

March 3, 1999

Lorna Milne, M.P.  
Chair  
Senate Legal and Constitutional Affairs Committee  
Senate of Canada  
Ottawa ON K1A 0A4

Dear Ms. Milne,

I am writing on behalf of the National Criminal Justice Section of the Canadian Bar Association, with respect to Bill C-51. The Section comprises both Crown and defence counsel across Canada, and has a long history of participation in law reform.

The National Criminal Justice Section welcomes the efforts made in Bill C-51, an omnibus bill that makes important improvements to the *Criminal Code* and other related statutes. In particular, the Section supports the following provisions as necessary amendments that will assist in the administration of the criminal justice system in Canada:

- Likeness of Bank Notes (Clause 12)
- Endorsements (Clause 17)
- Sentence (Clause 26)
- Supreme Court of Canada Practice (Clause 28)
- Consecutive Sentences (Clause 31)
- Notification (Clause 40) and
- Reasons (Clause 50).

Despite our general support for Bill C-51, the Section has a number of concerns with respect to some of the specific legislative changes provided for in this draft legislation. These concerns are set out in a clause-by-clause review in this submission. The Section takes no position on clauses of Bill C-51 other than those noted in this submission.

### **Mailing Obscene Matter (Clause 2)**

Clause 2 of Bill C-51 amends section 168 of the *Criminal Code* by setting out certain exceptions to the offence of making use of the mails for the purpose of transmitting obscenity. The phrases "connection with any judicial proceedings" and "persons who are concerned in the proceedings" in proposed sub-paragraph 168(2) (a) are vague and potentially overly broad. In our view, this sub-

paragraph should specifically refer to counsel in criminal proceedings using the mails to distribute otherwise obscene material when it is for the purpose of disclosure.

#### **Wiretap (Clause 4)**

The National Criminal Justice Section has an ongoing concern over the potential overuse of unusually intrusive investigative techniques, such as wiretap. While the offences added to s.183 of the *Criminal Code* are not conceptually distinct from those already present in the *Code*, the Section has a continuing concern over the proliferation of offences for which authorizations to intercept private communications can be granted.

#### **Instalment/Removal of Interception Device (Clause 5)**

Clause 5 proposes to amend s.186 of the *Criminal Code* to clarify that an authorization for an interception device includes the authority to install, maintain or remove the device. This is a welcome addition to the *Criminal Code*. The National Criminal Justice Section recommends that the proposed s.186(5.2) should be amended to permit both 'overt' or 'covert' removal.

#### **Child Prostitution (Clause 8)**

The proposed amendments in Bill C-51 will make it easier to successfully prosecute offenders if they were told that a prostitute they approached was underage, and will allow police to use electronic surveillance when investigating prostitution-related cases.

The National Criminal Justice Section recognizes that stern measures may be called for in order to deter child prostitution. However, it is questionable whether communication for the purposes of obtaining sexual services of a child prostitute should constitute a '5 year' indictable offence. The Section is of the view that it is more appropriate to have this offence as a more aggravated form of soliciting under s.213(1) of the *Criminal Code*. This would make it a hybrid offence with '2 years' as the maximum when proceeded with by indictment.

#### **Fraud in Relation to Valuable Minerals (Clauses 10 and 25)**

Bill C-51 proposes to amend the *Criminal Code* to modernize the provisions dealing with fraud in relation to valuable minerals. The National Criminal Justice Section has serious concerns about the presumptions contained in sections 394.1(2) and 656 of the *Criminal Code* that create a reverse onus. These presumptions basically place rebuttal of proof of ownership and criminal intent in the hands of the defence. While the presumptions are not new to these provisions, the amended provisions continue to impose burdens on the defence which ought not to be there unless and until the Crown has met a certain threshold of proof. General principles of criminal liability suggest that the Crown should have to

adduce some evidence on each of these aspects before the defence is required to ensure that a reasonable doubt is otherwise created.

The National Criminal Justice Section recommends that clauses 10 and 25 should be amended to set out the Crown's responsibility to prove the elements of the offence in sections 394.1 and 656 of the *Criminal Code*.

### **Bail Hearings (Clause 22)**

As noted above, the National Criminal Justice Section is generally opposed to the use of 'reverse onus' clauses, which place an extraordinary and often unfair burden of the defence. We extend this opposition to the use of reverse onus provisions in the context of bail hearings. The reverse onus is not a new feature of s.515(6) of the *Criminal Code*. The accused must show cause as to why he should not be detained and this puts an onus on the defence, rather than on the Crown, to justify continued detention. The Section opposes the intended expansion of the number of offences to which this reverse onus will apply.

### **Transfer (Clause 33)**

The National Criminal Justice Section supports the amendments to the transfer provisions in s.733 of the *Criminal Code*. However, in our view, the provisions should ensure that consent is obtained from the Attorneys General of both of the jurisdictions involved in this form of transfer, rather than simply the consent of the Attorney General of the province in which the probation order was made.

### **Fines (Clause 34)**

The National Criminal Justice Section supports the uniform method of calculating fines set out in the proposed amendments to subsection 734(7) of the *Criminal Code*. Given that it is in the public interest to have a uniform method, it is unfortunate that provinces are provided with the opportunity to change it by proposed s.734(7).

### **Licenses (Clause 35)**

The National Criminal Justice Section supports the underlying thrust of this provision which is that fines paid to the Crown ought to be given priority amongst creditors. However, further consideration should be given to the breadth of the power provided by this proposed amendment to s.734.5. In fact, it may be self-defeating as currently drafted if the "licence, permit or other instrument" referred to in this provision is necessary for the offender to make his or her living. An exemption from the rigors of this provision may be advisable.

The National Criminal Justice Section recommends that the proposed s.734.5 be amended to provide for an exemption for a "licence, permit or other instrument" necessary for the offender to make his or her living.

### **Conditional Sentences (Clauses 42 and 43)**

The National Criminal Justice Section supports the amendments in clauses 42 and 43 that make available to the justice advised of an allegation of breach of a conditional sentence methods of compelling the accused's appearance, other than arrest. It is difficult to understand why any temporal restriction is required within which the accused ought to answer to the allegation of having breached the conditional sentence. In our view, the Attorney General will have an interest in bringing forward the matter as soon as possible and the accused's interests will not be at risk. While inserting the phrase "or as soon thereafter as is practicable" is helpful, we see no reason to include any temporal restriction. By eliminating the 30 day requirement in s.742.6(3), one can avoid the problems seen in case such as *R. v. Busenius* (1998), 215 A.R. 71 (Prov. Ct); *certiorari* denied (Alta Q.B.).

The Section supports the proposed s.742.6(15)(b) of the *Criminal Code*, which will benefit the accused by enhancing the time credit to be given to him or her where a breach allegation is withdrawn or dismissed. It is our recommendation, however, that the term 'withdrawn' be removed from this proposed section. Our concern is that in some circumstances Crown Counsel might be disposed to withdraw a breach allegation upon consultation with the accused's counsel or upon independent review of the circumstances, but may feel constrained to prosecute the breach if the accused receives this added credit with respect to the time served.

In addition, the term 'exceptional cases' in proposed s. 742.6(16) is vague and should be at least clarified by illustration.

To summarize, the National Criminal Justice Section recommends that clauses 42 and 43 be amended to:

- remove the reference to 30 days in s.742.6(3);
- amend s.742.6(15)(b) by removing the words "withdrawn or"; and
- clarify by illustration the term 'exceptional cases' in s.742.6(16).

### **Telemarketing Fraud (Clause 53)**

The Minister for Industry has introduced amendments to the *Competition Act* (Bill C-20) which create new offences relating to deceptive telemarketing. Clause 53 of Bill C-51 builds on this initiative by linking the new offences to the existing *Criminal Code* scheme for the seizure and forfeiture of crime proceeds.

The Competition Law and Media and Communications Law Section of the Canadian Bar Association have prepared a comprehensive submission on Bill C-20. In particular, the Sections noted the need for certainty in the definition of telemarketing and related provisions. Canadian business needs certainty and does not want to be in a position of potentially breaching a criminal

statute. The submission recommended that greater guidance as to the intended scope of these provisions be given to the courts through proposed amendments to Bill C-20.

The National Criminal Justice Section reiterates these concerns at this time. If the *Criminal Code* proceeds of crime scheme is to be used with respect to deceptive telemarketing, it is essential that the scope and definition of these new offences is clarified in Bill C-20.

We trust that these comments will be of benefit to the Legal and Constitutional Affairs Committee in its consideration of Bill C-51.

Yours very truly,

Isabel Schurman  
Chair, National Criminal Justice Section