Barreau du Québec

Cabinet du bâtonnier
445, boulevard Saint-Laurent
Montréal (Québec) H2Y 3T8
514-954-3402 1 800 361-8495 | 514 954-3407
www.barreau.qc.ca

April 27, 2010

Sen. Marjory LeBreton
Leader of the Government in the Senate
Senate of Canada
Ottawa, Ontario K1A 0A4

Subject: **Bill S-2 – *An Act to amend the Criminal Code and other Acts (Protecting Victims from Sex Offenders Act)***

Dear Senator LeBreton:

The Barreau du Québec has reviewed Bill S-2, An Act to amend the Criminal Code and other Acts (*Protecting Victims from Sex Offenders Act*) and would like to submit its comments.

We note that this bill is a carbon copy of Bill C-34, An Act to amend the Criminal Code and other Acts (*Protecting Victims from Sex Offenders Act*) as it stood after examination by the Standing Committee on Public Safety and National Security. The amendments made to the first version have not altered the comments made by the Barreau in July 2009, which we would reiterate (copy attached).

We would like to add further comments regarding subsection 490.012 as proposed in the bill.

We note that for certain designated offences [paragraphs (a), (c.1), (d) or (e) of the definition of "designated offence" in subsection 490.011(1)] an application by the prosecutor is no longer required for the court to be obliged to make an order that a person convicted or found not criminally responsible on account of mental disorder comply with the *Sex Offender Information Registration Act* (S.C. 2004, c. 10, "SOIRA"). The order is therefore now automatic. In addition, the exception provided in subsection 490.12(4) is replaced by a provision that does not reiterate that subsection. This means that at the stage where the court issues the order it can no longer decide not to make it on the ground that "it is satisfied that the person has established that, if the order were made, the impact on them, including on their privacy or liberty, would be grossly disproportionate to the public interest in protecting society through the effective investigation of crimes of a sexual nature, to be achieved by the registration of information relating to sex offenders under the SOIRA" (subsection 490.012(4) of the Code).

A person affected may make an application to the court after the order is issued for termination of the order, which will be granted if the court is satisfied that continuing the order to comply with the SOIRA would have the effects on the person that are referred to in the existing subsection 490.012(4) of the Code.

In addition, the possibility of the court granting an exemption seems to be limited to convictions prior to December 15, 2004 (clause 13 of the bill) and outside Canada (clause 19 of the bill).

The Barreau opposes the elimination of the exception provided in subsection 490.012(4) of the *Criminal Code*. The discretion given to the court by that provision is essential for individualizing decisions that have severe intrusive consequences for a person. The Barreau reiterates that "the benefit of judicial discretion for all offences without distinction … would be to ensure a degree of consistency between the objectives of the legislation and the offences in question, while still meeting the constitutional standards developed in the case law."[1]

In addition, the Quebec Court of Appeal has ruled on the application of the exception set out in subsection 496.012(4) of the *Criminal Code*. Speaking for the Court, François Doyon J.A. stated:[2]

> [TRANSLATION]
>
> [68 According to Wells J.A. of the Newfoundland and Labrador Court of Appeal,[3] the interpretation given by the Alberta Court of Appeal[4] put the exception or exemption beyond the reach of any offender. In other words, it is not the public interest in absolute terms that must be compared to the effects of the *Sex Offender Act*, it is the public interest as it exists in the offender's particular case. In my opinion, that is the interpretation that must be adopted. I believe that a more rigid interpretation would make the procedure unfair by not allowing the exception or exemption to be granted virtually ever, since it is difficult to imagine a case where the effects of the procedure on an offender would be so substantial that they would be "grossly disproportionate" to the public interest in effective investigations being conducted into sexual offences. Society <u>always</u> has that interest and the particular case of an offender could never take priority over that interest if it were considered solely in the abstract or absolute. The impact of the particular situation of the offender on the public interest must therefore be taken into account, in order to determine, in the proportionality analysis, whether that interest is sufficiently important not to grant the exception or exemption.
>
> [69] It seems to me that this approach is consistent with the approach accepted by Fish J. in *R.C.*,[5] in which, although it was a different situation, in which he was analyzing the taking of DNA samples from a teenager, he acknowledged that it was possible to balance the interests of the young person and the interests of society. He stated:
>
> > R.W.C. was a first-time offender. Gass J. weighed the public interest in ordering that a DNA sample be taken from him and retained in the DNA

[1] Brief submitted by the Barreau du Québec, "Genetic Databases – Discussion Paper", July 2002, October 2002.
[2] *R. v. Réjean Asselin*, 2009 QCCA 188.
[3] Justice of the Newfoundland and Labrador Court of Appeal, *R. v. Turnbull* (2006), 214 C.C.C. (3d) 18 (N.L.C.A.)
[4] *R. v. Redhead* (2006), 206 C.C.C. (3d) 215 (Alta. C.A.)
[5] *R. v. R.C.*, [2005] 3 S.C.R. 99

> data bank against the impact of such an order on his privacy and security interests. She conducted this exercise in light of the principles and objects of youth criminal justice legislation, and found that the impact of the order would be grossly disproportionate.
>
> Her finding was reasonable in the circumstances and should not have been set aside by the Court of Appeal.

The Barreau du Québec reiterates that a judicial review of the assessments of the interests of the individual in question and the interests of society should be possible at the time the order to comply with the SOIRA is made. The provisions of that Act should not apply automatically; this should be assessed on the basis of the circumstances of each case.

We hope that these comments will be of assistance in your consideration of this bill.

Sincerely yours,

[signed]

Le Bâtonnier du Québec

Pierre Chagnon

Ref.: 0211

Encl. (1)

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514-954-3402 | 1 800 361-8495 | ℻ 514-954-3407
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July 15, 2009

The Hon. Peter Van Loan
Minister of Public Security of Canada
House of Commons
Ottawa, Ontario K1A 0A6

Subject: **Bill C-34 – *An Act to amend the Criminal Code and other Acts (Protecting Victims from Sex Offenders Act)***

Our file: 26450 D001, reference 138162

Dear Mr. Van Loan:

The Barreau du Québec has reviewed Bill C-34, An Act to amend the Criminal Code and other Acts (*Protecting Victims from Sex Offenders Act*) and would like to submit its comments. Although the House of Commons has adjourned until the fall, we would like to provide you with our comments immediately, in view of the importance of the matters addressed by this bill.

At the outset, we would like to inform you that the Barreau du Québec reserves the opportunity to supplement its comments, which are general in nature here. The complexity of the proposed amendments calls for more in-depth analysis, which we cannot undertake until the fall.

The Barreau du Québec would first reiterate its objection to the legislative process used, which involves amending sections of the *Criminal Code* rather than undertaking a comprehensive revision of the Code. We submit that this kind of revision would make the entire *Criminal Code* more coherent and better organized, and in particular would eliminate repetition.

The objectives of Bill C-34 include allowing police services to make proactive use of national data banks on sex offenders in their investigations. It provides that sex offenders who arrive in Canada must comply with the *Sex Offender Information Registration Act*. It further proposes that any sex offender in respect of whom a non-discretionary order is made ordering that they comply with the *Sex Offender Information Registration Act* must also submit to automatic DNA sampling.

One of the consequences of enacting the legislative proposed will be to limit the judicial discretion exercised by the courts somewhat more. The Barreau opposes any legislative measure that results in a reduction in the court's discretion.

We submit that this discretion is necessary in view of the severe intrusion that DNA sampling represents. It allows the court to assess, among other things, the circumstances in which the offence was committed.[1] The Barreau du Québec is still of the opinion that judicial discretion must be expanded to all offences, without distinction, "the benefit of which … would be to ensure a degree of consistency between the objectives of the legislation and the offences in question, while still meeting the constitutional standards developed in the case law".[2]

The effect of clause 3 of the bill is to add new offences to the primary offences (s. 487.04 of the *Criminal Code*). When the provisions relating to DNA identification were introduced, the Barreau expressed its concerns about the possibility that the list would be expanded "infinitely":[3]

> From the outset, the Barreau du Québec maintains its support for a pre-established list of offences. Moreover, considering this technique's potential for invasion of privacy, the Barreau du Québec has always favoured using this technique in the most serious crimes, such as those involving physical violence or attempted violent offences. Should there ever be plans to add new offences, which the Barreau does not favour, these criteria must be considered when adding any offences.
>
> In accordance with section 183 of the Criminal Code, the Barreau du Québec has always feared that this list could expand over time. Moreover, this fear has been borne out with the government's adoption of the Anti-Terrorism Act, which expands the list of primary offences by adding some that were considered secondary prior to the adoption of this Act.

Unfortunately, we have observed for several years that this is indeed the trend.

We hope that these comments will be useful to you in your consideration of this bill.

Sincerely yours,

[signed]

Le Bâtonnier du Québec

Pierre Chagnon

Ref.: 0211

Encl. (1)

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[1] *Ibid*, paras. 60 and 70

[2] Brief by the Barreau du Québec, "Genetic Databases – Discussion Paper", July 2002, October 2002.

[3] Brief by the Barreau du Québec on Bill C-3, *An Act to amend the DNA Identification Act, amending the Criminal Code and other Acts accordingly,* December 1997; Memorandum of the Barreau du Québec, "Genetic Databases – Discussion Paper", July 2002, October 2002.