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## **McMeekin: Bill-C-35 is smart law**

**BRUCE MCMEEKIN**

GLOBE AND MAIL UPDATE

Prime Minister Stephen Harper, backed up by Ontario Premier Dalton McGuinty and Toronto Mayor David Miller, introduced Bill C-35 in November to make long overdue changes to Canada's bail laws for arrests involving firearms. Currently, a person charged with offences involving firearms, including such violent crimes as attempted murder, extortion and aggravated sexual assault, can receive bail if the Crown fails to meet the onus of establishing that the release would threaten public safety. Bill C- 35 will "reverse the onus" on the Crown by requiring the accused to show why his or her release would not be a threat to public safety.

Tragically, the current bail regime has made it too easy for those charged with firearms offences to be released on bail. The results can be catastrophic. In December, 2005, Toronto car dealer Sepehr "Danny" Fatulahzadeh-Rabti was shot and killed. One of the accused in the crime is Jodie Wheatle, who at the time of the shooting was on bail after he had been charged a month earlier with carrying a loaded .45 calibre gun and assaulting a police officer in Toronto's Yorkdale Mall.

A few weeks later on Boxing Day, tragedy struck when Jane Creba was shot on Toronto's Yonge Street. Andre Thompson, one of the men who faces charges related to her death, had been released earlier that month after having served 30 days for an armed robbery. Having been convicted of a violent crime, he was prohibited from possessing firearms.

Our criminal law prohibits morally repugnant conduct. Through the operation of the courts, the law is formulated to deter criminal behaviour through sentencing. Policing and the bail system are two methods we have to prevent crime, as opposed to deterring it. The police did their job with Mr. Wheatle when they arrested him in a local mall. Yet a handicapped bail system may have failed to protect his alleged victim.

That's because bail is nothing more than a court order that allows the release of an accused as long as conditions set out within the bail are followed. If the accused does not follow the conditions, he can be arrested and charged again. Conditions such as reporting regularly to the police or abstaining from communicating with

witnesses are usual. A condition prohibiting the possession of a firearm is mandatory if the accused is charged with a violent crime. Other kinds of court orders are used to try to control violence or threats of violent behaviour after an accused has been convicted. If an accused, like Mr. Thompson, is convicted of a violent crime, the courts are required to include in the sentence an order prohibiting possession of firearms.

The theory has been that conditions on the bail and other orders can be used to protect the public instead of keeping the accused in custody. That depends, however, on the accused following the imposed rules. It is when they do not that tragedy can strike.

Bill C-35 is not without its critics. A number of members of the criminal defence bar have voiced concerns that the bill will result in the innocent being jailed until they can be exonerated at trial. A few politicians, including Michael Ignatieff, have voiced similar fears. In sum, their concerns are rooted in the belief that the bill's reverse onus undercuts the presumption of innocence enshrined in our constitution, the Charter of Rights and Freedoms.

The presumption of innocence has little to do with a bail hearing in which the accused's flight risk or threat to public safety, not his guilt or innocence, are the only issues. We do have the constitutional right not to be denied reasonable bail without just cause. "Just cause" has a large public safety component. Our Supreme Court has upheld the existing reverse onus bail provisions in situations where the accused has already been bailed on a previous serious charge. The accused is denied bail only when there is a substantial likelihood that an additional crime threatening public safety will be committed. Bill C-35 complements these provisions.

In the past, our courts have reviewed and upheld the reverse onus in environmental, workplace safety and many other varieties of regulatory offences. Despite the presumption of innocence, it requires defendants to prove they are not at fault for these offences. The courts have said the reverse onus infringes the right to the presumption of innocence but is a justifiable infringement — justifiable even though the fines and jail sentences available for a great number of regulatory offences far exceed the potential liability for most garden variety criminal offences, and justifiable because the reverse onus is fair, rational and proportional, even though it can lead to a conviction when there exists a reasonable doubt as to guilt.

Why? Because our courts have found that in some situations we are all better off with a law that engineers socially responsible behaviour. If one is presumed to be at fault for the death of an employee or a toxic spill that threatens human health, then most of us will do the right thing by undertaking everything we reasonably can to prevent or minimize the risk of an accident.

There has been less enthusiasm to incorporate reverse onuses in the criminal law because of the "stigma" a criminal code conviction carries; the stakes are high for individuals charged with criminal offences and they should be afforded the full protection of the presumption of innocence.

One can argue that there is little difference between the stigma arising from having been found at fault for an employee's workplace death and the criminal liability of a person who drives dangerously and kills a pedestrian. Yet, like the regulatory reverse onus, the bail reverse onus provisions are concerned with public safety at the front end — preventing a tragedy — and not the guilt or innocence of the accused. Given that the presumption of innocence remains intact in the criminal trial of the accused, Bill C-35 is smart law.

*Bruce McMeekin practises regulatory and business crime law with Miller Thomson LLP in Markham, Ont.*

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Toronto, ON Canada M5V 2S9  
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