limit the interpretation of "evidence to the contrary".²¹

The CBA Section fully agrees with this conclusion, and suggests that it should serve as a powerful indication of the magnitude of constitutional risk involved in limiting the nature and scope of these defences.

¹⁹ See for example, *R. v. Gilbert*, [1994] Carswell Ont 44 (Ont.C.A.), *R. v. Phillips*, [1988] Carswell Ont 65, *R. v. Ballem*, [1990] Carswell PEI 1 (P.E.I.S.C.C.A.).

²⁰ *R. v. Gibson*, [2006] S.C.C.A. No. 274, [2006] N.S.J. No. 178, *R. v. MacDonald*, [2006] S.C.C.A. No. 338, [2006] A.J. No. 706 (Alta. C.A.) These appeals are to be heard jointly. They are tentatively scheduled for October 15, 2007.

²¹ Report of the Standing Committee on Justice and Human Rights, *Toward Eliminating Impaired Driving* (Ottawa: May 1999).

As noted, the present provisions contain two related temporal presumptions, that the lowest reading of blood alcohol level at the time of testing is identical to that level at the time of driving, and that if the blood alcohol level was over the legal limit at the time of testing, it was also over that limit at the time of driving. Each of these presumptions applies either in the “absence of evidence to the contrary” or in the “absence of evidence tending to show” that the results were different, or under the legal limit. These exceptions are often referred to as “evidence to the contrary”.

Bill C-32 would have the effect of limiting the scope of “evidence to the contrary” in at least two ways. First, the proposed changes to sections 258(1)(c), and 258(1)(d) define evidence to the contrary as evidence tending to show *both* that the approved instrument was malfunctioning or was operated improperly (for breath samples), or that the analysis was performed improperly (for blood samples) *and* that the concentration of alcohol in the accused blood would not have exceeded the legal limit at the time of the offence.

Second, the proposed section 258(1)(d.01) defines evidence tending to show that the approved instrument was malfunctioning, was operated improperly, or the blood analysis was performed improperly as excluding evidence of the amount of alcohol consumed by an accused, the rate at which the accused absorbed and eliminated alcohol and any calculations based on evidence.

The addition of this new first element, relating to instrument malfunction, operator error, or improper analysis is problematic. First, as noted by this Committee’s report, it would be particularly difficult for an accused to raise a reasonable doubt based on instrument malfunction given that the instrument is in custody of the authorities. It would not be feasible to propose an application or attempt by an accused to gain access to the instrument for anything approaching contemporaneous testing.

Again, there are advantages in a complete audio and video recording of the calibration, testing and use of the approved instrument. This contemporaneous record would have all the advantages noted in relation to testing for drug impairment. A mandatory protocol of

approved instrument maintenance, testing and operation, and the evidentiary consequences of failing to comply with the protocol should be established.

RECOMMENDATION

The CBA Section recommends that a mandatory protocol of approved instrument maintenance, testing, and operation be established, including the evidentiary consequences of failing to comply with that protocol.

Given the increased importance of demonstrating instrument malfunction or operator error under Bill C-32, a mandatory protocol would give an appropriately transparent and consistent mechanism to enhance the accuracy and reliability of forensic alcohol testing. This would differ from the present recommended protocols established by the Forensic Science Alcohol Test Committee.²²

Second, the relationship between the proposed changes to sections 258(1)(c) and 258(1)(d.1) is unclear, and could potentially give rise to contradictory results. Currently, there is no potential incongruity between these sections with respect to evidence to the contrary. The relevant portion of sections 258(1)(c), and (d.1) simply refer to a presumption “in the absence of evidence to the contrary” or “in the absence of evidence tending to show that the concentration of alcohol in the blood of the accused at the time when the offence was alleged to have been committed did not exceed [the legal limit]”. The Supreme Court of Canada has described the effect of section 258(1)(d.1) as “expanding the presumption of identity... not to change the type of evidence needed to rebut presumption ... but to reinforce [it]”.²³

However, the proposed changes to sections 258(1)(c) and (d) in Bill C-32 would require evidence tending to show machine malfunction, operator or analytical error. Proposed subsection (d.1) does not refer to this element, but rather requires evidence tending to show that the accused’s consumption of alcohol was consistent both with a concentration

²² “Recommended Standards and Procedures of the Canadian Society of Forensic Science Alcohol Test Committee” (2003) 3-36 Can. Soc. Forens. Sci. J. 101 at 101–127.

²³ *Boucher, supra*, note 18 at para. 22.

of alcohol in the blood not exceeding the legal limit at the time of the offence and with the concentration of blood alcohol as revealed in the analysis of breath or blood.

The relationship between these two new provisions is unclear. Both relate to a similar temporal presumption – either that the blood alcohol at the time of driving is the same as the lowest shown on the certificate (section 258(1)(c)), or that if the blood alcohol level exceeded the legal limit at the time of testing, it also exceeded that limit at the time of the alleged offence. While section 258(1)(c) refers to breath samples, section 258(1)(d) to blood, and the proposed section 258(1)(d.1) to both, the requirements for evidence to the contrary in relation to the temporal presumptions are different.

The following example may highlight one of the difficulties that this may cause. An accused consumes a large amount of alcohol immediately prior to driving. He is arrested very shortly thereafter, before he has metabolized the alcohol. He is under the legal limit at the time of driving. However, he is absorbing the alcohol, and by the time he is tested his blood alcohol level is over the legal limit. This evidence appears to displace the presumption articulated in proposed section 258(1)(d.1). However, it would not displace the presumption in either section 258(1)(c), or (d) in the absence of additional evidence showing instrument, operator or analytical error.

This example may give rise to a further problem if proposed sections 258(1)(c) or (d) were clarified to prevail over the related provisions in section 258(1)(d.1). In that instance, an accused could raise a reasonable doubt that blood alcohol level was over the legal limit at the time of driving, but still be convicted in the absence of evidence tending to show instrument or operator error. This may cause constitutional problems, particularly as the doubt arises independent of any concern or issue about the operation of the approved instrument or analysis. While previous versions of these presumptions have been found constitutionally sound, it is far from clear that that would be the result in the circumstances described, given reasonable doubt as to impairment at the actual time of driving.

Finally, the impact of the proposed changes on the status of the remaining presumption of accuracy as described by the Supreme Court of Canada in *R. v. Boucher* is unclear. That presumption combines the effect of section 258(1)(g) of the *Criminal Code* and section 25 of the *Interpretation Act*. The presumption – that the results of the analysis of samples are an accurate determination of blood alcohol level at the time of testing – has an obvious relationship to the issues of instrument malfunction or operator error. While proposed section 258(1)(d.01) excludes certain kinds of evidence relating to demonstrating instrument malfunction or operator error, the Bill does not clarify the relationship between this provision and the presumption of accuracy arising from the combined effect of the sections referred to above.

V. CONCLUSION

We know from daily experience that the impaired driving sections are complex, and among the most heavily litigated in the *Criminal Code*. This area of the law consumes a disproportionate amount of court time and justice system resources. While an impaired driving case winds its way through the appellate courts, related cases are often affected by the legal uncertainty as a result. The interrelationships between the interpretation and operation of all aspects of any new legislative proposals should be thoroughly scrutinized to avoid exacerbating this existing reality. Given that this Committee itself expressed very similar concerns as recently as 1999, we urge very careful review of Bill C-32.

In our view, there are significant and palpable *Charter* concerns in the provisions of Bill C-32. Thorough discussion and debate should be permitted to clarify the constitutional status of the Bill's proposals. Every effort should be made to avoid a torrent of litigation and the consequent significant negative impact on the administration of criminal justice, as well as vastly increased demands on court resources that we anticipate should Bill C-32 be passed in its current form.

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

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

NATIONAL CRIMINAL JUSTICE SECTION
CANADIAN BAR ASSOCIATION

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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 stipulated offences³ when a firearm is used in the commission of the offence. Bill C-10

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>

³ See *Firearms Act*, SC 1995, c.39.

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:

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:

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).

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.

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.

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

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.”

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 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.

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.

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 offences¹⁰. 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 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,

¹⁰ *Supra*, note 6.

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 Canada¹². 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 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

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.

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, 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.

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