Bill C-15 – *Controlled Drugs and Substances Act* Amendments

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PREFACE

The Canadian Bar Association is a national association representing 38,000 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.

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Bill C-15 – *Controlled Drugs and Substances Act* Amendments

I. INTRODUCTION

The Canadian Bar Association's National Criminal Justice Section (CBA Section) appreciates the opportunity to comment on Bill C-15, *Controlled Drugs and Substances Act* (CDSA) amendments. The CBA Section consists of defence lawyers, prosecutors and legal academics from every province and territory, and included in our mandate is seeking improvements in the law and the administration of justice.

Justice Canada's news release to Bill C-15 says that it is intended to "crack down on crime and to ensure the safety and security of our neighbourhoods and communities." The CBA Section opposes passage of Bill C-15. We believe public safety concerns can be better met with existing legislative tools. We believe the Bill would not be effective, would be very costly, would add to strains on the administration of justice, could create unjust and disproportionate sentences and ultimately would not achieve its intended goal of greater public safety.

II. GENERAL COMMENTS ON BILL C-15

The CBA Section has consistently opposed the use of mandatory minimum sentences (MMS)[1] as we believe that they:

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[1] 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).

- do not advance the goal of deterrence. International social science research has made this clear.[2] The government itself has stated that:

  > The evidence shows that long periods served in prison increase the chance that the offender will offend again....In the end, public security is diminished, rather than increased, if we "throw away the key".[3]

- do not target the most egregious or dangerous offenders, who will already be subject to very stiff sentences precisely because of the nature of their crimes. More often, less culpable offenders are caught by mandatory sentences and subjected to extremely lengthy terms of imprisonment.
- 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.[4]
- 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.

Bill C-15 would create a complicated system of different escalating MMS depending on the nature and amount of the substance at issue, and the application of aggravating factors.[5]

Based on our experience, we believe that the Bill has the potential to add complexity to existing sentencing principles and to increase the court time required for sentencing

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2 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.

3 Department of Justice, *A Framework for Sentencing, Corrections and Conditional Release: Directions for Reform* (Ottawa: 1990) at 9. We note that MMS have been severely criticized in many other important studies, including Canada's own *Sentencing Commission Report*.

4 *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 (Ottawa: StatsCan, 2005) at 15, which states that: "Aboriginal people represent more than one in five admissions to correctional services."

5 See, for example Bill C-15, clause 3.

hearings. Fewer accused would likely plead guilty, adding to current strains on court resources. Further, we believe that the Bill would often conflict with existing common law and statutory principles of sentencing, such that sentences could be excessive, harsh and unfair in some cases.

Our analysis of Bill C-15 is informed by the following observations:

1. Every sentence imposed against an offender must comply with section 12 of the *Charter*[6].
2. Several factors listed in clause 1(1)(a)(i) of the Bill are already criminal offences (for example, see *Criminal Code* sections 467.11-13, 264.1). Some of those offences carry mandatory consecutive sentences (for example, see *Criminal Code* section 467.14) and others carry MMS (for example, see *Criminal Code* section 95(2);
3. Several factors listed in clause 1(1)(a)(i) of the Bill are already aggravating factors on sentence, which "shall" be considered by the court pursuant to CDSA section 10(2) and *Criminal Code* section 718(2)(a).

The Bill is silent on how these overlapping provisions would operate. In some instances the combined operation of these provisions would result in a sentence that is unfit or that offends section 12 of the *Charter*, and the sentencing judge would have no discretion to address those problems.

Bill C-15 would require MMS, even though circumstances of the offences and degrees of responsibility vary significantly. The penalties in the Bill are based on arbitrary factors and do not meaningfully distinguish the level of culpability[7]. For example, clause 3(1)(b) would impose escalating MMS for production of marijuana geared to the number of plants produced. If less than 201 and for the purpose of trafficking, the MMS would be six months. If less than 201, for the purpose of trafficking and any of the aggravating factors apply, the MMS would be nine months. If more than 200 but less than 501, the MMS would be one year. In the same case, if any of the aggravating factors apply, the MMS would be

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6 Section 12 states that "Everyone has the right not to be subjected to any cruel and unusual treatment or punishment." See *R. v. Smith*, [1987] 1 SCR 1045.

7 T T. Gabor and N. Crutcher, Mandatory Minimum Penalties: Their Effects on Crime, Sentencing Disparities, and Justice System Expenditures (Ottawa: Justice Canada, 2002) at 31.

eighteen months. If the plants exceed 500, the MMS would be two years. If any of the aggravating factors apply, the MMS would be three years. In our view, it is contrary to common sense for someone responsible for a 200-plant grow operation to receive a six-month MMS, while someone responsible for 201 plants to be subject to twice that sentence.

Given the significant prison terms proposed by the Bill, the Crown should be required to prove beyond a reasonable doubt those factors capable of triggering MMS. Where *mens rea* is a component of the triggering factor itself, for example, that a person is producing over a certain number of marijuana plants, or that an offence was committed near a school or at a public place usually frequented by persons under eighteen years of age, the Crown should also be required to prove the *mens rea* of that component (ie. the requisite awareness of the number of plants, proximity of the school, or the particular population frequenting the public place) beyond a reasonable doubt. The same requirement of proof should apply to existing aggravating factors of sentence defined by the CDSA and *Criminal Code*, above.

III. JUDICIAL DISCRETION

Canada's judges have a critical role in the operation of the criminal justice system. The MMS proposed in Bill C-15 would remove discretion from sentencing judges to effectively determine which sentence can best balance all fundamental objectives of sentencing. Prohibiting judges from exercising discretion to determine an appropriate sentence for the offender before them is 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.

There are good reasons for conferring discretion on the judge charged with imposing a fit sentence. The judge has heard the particular circumstances of the offence and the offender, and is best able to craft a sentence that will balance all the goals of sentencing. The judge is also best equipped to assess what will address the needs and circumstances of the community where the crime occurred. If evidence demonstrates that an offender should be subject to a lengthy prison sentence, the Crown will have brought that fact to the judge's attention. In our experience, repeat offenders and serious drug traffickers already receive significantly elevated sentences, even above the proposed MMS. Bill C-15 would remove

the discretion that the sentencing process requires to be fair, to deter criminals, and to rehabilitate offenders if there is a real prospect of doing so.

If, where the sentence imposed at trial 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. Bill C-15 would not only limit a judge in devising an appropriate sentence, it would limit the scope of appellate review where a clearly unfit sentence has been imposed. In our view, the formulaic approach in Bill C-15 would lead to real injustice in certain fact situations, and judges would be unable to fulfill their role as judges to address that injustice.

IV. SENTENCING PRINCIPLES

The *Criminal Code* sets out principles of sentencing that require 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. Bill C-15'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... the greatest impact on patterns of offending is publicizing apprehension rates, or increasing the prospect of being caught.[8]

Other principles of sentencing must also be considered in determining an appropriate sentence. For example, *Criminal Code* section 718.2(e) requires that the particular situation of aboriginal offenders be considered at sentencing. If a less restrictive sanction would adequately protect society, or where the special circumstances of aboriginal offenders should be recognized, increased sentences and MMS would conflict with that principle. The Supreme Court of Canada has also recognized that incarceration should generally be used as a penal sanction of last resort, and that it may well be less appropriate or useful in the case of

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[8] 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.

aboriginal offenders.[9] Penitentiary terms are generally served far from communities and families, going against efforts to promote eventual reintegration or rehabilitation of offenders, which are other important sentencing principles. Under Bill C-15, local judges would have no option but to sentence an offender from Nunavut, for example, to an MMS in Ontario, where offenders from the territory are routinely sent.

The *Criminal Code* contains a statutory acknowledgement of the principal of restraint, stating that the purpose of sentencing is to separate offenders from society only *where necessary*. Section 718.1 of the *Criminal Code* states that proportionality is the fundamental principle of sentencing, and that "a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender". Proportionality reflects the delicate balance that must be achieved in fashioning a just sentence.

In the area of drug offences, the public is often best protected through harm reduction strategies that encourage rehabilitation. In this regard, participation in a Drug Treatment Court should not be restricted as is proposed in section 5(2) of Bill C-15. In our view, it should be available to all offenders for whom rehabilitative considerations are appropriate.

V. CONCLUSION

As lawyers in criminal courts across the country every day, we know that major drug offences are treated very seriously by the courts and the principles of general deterrence and denunciation hold great weight in sentencing hearings for those offences. Judges have effective guidance from the CDSA and section 718 of the *Criminal Code* to determine a fit sentence for the individual offender given the circumstances of the offence. Crowns highlight relevant aggravating factors to judges. Judges can give those factors appropriate weight in determining if and when incarceration ought to be imposed, and the length and venue of such a sentence.

The CBA Section is opposed to the passage of Bill C-15. It would limit the flexibility required to resolve cases justly. Bill C-15 would certainly reduce the number of guilty pleas,

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

lead to more trials and more delays, and require additional resources to prosecute and incarcerate more offenders.

The MMS proposed by the Bill would focus on denunciation and deterrence to the exclusion of other legitimate sentencing principles, and often lead to injustice. Certainly, some offenders are good candidates for rehabilitation. MMS will result in offenders who could have been rehabilitated remaining incarcerated long after their detention acts as either a deterrent, is required for public safety or promotes rehabilitative goals. This would be unfair to the offender, at great cost to society. We believe that Bill C-15 would have a detrimental effect on an already strained justice system, and we urge that it not be passed into law.