THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

Criminal Justice Section
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Executive Summary

Bill C-75 *Criminal Code and Youth Criminal Justice Act amendments*

I. INTRODUCTION

The Canadian Bar Association Criminal Justice Section (CBA Section) appreciates the opportunity to comment on Bill C-75, amending the *Criminal Code, Youth Criminal Justice Act* and other Acts. Bill C-75 is omnibus legislation that represents the federal government's response to *R. v. Jordan*, the leading case on court delays. It includes reforms unrelated to court delays, including the abolition of peremptory challenges in jury selection, and changes to how cases involving domestic violence are handled and sentenced.

The complex problem of court delays requires a multi-faceted solution. Some of Bill C-75's proposals are commendable and will reduce delays without compromising the constitutional rights of the person on trial. Examples include creating a diversionary regime for certain administration of justice of offences and changing the bail process. These reforms are logical, consistent with existing case law and represent an empirically based response to court delays.

However, other proposals, including those to curtail preliminary inquiries and introduce "routine police evidence" by way of affidavit, would exacerbate, rather than alleviate, court delays, while simultaneously sacrificing important procedural protections. Introducing police evidence by affidavit, in particular, would be subject to serious scrutiny, increasing delays with additional *Charter* litigation and pre-trial applications. Similarly, nearly abolishing preliminary inquiries would eliminate a valuable tool both defence and prosecutors use to resolve and otherwise eliminate serious cases from the system.

This Executive Summary offers highlights from our comprehensive submission with a full analysis of Bill C-75. Reference to the full submission, including recommendations and references to source material, will give greater understanding of our views. In addition to the points above, we:

- encourage further study of peremptory challenges and caution against the current proposal to eliminate one of few tools Indigenous and racialized people on trial now have to ensure a representative jury
- support increased discretion by amending the victim fine surcharge regime, most of the proposed changes to the classification of offences, and changes to increase use of technology

- oppose the inclusion of a rebuttable presumption in human trafficking cases
- suggest changes to the (re)election system to promote greater efficiency in murder cases, and
- recognize the importance of redefining intimate partner violence, but oppose some of the proposed reforms to the bail and sentencing phases of these cases.

II. COURT DELAYS IN CONTEXT

In *Jordan*, the Supreme Court of Canada identified a "culture of complacency" in the criminal justice system and called for action. Public reaction was swift, and grew after a small number of murder cases were stayed following the ruling. Media, politicians and commentators weighed in, suggesting an array of reforms.

The CBA Section supports measures to streamline the criminal justice system, but expediency cannot supersede trial fairness and speed cannot supersede the truth-seeking function of the process. Reforms must respect constitutional and procedural protections that have proven their worth over decades, preventing wrongful convictions and promoting confidence in the administration of justice. Changes to the justice system should be evidence-based, rather than a response to an outcry from those unfamiliar with the system and the delicate balance of constitutional tenets it represents.

Currently, most cases do not run afoul of the *Jordan* ceilings: 99% of criminal cases are tried in provincial court and 94% of those cases completed within the *Jordan* timelines in 2015/2016. In other words, while court delays are an ongoing concern, the problem may not be as critical as reported.

Caution should be exercised in developing reforms based on the *Jordan* decision and its political fallout. Careful study should determine which aspects of the system require reform to mitigate delay, and where reform is possible, whether the price of expediency is worth any cost to trial fairness and other important values. A balancing of interests is required to ensure that useful tools are not tossed aside in the rush for speedier trials.

III. JUDICIAL INTERIM RELEASE

Many amendments to the bail regime in Bill C-75 would lead to more expedient hearings and remain consistent with existing case law and constitutional concerns, including the presumption of innocence and the right to reasonable bail under section 11(e) of the *Charter*. Many would also address the increasing rate of pre-trial incarceration, a troubling trend that has been statistically confirmed.

Sections 493.1 and 515(2.01) of Bill C-75 would codify the "restraint" and "ladder" principles, recently reaffirmed in *R. v. Antic*. They direct the officer, justice or judge to give "primary consideration" to release of the detainee at the "earliest reasonable opportunity" and "on the least onerous conditions" appropriate in the circumstances, and require that conditions imposed must be "reasonably practicable for the accused to comply with." This clarifies that pre-trial detention should be the clear exception, not the rule.

Similarly, section 493.2 would require consideration of the overrepresentation of Indigenous people, and other "vulnerable populations" overrepresented and disadvantaged in the criminal justice system. Like section 718.2(e), this should help to reduce the incarceration of people traditionally marginalized by the system.

Sections 515(2.02) and 515(2.03) would discourage the use of cash deposits and sureties. The overreliance on surety bail has been criticized as undermining the presumption of innocence and the

right to reasonable bail. It has also led to unnecessary delays, as judges often require *viva voce* evidence from proposed sureties and others. These practices have been particularly unfair to those unable to identify anyone as a suitable surety. The amendments should help to address these issues.

Other amendments in Bill C-75 would encourage a more streamlined bail process, including sections that clarify the ability to vary release orders by consent (sections 502 and 519.1), standardize the evidence of proposed sureties (section 515.1), and institute a diversionary regime for failure to comply allegations (sections 495.1, 496 and 523.1). Expanding police powers to release a person upon arrest should also reduce bail hearings (sections 498, 501, 503).

However, Crown counsel may increasingly choose to delay laying charges to prepare disclosure or further investigate allegation(s), and so avoid engaging the *Jordan* timelines. This could mean people spend more time on police-imposed conditions between arrest and charge approval. Improved training for officers about police undertakings and avoiding excessive conditions may help. Regulating the number of conditions imposed could also reduce bail variation hearings as the file progresses.

Better training is particularly important because police tend to impose more and stricter conditions than justices or judges, a practice that Bill C-75 and the *Antic* decision clearly discourage. A recent study showed that this *diminishes* the likelihood of compliance, even though people released by the police are generally less violent and have better records than those ultimately released by a judge.

IV. FAILURE TO COMPLY

Administration of justice offences consume a disproportionate amount of court time. Between 1998 and 2013, the percentage of people whose *most serious* offence was an administration of justice charge more than doubled. Bill C-75 would introduce a diversionary regime for offences involving certain failures to comply with court orders (i.e. breaches of bail and failures to appear) where the breach did not cause property damage, economic loss or physical or emotional harm to a victim. We support this proposal and the intent behind it. It would address delay by removing some administration of justice prosecutions from the court docket, particularly where the police are responsible for charge approval decisions. Crown counsel would have the option to eliminate these cases in appropriate circumstances, relieving pressure on the system as a whole.

We suggest clarifying section 523.1(3) if it is retained in its current form. As worded, the regime can only be used if the failure to comply "did not cause a victim physical or emotional harm, property damage or economic loss" (section 523.1(3)) but it is unclear if the disqualification would apply if the failure to comply caused *any* property damage or economic loss, or whether the property damage or economic loss must be related to a victim.

People on bail would be disqualified when their failure to comply caused a victim "emotional harm", but this term is vague and unfamiliar to the criminal law outside the victim impact statement regime. It is also subjective to the victim's state of mind, raising concerns about consistent application. This disqualifier also seems to work against the goal of reducing low-level administration of justice offences in the system, as it could often capture cases that should be diverted. There is no criminal offence of causing emotional harm, and the Bill should not unnecessarily interfere with the Crown's discretion to use this diversionary regime when appropriate.

For the same reasons, we recommend removing the "economic loss" and "property damage" disqualifiers. They limit Crown discretion to use the diversionary regime where appropriate, despite economic loss or property damage. The Crown always retains the power to charge

individuals separately with breach of bail, theft, mischief or other offences if the economic loss or property damage is significant.

This amendment would require the exercise of Crown discretion to be effective. The CBA Section recommends that federal Crown policy manuals should encourage judicial referral hearings to ensure the purpose of the regime is observed, and the Section encourages provincial and territorial counterparts to follow suit. Otherwise, individual prosecutors may not be aware of the broader policy goals at play (i.e. reducing court delays and diverting low-level bail breaches).

V. ROUTINE POLICE EVIDENCE

The CBA Section opposes section 657.01 of Bill C-75. Unlike other aspects of the Bill, it is inconsistent with existing case law, appears unconnected to any empirical study, and would likely exacerbate problems of delay. The section would also be vulnerable to challenges under sections 7 and 11(d) of the *Charter*.

This proposal would permit introduction of "routine police evidence" by way of affidavit or solemn declaration, broadly defined in section 657.01(7). The definition of police officer is also broad and includes any "officer, constable or other person employed for the preservation and maintenance of the public peace." In determining whether to permit a party to enter "routine police evidence" by way of affidavit, *and/or* whether to permit cross-examination of the witness, the court is to take into account the "interests of justice", including the factors in section 657.01(2).

In practice, section 657.01 would allow the Crown to call virtually any aspect of a police officer's evidence by affidavit. The person on trial would then have to give notice of intent to object to the procedure and/or request the attendance of the witness for cross-examination. Presumably, the accused would then be required to justify calling the witness. The factors in section 657.01(2) make it likely that the defence would be forced to expose its strategy before calling the witness. If the person on trial cannot persuade the court, no cross-examination would be permitted.

Cross-examination is vital to the search for truth, and the right to cross-examine is constitutionally recognized. Section 657.01 directly infringes this right by allowing evidence to be admitted without cross-examination. We are unaware of any study indicating that calling routine police evidence is causing delays or otherwise requires reform. Section 657.01 would encourage further litigation (applications to call routine evidence by way of affidavit, to oppose the procedure or to have the evidence by *viva voce* testimony; to challenge the section as constitutionally invalid, etc.). Indeed, it could take more court time to deal with these applications than if the 'routine' evidence was simply called in the first place.

Other practical problems are likely because of section 657.01. If the accuracy of the affidavit was in dispute, would the lawyer who drafted it (likely the prosecutor) then be subject to a subpoena? If the person on trial testifies and contradicts what is in the police affidavit, is that a violation of the *Browne v. Dunn* rule? Would the Crown be able to call the police witness in rebuttal, despite have chosen to rely on section 657.01? How would a trier of fact weigh the evidence of a police affidavit if it conflicts with *viva voce* evidence called by the defence? How will juries treat a police affidavit? These unresolved questions will only lead to further delays and litigation.

VI. PRELIMINARY INQUIRIES

Bill C-75 would restrict preliminary inquiries to offences with a maximum sentence of life imprisonment. This would not reduce court delays and would negatively impact the criminal justice system as a whole. As lawyers who practice in Canada's criminal courts every day, we know the practical value of preliminary inquiries to the criminal justice system. We have shared this experience with the Justice Minister recently, in March and again in April 2017.

Any connection between court delays and the preliminary hearing is speculative at best. Recent research shows, among other things, that only 25% of eligible cases actually opt for a preliminary inquiry, the proportion of cases with a preliminary inquiry does not exceed 5% of the overall caseload in any part of Canada, at most 2% of all court appearances are used for preliminary inquiries, and the vast majority of preliminary inquiries take two days or less.

Unnecessary preliminary inquiries have already been significantly curtailed. Tools are available if it appears that a preliminary inquiry would cause unjust delay. The Crown can directly indict the matter or proceed based on witness statements and other documents (section 540), parties can be required to focus the hearing to relevant issues (sections 536.3–536.5) and the judge can immediately end cross-examination if abusive, repetitive or otherwise inappropriate (section 537(1.1.)).

Restricting preliminary inquiries to offences punishable by life imprisonment is arbitrary, and the rationale for that distinction is not clear. Offences punishable by life imprisonment with no minimum sentence often do not mean serious jeopardy or lengthy incarceration. Someone who passes along a few grams of cocaine, or robs someone of their smartphone would be entitled to a preliminary hearing under Bill C-75, but someone charged with an offence carrying a mandatory minimum sentence (e.g. trafficking in firearms) would not . Many offences carry significant mandatory minimum sentences and other serious collateral consequences, without life imprisonment as the maximum penalty. Other serious offences for which preliminary inquiries would be unavailable include aggravated assault, some terrorism-related offences and criminal organization-related offences.

Preliminary inquiries can mitigate court delays, and eliminating them for most cases would only add delay. They offer an opportunity to examine witnesses and streamline applications to be heard in the trial. Counsel hear crucial witnesses testifying and being cross-examined, often leading to a time-saving resolution, either because prosecutors realize weaknesses in their case, or defence counsel encourage timely guilty pleas after assessing the strength of the Crown's case.

While we oppose Bill C-75's proposal to curtail preliminary inquiries, if amendments are made to further limit their availability, we suggest the following alternative. In addition to offences punishable by imprisonment for life, preliminary inquiries should also be available:

a) when both parties consent; or

b) when the court is satisfied that it is in the interests of justice to hold a preliminary inquiry, having regard to the following factors, with no one factor being determinative:

   i. the nature and seriousness of the charge(s), including the potential sentence arising from a conviction;

   ii. the age and vulnerability of any witnesses providing evidence at a preliminary inquiry;

   iii. the issues to be decided at the preliminary inquiry, including whether or not committal is in issue;

iv. the length and complexity of the case;

v. the length of the preliminary hearing proposed and whether or not a preliminary inquiry would cause undue delay;

vi. whether or not alternative mechanisms for receiving the evidence are available (for example, through use of a discovery hearing).

VII. (RE)ELECTIONS

Bill C-75 proposes changes to the (re)election procedures in the *Criminal Code*, many related to limiting the preliminary inquiry. The CBA Section encourages amending sections 473 and 561 to allow for more judge-alone trials without consent of the Crown. Currently, to have a judge-alone trial involving a charge of murder, for example, the person on trial must obtain the consent of the Attorney General under section 473 of the *Criminal Code*. This is one of few exceptions to the right to elect (or re-elect as the case may be) the mode of trial when a person faces charges with the risk of five years or more in prison (section 11(f) of the *Charter*.) Crown consent is exercised differently across Canada, creating an uneven playing field for people depending on where they are charged. More importantly, a refusal to proceed with a judge-alone trial creates significant delays in these serious cases.

In 2015/2016, it took an *average* of 471 days to complete a murder case, a 16% increase in time to trial over the previous year, even though 38% fewer murder cases were heard in 2015/2016. Despite these trends, in British Columbia where Crown consent for judge-alone trials seems to be more common, the median time from first appearance to conclusion in Superior Court was less than 300 days, one of the lowest rates in the country.

These statistics should carry weight when determining public policy. Any measure to streamline the process in superior courts should be considered, particularly *where it does not compromise the rights of the accused*. Reforming sections 473 and 561 may actually be consistent with the person on trial's "right" to waive a jury trial under section 11(f) of the *Charter*. In sum, reforming sections 473 and 561 would mean greater uniformity in the way murder cases are dealt with across the country, and improve efficiency in prosecuting these serious matters.

VIII. VIDEO CONFERENCING AND TECHNOLOGY

Bill C-75 would increase the use of technology to facilitate remote attendance by participants. We offer two suggestions on the new Part XXII.01. First, the "reasons" requirement under sections 715.23(2), 715.25(3) and 715.26(2) should be removed. These sections would reverse the presumption of personal appearance (section 715.21), suggesting that remote attendance should be the norm unless the judge or justice decides otherwise and records a statement of reasons to that effect. At worst this contradicts the general principle articulated in section 715.21, and at best, is confusing.

Second, the new Part should generally apply only to non-contentious hearings. As drafted, it does not distinguish between which appearances or parts of the proceeding would be prioritized for remote attendance. Remote appearances – and Part XXII.01 – should be favoured for non-contentious matters such as hearings that are *pro forma*, or deal with case management, arraignment, or the restitution of goods seized. These hearings are usually procedural and do not require the person on trial, judge or justice's physical presence. For more contentious hearings, the judge should assess all the circumstances to decide if certain witnesses can testify by videoconference, but the general principle should remain that the judge is present and the person on trial has the right to be present.

IX. PEREMPTORY CHALLENGES

Bill C-75 would change the jury selection process significantly, by abolishing peremptory challenges, altering the challenge for cause process, allowing judges to stand aside potential jurors to "maintain public confidence in the administration of justice" and allowing trials to continue by judge alone, with the consent of the parties, where the number of jurors is reduced below ten.

The change proposed to peremptory challenges seems to be a response to *R. v. Stanley*, where Gerald Stanley, a white male, was acquitted of the second degree murder of an Indigenous man, Colton Boushie. It was widely reported that Mr. Stanley used the peremptory challenge process to secure an "all-white" jury. Two ideas were frequently expressed: Mr. Stanley should have been convicted; and a more ethnically diverse jury would have convicted him. While we share the concern that peremptory challenges may be misused to racially discriminate against Indigenous people, our experience is that they are more frequently used to the benefit of Indigenous and other racialized persons. Those populations are disproportionately drawn into the criminal justice system, and often use this same process precisely to avoid an "all-white" jury.

Bill C-75 would also alter the challenge for cause process, which gives both the Crown and the person on trial the opportunity to have a prospective juror excused for a pre-existing bias that could affect their ability to render a just verdict. A judge may order a challenge for cause when there is a realistic potential for partiality based on a finding of widespread racial bias in the community where the offence took place. The judge asks predetermined questions to prospective jurors to determine whether a bias exists for each person. Currently, members of the jury panel ultimately determine whether a prospective juror is qualified to serve. Bill C-75 would redirect the decision-making process from the jury panel to the trial judge. As the judiciary in Canada tends to be relatively affluent and disproportionately white, the proposal could make it less likely that the challenge for cause would be decided by a racialized person or someone with limited financial means.

Apart from existing challenge for cause procedures, the presiding judge may direct a prospective juror to be stood aside "for reasons of personal hardship or any other reasonable cause". Bill C-75 would expand this to include standing aside a juror to "maintain public confidence in the administration of justice". This language is broad and vague, with no provision for the Crown or person on trial to ask questions or make submissions and no guidance to trial judges in making this determination. Judges would not be required to state why maintaining public confidence would be compromised by standing aside a particular juror so the proposal effectively invites judges to conduct their own peremptory challenge process. The goal may be to expand judges' powers to excuse jurors, for example, to ensure a jury is more diverse, but that should be clearly stated. At a minimum, we suggest judges should give reasons for standing aside a particular juror to ensure transparency in the process.

Bill C-75 was introduced less than two months after the *Stanley* verdict. Some amendments to the jury process, including abolishing peremptory challenges, seem insufficiently considered. If legislative reform is required, it should be based on empirical data generated through a thorough examination of the jury system. The CBA Section recommends that the government undertake further study before making any major legislative amendments to the jury process.

X. RECLASSIFICATION OF OFFENCES

Bill C-75 would convert certain "straight indictable" offences into hybrid offences, increase the limitation period for laying summary charges to twelve months and increase the maximum penalty for most summary conviction offences to two years less a day under section 787 of the *Criminal Code*.

The CBA Section supports the hybridization of offences and the increased limitation period for summary conviction charges to afford Crown counsel greater discretion in how to proceed with less serious prosecutions. However, these amendments would likely mean more cases will be heard in provincial court. This could result in further delays in those courts, unless more resources are allocated.

The CBA Section generally supports standardizing the maximum sentence for summary conviction offences but identifies two potential consequences from increasing the maximum sentence to two years less a day.

First, the increase could have an adverse impact on access to justice. Currently, under section 802.1 of the *Criminal Code*, agents may not appear to examine or cross-examine witnesses where the person on trial is liable to a term of imprisonment of *more than six months* (unless authorized by a provincial program approved by the lieutenant governor in council). In practice, this means that any agent, including students doing *pro bono* work with legal clinics, cannot represent people charged with summary conviction offences that carry a maximum sentence of more than six months. These so-called "super summary offences" typically carry a maximum term of 18 months imprisonment (e.g. breach of probation under section 733.1). Bill C-75 would hinder many people from getting help from law school clinics and other organizations that offer *pro bono* legal services, as the new maximum sentence would exceed the limit imposed by section 802.1. This could be remedied by amending that section to reflect the new maximum term for summary offences.

Second, increasing the maximum term of imprisonment for summary convictions may create an "inflationary ceiling" on sentences. With a sudden significant increase in the possible sentence for less serious offences – for example, from six months to two years less a day for assault – we see a real risk that sentences will begin to "inflate" over time. To ensure that the intent of standardizing the maximum sentence for summary offences is clearly communicated to the courts, the CBA Section recommends a "for greater certainty" clause be added to section 787. This would clarify that the increase in the maximum sentence for summary conviction offences does not reflect Parliament's intent to treat these offences more punitively.

XI. INTIMATE PARTNER VIOLENCE

Bill C-75 would add a definition of "intimate partner" to section 2 of the *Criminal Code*, reverse the onus on bail in certain domestic violence cases, and create an escalating sentencing regime for domestic violence offences. We support expanding the definition of intimate partner to include former spouses.

The Bill also proposes including the vague term "dating partner" in the definition of "intimate partner". Unlike spouse or common-law partner, it lacks a legal definition and does not necessarily imply an intimate partner (though the French "partenaire amoureux" does imply an intimate relationship). In any event, it is unclear whether without intimate relations, the definition would apply, or how many intimate encounters would lead to someone being a "dating partner".

An offence committed against a common-law or married partner is currently considered aggravating in that it represents a breach of trust. Not all dating arrangements involve a relationship of trust, particularly those short or sporadic in nature. Given the significant bail and sentencing changes proposed in the Bill for intimate partner violence, the term should be limited to the intended individuals (i.e. victims who by virtue of their relationship to the person on trial were in a vulnerable position at the time of the offence). In addition, including "dating partner" in the definition is likely to cause delays at the bail, trial and sentencing stages of the process, while these issues are litigated and clarified. It also likely means inconsistent application until appellate courts define the term. For these reasons, we recommend omitting "dating partner" from the definition of "intimate partner".

Bill C-75 proposes that, in determining whether release should be ordered, two specific factors should be considered by the judge: whether the person on trial is charged with an offence in the commission of which violence was used, threatened or attempted against their intimate partner; and whether that person has been previously convicted of a criminal offence.

These factors are rationally connected to the secondary ground in section 515(10), and we support their inclusion. However, despite the criminal charge and its aggravating nature for the purposes of bail, intimate partners may still need to have contact as the criminal matter is addressed (for example, there may be children in common or they may need to discuss financial issues). Judges must fashion a release that can recognize these situations while ensuring the safety of the complainant.

Similarly, a criminal record is rationally connected to determining whether the person on trial will commit further offences if released. Even those who have been convicted of multiple offences in the past are presumed innocent. A criminal record, especially for an offence related to the current charge, is probative for the secondary ground issue. This is reflected in the current practice of adducing a criminal record in the course of a bail hearing.

Bill C-75 also proposes that where a person on trial has been found guilty of a domestic violence matter, a reverse onus will apply when seeking release from custody for a subsequent charge. This reverse onus is unnecessary from a practical perspective. The amended section 515(3) already requires a justice to specifically consider the exact same factors. Further, the reverse onus bail provisions in this context would likely attract constitutional scrutiny.

A new reverse onus provision runs contrary to other amendments to encourage release of those presumed innocent of crimes, particularly those historically disadvantaged, in obtaining release. Given the great increase in the number of people detained pre-trial, we generally oppose a reverse onus, at least in part because of its likely disproportionate effect on Indigenous and otherwise vulnerable people.

Bill C-75 would change sections 267 and 272 to deem any choking during an assault or sexual assault to constitute a separate offence, whether or not any actual bodily harm was established by the evidence. Choking is already a form of assault under section 266, and where bodily harm is caused, it can be prosecuted under sections 267 and 272. If choking is used to facilitate an offence, it can be specifically highlighted through a prosecution under section 246 (the offence of overcoming resistance by choking). Choking is already considered an aggravating factor on sentencing and will figure prominently in any determination of whether an offence has been made out where choking is alleged. A separate offence, presumably to be treated like assault causing bodily harm, would add little to the existing framework. At a time of legitimate efforts to simplify the *Criminal Code*, these amendments seem particularly unnecessary.

Currently section 718.2(a)(ii) only deems an assault of a current spouse or common law partner as an aggravating feature on sentence. We support extending this to former spouses, recognizing that the same dynamic can exist after a relationship ends. However, we do not support extending the factors in section 718.2(a)(ii) to “dating partners”.

Bill C-75 would also amend section 718.3 to create escalating sentences for offenders convicted of more than one domestic violence offence (what some have termed “supermax” penalties). The CBA Section does not support this amendment, as whether a person has a criminal record for domestic violence is already an aggravating factor in sentencing. It is also an aggravating factor that a person committed the offence in the context of a domestic relationship.

XII. VICTIM FINE SURCHARGE

Money collected through sentencing for *Criminal Code* and *Controlled Drug and Substance Act* offences can support programs to assist victims of crime by, for example, offering counseling services or aiding in understanding the justice system and court process. Bill C-37amendments in 2013 doubled the victim fine surcharge and removed judges' discretion to exempt offenders from the surcharge where it would impose hardship. Since then, victim fine surcharges *cannot* be waived at sentencing even if a fine would cause undue hardship to the offender or the offender's dependents. Failing to pay the surcharge can result in penalties such as licence suspension and inability to obtain a pardon.

This change resulted not only in serious hardship for many offenders and their families but also some unusual results. Some judges have imposed nominal fines on top of other penalties (for example a one dollar fine so the victim fine surcharge was, at 30% of the fine, 30 cents) or granted extended periods to pay the fine imposed. Bill C-75 would reinstate judicial discretion: where it would cause undue hardship, a judge may exempt the offender from paying the surcharge. In our view, reinstating judicial discretion to waive victim fine surcharges would allow judges to ensure a just result and avoid the unfair impact that the current law has on poor and marginalized people who come before the courts.

The proposed amendments would also require imposing the victim fine surcharge for each offence, except "for certain administration of justice offences if the total amount of surcharges imposed on an offender for these types of offences would be disproportionate in the circumstances" (proposed section 737 (1.1)). If the total amount of surcharges imposed is disproportionate to the offender's ability to pay, exemptions should be available without regard to the nature of the offence.

Finally, we note that some regions have programs to allow offenders to work off fines. This option should be more uniformly available in all regions.

XIII. CONCLUSION

The CBA Section appreciates the opportunity to comment on Bill C-75, and recommends review of our full submission on Bill C-75 for additional explanation of our positions. While we support aspects of this omnibus criminal justice legislation, we believe that other parts of the Bill are likely to be found unconstitutional and lack an evidentiary foundation. They could contribute to, rather than alleviate, court delays.

More work should be done to ensure the criminal justice system remains efficient and fair to all participants. We note the conspicuous absence of meaningful reform to Canada's sentencing laws, particularly as they relate to mandatory minimum penalties and the availability of conditional sentence orders. Any worthwhile discussion of reducing court delays should include these important topics, given their significant impact on the effectiveness of the criminal justice system.

Summary of Recommendations:

1) **The CBA Section recommends clarifying the language of section 523.1(3) to ensure that breaches unrelated to the victim are not disqualified from proceeding to a judicial referral hearing.**

2) **The CBA Section recommends that Crown counsel policy manuals be amended to encourage the use of judicial referral hearings under section 523.1.**

3) **The CBA Section recommends amending section 523.1(3) to remove the disqualification due to "emotional harm," "economic loss," and "property damage".**

4) **The CBA Section recommends that section 657.01 and all amendments related to it be omitted from Bill C-75.**

5) **The CBA Section recommends that eligibility for preliminary inquiries remain unchanged. In the alternative, if amended, preliminary inquiries should remain available where the parties consent, where a preliminary inquiry would be in the interests of justice having regard to a series of factors, and/or where the maximum penalty is life imprisonment.**

6) **The CBA Section recommends that sections 473 and 571 be amended to allow the person on trial to elect (or re-elect) to have a judge-alone trial in murder cases without the consent of the Attorney General.**

7) **The CBA Section recommends that sections 715.23(2), 715.25(3) and 715.26(2) be amended to delete the requirement for reasons when denying an application for electronic appearances.**

8) **The CBA Section recommends that Part XXII.01 be limited to non-contentious hearings.**

9) **The CBA Section recommends that the *Criminal Code* be amended to allow counsel to appear by way of email (or a "telecommunication that produces writing") for non-contentious hearings.**

10) **The CBA Section recommends that there be further study of how best to improve Canada's jury system before any major legislative amendments in this area.**

11) **The CBA Section recommends that section 802.1 be amended to reflect the new maximum sentence for summary conviction offences.**

12) **The CBA Section recommends the enactment of a "for greater certainty" clause to ensure that the standardization of summary sentences does not create an "increased ceiling" effect.**

13) The CBA Section recommends that the term "intimate partner" should not include "dating partner" or "partenaire amoureux".

14) The CBA Section recommends that the proposed reverse onus in section 515(6)(b.1) be deleted from Bill C-75.

15) The CBA Section recommends that clauses 95, 99 and 297 ("choking" and "supermax" penalties) be deleted from Bill C-75.

16) The CBA Section recommends that clause 389 (enacting of the rebuttable presumption in human trafficking cases) be deleted from Bill C-75.

17) The CBA Section recommends amending the YCJA to better ensure that youth records are not disclosed after their access periods have expired.