Bill C-4 – *Youth Criminal Justice Act* amendments

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.

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I. INTRODUCTION

The Canadian Bar Association's National Criminal Justice Section (CBA Section) has commented on government proposals to reform the youth criminal justice system over the past several years and was regularly consulted in the years leading to the introduction of the *Youth Criminal Justice Act* (YCJA). The CBA Section includes prosecutors, defence counsel and academics from every province and territory in Canada. We have considered the proposals in Bill C-4, *Youth Criminal Justice Act* amendments (the Bill) and are pleased to offer our comments.

On balance, the CBA Section does not support passage of the Bill in its current form. While Bill C-4 contains several needed amendments, as a whole the proposed legislation would mark a significant step backward from the progress that came with the passage of the YCJA.[1] That legislation signaled a significant shift from its predecessor legislation, the *Young Offenders Act* (YOA).[2] The YCJA attempted to strike an appropriate balance between "toughening up" measures to deal with serious violent offenders and pursuing a more restorative approach though increased emphasis on alternative measures for non-violent offenders.

The YCJA has been, by any objective measure, an unmitigated success. According to the Canadian Centre for Justice Statistics, overall crime has been falling since the early 1990s and violent youth crime has remained stable for several years.[3] Every province and territory has experienced reductions in youth court caseloads since the introduction of the YCJA and fewer youth cases are resulting in custodial sentences being imposed.[4] The goals of the YCJA have

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1 S.C. 2002, c. 1.

2 The *Young Offenders Act*, R.S.C. 1985, c. Y-1, ss. 3, 4, and 20; was enacted in 1982 and came into force on 1 April 1984.

3 Jennifer Thomas, "Youth Court Statistics, 2006/2007" Canadian Centre for Justice Statistics (Statistics Canada: Catalogue no. 85-002-XIE, Vol. 28, no. 4.

4 *Ibid.*

largely been realized: there are fewer court cases and fewer youth in custody, without a concomitant increase in violent youth crime.

II. PRELIMINARY COMMENTS

Before we analyze the substantive content of the Bill, the CBA Section wishes to address two points that appear to underlie its introduction: first, that the amendments in the Bill are consistent with the spirit of the Honourable Justice Nunn's report about a notorious youth case in Nova Scotia; and second, that the Bill would remedy deficiencies in the current legislation that were important in Sébastien Lacasse's case, for whom the Bill is named.

The Nunn Report

The backgrounder to Bill C-4 references the important report of Mr. Justice Nunn, called *Spiraling Out of Control: Lessons From a Boy in Trouble*.[5] The backgrounder cites this report as offering tacit support for significant changes to the YCJA. [6] Justice Nunn made 34 recommendations, dealing with delays, court administration, facilities, Crown Attorneys, police and every aspect of the youth justice system in Nova Scotia. Of those, six dealt with the YCJA. Of the six:

- One recommended that protection of the public be made one of the primary goals of the YCJA (not the only primary goal);
- One dealt with a new definition of "violent offence" as endangering or likely endangering life or safety; and
- One dealt with a pattern of findings of offences in considering pre-charge detention.

In our view, Bill C-4 would go far beyond Justice Nunn's recommendations. Indeed, he has rejected the government's approach as embodied by the previous version of this Bill, stating:

> [T]here's no evidence anywhere in North America that I know of that keeping people in custody longer, punishing them longer, has any fruitful effects for society.... Custody should be the last ditch thing for a child.[7]

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5 (December 2006) http://gov.ns.ca/just/nunn_commission.asp

6 (Ottawa: Justice Canada, 2010).

7 Http://news.therecord.com/printArtcle421859, Sue Bailey, the *Canadian Press*.

He further stated:

> They have gone beyond what I did, and beyond the philosophy I accepted..I don't think it's wise.[8]

The CBA Section recognizes that it is Parliament's prerogative to determine policies and enact legislation, subject to constitutional scrutiny. However, it is troubling for legislative proposals to be held out as based on a respected judge's findings when that judge has publicly stated that the proposals are contrary to his views.[9]

Sebastien Lacasse

The proposed amendments have been given the "short title" of "Sébastien's Law", to commemorate a homicide victim by that name. This was a terrible event that we believe should not be exploited. According to media reports at the time, Mr. Lacasse had disapproved of his ex-girlfriend's new group of friends. At an event where his "ex" and her friends were present, he got on stage to sing a rap song that was purportedly offensive to her as a woman and her friends for its racist content.[10] He was subsequently attacked by a group of those present and killed.

We have previously stated[11] that the title of proposed legislation should reflect the proposals in a neutral, objective way, given that the Bill must receive parliamentary scrutiny before actually becoming law. The name given to this Bill appeals to emotion and could be seen as promoting a political response to a family's tragedy.

Further, the legal outcome of that case was appropriate. Three adults pleaded guilty to manslaughter and received four-year sentences. Another pleaded guilty to criminal negligence causing death. Two other adults were charged with obstructing justice. The person who actually stabbed Mr. Lacasse was seventeen at the time and pleaded guilty to second degree murder. He was sentenced to life in prison as an adult.[12] The current YCJA was used to impose

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8 *The Chronicle Herald*, September 9, 2008, article by Patricia Brooks Arenburg.

9 It should also be noted that the person who caused the accident which claimed the life of Ms. McEvoy, who was 16 at the time of the offence, was given an adult sentence of 4 ½ years in the penitentiary after pleading guilty to criminal negligence causing death. That sentencing used the provisions of the current law.

10 "Family Damaged by Slaying", *The Montreal Gazette*, April 25, 2006.

11 See, for example, Submission on Bill C-52, White Collar Crime (Ottawa: CBA, 2009).

12 "Young Offender Gets Adult Sentence for Murder", CBC News, September 7, 2006.

an adult sentence of life imprisonment on the seventeen year old involved. Nothing in Bill C-4 would have prevented the tragic death of Mr. Lacasse, nor would it respond with a harsher penalty than that imposed.

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To repeat, youth crime rates for such offences as assault, sexual assault and property crimes have dropped steeply since the early 1990s.[13] The YCJA has resulted in more youth being diverted away from the court system by the use of extra-judicial sanctions by the police. The two referenced supports for this Bill – a judge's expert report and a high-profile case where the accused was sentenced to life imprisonment as an adult under the current YCJA – do not support the proposed amendments.

III. BILL C-4: A SUBSTANTIVE REVIEW

The CBA Section generally supported the passage of the YCJA (then Bill C-7) in 2002 as an important new direction for youth justice in Canada. The Bill recognized that most youths come in contact with the law as a result of fairly minor and isolated incidents. It recognized the importance of not unnecessarily drawing those youths into the criminal justice system, but instead taking advantage of extra-judicial measures, such as warnings, cautions and referrals, victim/offender mediation and family conferencing. Most important for the long-term protection of society, it stressed the importance of rehabilitation and reintegration of offenders throughout, including in the *Preamble* and the *Purposes and Principles of the Act*. One of its key objectives was to keep young offenders out of jail except for the worst, most violent or habitual offenders. For those violent or habitual offenders, one of the changes in the YCJA was to make adult sentences more easily available for those convicted of certain designated violent offences.

Generally speaking, Bill C-4 would change the ground rules as to how Crown counsel and judges do their jobs. The Bill would expand the applicable sentencing principles to make them more punitive, significantly narrow the presumption against incarceration and change the focus of the guiding principles under section 3.

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13 Cesaroni & Bala, "Deterrence as a Principle of Youth Sentencing: No Effect on Youth, but a Significant Effect on Judges" (2008) 34 *Queens L.J.* 447-481.

The magnitude of the proposed amendments would represent a major overhaul of the YCJA. The proposed changes would have very serious consequences, resulting in more youths going to jail and going to jail for longer periods. While the amendments may be framed in general and abstract terms, they will ultimately apply to real young people forcing them to spend longer periods in real jails. The CBA Section believes that these changes will detract from, rather than add to, the long-term protection of society.

In our detailed comments, we have divided our submission according to what we see as the positive and negative portions of the Bill. While the CBA Section does not support passage of this Bill, its positive components might become the basis for more carefully tailored legislative proposals. This approach would reflect the reality of falling youth crime rates and an appreciation for the general success of the YCJA.

A. Positive Changes

i. Including the Presumption of Diminished Moral Blameworthiness

Bill C-4 contains significant amendments to the YCJA sentencing principles, and some are certainly commendable. For instance, YCJA section 3(1)(b) would be amended to add the principle of "diminished moral blameworthiness or culpability" of young persons. This is an obvious reference to the reasoning of the Supreme Court of Canada (SCC) in *R. v. B. (D.)*[14]. Speaking for the majority, Abella J. described the principle at the heart of the appeal:

> What the onus provisions *do* engage, in my view, is what flows from *why* we have a separate legal and sentencing regime for young people, namely that because of their age, young people have heightened vulnerability, less maturity and a reduced capacity for moral judgment. This entitles them to a *presumption* of diminished moral blameworthiness or culpability. This presumption is the principle at issue here and it is a presumption that has resulted in the entire youth sentencing scheme, with its unique approach to punishment.[15]

Like other countries with similar justice systems and fundamental values,[16] Canada has recognized that there are principled reasons for treating young people differently than adults. The CBA Section supports including this principle of fundamental justice in the YCJA.

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14 (2008) SCC 31460 at paras. 47 to 59.

15 *Ibid*. at para.41.

16 See, *R. v. B. (D.)* 231 CCC (3d) 363, para 85, which references the United Nations Standard Minimum Rules for the Administration of Juvenile Justice. See also page 359 of that decision, para 67.

ii. Prohibition Against Youth Serving Time in Adult Prisons

The CBA Section supports the amendment located at section 21 of the Bill that would mandate that no young person under the age of 18 could serve any portion of their jail sentence in an adult institution. Given the serious risk of abuse by adult inmates and the fact that rehabilitative programming designed for youth is unlikely to be available in an adult institution, we commend this aspect of the Bill.

iii. Definition of Serious Violent Offence

The redefinition of "serious violent offence" in section 2(2) of the Bill to include four designated offences[17] would clarify the law on this subject. The uncertainty about which kind of offence amounted to a serious violent offence under the YCJA has been unfortunate and clear guidance on this issue is a welcome addition. The CBA Section supports this amendment.

B. Negative Changes

While we commend some of the proposed changes to the guiding principles of the *Act*, others would undermine those principles. In particular, we object to the amendment to YCJA section 3(1)(a) to add the words "protect the public by" and the amendment to section 38(2) to add the principles of "denunciation and deterrence".

i. Short-term vs. Long-term Protection of the Public

The first amendment mentioned would be redundant. Section 3(1)(a) as currently worded already includes concepts of "crime prevention" and "accountability", and ends with the declaration that one of the goals of the Act is to "promote *long term* protection of the public". Assuming that the omission of the words "long term" in Bill C-4 is intentional, we suggest it would be unwise. Young people should not be locked up for long periods, except in the most serious cases. A young person will subsequently spend many years back in our communities, so it is in the best interests of both society *and* that young person to focus on how rehabilitation can best be achieved. The most effective way to protect society in the long term is to reform that youth before it is time for return to society. The current wording of YCJA section 3(1)(a) wisely recognizes this and should not be changed.

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17 The designated offences are: First and second degree murder, attempted murder, manslaughter and aggravated sexual assault.

ii. Adding Deterrence and Denunciation

A more troubling amendment is the proposed addition of "denunciation and deterrence" to section 38(2) by virtue of section 7 of Bill C-4. In *R. v. D.B.,*[18] the SCC clearly recognized a presumption of diminished moral culpability of youth. This underscores the need for very careful consideration before introducing sentencing principles of denunciation and deterrence to the Act, as proposed.[19]

This proposed amendment appears to respond to a previous SCC decision in *R. v. P . (B.W.) ; R. v. N. (B.V.)*[20] to make youth court sentences more onerous. However, this represents a radical departure from the stated goals of the YCJA as discussed in the Court's decision in *D.B.*, for example. In the *P. (B.W.)* case,[21] the SCC states that omitting "deterrence" is not a mere oversight but rather an intentional recognition of the fact that it is a controversial theory. There is little evidence that general deterrence is an effective sentencing principle when applied to adult offenders; indeed, it has been criticized in both judicial and academic spheres. It is highly unlikely that it is in any way effective for young persons, considering their diminished capacities. The wording of the current YCJA recognizes this.

Studies show that the principle of "deterrence" primarily affects one group – judges.[22] Including deterrence in the sentencing principles would suggest to judges that they should impose longer, harsher sentences. But for immature offenders unable to anticipate or appreciate consequences in the same way that adults do, it is particularly troubling that this principle would be grafted onto an otherwise progressive sentencing regime. This amendment would offer judges considering the imposition of a jail sentence a "peg to hang their coat on", but would go against other sections of the *Act* that clarify that jail should be avoided, and used only as a "last resort". Those sections are based on sound social science that shows imposing jail time is generally *not an effective deterrent* as against a young person, which has been proven conclusively over the last seven years.[23]

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18 [2008] 2 SCR 3.

19 We have previously made the same comment: see CBA Section submission on Bill C-25, *Youth Criminal Justice Act* amendments (Ottawa: CBA, 2008).

20 (2006) 1 SCR 941.

21 *Ibid*.

22 *Supra* note 13.

23 See, for example, Professor N. Bala, *Submission on Bill C-4, YCJA Amendments* at 9, and particularly references therein at footnote 9.

Since the YCJA was proclaimed in force in 2003, *rates of youth crime have gone consistently down* while the rates of incarceration of young persons (after sentence) have also gone down. In other words, the YCJA is working as intended. Radical amendments to successful legislation should certainly bear the onus of demonstrating exactly why those amendments are necessary.

Putting young people in jail is a waste of human potential. Unless incarceration is actually required for a valid social purpose, it is also a terrible waste of tax dollars that could be spent on positive steps aimed at reducing poverty and crime, like schools and social housing. If simply addressing misconceptions about youth crime being out of control, the government might focus efforts on correcting that misconception. In our view, unnecessary incarceration of young people is a mistake that Canada cannot afford.

iii. Publication Bans for Youth

Section 20 of Bill C-4 would amend the publication ban regime in the YCJA to stipulate that the court "*shall decide whether it is appropriate to make an order lifting the ban*" in terms of violent offences, therefore imposing an obligation on the court and counsel to visit the issue every time there is a conviction for these offences. This change would make publication possible for a conviction for anything from sexual offences, dangerous driving, flight from police, impaired driving, threats, common assault and harassment. Further, there is no requirement that publication can or should be limited to repeat or habitual offenders.

At present, publication of a young person's identity is only allowed:

a) when an adult sentence is imposed;
b) under section 110 which allows the judge to order publication temporarily (for instance if a dangerous youth escapes and must be captured); or
c) the young person asks for his or her identity to be published, under section 100(6) .

In contrast, Bill C-4 would encourage a judge to consider publication in relation to any and all "violent offences". Given the proposed breadth of that category, as discussed *infra*, the change would represent a huge expansion of the publication power. We see no need for this expansion, and strongly oppose this section. The underlying purpose of the publication ban is to minimize stigma and instead focus on rehabilitation of the young person. This amendment would steer judges away from that focus to more punitive considerations. The CBA Section

believes that this amendment is contrary to the spirit and substance of the SCC's comments in *R. v. B. (D.)*[24] concerning the effect of stigmatization and labeling on youth.

iv. Definitions of "Serious" and "Violent" Offences

Section 2(3) of the Bill proposes definitions for two new offence designations: "serious" offences and "violent" offences. The CBA Section believes that both definitions would expose too many youths to pre-trial detention and custodial sentences, when the focus of the Act has always been on meaningful consequences for the *most violent and habitual* offenders. The proposed designations cast too wide a net.

"Serious" offence would be defined as an indictable offence for which the maximum punishment is five years or more. As with proposals to limit conditional sentences by using the maximum punishment permitted for an offence to measure its seriousness, this is misguided. A range of sentences is permitted precisely to address the range of conduct that the offence applies to, allowing a long sentence when appropriate, and a short sentence for less egregious instances of the offence. The definition in Bill C-4 would bring in an extensive list of offences in the *Criminal Code*, and would exclude only very few, very minor offences. As examples of offences intended to encompass a range of conduct, including some that might not come to mind as "serious" crime, the following offences all have a maximum penalty of 5 or 10 years: fraud over $5000 (section 380(1)(a)); assault *simpliciter* (section 266(a)); uttering threats (section 264.1); (obstruct justice (section 139); theft over $5000 (section 334(a)); uttering a forged document (section 366-368), possession of a stolen credit card (section 342)and public mischief (section140), to name a few. When read with the proposed amendment to section 29 of the *Act*, a young person charged with any of those offences would also be eligible for pre-trial detention. This change is unnecessary and unwise.

"Violent" offence would be defined as an offence which results in "bodily harm," and includes threats or attempts to commit such offences. "Bodily harm" is defined in the *Criminal Code* as harm or an injury which is more than "merely transient or trifling in nature".[25] We appreciate that the Bill adopts the definition provided in *R. v. CD and CDK*[26] where the SCC said that "violent" offence is any offence where the youth "causes, attempts to cause or threatens to

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24 (2008) SCC 31460.

25 Section 2 of the *Criminal Code*.

26 R. v. C.D.; R. v. C.D.K., [2005] 3 S.C.R. 668, 2005 SCC 78.

cause" bodily harm).[27] However, Bill C-4 would expand the definition of "violent" offences to include "dangerous" acts, an approach expressly rejected by the SCC in the same case. Even if the conduct itself is not violent or does not result in bodily harm, conduct which results in a risk of bodily harm or endangerment would be characterized as a "violent" offence under the Bill. This broadened definition would capture various situations with no intent or awareness of harm. The fact of endangerment/harm would be adequate. It is easy to imagine scenarios that would result in unfair outcomes for youths.

If the new definition is adopted, the CBA Section believes that, at the very least, the definition of "violent offence" should include a knowledge element in relation to endangerment. The words "young person knows would endanger the life or safety, etc..." could be inserted into subsection (c) of the definition.

C. Other Concerns

Three further aspects of Bill C-4 cause concern. The proposed amendments seem to send an implicit message that three important participants in the criminal justice system – the police, Crown counsel and the judiciary – should not be trusted with discretionary powers. The CBA Section is opposed to amendments which would directly or indirectly discourage these groups from exercising their professional discretion under the YCJA, as discretion is the cornerstone of a "just" system.

i. Police Record Keeping

Section 25 of Bill C-4 would require that the police "shall keep a record of any extrajudicial measures that they use with young persons." This would add to the permissive regime of police record keeping that already exists in section 115 of the YCJA. It seems designed to supplement the amendment to section 39(1)(c) of the *Act*,[28] which now permits a youth court justice to consider "a pattern of extrajudicial sanctions" in addition to previous findings of guilt under the *Act* when considering whether or not to send a youth to jail.

In our view, these amendments undermine the purpose of including extrajudicial sanctions in the YCJA in the first place, and would send a mixed message to the police. Under the YCJA, the

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27 *Ibid.* at 87.

28 See section 8 of Bill C-4.

police are encouraged to exercise discretion to keep youth out of the courts by using the extrajudicial sanctions provided in the *Act*. The message to police in Bill C-4 would be that they must keep track of situations where they are "lenient" with a young person because the court may wish to use those statistics at a future date to impose a custodial sentence if that young person offends in a violent way. The CBA Section is concerned that this amendment will have a chilling effect on the police, and will in practice discourage officers from resorting to extra-judicial sanctions.

ii. Mandatory Crown Consideration of Adult Sentences

Section 11(1) of Bill C-4 would add a new section 64(1.1) to the YCJA, requiring Crown Counsel to consider whether it would be appropriate to apply for an adult sentence in a particular case. If the Crown decides not to apply for an adult sentence, they must inform the court that they are not doing so. Again, this suggests a basic mistrust of Crown counsel and their ability to properly use prosecutorial discretion in serious and violent cases. Further, it would force Crown counsel to put their decision not to seek an adult sentence on the record in every case. It could lead to youth court judges making inquiries of the Crown as to reasons for their decision, which would encroach on constitutionally protected prosecutorial discretion.[29]

iii. Mandatory Judicial Consideration of Publication Ban Removal

As discussed above, section 20 of the Bill would require a judge to consider lifting the ban on publication in each and every case where a young person has been convicted of a "violent" offence, as defined by the Bill. This suggests mistrust of the judiciary, by making this consideration mandatory. In our experience, both the Crown and the youth court justice would consider this option in appropriate cases under the current YCJA.

IV. CONCLUSION

While Bill C-4 contains some important and positive amendments, we do not support its passage as we believe it would actually undermine the long term protection of society. As a whole, the Bill would mean more young people going to jail for longer periods of time. It would move away from a restorative and rehabilitative model of youth justice to a more punitive

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29 See *Krieger v. Law Society of Alberta*, 2002 SCC 65, [2002] 3 S.C.R. 372; *British Columbia v. Crockford*, 2006 BCCA 360; 271 D.L.R. (4th) 445 at para 67.

model, which we see as both unnecessary and contrary to sound public policy based on well-accepted social science.

The increased reliance on incarceration would apply not to just serious violent and habitual offenders, but could now include a first time offender charged with theft over $5000, if that offender had previous contact with police that had resulted in extra-judicial sanctions. As a result, it would apply to the most typical young offender, a troubled young person that the YCJA would have previously diverted from custody and steered toward rehabilitation. The CBA Section supports an approach to youth justice that leads to greater public safety over the long haul, and for that reason does not support passage of Bill C-4.