THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

December 8, 2010

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

Dear Mr. Fast,

Re: Bill C-48 – *Criminal Code* amendments (Protecting Canadians by Ending Sentence Discounts for Multiple Murders Act)

I am writing on behalf of the Canadian Bar Association's National Criminal Justice Section (CBA Section) to provide our views on Bill C-48, *Criminal Code amendments* (Protecting Canadians by Ending Sentence Discounts for Multiple Murders Act). The Canadian Bar Association is a national association representing over 37,000 jurists, including lawyers, notaries, law teachers and students across Canada. The CBA's primary objectives include improvement of the law and the administration of justice. The CBA Section consists of prosecutors and defence lawyers from all parts of Canada.

The effect of Bill C-48 would be to require a judge sentencing an offender convicted of murder to decide whether or not the parole ineligibility period for the new conviction should be served consecutively with that of any other parole ineligibility periods for any prior murder convictions.[1]

Before addressing the specific proposals in Bill C-48, we reiterate the CBA Section's ongoing objections to the use of short titles which appear to "market" legislative proposals to Canadians. We suggest that short titles describe the proposed legislation in a neutral way.

The short title of this Bill in particular is misleading, in at least three ways. First, every murder conviction carries a mandatory sentence of life imprisonment. It is misleading to suggest that individuals convicted of multiple murders somehow benefit from "sentence discounts". Further, section 745.6 already provides that persons convicted of multiple murders are ineligible to make a so-called "faint hope" application for early parole after serving fifteen years in custody.

Second, the term "multiple murders" brings to mind serial killers sentenced at the same time for several murders. However, the proposed wording of section 745.21 refers to an accused found guilty of murder where that accused has "**previously** been convicted of murder". Section 745.51

[1] Note that section 120.2(2) of the *Corrections and Conditional Release Act* already does this automatically if the offender receives a determinate sentence consecutive to a life sentence and section 120.3 sets a 15 year limit from the last sentence to parole eligibility.

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refers to "an offender who was convicted of murder and who has **already** been convicted of one or more other murders". This wording does not appear to apply to individuals convicted of multiple murders at the same time, although victims' groups have expressed this expectation of Bill C-48.

Third, "protecting Canadians" implies that the current sentencing framework has somehow put Canadians in danger, so that legislative amendment is needed to offer sufficient protection from multiple murderers. As the statistics below indicate, this is simply not the case.

The terminology in proposed section 745.51 is almost identical to the current section 745.4 (which addresses parole ineligibility periods for second-degree murder) in that it directs judges to consider "the character of the offender", "the nature of the offence", and the "circumstances surrounding its commission" in deciding parole ineligibility. If the judge decides not to order consecutive parole ineligibility periods, reasons must be provided for that decision.

Section 745(b) of the *Criminal Code* already provides that a person convicted of second-degree murder who has previously been convicted of (any degree of) murder shall be sentenced to imprisonment for life without eligibility for parole for 25 years. Further, eligibility for parole is neither an entitlement nor a guarantee of parole at that or any time in the future. Parole Boards must make careful determinations on whether or when to release offenders eligible for parole, according to specific legislated criteria. The Parole Board's primary consideration is always the protection of society. An individual convicted of more than one murder will not be granted parole if the Board believes the individual poses a threat to society. The fact that a prisoner has committed a subsequent murder (for example, while imprisoned) would necessarily be considered by the Parole Board. The practical result of this Bill is to remove discretion from the Parole Board and shift the decision-making to judges at the time of sentencing, when they cannot know what progress an offender may later make during the sentence.

Fundamental to our view of Bill C-48 is the fact that very few convicted murderers released on parole go on to commit another murder.[2] Those who are re-incarcerated for a subsequent murder are not paroled. The current legislative framework, including the parole system, already accomplishes what this Bill purports to address.

Similar to the current law on parole ineligibility periods for second-degree murder, Bill C-48 would provide a role for the jury in deciding whether the parole ineligibility periods should be served consecutively. Under proposed section 745.21, where a jury finds an accused guilty of murder and that accused has previously been convicted of murder, the judge must ask the jury whether it wishes to make any recommendation on "the period without eligibility for parole to be served for this murder consecutively to the period without eligibility for parole imposed for the previous murder". The judge must then consider the jury's recommendation in determining whether to make an order under section 745.51.

While the CBA Section respects the important role jurors play in our criminal justice system, we do not believe it would be helpful to involve juries in the issue of consecutive parole ineligibility periods for individuals previously convicted of murder. This is based on our experience with jury recommendations on parole ineligibility for second-degree murder.

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[2] See Parole Board of Canada "Fact Sheet on Offenders on Conditional Release Convicted of Homicide" (2010-09-07) which states "From April 1, 1975 to March 31, 2008, it is estimated there were almost 342,000 releases on day parole, full parole or statutory release (on mandatory supervision). The releases that resulted in a homicide represent about *one-tenth of one percent* of all releases" (emphasis added).

Case law has established that submissions cannot be made to the jury prior to it retiring to determine whether to make (or not make) any recommendation on parole ineligibility.[3] This puts jurors in an impossible position, as they do not receive information about the personal circumstances of either the offender or the victim(s) that is statutorily required to make informed sentencing decisions. The proposal in Bill C-48 would exacerbate the situation, as the jury would also not have information about the prior murder conviction. Further, the jury's recommendation would not bind the court.[4] Judges, who hear full submissions at the sentencing hearing, would be likely to regularly impose parole ineligibility periods that differ from the jury's recommendations. This could generate frustration for hard-working jurors.

On a more practical note, our sense is that after a verdict, jurors simply want to go home. They have fulfilled a challenging and difficult civic responsibility, and do not expect to deliberate on a second issue. While giving jurors a role in sentencing may seem appropriate, our experience suggest that most jurors would prefer to be relieved of their duties following their deliberations on the verdict.

Finally, the CBA Section does not believe that Canadians would benefit from a system where individuals are condemned to spend their entire lives behind bars, with no hope of ever being released. Even those convicted of homicide, the most serious of all crimes, should know there is some slim possibility, after serving lengthy periods of their sentence behind bars, of being released into the community and contributing to society, provided that their behaviour while incarcerated makes them deserving of such a privilege. Further, release does not erase the fact that those convicted offenders are still serving life sentences. They continue to be subject to appropriate supervision, and to suspension and potential revocation of parole for a minor breach, or even in anticipation of any breach to protect society.

The CBA Section does not believe that Bill C-48 is warranted. The current sentencing framework in the *Criminal Code*, and the *Corrections and Conditional Release Act,* including the current parole regime, adequately protects society.

Thank you for the opportunity to participate in the review of Bill C-48.

Yours truly,

(original signed by Gaylene Schellenberg for Margaret Gallagher)

Margaret Gallagher
Chair, National Criminal Justice Section

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3 *R. v. Cruz*, 1998 CarswellBC 831, 16 C.R. (5th) 136, 124 C.C.C. (3d) 157 (B.C. C.A.); leave to appeal refused (1999), 58 C.R.R. (2d) 376, 130 C.C.C. (3d) vi (S.C.C.); *R. v. Nepoose*, 1988 CarswellAlta 239, 69 C.R. (3d) 59, 46 C.C.C. (3d) 421 (Alta. C.A.); *R.v. Okkuatsiak*, 1993 CarswellNfld 14, 20 C.R. (4th) 400, 80 C.C.C. (3d) 251 (Nfld. C.A.).

4 *R. v. Nepoose*, *ibid*.