THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

Submission on Bill C-10
Safe Streets and Communities Act

CANADIAN BAR ASSOCIATION

NATIONAL CRIMINAL JUSTICE SECTION
NATIONAL IMMIGRATION LAW SECTION
NATIONAL CIVIL LITIGATION LAW SECTION

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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 comments from the National Immigration Law Section and National Civil Litigation Law Section, and 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, National Immigration Law Section and National Civil Litigation Law Section of the Canadian Bar Association.

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I. EXECUTIVE SUMMARY

The Canadian Bar Association (CBA) is pleased to respond to Bill C-10, *Safe Streets and Communities Act*. The CBA is a national association representing over 37,000 jurists, including lawyers, notaries, law teachers and students across Canada. Its primary objectives include improvement to the law and the administration of justice.

This response is primarily the work of the CBA National Criminal Justice Section and its Committee on Imprisonment and Release (CBA Section or CBA Criminal Justice Section) representing prosecutors and defence lawyers, as well as legal academics, from every part of Canada. The Committee is responsible for several important documents that serve as the foundation for the CBA's policies on matters of imprisonment, release and sentencing.[1] The National Immigration Law Section (CBA Immigration Section) comprises lawyers whose practices embrace all aspects of immigration and refugee law. For aspects of Bill C-10 that pertain to immigrants and refugees, the CBA Immigration Section has offered comments. The CBA National Civil Litigation Law Section (CBA Civil Litigation Section), consisting of specialists in civil litigation from across Canada, contributed to the part of Bill C-10 pertaining to a new civil remedy for victims of terrorism. This Executive Summary outlines the CBA Sections' overall response to each part of Bill C-10. It is followed by a detailed analysis of the proposals.

The CBA Criminal Justice Section is active in providing input to proposed criminal justice legislation, and regularly appears before Parliamentary committees to offer practical expertise and analysis. Given that regular activity, the CBA Section has a history with several aspects of Bill C-10. In this global response, we refer to that history when it is relevant, and rely on CBA submissions as they were at the time of previous Parliamentary committee presentations.

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1 See, for example, Report of the Canadian Bar Association Committee on Imprisonment and Release, *Locking Up Natives in Canada* (Ottawa: CBA, 1988); and Report of the Canadian Bar Association Committee on Imprisonment and Release, *Justice Behind the Walls* (Ottawa: CBA, 1988).

Those submissions use the bill number assigned at that time, and may not reflect changes subsequently made to the bills now included in the Omnibus bill.

While some parts of Bill C-10 have previously been tabled in Parliament, not all have been fully studied by Parliamentary committee, nor have we yet been asked to appear as a witness on each of those parts. Our submissions on those topics are also included. Finally, time and the length of Bill C-10 have not permitted an analysis of every aspect of Bill C-10, and we note those aspects of the Bill where we offer no comment.

The CBA Section is of the view that bundling several critical and entirely distinct criminal justice initiatives into one omnibus Bill is inappropriate, and not in the spirit of Canada's democratic process. Again, some of these initiatives have received no Parliamentary committee consideration to date, yet contain fundamental shifts in Canada's approach to criminal law and the treatment of offenders. Even without an arbitrary 100 day deadline for passage, it is unrealistic to expect that, as part of a huge legislative package, those unstudied proposals will receive the detailed and careful consideration that is appropriate when considering significant legislative change. For the bills that have been studied in significant detail, there was either reason to object to their passage, or the government was unwilling to make amendments to achieve sufficient support to achieve passage into law. For bills where changes were previously adopted by Parliamentary committees, the same proposals are now included in Bill C-10 often without those considered amendments.[2] Further, Bill C-10 adds changes to bills previously studied by Parliamentary committees, without transparency as to exactly where such changes have been inserted. That transparency would have facilitated review by concerned organizations like the CBA, attempting to respond to the breadth of Bill C-10 within the short time available.

Even more important than our concerns about the process is our concern about the general direction of these initiatives. The CBA is committed to public safety, and there is broad consensus among reputable Canadian criminal justice experts as to what is most effective in achieving a safer society. At its 2011 Canadian Legal Conference, the CBA publicly urged that Canada adopt:

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2 See for example the *International Transfer of Offenders Act*, and the *Controlled Drugs and Substances Act* amendments.

- a more health based response to the mentally ill, in place of incarceration;
- policies and laws that recognize the historical, social and economic realities of aboriginal people;
- a judicial "safety valve" to ensure justice in sentencing; and
- a policy of transparency in regard to the cost of any future criminal justice initiatives.

In our view, the initiatives in Bill C-10 go in a contrary direction. They adopt a punitive approach to criminal behavior, rather than one concentrated on how to prevent that behavior in the first place, or rehabilitate those who do offend. As most offenders will one day return to their communities, we know that prevention and rehabilitation are most likely to contribute to public safety. The proposed initiatives also move Canada along a road that has clearly failed in other countries. Rather than replicate that failure, at enormous public expense, we might instead learn from those countries' experience.

Part 1 – *Justice for Victims of Terrorism Act*

Justice for Victims of Terrorism Act

The JVTA (previously Bill S-7, C-35) seeks to provide Canadians who have been victims of state-sponsored terrorism with a means of seeking compensation from persons, entities and states responsible for the terrorist activity. The CBA Criminal Justice and Civil Litigation Sections support this proposal. We suggest that if civil action by victims of terrorism proves too onerous, given the procedural hurdles and expense, consideration also be given to a criminal injuries compensation model. With a primary objective of providing material support to victims of terrorism, a criminal injuries compensation program does not directly eradicate terrorism. However, it acknowledges that victims who have endured great suffering may not be able to litigate to avail themselves of the benefit of principled and supportable public policy decisions.

Part 2 - Sentencing

Offences Against Children

The CBA Section has not prepared comments on this aspect of Bill C-10, formerly Bill C-54.

Conditional Sentences

This part of Bill C-10 (formerly Bills C-16 and C-42) has not received previous Parliamentary committee study, and its proposed changes would have a significant negative impact. The goal of restricting the availability of conditional sentences for serious violent crimes and serious property crimes would only be one result of enacting these proposals. These proposals would actually go much further, severely limiting conditional sentences for less serious violent and property offences as well, in precisely the situations where they are the most appropriate response. Further, the proposals represent a second step in limiting conditional sentences, following passage of Bill C-9 in 2009.

The CBA Section believes that any bill that proposes further mandatory minimum sentences (MMS) or limits the availability of conditional sentence orders should, in accordance with international norms, provide for a legislative exception to allow Crown prosecutors and sentencing judges to depart from statutory sentencing limitations and MMS where there are exceptional circumstances, or where it would be unjust not to do so.

The CBA Section recommends that the proposals to further limit conditional sentences beyond the stated objective not be enacted. Other alternatives could achieve that stated objective in a tailored way, to actually limit conditional sentences for serious violent offences and property offences only, while still ensuring those sentences remain available when they are the most appropriate response. In our view, incarcerating individuals unnecessarily, the certain result if the former Bill C-16 were to be enacted, does not promote public safety, and would more likely lead to injustice and public disrespect for the law.

Controlled Drugs and Substances Act amendments

The CBA Section prepared a submission addressing the proposals in previous Bills C-15, C-26, and S-10, and has appeared before both Commons and Senate Committee in regard to those proposals. The CBA Section opposes passage of these proposals and believes that the obstacles to passing them in prior Parliamentary sessions have been largely well founded.

The CBA Section believes that public safety concerns about drugs and drug trafficking can be met with existing legislation. The proposals would create a complicated system of different escalating MMS depending on the nature and amount of the substance at issue, and the

application of aggravating factors. This would add complexity to existing sentencing principles and increase court time required for sentencing hearings. The Bill would often conflict with existing common law and statutory principles of sentencing, and sentences could become excessive, harsh and unfair in some cases. While circumstances of the targeted offences and degrees of responsibility vary significantly, the proposals would require MMS without judicial discretion.

There are good reasons for conferring discretion on judges to impose fit sentences. They hear the particular circumstances of the offence and the offender, and are best able to craft a sentence that will balance all the goals of sentencing and address the needs and circumstances of the community where the crime occurred. If evidence demonstrates that an offender should be subject to a lengthy prison sentence, the Crown will bring that fact to the judge's attention. In our experience, repeat offenders and serious drug traffickers already receive significantly elevated sentences, even above the proposed MMS.

These proposals would limit the flexibility required to resolve cases justly. They would certainly reduce the number of guilty pleas, lead to more trials and more delays, and require additional resources to prosecute and incarcerate more offenders. Focusing on denunciation and deterrence to the exclusion of other legitimate sentencing principles will often lead to injustice. Certainly, at least some offenders are good candidates for rehabilitation, but MMS mean that offenders who could be rehabilitated will instead be incarcerated long after their detention acts as either a deterrent, is required for public safety or promotes rehabilitative goals. This would be unfair to the offender, at great cost to society. These proposals are misguided, and would have a detrimental effect on an already strained justice system.

Part 3 – Post Sentencing

Corrections and Conditional Release Act amendments

Previously Bills C-39 and C-43, this part of Bill C-10 has not received previous Parliamentary committee study, and represents a profound reorientation of Canada's correctional system.

The proposed amendments to the *Corrections and Conditional Release Act* (CCRA) have been held out as the beginning of a new policy direction for Corrections Services Canada (CSC). They flow from the work of the CSC's Independent Review Panel (Panel), which released its final report with recommendations for the federal government in December 2007. The Panel had

been asked to review the CSC's operational priorities, strategies and business plans. Its report is entitled *A Roadmap to Strengthening Public Safety* (*Roadmap*).

The *Roadmap* has since been embraced by the government and CSC as the script for a "transformation" agenda for Canadian federal corrections. These aspects of Bill C-10 address the primary recommendation of the *Roadmap*, which is the introduction of legislation reflecting a new approach to corrections, with greater focus on public safety and offender accountability as core concepts. The CBA Section and its Committee on Imprisonment and Release believe that these proposals are too limited, and omit reference to the fundamental values and principles of human rights.

Our submission considers the proposals based on a strong historical and legal foundation, anchored in an unwavering commitment to human rights in prison. We adopt this perspective not only because we believe it to be the right approach, but also because it is the approach that will best advance the goal of improved public safety. Human rights are not something that should be "balanced" against prison discipline and control, or prisoner accountability. Rather, they are something through which prison discipline and control must be interpreted and exercised in a professional manner. Legitimate discipline and control is necessary, but can only be effective in holding offenders accountable, promoting positive change in the individual and protecting public safety if it is inherently moral and justifiable.

Criminal Records Act **amendments**

The CBA Section and the CBA Immigration Section oppose passage of these proposed amendments, previously in Bills C-23 and C-23B. Rehabilitation and reintegration are key considerations of sentencing under the *Criminal Code.* The CBA Sections believe that delaying pardons to those who do actually deserve them does not advance worthwhile public policy objectives. While the Parole Board does and should have authority to require careful review before granting pardons for serious crimes with lengthy sentences, and to deny pardons where appropriate, we believe that measures to lengthen the wait for all pardon applications across the board are misguided. They would simply make rehabilitation and reintegration into society more difficult, rather than improve public safety.

International Transfer of Offenders Act amendments

The CBA Section responded to previous Bills C-5 and C-59, and appeared before the Commons Committee on Public Safety and Emergency Preparedness when it studied Bill C-5. Canadians who commit crimes in other jurisdictions will likely return to Canada, either by transfer during the sentence imposed by the other country, or by way of deportation at the end of it. Goals of reintegration, reformation and rehabilitation of offenders are promoted when offenders return to Canada to finish their sentences. Leaving a person far from family, community and other supports does not contribute to any correctional purpose and is contrary to achieving reintegration and rehabilitation to Canada. To protect the public, provide reintegration and rehabilitation to offenders, and meet its international obligations, we believe that Canada should generally pursue the repatriation of offenders to ensure they are subject to Canada's correctional practices and processes before they complete their sentences.

The proposed law would not meet these goals. The Ministerial discretion it provides would allow arbitrary and inconsistent refusals to transfer Canadian offenders back to Canada. Instead, we propose criteria for consideration be limited to dual criminality and citizenship, which would eliminate political considerations, arbitrariness and inconsistency, and give appropriate weight to the citizen's right of return, the *Charter* and the Rule of Law. The proposal in Bill C-10 is more likely to endanger the Canadian public, than protect it. Rehabilitating offenders in a manner consistent with the values of Canadian society is the key to the safety of our communities. The proposed legislation fails to recognize this practical reality.

Part 4 – Youth Criminal Justice

Youth Criminal Justice Act amendments

The CBA Section prepared a response to former Bill C-4, and appeared twice before the Commons Committee on Justice and Human Rights during its study of that Bill. While we note that the Bill 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*. 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.

By any objective measure, the *YCJA* has been an unmitigated success. 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. The goals of the *YCJA* have largely been realized: there are fewer court cases and fewer youth in custody, without a concomitant increase in violent youth crime.

Part 5 – Immigration and Refugee Protection Act

Immigration and Refugee Protection Act amendments

The CBA Immigration Law Section prepared a response to former Bill C-17 (also C-57) in a letter in 2009. The proposals now in Bill C-10 would amend the *Immigration and Refugee Protection Act* (IRPA) to allow immigration officers to refuse work permits for foreign nationals deemed to be at risk of exploitation based upon Ministerial instructions. The CBA Immigration Law Section is concerned about the wide-ranging Ministerial authority. While we acknowledge the serious problem of trafficked persons and the need for sound government policy to assist them, this particular scheme is unnecessary and would in fact be counterproductive.

The government's media statements suggest that the intent of the proposals is to prevent entry of "strippers" (exotic dancers) and other "vulnerable" applicants, including "low skilled labourers, as well as potential victims of human trafficking." Despite this, neither exotic dancers, victims of human trafficking, nor low skilled workers are mentioned in its terms. It authorizes an officer to refuse an otherwise valid work permit to any worker, in any occupation or industry, subject only to (as yet, undisclosed) Minister's instructions.

The undefined scope of the legislation and its potential applicability to any work permit applicant is concerning. It is impossible to discern from the Bill the scope of instructions that might be issued by the Minister, or the nature of opinion that must be formed by the officer. For example, the degree of "risk" before a Ministerial instruction could issue or the evidence of risk required in making a decision are not specified, but would remain entirely in the discretion of the Minister.

Providing assistance to trafficked and other vulnerable people is laudable but these proposals would introduce a scheme that is vague, confused and potentially harmful to the very people it seeks to protect. We recommend that it not be adopted in its current form.

II. *JUSTICE FOR VICTIMS OF TERRORISM ACT*

The *JVTA* would introduce a tort-based civil litigation regime for holding state sponsors of terrorist activity accountable. The CBA's National Criminal Justice and Civil Litigation Law Sections have considered the *JVTA* in light of its public policy objectives, specifically as to whether the Bill would advance those objectives lawfully, efficiently and economically.

The Bill resembles Senate Private Members' Bill S-225,[1] which itself replicated Bill S-218.[2] It also adopts many of the recommendations set out in the July 2011 proposal of the Canadian Coalition Against Terror (C-CAT), "*An Act to Amend the State Immunity Act* and the *Criminal Code* (deterring terrorism by providing a civil right of action against perpetrators and sponsors of terrorism)".[3]

The *JVTA* would create a cause of action for victims of terrorism offences, set out in Part II.1 of the *Criminal Code*. This would allow damage awards against perpetrators of terrorism, or against "a foreign state . . . that . . . committed an act or omission" that involves terrorist financing or the carrying out of specific types of terrorist activity. The Bill's preamble is important too, stating that the main purpose of the proposed act is to impair the functioning of terrorist groups, to deter and prevent acts of terrorism against Canada and Canadians.

The *JVTA* then proposes several amendments to the *State Immunity Act*[4] to create a list of state sponsors of terrorism, and to lift jurisdictional immunity from listed states for forensic proceedings arising from a state's support of terrorism. Finally, it provides for state-assisted enforcement of private litigant judgments against sponsors of terrorism.

Although not addressed expressly in the preamble, the *JVTA* seeks to provide Canadians who have been victims of state-sponsored terrorism with a means of seeking compensation from persons, entities and states responsible for the terrorist activity.

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1 *An Act to amend the State Immunity Act* and the *Criminal Code*, 2nd Sess., 39th Parl., 2007-2008.

2 *An Act to amend the State Immunity Act* and the *Criminal Code*, 1st Sess., 39th Parl., 2006.

3 Available at http://www.c-catcanada.org/, accessed 28 October 2009.

4 R.S.C. 1985, c. S-18, as amended.

We support this proposal, which would provide a sound option for victims of terrorism to seek recourse for the harms they have suffered. We note though that a tort-based, civil litigation model may not be entirely accessible to victims, given the procedural hurdles and associated costs frequently faced by litigants in civil courts.

Many countries have adopted a criminal injuries compensation model, with compensation paid by the victim's state of domicile. The *European Convention on Compensation for Victims of Violent Acts (1983)*[5], for instance, prescribes baselines for criminal-injuries compensation schemes which must be established by member states. Compensation under the *Convention* is available to injured persons and their dependents, even when the perpetrator has not been arrested, or even identified. The *Convention* covers loss of income, medical and hospitalization expenses, funeral expenses and income support for dependents.

Similarly, the European *Guidelines on the Protection of Victims of Terrorist Acts*[6] promote compensation schemes that protect the privacy of claimants, provide for compensation to victims of terrorist attacks even when the perpetrator has not been captured or identified, render coverage for short- and long-term medical, psychological, and social support. The *Guidelines* even provide for legal assistance when required by a victim.

In Italy, the national law *Nuove norme in fevore della vittime del terrorismo e delle stragi di tale matrice*[7] provides for payment of pensions to victims of terrorism based on the degree of injury. Victims of terrorism receive all medical care required to treat their injuries, including hospitalization, medication, appliances, mobility devices, prostheses and psychotherapy, free of charge.

Neither the proposed tort based model, nor the crime victim compensation model, with its primary objective of providing material support to victims of terrorism, would directly eradicate terrorism.

However, we support measures to compensate citizens victimized in terror attacks, and suggest use of the substantial resources of the federal government to pursue civil litigation—

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5 Council of Europe, 24 November 1983, E.T.S. 116.

6 Council of Europe, Committee of Ministers, *Victims –Support and Assistance*, (2006), at 115-118.

7 Act no. 206 (2004).

with all the procedural advantages offered by non-criminal proceedings—against the persons, entities and states responsible.

III. OFFENCES AGAINST CHILDREN

We have not prepared comments on this part of the Bill.

IV. CONDITIONAL SENTENCES

A. INTRODUCTION

There have been numerous attempts at sentencing reform over the past several years. The CBA's National Criminal Justice Section and its Committee on Imprisonment and Release (CBA Section) have actively participated in these initiatives and made many submissions to government, Parliamentary Committees and independent commissions on the central, interrelated issues of sentencing, corrections and conditional release.[1]

In our view, the process of reform requires a fact-based appraisal of the present situation, as well as a careful assessment of whether proposed reforms will enhance established goals and objectives of sentencing in Canada's criminal justice system. Any reforms should reflect available accumulated knowledge about sentencing, and attempt to achieve clearly articulated social objectives. Basic questions should be addressed, including;

- What are we trying to accomplish?
- Are the proposed reforms likely to make our communities safer? and
- What are the true costs of the proposed reforms?

In this submission, the CBA Section first summarizes our perspective on sentencing. With that orientation in mind, we consider the specific proposals in Bill C-10 that would further restrict the use of conditional sentences. We conclude that while the goal of restricting the availability of conditional sentences for serious violent crimes and serious property crimes may be a part of the outcome of the Bill, it would go much further than that. It would severely limit conditional sentences where they are the most appropriate response. Further, the proposals represents a second step in limiting conditional sentences, following passage of Bill C-9 in 2009.

For these reasons, we do not recommend that these proposals be enacted. Other alternatives could achieve the articulated objective of the Bill in a more tailored way, to actually limit

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[1] For a few examples, see *supra*, note 1, and also CBA Committee on Imprisonment and Release, *Parole and Early Release* (Ottawa: CBA, 1988); National Criminal Justice Section, *Submission on Bill C-90* (Ottawa: CBA, 1993); National Criminal Justice Section, Bill C-41, *Criminal Code* amendments (sentencing) (Ottawa: CBA, 1994); National Criminal Justice Section, Bill C-9, *Criminal Code* amendments (conditional sentence of imprisonment) (Ottawa: CBA, 2006).

conditional sentences for serious violent offences and property offences only, while still ensuring those sentences remain available when they are the most appropriate response and are sufficiently resourced to ensure their effectiveness.

B. OUR PERSPECTIVE ON SENTENCING

Some time ago, in a federal government Consultation Paper prepared in advance of what was then Bill C-90, the government stated:

> We instinctively look to long sentences to punish offenders, yet the evidence shows that long periods served in prison increase the chance that the offender will offend again ... In the end, public security is diminished rather than increased if we "throw away the key" and then return offenders to the streets at sentence expiry, unreformed and unsupervised.[2]

That paper and other documents and studies since have acknowledged Canada's over-reliance on incarceration, the need for alternative sanctions, the limited success of imprisonment in controlling or deterring crime, the impact of incarceration on particular populations, notably aboriginal people, and the extremely high cost of incarceration in both human and financial terms.

The CBA Section generally agrees with these observations. We have urged the federal government to provide financial support to provinces and territories to encourage the use of alternatives at the front end of the sentencing process and to diminish the use of imprisonment. We have also urged legislative amendments to promote alternative options in appropriate circumstances, and encouraged reliance on the judiciary to decide the most appropriate sentence after hearing firsthand the facts of each individual case. In our view, conditional sentences have helped to reduce the over-reliance on incarceration in Canada, and have gone a long way to ameliorating several previous problems.

Canadian judges are trusted to use discretion to impose terms of imprisonment, the most restrictive and expensive sentence available, without consideration of resources such as the existence of jail space. Judges can also be trusted to determine when less restrictive and expensive alternatives will best meet all Canadian sentencing principles.

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[2] Department of Justice, *A Framework for Sentencing, Corrections and Conditional Release, Directions for Reform* (Ottawa: 1990) at 9.

The CBA Section supports measures that will lead to a safer society. To a significant extent, our involvement in the process of law reform is to advance that goal. We believe though that improved public safety requires more than relying only on incarceration. A safe and just society requires that the sentencing process be used carefully, with a view to finding the least intrusive sanction appropriate to the particular offence and offender. Like the Law Reform Commission of Canada, the *Archambault Report*, and the *Daubney Report*,[3] the CBA Section supports principles of proportionality and restraint in imposing criminal sanctions. The *Criminal Code* also requires consideration of principles of restraint and proportionality when judges determine an appropriate sentence. On the principle of restraint, it has been said that:

1. Restraint must be applied in determining what behaviour should be prohibited by the criminal process.
2. Imprisonment, the "final coercive sanction", can only be imposed as a last resort.
3. Increasing the intensity of criminal sanctions does not increase compliance to social norms.[4]

C. ANALYSIS OF THE PROPOSED CHANGES

Various government communications concerning the proposed changes clarify that the intent is to limit conditional sentences so that they are unavailable for serious violent offences and serious property offences. However, conditional sentences are generally *not* an option for serious violent offences under the current law, as they may only be considered where the judge would otherwise impose a sentence of less than two years. In addition, appellate courts can correct any conditional sentence that may be inappropriately awarded by a trial court judge.

Taking the government's statements at face value, if the goal is to ensure that conditional sentences are only available for less serious violent or non-violent crimes and minor property crimes, the CBA Section believes that a more targeted and direct approach is required than that suggested.

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3 See Report of the Canadian Sentencing Commission, *Sentencing Reform - A Canadian Approach* (the *Archambault Report*) (Ottawa: Supply and Services Canada, 1987); Report of the Standing Committee on Justice and Solicitor General of its Review of Sentencing, Conditional Release and Related Aspects of Corrections, *Taking Responsibility* (the *Daubney Report*) (Ottawa: Justice Canada, 1988).

4 M. Mauer, *Americans Behind Bars: The International Use of Incarceration 1992-1993* (The Sentencing Project, Sept. 1994).

Relying on Statutory Maximum

The Bill proposes determining when conditional sentences would not be available through an extremely broad mechanism, and would capture much more than only serious violent crimes. It would eliminate any crime that permits a maximum sentence of 14 years or more from consideration.

The result would be to eliminate this important alternative to incarceration for many cases where it may well be appropriate. Maximum sentences of 14 years or more are allowed for many *Criminal Code* offences, providing a sentencing range that can encompass serious conduct and conduct that is often neither serious nor violent. Like its predecessor Bill C-9[5], the Bill seems to overlook the basic reason for providing sentencing ranges for particular offences. Sentencing ranges allow judges to deal appropriately with a wide range of conduct. A just sentencing regime allows a judge sufficient flexibility to construct an appropriate response for individual offences along the continuum of that conduct.

Using the statutory maximum permitted for the most egregious example of a particular offence to restrict the use of conditional sentences does not reflect this important reality. Like in Bill C-9, the mechanism proposed would result in restrictions that are far too broad, often arbitrary and inflexible, and could well result in sentences that are, simply put, unjust. Some of the offences that would be covered under the Bill's regime include use of a forged passport (section 57), perjury (section 132), drawing document without authority (section 374), fraud over $5000 (section 380), and possession of counterfeit money (section 450). Certainly, there might be cases under each of these examples that warrant 14 years' incarceration, but just as certainly, there would be cases that were much less serious and where a conditional sentence would be appropriate and just.

We believe a more refined tool is required to recognize the breadth and complexity of conduct captured under various *Criminal Code* offences, and to allow judges the necessary flexibility to craft a just and appropriate sentence in the circumstances of each case. All of the fundamental purposes and principles of sentencing in sections 718, 718.1 and 718.2 of the *Code* must be respected.

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5 The CBA Section took pains in 2009 to explain why a similar mechanism in Bill C-9 to determine when conditional sentences should be unavailable was misguided and inappropriate.

One such sentencing principle is proportionality, to reflect the necessary and delicate balance that must be achieved in fashioning a just sentence. This balance also contributes to the administration of a justice system that makes sense to the public it is intended to protect. Logic and fairness requires an individualized, proportionate sentence. We believe that this is why mandatory minimum sentences have been severely criticized in many important studies, including Canada's own Sentencing Commission Report.[6] In our view, incarcerating individuals unnecessarily, the certain result if these proposals would be enacted, does not promote public safety, and would more likely lead to injustice and public disrespect for the law.

Named Offences

In addition to prohibiting all offenders who are found guilty of an offence with a statutory maximum of 14 years or more from receiving conditional sentences, the Bill would further limit such sentences for numerous other offences: for offenders convicted of any offence, prosecuted by way of indictment, for which the maximum term of imprisonment is ten years or more that (i) resulted in bodily harm; (ii) involved the import, export, trafficking or production of drugs; or (iii) involved the use of a weapon. The Bill also lists further offences when persons convicted would no longer be eligible to receive conditional sentences.

Of particular note in this list are drug offences, which are not serious property or serious violent offences. The spectrum of offenders captured by the proposed drug offence portion of the Bill is wide-ranging: all those convicted of trafficking or possession for the purpose of trafficking of any Schedule I substance or an amount of marijuana greater than three kilograms.

This has the potential to impact many individuals who struggle with addiction. Unfortunately, addiction and trafficking are joined hand-in-hand for many offenders who choose between property offences or drug offences to support their habit. At present, conditional sentences are often crafted to allow addicted offenders to receive counseling and treatment. While some might argue that putting an addict in custody prevents their access to drugs, the drug use rates in prisons in Canada are a separate cause for concern. Simply incarcerating addicts involved in trafficking or serious property offences fails to address their prospects for rehabilitation.

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6 *Supra*, note 3, *Archambault Report*.

Among other offences, conditional sentences will no longer be available for offenders convicted of fraud over $5000 (section 380). These offenders are also often charged with theft over $5000 (section 334). These people are regularly first time offenders who, apart from the offence before the court, are functioning and participating members of society. The sweeping change proposed would leave judges with little discretion in the numerous fraud cases that come before the courts every year. The Chief Justice of British Columbia, Finch C.J.B.C., recently made the following comments:

> In my respectful opinion, a sentence of imprisonment is unfit in these circumstances. It cannot be necessary in the interests of general deterrence for serious theft, to incarcerate someone who is mentally ill when the offences were committed, whose mental illness was a cause of her committing the offences, who pleads guilty, who makes restitution, and who undertakes an appropriate course of medical treatment. To the extent that public opinion is relevant to the principle of general deterrence, I am satisfied that reasonable citizens informed of all the relevant circumstances in this case would consider that the provisions of the *Criminal Code* and the ends of justice are met by a conditional sentencing order.[7]

Judicial Discretion

From our experience in Canadian courts across the country every day, we can advise that Canada's judges apply careful reasoning and analysis before imposing conditional sentences. Conditional sentences are not handed out lightly and are only available when a judge is satisfied that the sentence would not endanger the community and would be consistent with the fundamental purposes and principles of sentencing. Further, judges who impose a conditional sentence order can impose a longer sentence than might otherwise be ordered if the person were required to serve their time incarcerated. Finally, the combination of a lengthy conditional sentence (i.e., two years less a day) and a lengthy period of probation can give sentencing judges the opportunity to judicially supervise an offender for up to five years.

From an objective viewpoint, such a combination sentence is a more significant punishment than a 14-day, 30-day or 90-day jail sentence.

The Bill's proposals would unduly limit judicial discretion. The CBA Section trusts judges' extensive legal and practical experience and their independent role in the justice system. The judge at trial has the unique opportunity to observe the accused, learn the accused's history

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7 *R. v. Dickson*, 2007 BCCA 51 at para. 70.

and current circumstances, hear all the facts of the particular case, and become aware of the prevailing conditions in the local community. Allowing a wide range of sentencing options enables trial judges to design a proportionate, just and appropriate sentence for each individual case. Further, because sentencing judges are best positioned and able to craft a sentence that addresses all relevant circumstances, appellate courts generally give deference to sentencing judges' decisions.[8]

Conditional sentences are vital in providing sentencing judges with options. The CBA Section urges that they be retained for use in appropriate cases, particularly where public safety does not require incarceration. The proposal to exclude all offences that have a maximum sentence of 14 years' imprisonment or more, along with other named offences would severely curtail judicial discretion, and directly conflict with established sentencing principles of proportionality, restraint and the obligation of imposing the least restrictive sanction appropriate to the circumstances.[9]

In comparable jurisdictions where legislators have moved toward less flexible sentencing models, they have included some sort of "safety valve" provisions to avoid an unjust result. We strongly suggest that Canada do the same.

In the US, which has by far the world's highest incarceration rate,[10] judges may depart from mandatory minimums in defined circumstances, including where the offender does not have significant criminal history, did not use violence or a weapon or cause serious bodily harm to any person.[11] The US Federal sentencing regime also gives courts authority to impose a sentence below a statutory minimum sentence upon a motion by the government.[12] In the United Kingdom, there are two formulations of an exemption provision, in relation to four different statutes[13] that contain mandatory minimum sentences. The first formulation is for

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8 See, for *example*, *R. v. C.A.M.*, [1996] 1 SCR 500.

9 *Criminal Code* section 718.

10 Senator Jim Webb, Parade (March 29, 2009) 4. http://www.parade.com/news/2009/03/why-we-must-fix-our-prisons.html

11 See 18 U.S.C. § 3553 (f).

12 The U.S. federal sentencing regime allows for the court to depart from mandatory minimum sentences where an accused person has provided assistance to the government in the investigation or prosecution of another person who has committed an offence: 18 U.S.C. § 3553 (e). This motion is commonly referred to as a §5K1.1 motion.

13 In the United Kingdom, four principal provisions for mandatory minimum sentences of imprisonment in English law all contain exemption of "safety valve" provisions to deal with exceptional or unusual cases:

Powers of Criminal Courts (Sentencing) Act 2000, s.110

(1) This section applies where -
  (a) a person is convicted of a class A drug trafficking offence committed after 30th September 1997;
  (b) at the time when that offence was committed, he was 18 or over and had been convicted in any part of the United Kingdom of two other class A drug trafficking offences; and
  (c) one of those other offences was committed after he had been convicted of the other.

(2) The court shall impose an appropriate custodial sentence for a term of at least seven years except where the court is of the opinion that there are particular circumstances which -
  (a) relate to any of the offences or to the offender; and
  (b) would make it unjust to do so in all the circumstances.

Powers of Criminal Courts (Sentencing) Act 2000, s.111

(1) This section applies where -
  (a) a person is convicted of a domestic burglary committed after 30th November 1999;
  (b) at the time when that burglary was committed, he was 18 or over and had been convicted in England and Wales of two other domestic burglaries; and
  (c) one of those other burglaries was committed after he had been convicted of the other, and both of them were committed after 30th November 1999.

(2) The court shall impose an appropriate custodial sentence [a sentence of imprisonment] for a term of at least three years *except where the court is of the opinion that there are particular circumstances which -*
  (a) relate to any of the offences or to the offender; and
  (b) would make it unjust to do so in all the circumstances.

Firearms Act 1968, s. 51A

(1) This section applies where—
  (a) an individual is convicted of
    (i) an offence under s. 5(1)(a), (ab), (aba), (ac), (ad), (ae), (af) or (c) of this Act, or
    (ii) an offence under s. 5(1A)(a) of this Act, and
  (b) the offence was committed after the commencement of this section and at a time when he was aged 16 or over.

(2) The court shall impose an appropriate custodial sentence (or order for detention) for a term of at least the required minimum term (with or without a fine) *unless the court is of the opinion that there are exceptional circumstances relating to the offence or to the offender which justify its not doing s*o.

(3) Where an offence is found to have been committed over a period of two or more days, or at some time during a period of two or more days, it shall be taken for the purposes of this section to have been committed on the last of those days.

(4) …

(5) In this section "the required minimum term" means—
  (a) in relation to England and Wales—
    (i) in the case of an offender who was aged 18 or over when he committed the offence, five years, and
    (ii) in the case of an offender who was under 18 at that time, three years

Violent Crime Reduction Act 2006, s.28

.....

(3) Where—
  (a) at the time of the offence, the offender was aged 16 or over, and
  (b) the dangerous weapon in respect of which the offence was committed was a firearm mentioned in section 5(1)(a) to (af) or (c) or section 5(1A)(a) of the 1968 Act (firearms possession of which attracts a minimum sentence),

Class A drugs and burglary, and refers to 'particular circumstances' which would make it 'unjust' to impose the minimum sentence. The second formulation is for certain firearms and weapons offences, and refers to 'exceptional circumstances' which 'justify' the court not imposing the mandatory minimum sentence. In South Africa, exemption provisions require the accused person to demonstrate that there are "substantial and compelling circumstances" which would "justify" the imposition of a lesser sentence.[14] Australia also has an exceptional circumstance provision within its mandatory sentencing regime for property offenders.

In Canada, where the government has created many new mandatory minimums and is moving to restrict the use of other flexible sentencing tools, such as the conditional sentence order, there are no similar safety valve provisions, regardless of any injustice that might result. If, for example, an accused person suffers from a physical disability that would make their incarceration in a provincial or federal institution practically impossible, there may be no discretion left to the Crown prosecutor or the sentencing judge to impose a conditional sentence in a particular case. Likewise, where the accused suffers from a mental illness, but remains criminally responsible, judges have no flexibility to impose a conditional sentence order in an ever increasing number of circumstances.

The CBA Section believes that any bill which proposes mandatory minimum sentences or limits the availability of conditional sentence orders should, in accordance with international norms, provide for some kind of legislative exception to allow Crown prosecutors and sentencing judges to depart from statutory sentencing limitations and mandatory minimums where there are exceptional circumstances or where it would be unjust not to do so.[15]

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the offender shall be liable, on conviction on indictment, to imprisonment for a term not exceeding 10 years or to a fine, or to both.

(4) On a conviction in England and Wales, where—

(a) subsection (3) applies, and

(b) the offender is aged 18 or over at the time of conviction,

the court must impose (with or without a fine) a term of imprisonment of not less than 5 years, *unless it is of the opinion that there are exceptional circumstances relating to the offence or to the offender which justify its not doing so*.

(all emphasis added.)

14 Section 51(3) of the Criminal Law (Sentencing) Amendment Act, 2007.

15 At its 2011 Canadian Legal Conference, the CBA National Council supported this position: See CBA Resolution 11-09-A.

Public Perception

Finally, we note that conditional sentences are too often represented as "soft" or an "easy" sentence imposed on offenders who have committed crimes that deserve a greater punishment. This need not and should not be the case. When conditional sentences were created, there was a recognition that offenders who were not incarcerated could still contribute to the country's economic well-being through their employment, and suffer the punitive consequences of committing crimes by being restricted to the confines of their homes when not working. Unfortunately, this recognition did not extend to providing the resources to ensure that conditional sentences operated as effectively as possible.

The cost of incarcerating offenders is known to be an enormous drain on the public purse. If the funding to house offenders and build more jails (the likely outcome of the proposed amendments) was used instead to enforce conditional sentence orders, we suggest the fruits of that expenditure would benefit everyone in society. It would be far more desirable to fund provincially operated programs, such as electronic monitoring. This type of supervision would allow the authorities to ensure offenders comply with "house arrest" conditions, allow judges to impose strict curfew times and make breaches of the conditional sentence order easier to prove. Funds could also be allocated to creating new community oriented programs which would require offenders to give back to the local community in a variety of ways.

Such measures would be likely to significantly boost public confidence in conditional sentences by giving them "teeth", while at the same time, making sure that the offender can continue to work for a living.

D. CONCLUSION AND RECOMMENDATION ON CONDITIONAL SENTENCES

Harsher penalties have not been convincingly associated with reduced crime or reduced recidivism. Severely curtailing conditional sentences in favour of incarceration may offer the public a false impression of increased safety, but the role of responsible government leaders is to provide accurate information to the public. The proposed limitations on conditional sentences in Bill C-10 would be likely to diminish any focus on rehabilitation. In many cases, supervision and support in the community is more effective at reducing future criminal acts than incarceration and eventual release.

We know from daily experience that justice system participants will strive for a just result. For example, judges who see that an offender is on the borderline of a sentence of imprisonment that seems unjust may opt in favour of probation, if a conditional sentence is not an option. Crown prosecutors are likely to select appropriate charges based on all information at hand, and the absence of a conditional sentence option would be considered. Under the Bill, they may be required to act contrary to their assessment of the correct result in the circumstances, compromising their constitutionally mandated independence, which is vital to the administration of justice.

The former Chief Justice of British Columbia, McEachern C.J.B.C., once noted the following:

> The rub comes, as in this case, when the range of fit sentences for an offence extends above and below the maximum of two years less one day. When that happens, it seems to me that the sentence should be reduced wherever possible so that a conditional sentence may be imposed in proper cases. "Wherever possible" means a sentence that results from a balancing of all relevant purposes and principles of sentencing although in such a case the sentencing judge will inevitably conclude that some of these matters must be given more weight than others.[16]

By removing the possibility of a conditional sentence for so many types of offenders, we expect judges will move towards the least severe sentence "wherever possible". If a conditional sentence is no longer available, judges may consider suspended sentences followed by a period of probation if incarceration is inappropriate. However, in many cases neither a suspended sentence nor a term of incarceration is appropriate. Judges, defence lawyers, and Crown counsel will face situations where a reasonable and just result is unavailable.

The CBA Section recommends a more nuanced approach, if further limits on the availability of conditional sentences are desired. Given the "legislation creep" in the erosion of conditional sentences (first in Bill C-9 and now in this Bill), it is imperative that consideration be given to including safety valve provisions. We suggest the government:

- permit the sentencing judge to consider the imposition of a conditional sentence order, notwithstanding the restrictions, in exceptional circumstances;
- create a separate exemption to permit the sentencing judge to consider the imposition of a conditional sentence order, without regard to any statutory limitations, where the offender suffers from any significant

16 *R. v. Biln*, 1999 BCCA 369 at para. 27.

> mental or physical illness or impairment, the proof of which rests upon the offender on a balance of probabilities.

In its current form, and without a safety valve provision, the proposed Bill will undoubtedly lead to more trials as a result of fewer guilty pleas. That factor alone will eliminate any efficiencies in the justice system, and certainly increase demands for legal aid. In addition to the costs of incarceration, particularly in circumstances where the offender and the offence are not a danger to the community, there will be enormous resulting social costs. For example, if a parent is incarcerated rather than serving a conditional sentence that allows them to continue to fulfill work and childcare responsibilities, it may perpetuate a cycle of child poverty with all associated risk factors. Further, the lack of judicial discretion to achieve a just result in the particular case will have a disproportionate impact on populations already over-represented in the justice system, notably the economically disadvantaged, Aboriginal people, members of visible minorities and the mentally ill. For example, offenders from Canada's northern communities are usually incarcerated in facilities far from home. Families may not have financial means to maintain contact with the offender while incarcerated, given the costs of transportation and accommodation. This isolates and alienates the offender and undermines rehabilitation and reintegration efforts.

Bill C-10 would necessarily restrict and limit judicial discretion on sentencing. That discretion forms a fundamental part of Canada's criminal justice system. In contrast, the US experience with mandatory sentencing guidelines resulted in a dramatic transfer of control over penal consequences from the judiciary to the prosecution service. The US Supreme Court recently held that the sentencing guidelines were only advisory, restoring a modicum of discretion to trial judges in that country. In Canada, conditional sentences give judges the capacity to shape sentences based on their experience and the collective experience of other judges for specific offenders convicted of specific offences. Any further limitations on the availability of conditional sentences will tread too deeply into judicial discretion. Absent the inclusion of safety valve provisions, the CBA Section does not recommend that these proposals be enacted into law.

V. *CONTROLLED DRUGS AND SUBSTANCES ACT* AMENDMENTS (Former Bill C-15, C-26, S-10)

A. INTRODUCTION

The CBA Section opposed passage of what was called Bill C-15 at the time of preparing the following submission, and opposes the same proposals in Bill C-10.

We believe public safety concerns can be better met with existing legislative tools. We believe the Bill would not be effective, would be very costly, would add to strains on the administration of justice, could create unjust and disproportionate sentences and ultimately would not achieve its intended goal of greater public safety.

B. GENERAL COMMENTS ON BILL C-15

The CBA Section has consistently opposed the use of mandatory minimum sentences (MMS)[1] as we believe that they:

- do not advance the goal of deterrence. International social science research has made this clear.[2] The government itself has stated that:

  > The evidence shows that long periods served in prison increase the chance that the offender will offend again....In the end, public security is diminished, rather than increased, if we "throw away the key".[3]

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1 For example, see Submission on Bill C-68, *Firearms Act* (Ottawa: CBA, 1995) at 10-13; Letter to Senator Beaudoin from CBA President G. Proudfoot (Ottawa: CBA, 1995); Submission on Bill C-41, *An Act to amend the Criminal Code* (sentencing) (Ottawa: CBA, 1994); and, Submission on Bill C-215 (*Criminal Code* amendments (consecutive sentences) (Ottawa: CBA, 2005).

2 See, for example, Michael Tonry, "Mandatory Penalties" (1992), 16 *Crime and Justice Review* 243, which begins with the simple and succinct statement, "Mandatory penalties do not work". See also, Neil Morgan, "Capturing Crimes or Capturing Votes: the Aims and Effects of Mandatories" (1999) UNSWLJ 267 at 272 and the Crime Prevention Council of Northern Australia, "Mandatory Sentencing for Adult Property Offenders" (2003 presentation to the Australia and New Zealand Society of Criminology Conference (August 2003): http://www.nt.gov.au/justice/ocp/docs/mandatory_sentencing_nt_experience_20031201.pdf

Professor Morgan, of the Crime Research Centre at the University of Western Australia, notes that in the United States and Australia, criminologists have given careful study to the effects of mandatory sentencing on attaining sentencing objectives. The state of Western Australia introduced two mandatory minimum sentencing schemes in 1992 and 1996, respectively, targeting high-speed vehicle chases and home burglaries. Morgan used subsequent sentencing data in a study to examine the effects of these provisions. In the course of his study, he also examined recent literature in the United States. Morgan stated that:

The obvious conclusion is that the 1992 Act has no deterrent effect. This is fully in line with research from other jurisdictions.

3 Department of Justice, *A Framework for Sentencing, Corrections and Conditional Release: Directions for Reform* (Ottawa: Justice Canada, 1990) at 9. We note that MMS have been severely criticized in many other important studies, including Canada's own *Sentencing Commission Report*.

- do not target the most egregious or dangerous offenders, who will already be subject to very stiff sentences precisely because of the nature of their crimes. More often, less culpable offenders are caught by mandatory sentences and subjected to extremely lengthy terms of imprisonment.
- have a disproportionate impact on those minority groups who already suffer from poverty and deprivation. In Canada, this will affect aboriginal communities, a population already grossly over represented in penitentiaries, most harshly.[4]
- subvert important aspects of Canada's sentencing regime, including principles of proportionality and individualization, and reliance on judges to impose a just sentence after hearing all facts in the individual case.

Bill C-15 would create a complicated system of different escalating MMS depending on the nature and amount of the substance at issue, and the application of aggravating factors.[5]

Based on our experience, we believe that the Bill has the potential to add complexity to existing sentencing principles and to increase the court time required for sentencing hearings. Fewer accused would likely plead guilty, adding to current strains on court resources. Further, we believe that the Bill would often conflict with existing common law and statutory principles of sentencing, such that sentences could be excessive, harsh and unfair in some cases.

Our analysis of Bill C-15 is informed by the following observations:

1. Every sentence imposed against an offender must comply with section 12 of the *Charter*[6].
2. Several factors listed in clause 1(1)(a)(i) of the Bill are already criminal offences (for example, see *Criminal Code* sections 467.11-13, 264.1). Some of those offences carry mandatory consecutive sentences (for example, see *Criminal Code* section 467.14) and others carry MMS (for example, see *Criminal Code* section 95(2);

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4 *Juristat:* Canadian Centre for Justice Statistics, "Returning to Correctional Services after Release: A Profile of Aboriginal and Non-Aboriginal Adults Involved in Saskatchewan Corrections from 1999/00 to 2003/04", Vol. 25: 2 (Ottawa: StatsCan, 2005). On the inordinately high level of arrest and incarceration of people of Aboriginal background, see also *Juristat*, "Adult Correctional Services in Canada" 26:5 (Ottawa: StatsCan, 2005) at 15, which states that: "Aboriginal people represent more than one in five admissions to correctional services."

5 See, for example Bill C-15, clause 3.

6 Section 12 states that "Everyone has the right not to be subjected to any cruel and unusual treatment or punishment." See *R. v. Smith*, [1987] 1 SCR 1045.

3. Several factors listed in clause 1(1)(a)(i) of the Bill are already aggravating factors on sentence, which "shall" be considered by the court pursuant to CDSA section 10(2) and *Criminal Code* section 718(2)(a).

The Bill is silent on how these overlapping provisions would operate. In some instances the combined operation of these provisions would result in a sentence that is unfit or that offends section 12 of the *Charter*, and the sentencing judge would have no discretion to address those problems.

Bill C-15 would require MMS, even though circumstances of the offences and degrees of responsibility vary significantly. The penalties in the Bill are based on arbitrary factors and do not meaningfully distinguish the level of culpability[7]. For example, clause 3(1)(b) would impose escalating MMS for production of marijuana geared to the number of plants produced. If less than 201 and for the purpose of trafficking, the MMS would be six months. If less than 201, for the purpose of trafficking and any of the aggravating factors apply, the MMS would be nine months. If more than 200 but less than 501, the MMS would be one year. In the same case, if any of the aggravating factors apply, the MMS would be eighteen months. If the plants exceed 500, the MMS would be two years. If any of the aggravating factors apply, the MMS would be three years. In our view, it is contrary to common sense for someone responsible for a 200-plant grow operation to receive a six-month MMS, while someone responsible for 201 plants to be subject to twice that sentence.

Given the significant prison terms proposed by the Bill, the Crown should be required to prove beyond a reasonable doubt those factors capable of triggering MMS. Where *mens rea* is a component of the triggering factor itself, for example, that a person is producing over a certain number of marijuana plants, or that an offence was committed near a school or at a public place usually frequented by persons under eighteen years of age, the Crown should also be required to prove the *mens rea* of that component (ie. the requisite awareness of the number of plants, proximity of the school, or the particular population frequenting the public place) beyond a reasonable doubt. The same requirement of proof should apply to existing aggravating factors of sentence defined by the CDSA and *Criminal Code*, above.

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7 T T. Gabor and N. Crutcher, Mandatory Minimum Penalties: Their Effects on Crime, Sentencing Disparities, and Justice System Expenditures (Ottawa: Justice Canada, 2002) at 31.

C. JUDICIAL DISCRETION

Canada's judges have a critical role in the operation of the criminal justice system. The MMS proposed in Bill C-15 would remove discretion from sentencing judges to effectively determine which sentence can best balance all fundamental objectives of sentencing. Prohibiting judges from exercising discretion to determine an appropriate sentence for the offender before them is contrary to the spirit and letter of a large body of jurisprudence that recognizes the unique position of sentencing judges in assessing and determining the most appropriate sentence in the individual case.

There are good reasons for conferring discretion on the judge charged with imposing a fit sentence. The judge has heard the particular circumstances of the offence and the offender, and is best able to craft a sentence that will balance all the goals of sentencing. The judge is also best equipped to assess what will address the needs and circumstances of the community where the crime occurred. If evidence demonstrates that an offender should be subject to a lengthy prison sentence, the Crown will have brought that fact to the judge's attention. In our experience, repeat offenders and serious drug traffickers already receive significantly elevated sentences, even above the proposed MMS. Bill C-15 would remove the discretion that the sentencing process requires to be fair, to deter criminals, and to rehabilitate offenders if there is a real prospect of doing so.

If, where the sentence imposed at trial is demonstrably unfit or an error of law has occurred, an appellate judge can adjust the sentence accordingly, taking into account the principles of sentencing. Bill C-15 would not only limit a judge in devising an appropriate sentence, it would limit the scope of appellate review where a clearly unfit sentence has been imposed. In our view, the formulaic approach in Bill C-15 would lead to real injustice in certain fact situations, and judges would be unable to fulfill their role as judges to address that injustice.

D. SENTENCING PRINCIPLES

The *Criminal Code* sets out principles of sentencing that require a judge, at the time of sentencing, to weigh all competing considerations. That approach accords with a measured sentencing regime and, in our view, with common sense. Bill C-15's emphasis on deterrence over all other sentencing principles is, in our view, misplaced. A recent Canadian Safety Council study found that,

> There are few if any who deny a general deterrent effect of the criminal law, but recent studies confirm what has long been believed by most criminologists. There is little demonstrable correlation between the severity of sentences imposed and the volume of offences recorded... the greatest impact on patterns of offending is publicizing apprehension rates, or increasing the prospect of being caught.[8]

Other principles of sentencing must also be considered in determining an appropriate sentence. For example, *Criminal Code* section 718.2(e) requires that the particular situation of aboriginal offenders be considered at sentencing. If a less restrictive sanction would adequately protect society, or where the special circumstances of aboriginal offenders should be recognized, increased sentences and MMS would conflict with that principle. The Supreme Court of Canada has also recognized that incarceration should generally be used as a penal sanction of last resort, and that it may well be less appropriate or useful in the case of aboriginal offenders.[9] Penitentiary terms are generally served far from communities and families, going against efforts to promote eventual reintegration or rehabilitation of offenders, which are other important sentencing principles. Under Bill C-15, local judges would have no option but to sentence an offender from Nunavut, for example, to an MMS in Ontario, where offenders from the territory are routinely sent.

The *Criminal Code* contains a statutory acknowledgement of the principal of restraint, stating that the purpose of sentencing is to separate offenders from society only *where necessary.* Section 718.1 of the *Criminal Code* states that proportionality is the fundamental principle of sentencing, and that "a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender". Proportionality reflects the delicate balance that must be achieved in fashioning a just sentence.

In the area of drug offences, the public is often best protected through harm reduction strategies that encourage rehabilitation. In this regard, participation in a Drug Treatment Court should not be restricted as is proposed in section 5(2) of Bill C-15. In our view, it should be available to all offenders for whom rehabilitative considerations are appropriate.

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8 Professors David Pacciaco and Julian Roberts, "Sentencing in Cases of Impaired Driving Causing Bodily Harm or Impaired Driving Cause Death" (Ottawa: Canada Safety Council, 2005) at 2.

9 *R. v. Gladue*, [1999] 1 SCR 207.

E. CONCLUSION ON CONTROLLED DRUGS AND SUBSTANCES ACT

As lawyers in criminal courts across the country every day, we know that major drug offences are treated very seriously by the courts and the principles of general deterrence and denunciation hold great weight in sentencing hearings for those offences. Judges have effective guidance from the CDSA and section 718 of the *Criminal Code* to determine a fit sentence for the individual offender given the circumstances of the offence. Crowns highlight relevant aggravating factors to judges. Judges can give those factors appropriate weight in determining if and when incarceration ought to be imposed, and the length and venue of such a sentence.

The CBA Section is opposed to the passage of Bill C-15. It would limit the flexibility required to resolve cases justly. Bill C-15 would certainly reduce the number of guilty pleas, lead to more trials and more delays, and require additional resources to prosecute and incarcerate more offenders.

The MMS proposed by the Bill would focus on denunciation and deterrence to the exclusion of other legitimate sentencing principles, and often lead to injustice. Certainly, some offenders are good candidates for rehabilitation. MMS will result in offenders who could have been rehabilitated remaining incarcerated long after their detention acts as either a deterrent, is required for public safety or promotes rehabilitative goals. This would be unfair to the offender, at great cost to society. We believe that Bill C-15 would have a detrimental effect on an already strained justice system, and we urge that it not be passed into law.

VI. CORRECTIONS AND CONDITIONAL RELEASE ACT AMENDMENTS

A. INTRODUCTION

The proposed changes to the *Corrections and Conditional Release Act* and *Criminal Code* amendments (previously called Bill C-43 and C-39) have been held out as the beginning of a new policy direction for Corrections Services Canada (CSC). It flows from the work of the CSC's Independent Review Panel (Panel), which released its final report with recommendations for the federal government in December 2007. The Panel had been asked to review the CSC's operational priorities, strategies and business plans. The Panel's report, entitled *A Roadmap to Strengthening Public Safety*, (*Roadmap*)[1] contained 109 recommendations, focused on five key areas:

- increasing offender accountability;
- eliminating drugs from prisons;
- developing employability/employment skills;
- renewing physical infrastructure; and,
- eliminating statutory release and moving to earned parole.

The *Roadmap* has been embraced by the Government and CSC as the script for a "transformation" agenda for Canadian federal corrections. The Government officially responded to the *Roadmap* in Budget 2008, investing $478.8 million over five years "to initiate the implementation of a new vision and set the foundation to strengthen the federal correctional system". Meanwhile, CSC has also been pressing forward with an implementation plan for key recommendations from the *Roadmap* not requiring legislative change.

In the final days of the Parliamentary session in June 2009, the Minister of Public Safety introduced proposed legislative amendments to the *CCRA* as then Bill C-43. The Bill addressed the primary recommendation of the *Roadmap*, which is the introduction of legislation reflecting a new approach to corrections, with greater focus on public safety and offender accountability

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1 Correctional Services of Canada Review Panel, *A Roadmap to Strengthening Public Safety* (Ottawa: Public Works, 2007) (*Roadmap*).

as core concepts.[2] The direct link between the *Roadmap* and the proposed amendments is clear from the Minister's statements about the Bill:

> It sets the foundation to strengthen the federal correctional system as we are proposing with the tabling of this bill.[3]

With some further changes, Bill C-43 is now part of the Omnibus package, Bill C-10.

The CBA Section and its Committee on Imprisonment and Release believe that the *Roadmap's* recommendations and CSC's transformation agenda should not be so readily embraced. In contrast to the extensive public consultation process that shaped the 1992 *CCRA* itself, neither the *Roadmap* nor CSC's transformation agenda have been subjected to the kind of public scrutiny that such far-reaching changes to the Canadian federal correctional system demand. Missing from the *Roadmap* is any:

- review of correctional and legal history;
- consideration of relevant reports of various Royal Commissions, task forces and academic research; and
- analysis of human rights standards and jurisprudence applicable to corrections policy.

The only independent critique of the *Roadmap*[4] acknowledged that the *CCRA* reflected a contemporary model of corrections with values and principles embodied in the *Charter of Rights and Freedoms* and concluded, "in sharp contrast, the *Roadmap* is a flawed moral and legal compass. It points in the wrong direction without reference to the fundamental values and principles of human rights. The Panel's analysis reveals such fundamental misunderstandings and misinterpretation of the Canadian correctional context that both its observations and recommendations are indelibly flawed."[5] We agree with this analysis. The proposed amendments to the *CCRA* as the legislative child of the *Roadmap,* rests on shaky ground.

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2 Backgrounder Bill C-43, June 16, 2009.

3 Backgrounder Bill C-43, June 16, 2009.

4 Authored by the foremost Canadian correctional law and policy experts, see *A Flawed Compass: A Human Rights Analysis of the Roadmap to Strengthening Public Safety Preface* (Vancouver: M. Jackson, 2009) by Professor Michael Jackson and Graham Stewart.

5 *Ibid,* at 4.

In this submission, we analyze the Bill based on a stronger historical and legal foundation, one anchored in an unwavering commitment to human rights in prison. We adopt this perspective not only because we believe it to be the right approach, but also because it is the approach that will best advance the goal of improved public safety.

B. ANALYSIS

While Bill C-10 contains a number of technical amendments to the *CCRA*, we focus our attention on amendments that raise issues of broader legal principle and human rights.[6]

Sections 3 and 4

The Bill would amend sections 3 and 4 in significant ways. Section 3 currently provides:

> Purpose of correctional system
>
> 3. The purpose of the federal correctional system is to contribute to the maintenance of a just, peaceful and safe society by:
> (*a*) carrying out sentences imposed by courts through the safe and humane custody and supervision of offenders; and
> (*b*) assisting the rehabilitation of offenders and their reintegration into the community as law-abiding citizens through the provision of programs in penitentiaries and in the community.
>
> Section 4 provides, in relevant part:
> Principles that guide the Service
> 4. The principles that shall guide the Service in achieving the purpose referred to in section 3 are:
> (a) that the protection of society be the paramount consideration in the corrections process;

The Bill would move 4(a) into a new section 3.1.

Whether this change in wording would change anything of substance is debatable as the amendment can best be explained by the government's position that public safety is the basis

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6 See also the more detailed and documented analysis contained in *A Flawed Compass*, *ibid*.

of its criminal justice policies. What is important, however, is that the current wording of section 3 reflects a careful balancing of several purposes of corrections, including public safety, consistent with the overall purposes of the criminal law as articulated in the *Criminal Code*. This balanced perspective would be missing from the proposed amendment.

The *CCRA* now reflects the overarching purpose of the criminal justice system – "the maintenance of a just, peaceful and safe society" – by specifying that the means through which correctional authorities contribute to that broader goal is through safe and humane treatment of prisoners and aiding in their reintegration into society. In our view, isolating public safety as a separate overriding principle would not advance the purposes of corrections nor would it improve public safety. The risk of a one-dimensional emphasis on the goal of safety alone is that the other critical values of a "just, peaceful and safe society" could too easily be trumped by anything seen as required for "public safety", particularly since there is an interpretative vacuum as to what the term will actually mean for correctional decision-making. The Bill should not include this amendment, as it distorts the necessary balancing of societal interests that is now properly contained in section 3.1.

Principle of Least Restrictive Measures

The Bill would change the wording of the rest of the current section 4 in a number of ways. The two most significant changes are to the principles regarding the least restrictive measures and retained rights. The proposed amendments in section 4 of the Bill reflect insufficient attention to the relevant constitutional framework within which these important principles were drafted, and to judgments of the Supreme Court of Canada in response to that framework. While the Bill does not suffer from the same constitutional infirmity of the *Roadmap*'s original recommendation, it remains problematic in its present form.

Section 4(d) now reads that:

> that the Service use the least restrictive measures consistent with the protection of the public, staff members and offenders;

The *Roadmap* suggested amending 4(d) to read:

> that, in managing the offender populations in general and the individual offenders, in particular, the Service use appropriate measures that will ensure the protection of the public, staff members and offenders, and that are consistent with the management of the offender's correctional plan;

Bill C-10 proposes the *Act* would read:

> the Service uses measures that are consistent with the protection of society, staff members and offenders and that are limited to only what is necessary and proportionate to the purposes of this Act.

In *A Flawed Compass*, Professor Michael Jackson and Graham Stewart offer a detailed account of the legislative history of the least restrictive measures standard in the *CCRA*. They consider the derivation of that principle from the Supreme Court of Canada's pre-*Charter* decision in *Solosky* and the post-*Charter* line of cases on what constitute reasonable limits on *Charter* rights, beginning with *Oakes*.

The proposed change in the *Roadmap* away from "least restrictive measures" to instead use "appropriate measures" would substitute a policy and operationally derived standard left entirely to the discretion of correctional authorities for a constitutionally derived standard based on restraint in the exercise of state power. The change in Bill C-10 is not subject to the same criticism, as its limiting language of "necessary and proportionate to the purposes of this Act", incorporates part of the *Oakes* proportionality analysis. It also tracks language found in the 2006 European Prison Rules which provide:

> Restrictions placed on persons deprived of their liberty shall be the minimum necessary and proportionate to the legitimate objective for which they are imposed.[7]

However, the language of Bill C-10 is not a complete expression of the Canadian constitutional standard. The proportionality inquiry mandated by the Supreme Court has three elements:

1. the measures must be fair and not arbitrary, carefully designed to achieve the objective and rationally connected to it;
2. the means should impair the right in question as little as possible; and
3. there must be a proportionality between the effects of the limiting measure and the objective - the more severe the negative effects of a measure, the more important the objective must be.[8]

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7 Council of Europe. (2006) Recommendation (2006)2 of the Committee of Ministers to member states on the European Prison Rules. Adopted by the Committee of Ministers on 11 January 2006 at the 952nd meeting of the Ministers' Deputies. Dirk Van Zyl Smit,The 2006 European Prison Rules, CONGRÉS PENITENCIARI INTERNACIONAL: La funció social de la política penitenciària Barcelona 2006, online at http://www20.gencat.cat/docs/Justicia/Documents/ARXIUS/doc_16992330_1.pdf

8 *R v Oakes,* [1986] 1 SCR. 103.

Bill C-10 incorporates the first and third elements. The second is missing. This second element is captured in the current wording of the *CCRA*. If a clarification to this section is required to reflect evolving human rights standards, we suggest that the Bill be amended to read:

> the Service uses the least restrictive measures that are consistent with the protection of society, staff members and offenders and are limited only to what is necessary and proportionate to the purposes of this Act.

There is a compelling case for maintaining the least restrictive measures standard as part of the legislative framework for corrections. Correctional agencies represent the most coercive arm of the state. They administer the most severe sanction known to Canadian society – the deprivation of liberty. The unfortunate reality is that this exercise is situated in the context of a documented history of abuse of human rights in prisons, and the judicially recognized resistance of CSC to incorporate a culture of respect for rights.[9] We believe that correctional agencies must be subject to a standard of accountability that requires them to limit the infliction of pain and suffering - inherent in the very nature of imprisonment – to the greatest extent possible.

Maintaining a standard of accountability that incorporates the principle of least restrictive measures is reinforced by the recent report of Commissioner Thomas Braidwood on the use of tasers by law enforcement officers. He stated:

> In developing my recommendations, I was guided by several principles—that the police are subject to civilian authority, that the police must be given appropriate tools to do their job, that the police should use the least force necessary to manage the risk, and that the use of force must be proportionate to the seriousness of the situation.[10]

Commissioner Braidwood recommended that instead of the loosely formulated policies in place when Polish immigrant Robert Dziekanski died from being tasered by law enforcement personnel in October 2007, new policies should be adopted to limit the use of tasers to cases where the subject is causing bodily harm or the officer is satisfied, on reasonable grounds, that the subject's behaviour will imminently cause bodily harm. The Commissioner added that, "Even then, an officer should not deploy the weapon unless satisfied, on reasonable grounds,

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9 Louise Arbour, Commission of Inquiry into Certain Events at the Prison for Women in Kingston (Ottawa: Public Works and Government Services Canada, 1996) at xi [*Arbour Report*].

10 Restoring Public Confidence: Restricting the Use of Conducted Energy Weapons. Braidwood Commission on Conducted Energy Weapons, June 18, 2009 at 16.

no lesser force option would be effective, and de-escalation and or/ crisis intervention techniques would not be effective".[11]

As part of his application of the proportionality test, Commissioner Braidwood's recommendation incorporates the least restrictive measures principle to ensure that a legitimate law enforcement weapon would not be abused. He is clear that it would only be deployed in accordance with what he referred to as "Canadian values".

We believe that existing provisions of the *CCRA* that require CSC to use the least restrictive measures consistent with the protection of society, staff members and offenders also reflect Canadian values. Those values are currently entrenched in the *Canadian Charter of Rights and Freedoms*. There is no legitimate reason for removing this principle in a revised *CCRA* and every reason to reinforce it.

Commissioner Braidwood's use of the term "least restrictive measure" also demonstrates that the term has meaning beyond the area of corrections. In addition to the CCRA and the *Prisons and Reformatories Act*, the term also appear in the former *Youth Criminal Justice Act*, the mental disorder provisions of the *Criminal Code*, provincial mental health/disability acts, child and family services acts and adult guardianship acts. The term "least restrictive" appears in almost 70 Canadian acts or regulations. The absence of any litigation on the meaning or ambiguity of the concept demonstrates that it now has a relatively consistent, precise and useful meaning. To delete the term from the CCRA would raise questions as to the reason and implications of the deletion. Introducing any uncertainty to this fundamental concept of restraint in the use of force by the state could result in a whole new round of unnecessary litigation.

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[11] See *ibid.*:

2. I recommend that officers of provincially regulated law enforcement agencies be prohibited from deploying a conducted energy weapon unless the subject's behaviour meets one of the following thresholds:
   - the subject is causing bodily harm; or
   - the officer is satisfied, on reasonable grounds, that the subject's behaviour will imminently cause bodily harm.
3. I recommend that, even if the threshold set out in Recommendation 2 is met, an officer be prohibited from deploying a conducted energy weapon unless the officer is satisfied, on reasonable grounds, that:
   - no lesser force option has been, or will be, effective in eliminating the risk of bodily harm; and
   - de-escalation and/or crisis intervention techniques have not been or will not be effective in eliminating the risk of bodily harm at19.

Before passage of this Bill, CSC should be asked to state what legitimate correctional measures it wishes to introduce, that are necessary and proportionate to the purposes of the *Act*, that would be precluded under the current legislation's least restrictive measures principle. In our view, there are none. To date, no case has been made by either the CSC or the government for changing this critical principle, which has been an integral part of correctional law for the last quarter century.

In *A Flawed Compass*, the authors conclude that what lies behind the proposed amendment is a profoundly disturbing development that demonstrates the importance of preserving the least restrictive language in the *CCRA*. In attempting to make a case for repealing the least restrictive standard, the Panel wrote that it "believes that this principle has been emphasized too much by the staff and management of CSC, and even by the courts in everyday decision-making about offenders".[12] In *A Flawed Compass*, the authors note that the Panel evidenced "no appreciation that the principle has been appropriately and necessarily emphasized "even by the courts", simply because it is consistent with a *Charter* derived constitutional test. That test permits reasonable intrusions on *Charter* rights where the only justifiable limitations are those necessary to achieve a legitimate correctional goal, and are the least restrictive possible".[13]

The Panel's analysis and several key recommendations lack recognition of other constitutional and human rights' principles as well. The federal government and the CSC's hasty endorsement of the *Roadmap* only reinforces problematic and deeply embedded attitudes to the effect that laws and judicial legal constraints on correctional discretion only "handcuff" correctional authorities in effectively managing Canada's prisons. Justice Louise Arbour in her inquiry into practices at the Prison for Women, found that notwithstanding the passage of the *CCRA* "one sees little evidence of the will to yield pragmatic concerns to the dictates of a legal order. The Rule of Law is absent, although rules are everywhere".[14] Even without legislative change, the Panel's statement that "it believes that [the least restrictive measures] principle has been emphasized too much by the staff and management of CSC" has legitimized within CSC an almost visceral reaction to, and organizational rejection of the least restrictive measures language. It is therefore critical that this language be preserved in the *CCRA*. Indeed, given the waning commitment for respect for human rights within prisons, the principle should actually

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12 *Roadmap*, *supra* note 1 at 16.

13 *A Flawed Compass*, *supra* note 4 at 47.

be enhanced. It is not difficult to combine this principle with the language proposed in such a way as to strengthen, rather than undermine the Rule of Law. The CBA Section recommends that section 4 of Bill C-10 be amended to read, "the Service uses the least restrictive measures that are consistent with the protection of society, staff members and offenders and are limited to only what is necessary and proportionate to purposes of the Act."

The Bill also proposes amendments to other sections currently using the language of least restrictive measures. The Bill would amend section 28 dealing with the placement and transfer of offenders by changing the first part of the section that currently reads:

> Where a person is, or is to be, confined in a penitentiary, the Service shall take all reasonable steps to ensure that the penitentiary in which the person is confined is one that provides the least restrictive environment for that person, taking into account...

To instead read:

> If a person is or is to be confined in a penitentiary, the Service shall take all reasonable steps to ensure that the penitentiary in which they are confined is one that provides them with an environment that contains only the necessary restrictions, taking into account...

Removing the "least restrictive" language would purge the *CCRA* of this vital check on correctional authority, without a compelling correctional rationale for the change. The CBA Section recommends that if any amendment is deemed necessary, section 28 should be changed to read:

> If a person is or is to be confined in a penitentiary, the Service shall take all reasonable steps to ensure that the penitentiary in which they are confined is one that provides them with the least restrictive environment that contains only the necessary restrictions, taking into account...

The Principle of Retained Rights

Section 4(e) of the *CCRA* currently articulates another fundamental cornerstone of Canadian correctional law, the principle of retained rights. The section provides:

> ...offenders retain the rights and privileges of all members of society, except those rights and privileges that are necessarily removed or restricted as a consequence of the sentence.

As with the least restrictive measures principle, the *Roadmap* proposes instead demoting this principle to read:

> ...offenders retain the basic rights and privileges of all members of society, except those rights and privileges that are necessarily removed or restricted as a consequence of the sentence, or that are required in order to encourage the offender to begin to and continue to engage in his or her correctional plan.

We believe that this re-wording would:

(1) be inconsistent with the evolving common law and Charter jurisprudence on the human rights of prisoners, specifically the judgments of the Supreme Court of Canada in *Solosky v. The Queen* [1980] and *Sauvé v. Canada* [2003];

(2) disregard the extensive legislative history and context of the CCRA (specifically the work of the Correctional Law Review[15]);

(3) be out of step with international human rights standards;

(4) compromise respect for the rule of law and human rights in Canadian prisons and

(5) undermine, rather than promote, prisoners' safe reintegration into society. [16]

Some indication of the Panel's correctional philosophy can be gained from the same "basic rights" correctional philosophy advanced by members of the former Canadian Alliance Party in its dissenting report to the Parliamentary Sub-committee's Five Year review of the *CCRA*:

> Putting the protection of a law-abiding society first means that it is necessary to accept to some degree that the rights and privileges of those who obey the laws of this country are fundamentally different from the rights of those who do not. The system does not do this.
>
> Section 4 of the Corrections and Conditional Release Act (CCRA) states "that offenders retain the rights and privileges of all members of society, except those rights and privileges that are necessarily removed or restricted as a consequence of the sentence." The Canadian Alliance believes that any person who has been convicted in a Canadian court should temporarily lose some of their rights and privileges as a Canadian. Primary exceptions to this are basic Charter rights such as right to an attorney and the right to humane and healthful treatment. We define this as the right to be incarcerated in accommodations with reasonable environmental control, to be provided with basic personal care supplies, to be fed according to the Canadian nutrition guide, and to be provided with access to basic medical treatment. Beyond this, prisoners should have the ability to earn other rights and privileges such as more freedom within the prison, transfers to more desirable facilities,

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15 See, 50 Years of Human Rights Developments in Federal Corrections Canada, A Framework for the Correctional Law Review: Working Paper No. 2, June 1986. www.csc-scc.gc.ca/text/pblct/rht-drt/15-eng.shtml

16 *A Flawed Compass*, *supra* note 4 at 43.

> training programs, sports programs, visitor privileges, payment for work performance, canteen privileges, temporary absences and parole. Each of these rights and privileges must be earned by appropriate behaviour which in turn means that they can also be taken away for inappropriate behaviour.[17]

According to the Panel, apart from a basic level of rights, prisoners do not have the right to have rights. The assumption seems to be that human rights properly belong to those who are law-abiding members of society. For those who have crossed the threshold to become law-breakers and have been sentenced to prison, the right to all but the most "basic" rights is forfeited. Any further rights must then be earned back to show that offenders have taken responsibility for their criminal actions and are actively engaging in rehabilitating themselves.

With specific reference to the concept of distinguishing "basic rights" and prisoners "earning" anything beyond a rudimentary level of shelter, nutrition and health care, *A Flawed Compass* stated:

> The Panel, in proposing that prisoners be allowed "basic rights" and that any additional rights must be earned, views rights as being contingent, in that they can be taken away for 'bad' behaviour and restored for 'good 'behaviour. This view, however, misconceives at a fundamental level the very nature of human rights, as rights that are inherent in the human person, based upon a sense of common humanity and dignity. The inherent nature of the rights contained with the Charter has been recognized and affirmed by the Supreme Court in *Sauvé* in their statement that "Charter rights are not a matter of privilege or merit, but a function of membership in the Canadian polity that cannot lightly be cast aside".**[18]**
>
> When human rights are seen as contingent, when the value of punishment is prioritized over our constitutional commitment to the principle of the inherent dignity of every individual, we risk undermining the very value of that foundational principle. Our commitment to human dignity, as it is expressed through *Charter* rights, is a commitment to the idea embodied in the *Universal Declaration of Human Rights* that every individual is worthy of respect simply because they are human. When we begin deeming people 'worthy' and 'not worthy' of such respect, the value of human dignity is diminished. As such, to act upon the Panel's recommendations would not only result in undermining the human rights of prisoners, it would result in the devaluation of foundational constitutional principles.

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17 Canadian Alliance Official Opposition Minority Report on the Corrections and Conditional Release Act ,Jim Gouk M.P. included in *A Work in Progress: The Corrections and Conditional Release Act* [Ottawa: Public Works and Government Services, 2000] online at http://cmte.parl.gc.ca/Content/HOC/committee/362/just/reports/rp2537364/just01/362_JUST_Rpt03-e.pdf

18 See, *Sauvé v. Canada (Chief Electoral Officer),* [2002] 3 SCR 519, 2002 SCC 68 at para. 14.

We realize that the *Roadmap*'s recommendation to erode the retained rights principle is not included in the Bill, but it would propose changing the wording of the principle to read:

> ...offenders retain the rights of all members of society except those that are, as a consequence of the sentence, lawfully and necessarily removed or restricted.

This revised language would delete any reference to privileges in the current text of the *CCRA* but tracks the language of the 2006 European Prison Rules.[19] As such the amendment reflects contemporary human rights standards. Again though, the question is why, given that the Bill does not adopt the Panel's contingent "basic rights" ideology, it is necessary to change the existing language of the *CCRA.* That existing language that not only reflects a broader version of the retained rights and privileges principle, but it also has the significant advantage of a Canadian Supreme Court of Canada pedigree.

A partial answer to explain dropping the reference to privileges is to advance the Panel's vision of "transforming" corrections by distinguishing between rights and privileges in order, in the language of the Panel's original recommendation, "to encourage the offender to begin to and continue to engage in his or her correctional plan". This, in fact, is reflected in a further proposed amendment, section 15(2), which reads:

> The Commissioner may provide offenders with incentives to encourage them to make progress towards meeting the objectives of their correctional plans.

Dropping any reference in the *CCRA* to the least restrictive measures and retained "privileges" and instead authorizing "incentives" is worrisome. It runs a real risk of undermining Canada's commitment to maintaining human rights and humane prison conditions at a time when reinvigoration, rather than erosion, is most needed. The CBA Section recommends that the current wording of section 4(e) CCRA be retained.

A Confusion of Responsibilities

Bill C-10 proposes another amendment to basic principles of corrections and conditional release that may seem minor, but would actually reflect a significant and dangerous distortion of responsibilities within the criminal justice system. Under proposed section 4(a), one of the

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19 Persons deprived of their liberty retain all rights that are not lawfully taken away by the decision sentencing them or remanding them in custody. 2006 European Prison Rules, Rule 2.

principles that guide CSC in achieving the purpose referred to in section 3 would read (new text bolded);

> the sentence is carried out having regard to all relevant available information, including the stated reasons and recommendations of the sentencing judge, **the nature and gravity of the offence, the degree of responsibility of the offender**, information from the trial or sentencing process, the release policies of and comments from the National Parole Board and information obtained from victims, offenders and other components of the criminal justice system.[20]

The proposed addition to the section has its origin in the 1996 *Criminal Code* amendments where the fundamental principle of sentencing is set out in section 718.1[21] as one of many factors for judicial consideration in sentencing. That section is clearly directed to the judiciary in determining a just and appropriate sentence. The purposes of corrections as expressed in the *CCRA* however are not the same as the purposes of sentencing. The purpose of the *CCRA* is "carrying out sentences imposed by courts through the safe and humane custody and supervision of offenders and (b) assisting the rehabilitation of offenders and their reintegration into the community as law-abiding citizens through the provision of programs in penitentiaries and in the community".

The *Roadmap* itself recognizes that offenders are not sent to prison for punishment, but as punishment. Giving those responsible for administering the sentence power to take into account "the nature and gravity of the offense and the degree of responsibility the offender" risks inviting them to second-guess judges and substitute for a judicial calibration formed on the basis of legal submissions, a revised correctional assessment. Unlike the original sentence, the correctional assessment cannot be challenged on appeal and may be based on information never tested in a court room. Even now, correctional assessments sometimes privilege police reports over the judge's reasons for sentence, even when those reasons make findings of fact that clearly reject or do not corroborate statements and observations set out in the police reports.

Certainly, the "gravity" and "degree of responsibility" are important considerations and courts apply them in deciding the quantum of the sentence. However, once the quantum is decided by the court, allowing the decision to be revisited repeatedly by correctional officials throughout

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[20] There is a parallel amendment to the section that sets out the principles guiding the Parole Board.

[21] 718.1 *Criminal Code*: A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

the sentence is unjust. The courts sentence within the context of correctional law. A judge knows that parole eligibility for most occurs at one-third of a sentence, and that the least restrictive measures principle applies in the context of risk assessment regarding gradual release. Bringing consideration of seriousness and degree of responsibility into correctional decision making – beyond consideration of risk – could distort the original sentence by making it much more onerous than the judge intended.

The court's sentence is the framework within which correctional authorities must work to achieve the purpose of corrections. Selectively introducing the language of sentencing, the exclusive prerogative of the judiciary, into principles used by correctional authorities to administer the sentence is, in fact, a wholly objectionable and unacceptable confusion of the distinct responsibilities of the judiciary and those of corrections. Further, selecting only one of the many sentencing principles for use in the correctional environment particularly invites abuse through decisions that could be self-justifying on the basis of purely punitive, rather than correctional, intent. The CBA Section recommends that that the current wording of section 4 (a) CCRA be retained to prevent confusion of the role of the judiciary with the role of corrections personnel.

Impact on the Parole Board

Part II of Bill C-10 would parallel the proposed changes to Part I. It would create a new section 100.1 replicating the language of the existing section 101(a), insert in the new section 101(a) "the nature and gravity of the offence, the degree of responsibility of the offender" as considerations that guide the Board, and in the amended 101(c) replace the least restrictive determination language for "necessary and proportionate to the purpose of conditional release". Our earlier critique and recommendations apply to these similar proposed amendments.

However, authorizing the Board to consider "the nature and gravity of the offence, the degree of responsibility of the offender" in making its decisions goes beyond simply confusing the responsibilities of the judiciary and the Board. Over recent years, appointments to the Board have shifted increasingly toward individuals from the law enforcement and correctional communities. Representatives from these communities make important contributions as Board members and bring perspectives that deserve a place in parole decision-making. The problem arises if these appointments are disproportionate to other important representatives, as it sways the focus of the Board in ways that can undermine the purposes of conditional release.

Already, many experienced Board members from other backgrounds, with a wealth of experience and judgment, have not been re-appointed. In several regions, decisions are being made by relatively inexperienced members without the moderating effect of diverse backgrounds, historically the mark of Board membership.[22] This politicization, or indeed "policization," of the Parole Board, while often a feature of appointments in the U.S, is unprecedented in Canadian experience in the years since the Board was established in 1958.

Prisons must be places that will return prisoners to the community reformed and prepared to safely reintegrate into society. The proposed changes would instead move in the opposite direction. The CBA Section recommends that that the proposed introduction of section 101.1 be rejected, the current wording of section 101 (a) CCRA be retained and that the section 101. (d) be amended to read "that parole boards make the least restrictive determination that is consistent with the protection of society, staff members and offenders and limited only to what is necessary and proportionate to the purpose of conditional release.

Conditions of confinement and "subclassifications"

Bill C-10 contains several amendments that on their face and without historical context would be unlikely to attract much attention. The intent and implication of the amendments are not fully identified in the information package accompanying the Bill, but we believe that they raise significant human rights issues. For example:

> 15.1 (1) The institutional head shall cause a correctional plan to be developed in consultation with the offender as soon as practicable after their reception in a penitentiary. The plan is to contain, among others, the following:
>
> (a) the level of intervention in respect of the offender's needs; and
>
> (b) objectives for
>
> (i) the offender's behaviour, including
>
> (A) to conduct themselves in a manner that demonstrates respect for other persons and property,
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> (B) to obey penitentiary rules and respect the conditions governing their conditional release, if any,
>
> (ii) their participation in programs, and

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22 Of 36 new members the Public Safety Minister named to the Parole Board between 2006 -2008, 8 were retired police officers and 15 former federal and provincial corrections staff. Reappointed were a further 4 retired police officers and 4 former corrections administrators. By comparison, Public Safety Minister, Anne McLellan, between 2004 and 2006, named 2 retired police officers and 1 retired corrections employee out of the 27 appointments to the Board. See, *Globe and Mail*, June 29, 2008.

> (iii) the meeting of their court-ordered obligations, including restitution to victims or child support.
>
> (2) The plan is to be maintained in consultation with the offender in order to ensure that they receive the most effective programs at the appropriate time in their sentence to rehabilitate them and prepare them for reintegration into the community, on release, as a law-abiding citizen.
>
> (3) In making decisions on program selection for — or the transfer or conditional release of — an inmate, the Service shall take into account the offender's progress towards meeting the objectives of their correctional plan.
>
> 15.2 The Commissioner may provide offenders with incentives to encourage them to make progress towards meeting the objectives of their correctional plans
>
> Section 30 of the Act is amended by adding the following after subsection (2):
>
> (3) Within the maximum and medium security classifications, the Commissioner may assign an inmate to a subclassification in accordance with the regulations made under paragraph 96.

In the *Roadmap*, under the rubric of "offender accountability", the Panel recommended making compliance with the offender's correctional plan a defining feature for determining conditions of confinement and conditional release:

> ... life inside a penitentiary should promote a positive work ethic. Today, an offender who is actively engaged in his/her correctional plan is often treated no differently than an offender who is still engaged in criminal behaviour. The Panel feels that this is detrimental to promoting offender accountability. In this context, the Panel supports an approach that links conditions of confinement to an offender's responsibilities and accountabilities. These conditions must be identified and managed under the rights and privileges stated in the Act. The following areas could be targeted: degree of association with other offenders; movement (escorted, unescorted, and supervised); private family visits (access to and degree of frequency); leisure activity; personal clothing and property; searching; pay levels and access to money; access to penitentiary and CORCAN employment; access to programs (school or cell-based).[23]
>
> Recommendations
>
> 3. The Panel recommends that, at each security level (minimum, medium and maximum), a basic level of rights should be defined.
>
> 4. The Panel recommends that differing conditions of confinement should be dependent on an offender's engagement in his or her correctional plan and the offender's security level.[24]

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23 *Roadmap*, *supra* note 1 at 59.

24 *Ibid.*, at 60.

The Panel clearly placed great weight on the correctional plan. An offender's willingness to engage with the correctional plan would be required for certain rights and privileges and conditions of confinement to follow. The Panel proposed that it be entrenched as an "accountability contract" on which parole release would be contingent. Bill C-10 would legislate the same approach. In our view, the correctional plan is not such a "silver bullet" that it justifies this strong and direct link to rights, privileges, conditions of confinement and release to the community.[25]

The correctional plan now typically identifies which of the CSC's programs are necessary to address the prisoner's needs, risk factors, and reintegration potential, and any educational upgrading or job training that may be appropriate and available. In theory, and according to the proposed section 15.1, an offender's correctional plan should be handmade and carefully tailored to each offender. Unfortunately, the reality is that correctional plans are more like an assembly line, mass produced product made from standardised parts. Any fifty correctional plans will broadly fit into just a few distinct types, and the same sets of programs are identified for many prisoners. For example, for prisoners serving long sentences, the policy acknowledges that the "focus of the initial activities or programs should be related to assisting the offender in adjusting to the institution and to the sentence." In other words the correctional plan is initially to help the prisoner do time.

The Panel proposed that CSC re-examine rights and privileges and develop regimes based on performance under a prisoner's correctional plan, differentiating access to "rights and privileges" both by security level and such performance. Less than a decade ago when this "regimes" concept was first advanced, CSC consulted with the National Associations Active in Criminal Justice (NAACJ) and the Canadian Bar Association, and then stepped back from this approach. In the *Roadmap*, it is proposed as a "new" idea, without appreciating its implications or the road previously travelled by CSC. The new authority that would be conferred on the Commissioner by the Bill, "to provide offenders with incentives to encourage them to make progress towards meeting the objectives of their correctional plans," coupled with the authority "to assign an inmate to a sub-classification", would introduce the "regimes" philosophy under more benign language of incentives and classifications.

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25 *Ibid.*, at 107.

Even with some reforms over recent decades (for eg., TV's, and private, family visits), life within maximum and medium penitentiaries is a faint echo of a productive and meaningful life. In their everyday monotony of counts, searches, and confinement within tiny spaces, prisons are characterized by deprivation. Prisoners often refer to it as "being on another planet." By their very nature and the restrictions of current (which in some cases means nineteenth century) architecture, the space - both conceptual and physical - for providing greater incentives to motivate offenders in prisons is narrowly circumscribed. What is possible is that by redefining rights, privileges and incentives, those who are noncompliant or even unmotivated would get less, or even nothing.

Private family visits, the most cherished opportunity for privacy and intimacy with family members, could be limited to those deemed compliant with their correctional plan, even if the prisoner met existing criteria for family visits. Participation in sports, one of the few pro-social opportunities for self-esteem and achievement - individual and collective – similarly could be redefined as an incentive for compliance with the correctional plan, rather than an essential outlet from the damaging effects of prison life. Already under policies of drug interdiction, the landscape of outside yards is changing in Canadian prisons. The once compendious yard is compartmentalized with more and more fences, and the hours within which prisoners have access to these outdoor spaces have narrowed. Canadian prisons are not "club feds" and the language of incentives in the Bill distorts what appears to actually be envisaged.

Bill C-10 would introduce sub-classifications of prisoners who, dependent on prison officials' determination of compliance with correctional planning or potentially shifting behavioural expectations would be accorded more or fewer rights and privileges. In our view, this would not lead to better motivated offenders, but to a harder, tougher cohort of individuals who are already quite used to privation. It is also clear from our years of experience that if offenders "participate" or attend programs only to avoid negative consequences or meet expectations of authorities, they are less likely to internalize the potential benefits.

This ultimately defeats the purpose of the correctional plan. Organizing a prison/prisoner management system around principles of human dignity and fair and just decision-making, rather than fear of reprisal and deprivation, is not only more consistent with human rights law. It would also offer a realistic prospect of improving, rather than damaging, the humanity of offenders and promote any ultimate successful reintegration.

Administrative Segregation

Our critique of Bill C-10 to this point has been directed at proposed changes to the legislation that will:

- undermine the protective umbrella of law to prevent abuse of authority;
- distort the respective responsibilities of the judiciary and the correctional system; and
- legitimate, under the colour of benign language, more repressive regimes.

Our critique of the Bill's provisions regarding administrative segregation is that they are limited to amendments of a purely technical nature but fail to use this opportunity for Parliamentary review of the *CCRA*. Such a review could implement a much needed process for independent adjudication of segregation decisions, which has been unequivocally recommended by a Committee of the House of Commons and the CBA, among others.[26]

The *CCRA* now provides for two forms of segregation. Disciplinary segregation can be imposed as a sanction after a prisoner has been found guilty of a serious disciplinary offence in a hearing before an independent chairperson. It is the most severe form of punishment that can be administered as a disciplinary sanction. However, it is limited to a maximum of 30 days, but can be increased to a maximum of 45 days for multiple convictions.[27]

The second form is administrative segregation. Its purpose is to keep a prisoner from associating with the general population. It can be used whenever the institutional head has reasonable grounds to believe that the continued presence of the prisoner in the general population jeopardizes the security of the penitentiary or the safety of any person, including the prisoner, or would interfere with a serious investigation. In all cases, the institutional head must be satisfied that there is no alternative but to segregate the prisoner and must ensure that the prisoner is returned to the general population as soon as possible.[28]

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26 See, CBA submission on the *Five year review of the Corrections and Conditional Release Act* (Ottawa: CBA, 2005).

27 *CCRA* section 44.

28 *CCRA* section 31. Bill C-10 would change the language somewhat principally to remove references to "the general population" and substituting "other inmates". This reflects that the general population of the contemporary prison is in many cases made up of different groups who for reasons of security or programs are separated from each other.

Unlike disciplinary segregation, there are no legislative limits to the duration of administrative segregation although it is subject to periodic review. In practice, the time in administrative segregation can extend to months, even years.[29] It is ironic that the severest conditions of imprisonment when authorized as punishment are restricted in time and protected from abuse by independent adjudication, but similar conditions of confinement, justified by the need to protect prisoners from harm, is subject to neither temporal limits nor the same level of protection against abuse.

The system of independent adjudication of disciplinary cases was introduced in 1980 following recommendations in the 1977 report of the Parliamentary Subcommittee on the Penitentiary System in Canada. Since then, a succession of inquiries, committees and experts have recommended independent adjudication be introduced to the process of indefinite administrative segregation. Independent adjudication of segregation decisions has been argued as necessary to ensure a fair and unbiased hearing, compliance with the statutory framework, protection of prisoners' rights and privileges while segregated, and the implementation of re-integration plans to ensure that correctional authorities administering the sentence use the least restrictive measures. The recommendation for independent adjudication has been advanced by Justice Arbour, CSC's Task Force on Segregation, the Yalden Working Group on Human Rights, the Canadian Human Rights Commission and the Correctional Investigator.

A House of Commons Committee conducted the five-year review of the *CCRA* and produced, "A Work in Progress", specifically addressing the issue of administrative segregation. The CBA appeared before the Committee and reviewed the history of this issue and CSC's recalcitrance in responding to previous recommendations that independent adjudication be implemented.[30] The Committee recommended that CSC should appoint independent chairs for administrative segregation similar to the regime for the disciplinary process.[31] The general consensus on this issue, including this House's own Committee would seem to guarantee CSC recognition that it merited space in the correctional legal landscape, but to date, there has been continuing and

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29 A detailed examination of the law and practice of administrative segregation can be found in Michael Jackson, *Justice behind the Walls: Human Rights in Canadian Prisons*, sector 4 online at http://justicebehindthewalls.net/book.asp?cid=112

30 For a detailed history of the issue see Michael Jackson, The Litmus Test of Legitimacy: Independent Adjudication and Administrative Segregation, (2006) 48 *Canadian Journal of Criminology and Criminal Justice* 157.

31 *A Work in Progress*, *infra* at 56.

steadfast resistance to these recommendations.[32] Bill C-10 misses an important opportunity to introduce a long delayed reform that has been supported by of every commission and committee that has reviewed the issue over the last 15 years.

Ashley Smith, a nineteen year old girl, strangled herself to death after over a year of continuous administrative segregation in federal prison. The report of the Correctional Investigator on her case underlines how significant the absence of this crucial element of independent adjudication is to a fair and effective correctional system. Principles of fundamental justice, fairness and human rights call for including independent adjudication of segregation decisions in Bill C-10. The CBA Section recommends that Bill C-10 include a provision to require independent adjudication of segregation decisions.

"Modernizing" the Disciplinary System

The changes that Bill C-10 would make to the prison disciplinary process were previously described in Bill C-43's *Press Release* as:

> The current disciplinary system and corresponding actions in penitentiaries will be modernized to ensure cooperation with staff and compliance with institutional rules and regulations. To that end, stronger inmate disciplinary and incentive measures, as well as a modern scheme for segregation, are proposed.

The *CCRA* will be amended by:

> addressing disrespectful, intimidating and assaultive behaviour by inmates towards any staff member or other person;
>
> providing that inmates convicted of throwing bodily substances or knowingly making fraudulent claims would face disciplinary sanction; and,
>
> providing that inmates convicted of serious disciplinary offences who are segregated from other inmates could also be subject to restrictions on visits.

Describing the amendments to the segregation process as a "modern scheme" overlooks the single most important element that is missing – independent adjudication. It ignores the collective voice of the many Parliamentarians, judges, human rights commissioners and even CSC's own task force members who have previously recommended its inclusion.

Bill C-10 reflects the recommendations set out in a brief to the *Roadmap* Panel from the Union of Canadian Correctional officers (UCCO). In *A Flawed Compass*, the authors demonstrate that

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32 For a detailed history of the issue see Michael Jackson, *supra* note 30.

the "research" UCCO relied on in its brief was unsound, and also that the Panel's recommendations on changes to the disciplinary process were misinformed and completely overlooked the substantial body of scholarly research.
Bill C-10 amendments would introduce minor changes to existing disciplinary offences, create some new disciplinary offences already covered by the current offences and intensify the rigours of disciplinary segregation. For example, the new offence of "throws a bodily substance towards another person" under the existing legislative framework constitutes both the disciplinary and criminal offences of assault. Committing an assault has been part of the disciplinary code since the opening of Kingston penitentiary in 1835.

Nothing is added to the purpose of maintaining a just, safe and humane prison by including this new offense. Singling out for special treatment the behaviour of throwing a bodily substance towards another person, because it is supposedly different from other threats or applications of force, is difficult to justify. This behaviour almost always occurs when a prisoner has already been subject to segregation and in most cases is the expression of extreme frustration over the perceived injustice of their confinement and the conditions of segregation or reflective of the damaging psychological effects of that confinement. Often the offender has a history of mental illness exacerbated by the segregation. Handling and throwing a bodily substance is degrading to both the prisoner and to the staff person. A prisoner brought to the extremes of resorting to this behaviour will often not need or be unable to understand further punishment and even more severe levels of deprivation. Including this offence will offer nothing that will contribute to improved behaviour in the interests of either the prisoner's mental health or staff safety.

The substantive change that Bill C-10 would make to disciplinary sanctions is not to create better alternatives to punishment along the lines of restorative justice, though CSC expresses commitment to this approach. Instead, it would intensify the harshness of segregation when imposed as a sanction for a serious offense by authorizing, as part of a sentence of segregation, restrictions on visits with family, friends and other persons from outside the penitentiary – for a maximum of 30 days. Prisoners now sentenced to segregation, to ensure that they do not associate with other offenders, must visit in the closed visit section of the visiting area where their contact is through glass and telephone. The Bill's amendment would authorize complete removal of any visiting.

Experienced correctional practitioners recognize that most often, a loved one's visit with a segregated prisoner has a positive impact on the prisoner's behaviour while in segregation, and the prisoner is then less likely to be confrontational with staff. Intensifying the already harsh rigors of segregation will not improve conditions for correctional staff nor will it advance public safety. Ratcheting up the harshness of imprisonment is a repressive return to a past that had, until now, appropriately been consigned to the dustbin of history. The CBA Section recommends that the proposed amendments to the disciplinary regime be rejected.

Expanding Police Powers of Arrest

Clause 92 adds the new section 137.1 to the *CCRA* to allow any security officer to arrest an offender without warrant for a breach of a condition of their parole, statutory release or unescorted temporary absence. However, officers may not arrest an offender without warrant if they believe on reasonable grounds that the public interest may be satisfied without arresting the person, having regard to, for example, the need to establish the identity of the person or prevent the continuation or repetition of the breach, or if they have no reason to believe on reasonable grounds that, if they do not arrest the person, the person will fail to report to their parole supervisor.

This amendment has been the subject of previous private members bills. The justification often given is that it is necessary to augment police powers over federal parolees who breach a condition of release, in the interests of public safety. There are serious problems with this justification.

First, and most significantly, despite repeated requests to provide concrete examples why they need this power, police authorities have not been able to do so or document a case where under the existing legislative framework they were unable to act when acting was appropriate.

Second, since the 1990s when this issue was first raised, both legislative and policy amendments have been made to respond to police concerns and permit prompt and effective police intervention:

- Section 161 (1) was added to the *Criminal Code* in 1993 to authorize a Court to impose an order up to life prohibiting a convicted sex offender from being in any area where children can reasonably be expected. Police have full authority under the Code to arrest without warrant any conditionally released offender who breaches this order.

- Section 264 of the *Criminal Code* was introduced in 1993 to make any threatening behaviour such as stalking a criminal offence. A released offender who threatens a potential victim can already be arrested by police without warrant.
- Since mid-October 1993, police agencies have had direct access to information on conditionally released offenders, including the conditions of release, through a link between the Canadian Police Information Centre computer network and the Offender Management System maintained by the Correctional Service of Canada (CSC).
- The *Corrections and Conditional Release Act* provides for facsimile transmission of warrants of arrest and apprehension, and authorizes police to arrest an offender without warrant on the knowledge that a warrant is being issued.
- CSC duty officers are available on a 24-hour basis to issue warrants of apprehension and recommitment at any time.

The legal and operational reality is such that the police already have access to federal parole offices 24 hours a day. Should they observe a federal offender breaching a condition of parole or temporary absence, they can contact a federal parole officer who in turn can immediately issue a warrant for the offender's arrest under the *CCRA.* Police officers can arrest a parolee in breach of a condition of release on the knowledge that a parole officer has issued a warrant of arrest. The current legislation allows for warrants to be faxed anywhere in the country where necessary. Again, we know of no evidence of any situation where police were unable to contact a correctional authority and a parolee had to be "let go".

A third problem with the proposed amendment is that federal parole officers are best placed to decide when a warrant of arrest should be issued for a breach of conditions of conditional release. They often do so in collaboration with police. But giving police the same broad power of arrest as presently given to supervising parole officers and the Parole Board for federally released offenders in possible breach of a parole condition interferes with the Parole Board and CSC's authority to issue warrants of apprehension and manage parolees in the community. In the absence of criminal conduct (in which case police have full powers of arrest), the current regime appropriately requires that the National Parole Board and CSC parole supervisors be consulted to determine whether the breach of a condition would increase risk to a point where suspension and arrest would be warranted. The police are not similarly situated to make that judgment, with knowledge of the particular facts and context of the offender's release. As a concrete example, an offender may have a curfew that has been extended by the offender's parole officer to permit attendance at an evening family function. If, on the way home, he is

stopped by the police, who see that he has a curfew restriction, and the police do not consult with the parole officer, the offender would likely be arrested and unnecessarily spend the night or weekend in police cells, until the offender's parole officer can confirm the curfew extension. Of course police officers retain the power to arrest offenders on conditional release without warrant, if they observe the offender committing a criminal offence. In fact, section 31 of the *Criminal Code* authorizes the arrest without warrant of anyone has committed a breach of the peace or who, on reasonable grounds is believed to be about to engage in a breach of the peace. It is, however, not part of modernizing the correctional legal landscape to expand police powers of arrest for no valid correctional or law enforcement purposes. The CBA Section recommends that the proposed new section 137.1 to the CCRA be rejected.

C. CONCLUSION ON CCRA AMENDMENTS

The main theme of the CBA Section's recommendations in this submission is the importance of protecting human rights as an integral part of correctional legislation. For decades, Canada has taken pride in its commitment to advancing human rights. The *Charter of Rights and Freedoms* is the legal lodestar in entrenching international human rights protections in Canada's own *Constitution*.[33] The overarching human right to dignity does not stop at the prison door and, as the Supreme Court has made clear, the *Charter* applies with full force to people who are imprisoned. Entrenching human rights in the *Constitution* is one thing: translating the right to human dignity in the everyday life of a prison is quite another.

Human rights are not something to "balance" against prison discipline and control, or prisoner accountability. Rather, it is something through which prison discipline and control must be interpreted and exercised in a professional manner. Legitimate discipline and control is necessary, but can only be effective in holding offenders accountable, promoting positive

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[33] See the statement of Chief Justice Brian Dickson In *Reference Re Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313 : "Since the close of the Second World War, the protection of the fundamental rights and freedoms of groups and individuals has become a matter of international concern. A body of treaties (or conventions) and customary norms now constitutes an international law of human rights under which the nations of the world have undertaken to adhere to the standards and principles necessary for ensuring freedom, dignity and social justice for their citizens. The Charter conforms to the spirit of this contemporary international human rights movement, and it incorporates many of the policies and prescriptions of the various international documents pertaining to human rights." (at 348)

change in the individual and protecting public safety if it is inherently moral and justifiable.[34] Promoting and respecting human rights is not about being "soft", it is about being decent.

Respect for human rights is a necessary condition for the exercise of correctional authority. The government's criminal justice initiatives, those already passed into law and those proposed in this Omnibus Bill, will result in an expansion of the practice of imprisonment that is unprecedented in Canadian history. At this critical stage, the CBA Section believes that the proposed amendments to the *CCRA* do not represent a "modernization" of the correctional system, as has been suggested in government communications, but will actually move Canada further from one of the fundamental criteria for a correctional system for the 21st century - that in law, policy and practice, the system must demonstrate its overriding commitment to the protection of human rights.

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[34] John Howard, whose 1777 seminal work The State of the Prisons in England and Wales inspired the idea of the modern penitentiary as a humane response to crime, in his proposals for reform of the prisons, was insistent that punishment, in order to be effective, must maintain its moral legitimacy in the eyes of both the public and the offender. For Howard the most painful punishments and those that aroused the greatest guilt were those that observed the strictest standards of justice and morality. See http://justicebehindthewalls.net/book.asp?cid=765&pid=816;

VII. *CRIMINAL RECORDS ACT* AMENDMENTS

The Canadian Bar Association's National Criminal Justice and Immigration Law Sections (CBA Sections) oppose passage of the proposed amendments to the *Criminal Records Act*.

A. INTRODUCTION

Proposed amendments to the *Criminal Records Act* would replace the "pardons" scheme with one of "record suspensions". The proposals are designed to prevent serious criminals from seeking a pardon. Restrictions to the record suspension scheme are extended by increasing waiting periods for more offences and increasing the barriers to access to record suspensions. The main features of the proposed record suspension scheme include:

- Replacing the term "pardon" with the term "record suspension";
- Extending ineligibility periods for applications for a record suspension to five years for summary conviction offences and to 10 years for those convicted by indictment;
- Making ineligible for record suspension those persons convicted of sexual offences against minors and those who have been convicted of more than three indictable offences;
- Enabling the National Parole Board to consider additional factors when deciding whether to order a record suspension.

These proposals, coupled with the changes in the Limiting Pardons for Serious Crimes Act (formerly Bill C-23A) which came into effect in June 2010, significantly change the old pardon regime.

B. ANALYSIS

Pardons are an important aspect of sustainable rehabilitation. They should be both meaningful and accessible to those who fulfill the required criteria. In Canada in 2009-2010, 24,139 pardons were granted, with a grant rate of 98%. In the last five years, 111,910 pardons were granted, and since 1970, more than 400,000 Canadians have received pardons. It is important to note that 96% of these pardons are still in force, indicating that the vast majority of pardon recipients remain crime-free in the community.[1]

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[1] See: http://pbc-clcc.gc.ca/infocntr/factsh/parole_stats-eng.shtml#13.

The CBA Sections agree that the Parole Board should have power to make meaningful inquiries prior to granting a pardon. If, after making inquiries, the Parole Board concludes that more time is required before a pardon should be issued, then it can make that decision under current law. With fewer individuals eligible for a record suspension, the stigma of a conviction would follow them indefinitely.

We are concerned that the proposed legislation would change the waiting period for all indictable offences from 5 to 10 years, without regard to the nature of the particular offence. However, we are particularly concerned about the proposed treatment of summary conviction offences. We see no justification for increasing the waiting period for those offences as proposed. Summary conviction offences, by their very definition, are minor under the *Criminal Code*. Increasing the waiting period from 3 to 5 years for someone who has been convicted of a summary conviction reduces that person's potential for reintegration into the community for a longer period. It effectively increases the waiting period for a person who has made a minor mistake and has since led a reformed life for several years.

We are concerned about clause 115, section 4(5) which permits the Governor in Council, rather than Parliament, to determine further offences for which pardons may not be granted. The CBA Sections suggest that decisions regarding which offences may not receive pardons from criminal convictions should only be made after open debate in Parliament. Decisions regarding which offences are eligible for pardon is fundamental to the criminal law, and should only be decided by Parliament.

Under current law, for summary convictions an application for pardon may be made 3 years after a sentence is completed. With the delay between the commission of the offence and the actual conviction, the total waiting time is generally already far longer than 3 years. In addition, processing a pardon application is time consuming, and backlogs currently exceed 1 1/2 years. For these reasons, increasing the waiting period as proposed in Bill C-10 is both unnecessary and counterproductive.

Under the *Immigration and Refugee Protection Act*, foreign nationals and permanent residents convicted in Canada of an indictable or hybrid offence are inadmissible, and the only way to overcome this is through a pardon (or record suspension). Non-citizens will have to wait longer before being eligible for removal of inadmissibility. More immigration applicants will be

permanently ineligible for a record suspension. Those applying for a record suspension will be less likely to receive one. With the additional criteria that must be considered by the Parole Board, the time for processing applications for a record suspension will likely increase.

If relief from inadmissibility arising from a Canadian conviction is unavailable or delayed, more emphasis may be placed on applications for discretion under a temporary resident permit (IRPA section 24) or on humanitarian and compassionate grounds (IRPA section 25) to overcome the inadmissibility on a temporary or permanent basis. Foreign nationals seeking to come to Canada through sponsorship by a spousal or conjugal partner could also apply for discretion to the Immigration Appeal Division (except those inadmissible for "serious criminality" with a two-year sentence of incarceration.

Given that rehabilitation and reintegration are key considerations of sentencing under the *Criminal Code*, the CBA Sections believe that delaying pardons to those who do actually deserve them does not advance worthwhile public policy objectives. While the Parole Board does and should have authority to require careful review before granting pardons for serious crimes with lengthy sentences, and to deny pardons where appropriate, we believe that measures to lengthen the wait for all pardon applications across the board are misguided. It would simply make rehabilitation and reintegration into society more difficult, rather than improve public safety.

VIII. *INTERNATIONAL TRANSFER OF OFFENDERS ACT* AMENDMENTS (FORMER BILLS C-5 and C-57)

The CBA Section prepared this response to the International Transfer of Offenders proposals when contained in Bill C-5.

A. INTRODUCTION

Bill C-5, *International Transfer of Offenders Act* (ITOA) is domestic legislation that implements international treaties between Canada and other countries for the purpose of repatriating offenders to or from Canada, to enable their rehabilitation and reintegration into their home community. For the same purpose, Canada has entered into bilateral treaties with countries such as the United States, as well as a multilateral convention through the Council of Europe, and various administrative arrangements (for example, with Japan) under authority of the current ITOA.[1]

Under the Strasbourg Treaty (*Convention of the Transfer of Sentenced Persons*),[2] the Managua Treaty (*Inter-American Convention on Serving Criminal Sentences Abroad*),[3] and the current ITOA, offenders transferred to Canada continue to serve their sentences according to Canadian law. They are subject to Canadian prison and parole restrictions, including suspension and revocation of conditional release. They are subject to corrective and rehabilitative programs as required by Canadian prison or parole authorities, under the authority of Public Safety Canada through the administration of the *Corrections and Conditional Release Act* (CCRA).

While Bill C-5 promises to "enhance public safety", the CBA Section believes that the Bill does not reflect that solid foundation. Instead, it would generate uncertainty in dealing with transfers, reduce Canadian control over offenders, and so ultimately reduce public safety. Further, the existing ITOA has proven effective, and we are not aware of any public safety problem as a result of the current law. The CBC recently reported Public Safety Canada's own statements on the relatively low rate of recidivism by offenders transferred back to Canada. Of

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1 *International Transfer of Offenders Act*, S.C. 2004, C-21, s. 13 - 29.

2 See Articles VIII – XV.

3 See Article VII.

the "hundreds of offenders transferred back who made it through parole without any problems, less than one per cent re-offended within the next two years".[4]

Under Bill C-5, offenders could more readily be refused transfer back, so would more often instead return to Canada by way of deportation after completing their sentence in a foreign prison. They would then return without the consequences, assessments, restrictions and follow-up involved when an offender is formally transferred to Canada during the course of a sentence.

The CCRA governs treatment of all federal prisoners in Canada.[5] Decades of research and statistics show that the public is best protected through the reformation and rehabilitation of the prisoner.[6] Under the CCRA, "accessibility to the person's home community and family, a compatible cultural environment and a compatible linguistic environment" are factors that must be taken into account in determining the place of confinement. This is inconsistent with the direction now proposed by Bill C-5.

Finally, the Bill relies excessively on the exercise of discretion by the Public Safety Minister, in a manner inconsistent with Canada's international obligations to enable and facilitate transfers (which remains the purpose of the ITOA under Bill C-5), and with the Rule of Law.

All Treaties, Conventions and arrangements currently in place are premised on the knowledge that it is in the "best interests of the offender" to enable or facilitate such transfers where the incarcerating or sending country agrees to the transfer and the offender applies for it. The underlying message in the Bill is that the offender's interests in returning to Canada are contrary to the Canadian public's interest. That is, in our view, simply incorrect. We believe that the offender's interest and the public interest are congruent.

B. ACHIEVING PUBLIC SAFETY

Bill C-5 lacks the substance to support its short title of "Keeping Canadians Safe". Before explaining the basis for this conclusion in more detail, we reiterate the CBA Section's ongoing

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4 "Recidivism rate low for repatriated offenders". See, http://www.cbc.ca/canada/story/2010/10/28/prison-trasfer-recidivism-figure-briefing-note

5 CCRA section 28.

6 M. Jackson and G. Stewart, *A Flawed Compass* (Vancouver: M. Jackson, 2009) at, for e.g., 49 or 199.

objections to the use of short titles for proposed legislation to apparently "market" legislative proposals to Canadians. We suggest instead that short titles, when used, simply describe, in a neutral way, the contents of the proposal.

Parliament has mandated sentencing goals for consideration in section 718 of the *Criminal Code*, and elsewhere in the Code. Section 718 states that "the fundamental purpose of sentencing is to contribute...to... a just, peaceful and safe society...". Section 718(d) says rehabilitating offenders is one of the objectives of a safe society.

Canadian courts, at all levels, have also recognized that rehabilitation of offenders is the best guarantee of public safety. If rehabilitated while in custody, an offender is less inclined to commit criminal acts once returned to society[7], and can instead contribute to the community as a productive citizen. The same holds true of people who have committed crimes abroad. Public safety is best served by doing whatever possible so offenders will ultimately contribute to the well being of our society, not present an ongoing threat to it.

Neither in the news release accompanying the Bill, nor in remarks made in the House of Commons[8] has any explanation been offered as to how Bill C-5 would enhance public safety. Nor have any comments been offered as to how existing legislation has failed to meet that objective, or precisely what problems are to be addressed by the Bill.

According to the news release, the Bill will make "the protection of society the guiding principle in decisions affecting the correctional system".[9] Section 3 of the Bill would add the words "to enhance public safety" to the original purpose of the *Act*, which is "to contribute to the administration of justice and the rehabilitation of offenders and their reintegration into the community by enabling offenders to serve their sentences in the country of which they are citizens or nationals".

However, the current legislation works well and does enhance public safety. It facilitates the return of offenders to Canadian correctional institutions, and by doing so, ensures that they

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7 *Ibid*.

8 40:2 *Hansard* - 118 (2009/11/26) 1445.

9 Public Safety Canada *News Releases*, 2009-11-26. Note that this is already in section 4(a) of the CCRA regarding Correctional Service of Canada and section 101(a) of the CCRA regarding the National Parole Board.

will be subject to Canada's system of corrections and conditional release. That system is known to work well both nationally and internationally. It is built on sound principles and experience as to what best advances Canadian sentencing purposes and principles, including rehabilitation and reintegration of offenders.

A person returning to Canada only after a foreign sentence has been completed would not be subject to any state control in Canada, and would arrive without any criminal record for offences abroad showing on the Canadian Police Information Centre (CPIC) data base. Canadian authorities are unlikely to have much, if any, information about programs aimed at reformation, rehabilitation or planned reintegration that the person had access to while in custody. Many foreign countries, including the US, consider "aliens" ineligible for any programs available to citizens of that country. As such, they may be held in the most restrictive circumstances, ineligible to, for example, participate in drug treatment programs.[10] The unrehabilitated offender will inevitably become Canada's problem.

On the other hand, if the offender is returned to Canada to serve a sentence,[11] the transfer will show up on CPIC. The offender will be processed through a Correctional Service Canada (CSC) Reception Centre and be subject to the same ongoing assessments as any other person sentenced to a federal prison in Canada.[12] Once the transferred sentence is converted to a Canadian sentence, the person will be classified according to Canadian criteria (as maximum, medium or minimum security risks) and have a correctional plan to address reformation and rehabilitation goals. Most importantly, that person's eventual release and reintegration into Canadian society will be monitored through a form of conditional release, in a setting where family, social ties and community supports are more likely to exist. In sum, the offender becomes a "known quantity" in Canada when transferred back to serve a sentence.

Further, should the offender re-offend and receive another federal sentence, the system will recognize that person as a second time federal offender and therefore ineligible for Accelerated

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10 In the US, a Canadian is considered an "alien" and ineligible for minimum camp or any significant programming. The US also abandoned "rehabilitation" as an aim of imprisonment through passage of the *Sentencing Reform Act* (1984).

11 Dual criminality is a condition precedent, just as in the case of extradition.

12 If the sentence is less than 2 years, the provincial/territorial reception and assessment process will instead take place.

Parole (APR). In contrast, an offender who returns to Canada after the sentence was served elsewhere would appear as a first time offender in Canada and so be eligible for APR.[13] Where an offender is transferred back to Canada to serve a sentence, authorities will also know whether that person requires continued intervention or monitoring by the state after sentence expiry.[14] Alternatively, an offender may require transfer to provincial mental health authorities.[15] If released back into the community, correctional authorities can also alert relevant police forces of the person's whereabouts and allow for any required monitoring.

All of these safeguards would be lacking for offenders refused transfer during the course of a sentence because of Bill C-5. Those offenders would arrive back in Canada following sentence expiry, without legal restriction of any kind. In fact, the proposed approach is quite likely to diminish public safety, rather than enhance it.

C. THE RIGHT OF RETURN

Under section 6 of the *Canadian Charter of Rights and Freedoms*, every citizen has a constitutional right to enter, remain in and leave Canada.[16] In *Cotroni,*[17] the Supreme Court of Canada (SCC) held that extradition engages section 6 of the *Charter* as it involves the right "to remain in Canada", but that the *Extradition Act* constitutes a "reasonable limit" on that right under section 1 of the *Charter*. Investigating, prosecuting and suppressing crimes, and maintaining peace and public order are all important goals of organized societies, and a country's commitment to those goals cannot realistically be confined to its national boundaries. Consequently the SCC held that the first branch of the *Oakes* test, namely that the legislation pertains to "a pressing and substantial object", was met.

The weight of Canadian judicial authority appears to hold that while the "right to enter" Canada under section 6 of the *Charter* is engaged in transfer circumstances, that right is suspended because of the other country's sentence until that country allows the offender to return to Canada. Recent cases have held that the ITOA provides a "reasonable limit" on that right under section 1 of the *Charter*. However, a section 1 analysis has not been fully explored to date,

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13 Note that this will depend on the particular offence and the offender's history of violence.

14 This can be accomplished using a peace bond under sections 810, 810.01, 810.1, 810.2 of the *Criminal Code*.

15 See, for example, Part II of Ontario's *Mental Health Act*, R.S.O. 1990, c- M 7.

16 Section 6(1) of the Canadian *Charter of Rights and Freedoms*.

17 *United States of America v. Cotroni; United States of America v. El Zein* [1989] 1 SCR 1469.

especially in relation to the factors the Minister should consider in making transfer decisions. As such, it is unclear whether the "right to enter" under section 6 of the *Charter* is engaged when a Canadian citizen is under the legal authority of another country, particularly if the incarcerating country has agreed that the offender can return to Canada to serve a sentence.[18] Also undetermined is whether legislation purporting to limit a citizen's right of return is a "reasonable limit" under section 1 of the *Charter*. However, section 6 does guarantee that a citizen cannot be stopped from returning to Canada after serving a foreign sentence, or if deported back at an earlier time by the foreign country.[19]

Certainly, section 6 offers important context. The right of return plays a critical part in rehabilitation and reintegration for Canadians imprisoned abroad, as without transfer back under the ITOA, they will likely instead be deported to Canada after their sentences are served, without any record or consequences.[20] The SCC has taken a broad, purposive approach[21] in interpreting *Charter* rights. Following that approach, we suggest that legislation should continue to enable and facilitate citizens' return to Canada, and avoid any arbitrary state action that would impede that return. Transfer back and conversion of the conviction and sentence to Canadian requirements, including a criminal record in Canada, better serves the Canadian public interest.

D. MINISTERIAL DISCRETION

Bill C-5 would give the Minister of Public Safety broad and unconstrained power to deny Canadian offenders return to their home country to serve their sentences. Mandatory considerations that currently *must* be applied in determining offender transfer requests would be replaced by optional criteria that the Minister *may* consider. The Minister would also be permitted to consider any other factor believed to be relevant.[22] With such open-ended discretion, these critical decisions would be determined according to the opinion of the

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18 Consider the apparent conflict in the Federal Court Trial Division between the *Van Vlyman* case on one hand (section 6 is engaged but section 1 need not be considered, on the facts of that case), and *Kozarov/ Da Vito* and *Getkate* on the other (section 6 is not engaged, but if it is, the ITOA is a section 1 reasonable limit), and then the *Curtis* and *Dudas* cases (it is engaged, but a section 1 reasonable limit applies).

19 See *Cotroni*, *supra* note 17.

20 While it is the prerogative of each country to determine whether a person will be deported to their home state after serving a sentence, it is difficult to imagine another country allowing a foreign national, particularly a convicted criminal, to remain in that country.

21 *Sauvé v. Canada* (Chief Electoral Officer), [2002] 3 SCR 519.

22 Bill C-5, section 10 amendments.

Minister in each case.[23] It remains to be seen whether Canada's courts will interpret this broad discretion as a "reasonable limit" demonstrably justified under section 1 of the *Charter*.[24]

In our view, Bill C-5 would offer less certainty as to what the Minister would or should consider in each case, and the weight to be assigned to particular factors. It could allow the Minister's decisions to be immunized from scrutiny, and in particular judicial review. The decision of the Federal Court in *Van Vlyman*[25] and more recently *Getkate v. Canada (Minister of Public Safety and Emergency Preparedness)*[26] illustrate that Canadian courts have already recognized the importance of a right of review of Ministerial decisions, especially when based on the exercise of discretion.

While Bill C-5's proposed criteria to guide Ministerial decisions appear to be aimed at ensuring public safety, we believe that practically speaking they will not have that effect. For example, one reason to deny a transfer under Bill C-5 would be if a person "is a danger to a member of his or her family". Because an offender will be able to return to Canada at some point, if only after completing a sentence, any perceived danger to family will be exacerbated if the transfer back is unaccompanied by restrictions. It would be better to have the offender participate in Canadian rehabilitation programs or subject to Canadian preventative measures and conditions of release than to allow the offender to return without supervision.[27] If the offender is in Canada, the family may even have input into these decisions.[28]

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23 *Ibid*. The CBA has previously objected to this type of open-ended decision making in the context of when Canada chooses to intervene in death penalty cases. See, 2008 letter from CBA President, Bernard Amyot to Justice Minister Nicholson and Public Safety Minister Day (Ottawa: CBA, 2008).

24 Problems in the exercise of discretion have already begun to emerge. The treatment of Brenda Martin, whose prison transfer from Mexico after conviction for fraud was suspended allowing for her return to Canadian custody, is hard to explain in light of the increased number of denials of other Canadians citizens over the past several years. The recent situation has reversed a 30 year trend towards increased and more efficient approvals.

25 *Van Vlymen v. Canada* (Solicitor General) (F.C.), [2005] 1 F.C.R. 617 .

26 [2009] 3 F.C.R. 26, 2008 FC 965.

27 As noted above, it is not realistic to expect other countries to be able to provide information to Canadian authorities of a quality equal to that which Canada itself can obtain through the correctional system. If a person is returned to Canada by the other state, it would be more difficult for Canadian authorities to gather the information required to place the person under a restraining order if the person has not been subject to Canadian supervision already. All such information would be within the control of the other state. This could require translation, legal review of the material and additional resources. One must be cognizant of the practical difficulties of gathering such evidence and using it in support of a Canadian restraining order application. It is much easier to use materials gathered in Canada for this purpose.

28 For example, a probation and parole officer could assist in family re-integration and counseling, or in monitoring an offender to ensure no contact with family members if that is the wish of family members. By being in Canada, the offender is subject to supervision and the supervisor of the offender will be able to contact family, or victim/witness assistance programs in order to better devise a plan for the

Other proposed criteria under section 10 that warrant comment include:

a) whether in the Minister's opinion the offender's return to Canada will constitute a threat to the security of Canada

The Federal Court (Trial Division) in *Getkate*[29] found the Minister's interpretation of a generalized risk to Canadians to be unreasonable, and set aside his decision. The Court held that there must be an actual threat to the security of Canada.

b) whether in the Minister's opinion the offender's return to Canada will endanger public safety, including (i) The safety of any person who is a victim, as defined in subsection 2(1) of the *Corrections and Conditional Release Act*, of an offence committed by the offender

Suggesting that victims are better protected by allowing offenders to be deported back to Canada with no gradual release nor any restrictions or supervision by Canadian authorities is unreasonable.

c) whether, in the Minister's opinion, the offender is likely to continue to engage in criminal activity after the transfer

This appears to suggest that the Minister take on the role of "parole board" for Canadians held abroad. If so, the Minister's office would need to gather all the information that the parole board now gathers to make its decisions (correctional reports, etc). Certainly, full and appropriate information should guide such decisions.

d) whether, in the Minister's opinion, the offender left or remained outside Canada with the intention of abandoning Canada as their place of permanent residence

The issue of intention was considered by the Federal Court (Trial Division) in *Kozarov*[30] where the Court upheld the Minister's denial. With respect, our view is that citizenship must trump residency, not the other way around. The *Charter* does not suggest that section 6 rights are time limited, or lost when a person sets up long term residence abroad.

e) whether, in the Minister's opinion, the foreign entity or its prison system presents a serious threat to the offender's security or human rights

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rehabilitation of the offender. Equally, the supervisor will be able to contact the police if any danger to the family becomes known or suspected.

29 *Supra*, note 26.

30 *Kozarov v. Canada* (Minister of Public Safety and Emergency Preparedness) (F.C.), [2008] 2 F.C.R. 377.

This consideration is in the current ITOA, but would be changed so that the Minister's opinion would control the outcome, rather than the facts concerning the foreign entity or its prison system.

f) whether the offender has social or family ties in Canada

In *Kozarov,*[31] the federal government argued that the individual's ties to Canada were insufficient. However, the proposed legislation does not speak to sufficiency, but only the existence of such ties. If a person's friends and relatives die, it does not make that person less of a citizen. Again, this does not seem a reasonable limit on the section 6 right to enter Canada.

g) whether the offender has refused to participate in a rehabilitation or reintegration program

If an offender refuses to participate in a foreign rehabilitation or reintegration program, that person presumably represents a greater danger to the Canadian public when deported back, free of legal restrictions. If transferred, the offender comes into the Canadian system, is assessed for security and placement, becomes a "known", and either participates in programs here or is denied conditional release until determined by a parole board not to be an "undue risk" to the public. If kept in custody until the end of the court imposed sentence, offenders may even be subjected to a peace bond that keeps them in prison after their warrant expires.

h) whether the offender has accepted responsibility for the offence for which they have been convicted, including by acknowledging the harm done to victims and to the community

A requirement that convicted people must accept responsibility for the offence as charged is problematic. While appropriate in some cases, it is a sad reality that people are wrongly convicted, even in Canada's justice system dedicated to ensuring the innocent are not found guilty.[32] Many justice systems do not meet Canada's standards, so precluding transfer because an offender maintains innocence could well work further injustice.

i) the manner in which the offender will be supervised, after the transfer, while they are serving their sentence

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31 *Ibid*.

32 The cases of Donald Marshall, David Milgaard and Guy Paul Morin are examples of this. There are many others. In the US, 249 post-conviction exonerations have resulted from DNA testing alone, including 17 people sentenced to death. See, http://www.innocenceproject.org/know/. The Death Penalty Information Centre indicates that at least 138 people sentenced to death in the US have been exonerated http://www.deathpenaltyinfo.org/home.

Again, once deported after sentence expiry, there will be no supervision. In contrast, if transferred during the sentence, the offender will be supervised by the CSC on a federal sentence.

j) any other factor that the Minister considers relevant.

As noted elsewhere in this submission, untrammeled ministerial discretion is not consistent with democratic principles.[33] Bill C-5 would amend section 10(2) of the ITOA to replace the word 'shall' with 'may', so that the Minister no longer is required to consider the existing factors in the *Act*, but could instead choose to consider those factors.

Section 10(1)(a), whether, in the Minister's opinion, the offender will commit a terrorism or criminal organization offence after transfer, is the most common basis for denial of transfer. Several cases regarding this factor are pending in the Federal Court.[34] We believe that courts' ability to review Ministerial decisions is vital to the Rule of Law. Elected officials, like Ministers, should not have unlimited discretion.[35] Indeed, even Crown prerogatives are subject to judicial review in certain cases.[36] Soundly based ministerial decisions will not be readily overturned by the courts. Only decisions incorrect in law or otherwise unreasonable, such as those made without regard to the evidence or in an arbitrary manner, are likely to attract serious scrutiny. The courts are generally reluctant to substitute their views for those of the Minister, but will consider whether the Minister's decision complies with the *Charter* and laws passed by Parliament.

Bill C-5's proposed criteria for Ministerial decision-making would justify virtually any refusal to transfer an offender to Canada, unrelated to promoting reformation, rehabilitation, reintegration or public safety. While this may result in a temporary delay in an offender's return to Canada until the sentence is served, it will not contribute to long term public safety here.

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33 In certain cases, it is even the subject of abusive conduct. See, *Roncarelli v. Duplessis*, [1959] SCR. 121.

34 The recent case of *Grant* (March 4th,2010 T-1414-09 FCTD) set aside the Minster's decision on this ground and ordered the Minster to reconsider within 45 days.

35 *Roncarelli v. Duplessis*, [1959] SCR 121; *C.U.P.E. v. Ontario* (Minister of Labour) 2003 SCC 29.

36 *Operation Dismantle v. The Queen*, [1985] 1 SCR 441; *Canada v. Kamel* 2009 FCA 21; *Abdelrazik v Canada* 2009 FC 580; *Black v. Chretien* (2001), 54 OR (3rd) 215 (C.A.).

E. CANADA'S INTERNATIONAL OBLIGATIONS

Laws and Ministerial actions should be in accordance with Canada's international commitments. This rationale is often cited as the reason why Canadians are subject to extradition to foreign states.[37] CSC has articulated the purpose of offender transfers[38] in a manner consistent with its mandate for offenders in Canadian federal facilities. It recognizes the difficulties faced by Canadians incarcerated abroad, similar to others away from home, family, and compatible linguistic and cultural environments. "Canadians incarcerated in foreign countries often find themselves facing serious problems coping with local conditions. The most common problems involve culture shock, isolation, language barriers, poor diets, inadequate medical care, disease and inability to contact friends and family".[39] The impact of transfer denial on a family at home, as well as on the offender, is often devastating to the relationship, resulting in greater instability upon return.

Canada has entered into 14 bilateral treaties and acceded to three multilateral conventions on transfer, dealing with more than 60 other states. The "best interests of offenders" is the guiding principle behind these treaties. Canada's international obligations are reflected in the preamble to the *Convention on the Transfer of Sentenced Persons*,[40] in force in this country since September 1, 1985. The stated goals of the Convention include "developing international co-operation in the field of criminal law" and it sets out a comprehensive agreement for transferring offenders between the state where sentenced and their own nation. Similarly, the *Inter-American Convention on Serving Criminal Sentences Abroad*[41] states that the signatories "desire to cooperate to ensure improved administration of justice through the social rehabilitation of the sentenced persons" and "that to attain these ends, it is advisable that the sentenced person be given an opportunity to serve the sentence in the country of which the sentenced person is a national".

Canada and many other nations have committed themselves to the transfer of offenders back to their home country to encourage rehabilitation and ultimately reduce crime. Bill C-5 is

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37 See, for example, *Lake v. Canada* (Minister of Justice), 2008 SCC 23.

38 Correctional Service Canada - Programs International Transfer of Offenders, found at http://www.csc-scc.gc.ca/test/prgrm/inttranser/trans-eng.shtml.

39 *Ibid*.

40 E104447 - CTS 1985 No. 9.

41 E102891 - CTS 1996 No. 23.

inconsistent with these goals. Instead, it would allow Canadians, based upon loosely defined discretion by the Minister, to be denied entry and return to Canada and forced to remain in custody in another country. CSC has recognized the conditions in many of those countries as undesirable or improper.

The issue of reciprocity between states should also be considered. If Canada refuses the transfer of its own citizens from other countries, it is equally possible that other states will refuse the transfer of their nationals from Canadian prisons. Rather than encouraging cooperation in the administration of justice between states, this could lead to international problems. Foreign offenders serving sentences in Canada do so at Canadian taxpayers' expense. As those offenders are likely to be deported after their sentence is served,[42] any benefit to Canada from programs aimed at rehabilitating foreign offenders is unlikely to ensue.

F. OTHER CONCERNS

In addition to the concerns outlined above, delay in processing applications has already become a serious problem.[43] Delay occurs primarily at the Ministerial stage, rather than in the processing time by the CSC International Transfer Unit. Lawyers practicing in this area find it increasingly difficult to obtain information about the status of a file from the Minister's office, particularly as to when it was transferred from the CSC office for the Minister's consideration.

Generally, these decisions should not require significant time. The current lack of transparency, coupled with delays of over a year at the Minister's office alone, suggest that problems are not because of deficiencies in the legislation, but rather operational or resource problems.

Bill C-5 would encourage more litigation. Offenders denied transfer can look only to the courts for redress, which results in additional and unnecessary cost to taxpayers. The proposed amendments would make "public safety" the primary consideration for transfer determinations, but the current purpose of the *Act* would remain as it now is, to "enable" transfers in the interest of the reformation and rehabilitation of the offender." This is likely to

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42 IRPA, SC 2001, C-27.

43 In the 2005 case of David Van Vlyman, *supra* note 25, the Federal Court found 9 ¼ years of bad faith on the part of the then Solicitor General. Specifically, the Court held that the Solicitor General had willfully violated a citizen's constitutional rights under section 6 and 7 of the *Charter* by failing to make a decision on his transfer application.

generate confusion. Limiting legislative criteria for consideration simply to dual criminality and Canadian citizenship would be a better use of limited resources.

G. CONCLUSION TO ITOA AMENDMENTS

Canadians who commit crimes in other jurisdictions are subject to that state's laws until their sentence is served. However, Canadians in that situation will likely return to Canada, either by transfer during the sentence, or by way of deportation at the end of it.

Goals of reintegration, reformation and rehabilitation of offenders are promoted when offenders return to Canada to finish their sentences. The current CCRA recognizes that accessibility to one's home community and family, as well as a compatible cultural and linguistic environment are important factors in that regard.[44] Leaving a person in custody far away from family, community and other supports does not contribute to any correctional purpose and is contrary to achieving reintegration and rehabilitation to Canada.[45] To protect the public, provide reintegration and rehabilitation to offenders, and meet its international obligations, we believe that Canada should generally pursue the repatriation of offenders to ensure they are subject to Canada's correctional practices and processes before they complete their sentences.

Bill C-5 would not meet these goals. The Ministerial discretion it provides would allow for arbitrary and inconsistent refusals to transfer Canadian offenders back to Canada. Instead, limiting the criteria for consideration to dual criminality and citizenship would eliminate political considerations, arbitrariness and inconsistency, and give appropriate weight to the citizen's right of return, the *Charter* and the Rule of Law.

Contrary to what the Bill is purported to represent, it would be more likely to endanger the Canadian public, than to protect it. Rehabilitating offenders in a manner consistent with the values of Canadian society is the key to the safety of our communities. The proposed legislation fails to recognize this practical reality.

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44 See section 28 *CCRA*.

45 See, for example, *Effects of Long Term Incarceration* (Edmonton: John Howard Society of Alberta, 1999), and studies cited therein.

IX. *YOUTH CRIMINAL JUSTICE ACT* AMENDMENTS (FORMER BILL C-4)

The CBA Section responded to amendments to the YCJA when contained in Bill C-4.

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

B. 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

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1 SC 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*.

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]

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

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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*.

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

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 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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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.

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.

C. 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.

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.

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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.

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.

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.

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.

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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.

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.

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.

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

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

18 [2008] 2 SCR 3.

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]

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.

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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.

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.

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24 (2008) SCC 31460.

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 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

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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.

27 *Ibid.* at 87.

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.

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 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

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28 See section 8 of Bill C-4.

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.

D. CONCLUSION ON YCJA AMENDMENTS

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 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

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

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.

X. *PREVENTING THE TRAFFICKING, ABUSE AND EXPLOITATION OF VULNERABLE IMMIGRANTS ACT* (FORMER BILLS C-17 and C-57)

The CBA's Immigration Law Section (CBA Section) is concerned about proposals now in Bill C-10, formerly called Bill C-17 and C-57. The Bill would amend the *Immigration and Refugee Protection Act* (IRPA) to allow immigration officers to refuse work permits for foreign nationals deemed to be at risk of exploitation based upon Ministerial instructions. The CBA Section has significant concerns about the manner in which the Bill gives the Minister wide-ranging authority to shape the substance of the protective legislation. While we acknowledge the serious problem of trafficked persons and the need for sound government policy to assist them, this particular scheme is unnecessary and in fact counterproductive.

In the course of review of what was then Bill C-57, we wrote to the Minister in June 2007. We outlined our concerns and asked specific questions about the impetus for the Bill and the manner in which it would be operationalized. We regret to say that the response did not alleviate our concerns and in fact heightened them. These concerns are outlined below.

A. Outline of the Bill

The Bill proposes that:

- The Minister could issue instructions prescribing public policy considerations guiding an officer's discretion to issue a work permit to a foreign national. The considerations would be aimed at protecting foreign nationals from humiliating or degrading treatment, including sexual exploitation.
- An officer would refuse to authorize a work permit to a foreign national if, in the officer's opinion, the public policy considerations in the Minister's instructions justify the refusal.
- A refusal to authorize a work permit would require concurrence of a second officer.

The government's Press Release and Backgrounder dated May 16, 2007 ("Canada's New Government Introduces Amendments to Deny Work Permits to Foreign Strippers"), indicates that the intention of the Bill is to prevent entry of "strippers" (exotic dancers) and other "vulnerable" applicants, including "low skilled labourers as well as potential victims of human

trafficking." "The instructions would be based on clear public policy objectives and evidence that outlines the risk of exploitation [foreign worker applicants] face."

Scope of Ministerial Instructions is Ill-Defined

Despite the government's stated purpose for introducing the Bill, neither exotic dancers, nor victims of human trafficking, nor low skilled workers are mentioned in its terms. The Bill authorizes an officer to refuse an otherwise valid work permit to *any worker*, in *any* occupation or industry, subject only to (as yet, undisclosed) Minister's instructions.

Foreign worker applicants for work permits do not exist in a vacuum. For every applicant there is a corresponding employer in Canada who has offered employment and who will be affected by refusal of the work permit. In most cases the employer has applied to Human Resources and Social Development Canada (HRSDC) for a Labour Market Opinion (LMO). The LMO has been issued after HRSDC consideration of a labour market shortage for the offered occupation, efforts by the employer to locate an employee from the local labour market, the appropriateness of salary and economic benefits arising from the employment of the foreign worker.

The undefined scope of the legislation and its potential applicability to any work permit applicant is a matter of concern to the CBA Section. The conflict between the public statement focus on exotic dancers and trafficked persons and the unrestrained language of the legislation is an obvious incongruity that begs explanation.

It is impossible to discern from the Bill the scope of instructions that might be issued by the Minister, or the nature of opinion that must be formed by the officer. It is unclear:

- what degree of "risk" must be apparent before a Ministerial instruction could issue;
- what evidence of risk the Minister would have in making a decision. CIC's response to our questions indicated that the nature of the evidence required could not be "speculated on hypothetically." It would remain entirely in the discretion of the Minister;
- how the Minister or officers would apply the standard of "humiliating or degrading treatment". Would they apply the "community standards test" of obscenity in *R. v. Butler*[1] to a non-criminal, employment opportunity?

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1 [1992] 1 SCR 452.

CIC's response did not state what definition would be used, indicating that the "definition of that phrase will develop over time as it is given judicial consideration under IRPA";

- whether the Minister's instructions will designate specific occupations (i.e. exotic dancers), or name specific employers or locations of employment.
- whether the Minister's instructions would extend to workers such as live-in caregivers, store clerks, hotel workers, or agricultural workers. Again, the instructions need not be limited to preventing mistreatment solely of a sexual nature. In the response to our letter, CIC could not provide us with an example of a proposed instruction or the kind of criteria that would be used to instruct officers. Instead, the response indicated that, "The authority is meant to be issued for unanticipated situations that might arise, and as such instructions cannot be described in advance".

Application of the Scheme will not Help and Might be Harmful

A mere four new work permits were issued to exotic dancers in 2006 (the last year for which the Department has statistics).[2] If the "clear public policy objectives" behind Bill C-17 is to reduce the number of foreign exotic dancers coming to Canada, we question whether there is a legitimate social problem in that regard. If the policy objective is to assist trafficked and other vulnerable persons, the Bill's focus on limiting work permits is unlikely to be effective. Worse, it will promote unwarranted refusals of work permits to those at risk of increased exploitation by their traffickers if denied admission to Canada. The approach taken in Bill C-17 is fundamentally incompatible with the government's previous initiatives to provide trafficked persons with access to the Canada's criminal justice system, such as the introduction of the Temporary Residence Permit for victims of trafficking[3]

The legislation depends upon accurate predictions of employees being at risk of exploitive and abusive conduct before that conduct ever occurs. Enforcement dependent on prediction is inherently fallible. We view this as the fundamental flaw in the legislation. The focus should instead be on ensuring that work conditions for newcomers in Canada are appropriate, safe and non-exploitive, and ensuring that our criminal laws are strictly enforced against those who exploit trafficked and other vulnerable persons.

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2 See letter to the CBA dated August 15, 2007. Testimony from CIC officials to this Committee on January 30, 2008 suggests that 21 work permits (including both new permits and extensions) were granted to exotic dancers in 2006.

3 See section 16 of Citizenship and Immigration Canada's Inland Processing Manual 1, www.cic.gc.ca/english/resources/manuals/ip/ip01-eng.pdf).

The government has not provided examples of how instructions to officers will be worded. Without the content and form of Minister's instructions, it is impossible to know whether this scheme will be accurate, effective or fair. For example, we can surmise that the instructions are unlikely to be based purely on specific occupations, as this is incompatible with the Minister's assurance in the Backgrounder that "each application would be assessed on its own merits" and that officers would make their decisions "on a case by case basis". With instructions published in the *Canada Gazette*, it is unlikely that specific employees or applicants would be identified. In these circumstances, the Minister's instructions will likely provide a degree of latitude to officers to decide whether the risk exists. The Bill establishes no standard of evidence for the officer to apply the instruction to deny the work permit based on a risk of offending conduct. There is no requirement for evidence at all – see the reference to the officer's "opinion" in proposed s. 30(1.2). These conditions will make wrong decisions more likely than not.

Inappropriate for Objective to be Accomplished by Ministerial Instructions

While we are not convinced of the need for additional regulation in this area, we note that the Minister (or Governor in Council) could implement this policy through an amendment to subsection 200(3) of the IRPA *Regulations*, listing exceptions to the issuance of work permits. The amendment could provide:

> (3) An officer shall not issue a work permit to a foreign national if….
>
> (f) there are reasonable grounds to believe that the foreign national will be engaged in treatment that is humiliating or degrading, including sexual exploitation.

It is not clear why Minister's instructions are preferable to an amendment to the *Regulations*. The Rule of Law requires that governmental authority be legitimately exercised only in accordance with written, publicly disclosed laws adopted and enforced in accordance with established democratic procedure. The principle is intended to be a safeguard against arbitrary governance. Legislated entrenchment of ministerial authority to issue unreviewable instructions with the power of law may risk eroding this safeguard.

Our difficulty in evaluating Bill C-17 from the perspective of the fair administration of justice is precisely because the content of the law is not complete until the Minister implements binding instructions. These instructions are not known to Parliament now and will be implemented without review by Parliamentary Committee or the public, as is done with Regulations. The

Minister's instructions would be reported to Parliament and published in the *Canada Gazette*. Pursuant to s. 93 of IRPA, instructions are deemed *not* to be statutory instruments for the purposes of the *Statutory Instruments Act*, and will not be referred to Committee for review, public discussion or comment. If Bill C-17 is passed in its current form, Parliament will have no future oversight of the content of the Minister's instructions and the consequential substance of the law.

No Appeal from a Bad Decision

There is no appeal provided, by IRPA or the proposed amendments, to remedy a bad decision to refuse a work permit on grounds of risk of exploitation. The applicant's only remedy under IRPA is an application for leave and judicial review before Federal Court. This is an unsatisfactory procedure for a number of reasons:

- There is no right to judicial review. IRPA mandates that leave must be granted. Approximately 85% of applications for leave are denied without reasons and without appeal from refusal to hear the judicial review.
- The employer has no standing to participate in the leave or judicial review application.
- Judicial review proceedings are not appeals; new evidence to contradict the officer's decision cannot be brought forward.
- Judicial reviews are time consuming. Most applications take eight months or more to be heard and determined.

Decisions rendered through the proposed process should not be insulated from a meaningful appeal.

B. Conclusion To Trafficking Vulnerable People Act

To conclude, providing assistance to trafficked and other vulnerable people is a laudable goal; however, the Bill proposes a scheme that is vague, confused and potentially harmful to the very people it seeks to protect. Accordingly, we recommend that it not be adopted in its current form.

XI. CONCLUSION

The government's criminal justice initiatives, those recently passed into law and those proposed in this Omnibus Bill, will result in an expansion of the practice of imprisonment that is unprecedented in Canadian history. At this critical stage, the CBA Section believes that the proposed amendments the CCRA will actually move Canada further from one of the fundamental criteria for a correctional system for the 21st century - that in law, policy and practice, the system must demonstrate its overriding commitment to the protection of human rights. In addition, Bill C-10's proposals will worsen Canada's well documented history of disproportionately incarcerating its Aboriginal people.

The CBA Section's work in the area of criminal justice has some consistent themes, and rests on several important tenets – a long history of CBA policy, a commitment to human rights and constitutional values, a strong belief in justice, fairness, equality and procedural safeguards, a goal of having an effective and efficient criminal justice system, and our daily experience in Canadian courts in every corner of this country. We have offered our critique of Bill C-10 on the basis of that solid foundation. The politics of criminal justice should not trump the evidence and knowledge available as to what are the most effective criminal justice policies and best use of public resources.

In sum, the CBA Section believes that many of the positive reforms of the past 30 years, reforms that have led to humanizing Canada's criminal justice and correctional system, and building for Canada an enviable international reputation for respecting human rights, would be imperiled with the passage of the Omnibus Bill.