THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

May 29, 2012

Via email: FINA@parl.gc.ca

James Rajotte, M.P.
Chair
Standing Committee on Finance
Sixth Floor, 131 Queen Street
House of Commons
Ottawa, ON K1A 0A6

Via email: nffn@sen.parl.gc.ca

The Honourable Joseph A. Day, Senator
Chair
Senate Committee on National Finance
The Senate of Canada
Ottawa, ON K1A 0A4

Dear Senator Day and Mr. Rajotte,

Re: Bill C-38, Part 4, Division 37 – *Corrections & Conditional Release Act*

I am writing on behalf of the Canadian Bar Association's National Criminal Justice Section and its Committee on Imprisonment and Release (CBA Section) regarding Part 4, Division 37 of Bill C-38, amending the *Corrections and Conditional Release Act* (CCRA). The CBA is a national association of over 37,000 lawyers, notaries, students and law teachers, with a mandate to promote improvements in the law and the administration of justice. Members of the CBA Section include both prosecutors and defense counsel from every province and territory in Canada, as well as legal academics specializing in criminal law.

The Canadian Bar Association has stated before its objection to the omnibus style of legislation employed in Bill C-38. The significant impact and sweeping nature of the changes, and the quick timeframe for its passage, militate against meaningful comment or debate. The result is that CBA Sections are commenting only on certain portions of the Bill, although we have significant concerns about others.[1]

Part 4, Division 37 would amend the *Corrections and Conditional Release Act* (CCRA) to eliminate the requirement of an in-person hearing for post-suspension hearings. In our view, the proposed amendment to the CCRA would unjustifiably infringe constitutional rights.

The recently enacted Bill C-10[2] made a number of amendments to the statutory scheme for corrections and conditional release. There was no suggestion that a further far-reaching amendment to the CCRA would be introduced as part of a cost saving budget item.

---

1 See also letters from CBA Competition Law Section on Part 4, Division 28 and from CBA Immigration Law Section on Part 4, Division 54.

2 S.C. 2012, c. 1.

500-865 Carling Avenue, Ottawa, ON, Canada K1S 5S8
tel/tél : 613.237.2925 | **toll free/sans frais** : 1.800.267.8860 | **fax/téléc :** 613.237.0185 | **info@cba.org** | **www.cba.org**

A. How Division 37 would modify existing correctional law

Under the CCRA, offenders are subject to conditions of parole and can have their parole or statutory release suspended on a warrant issued by a parole officer of the Correctional Service of Canada for an alleged breach of those conditions. If suspended, the offender is arrested and returned to custody. The parole officer has 30 days to determine whether to cancel the suspension, in which case the offender returns to the community, or refer the case to the Parole Board. An offender on day parole, full parole or statutory release, whose conditional release is suspended by a parole officer, has the right to appear in person before the Parole Board charged with deciding whether to cancel the suspension, or revoke the release.

The review is conducted by an in-person post-suspension hearing before two members of the Board. The offender is entitled to attend with an assistant[3] or legal counsel.

Section 140(1) of the CCRA lists the reviews which the Parole Board of Canada must make through in-person hearings rather than file studies. Part 4, Division 37, s. 527 would amend s.140(1)(d) to no longer mandate hearings for reviews following the suspension of parole or statutory release (i.e. post-suspension hearings). The decision will be based on a file review without a hearing with the suspended offender.

B. Importance of an in-person hearing

The right to an in-person hearing before the Board is critical to the integrity and transparency of the parole process. At an in-person hearing, the Board can more effectively consider all aspects relevant to public safety. The Board has all accurate and complete information and relevant arguments. If confronted by gaps in the information record, Board members can question both the offender and the parole officer. They can probe beyond the limited issue of a breach of conditions and consider the legally relevant issue of whether the offender's release represents a risk of re-offending. Credibility can often be determined only by a careful probing of the evidence.

The suspended offender's opportunity to present their case and receive a fair decision is significantly enhanced at an in-person hearing. The offender learns what the Board members believe the facts to be, and is able to correct them, if necessary, and provide other relevant facts. The offender also hears what the Board's concerns are arising from the alleged breach and has an opportunity to respond and, if the breach is admitted, provide further explanation.

Hearing the offender in person is an essential element of a fair process and the Board's ability to fairly assess the risk to the public.

It may be helpful to consider the factual and legal context and consequences of parole suspension and revocation. Contrary to public perception, the great majority of suspensions are not based on the parolee's re-offending for a serious crime of violence or any crime, but for allegations of breach of a condition of parole. These may include alleged violation of a night curfew at a halfway house, being outside the boundaries of the parole area, drinking alcohol or having a positive urine analysis for drugs in violation of an abstinence clause, or "associating" with someone the police believe may be involved with criminal or gang activities in violation of a non-association condition. Suspension can also be triggered by a parole officer's belief that an offender is not being sufficiently 'transparent" in reporting activities in the community.

A parole officer's documents of the alleged breach of conditions and assessment for decision, the primary document the Parole Board reviews following a suspension, is often primarily based on

---

[3] who may be a community support person

information provided by police. The police reports are not disclosed to the offender. Without an in-person hearing the reliability of this information cannot be properly tested.

The experience of CBA Section members who have appeared before the Parole Board at the in-person hearing is that the "facts" of the breach of conditions are often demonstrated to be unreliable and inconsistent with other reliable information provided by the offender that is not in the parole officer's assessment and recommendation to the Board.

The following case scenarios demonstrate the importance of in-person hearings:

- Parole officer recommends revocation and states that, based on reliable police information, offender crossed US border, in breach of condition not to leave the jurisdiction, and participated in a robbery. The police reports claim an eyewitness to the robbery positively identified offender. Offender's counsel interviews eyewitness who states he was shown photo of offender by the police and recognized him. Eyewitness states robbery suspect was medium height, average build, and had no facial hair. At the in-person hearing, offender provides alibi as to his whereabouts at the time of the robbery and the Board can observe that the offender is 6 feet 4, very slim and has a very distinctive goatee beard.

- Parole officer recommends revocation based on a positive urine analysis for Tylenol 3 and no medical prescription. At the in-person hearing the offender shows that he not only had a prescription from a clinic in the community but also from the Penitentiary for 12 years before his release.

- Parole officer recommends revocation based on breach of a condition not to have any contact with ex-wife and states ex-wife saw offender's car outside her house. At the in-person hearing offender provides documentary record that his car was in storage at the time and his ex-wife had a prior charge of obstructing justice charge for providing a false report to the police.

- Parole officer recommends revocation of an offender serving a life sentence, who had been on parole without re-offending for 20 years, stating that the offender's risk is now unmanageable because of bizarre and confrontational behaviour believed to be associated with dementia and there is no acceptable assisted living plan. At the in-person hearing the offender, assisted by his niece, presents a reasonable, realistic community living plan that has the support of the institutional treatment team.

In all these cases, without an in-person hearing and the ability to challenge the parole officer's version of the facts, the offender's parole would almost certainly have been revoked.

The consequences of revocation are that the offender will have to serve more time in prison before eligibility to re-apply for parole or being re-released. The *Safe Streets and Community Act* (Bill C-10) doubled, from six months to one year, the waiting time for new release applications after a revocation decision. Especially for those serving life or long sentences, the resulting incarceration will be much longer after revocation, as even for the most minor of breaches they typically will be expected to start over, first serving enough time to build credibility to obtain a gradual program of escorted absences, then unescorted absences, and then day parole. For long term offenders, even after many successful years of release, further years of incarceration are at stake at a post-suspension hearing.

C. Impact on Aboriginal offenders and community

The proposed CCRA amendment will disproportionately impact Aboriginal offenders who, as a result of systemic discrimination, have lower rates of conditional release and higher rates of revocation. In *Ipeelee,*[4] the Supreme Court of Canada recently reaffirmed its decision in *Gladue*[5], that the courts must take into account the special circumstances of Aboriginal offenders. The Parole Board has previously responded to this challenge by introducing Elder assisted hearings. A Board-appointed Aboriginal Elder presides over a circle conference and counsels the offender and provides advice to Board members. This initiative has received international recognition as a way to enable Aboriginal offenders to present their cases at parole hearings and to answer the case against them at post-suspension hearings. Involvement of Elders provides an opportunity for traditional teaching and positive Aboriginal community involvement. Abolishing post-suspension hearings will eliminate these Elder-assisted hearings, thus aggravating the systemic discrimination referred to in *Gladue* and *Ipeelee*.

D. Legal history of the constitutional right to in-person post-suspension hearings

In the early years of the Canadian parole system, release and post-suspension were made on the basis of file review. The Senate Committee on Legal and Constitutional Affairs examined the parole system in Canada and released a comprehensive report in 1974.[6] Recommendation 36 reads:"Parole legislation should provide for the right to a hearing for inmates who have applied for discretionary parole."[7] The rationale for the recommendation was:

> The system must not only act fairly but must be seen to act fairly by the person directly affected. No parole decision should be taken without a hearing and no hearing should take place without the presence of the parole applicant.[8]

Paralleling its recommendation and rationale for parole hearings, the Senate Committee Report recommended in the post-suspension context that, in all cases where revocation is considered, except where a warrant of suspension has not been executed within 60 days, a hearing should be held before the decision to revoke is made.[9]

Before the *Charter of Rights and Freedoms* was enacted, the Supreme Court of Canada affirmed in *Martineau and Butters v. Matsqui Institution (No.2)*[10] that decisions affecting prisoners must respect the common law duty to act fairly. After the *Charter*, the courts have left no doubt that Parole Board procedures must conform to s. 7 of the *Charter*. [11] The only question remaining in early days under the *Charter* was the nature of the fairness obligation and the application of principles of fundamental justice to the parole context.

---

4 *R. v. Ipeelee*, 2012 SCC 13

5 *R. v. Gladue* [1999] 1 S.C.R. 688

6 Senate Committee on Legal and Consititutional Affairs, *Parole in Canada*, Hon. H. Carl Goldenberg, Q.C., Chair, March 1974

7 Ibid, p. 80

8 Ibid, pp 81-82.

9 Ibid, p. 111.

10 (1979) 50 CCC(2d) 353

11 More recently reaffirmed clearly in *Mooring v. National Parole Board* [1996] 1 S.C.R. 75.

In the parole context, with the vital liberty interests at stake, the necessity of an in-person hearing was quickly affirmed as a principle of fundamental justice. The courts arrived at the same conclusion for parole reviews as the 1974 Senate Standing Committee. Almost immediately after the *Charter, R. v. Cadeddu*[12] held that s.7 of the *Charter* gave a suspended prisoner the right to an in-person hearing when revocation was being determined. Other cases followed: in June 1982, the Federal Court held in *Couperthwaite v. National Parole Board*[13] that, for procedural fairness, a parole panel could not discuss a case outside the presence of the prisoner. *Dubeau and Morgan*[14] recognized the right of prisoners to be accompanied by an assistant. In *Re Mason and the Queen*[15], a revocation case, the Ontario High Court considered a section of the Parole Regulations which authorized an absentee third vote where the two Board members present split their votes. The Court found this practice violated the principles of fundamental justice in s.7 of the *Charter*, and ruled an inmate must be afforded an in-person hearing before each board member that considered the case. Finally, in *O'Brien v National Parole Board*[16], the Federal Court ruled that a hearing, which was not attended by all the Board members who would be voting in the case, violated fairness.

In 1986, *R v.Cadeddu* was cited with approval by the Supreme Court of Canada in *Reference Re section 94(2) of the Motor Vehicle Act* (B.C.)[17]

E. Conclusion

In our view, the proposed amendment will violate s. 7 of the *Charter*, namely, that "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." It has the potential to deprive an accused of a right to liberty through incarceration. Replacing the right to an in-person hearing in post-suspension situations with a statutory scheme of file review where an offender's liberty interest is at stake violates a fundamental principle of justice. This cannot be demonstrably justified as a reasonable limit on a constitutional right. The measure will not result in cost-savings; rather it will increase the number of persons incarcerated at great expense to Canadian society.

Yours truly,

(original signed by Tamra L. Thomson for Dan MacRury)

Dan MacRury, Q.C.
Chair, National Criminal Justice Section

---

12 (1982) 4 CCC (3d) 97.

13 No.T-2146-90 (September 18, 1990).

14 (1982) 65 CCC (2d) 216.

15 (1983) 7 CCC (3d) 141.

16 (1984) 2 FC 314

17 [1985] 2S.C.R. 486