THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

November 2, 2009

Mr. Ed Fast, M.P.
Chair
Committee on Justice and Human Rights
House of Commons
Ottawa, ON K1A 0A6

Dear Mr. Fast,

Re: Bill C-36 – Serious Time for the Most Serious Crime Act

The Canadian Bar Association is a national association representing 37,000 jurists, including lawyers, notaries, law teachers and students across Canada. The CBA's primary objectives include improvement in the law and in the administration of justice. The National Criminal Justice Section (CBA Section) consists of prosecutors, defence lawyers and legal academics from every province and territory.

The CBA Section appreciates the opportunity to comment on Bill C-36, *Serious Time for the Most Serious Crime Act*. Bill C-36 would abolish the "faint hope" clause under section 745.6 of the *Criminal Code* for all offenders convicted of murder in future, and severely limit its application for those already serving life sentences for murder. The CBA Section opposes passage of Bill C-36, as we believe that the "faint hope" clause is important in the context of the overall sentencing regime and sentencing for murder in particular.

The "faint hope" clause now applies only after an offender has served at least 15 years incarcerated in a federal institution, serious time by any standard. Government communications on Bill C-36 suggest an increase in the number of offenders being released under the clause. This is far from the reality,[1] and seems to imply that even one person having access to the National Parole Board (NPB) before serving the full 25 years is too many. We disagree.

[1] See a 2001 Justice Canada *Fact Sheet, "*Section 745.6, The "Faint Hope Clause*""* at 3-4. From the time of the first "faint hope" hearing in 1987 to 2000, only 21% (103) of eligible offenders had even applied for a hearing. Over those thirteen years, 84 cases were successful in having some reduction in parole ineligibility, an average of six per year. In the same thirteen year period, only four offenders' parole was revoked for an alleged new offence (one armed robbery, one serious drug offence, and two less serious drug offences).

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Statistics Canada's *Homicide in Canada, 2007* is informative. It finds that:

- "homicides are a relatively rare occurrence in Canada and have been generally declining over the past 30 years;"
- "Canada's homicide rate continues to be about one-third that of the United States, but comparable to Australia, New Zealand and many European nations;" and
- since the mid-1970s, "Canada's homicide rate has generally been declining and is down 40% since 1975." [2]

Before amendments in 1997 significantly curtailed the availability of section 745.6, the CBA Section noted how few people it actually impacted, and said that of the 63 completed applications prior to 1995:

> … 13 were rejected, 19 were allowed to apply to the Parole Board, 27 were allowed to go the Board only after 16-20 years in prison, and three could go to the Board only after 21-23 years were served. Six prisoners whose applications to the jury were successful were ultimately denied release by the Parole Board. It is important to remember that even those allowed early release are subject to lifetime supervision, and may be re-institutionalized for any transgression. Also notable is the fact that, of those allowed early release to date, only one has re-offended, by committing an armed robbery.[3]

A 2001 Justice Canada publication reported that, on average, six people annually have been granted early parole under the "faint hope" clause. The recidivism rate for offenders released under the "faint hope" clause is very low and none has been revoked for murder.[4]

In our view, *Criminal Code* reform calls for a fact-based appraisal of the present situation, as well as a careful assessment of whether proposed reforms will enhance the objectives of sentencing in the criminal justice system. Important questions should be answered, including:

- What are we trying to accomplish?
- Are the proposed reforms likely to make our communities safer?
- Do we need this legislative change?

The CBA Section believes that Bill C-36 is unnecessary and would not improve community safety. The "faint hope" clause operates fairly and efficiently, and should be retained without amendment. It gives hope to those serving lengthy terms of imprisonment, which encourages rehabilitation and consequently creates safer conditions within prisons, and eventually in the outside world as well. Each time the NPB decides a prisoner can be safely and gradually released under supervision, after serving over 15 years in prison, it saves taxpayers tens of thousands of dollars each year. The clause also represents a unique opportunity for community input into an essential and integral part of the sentencing process.

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2 Geoffrey Li, "Homicide in Canada, 2007", *Juristat*, October 2008.

3 See, CBA Submission on Bill C-45 (Ottawa: CBA, 1997).

4 *Supra*, note 1.

Too many people believe that the "faint hope" clause simply allows those convicted of murder to be released after serving only 15 years of their sentence. The CBA Section urges the government to set the record straight, rather than enacting legislation based upon misinformation.

SENTENCING FOR MURDER

Following abolition of the death penalty from the *Criminal Code* in 1976, Canada introduced a new homicide regime. Replacing the capital/non-capital distinction with first and second degree murder and mandatory life sentences necessarily led to considering an appropriate threshold for parole eligibility. Since then, a conviction for first-degree murder has carried a mandatory life sentence without eligibility for parole for 25 years. Second-degree murder carries a mandatory life sentence with no eligibility for parole for a minimum of ten and a maximum of 25 years, to be set by the trial judge after hearing from the jury. The sentencing scheme for murder is unique in that it includes jury input. Under sections 745 and 746, on a conviction for second-degree murder, the trial judge seeks a recommendation from the jury on the appropriate length of parole ineligibility.[5]

After serving at least 15 years for either first or second-degree murder, an offender may apply under section 745.6 to have the period of ineligibility to apply for parole shortened or terminated. The "faint hope" clause was introduced to allow a jury to consider the individual's circumstances, and determine whether the individual should have access to the NPB earlier than would otherwise be possible. This provides a rare opportunity for community input into the criminal process.

In 1997, section 745.6 was significantly limited by several controversial amendments:

- the preclusion of multiple murderers from applying for relief under the provision;
- the establishment of a screening process by a judge; and
- the requirement that the jury be unanimous in its decision to reduce the period of parole ineligibility. Under the preceding provisions, the jury was permitted to act with a two-thirds majority.

Since the amendments, an application is first reviewed by the Chief Judge and then a jury, taking into account factors such as the offence, character of the applicant, applicant's behaviour in prison and information provided by victims. The jury must now unanimously agree to accept the application to allow the offender earlier access to the NPB.

Professor Allan Manson has noted that those who "claim that parole eligibility review does not have public support seem to ignore the fact that a prisoner's application is determined by a jury who are usually members of the community where the offence was committed. Accordingly, the prisoner obtains relief only if the jury decides in his or her favour."[6] The jury's verdict must be seen as a measure of public support for the process, particularly now that it must be unanimous in its decision.[7]

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5 A. Manson, P. Healey and G. Trotter, *Sentencing and Penal Policy in Canada* (Toronto: Emond Montgomery Publications Ltd., 2000) at 469.

6 Manson *et al*., *ibid.* at 516-517.

7 Prior to the 1997 amendments, the jury could recommend acceptance of the parole application with a 2/3 majority.

BILL'S APPLICATION TO FUTURE OFFENDERS CONVICTED OF MURDER

Bill C-36 proposes that offenders who commit murder on or after the day the legislation would come into force would not be eligible for early parole under the "faint hope" regime. Offenders serving a life sentence for first degree murder would be ineligible to apply to the NPB for parole until they serve at least 25 years.

One important purpose of section 745.6 is to provide "faint hope" for those convicted of murder. If they work very hard at rehabilitation and are truly remorseful, they might be released on parole sometime after serving 15 years but before the full 25 years of incarceration. The hope is "faint"; they would need to satisfy their case management team, their psychologists, psychiatrists, and finally a judge and a jury that an application was worthy of consideration by the NPB. Ultimately, the NPB remains responsible for determining if the offender is worthy of early parole.

The clause provides an incentive to those serving life sentences to behave well while in custody and to seek out rehabilitative programming. This contributes to safer working conditions for prison guards and employees of Corrections Canada. Even among offenders convicted of first degree murder, there can be different considerations at play. The CBA Section believes that a purely punitive model is inconsistent with years of research and statistics that have founded Canadian sentencing philosophy and principles, showing that a safer society is achieved by emphasizing rehabilitative initiatives and adherence to human rights principles within penal institutions.[8]

APPLICATION TO THOSE OFFENDERS CURRENTLY INCARCERATED FOR MURDER

Under Bill C-36, those now serving life sentences for first or second-degree murder could still seek early access to the NPB, but would face significantly tougher rules when applying:

- a judge would have to be satisfied that there is a "substantial likelihood" that a jury would agree unanimously to reduce the applicant's Parole Eligibility Date;
- after serving at least 15 years, an offender would have only three months to apply or re-apply to be considered for the "faint hope" regime;
- an offender who did not apply within the three-month period would have to wait at least five years before having another chance to apply; and,
- unsuccessful applicants would have to wait a minimum of five years before they could re-apply. Again, an offender would only have a three-month period to re-apply.

a) Demonstration of a "substantial likelihood"

Under Bill C-36, the offender would first have to convince a judge that the offender would have a "substantial likelihood of success" with a jury asked to unanimously decide to reduce the number of years of imprisonment the offender must serve without eligibility for parole. Since the 1997 changes, the offender has had to demonstrate a "reasonable prospect" of success. Bill C-36 would significantly increase the degree of probability that the offender must demonstrate before the application may even go to the jury for consideration.

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[8] See, M. Jackson and G. Stewart, *A Flawed Compass* (Vancouver, 2009).

This proposal fails to give appropriate credit and deference to Canadian jurors. A unique aspect of the "faint hope" clause is that each offender's application, once deemed to have some merit by a judge, has been left to a jury of peers to assess. Twelve people, reasonably informed of the details of the case and the offender's progress while incarcerated, have been given responsibility for determining when and whether the particular offender might deserve the opportunity to apply to the NPB. In addition to being a more than adequate safeguard of public safety, this provides an important opportunity for citizens to participate in the administration of justice.

The CBA Section believes this responsibility should remain with the jury. The 1997 amendments requiring the jury to be unanimous are a formidable safeguard for society and a significant obstacle for any offender hoping to rely on section 745.6. Only suitable offenders would gain unanimous jury approval, allowing an offender the opportunity to move on to a hearing before the NPB.

b) Three-Month Application Window

Bill C-36 would erect technical barriers to offenders applying under section 745.6, by imposing an arbitrary three month limitation period to make an application. Statistics show that many offenders serving sentences for murder do not make "faint hope" applications,[9] possibly because they lack funds to pay a lawyer and legal aid assistance is unavailable. The practical reality is that few offenders are able to pursue an application under section 745.6 in their fifteenth year because of institutional impediments such as obtaining the necessary parole eligibility report and other psychological and psychiatric reports or court delays in obtaining a hearing date. The CBA Section opposes adding unnecessary technical obstacles to an application process that is already rife with substantive checks and safeguards. No eligible offender should be deprived of an opportunity to apply simply because of a chronically overburdened and under resourced institution.

c) Extension of the Re-Application Period

One justification offered for extending the period in which a re-application may be made is to spare victims' families the distress associated with the "faint hope" application process. For some, this may be a valid concern, but others may actually support an offender's bid for early parole after already serving a very lengthy term of incarceration. For example, where the victim and offender are related or known to each other, as in 84% of solved homicides in 2007[10] or where the murderer was quite young at the time of the offence, the victim's remaining family may support release after an extended period of incarceration.[11] Other victims may not wish to participate at all, given the time elapsed, or may simply rely on the parole system to act as appropriate. Bill C-36 would remove any consideration of early parole for all offenders, regardless of the circumstances of a particular case and the actual input from the victim's family.

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9 *Supra*, note 1.

10 *Supra*, note 2 at 14.

11 See the case of Richard Kowbel, from British Columbia's Supreme Court (file no. XO18242, July 28, 2003, McKinnon, J.). A young man had attacked his family, killing his mother and seriously injuring his father and sister. Both the offender's father and sister testified in support of his 15 year review application.

If the goal is to limit the number of applications an offender can make under the "faint hope" clause, the decision regarding an appropriate waiting period should be left with the jury, as is currently the case under section 745.63(6). Upon rejecting the application, the jury could recommend when or even whether the offender may make another one, having just heard the entire application and decided its outcome. The jury could also consider the interests of the victim's family and any impact on family members in determining an appropriate waiting period. If the jury was close to deciding in favour of the applicant, pursuant to section 745.63(6)(a), it might allow a re-application in two years. On the other hand, under current section 745.63(6)(b), the jury could prohibit the applicant from ever making another application.

CONCLUSION

The CBA Section recommends that Bill C-36 not be enacted. The "faint hope" clause does not jeopardize public safety, as shown by experience to date. The current limits on the availability of "faint hope" hearings provide ample impediments to undeserved or frivolous applications. There are few "faint hope" hearings. The number of murderers who offend at all, let alone violently, while on parole is extremely low. On the other hand, the "faint hope" clause serves important functions in terms of fairness and rehabilitation for deserving offenders who have made significant changes over 15 or more years of incarceration.

Yours sincerely,

(Original signed by Gaylene Schellenberg for Josh Weinstein)

Josh Weinstein,
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National Criminal Justice Section