THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

Bill C-2 – *Criminal Code amendments (mega trials)*

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 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 in the law and in the administration of justice. The CBA Criminal Justice Section (CBA Section) consists of prosecutors and defence lawyers from all parts of Canada.

The short title of Bill C-2 is the *Fair and Efficient Criminal Trials Act*. The proposals are, in some ways, a welcome addition to the tools that the judicial system needs to tackle the increasing number of complex, lengthy trials. Certainly, some form of case management is required to shepherd these trials through the pre-trial time period, to focus issues and to efficiently allocate resources. Everyone benefits when cases that threaten to consume huge amounts of court time are supervised prior to trial to prevent unnecessary delays and parties are focused on the issues to be decided.

That said, the CBA Section has identified some problematic proposals in Bill C-2, at least in some aspects. We have suggested areas that should be reconsidered before enacting this Bill.

II. DEFINITION OF "MEGA TRIALS"

Although Bill C-2 is intended to address complex "mega trials", it lacks a definition of what constitutes a "mega trial". Proposed section 551.1 would permit an application by either party or the court to have a "case management judge" appointed on any trial, no matter how simple. This omission has the potential to result in overuse of such applications and appointments. It could then drain judicial resources, and result in cases that do not need the detailed case management that the Bill envisages having case management judges assigned.

Criteria should be established to ensure that resources are used in the most appropriate manner. This could be done by amending section 551.1 to state that a case management judge

will be assigned if the judge hearing the application believes it necessary for the proper administration of justice, having regard to the length of the trial, the complexity of the issues and any other factor the judge deems relevant to have a case management judge assigned.[1] This would provide clarity to all parties when contemplating an application. We also suggest that any successful application should result in a case management judge being assigned to the case as early as possible, so that the journey through the courts, whether at the superior court or provincial or territorial courts, is meaningful from the outset.

These recommended changes would ensure that only those trials that require detailed case management use the judicial resources that the proposed system would entail. Other trials would still benefit from section 625.1 of the *Criminal Code*, which mandates pre-hearing conferences and is a useful tool in the administration of an efficient justice system.

III. POWERS OF THE CASE MANAGEMENT JUDGE

Continued pre-trial case management is both welcome and necessary in lengthy complex cases.

In our view, a case management judge should be appointed at the earliest opportunity and ideally when the case is still in provincial court. Provincial judges, as members of statutory courts do not have the inherent constitutional power to make orders for *Charter* relief, such as settling disclosure issues, unless the provincial court judge is the trial judge. A judge of a superior court, on the other hand, possesses inherent jurisdiction under the *Constitution* and can make orders necessary for the effective administration of justice. A superior court judge assigned to be a case management judge while the matter is still in the provincial court would be able to make rulings to help guide the matter through the lower court, become familiar with the case, and maintain the role of case management judge when the matter later proceeds to the superior court. This would promote more efficient use of resources.

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[1] The CBA Section does not believe a list of criteria should be enacted within the legislation itself. A list may result in a court too readily applying only the listed criteria, to the exclusion of others. This would impede the necessary flexibility to ensure that resources are marshaled in the most appropriate way in each case. Our proposal would allow courts to appropriately recognize local conditions and resources. Further, the courts themselves will quickly develop criteria most applicable in their respective jurisdictions. This will also assist in the administration of justice.

Where a case that qualifies as a mega trial is to be dealt with in the provincial or territorial court, it is essential to have a trial judge assigned as soon as possible. That judge will then be able to make all rulings necessary to the case.

Providing a case management judge to focus issues, streamline pre-trial motions and make suggestions to the parties is essential in the context of a mega trial and the Bill's proposals may, if used properly, assist in the administration of the trial. However, the proposals to allow the case management judge to make binding rulings on the parties are too far reaching and would, we believe, have undesirable effects. Although it is not legally essential that the trial judge rule on every pre-trial motion, it is preferable. Even motions such as those involving third party records or apparently straight forward disclosure issues may have a great impact upon the conduct of the trial, particularly if the matter of the motion has to be revisited when new or different evidence on the point emerges at trial. The early assignment of a trial judge is better suited to administering the trial. It is also vital that the trial judge, and no other judge, makes rulings governing the admissibility of evidence.

The reason why the trial judge, rather than the case management judge, is in the best position to make rulings is that the trial judge has full knowledge of the legal landscape of a given case. This principle has been recognized by the Supreme Court of Canada in *R. v. Litchfield*. The Court made these observations governing severance:

> Moreover, as a matter of practice and policy, it is obviously preferable that the trial judge hear applications to divide and sever counts so that such orders are not immunized from review. Otherwise, procedure begins to govern substance. Indeed, it makes sense that the trial judge consider applications to divide and sever counts since an order for division or severance of counts will dictate the course of the trial itself. Courts have recognized that it is preferable that trial judges make division and severance orders (see, e.g., R*. v. Watson* (1979), 12 C.R. (3d) 259 (B.C.S.C.), and *R. v. Auld* (1957), 26 C.R. 266 (B.C.C.A.)). Not only are trial judges better situated to assess the impact of the requested severance on the conduct of the trial, but limiting severance orders to trial judges avoids the duplication of efforts to become familiar enough with the case to determine whether or not a severance order is in the interests of justice. It seems desirable, therefore, that in the future only trial judges can make orders for division or severance of counts in order to avoid injustices such as occurred in this case.[2]

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2 *R. v. Litchfield,* [1993] 4 SCR 333.

These observations apply equally to rulings made on admissibility of evidence, or pursuant to the *Canadian Charter of Rights and Freedoms*.

By separating the functions of issuing rulings between the case management and the trial judge, Bill C-2 would create difficulties likely to defeat the original purpose of the proposed amendments, that is, the efficient management of criminal cases. To illustrate this point, we provide some situations that could arise under the "split" scenario that the *Act* creates:

- **What happens if the trial judge disagrees with the rulings of the case management judge?**

  This would cause great difficulties in the conduct of the trial. Rulings may be subject to interpretation as the evidence unfolds (e.g. some of a witness' evidence may be deemed admissible but limited parts excluded).

  Should an argument occur over the limits of the ruling, what is to be done? Is the trial judge allowed to interpret the case management judge's ruling? Do the parties return to the case management judge for clarification? If a significant length of time has passed between the ruling and the need for clarification, will the case management judge (who has not been in a position to hear the evidence) be able to recall the arguments made prior to the ruling?

  Whatever the solution, any course of action necessary to deal with the situation defeats the reason for the enactments: saving court time and judicial resources.

- **What happens if the parties seek to revisit the ruling based on a change of circumstances?**

  The difficulty in this situation would be that the trial judge may not be fully aware of the nuances of a particular decision so as to decide whether a change of circumstances had occurred. The judge who made the ruling could easily address the central question of whether a fact, piece of evidence or change in position by either party had changed the basis of the initial ruling. A trial judge who was bound by another judge's ruling would not. Again, returning to the original (case management) judge would defeat the purpose of the enactments.

- **What happens if the case management judge cannot rule on a pre-trial motion without hearing other aspects of the evidence first?**

  Various motions require discrete evidence to be heard before any ruling. An example is similar fact evidence. In that case, the Crown witnesses testify before the admissibility *voir dire* takes place so the judge has the context to decide the admissibility of the

> evidence. The trial judge will have the advantage of hearing the evidence first and then deciding in the evidentiary landscape of the trial whether the evidence should be admitted generally, for a particular purpose only, or excluded. Indeed this is the advantage the Supreme Court alluded to in the context of severance applications in *Litchfield*. Further, in many instances, "provisional" rulings are made at trial where the trial judge reserves the right to revisit the ruling after a witness has testified or been cross-examined. The "split" system would make these rulings very difficult, if not impossible.

A system where the judge who presides over the reception of evidence also decides the legal issues in the case has significant advantages over that which divides the roles between a case management judge and trial judge. The evidentiary landscape of a case may be very different than the legal one presented in a different time frame before a different judge. Legal rulings are best made when the judicial officer making them has the simultaneous vantage point of both the evidentiary and legal lay of the land.

A system that produces conflicting and revised rulings will simply lead to more appeals on the same issues. As with the trial process itself, the spirit of the proposals in Bill C-2 would be defeated if they lead to an increase in cases being appealed, which in turn would lead to more re-trials and greater costs to the justice system.

IV. NUMBER OF JURORS

In lengthy trials, there is a risk that some sworn jurors may, for personal reasons, be lost or discharged. With the minimum requirement of ten for a jury panel, the chances of a mistrial increase with the length of a trial. Bill C-2 would seek to address this issue by allowing an increase in the number of prospective jurors from 12 to 14.

While the proposal has a certain merit, we believe it should be limited to only those trials specifically defined as mega trials, and not all trials. Also, consideration should be given to a provision that allows a trial judge to convert a jury trial into a "judge alone" trial on consent of all parties, when the jury composition falls below the minimum requirement of 10. This would promote efficiency and negate the need for costly mistrials.

One of the most significant difficulties with the proposed increase and "culling" of jurors at the end of the trial is its impact on the selection process. Both Crown and defence counsel select jurors and exercise peremptory challenges based on the knowledge that the jurors selected will be the jury that decides the case on a unanimous basis. That would change dramatically if two of the jurors selected were removed from the decision making process at the end of the case. It would also lead to potential for grievances on both sides if the jurors selected for removal were those carefully chosen at the outset to provide perceived balance in the jury.

Other potential problems are raised by the proposal to increase and then potentially eliminate jurors later. Jurors might be less committed to listening to the trial evidence as it unfolds, knowing they may not participate in the verdict. It could create unnecessary social costs to the jurors. Jury duty necessitates that jurors be removed from their jobs, families, and everyday activities to some degree. At the end of the trial, two jurors could be told that they no longer need to participate. Those jurors might seriously question why their lives had to be disrupted for an extended period if they are not included in the jury's final deliberations. This could lead to more people evading jury duty, and could lessen respect for the jury system.

V. RULING AFTER A MISTRIAL

A fundamental aspect of the Canadian justice system is that at the outset of a criminal trial, the parties are in a position to persuade a neutral presiding judge, possessed of an open mind, of the merits of their position. The current rule that a mistrial voids all legal rulings made in the previous trial reflects this concept. A new trial is held before a different presiding judge.

In discussing the "split scenario" of having two judges, we pointed out that imposing legal rulings from one judge onto another is impractical, as well as undesirable. One judge must make the rulings that govern a criminal trial.

Of course, this does not prevent both parties from agreeing that previous rulings from a mistried hearing can be applied to the new trial. However, counsel must have the option of revisiting a pre-trial ruling believed to be erroneous and, in ordinary circumstances, potentially subject of an appeal. Is the Crown or defence expected to accept the disputed ruling and appeal it after the new trial, even though the appellate court could pronounce that the ruling was wrongly decided? Is a trial judge required to apply a legal ruling that judge strongly believes will be overturned on appeal?

The proposals in Bill C-2 attempt to provide flexibility by allowing the previous rulings to be revisited if a party can demonstrate that it is "in the interests of justice" to do so. Yet, the meaning of that test is unclear. Is it a high burden, or is it something that rests simply in the discretion of the trial judge? Presumably the burden is substantial so the provision itself could not be ignored. If so, it would be a significant task for one judge to tell another that a ruling was so erroneous that it would be contrary to the interests of justice to allow the ruling to stand. This would potentially raise an already significant burden to an impossible one.

Either party would have to wait until the conclusion of the trial to launch an appeal. If successful, the matter would have to be re-tried after a delay of many months or even years. The advantage of allowing the revisitation of motions already decided by another judge on a previous occasion (mistried hearing) is that if the second judge agreed with the first, the unsuccessful party might think twice before raising it as a ground of appeal.

VI. COSTS

Mega trials can be a drain on the justice system for all concerned. The cost of prosecution, the cost of defence to individuals, whether with legal aid or not, and the cost to the court system can all be great. The CBA Section encourages adequate funding, efficiency and effectiveness in the administration of provincial and territorial legal aid systems. These systems promote efficiency and cost savings in the long run, and can take into account local practices while still maintaining the high standards of Canadian justice.

The costs of mega trials also mean that "regular" trials in the system, unquestionably the bulk of cases, have fewer resources available, as resources are finite. Those other cases may never be prosecuted if the state does not devote needed resources, or persons facing trial may not receive the full benefit of Canadian justice if they do not have access to the resources needed to make full answer and defence to a prosecution. These realities must be addressed.

The CBA Section also encourages the creative use of practical solutions, in addition to necessary legislative amendment, to promote efficiency in the administration of justice. For example, Attorneys General should look to those jurisdictions where case management is being practically pursued, and determine which models should be emulated. Similarly, directives on full disclosure of the prosecution case to the defence would encourage trials to be reached

sooner, lessen disputes and litigation over disclosure, and result in greater case settlement through pleas, withdrawal of charges or laying more appropriate charges. Where appropriate, diversion of lesser matters would free resources to deal with greater, more serious offences.

VII. CONCLUSION

It is in the interest of all parties to promote the effective and efficient use of resources. Criminal justice proceedings must also conform to the principles of fundamental justice. The rule of law demands no less and the protection of the public, through a functioning justice system, requires this.

Bill C-2 is a promising first step to address the drain of mega trials on the resources of our judicial system. However, the Bill as written would not achieve its stated goals. The CBA Section believes that Bill C-2 requires further study and some amendments before passage, and suggest s that be prioritized so the Bill can become law as quickly as possible.