THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

March 15, 2011

Via email: LEG-JUR@sen.parl.gc.ca

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

Dear Senator Fraser:

Re: Bill C-59 – *Corrections and Conditional Release Act* amendments

I am writing on behalf of the Committee on Imprisonment and Release of the Canadian Bar Association's National Criminal Justice Section, in regard to Bill C-59. We urge the Senate Committee to provide the careful, detailed review of the Bill that it has not yet been afforded, as its proposals are serious and warrant that attention.

The *Corrections and Conditional Release Act* (CCRA) became law almost 19 years ago, including accelerated parole review (APR) for first time federal offenders (those serving 2 years and up). Under the CCRA, APR applies only to eligible offences (those not exempted in section 125), and those not included in an appended schedule of violent offences. As APR has never applied to violent offenders, Bill C-59 would not improve public safety. It would add to further overcrowding in prisons, drive up public costs, and increase the work load of jail guards and other prison workers.

Under the current law, just before a sixth of the sentence of an eligible non-violent offender is served, a Parole Board of Canada member considers whether there are reasonable grounds to believe that offender will reoffend in a violent manner prior to the expiry of the sentence. If not, the offender is directed to day parole, and then full parole. If yes, the Board member directs the matter to two different Board members, who consider the same question at an in-person hearing with the offender. If they find no grounds, they direct conditional release on either day parole or full parole. If they do find grounds, they deny release. The person then loses their APR status and becomes subject to the test for full parole. In this way, the risk of losing APR status encourages good behavior by all eligible offenders.

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Restraint in Incarceration

Grounding the CCRA, and APR in particular, is the fundamental principle of societal restraint in the use of incarceration. For non-violent offenders, prisons are too often breeding grounds for crime.[1] For those offenders, the shock of a short period of incarceration, and then gradual release and re–integration is generally enough to deter future criminality. Further, gradual release is always subject to suspension and revocation for any violation, meaning return to custody.

Canadians should be aware of the cost of incarcerating non-violent offenders in federal prisons, especially when less expensive alternatives can control those offenders and reintegrate them into society. This Bill would hold non-violent offenders longer than justified for public safety reasons, resulting in unnecessary public expense. It would make eligibility dates and criteria for release of non-violent offenders the same as for violent offenders.[2] In our view, the current process serves the public interest better than what is proposed in Bill C-59.

Since 1992, many people have been sentenced under the APR provisions of the CCRA. Some have already been directed to parole, and for others, a decision is pending. There is no indication that this approach has been generally problematic. A few exceptional cases involving substantial white collar theft and fraud have received media attention, eliciting sympathy to those victimized and anger against the perpetrators. Currently, after eligible non-violent offenders serve a set denunciatory period of imprisonment, they can be back working and paying their own bills, rather than being supported by the state. Importantly, offenders now have greater opportunity to make restitution to victims than they would under Bill C-59. All the while, a return to custody and loss of APR status is the result of any transgression.[3]

Constitutionality and Impact

The retroactive aspect of Bill C-59 may well attract constitutional scrutiny, as section 11 of the *Canadian Charter of Rights and Freedoms* provides that any person charged with an offence has the right *if found guilty of an offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.* To the extent that Bill C-59 would apply retroactively to those already found guilty and already punished, it is likely to be subject to serious constitutional criticism by Canadian courts.

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We believe that Bill C-59 should be abandoned. Its retroactive application would have an unconstitutional and unfair impact on many individuals. It would not address any problem not better addressed through alternative, less restrictive ways. If the Bill does go forward, we

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1 See the discussion about this principle and sentences of imprisonment in the Report of the Canadian Sentencing Commission, *Sentencing reform – A Canadian Approach* (February 1987) especially at 44, 77, 113, 164.

2 No cost estimate for this Bill has been prepared,but the cost of Bill C-25 curtailing enhanced credit for remand time was evaluated by the Parliamentary Budget Officer as several times what had been suggested by the government.

3 See also chapter 4 of the *Sentencing Commission Report, supra*, note 1 dealing with the problem of public perceptions of leniency and the role of the media. See also, Sara Beale, "The news media's influence on criminal justice policy: how market-driven news promotes punitiveness" (2006) 48:2 William and Mary Law Review.

recommend that its retroactive effect be omitted, and that it apply only to specified offences under section 125(1)(a)(i) through (vi) and (a.1)(b) and (c), such as some thefts or frauds involving substantial deprivation of property and significant victimization.

Thank you for considering our views.

Yours truly,

(original signed by Gaylene Schellenberg for John W. Conroy)

John W. Conroy, Q.C.
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