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ASSOCIATION CANADIENNE DES JURISTES DE L'ÉTAT

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CANADIAN ASSOCIATION OF CROWN COUNSEL COMMENT: Bill C-10

The CACC is comprised of organizations of Crown prosecutors, civil lawyers and notaries employed by the Crown in the federal government and each of the Provinces. These member organizations represent the front-line prosecutors and civil government lawyers in each province and within the Federal Prosecutions Service and Department of Justice. The CACC represents the interests of prosecutors to their respective ministries of justice and to the justice system at large. As such we are happy to have been given the opportunity to address this Committee on the amendments to the Criminal Code proposed in Bill C-10.

When the CACC makes comment on a proposed piece of legislation it does so from an apolitical, non-partisan perspective. As befits the quasi-judicial role of crown attorneys in the criminal justice system, we do not comment on whether a particular proposed change to the law reflects good or bad policy, but strive to provide input on the likely systemic impact of the proposed change "on the ground" from the perspective of a front-line prosecutor. We are strongly of the view that this perspective is critical to your work in making effective criminal law.

In preparation for these submissions, each provincial and federal crown attorneys association was canvassed regarding their views on the likely impact of the proposed changes to the Criminal Code contained in Bill C-10. As you know, if implemented, Bill C-10 will amend many, separate pieces of Federal legislation. Due to time constraints, we have chosen to comment only on the legislation which most directly impacts on our front-line work: the *Criminal Code*, the *Controlled Drugs and Substances Act* and the *Youth Criminal Justice Act*.

Criminal Code Amendments

When implemented, Bill C-10 will:

- **Increase certain existing mandatory minimum sentences**
- **Create entirely new mandatory minimum sentences for certain offences**
- **Create new offences and expand certain prohibition orders**
- **Restrict the availability of conditional sentences**

We expect that these changes will increase the overall workload of participants in the criminal justice system by increasing the trial rate. Absent significant, tangible new resources to support this new workload, these changes will exacerbate an already dangerous situation of work overload.

Impact of Criminal Code Amendments on the Trial Rate

The criminal justice infrastructure across Canada, particularly but not limited to its most populous communities and the Canadian north regions, is critically over-burdened with criminal cases. Indeed, it is common practice in these jurisdictions to prioritize cases for the limited capacity in the justice system available for criminal trials – and to triage the rest out of the system by way of diversion programs, plea bargaining and withdrawal of charges. As it is currently resourced, the criminal justice system cannot fully and consistently carry into effect many of our criminal laws.

Bill C-10 will increase the work load on this overburdened justice system, without tangible new resources necessary to operationalize these new laws.

By increasing existing mandatory minimums, creating new mandatory minimum sentences, creating new criminal offences and further restricting those offences which are eligible for conditional sentences we predict that many charges that

would have been diverted out of the court system by a guilty plea will instead go to trial, thus increasing the burden on those in the court system: judges, court workers, defence counsel and Crown prosecutors. And, because of the restrictions on sentences, more accused will receive jail sentences, thus increasing the demands on the corrections systems.

Proposed Changes to the CDSA

The CACC gave evidence on Bill C-15, as it then was, before the Senate Constitutional and Legal Affairs Committee in September of 2009. Set out below is a summary of the systemic impact of the amendments to the *CDSA* now proposed in Bill C-10.

The Frequency and Length of Bail Hearings

Bill C-10 would likely increase the frequency and duration of judicial interim release (bail) hearings for accused facing the charges for which Bill C-10 would create a reverse onus.

Increased Trial Rate

The proposed amendments would create new minimum jail terms for persons charged under the CDSA for various trafficking, importing and exporting and producing charges. All jurisdictions are of the view that these mandatory minimum sentences will reduce guilty pleas and increase the rate at which matters go to trial on the charges affected.

Additionally, we anticipate that there will be more work for our trial prosecutors and civil counsel as the new provisions are challenged constitutionally.

These proposed changes, as with the other recent Criminal Code amendments which have enshrined new offences, new mandatory minimum sentences and new procedures for dangerous offender designations, will lead to a significantly increased trial rate and fewer guilty pleas.

Unlike many of the other amendments proposed in Bill C-10, the Federal government has direct responsibility and control over prosecutions under the CDSA. In order for these laws to be carried into effect, the Federal government must add tangible resources to the criminal justice system in the form of prosecutors, legal aid, judges, court staff, probation/parole offices and corrections.

Proposed Changes to the Youth Criminal Justice Act

Youth Courts created by the YCJA have traditionally had a lower trial rate than adult courts. The proposed changes to the YCJA will have a significant impact on the trial rate and workload of these youth courts.

Altering Pre-trial Detention Provisions

Currently, s. 39 (1) of the YCJA creates a presumption against detention unless the young person could be committed to custody upon conviction. This requires a consideration of sentencing at the bail hearing and has been the subject of much controversy.

Bill C-10 provides some clarity regarding grounds for detention in its amendments to s. 29(2) (3) of the YCJA. Primary grounds in addition to secondary grounds will be directly applicable to the bail hearing. Detention will be primarily preserved for young persons charged with "serious offences". Detention will not be possible for charges other than those enumerated as "serious" unless there is a history of either outstanding charges or findings of guilt. Tertiary ground

detention requires existing charges involving a "serious offence" and "exceptional circumstances" that require the detention of the young person.

The onus of proving that detention is necessary is always borne by the Crown. While it is difficult to predict, we anticipate that this will result in more bail hearings under this new regime.

Strengthening Youth Sentencing Provisions

Under the YCJA custodial sentences may only be given where certain pre-conditions are met, such as being found guilty of a "violent offence". Bill C-10 would expand "violent offence" to include "an offence in the commission of which a young person endangers the life or safety of another person by creating a substantial likelihood of bodily harm". The potential vagueness of this apparently objective standard may attract constitutional challenge.

Custody may also be considered under the proposed amendments where the young person has been convicted of an offence for which an adult could receive a sentence of more than two years and there is a criminal history with a pattern of findings of guilt – which may now include extrajudicial sanctions (diversion programmes that, once completed, result in charges being withdrawn).

These amendments will increase the number of cases in which custody is a possible outcome and this risk will increase the trial rate in youth cases.

Restrictions of Publication of Young Offenders' Identities

The proposed amendments would permit publication of the names of young persons convicted of violent crimes in limited circumstances which would be determined by a hearing. These hearings will increase workload.

Altering the Adult Sentencing Regime

The amendments will increase the number of cases where an adult sentence is available in youth matters. Where a young offender has been convicted of a "serious violent offence" the Crown must consider whether or not an adult sentence is warranted and, if it decides against such an application, the Crown must advise the court before the young person enters a plea or, with leave of the court, before the commencement of trial.

Overall, we are of the view that the amendments to the YCJA proposed in Bill C-10 will create a shift in youth justice which will likely result in:

- **more bail hearings**
- **an increase in custodial sentences for youth who are found guilty of violent offences or who are repeat offenders.**

In addition these amendments may reasonably be expected to result in: an increase the number of youth justice trials, identity protection hearings, and adult sentence applications. In short, these amendments will require new, tangible resources if they are to be effectively carried into operation.

Provincial Reaction to Increase in Systemic Workload

Provincial reaction to the proposed amendments in Bill C-10 has been varied. British Columbia, Ontario, Newfoundland and Labrador and Quebec have taken strong positions – publicly declaring that they will not support the workload created by the legislation in any tangible way. Manitoba, Alberta and New Brunswick have declared that they intend to provide the support required to operationalize the legislation.

British Columbia is chronically short of judges and courts – and prosecutors. It is currently 20 judges short of the 2005 judicial complement, in a court system that is daily staying charges because they cannot get to trial in a reasonable time.

Ontario's criminal justice system is overburdened and, despite the Provincial Government's acknowledgment of the crisis in 2007, efforts to properly resource the criminal justice system have been abandoned. This is particularly acute in the offices of the Crown Attorney. The "Justice on Target Initiative" has highlighted that many offices, including the largest Crown Office in the country (Toronto), are chronically understaffed. Even without the Omnibus Crime Bill, significant portions of the Criminal Code simply cannot be effectively applied or enforced in jurisdictions that have caseloads beyond their capacity.

Quebec has only just begun to rebuild its criminal justice system – a task that may take the better part of a decade and will require sustained and new investment. Until this rebuilding is complete it will continue to deal with overburdened courts as it takes on the new challenge of aggressively moving against organized crime and corruption.

Nova Scotia is concerned about the workload that the amendments will create. Nova Scotia's prosecution service is staffed at the same level with which it was struggling to meet its workload in 2005. Unfortunately, the workload has not remained static. In 2011 there were more than 20% more charges than in 2005.

Newfoundland and Labrador, New Brunswick, Manitoba, Saskatchewan, Alberta and PEI also continue to struggle with limited staff and increasing workloads

Impact of Excessive Workloads on Rule of Law

Crown Prosecutors play a fundamental role in the application of the Criminal Code of Canada – our national criminal law. We are responsible for carrying the criminal and other federal laws into effect. A cornerstone of the central role of prosecutors in the administration of justice is to uphold the rule of law – to apply the law without favour or prejudice to any person. Further, added workload to our justice system, unsupported by new criminal justice infrastructure, makes this role untenable.

Where criminal charges have overwhelmed the capacity of the criminal justice system, prosecutors must choose which cases proceed to trial and which are diverted out of the system. Prior to the enactment of new criminal legislation these choices meant that an ever smaller portion of the national criminal law was supported by the criminal justice system – police, prosecutors, defence, courts, judges, probation and parole and corrections. The added workload anticipated by the enactment of Bill C-10 will arrive in a system that, practically, has already lost its capacity for further diversion. We cannot prosecute less than we do now without disregarding the intention of Parliament.

While mandatory minimum sentences by definition restrict the range of sentence available to a sentencing judge, there remains in the hands of the prosecutor discretion regarding charge withdrawal, substitution and mode of trial election. However, prosecutors cannot disregard their fundamental role in upholding the rule of law in our Canadian justice system. Without significant, new, added capacity the cases that we select for trial will overwhelm the justice system and charges will be stayed for our failure to bring them to trial in a reasonable time.

Given the likelihood that lower sentences (even new mandatory minimum sentences) are available through summary election, we predict that the lion's

share of the new work created by Bill C-10 will be borne by the Provincial Court system.

Provinces that have indicated they will not add resources to the criminal justice system cannot expect that "zero tolerance" policies can be effectively administered after the enactment of the Bill. Such policies are drafted to ensure that Parliament's intent is carried into effect by strict utilization and enforcement of its legislation. Generally "zero tolerance" policies restrict, prosecutors' abilities to use the tools of election, diversion, charge substitution and withdrawal, which, when used, can provide for enhanced capacity in the criminal justice system. Without the discretion of prosecutors to use these tools the system will become acutely overwhelmed with cases.

It should be noted that even in the Provinces that have indicated that they will support the workload that will be created by the enactment of Bill C-10, none have indicated that they will increase resources to any part of the criminal justice system other than 'prisons'. Of course, this position is as illogical as it is untenable. Police, prosecutors, defence counsel, courts, judges, probation and parole services – in short, the rest of the criminal justice system – will also experience the increased work created by such legislation. If the criminal justice system as a whole is not funded to support the legislation we can expect serious public safety consequences – dangerous offenders will have their charges stayed for delay – and we can reasonably expect greater risk of wrongful convictions.

The variability of financial support for the new criminal justice workload across the country creates a number of critical national justice issues including:

- the inconsistent application of criminal law across jurisdictions;
- conflict between prosecutors and governments regarding support of "rule of law";

- diminished public safety as excessive cases continue to overwhelm the criminal justice system;
- diminished public confidence in the administration of justice.

National Justice Summit

Our existing criminal justice infrastructure is already over capacity in many critical areas of the country. We are of the view that unless both the federal and provincial governments are prepared to back up this new legislation with tangible resources, its passage will only exacerbate an already very critical situation.

Given the recent, vigorous debate between respective provinces and between the provinces and the federal government, we are deeply concerned that the criminal justice system is in grave danger of becoming a political casualty. The time has come for a National Justice Summit at which Attorneys General and leaders in the criminal justice community may meet with the objective of arriving at a viable, national criminal law policy which will protect the rule of law in our administration of justice and ensure public safety.

Time is of the essence. The deleterious impact of the increased workload created by previously enacted criminal law continues unabated by additional resources. The impact of Bill C-10's additional workload may reasonably be expected within 9 months of proclamation.