THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

September 15, 2009

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

Dear Senator,

Re: Bill C-25, *Criminal Code* amendments (limiting credit for time spent in pre-sentencing custody)

I am writing on behalf of the Canadian Bar Association's National Criminal Justice Section (CBA Section) regarding Bill C-25, *Criminal Code* amendments (limiting credit for time spent in pre-sentencing custody). The CBA is a national association of 37,000 lawyers, notaries, students and law teachers, with a mandate to promote improvements in the law and the administration of justice. Members of the CBA Section include both prosecutors and defence counsel from every province and territory in Canada, as well as legal academics specializing in criminal law.

As Bill C-25 was not amended by the House of Commons, I have attached the CBA Section's prior submission on the Bill in both official languages.

We look forward to discussing the CBA Section's concerns about the Bill.

Yours truly,

(Original singed by Gaylene Schellenberg for Joshua Weinstein)

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THE CANADIAN BAR ASSOCIATION
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May 22, 2009

Ed Fast, M.P.
Chair
House of Commons Committee
on Justice and Human Rights
Sixth Floor, 131 Queen Street
House of Commons
Ottawa ON K1A 0A6

Dear Mr. Fast,

Re: Bill C-25, *Criminal Code* amendments (limiting credit for time spent in pre-sentencing custody)

I am writing on behalf of the Canadian Bar Association's National Criminal Justice Section (CBA Section) regarding Bill C-25, *Criminal Code* amendments (limiting credit for time spent in pre-sentencing custody). I regret that we are unable to appear at the Committee's hearings on this Bill, but trust that our comments will be of use in your deliberations. The CBA is a national association of 37,000 lawyers, notaries, students and law teachers, with a mandate to promote improvements in the law and the administration of justice. Members of the CBA Section include both prosecutors and defence counsel from every province and territory in Canada, as well as legal academics specializing in criminal law.

Bill C-25 would limit the practice of giving enhanced credit for time spent in pre-sentencing custody. The CBA Section believes that the proposed amendments would have an adverse impact on the fair and effective administration of criminal justice across Canada.

The Supreme Court of Canada has said that "to respond to misperceptions about the current use of judicial discretion ... by amending section 719(3) of the *Criminal Code* to lengthen sentences would be to create a result which is "offensive both to rationality and justice".[1] The Bill's short title, "Truth in Sentencing Act" suggests an absence of "truth" in current sentencing practices. However, the Backgrounder to Bill C-25 acknowledges a public misconception that credit for

[1] *R. v. Wust*, 2000 SCC 18 (CanLII), [2000] 1 S.C.R. 455 at para. 33.

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time served represents an undeserved benefit to offenders. In our view, misconceptions about the justice system are better addressed through public education.

The practice of enhanced credit for some pre-trial custody situations was developed to take into account the fact that some offenders, while still presumed to be innocent, were incarcerated in conditions worse than they would experience after conviction. For example, individuals not yet convicted of an offence are often held with two or three other persons in cells designed for one. They rarely have access to rehabilitative programs that are normally available after sentencing. Regional differences are significant, and in some parts of the country, individuals can even be held with the general prison population pending trial. The Backgrounder recognizes these issues, saying that:

> Giving extra credit for time served has become the practice in order to take into account certain circumstances such as lack of programming or activities for inmates, overcrowding in the facility and the fact that time spent in remand custody, unlike time spent in sentenced custody, does not count towards a prisoner's eligibility for full parole or statutory release.

As lawyers for both the prosecution and the defence, we are in Canadian courts every day. We know that judges do well at – and are best placed to arrive at – a just and appropriate sentence once an offender is found guilty, taking into account all the factors in each case, including the length and circumstances of any pre-trial detention. It is the role of judges to use discretion in determining the appropriate credit for pre-trial detention as fairness dictates in the particular circumstances. Judges are not required to grant additional credit for time spent in pre-trial custody and credit may be denied.[2] In our experience, when prosecutors show the court why certain individuals should not receive enhanced credit, the court takes that information seriously.

Courts have generally steered away from an absolute rule of "2 for 1" credit, instead using it as a guide to determine appropriate credit on the facts of each case. A unanimous decision of the Supreme Court of Canada supported this approach: [3]

> .. the goal of sentencing is to impose a just and fit sentence, responsive to the facts of the individual offender and the particular circumstances of the commission of the offence. In the past, many judges have given more or less two months credit for each month spent in pre-sentencing detention. This is entirely appropriate even though a different ratio could also be applied, for example if the accused has been detained prior to trial in an institution where he or she has had full access to educational, vocational and rehabilitation programs. The often applied ratio of 2:1 reflects not only the harshness of the detention due to the absence of programs, which may be more severe in some cases than in others, but reflects also the fact that none of the remission mechanisms contained in the *Corrections and Conditional Release Act* apply to that period of detention. "Dead time" is "real" time.

Jail time served after sentencing is governed by the *Corrections and Conditional Release Act,*[4] according to which the vast majority of offenders finish serving their sentences after being released from the physical confines of jail, permitting gradual monitored reintegration into society. The Supreme Court decision above refers to the fact that earned remission and early parole do not apply to time spent incarcerated before sentence is imposed. Judicial discretion in

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2 We note that *R. v. Chiasson*, 2005 NBCA 78 (CanLII) found 2:1 to be the norm, and required judges not following it to offer their reasons.

3 *Wust, supra*, note 1 at para. 44.

4 S.C.1992 c.20.

awarding appropriate credit for that time is critical to avoid skewed sentences and inconsistent results. The Alberta Court of Appeal in *R.* v. *Roberts* said:

> ..there is a heavier factor than the infinite variety of conditions, facilities and programs in pre-trial jails, provincial jails, and federal penitentiaries (of various levels of security). That is early release…the true rationale for weighted credit for pre-trial custody. Few prisoners serve their whole sentence. It is common that they be released between 1/3 and 2/3 of the way through it. A median between the two points is one-half. Dividing by one-half yields the common double credit for pre-trial custody, which is (by definition) all served.[5]

We offer an example of the unjustified disparity in sentencing that could result from passage of Bill C-25.

> **A** and **B** are the same age with minimal prior records, and are jointly charged with commercial trafficking of cocaine. **A** is detained prior to trial because he is not from the community and has failed to appear for court in the past. **B** is released on bail as he lives with his parents and has not previously failed to come to court.
>
> Six months later, both **A** and **B** are convicted on the same facts and each sentenced to three years' imprisonment. Under the current law, **A** would normally receive 2:1 credit for the six months served as "dead time" and be sentenced to an additional twenty four months. **B** would begin serving the full three year sentence.
>
> Since neither **A** or **B** have prior records of serious offences, under the CCRA they would typically be released on parole after serving one third of their penitentiary sentence. **A** would serve another eight months over the six months already served, for a total period of incarceration of fourteen months. **B** would serve twelve months of incarceration before being released on parole. **A** would serve two months more time incarcerated than **B**, though both were guilty of the same offence.
>
> Bill C-25 would make this discrepancy worse. **A** would get credit for only the six months pre-sentence and would serve an additional ten months of custody, for a total of sixteen months incarcerated, six served in the generally harsher remand conditions. On the other hand, **B** will still serve twelve months.

It has been suggested[6] that the current system may be abused by prisoners hoping to stay longer in pre-trial custody to reduce the overall time they spend behind bars. Again, we refer to the Backgrounder:

> However, studies indicate that the most important factor contributing to the significant increase in the remand population is the fact that court cases are tending to become more complex and therefore lengthier.

Toronto Police Chief Bill Blair has stated that, "An average person has to undergo 13 remands before their case can proceed." Repeated remands may be a problem, but are more likely indicative of delays in providing disclosure necessary for the case to proceed than abuse by those accused of crimes. Shortages in available judges and court time can also lead to even routine trials being scheduled more than twelve months into the future. While we acknowledge the Bill

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5 2005 ABCA 11 at 74 (CanLII).

6 Backgrounder to Bill C-25 (Ottawa: Justice Canada, 2009).

has support from some provinces and territories expecting that it will reduce remand populations by removing any incentive for accused to extend pre-trial custody, we anticipate that pressures on court administration would actually increase as a result of Bill C-25, as provinces and territories would be called upon to incarcerate more people for longer periods. We also anticipate additional section 525 hearings for bail when trials are delayed, adding further to the costs of administering justice.

Another likely outcome of Bill C-25 would be that people with legitimate defences may be pressured to plead guilty. A significant number of accused persons who cannot make bail are the most disadvantaged persons in society – the poor, the homeless, the drug addicted and the mentally ill. Studies have found a "clear relationship between custody pending trial and the trial itself. Not only was custody likely a factor in inducing guilty pleas, but those not in custody during trial were more likely to be acquitted than those in custody, and, if convicted, were more likely to receive lighter sentences."[7]

If passed, the Bill would lead to increased financial pressures for administering justice, longer sentences and unjustifiable discrepancies in sentencing. The better answer is for the government to ensure that judges retain discretion to determine appropriate credit for pre-sentencing custody in each case and persons in custody while awaiting trial have access to early court dates.

Thank you for considering our views.

Yours truly,

(Original signed by Joshua A. Weinstein)

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[7] *R.* v. *Hall*, [2002] 3 S.C.R. 309 citing a study by Professor Martin Friedland, at 175.