THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

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Via email: ps.CRAconsultation-consultationLCJ.sp@canada.ca

Lyndon Murdock
Director, Corrections and Criminal Justice Division
Public Safety Canada
10th floor
269 Laurier Avenue West
Ottawa, ON K1A 0P8

Dear Mr. Murdock:

Re: *Criminal Records Act* Review Consultations

I am writing on behalf of the Canadian Bar Association's Criminal Justice Section and its Committee on Imprisonment and Release (the CBA Section) on the current review of the record suspension regime. The CBA is a national association representing over 36,000 jurists, including lawyers, notaries, law teachers and students across Canada. Among the Association's primary objectives is seeking improvement in the law and the administration of justice. The CBA Section represents experienced prosecutors and defence lawyers from across Canada, and the Committee on Imprisonment and Release consists of experts in sentencing and prison law.

CBA Section members frequently advise their clients on the implications of a criminal record in various areas of the law including criminal, family, business, employment, and immigration matters. In the past decade, there have been several reforms to the administrative process for pardoning offenders, which since 2013 have been known as 'record suspensions'.

General Comments

The CBA has called for reform of the pardons process to improve accessibility for offenders attempting rehabilitation and to avoid further conflict with the law.[1] Rehabilitation and reintegration have been the main objectives of modern Canadian penal policy for decades. Granting pardons once offenders have paid their debt to society is an essential part of that policy.

1 CBA Resolution 16-08-A.

At a minimum, the CBA Section believes **Canada should return the law to the state of pardon practice prior to the 2013 amendments. The term 'record suspension' should be abandoned, and the term 'pardon' reinstated.** That term was well understood and acknowledged the fact of the offender's rehabilitation, and we primarily rely on that term in this letter.

We support reinstituting and expanding the availability of pardons. "Far from being a 'privilege' bestowed upon the individual by a benevolent state, pardons were introduced as a necessary part of remedying the injustice caused by retaining criminal records forever."[2] Having a criminal record was considered part of the punishment when the *Criminal Records Act* was first introduced, so it makes sense to remove that record once an offender has served any sentence imposed.[3]

There is also a societal interest in granting pardons after offenders have paid their debt to society where those offenders have demonstrated they will not reoffend. Imposing unnecessary impediments to full reintegration into society can mean handicaps in obtaining employment, housing and other services. In contrast, granting a pardon can mean a fresh start to the offender and may provide an incentive to avoid returning to the stigma of having a criminal record.

Concerns are sometimes raised that former offenders, especially sexual offenders, may escape notice by the police because of a record suspension or pardon. We note that such offenders are generally subject to mandatory reporting requirements and must comply because failing to do so would be another offence. Any conviction for an offence of this nature would likely mean the denial of a pardon and its revocation if the offending occurred subsequent to the pardon being granted.

Procedural Considerations

Estimates suggest that at least one in ten Canadians has a criminal record.[4] **Section 4(2) of the *Criminal Records Act*** (specifically Schedule 1 to the Act) makes many people ineligible to apply for a pardon. This **should be repealed or amended.**

There has been a 421% increase in the application fee since 2013.[5] This creates (or at least has the potential to create) a permanent inability of the poorest members of society to obtain pardons. Yet they are the ones most likely to need them to obtain employment. If they have no chance of obtaining employment, they have no incentive to go back to school, upgrade skills, become better citizens, or pay more taxes in higher paying jobs. **The cost of applying for a pardon should be eliminated or significantly reduced** so no one is prevented from moving on simply because of poverty.

The wait periods prior to the 2013 amendments were three and five years. **The CBA Section supports returning to those shorter wait periods.** In addition, **Canadians should expect a predictable and reasonable response time to any application. Government departments that provide information required for the application** (like the Local Police Records Check Form and

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2 Factum of Peck and Company in *R. v. Chu*, 2016 BC Superior Court, File No. S-157746 Vancouver Registry, at 11.

3 *Ibid*., at 4-13.

4 *Ibid,* at 15. See also, https://nationalpardon.org/a-criminal-population-the-10-question/

5 www.thestar.com/opinion/commentary/2015/06/17/making-pardons-tougher-to-obtain-is-harsh-and-unfair.html

the Court Information Form) **must also be resourced to provide the necessary information promptly**.

Finally, **we support consideration of a process that would automatically grant a pardon, without application or fee, to offenders who have not been reconvicted after a certain number of years or where the conduct underlying the offense has become legal and is no longer a crime.** This could be tailored to apply only to certain specified offences or a category of specified offences, or as prescribed by regulation. Since 1974, the United Kingdom's *Rehabilitation of Offenders Act* has granted pardons without application or fee after a number of years of crime-free living for certain categories of offenders. A similar pardon process in Canada could simplify and expedite the pardon process, resulting in significant financial, societal and individual benefits. This regime could be suitable for people convicted of summary offences, recipients of suspended sentences, or persons convicted of minor crimes or crimes that are no longer illegal, which will soon include possession of marijuana, for example.

Criminal Record Checks

Sections 11(d), (h) and (i) of the *Charter* respectively provide that any person charged with an offence has the right:

- to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;
- if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again; and
- if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

These sections of the *Charter* come into play when considering the actual records kept by the police and other authorities pursuant to the *Criminal Records Act* and the prejudicial use that may be made of them without any conviction. **A 'criminal record' should be defined to limit it to a conviction for an offence under a federal criminal law statute. If records are to be kept for anything short of a conviction, then the Act should state a specific time until that non-conviction record is automatically expunged.** The Act currently provides for expungement of absolute and conditional discharges after a year in the case of the former and three from the end of the probationary period in the case of the latter. However, there is no provision for records about stays of proceedings or withdrawal of charges. Section 579(2) of the *Criminal Code* says that if proceedings are not recommenced within a year of a stay of proceedings, "the proceedings shall be deemed never to have been commenced", but it does not provide for any records to be expunged. In our experience, those records routinely appear as part of criminal records checks.

A person seeking to clear their name may not have been charged, but rather been the subject of numerous police contacts. A 'fingerprint' can be created from investigations, charges, withdrawals and other practices not resulting in convictions. The subject of **what, if any, non-conviction information should be disclosed by police is a matter deserving of further consideration by Parliament.**[6]

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6 See, Canadian Civil Liberties Association reports, including The *Presumption of Guilt? Disclosure of Non-Conviction Records in Police Background Checks* (Toronto: CCLA, 2012).

If records are to be kept of non-conviction information, and if those records are to be used against a person to prejudice them at a potential sentencing or for corrections or parole, the reasons for the stay, withdrawal or other disposition should at least be disclosed to the individual affected so that they can fairly respond.

Thank you for considering the CBA Section's views on this important issue.

Yours truly,

(original letter signed by Gaylene Schellenberg for Eric V. Gottardi)

Eric V. Gottardi
Past-Chair, CBA Criminal Justice Section