



December 7, 2009

Mr. Ed Fast, M.P.
Chair
Justice and Human Rights Committee
Sixth Floor, 131 Queen Street
House of Commons
Ottawa, ON K1A 0A6

Dear Mr. Fast,

Re: Bill C-52, *Criminal Code* amendments (sentencing for fraud)

The Canadian Bar Association National Criminal Justice Section (CBA Section) welcomes this opportunity to comment on Bill C-52, *Criminal Code* amendments (sentencing for fraud). The CBA 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. The CBA Section represents a balance of Crown counsel, defence lawyers and academics from every part of Canada.

Government communications about Bill C-52¹ suggest that it would offer a better legislative response to serious instances of “white collar crime”. In fact, Bill C-52 would treat all acts of, or attempts at fraud more harshly, even if the hallmarks of serious “white collar crime” are lacking. While fraud can certainly be a serious crime with devastating consequences for its victims, the offence encompasses a broad range of conduct and different degrees of moral blameworthiness. Bill C-52 would limit judicial discretion to address the individual circumstances of each case, and add another mandatory minimum penalty to the *Criminal Code*. We believe that the Bill would increase pressures on the already taxed criminal justice system, and not improve on what is already available in the *Criminal Code*. We recommend that the Bill not be passed into law.

General Comments

Based on our experience as both Crown and defence lawyers from all regions of Canada, we believe that legislative tools to address serious “white collar crime” are already in place. Judges routinely factor the amount of a fraud into their determination of an appropriate sentence. In circumstances where the fraud is clearly in excess of one million dollars, the punishment would undoubtedly be very severe.

¹ See *Background* to Bill C-52, released October 2009.

The Bill would circumscribe judicial discretion in sentencing for all fraud offences. The CBA has repeatedly expressed confidence in Canada's judiciary, and recognizes judges' critical role in the justice system, and indeed, Canada's democracy. We base this confidence primarily on daily observation of the admirable work judges do in courts across the country.

There are serious efforts underway to improve system efficiencies and the administration of justice, particularly in criminal courts.² Bill C-52 would move in the opposite direction through:

- (i) imprecise and overly broad language to trigger mandatory minimum two year sentences;
- (ii) potential confusion by re-stating existing sentencing principles within the substantive fraud provision of the *Code*, rather than alongside the *Code*'s other sentencing provisions;
- (iii) additional litigation given the possible indefinite duration and broad scope of proposed prohibition orders; and
- (iv) the ambiguous concept of "community impact statements" and potential disagreement as to what is a community and who may speak on its behalf.

Detailed Analysis

Clause 2

This clause would create a new mandatory minimum sentence of two years' imprisonment for fraud over one million dollars. The CBA Section has consistently opposed mandatory minimum sentences. We are not alone in this position:

A March 2005 report from criminologist Julian V. Roberts, *Mandatory Sentences of Imprisonment in Western Nations Representative Models*, found that very few countries have enacted mandatory sentences of imprisonment... And countries with some of the most severe laws for MMPs are beginning to repeal them. For example, about 25 U.S. states in the past few years have passed laws eliminating or reducing some of the lengthy MMPs, given the distortion, increased costs, and high rates of incarceration that have resulted from rigid sentencing schemes, such as California's "Three Strikes" laws. Furthermore, the American Bar Association released a 2004 report following lengthy study and recommended an end to MMPs. Other findings included MMPs not having any evident effect on crime rates, and declining public support for these penalties.³

The proposed mandatory minimum sentence would be triggered based on the "total value of the subject matter", an insufficiently precise term. Given the serious consequences (incarceration), we expect additional litigation on this point would be the result. A mechanism for assessing the "total value of the subject matter" is equally uncertain and we anticipate sentencing hearings could become a potentially detailed and painstaking analytical exercise to determine the precise value of different elements of the "subject matter" at issue. While we oppose passage of Bill C-52, if it does become law, it should require notice to the accused of the Crown's intention to

² For example, in 2002 the federal government initiated a Steering Committee on Justice Efficiencies, in which CBA and other non-governmental organizations work with federal, provincial and territorial government officials and judicial representatives to consider measures to alleviate pressures on the criminal justice system. Related to this group is the Criminal Justice Symposium organized by the Canadian Association of Chiefs of Police, now planning its second symposium for January 2010.

³ Cited in Justice Canada's *Background* to Bill C-41, in 2005.

seek the mandatory minimum as a result of the “total value of the subject matter” allegedly over one million dollars.

Section 380 would include fraud that involves both actual deprivation as well as the risk of deprivation. We stress that Bill C-52 would then mandate at least two years’ incarceration for an individual involved in a fraud even where there was no actual loss to a complainant. This is manifestly different and should be treated differently from a “Ponzi scheme” or other fraud where victims have actually lost their life savings.

Clause 3

The Bill proposes aggravating factors and “non-mitigating factors”, and requires the court to state on record which factors it took into account. This overlaps with the general principle that judges must provide reasons for their decisions. Though the factors listed are relevant and appropriate, the proposed changes merely restate factors routinely considered by judges, and those regularly cited by Crowns and defence counsel in dealing with Part XXIII of the *Code* in sentencing hearings. This duplication could encourage a misperception that the repeated factors are to be treated as “super” aggravating factors. At the very least, this overlap introduces new and unnecessary complexity within the *Code*.

Clause 4

(i) Prohibition Order

The changes proposed in section 380.2 would create a prohibition order barring an offender from working or volunteering in any capacity that involves having “authority over the real property, money or valuable security of another person”. Again, while we oppose passage of the Bill, if it does become law, we suggest that the prohibition order should be more carefully circumscribed.

As proposed, the prohibition order casts too wide a net, including even frauds of less than \$5,000 and findings of guilt that result in discharges rather than convictions. An order could be indefinite in duration, and it appears that any activities where the offender has any authority over anything of value belonging to another person are included. This could conceivably prohibit someone from working as a cashier at a convenience store or a coat check clerk at a charity event, if they would be handling the money of their employer or the employer’s clients. We are unaware of any other section of the *Code* that includes the concept of having authority over the real property, money or valuable security of another person. While an offender could apply to vary a prohibition order on the basis of changed circumstances, many offenders would lack resources to bring a variation application, and strained legal aid plans would be unlikely to provide that assistance.

Judges can already craft conditions within probation orders that would effectively prevent offenders from engaging in “high-risk financial activities” (see section 732.1(3) (h)). Probation orders can last for up to three years, after serving a period of imprisonment (see section 732.2(2)). Prohibitions on engaging in certain financial activities can also be found in securities legislation, and in sanctions imposed by professional associations.

(ii) Restitution orders

Section 380.3 in Bill C-52 would require courts to consider a restitution order under sections 738 or 739 of the *Code* any time they sentence or discharge an offender for any fraud, either over or under \$5,000. This is unnecessary, as judges already can and do order restitution when appropriate. The CBA Section supports restitution to victims of fraud if possible, and our experience is that the possibility of making restitution is always discussed between Crowns and defence lawyers and considered during judicial pre-trials.

Also from daily experience, we know that police officers routinely inform alleged victims of economic offences that the criminal justice system cannot be used as a collection agency. Section 380.3 would possibly require them to change this advice, as it could encourage inappropriate use of criminal courts instead of civil courts. This change would undoubtedly have a detrimental impact on the efficacy of the administration of criminal justice. It could also generate confusion about the role of prosecutors in the justice system, as they could be perceived as lawyers for the victims, as opposed to advocates for the public interest.

Section 380.3(5) would require reasons for deciding *not* to make a restitution order, effectively creating a presumption in favour of restitution. A judge who does not order restitution must explain that position. Again, where restitution is possible and appropriate, it is already considered and ordered by courts. Each case should continue to be judged on its own merits.

(iii) Community Impact Statements

Section 380.4 would introduce a new "community impact statement" that appears similar to a victim impact statement. However, "community" is not defined and may mean different things to different people. Who speaks for a community can be a complicated and controversial matter. Introducing these ambiguities to the *Criminal Code* would not improve justice efficiencies.

Finally, until recently, any short title given to legislative proposals used neutral terms describing the proposed amendments.⁴ This Bill's short title, "Retribution on Behalf of Victims of White Collar Crime Act" is neither short nor entirely accurate. The *Criminal Code* requires that the sentencing process advance several goals. Retribution is but one of those goals. Also, the proposed changes address fraud generally, not only "white collar crime". We recommend reverting to the previous practice of naming Bills concisely and in neutral language.

Bill C-52 would not add to the tools already in the *Criminal Code*. Instead, it would constrain the role of judges by introducing another mandatory minimum sentence of imprisonment, add to demands on the public purse and lead to more pressures on the criminal justice system. Given its lack of precision and scope, it could produce unjust, overly harsh results in some cases.

⁴ See, for example, "An Act in respect of criminal justice for young persons and to amend and repeal other Acts" (2002) which had the short title, "Youth Criminal Justice Act". In this session of Parliament, Bill C-8, "An Act respecting family homes situated on First Nation reserves and matrimonial interests or rights in or to structures and lands situated on those reserves" has the short title of "Family Homes on Reserves and Matrimonial Interests or Rights Act".

Thank you for considering the views of the CBA Section. We look forward to the opportunity of discussing them with you more fully.

Yours sincerely,

(Original signed by Gaylene Schellenberg for Josh Weinstein)

Josh Weinstein
Chair, National Criminal Justice Section