David Asper Centre for Constitutional Rights
UNIVERSITY OF TORONTO

Bill C-10: Submissions to the Standing Senate Committee on Legal and Constitutional Affairs

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About the Asper Centre

The David Asper Centre for Constitutional Rights is a centre within the University of Toronto, Faculty of Law devoted to advocacy, research and education in the area of constitutional rights in Canada. The Centre houses a unique legal clinic that brings together students, faculty and members of the legal profession to work on significant constitutional cases. Through the establishment of the Centre the University of Toronto joins a small group of international law schools that play an active role in constitutional debates of the day. It is the only Canadian Centre in existence that attempts to bring constitutional law research, policy, advocacy and teaching together under one roof. The Centre aims to play a vital role in articulating Canada's constitutional vision to the broader world. The Centre was established through a generous gift to the law school from U of T law alumnus David Asper (LLM '07).

Our Mission: Realizing Constitutional Rights through Advocacy, Education and Research.

Our Objectives:

- To make a significant contribution to the quality of constitutional advocacy in Canada
- To be an expert resource on constitutional rights in Canada
- To increase the awareness and acceptance of Canadian constitutional rights

This submission was prepared by the Asper Centre's **Crime Bill Working Group**[1] consisting of a group of student volunteers at the Faculty of Law, interested in criminal justice issues, who conducted research on Bill C-10. The students worked under the supervision of Professor Kent Roach and Executive Director, Cheryl Milne.

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Summary of Recommendations

1. **Part 1: Do not enact Bill C-10**. The radical policy change in Bill C-10 is inconsistent with Canada's long-standing criminal justice values. **Public support for harsher sentencing is a misconception; public opinion is more complex, and supports *more effective* crime control strategies, not unnecessary harshness.**

At a minimum, do not enact the following <u>particularly problematic</u> amendments:

2. **Part 2: Do not eliminate conditional sentencing for any offences.** A blanket denial based solely on the nature of the offence leads to disproportionate punishment and victimization of people with mental illness and Aboriginal people. This amendment would be vulnerable to a s. 15 *Charter* challenge.

3. **Part 3: Do not make the following amendments to the *YCJA:***
   a) **Do not introduce "deterrence and denunciation" as guiding principles in the *YCJA.*** Rehabilitation should remain the central objective of the *YCJA.*
   b) **Do not change the long-term model of "public safety through rehabilitation" to a shortsighted model of "public safety through accountability."** Such drastic policy change should not be the result of "anecdotal" high profile cases of youth crime.
   c) **Do not broaden the statutory definition of "violent offences" and "serious offences".** As currently drafted, Bill C-10 will attach significant repercussions to instances of reckless adolescent behaviour.
   d) **Do not increase the ease of name publication for young offenders.** Publication hinders rehabilitation and reintegration without achieving any benefits.
   e) **Do not increase the availability of (1) custodial sentencing and (2) pre-trial detention.** Custodial sentences do not reduce recidivism for youth; pre-trial detention increases the risk of false guilty pleas and other miscarriages of justice.
   f) **Do not impose duty of Crown to "consider" seeking adult sentences for youth charged with "violent offences".** This duty is incongruous with the principle of "diminished moral blameworthiness"; the principle is not removed by virtue of involvement in a "violent offence"; this is particularly so in light of the *broadened* definition of "violent".

4. **Part 4: Do not adopt a scheme of mandatory minimum sentences without a statutory safety valve of judicial discretion.** Mandatory minimums are ineffective, threaten proportionality, and are vulnerable to challenges under ss. 7, 12 and 15 of the *Charter*. Canadian constitutional values support the UK middle-ground approach of preserving judicial discretion in departing from statutory minimums "when it is in the interests of justice to do so."

5. **Conclusion: Stand by the stated purpose of "Safe Streets and Communities".** Introduce a five-year sunset clause on the bill, accompanied by independent data collection to determine whether these measures increase public safety, public support and opposition to them and to gauge their effects on both provincial and federal prisons.

Part 1: Public Support for Harsher Penalties is Misconceived

Public support for "harsher penalties" is misconceived. First, polls surveying the need for "harshness" only reveal a superficial level of public opinion. Second, any public desire for "harshness" in the criminal justice system is premised on an assumed link between "harshness" and "safety", which is false. Third, in jurisdictions with mandatory minimum sentences, experience led to decreased public support

Support for harsher penalties is a superficial understanding of public opinion. In reality, Canadians support (1) reintegration over separation and (2) investment in prevention rather than investment in imprisonment.

A survey of Ontario residents' views on crime and the criminal justice system[2] revealed the following:

(1) Most people do not know the current maximum penalties for common crimes; people do not have a benchmark when they are asked about harshness[3]
(2) When presented with the costs of imprisonment, a vast majority supported investment in alternatives to prison and crime prevention, instead of prison (over 65% for adults and over 78% for youth)[4]
(3) When people are reminded that the person will be released, people are more likely to favour community service orders and probation over prison; people prefer reintegration over temporary separation[5]
(4) When asked directly "What is the best way to deal with crime?" less than one third of people answered "harsher sentencing"[6]
(5) People believe in tailored sentences; when people are given a brief description of a youth offender rather than simply being told "youth offender" inclination to prefer imprisonment drops by almost 50%[7]

Further, a British Columbia study of systemic sentencing data shows that public perception of "leniency" is misconceived. While BC residents *felt* that sentencing in BC was more lenient than in the rest of the country, the data showed otherwise. [8]

Any support for harsher penalties is premised on a link between "harshness" and "safety". No data supports this link.

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[2] Anthony Doob et al, *An Exploration of Ontario Residents' Views of crime and the Criminal Justice System*, (Toronto: Centre of Criminology, University of Toronto, 1998)
[3] *Ibid* at 14
[4] *Ibid* at 28
[5] *Ibid* at 33
[6] *Ibid* at 24
[7] *Ibid* at 37
[8] Anthony N. Doob & Cheryl Marie Webster, *Concern with Leniency: An Examination of Sentencing Patterns in British Columbia,* (Victoria: British Columbia Ministry of Attorney General , 2008)

Studies show that people who are more "afraid" of crime are more likely to support "harsher" penalties.[9] This shows that people want safety; harshness is the route that they wrongly believe will achieve safety.

There is no correlation between increased imprisonment and decreased recidivism.[10] On the contrary, "there were tentative indications that increasing lengths of incarceration were associated with slightly greater increases in recidivism."[11] On the other hand, statistics show that "Intensive Supervision Programs (ISPs) that also included treatment services produced small reductions in recidivism (approximately 10%)."[12]

In jurisdictions that have more experience with mandatory minimum sentences, the public does not support statutory minimums.

In 2007, an American Civil Liberties Union survey found that 63 percent of Americans oppose mandatory minimums (37 percent strongly oppose).[13] Further, in 2008, a survey conducted by Strategy One found that:

1. 78% of Americans agree that courts, not Congress, should determine a person's prison sentence and
2. 59% of Americans oppose mandatory minimum sentences for nonviolent offenders. [14]

These polls show that public opinion in jurisdictions with increased incarceration do **not** support mandatory minimum sentencing, and prefer judicial discretion and individualized penalties.

The Vast Majority of Canadians Feel Safe

Recent statistics (2009)[15] show that the vast majority of Canadians feel safe. 93% of Canadians feel very satisfied with their personal safety from crime. On a comparative basis, Canadians from the Eastern provinces report the highest levels of satisfaction (97% in PEI) and the Western provinces show a relatively lower level, although still very high (89% in BC). The level of satisfaction in Ontario is likewise, very high at 95%.

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[9] Doob et al, supra note 1 at 3

[10] Paula Smith et al, *The Effects of Prison Sentences and Intermediate Sanctions on Recidivism: General Effects and Individual Differences*, (Public Works and Government Services Canada, 2002, online: < http://www.sgc.gc.ca>). One hundred and seventeen studies dating from 1958 involving 442,471 offenders produced 504 correlations between recidivism and (a) length of time incarcerated, (b) serving an institutional sentence vs. receiving a community-based sanction, or (c) receiving an intermediate sanction.

[11] *Ibid* at 2

[12] *Ibid* at 2

[13] *Ibid* at 2

[14] "Smart on Crime, Recommendations for the Next Administration and Congress", online: 2009 Transition <http://2009transition.org/criminaljustice/index.php?option=com_content&view=article&id=44&Itemid=97>.

[15] Shannon Brennan, Canadians' perceptions of personal safety and crime, 2009, online: <http://www.statcan.gc.ca/pub/85-002-x/2011001/article/11577-eng.htm>

Conclusion on Public Opinion

Although superficial polls in Canada may indicate public support for harsher sentencing, this support is overstated and misconceived:

1. Canadians favour reintegration over separation; further, Canadians support investment in alternatives to imprisonment and crime prevention over investment in prisons.
2. Any support for harsher sentencing is rooted in misconceived links between harshness and safety; these links do not exist.
3. In the United States, a jurisdiction that has experimented with mandatory minimum sentencing extensively, the public does not support mandatory minimum sentencing.

The drastic policy change that is brought about by Bill C-10 runs contrary to Canadian values of criminal justice and does not have the support of the Canadian public.

Part 2: Removal of Conditional Sentences Will Have a Discriminatory Effect

Removing conditional sentences and increasing the rate of imprisonment will victimize people with mental disabilities and Aboriginal offenders in particular. Two of the many benefits of conditional sentencing are:

- The ability to sentence mentally disabled offenders to specialized institutions, and
- The ability to better fulfill the judicial duty under s. 718.2(e) by taking into account the unique circumstances of Aboriginal offenders

In ***R v Knoblauch***,[16] the Supreme Court of Canada held that conditional sentencing is available to mentally impaired offenders, and the availability of treatment-based community sentencing is within the discretion of the sentencing judge. In some situations, a conditional sentence in a secure psychiatric facility will achieve more benefits for both the offender and society as a whole.

In ***R v Gladue***[17], the Supreme Court of Canada stressed that the disproportionate imprisonment of aboriginal offenders was a crisis in the criminal justice system. The court held that s.718.2(e) of the Code embodied a remedial judicial duty to (1) ameliorate the overrepresentation crisis and (2) treat aboriginal offenders fairly by taking into account their difference.

Removing conditional sentencing will have a disproportionate effect on these vulnerable segments of offenders.

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[16] *R v Knoblauch,* 2000 SCC 58, [2000] 2 SCR 780 at para 48
[17] *R v Gladue*, [1999] 1 SCR 688, 171 DLR (4th) 385

Mental Illness and the Criminal Justice System: the Last Fifteen Years

The segment of offenders with mental illness is significant. Approximately 35 per cent of the 13,300 inmates in federal penitentiaries have a mental impairment requiring treatment. This estimate has tripled in the last seven years. Additionally, the ratio is far higher than the mental illness ratio in the general population. [18] Len Wall of the Schizophrenia Society of Canada captures the seriousness of the problem:

> *"Prisons can be dangerous and destructive places for people who are mentally ill. They are victimized and exploited. Prison rules punish mentally ill offenders for symptoms of their illness - such as being noisy or refusing orders, or even self-injury and attempted suicide. Prisoners who are mentally ill are more likely than others to end up housed in especially harsh conditions, such as isolation which, in turn, can place them at risk for acute psychosis or suicide."*

The Corrections Service of Canada tracks the incidence of mental illness at intake among the federal prison population. Over the last 15 years, the proportion of inmates experiencing mental illness has been steadily increasing.

In 1997, 8% of the total in-custody offender population had been diagnosed with a mental illness at the time of their admission. By 2001, the number had increased to 10%,[19] and by 2010, to 11%.[20] This includes only the proportion of the prison population that has been diagnosed, however. Given that many men and women entering federal prisons have long histories of poverty, housing vulnerability and addiction, it is likely that many experience mental health issues that go undiagnosed. For instance, the latest CSC data suggests that 38% of the male federal offenders admitted to penitentiary require further assessment to determine if they have mental health needs. Among admitted female offenders, more than 50% require further mental health assessment. Issues such as stigma, fear and inadequate tools for detection and diagnosis mean that this number likely under-represents the scale of the problem. [21]

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[18] Kirk Makin, "Why Canada's prisons can't cope with flood of mentally ill inmates" (January 21, 2011), online: The Globe and Mail <http://www.theglobeandmail.com/news/national/why-canadas-prisons-cant-cope-with-flood-of-mentally-ill-inmates/article1879501/>)

[19] Tim Riordan, *Exploring the Circle: Mental Health, Homelessness and the Criminal Justice System in Canada*, 23 April 2004. Pp 2.

[20] Dr. John Service, *Under Warrant: A Review of the Implementation of the Correctional Service of Canada's Mental Health Strategy, September 2010*

[21] Howard Sapers, Correctional Investigator. Annual Report of the Office of the Correctional Investigator, 2010-2011. June, 2011. Available from: http://www.oci-bec.gc.ca/rpt/annrpt/annrpt20102011-eng.aspx#note1

Mental Health among Incarcerated Men in 2009
In 2009, 38.4% reported or were assessed at intake as showing symptoms associated with possible mental health problems that require follow-up assessment by a mental health professional. These included: • Obsessive-Compulsive (29.9%) • Depression (36.9%) • Anxiety (31.1%) • Paranoid Ideation (30.6%) • Psychoticism (51%)
• 78% of those reporting a substantial to severe dependence on alcohol also reported mental health distress (concurrent disorder)
• Aboriginal offenders were five times more likely to be categorized as severely dependent on alcohol as non-Aboriginal offenders.
• 29% scored high on scales assessing depression and hopelessness; over 20% endorsed at least one item on the current or historical suicide indicator scale.

Source: CSC, *An Initial Report on the Results of the Pilot of the Computerized Mental Health Intake Screening System (CoMHISS)*, March 2010.

Mental Health among Incarcerated Women in 2009
• In 2009, 29% of women offenders were identified at admission as presenting mental health problems; this proportion has more than doubled over the past decade. • 31% of women were identified, at intake, as having a past mental health diagnosis, representing a 63% increase over the past decade. • 48% of women were identified, at intake, as having a current need for prescribed medication. • Since 2003, at intake, approximately 77% of women report abusing both alcohol and drugs. • Just under half of women self-report having engaged in self-harming behaviour.

Source: Howard Sapers, Correctional Investigator. Annual Report of the Office of the Correctionals Investigator, 2010-2011. June, 2011.

Mental Health Services in Prisons: Bill C-10 Will Exacerbate the Problem

The high proportion of inmates with mental health issues presents a serious challenge: **a significant proportion of inmates with mental health issues are unable to access treatment.** The lack of available mental health services means that inmates with mental health issues are

more likely than other inmates to serve their full sentences in incarceration. Primarily, this is due to behaviour issues that flow from untreated mental illness.[22]

The failure to provide services to mentally ill patients, and the longer periods of incarceration they are forced to endure as a result of that failure, run counter to the purposes of the corrections system. Critics have noted that this treatment of the mentally ill seems to "'punish' people with mental disorders;" this, they note, "is obviously discriminatory, unacceptable and does not meet the minimum standards set by the *Corrections and Conditional Release Act (CCRA)*."[23] The *CCRA* states that the purpose of the federal correctional system is to "contribute to the maintenance of a just, peaceful and safe society by (*a*) carrying out sentences imposed by courts through the safe and humane custody and supervision of offenders and (*b*) assisting the rehabilitation of offenders and their reintegration into the community as law-abiding citizens through the provision of programs in penitentiaries and in the community" [emphasis added].[24]

More explicitly, Section 86 of the CCRA commits the government to "provide every inmate with: (*a*) essential health care; and (*b*) reasonable access to non-essential mental health care that will contribute to the inmate's rehabilitation and successful reintegration into the community." Additionally, it specifies that all health care under subsection (1) "shall conform to professionally accepted standards."[25] Health care for the purposes of the Act includes: "medical care, dental care and mental health care, provided by registered health care professionals."[26]

The new crime bill provisions, unless accompanied by a significant increase in spending on mental health services, will compound existing problems, leaving a higher proportion of inmates without the mental health services they need. As the new crime bill removes conditional sentences and sentencing discretion for judges, it may lead to an increase in the proportion of the prison population suffering from mental health issues. It will almost certainly lead to an increase in the absolute numbers of mentally ill inmates. Funding for mental health services in federal prison is already inadequate, contrary to s. 86 of the CCRA. The shortage of services is already condemning mentally ill prisoners to longer sentences, and inhibiting their rehabilitation and reintegration into the community, one of the stated purposes of the CCRA.

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[22] Dr. John Service, *Under Warrant: A Review of the Implementation of the Correctional Service of Canada's Mental Health Strategy, September 2010*

[23] Ibid, p 12.

[24] S 3, Corrections and Conditional Release Act, S.C. 1992, c. 20. Revised March 28, 2011.

[25] S 86, Corrections and Conditional Release Act, S.C. 1992, c. 20. Revised March 28, 2011.

[26] S 85, Corrections and Conditional Release Act, S.C. 1992, c. 20. Revised March 28, 2011. . *For the purposes of s. 86 and 87 of the CCRA, "*Mental health care" means the care of a disorder of thought, mood, perception, orientation or memory that significantly impairs judgment, behaviour, the capacity to recognize reality or the ability to meet the ordinary demands of life; "treatment" means health care treatment.

Mental Illness, Bill C-10 and S. 15 of the *Charter*

In light of this history of prejudice and discrimination, the provisions eliminating conditional sentencing are particularly **vulnerable to a s. 15 *Charter* challenge**. A blanket removal of conditional sentencing based solely on the type of offence, combined with inadequate support for mentally ill offenders, in effect, perpetuates disadvantage and stereotypes against this vulnerable group.[27] The *Charter* guarantees substantive equality which requires government to take into account contextual factors such as race and disability, that may require differential treatment in order to be treated fairly.

The amendments are even more vulnerable on a section 1 analysis. First, given the vast social science data that exists on the topic, removing conditional sentences would not be rationally connected with the goal of ``safe streets and communities``. Second, removing conditional sentences through a blanket exclusion for the enumerated offences would not be minimally impairing; the status quo of judicial discretion is a far less impairing tactic that reasonably achieves the objective.

Aboriginal Overrepresentation in Prisons is a Pressing Social Problem

Aboriginal people are significantly overrepresented in correctional facilities when compared to their level of representation in the general population. In 2008-2009, Aboriginal people accounted for[28]:

- 27% of admissions to provincial and territorial sentenced custody,
- 18% of admissions to federal custody, and
- 21% of admissions to remand.

The overrepresentation is even more substantial for Aboriginal women. In 2008-2009, over 1 in 3 women admitted to sentenced custody was aboriginal (37%). [29]

These proportions are shocking, when it is kept in mind that Aboriginal people account for only 3% of the total Canadian adult population.[30]

Additionally, the overrepresentation of Aboriginal people in custody has been increasing since 2004-2005:

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[27] *R v Withler*, [2011] 1 SCR 396, [2011] SCJ No 12 at para 3

[28] Donna Calverley, "Adult Correctional Services in Canada, 2008/2009", online: Statistics Canada <http://www.statcan.gc.ca/pub/85-002-x/2010003/article/11353-eng.htm>.

[29] *Ibid*

[30] *Ibid*

- Representation of Aboriginal women in custody increased by 6 percentage points
- Representation of Aboriginal men in custody increased by 2 percentage points.

It is reasonable to think that these increases would have been even greater without the availability of conditional sentences, which are supposed to provide a viable and meaningful alternative to imprisonment and can contain punitive elements such as house arrest.

In its 1999 decision in *Gladue,* the Supreme Court emphasized the gravity of the overrepresentation crisis and reviewed the several studies and inquiries that sought to understand the problem.[31]

The Court underlined the cultural inadequacy of certain measures for aboriginal people:

> In Bridging the Cultural Divide, supra, at p. 309, the Royal Commission on Aboriginal Peoples listed as its first "Major Findings and Conclusions" the following striking yet representative statement:
>
> > The Canadian criminal justice system has failed the Aboriginal peoples of Canada -- First Nations, Inuit and Métis people, on-reserve and off-reserve, urban and rural -- in all territorial and governmental jurisdictions. The principal reason for this crushing failure is the fundamentally different world views of Aboriginal and non-Aboriginal people with respect to such elemental issues as the substantive content of justice and the process of achieving justice.[32]

While admitting that the overrepresentation problem cannot be solved solely through sentencing innovation, the Supreme Court underlined the role of the sentencing judge in "remedying injustice against aboriginal peoples":

> Sentencing judges are among those decision-makers who have the power to influence the treatment of aboriginal offenders in the justice system. They determine most directly whether an aboriginal offender will go to jail, or whether other sentencing options may be employed which will play perhaps a stronger role in restoring a sense of balance to the offender, victim, and community, and in preventing future crime.[Emphasis added][33]

[31] *Gladue, supra* note 17 at paras 58 - 65
[32] *Gladue, supra* note 17 at para 62
[33] *Ibid,* at para 65

Bill C-10 is Incompatible with the Judicial Duty under s. 718.2(e)

The role of sentencing judges in remedying injustice was elevated to a judicial duty in *Gladue*[34]*;* it is a duty captured by s. 718.2(e) in the *Criminal Code.* This judicial duty is remedial in nature, and is more than a reiteration of sentencing principles. By removing discretion, Bill C-10 will conflict with this judicial duty.

In sentencing an Aboriginal offender under s. 718.2(e), judges **must consider**:

1. The unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts; and
2. The types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular aboriginal heritage or connection.[35]

While the remedial judicial duty does not entail an "automatic" sentence reduction[36], the Supreme Court emphasized that restorative and rehabilitative sentencing goals may often be particularly required in the case of Aboriginal offenders. For example, in discussing the first step of the framework, the Court stated:

> In cases where such [systemic] factors have played a significant role, it is incumbent upon the sentencing judge to consider these factors in evaluating whether imprisonment would actually serve to deter, or to denounce crime in a sense that would be meaningful to the community of which the offender is a member. In many instances, more restorative sentencing principles will gain primary relevance precisely because the prevention of crime as well as individual and social healing cannot occur through other means.[37]

Additionally, in discussing the second step of the framework, the Court added:

> What is important to recognize is that, for many if not most aboriginal offenders, the current concepts of sentencing are inappropriate because they have frequently not responded to the needs, experiences, and perspectives of aboriginal people or aboriginal communities.[38]

The new blanket prohibitions on conditional sentencing and the statutorily imposed mandatory minimums will conflict with the proper application of the *Gladue* framework. In other words, Bill C-10 will impair or effectively remove the ability of sentencing judges to exercise their s. 718.2(e) judicial duty. The new provisions may force judges to impose a sentence that would be:

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[34] *Ibid,* at para 34
[35] *Ibid,* at para 66
[36] *Ibid,* at para 88
[37] *Gladue, supra* note 17 at para 69
[38] *Ibid* at para 73

1. Insensitive to the "unique systemic or background factors" which brought the aboriginal offender before the courts, or
2. Inappropriate or incompatible with the "particular aboriginal heritage."

Bill C-10, s. 718.2(e) and Section 15 of the Charter

The impairing effect on the judicial duty under s. 718.2(e) is prima facie discriminatory under s. 15 of the *Charter*. Although in *Gladue* the Court did not conduct a s. 15 analysis, the principles enunciated reveal a constitutional dimension in s. 718.2(e).

> There is no constitutional challenge to s. 718.2(e) in these proceedings, and accordingly we do not address specifically the applicability of s. 15 of the Charter. We would note, though, that the aim of s. 718.2(e) is to reduce the tragic overrepresentation of aboriginal people in prisons. It seeks to ameliorate the present situation and to deal with the particular offence and offender and community. The fact that a court is called upon to take into consideration the unique circumstances surrounding these different parties is not unfair to non-aboriginal people. Rather, the fundamental purpose of s. 718.2(e) is to treat aboriginal offenders fairly by taking into account their difference.[39]

The fundamental purpose of s. 718.2(e) has a clear remedial s. 15(2) dimension. This judicial duty, in other words, is meant to remedy systemic discrimination.

Although the court clarified that the application of s. 718.2(e) does not entail an "automatic sentence reduction", it clearly stated that the judicial duty was fundamentally about:

- Ameliorating the tragic overrepresentation of aboriginal people in prisons, and
- Treating aboriginal offenders fairly by taking into account their difference.

Impairing such a duty through blanket sentencing provisions will perpetuate discrimination. Bill C-10 will:

- Exacerbate the tragic overrepresentation of aboriginal people in prisons, and
- Treat aboriginal offenders in a discriminatory manner by imposing statutorily mandated sentences without taking into account their difference.

Both the removal of conditional sentences and the statutory mandatory minimum sentences are vulnerable to a s. 15 *Charter* challenge for their discriminatory effect on Aboriginal offenders.

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[39] *Gladue, supra* note 17 at para 87

Finally, as mentioned above, the sentencing provisions would not likely be saved under s. 1 of the *Charter.* First, there is no proven rational connection between blanket removals of conditional sentencing and public safety. Second, the current model of judicial discretion as well as mandatory sentences that allow judges to justify departures in exceptional circumstances are both far less impairing than the proposed amendments which will force judges to sentence offenders to mandatory minimum terms of imprisonment regardless of their personal characteristics.

Part 3: *YCJA* Reforms Are Ineffective and Inconsistent with Canadian Values of Youth Justice

In *R v D.B.*[40]the Supreme Court of Canada recognized the principle of fundamental justice that young people be presumed to have reduced moral blameworthiness in the context of our criminal justice system. This fundamental premise of our treatment of youth rquires that any attempt to impose adult consequences for youth behaviour be done cautiously and with due attention paid to the special protections of young people's rights under the *Charter* and the United Nations *Convention on the Rights of the Child.* The Asper Centre Crime Bill Working Group **supports the submissions of Justice for Children and Youth to House of Commons Committee on Justice and Human Rights (Nov. 6, 2011)**.[41] In particular, the working group wishes to emphasize the following problematic amendments.

Broad Policy Changes with Consequences throughout the *YCJA*

a. Change from "Long-term Public Safety" to "Public Safety through increased Accountability"

Provision 168(1) proposes to change the declaration of principle in s. 3(1) from one of rehabilitation with the goal of "long-term public safety" to one of "public safety" achieved through "accountability". This proposed amendment signals a shift from a long-term rehabilitation focused approach to a short-sighted punitive approach. The current *YCJA* was developed through decades of research and has been commended as a modern, advanced approach to addressing youth crime. Since the enactment of the *YCJA* in 2003, all youth crime statistics have been declining.[42] The proposed shift away from rehabilitative goals and towards punitive measures is a counter-productive step for our youth criminal justice system.

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[40] *R v D.B.*, [2008] 2 SCR 3

[41] Justice for Children and Youth, "Submissions on Bill C-10: Youth Criminal Justice Act Amendments Submitted to the House of Commons Committee on Justice and Human Rights"(6 November, 2011), online: Justice For Children and Youth <http://www.jfcy.org/PDFs/BillC-10_Nov2011.pdf>

[42] Shannon Brennan and Mia Dauvergne, "Police-reported crime statistics in Canada, 2010," Juristat, Statistics Canada catalogue no. 85-002-X, 21 July 2011, p. 20.

b. Addition of "Deterrence" and "Denunciation" as Sentencing Objectives

The addition of "specific deterrence" and "denunciation" as sentencing objectives in the *YCJA* also indicates a step backwards for Canada's modern, advanced approach to youth criminal justice. [43] This addition introduces adult sentencing principles into the youth criminal justice regime. In *R. v. B.W.P.; R. v. B.V.N.*[44] the Supreme Court of Canada recognized that adult sentencing principles do not apply to the *YCJA,* and deterrence was purposely omitted as an objective under the Act.

Of course, Parliament is able, through legislative amendment to introduce these objectives. However, such an amendment blurs the line between the necessarily distinct criminal justice models Canada has devised for young offenders and adult offenders. The distinction between the two was constitutionally recognized in *R v D.B.*[45]

The development of the *YCJA* and its underlying policies took decades; as a result, all youth crime statistics have been declining. Anecdotal evidence obtained from high-profile, tragic cases should not drive Parliament to take a step back from what has been proven as an effective approach to youth criminal justice.

This reform of "principle" is based on a misunderstood reading of the *Nunn Commission Report.* The 2006 Commission has concluded that "protection of the public" should be introduced as an objective.[46] However, protection of the public, particularly in the context of youth, is better achieved through rehabilitation and reintegration goals. Indeed the protection of the public is already a stated principle of the Act.[47] Further, "denunciation," in particular, has a counter-productive effect in minimizing youth criminal behaviour.

c. Broadened Definition of "Violent Offences" and "Serious Offences"

Provision 167(3) expands the definition of "violent offences" to include reckless behaviour that endangers the safety of the public. A violent offence will now include:

- an offence causing bodily harm;
- an attempt or a threat to cause bodily harm; and
- an offence that endangers the life or safety of another person by creating a substantial likelihood of causing bodily harm.

This expansion is rooted in Recommendation 21 of the *Nunn Report*. On its face, the amendment seems logical; a substantial likelihood of causing bodily harm seems to connote a violent crime.

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[43] D. Merlin Nunn, Spiralling Out of Control: Lessons Learned from a Boy in Trouble – Report of the Nunn Commission of Inquiry, December 2006

[44] *R. v. B.W.P.; R. v. B.V.N.,* [2006] 1 SCR 941 at para 4

[45] *R v D.B., supra* note 40

[46] *Nunn Commission Report*, supra note 29 at 236

[47] *Youth Criminal Justice Act,* S.C. 2002, c.1, s.3(1)

In practice, however, this expansion will now cover a very wide range of common adolescent behaviour. Such offences would include, for example: poking someone with a pencil in school (assault with a weapon), schoolyard fights (assault), pinching other kids' rear ends (sexual assault).[48]

Provision 167(3) also expands the definition of serious offences to include many *Criminal Code* offences; very few would be excluded from this definition. Examples include[49]:

- common assault (section 266(a), such as a school yard fight where both young people get charged);
- uttering threats (section 264.1);
- obstruction of justice (section 139, such as lying to the police about one's age);
- theft over $5000 (section 334(a), such as taking the family car without permission);
- uttering a forged document (section 366-368, such as forging a parental note to a teacher);
- public mischief (section 140).

Combined with the other amendments of Bill C-10, these definition expansions will lead to easier publication of young offender names and increased incarceration (pre-and post sentencing) –these effects will be counter-productive to the rehabilitation of young offenders and the ultimate achievement of public safety.

Three Counter-Productive Amendments

a. Facilitating Publication of Young Offenders' Names Signals a Shift from Rehabilitation to Vindictiveness

The amendments relating to publication bans lead to an erosion of the privacy principle in the *YCJA.* Bill C-10 removes the old reverse onus for publication bans that the Supreme Court declared was in violation of s. 7 of the *Charter*;[50] however, it introduces the possibility of publishing the identity of a young person where the court has dismissed an application that was filed to impose an adult sentence on a young person and has instead imposed a young offender sentence for a "violent offence" within the meaning of clause 167(3) of the bill.

These clauses significantly erode the principle of privacy, especially when combined with two other problematic amendments of Bill C-10:

1. the broadened definition of "violent offences" and
2. the duty on Crown counsel to "consider" seeking adult sentences.

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[48] Justice for Children and Youth's Submissions on Bill C-10, *supra* note 41, at 10
[49] *Ibid* at 11
[50] *Supra,* note 40 at para 87

This is a clear signal that publication will be more readily available, and as a result, rehabilitation will be compromised. These amendments ignore the cautions of the Supreme Court in *R v D.B.*; the court was clearly alive to the social science evidence and international law trends *against* publication. For example, the Court emphasized that:[51]

- In s. 3(1)(*b*)(iii) of the *YCJA*, as previously noted, the young person's "enhanced procedural protection ... including their right to privacy", is stipulated to be a principle to be emphasized in the application of the Act.
- Scholars agree that "[p]ublication increases a youth's self-perception as an offender, disrupts the family's abilities to provide support, and negatively affects interaction with peers, teachers, and the surrounding community".[52]
- "I think you'd be hard-pressed to find a single professional who has worked in this area who would be in favour of the publication of names. From the very beginning when this was proposed in May 1998, I'd never heard anybody give a single reasoned, principled argument for doing it."[53]
- International instruments have also recognized the negative impact of such media attention on young people. The *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* ("Beijing Rules") provide that "[t]he juvenile's right to privacy shall be respected at all stages in order to avoid harm being caused to her or him by undue publicity or by the process of labelling" and declare that "[i]n principle, no information that may lead to the identification of a juvenile offender shall be published".[54]

The Supreme Court concluded that "lifting a ban on publication makes the young person vulnerable to greater psychological and social stress. Accordingly, it renders the sentence significantly more severe."[55]

Given the negative impact publication has on the rehabilitation prospects of young offenders, this policy change signals a major shift in our youth criminal justice model to one of "vindictiveness", or, in the words of Professor Doob, "gratuitous meanness".[56]

There is no evidence that a vindictive youth criminal justice approach would increase public safety. These measures are neither consistent with, nor necessary for improvements in public safety.

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[51] *Ibid* at paras 84 – 87
[52] Nicholas Bala, *Young Offenders Law* (Concord, Ont.: Irwin Law, 1997) at p 215
[53] *R v D.B., supra* note 40 at para 87
[54] *Ibid* at para 85
[55] *Ibid* at para 87
[56] *Ibid* at para 84

b. The Increased Availability of Pre-trial Detention and Custodial Sentences Hinders Rehabilitation

Pre-trial Detention

Provision 169 of Bill C-10 provides that the pre-sentencing detention of young persons is prohibited, except where the young person is charged with a "serious offence" or where "they have a history that indicates a pattern of either outstanding charges or findings of guilt."

First, "serious offence", as mentioned above, is a low threshold for the availability of pre-trial detention. Many offences in the *Criminal Code* are now deemed to be "serious offences" according to Bill C-10.

Second, Bill C-10 increases the availability of pre-trial detention by taking into account **"outstanding charges"** (not only findings of guilt).

The conditions needed for pre-trial detention may appear restrictive. Clause 169 of the bill does require a judge to be satisfied on a balance of probabilities that:

- there is a substantial likelihood that the young person will not appear in court,
- detention is necessary for public safety/ there is a substantial likelihood that the person will commit another "serious offence", OR
- the young person has been charged with a serious offence and there are exceptional circumstances warranting detention and detention is necessary to maintain confidence in the administration of justice

However, in light of the broad definition of "serious offence" and the somewhat vague condition of "necessary to maintain confidence in the administration of justice", it is very likely that pre-trial detention will increase for young persons. Pre-trial detention is problematic for three main reasons:

1. It infringes the liberty of youth who have not yet been found guilty;
2. It has a negative impact on recidivism;[57] and
3. It encourages false guilty pleas and increases the risk of miscarriages of justice.

Custodial Sentences

Provision 173 of Bill C-10 will increase the availability of custodial sentences by allowing the imposition of custodial sentences where " the young person has committed an indictable offence for which an adult would be liable to imprisonment for a term of more than two years and has a history that indicates a pattern of either extrajudicial sanctions

[57] Moyer, S., *Pre-trial Detention under the Young Offenders Act: A Study of Urban Courts* (Department of Justice Canada, 2005).

("EJS") or of findings of guilt or of both …".

Custody has always been seen as a penalty of last resort for young persons; this amendment would drastically alter this rehabilitation-focused approach. More specifically, including a "pattern of extrajudicial sanctions" as a reason for incarceration frustrates the very purpose of the EJS scheme. Youth participating in these programs (1) may not have access to legal advice, (2) may not understand the future consequences of accepting EJS, and (3) may see EJS as an attractive alternative to a trial.[58] Using youths' history with the EJS program against them in considering custodial sentences is unjust and hinders rehabilitation.

c. Duty on Crown to "Consider" Seeking Adult Sentences is Problematic

It is Incongruous with the Principle of Reduced Moral Blameworthiness of Youth

Provision 176(1) of Bill C-10 proposes a mandatory duty on Crown counsel to consider seeking adult sentences for youth convicted of "violent offences". If they decide not to seek adult sentences, they must advise the court of their decision.

Although clothed in "permissive" language, the new provisions are incongruous with the basic tenets of our youth criminal justice system. Given the broadened definition of "violent offences", Bill C-10 signals a problematic endorsement of adult sentences for young persons. If "reduced moral blameworthiness" of youth is a principle of fundamental justice (*R v D.B.*), why would it be necessary for Crown counsel to always consider an adult sentence? The mere fact that the offence is "violent" (especially when "violent" is so broadly defined) does not negate or diminish the importance of the principle established in *R v D.B.*

The Adult System is Ineffective in Rehabilitating or Deterring Youth

Many studies have been conducted on the effectiveness of the adult sentencing system on youth. There is a general consensus that there is no deterrence benefit to treating youths as adults[59]:

- Youths punished in the adult system are *not* more likely to be deterred from further criminality than youths handled in the juvenile system
- In 2000, a study compared robbery and burglary youthful offenders in NY and New Jersey. In New York the 15 and 16 year olds were prosecuted in the criminal courts; in NJ they were still considered youths. There appeared to be no effect of the court system for burglary offenders, but for robbery offenders transfer to adult court tended to be associated with *increased* subsequent offending.
- In 2000, a study followed 2,738 youths who were transferred into the adult system and carefully matched the youths on seven relevant factors (i.e. offence, past record, age,

[58] Justice for Children and Youth Submissions, *supra* note 40 at 15
[59] Anthony Doob and Carla Cesaroni, *Responding to Youth Crime in Canada,* (Toronto: University of Toronto Press, 2003) at 185

race) with youths who were prosecuted as youths. The study showed increased recidivism for the transferred youths in the short term (roughly 2 years) on every measure that was examined and similar findings for almost all measures in the long term.

- Mass transfers of youth to adult court also fail to achieve general deterrence objectives. A 1998 study examined the impact of legal changes in New York which sent thousands of youths to adult court. In spite of the high publicity and aggressive implementation, there was no impact on youth crime rates more generally.
- Youths prosecuted through the youth justice system registered signs of caring, concern and interest from the judge; the opposite was true in the adult criminal justice system. Youths are sensitive and responsive to these signs of caring since many of them have not experienced them in the primary sphere of home and school.

Positive Amendment: Precluding Detention of Youth in Adult Facilities

The Asper Centre Crime Bill Working Group **supports provision 76(2) of Bill C-10**, **which prohibits the detention of youth in adult prisons.** This is a welcome legislative enactment and brings Canada more closely in compliance with its international obligations under the United Nations *Convention on the Rights of the Child*.

1. Youths in adult prisons are more likely to be victims of violence (including sexual assaults) from other inmates and staff.[60]
2. Public opinion is strongly opposed to incarcerating youths in the same facilities as adults. In a 1997 Ontario public opinion study, 86% of respondents supported separate facilities. [61]

Part 4: Mandatory Minimum Sentences Are Ineffective, Disproportionate and Constitutionally Vulnerable Legislative Tools

1. Mandatory Minimums Are Ineffective Deterrents

Increases in sentence severity do not achieve the "general deterrence" goals they seek. Theoretically speaking, mandatory minimums and harsher sentencing are appealing; when the cost of an action is higher (penalty wise), fewer people do it. However, in practice, people must do three things to make the theory work; since people fail to do these three things, the theory of general deterrence also fails[62]:

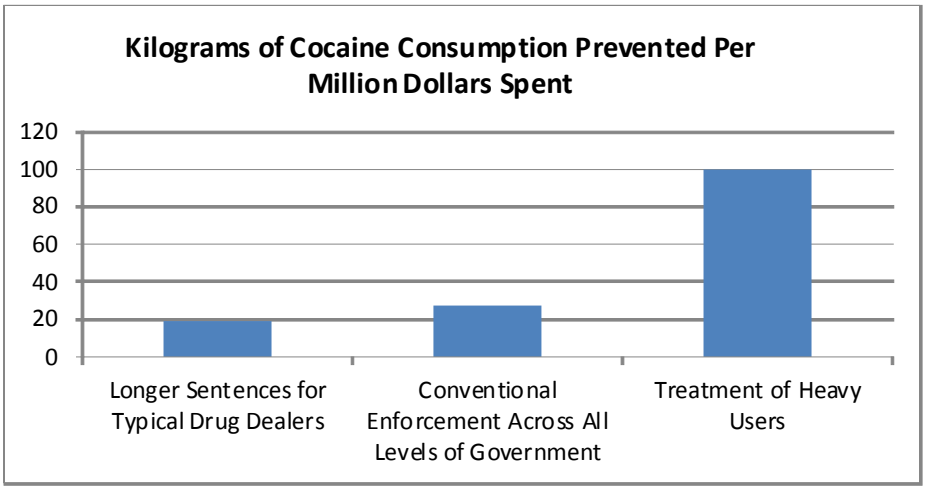
1. People have to consider the consequences of their actions
2. People must have an accurate view of what the penalty is likely to be

[60] *Ibid* at 186
[61] Doob et al, *supra* note 1 at 12
[62] Doob & Webster, *supra* note 7 at 7

3. Potential offenders have to weigh the consequences, not only in light of what the penalty would be but also the likelihood of getting caught

Due to these three tendencies in human behaviour, mandatory minimum sentences are ineffective deterrents.

Drug crime, for unique reasons, is particularly unlikely to be controlled through mandatory minimum sentencing. When comparing the amount of taxpayer dollars spent to the narcotics consumption prevented, mandatory minimums are the least effective method of drug control, lagging behind increased treatment for addicts and increased enforcement expenditures.[63]



Logically speaking, this outcome is expected of "black market" offences. The benefits of selling drugs are not independent of the expected sentence. As the expected sentence increases, so does the mark-up in drug price (since the dealer expects compensation for the risk). "Extending sentences increases not only the expected nonmonetary cost in terms of time spent in prison but also the expected monetary reward of dealing."[64] It is thus not clear that extending sentences will deter the net amount of drug dealing. (They may affect *who* chooses to deal – namely people who place a high value on money and a low value on the risk of imprisonment.)

One may expect that these higher resulting prices will affect the demand for drugs; however, given the low elasticity of demand for addictive substances, the decrease in demand will be negligible. This is why mandatory minimums underachieve in terms of reducing consumption per dollars spent.

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[63] Jonathan Caulkins et al, *Mandatory Minimum Drug Sentences: Throwing Away the Key or the Taxpayers' Money*, Drug Policy Research Centre RAND, 1997, Summary xvii, figure S.1

[64] Caulkins et al, *supra* note 68 at 13

2. Mandatory Minimums Lead to Disproportionate Punishment and Are Potentially Unconstitutional

Aside from their ineffectiveness, mandatory minimums undermine proportionality in two main ways:

1. They lead to disproportionate punishment for the least blameworthy offenders by taking away judicial discretion. Proportionality of punishment is a central principle of sentencing; it is a principle "of constitutional weight" according to the Supreme Court in *Nasogaluak*[65].
2. They cause statutory "cliffs" through inadequate drafting, especially for drug offences (i.e. double sentence for an offender growing 201 marijuana plants than for an offender growing 200 marijuana plants).

Examples of Disproportionate Punishment under Bill C-10

The following cases are examples of accused with diminished moral blameworthiness, and the sentences they would receive under Bill C-10.

R. v. V. (K.B.)[66]

A father admitted to having grabbed his son in the genital area as a disciplinary response; the child had engaged in similar activity with others. The accused explained that he grabbed his son by the testicles to show him how much it hurt and to prevent him from doing it to other children. The trial judge convicted the accused of sexual assault; the Ontario Court of Appeal dismissed the appeal, ruling that a "sexual gratification motive" was not a prerequisite for a conviction of sexual assault.

Offence: Sexual assault of person under 16

Sentence under Bill C-10: 1 year mandatory minimum (indictment); 90 days mandatory minimum (summary conviction)

R v Kang[67]

Kang was a 26-year-old male with no previous record of offences. He pleaded guilty to and was convicted of possession of cocaine for the purpose of trafficking. He agreed to transport four one-kilogram bricks of cocaine from Vancouver to Toronto; he was apprehended in Toronto in possession of the cocaine. Kang suffered from Tourette Syndrome, "combination mental illness and neurological disorder", had been abandoned by his family and was near financial and emotional collapse. He had complied with all terms of the judicial interim release

[65] *R v Nasogaluak*, 2010 SCC 6, [2010] 1 SCR 206
[66] *R v V.(K.B.),* 1992 CarswellOnt 86
[67] *R v Kang*, 2005 CarswellBC 3114

and appeared to bear no risk of re-offending. Kang's Tourette Syndrome would render him particularly vulnerable to negative environment of custodial term of imprisonment; in the very exceptional circumstances of his case, a conditional sentence was properly imposed. The accused was sentenced to two years less a day conditional term of imprisonment including "house arrest", treatment, and 40-hours of community service conditions.

Offence: possession for purpose of trafficking; 4 kg of cocaine (likely aggravating factor of "assisting in organized crime")

Sentence under Bill C-10: 1 year mandatory minimum

Examples of Disproportionate Punishment in the United States

Examples from the United States make the issue of proportionality clear. While the mandatory minimum sentences introduced by Bill C-10 may not be as stringent as some of the examples below, the bill is a step towards a system of disproportionate and ineffective sentencing.

> "In Houston, for example, a 37-year-old stevedore was prosecuted and convicted of possessing 1/1,000th of a gram of crack (the residue on a crack pipe). Because the defendant had two previous drug convictions, he was required to be sentenced to a 25-year minimum term as a "habitual offender.
>
> Brenda Valencia, a 19-year-old with no prior convictions, or even any evidence of involvement in drug sales, drove her aunt from Miami to a drug dealer's home in Palm Beach County. For that she was sentenced to 12.5 years in prison, which the sentencing judge, Federal District Judge Jose Gonzalez, Jr., termed "an outrage.
>
> Christian Martensen, a young fan of the Grateful Dead, followed the band on tour. When his van broke down, he needed money to fix it, and another fan offered Martensen $400 if Martensen would find him someone who would sell some LSD. Martensen accepted the fan's offer; the fan turned out to be an undercover federal agent, and Martensen is now serving a 10-year mandatory minimum. He had no prior record."[68]

[68] Kopel, David B. "Prison Blues: How America's Foolish Sentencing Policies Endanger Public Safety", *Cato Policy Analysis No. 208* (Cato Institute: May 17, 1994), available online at http://www.cato.org/pubs/pas/pa-208.html

Charter Vulnerability of Mandatory Minimum Sentencing

Such examples, in Canada, would be clearly subject to a s. 12 *Charter* challenge. In *R v Smith*[69], the Supreme Court of Canada struck down a seven year mandatory minimum sentence provision for a drug offence as constituting cruel and unusual punishment, and not salvageable under s. 1.

While the mandatory minimum sentences proposed by Bill C-10 may not rise to the threshold of "cruel and unusual" punishment, they pose a clear potential for disproportionate sentencing.

It is very likely that proportionality in sentencing may be recognized as a principle of fundamental justice in a s. 7 challenge to the new provisions.

For example, in *Smith,* Lamer J, speaking for three judges in a split six-judge decision, stated:

> The notion that there must be a gradation of punishments according to the malignity of offences may be considered to be a principle of fundamental justice under s. 7, but, given my decision under s. 12, I do not find it necessary to deal with that issue here. [70]

Although not necessary to consider in that case, the possibility of accepting proportionality as a principle of fundamental justice was recognized since 1987. The importance of the principle has only increased since then. In *Nasogaluak,* a 2010 decision, the Supreme Court held that:

> It is clear from these provisions that the principle of proportionality is central to the sentencing process (*R. v. Solowan*, 2008 SCC 62, [2008] 3 S.C.R. 309, at para. 12). This emphasis was not borne of the 1996 amendments to the *Code* but, rather, reflects its long history as a guiding principle in sentencing (e.g. *R. v. Wilmott* (1966), 58 D.L.R. (2d) 33 (Ont. C.A.)).[71]

Given its centrality to Canadian sentencing, and its long history, the principle of proportionality may very well be recognized as a principle of fundamental justice in upcoming litigation. The requirements seem to be easily met[72]:

1. There is "some consensus" that proportionality is vital and fundamental to our societal notion of justice. *Nasogaluak* emphasizes the centrality of the principle.

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[69] *R v Smith*, [1987] 1 SCR 1045, 40 DLR (4th) 435
[70] *Ibid* at para 58
[71] R v Nasogaluak, *supra* note 65 at para 41
[72] *Rodriguez v. British Columbia (Attorney General)*, [1993] SC.J No. 94, 107 DLR (4th) 342 at para 141; *R v Malmo–Levine*, 2003 SCC 74, 233 DLR (4th) 415 para 112

2. It can be identified with precision. Proportionality requires that a sentence "speaks out against the offence and punishes the offender no more than is necessary."[73] It is no less capable of application than other principles of fundamental justice, such as non-arbitrariness or overbreadth.
3. Proportionality is a legal principle. It is rooted in the common law, and recognized in the *Criminal Code* as the "fundamental principle" of sentencing.[74]

The limited *Charter* case law of mandatory minimums is understandable given the limited Canadian experience with such legislative instruments. At the time of *Smith,* for example, the principles of fundamental justice under s. 7 were just barely recognized as encompassing more than procedural safeguards.[75]

The trajectory of our *Charter* jurisprudence over the past three decades indicates that mandatory minimum sentences will be vulnerable to constitutional challenges. Their proven low effectiveness in achieving the "safety" goals of Bill C-10 will make the provisions that much more vulnerable in a s. 1 analysis.

Inadequate Drafting: Statutory Cliffs

Bill C-10 creates statutory cliffs by imposing mandatory minimum sentences for the production of marijuana (grow-ops). For example, an offender convicted of growing 200 plants in a manner that "constitutes a potential public safety hazard in a residential area" will be sentenced to a minimum of 9 months; on the other hand, an offender convicted of growing 201 plants in the same "aggravating manner" will be sentenced to a minimum of 18 months.

In a sentencing regime governed by judicial discretion there would be no difference in sentencing between a 200 plant grow-op and a 201 plant grow-op. Proportionality would not allow a double sentence to be imposed on the latter.

The perceived unfairness of such disproportionate schemes will lead to the criminal justice system to adapt; the adaptation will likely occur through increased reliance on prosecutorial discretion.

Increased Reliance on Prosecutorial Discretion is a Risky Alternative

Restricting judicial discretion bolsters the power of prosecutors to influence sentencing outcomes through their exercise of discretion in charging[76]. This phenomenon reflects the fact that "[judges], prosecutors, defense council, and probation officers work together on an

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[73] *Nasogaluak, supra* note 65 at para 42
[74] *Criminal Code,* RS C 1985, c C-46 s 718.1
[75] *Smith, supra* note 69 at para 21
[76] Michael Tonry, *Mandatory Minimums, and Public Policy*. Criminology and Public Policy Volume 5, Issue 1, pp. 45 – 56 at 47

ongoing basis in most courtrooms" and, as a result, **"[shared] understandings evolve about** 'going rates' and about reasonable and unreasonable sentences and modes of official behavior." When legislation forces a departure from these shared understandings, practitioners, including prosecutors, will alter their behaviour to mitigate the legislation's effect and bring sentences back into line with their pre-existing understandings of how the law should work.[77]

This phenomenon has been formally recognized since at least the 1960s, when Frank Remington observed that "[l]egislative prescription of a high mandatory sentence for certain offenders is likely to result in a reduction in charges at the prosecution stage, or if this is not done, in a refusal of the judge to convict at the adjudication stage. The issue…thus is not solely whether certain offenders should be dealt with severely, but also how the criminal justice system will accommodate to the legislative change".[78]

While this may be an optimistic view of how the legal system will adapt to disproportionate statutory "cliffs", it is still not satisfactory. Prosecutorial discretion, while necessary, is not a transparent process; increased reliance on such discretion endangers the rule of law.

One of the problems with this increase in prosecutorial discretion is the lack of data regarding what influences a prosecutor's decision. Since these decisions, unlike judicial decisions, are private and not subject to review, there are some concerns that they could be unduly influenced by prejudicial factors. A 2007 study conducted on prosecutorial discretion by Ulmer et. al. in Pennsylvania concluded that "mandatory minimums are not mandatory at all, but simply substitute judicial discretion for prosecutorial discretion"[79]. The authors argue that prosecutors' perceptions of blameworthiness and community protection shape their decisions regarding when to apply mandatories, and that these concerns are influenced by factors such as case processing concerns (rewarding guilty pleas), social status, gender, ethnicity, age, and the social context (for example crime rates and political ramifications)[80].

Additionally, research has been done on the increased bargaining power, which mandatory minimums give to prosecutors. Since in both Canada and the United States, the majority of criminal convictions are settled without going to trial, an even balance of power between the crown and the defence becomes important to ensuring a fair outcome. It has been pointed out in the United States that the threat of a mandatory minimum being imposed increases the likelihood of a defendant accepting a plea bargain for a lesser, offence which does not carry the minimum penalty, rather than going to trial and risking the mandatory imprisonment. For example, Stephanos Bibas has written extensively about plea bargaining, mandatory minimums, and the risk that a defendant against whom the crown does not have

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[77] *Ibid* at 46

[78] Frank Remington, Introduction in Robert Dawson, Sentencing. Boston: Little, Brown at: xvii

[79] Ulmer, Kurlychek and Kramer. "Prosecutorial Discretion and the Imposition of Mandatory Minimum Sentences". *Journal of Research in Crime and Delinquency*, vol. 44, no. 4, November 2007.

[80] *Ibid*.

enough evidence to disprove reasonable doubt will take a guilty plea over the risk of certain jail time[81].

Furthermore, a link has been drawn between the threat of mandatory minimums, informer evidence and wrongful convictions[82]. Some commentators point out that the majority of wrongful convictions rely on informer or "jailhouse confessions", often procured by the crown under threat of imprisonment. Three of the most high profile wrongful conviction cases in Canada, Donald Marshall Jr., David Milgaard, and Guy Paul Morin, were convicted based on false information. Although the link between the likelihood of wrongful testimony and the threat of a mandatory penalty is not conclusive, the resulting imbalance in bargaining power is risky. An increase in prosecutorial power (and corresponding loss of power on the side of the defence) may increase the danger of wrongful convictions.

Drug Treatment Exemption Is Insufficient to Guard Against the Proportionality Concerns of Mandatory Minimum Sentences

Bill C-10 does provide a limited exemption from the statutory minimums for offenders who "successfully complete" a Drug Treatment Court program. **This exemption, while laudable, is insufficient to combat the proportionality issues outlined above.**

1. Many of the most vulnerable victims of addiction do not successfully complete the programs:
   - For example, statistics on the Vancouver Drug Treatment Courts show that only 14% of participants complete the program[83]
   - Additionally, studies done on the success rate of Toronto Drug Treatment courts suggest that women and people under 25 years old, are more likely to drop out of the programs. The programs are not sufficiently tailored to address the specific needs of these groups. [84]
2. The exemption only mitigates against disproportionate results in drug offence sentencing; however, these issues will occur wherever mandatory minimums are enacted (i.e. sex offences).
3. **<u>Better option:</u> statutory safety valve allowing judicial discretion in appropriate cases.**

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[81] For example, see "Judicial Fact Finding and Sentence Enhancements in a World of Guilty Pleas". *Yale Law Journal*, vol. 110, pg 1097. 2000-2001.

[82] Martin, Dianne L. "Distorting the Prosecution Process: Mandatory Minimum Sentences and Wrongful Convictions". *Osgoode Hall Law Journal*, vol. 39, no. 2 & 3. 2001.

[83] Public Safety Canada, National Crime Prevention Centre, Building the Evidence - Evaluation Summaries, "Drug Treatment Court of Vancouver (DTCV)," 2008-ES-18.

[84] Public Safety Canada (2007). See Felan Parker, "Women, Drugs and Court-Ordered Therapy," Carleton University Research.

Better Practices from the UK: Statutory Safety Valves

In United Kingdom legislators have been careful to preserve a certain degree of judicial discretion in sentencing, even in the context of mandatory minimum sentences.

The Criminal Justice Act 2003 was the first statute to consider the role of the judiciary in sentencing considering the statutory regime. This Act allowed courts to deviate from a mandatory minimum sentence in a wide range of offences should "the court is of the opinion that there are exceptional circumstances relating to the offence or to the offender which justify not doing so..." [85] The relevant statutory sentencing provisions are sections 172 and 174 of the Criminal Justice Act. Known as the departure test, these sections set out the judicial duty with respect to sentencing. They read as follows;

> 172 Duty of court to have regard to sentencing guidelines
> (1) Every court must—
> (a) in sentencing an offender, have regard to any guidelines which are relevant to the offender's case, and
> (b) in exercising any other function relating to the sentencing of offenders, have regard to any guidelines which are relevant to the exercise of the function.
>
> (2) In subsection (1) "guidelines" means sentencing guidelines issued by the Council under section 170(9) as definitive guidelines, as revised by subsequent guidelines so issued".
>
> 174 Duty to give reasons for, and explain effect of, sentence
> (1) Subject to subsections (3) and (4), any court passing sentence on an offender—
>
> (a) must state in open court, in ordinary language and in general terms, its reasons for deciding on the sentence passed, and
> (b) must explain to the offender in ordinary language—
> (i) the effect of the sentence,
> (ii) where the offender is required to comply with any order of the court forming part of the sentence, the effects of non-compliance with the order,
> (iii) any power of the court, on the application of the offender or any other person, to vary or review any order of the court forming part of the sentence, and
> (iv) where the sentence consists of or includes a fine, the effects of failure to pay the fine.
>
> (2) In complying with subsection (1)(a), the court must—
> (a) where guidelines indicate that a sentence of a particular kind, or within a particular range, would normally be appropriate for the offence and the sentence is of a different

[85] Criminal Justice Act 2003, c.44, s.287(2) relating to firearm offences for example. See also Julian V. Roberts. "Sentencing Guidelines and Judicial Discretion: Evolution of the Duty of Courts to Comply in England and Wales" (2011) 51:6 The British Journal of Criminology 997. p.999

> kind, or is outside that range, state the court's reasons for deciding on a sentence of a different kind or outside that range.[86]

The parameters of sentencing have recently been altered through the *Coroners and Justice Act* 2009; however Section 125 still maintains that a court must follow any relevant guidelines unless the court is satisfied that it would be contrary to the interests of justice to do so. This section reads,

> 125 (1) Every court—
>
> (a) must, in sentencing an offender, follow any sentencing guidelines which are relevant to the offender's case, and
>
> (b) must, in exercising any other function relating to the sentencing of offenders, follow any sentencing guidelines which are relevant to the exercise of that function,
> unless the court is satisfied that it would be contrary to the interests of justice to do so.
> . . .
> (3) the duty imposed on a court by subsection (1)(a) to follow any sentencing guidelines which are relevant to the offender's case includes—
>
> (a) in all cases, a duty to impose on P, in accordance with the offence-specific guidelines, a sentence which is within the offence range, and
>
> (b) where the offence-specific guidelines describe categories of case in accordance with section 121(2), a duty to decide which of the categories most resembles P's case in order to identify the sentencing starting point in the offence range; *but nothing in this section imposes on the court a separate duty, in a case within paragraph (b), to impose a sentence which is within the category range*."(emphasis added) .[87]

The language of Section 125 was a contentious issue during the passing of the Bill. The issue was the extent to which judicial discretion would still be an essential feature of sentencing, depending on whether the section required courts to "have regard to" or "follow" as a compliance requirement.[88] In the end, the stronger language of "must follow" was maintained, and in response to criticism from the Magistrates and the Bar Council an amendment was made.[89] Amendment 189C has the effect of preserving a degree of judicial discretion in sentencing.[90] The effect of this amendment was that judicial discretion was limited not within a narrow category of seriousness of a crime, but rather within the larger category of

[86] Sections 172, 174 Criminal Justice Act 2003
[87] Coroners and Justice Act 2009.
[88] Op Cit Roberts p. 1008
[89] Ibid.
[90] Ibid.

sentences within the total offence range.[91] The testimony of the Home Secretary provides further explanation:

> "[t]he government amendments . . . make it clearer that the duty to follow guidelines does not mean that a sentencer has to sentence within a narrow category; rather, the sentencer is required to sentence only within the entire guidelines range for the offence... For example, the existing robbery matrix offers considerable flexibility. Judges and magistrates have to make judgments about additional aggravating and mitigating factors—they can decide that those factors cover the whole of the range laid down for a sentence and not just one category of case within an offence range—**and they can depart from the whole thing if they consider that to be necessary and in the interests of justice"**.[92]

The current approach to sentencing in the United Kingdom, maintains a degree of judicial discretion combined with statutory minimums.

Any uncertainty in departing from a mandatory minimum sentence is somewhat clarified by the newly established Sentencing Council. The inception of the Coroners and Justice Act 2009, which led to the formation of the Sentencing Council, was in response to two developments in penal practice.

The first of these developments was the Carter Report of 2007 which examined the overcrowding of the prison population.[93] In terms of sentencing policy, Lord Carter examined American precedents and concluded that part of the solution to the overcrowding problem were structured sentencing guidelines.[94] Such guidelines would be drafted and their implementation would be overseen by an independent sentencing commission. The establishment of the sentencing guidelines would be subject to parliamentary approval, and would have the overall goal of "bringing transparency and control to the factors that influence sentencing".[95]

The second development was the report produced by the Sentencing Commission Working Group, formed to assess if the American-style structured sentencing would be a viable option in the United Kingdom.[96] This report concluded that the American practice was too **rigid,**

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[91] Ibid.
[92] Op Cit Roberts p. 1009
[93] The report most notably predicted that the demand for prison places would outweigh the supply of space unless measures intended to increase capacity were undertaken. Lord Carter's Review of Prisons, Securing the Future: Proposals for the efficient and sustainable use of custody in England and Wales, December 2007. p.27
[94] "The main feature of a structured sentencing framework is a single comprehensive set of indicative guideline ranges. This would cover sentence lengths, types of community sentences and the level of financial penalty, for groups of all offences, ranked by seriousness and offender characteristics (e.g. criminal history and culpability)." Ibid para. 30, p. 33
[95] Ibid at para. 41
[96] Sentencing Commission Working Group, Sentencing Guidelines in England and Wales: an Evolutionary Approach, July 2008.

and was "too restrictive of judicial discretion".[97] Instead, guidelines were to be formulated with greater flexibility, by the Sentencing Council – an independent public body of the Ministry of Justice.[98] Flexibility was interpreted by this Working Group not as providing a greater range of length of sentences, but rather greater emphasis placed on assessing aggravating and mitigating circumstances when departing from a statutory minimum.[99] The role of the court in relation the guidelines of the Sentencing Council, is described as follows:

> "[t]he court has a duty to impose a sentence within the offence range set out in the guideline unless it would be contrary to the interests of justice to do so. If the guideline sets out categories of case the court must identify which category the case before the court most resembles in order to identify the relevant starting point within the offence range. Courts are not however required to sentence within the category range, if such is described in a guideline, and the court may decide that the case before the court does not sufficiently resemble any of the categories described in the guideline. In each scenario outlined above, the court may depart from the guidelines where it is in the interests of justice to do so, in accordance with section 125(1)".[100]

Guidelines act to clarify the duty of the court to take into account the statutory sentencing regime, but also guide their discretion when considering factors which inevitably differ between crimes. Generally, it is accepted that

> "[t]he role of legislation as a source of English sentencing law has...largely been one of providing powers and setting outer limits to their use. Within those outer boundaries sentencing practice has been characterized by considerable discretion, subject...to the general superintendence of the Court of Appeal and to the growing influence of sentencing guidelines".[101]

In this way, the English legislators have adopted a middle ground approach which balances potential unfair sentencing implications of mandatory minimum sentencing with guided judicial discretion.

Statutory Safety Valves Are Necessary for *Charter* Compatibility

Preserving judicial discretion and allowing departure from statutory minimums "**when it is in the interests of justice to do so"** would be more compatible with ss. 7, 12 and 15 of the

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[97] Ibid. p. 17
[98] The Sentencing Council for England and Wales. "About the Sentencing Council", Online <http://sentencingcouncil.judiciary.gov.uk/about-us.htm>.
[99] Ibid
[100] Criminal Law Policy Unit, Ministry of Justice. "Coroners and Justice Act 2009 (Provisions Coming into Force on 6 April 2010)". Ministry of Justice Circular 2010/06. Online <http://www.justice.gov.uk/publications/docs/circular-06-2010-coroners-justice-act-provisions.pdf>. p.10
[101] Andrew Ashworth, *Sentencing and Criminal Justice*, 4th ed (New York: Cambridge University Press 2010). p.25

Charter. This approach would allow Parliament to express the perceived seriousness of certain offences, while still preserving the fundamental principle of proportionality with the *offence* and the moral culpability of the *offender.*

The Supreme Court of Canada in *R v Ferguson*[102] ruled that trial judges should not create constitutional exemptions from mandatory minimum sentences out of deference to Parliament's intent in creating such sentences. This means that a trial judge only has the stark choice between upholding a sentence and striking it down in its entirety.

The subsequent decision in *Nasogaluak* only slightly narrowed the *Ferguson* holding, by stating that it did not "foreclose the possibility that, in some exceptional cases, a sentence reduction outside statutory limits may be the sole effective remedy for some particularly egregious form of misconduct by state agents in relation to the offence and the offender."[103]

This narrow possibility only addresses "egregious state misconduct". All the potential *Charter* breaches stemming from the *provisions themselves* (i.e. the breaches outlined above under ss. 12, 7 and 15) would necessarily lead the judge to strike down the provisions in their entirety.

The framework in which Canadian sentencing judges operate makes it even more necessary for Parliament to add statutory exemptions like the ones enacted in England.

Conclusion: The Asper Centre Crime Bill Working Group does not support Bill C-10.

1. Public support for harsher penalties is misconceived. The bill reveals a policy shift that is neither necessary for public safety nor consistent with Canadian criminal justice values.
2. The removal of conditional sentencing will victimize and perpetuate discrimination against mentally ill and aboriginal offenders. These provisions are vulnerable to a s. 15 *Charter* challenge.
3. The amendments to the *YCJA* are inconsistent with Canadian values and signal backwards steps for our advanced model of youth justice.
4. Mandatory minimum sentences, without a statutory safety valve of judicial discretion, are vulnerable under ss. 7, 12 and 15 of the *Charter.*
5. Without solid data showing a connection between "harshness" and "public safety", the government would have difficulty upholding any provisions under s. 1 of the *Charter.*

[102] *R v Ferguson*, 2008 SCC 6, [2008] 1 SCR 96,
[103] *Nasogaluak, supra* note 66 at para 6