Canadian Justice Review Board

*In Alta Tende, Integitatem Pete Prinipiaque*

**To the Senate Standing Committee on Legal and Constitutional Affairs concerning S-207; An Act to amend the Criminal Code**

**BRIEF TO THE SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS**

**PREAMBLE to BILL S-207 STATES:**

*"It is a fundamental principle that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the person being sentenced."*

**INTRODUCTION:**

Although the Bill correctly premises that sentencing must be proportional to the gravity of the offence, it incorrectly represents the existing Criminal Code as being deficient, when in fact the Criminal Code of Canada already provides a wide range of sentencing options and judicial discretion that ensures proportionality.

**THE PROBLEM:**

Bill S-207 seeks to amend section 718 and section 720 of the Criminal Code when no amendments are necessary.

**ANALYSIS:**

**Section 718**

[1] It is well settled by the Supreme Court of Canada that s.718 already provides a complete range of sentencing options for judges to apply. Per Lamer C.J. and L'Heureux-Dubé, Gonthier, Cory, Iacobucci, Bastarache and Binnie JJ. in - R. *v.* Gladue, [1999] 1 S.C.R. 688:

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Per Lamer C.J. and L'Heureux-Dubé, Gonthier, Cory, Iacobucci, Bastarache and Binnie JJ:

> *"Part XXIII of the Criminal Code codifies the fundamental purpose and principles of sentencing and the factors that should be considered by a judge in striving to determine a sentence that is fit for the offender and the offence.*
> *.. In that Part, s. 718.2(e) mandatorily requires sentencing judges to consider all available sanctions other than imprisonment and to pay particular attention to the circumstances of aboriginal offenders. The provision is not simply a codification of existing jurisprudence. It is remedial in nature and is designed to ameliorate the serious problem of overrepresentation of aboriginal people in prisons, and to encourage sentencing judges to have recourse to a restorative approach to sentencing. There is a judicial duty to give the provision's remedial purpose real force. Section 718.2(e) must be read in the context of the rest of the factors referred to in that section and in light of all of Part XXIII. In determining a fit sentence, all principles and factors set out in that Part must be taken into consideration. Attention should be paid to the fact that Part XXIII, through certain provisions, has placed a new emphasis upon decreasing the use of incarceration. Both the sentencing judge and all members of the Court of Appeal acknowledged that the offence* (in R. v. Gladue) *was a particularly serious one. For that offence by this offender a sentence of three years' imprisonment was not unreasonable. More importantly, the accused was granted, subject to certain conditions, day parole after she had served six months in a correctional centre and, about a year ago, was granted full parole with the same conditions. The results of the sentence with incarceration for six months and the subsequent controlled release were in the interests of both the accused and society."*

**WORDS MATTER**

[2] S-207 seeks to amend sections **718**.3 (1) by replacing the word "where" with the word "if" and replacing the word "subject to" with the word "despite."

[3] Section 718.3(1) in the existing Criminal Code states:

> **718.3 (1) Where** an enactment prescribes different degrees or kinds of punishment in respect of an offence, the punishment to be imposed is, **subject to** the limitations prescribed in the enactment, in the discretion of the court that convicts a person who commits the offence.

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The proposed amendment would state:

> **718.3 (1) If** an enactment prescribes different degrees or kinds of punishment in respect of an offence, the punishment to be imposed is, **despite** the limitations prescribed in the enactment, in the discretion of the court that convicts a person who commits the offence.

THE AMENDMENT HAS A VERY DIFFERENT MEANING.

[4] Similarly, S-207 also seeks to amend section 718.3 (4) by replacing the word "where" with the word "if."

Section 718.3 (2) in the existing Act states:

> **(2) Where** an enactment prescribes a punishment in respect of an offence, the punishment to be imposed is, **subject to** the limitations prescribed in the enactment, in the discretion of the court that convicts a person who commits the offence, but no punishment is a minimum punishment unless it is declared to be a minimum punishment.

The proposed amendment would state:

> **(2) If** an enactment prescribes a punishment in respect of an offence, the punishment to be imposed is, **despite** the limitations prescribed in the enactment, **including** a punishment declared to be a minimum punishment, in the discretion of the court that convicts a person who commits the offence.

THE AMENDMENT HAS A VERY DIFFERENT MEANING. It means that "the punishment to be imposed is in the discretion of the court that convicts a person who commits the offence, **despite** (aka irrespective of) the limitations prescribed in the enactment, **including** a punishment declared (by Parliament) to be a minimum punishment.

[5] By replacing words that have one meaning with words that have different meaning Bill S-207 removes the force and effect of the existing Act in a manner that may also interfere with the Crown's ability to appeal an unreasonably lenient sentence.

[6] Ironically, the amendment places no limits on a judge imposing a sentence more severe than allowed by law contained in the Act.

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[7] Bill S-207 adds section 718.4 to the existing Criminal Code:

> **Change to mandatory prohibition order**
> **718.4 (1) If a court is required to make a prohibition order** under a provision of this Act, **it may decide to not make that order**, add conditions or vary any of the conditions set out in that provision, including the period of the prohibition, if the court considers it just and reasonable to do so.
> **Reasons**
> **(2)** The court shall include in the record a statement of the reasons for making a decision under subsection (1).

[8] In Canada the two most common prohibition orders are: (1) Firearms ban and (2) Driving bans, but there are others. Section 109 of the Criminal Code says which violent crimes must have a weapons prohibition order, when a person is convicted.

[9] Canadian Senators (and ultimately the House of Commons) might reasonably ask what is Senator Pate's purpose in adding section 718.4 to the Criminal Code.

[10] The addition of s.718.4 (1) & (2) appears to improperly empower a judge to ignore a legal requirement previously enacted by Parliament. It also appears to provide a trial judge with unfettered discretion to bypass an important feature of the existing Criminal Code and to remove any appellate court oversight if the trial judge has carte blanche. The question arises: why would it be good to allow that?

[11] Bill S-207 also adds s.718.5 to the existing Criminal Code.

> **Minimum punishment or parole ineligibility**
> **718.5 (1)** A court shall, prior to imposing a minimum punishment of imprisonment or period of parole ineligibility under a provision of this Act,
> **(a)** consider all available options, other than the minimum punishment of imprisonment or period of parole ineligibility; and
> **(b)** determine that there is no alternative to the minimum punishment of imprisonment or period of parole ineligibility that is just and reasonable.
> **Written reasons**
> **(2)** The court shall provide written reasons for imposing a minimum punishment of imprisonment or period of parole ineligibility under a provision of this Act.

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[12] The proposed 718.5 (1) does not define whether "minimum punishment" is the minimum prescribed in the existing Criminal Code, or something less prescribed by the judge. This is important. Clarity is required.

[13] In most other respects the proposed addition of 718.5(1) is redundant and unnecessary because the same is embodied in the existing Act as detailed in the remarks of Lamer C.J. and L'Heureux-Dubé, Gonthier, Cory, Iacobucci, Bastarache and Binnie JJ. in - R. *v*. Gladue, [1999] 1 S.C.R. 688: (supra).

Section 718.5 (2) states that the court shall provide written reasons for imposing a minimum punishment of imprisonment or period of parole ineligibility under the province of this Act. There is no need for this statement as this is covered under section 726.2, which states:

> **"Reasons for sentence**
> 726.2 When imposing a sentence, a court shall state the terms of the sentence imposed, and the reasons for it, and enter those terms and reasons into the record of the proceedings. 1995, c. 22, s. 6."

Perhaps in light of section 726.2 and section 718.2 the addition of section 718.5 is redundant and does nothing in regards to assisting the courts.

[14] Bill S-207 seeks to replace Subsection 720(2) of the Act with the following:

> *(2) The court may, with the consent of the person who has been found guilty and after considering the interests of justice and of any victim of the offence, delay sentencing to enable the person who has been found guilty to attend, under the supervision of the court, a treatment or counselling program that the court considers appropriate in the circumstances.*

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The original words in s.720 (2) are:

> 2) The court may, **with the consent of the Attorney General** and the offender and after considering the interests of justice and of any victim of the offence, delay sentencing to enable the offender to attend a treatment program approved by the province under the supervision of the court, such as an addiction treatment program or a domestic violence counselling program. R.S., 1985, c. C- 46, s. 720; 1995, c. 22, s. 6; 2008, c. 18, s. 35.[emphasis added]

[15] To remove the "*consent of the Attorney General*" from the existing legislation is contrary to Parliament's intent to have democratic accountability. The absolute importance of democratic accountability has been addressed by former Liberal justice minister the Honourable A. Anne McLellan PC OC AOE in her paper "*Review of the Roles of the Minister of Justice and Attorney General of Canada, June 28, 2019*,"[1] wherein she states:

> ***"Accountability***
> *The other key principle which comes into play when considering the role of the Attorney General is accountability. In a democracy, members of government who exercise state power must be accountable to the public for their actions. Because prosecutors have such wide discretion, public confidence in the justice system requires that they be held accountable for the exercise of that discretion.*
> *This accountability comes in a number of forms. First, the DPP is accountable to the Attorney General. A second accountability is that of the Attorney General to the public through Parliament. Professor Edwards described this political accountability as being as important as the principle of prosecutorial independence."*[2]

**DUTY OF THE SENATE:**

[16] The Honourable Senator Pate lists herself as an advocate for, *inter alia*, the Elizabeth Fry Society which had done some good work advocating for the interests of women convicts.

[17] But the Senate is a legislative body. If the Honourable Senator believes that the Criminal Code contains sentencing provisions that are inappropriate, harsh, or discriminatory, then the Honourable Senator should propose amendments to only those specific sentences.

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[18] As noted by the Supreme Court, (supra), the courts are not law makers. Section 718 already expresses Parliament's intent that judges have discretion to apply a wide range of sentences proportional to the seriousness of the offence.

[19] The thrust of Bill S-207 improperly unloads the Legislator's responsibilities onto judges, who may then become subject to the same political pressures in their decision making.

**DISCUSSION:**

[20] The existing Criminal Code provides important guidelines and a wide range of sentencing options that Parliament considers appropriate. If left entirely to judges then the sentencing criteria can vary from judge to judge. This may encourage "judge shopping," where defense counsel seeks out the most lenient judge to hear their clients' case and ask for adjournments when they encounter other judges. It becomes unimportant for defense counsel to know the law as opposed to knowing the judge.

[21] Although "judge shopping" is not illegal the practice is frowned upon and contributes to court delays and added expense. It also means that decisions of the court lack consistency. In the same set of facts and circumstances one judge may be lenient and another judge may not.

[22] The unfettered sentencing discretion proposed by Bill S-207 is a double-edged sword with the potential for discriminatory rulings.

[23] House Bill C-3 is currently before the Senate. House Bill, C-3 is an *Act to amend the Judges Act and the Criminal Code* because of the concern that judges lack sufficient education to have unfettered discretion.

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[24] Senate Bill S-207 fails to appreciate that judges may often identify with and be lenient towards defendants of their own social class. This would seem to be evident from Judge Gordon Sedgwick's ruling in a case of sexual assault. [R v. Markman ONSC 1998] in which the doctor pleaded guilty to sexually assaulting three staff members between 1988 and 1996. In a victim impact statement, filed with the court, she vividly describes the effects of the "calculated and brutal attack" inside a closed office. The doctor could have been sentenced to 10 years in jail under the guidelines for sentencing in such cases, but Superior Court Justice Gordon Sedgwick concluded that the doctor did not pose a threat to society and granted a conditional discharge. The sentence raised eyebrows and prompted the Ottawa Citizen Editorial Board to decry the situation in the following terms:

> *"**What about the judge's obligations to society?***
> *Imagine if the same acts were committed by a 22-year-old with a spotty record of unemployment, shabbily dressed and of little social standing: Would there be concern that he be able to carry on his obligations? Would there be consideration that he is receiving treatment and should pose no further threat? Probably not. The decision of when to show mercy is subjective and that means professionals with whom judges can more easily identify possibly receive more consideration. Professionals may be judged to have sexual disorders, while those lower on the social scale are more likely to be seen as simply having a dangerous tendency to criminal behaviour. **And this brings the justice system into disrepute."*** [emphasis added]
> The Ottawa Citizen Sept 17, 1998 pg D 4 ISSN/ISBN 10383222

[25] The Criminal Code's sentencing provisions in their present form are not unreasonable. They address Parliament's response to many different types of crimes. The proposed amendments in Bill S-207 would impact other sections of the Act and the right to have some court of appeal oversight. Inappropriate minimum or less than minimum sentences are regarded by the public as casting the administration of justice into disrepute.

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[26] The remarks of the Honourable Justices Moldaver, Rothstein and Wagner JJ of the Supreme Court of Canada in R v. Nur [2015] 1 S.C.R. 773,[3] address this point in the following terms in relation to appropriate sentencing for crimes defined by s.95 of the Code**:**

> *"Section 95 represents Parliament's considered response to the pressing problem of gun violence in our communities. Parliament chose to craft a wide-reaching offence to denounce and deter serious criminal activity with lengthy mandatory minimums. At the same time, it provided a safety valve to divert the least serious cases into summary proceedings carrying no minimum sentence. With respect, I see no reason to second-guess Parliament based on hypotheticals that do not accord with experience or common sense*.
> *Nor, on my proposed framework, is there any sound basis for disturbing the extensive deliberations of our elected representatives on this important issue. I would allow the appeals, and uphold the constitutional validity of s.95 (2).*

[27] The foregoing remarks make clear that judges already have discretion on a case-by-case basis to consider whether a sentence is constitutional.

[28] The jurisdiction of the court (whether by judge or jury) is to hear the case, decide on the facts, and apply the law to the facts so found. The law in the Criminal Code allows for broad judicial discretion.

[29] In the matter of R v Yare, [2018] MBCA the trial judge decided on an unreasonably lenient sentence which the crown prosecutor appealed. The appellate court ruled as follows per William J. Burnett, Janic L. Maistre, & Karen I Simonsen JJA:

> "[23] *" In our view, the sentencing judge imposed an artificial sentence in order to circumvent Parliament's will and, in doing so, he erred in principle by over emphasizing the collateral consequences. Moreover, reducing the sentence by more than six months from what he considered appropriate to avoid immigration consequences resulted in a sentence that is not proportionate having regard to the circumstances of the offence and the moral culpability of the offender."*

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[30] Senate Bill S-207 interferes with the independence of Crown Prosecutors in deciding what charges should be laid and the penalty that should be sought. It does this by proposing to amend s.720, to remove the "*consent of the Attorney General*" from the existing legislation. Bill S-207 is therefore contrary to the longstanding principle of democratically accountable government policy and law. It undermines the entire judicial system and the rule of law.

[31] The absolute importance of democratic accountability has been addressed by former Liberal justice minister the Honourable A. Anne McLellan PC OC AOE in her paper "*Review of the Roles of the Minister of Justice and Attorney General of Canada, June 28, 2019*," wherein she states:

> ***"Accountability***
> *The other key principle which comes into play when considering the role of the Attorney General is accountability. In a democracy, members of government who exercise state power must be accountable to the public for their actions. Because prosecutors have such wide discretion, public confidence in the justice system requires that they be held accountable for the exercise of that discretion. This accountability comes in a number of forms. First, the DPP is accountable to the Attorney General. A second accountability is that of the Attorney General to the public through Parliament. Professor Edwards described this political accountability as being as important as the principle of prosecutorial independence."*[4]

[32] In 1978, a former Attorney General of Canada, the Hon. Ron Basford, stated:

> "…*In arriving at a decision on such a sensitive issue as this, the Attorney General is entitled to seek information and advice from others but in no way is he directed by his colleagues in the government or by Parliament itself. That is not to say that the Attorney General is not accountable to parliament for his decisions, which he obviously is*."[5]

**CONCLUSION:**

[33] Although Senate Bill s-207 purports to champion the fundamental principle that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the person being sentenced, it is founded or mired in a series of false or misguided assumptions.

[34] The Criminal Code of Canada has full force and effect and does not need amendments such as Bill-s-207 would have members of the Senate to believe.

[35] A sufficient degree of judicial discretion already exists without the need for any amendments to the Criminal Code. As a further example of judicial discretion, section 745.3,[6] already provides that when a jury finds an accused guilty of first-degree murder or second degree murder, the judge presiding at the trial shall, before discharging the jury, put to them the following question:

> *"You have found the accused guilty of first degree murder (or second degree murder and the law requires that I now pronounce a sentence of imprisonment for life against the accused. Do you wish to make any recommendation with respect to the number of years that the accused must serve before the accused is eligible for release on parole?*
> *You are not required to make any recommendation but if you do, your recommendation will be considered by me when I am determining whether I should substitute for the twenty-five year period (or for the ten year period), which the law would otherwise require the accused to serve before the accused is eligible to be considered for release on parole, another period of time."*

[36] Inexplicably Bill S-207 proposes to replace s.745.3 with s.745.2 that has exactly the same wordings and meaning.

[37] The sentencing provisions of the current Criminal Code of Canada have been democratically enacted as the rule of law. Parliament alone should decide on sentencing and ranges of sentencing. Judges are functionaries, not legislators.

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[38] The Canadian Justice Review Board (CJRB) submits that the foregoing reasons make clear that Senate Bill S-207 is counterproductive and should not be enacted.

**ALL OF WHICH IS RESPECTULLY SUBMITTED**

**E. F Marshall**

Chairperson

Canadian Justice Review Board

…/13 ENDNOTES

ENDNOTES:

[1] Review of the Roles of the Minister of Justice and Attorney General of Canada, P. 15 - 16. June 2019. Review of the Roles of the Minister of Justice and Attorney General of Canada (pm.gc.ca) https://pm.gc.ca/sites/pm/files/inline-files/Review%20of%20the%20Roles%20of%20the%20Minister%20of%20Justice%20and%20Attorney%20General%20of%20Canada_3.pdf

[2] Review of the Roles of the Minister of Justice and Attorney General of Canada, P. 15 - 16. June 2019. Review of the Roles of the Minister of Justice and Attorney General of Canada (pm.gc.ca) https://pm.gc.ca/sites/pm/files/inline-files/Review%20of%20the%20Roles%20of%20the%20Minister%20of%20Justice%20and%20Attorney%20General%20of%20Canada_3.pdf

[3] **CITATION:** R. *v.* Nur, 2015 SCC 15, [2015] 1 S.C.R. 773. [199]

[4] Review of the Roles of the Minister of Justice and Attorney General of Canada, P. 15 - 16. June 2019. Review of the Roles of the Minister of Justice and Attorney General of Canada (pm.gc.ca) https://pm.gc.ca/sites/pm/files/inline-files/Review%20of%20the%20Roles%20of%20the%20Minister%20of%20Justice%20and%20Attorney%20General%20of%20Canada_3.pdf

[5] Part I UNDERSTANDING CRIMINAL LAW IN CANADA Chapter 4 https://www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/fpd/ch04.html

[6] Persons under sixteen
745.3 Where a jury finds an accused guilty of first degree murder or second degree murder and the accused was under the age of sixteen at the time of the commission of the offence, the judge presiding at the trial shall, before discharging the jury, put to them the following question:
You have found the accused guilty of first degree murder (or second degree murder) and the law requires that I now pronounce a sentence of imprisonment for life against the accused. Do you wish to make any recommendation with respect to the period of imprisonment that the accused must serve before the accused is eligible for release on parole? You are not required to make any recommendation but if you do, your recommendation will be considered by me when I am determining the period of imprisonment that is between five years and seven years that the law would require the accused to serve before the accused is eligible to be considered for release on parole. 1995, c. 22, ss. 6, 22.