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THE JOHN HOWARD SOCIETY OF CANADA
LA SOCIÉTÉ JOHN HOWARD DU CANADA

Brief to the
House of Commons
Standing Committee on Justice, Human Rights, Public Safety and
Emergency Preparedness
39th Parliament

Regarding

Bill C-10

Act to amend the Criminal Code (Minimum penalties for offences involving firearms
and to make consequential amendments to another Act)

The John Howard Society of Canada

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I. Executive Summary

The John Howard Society is a national charity comprising those who believe an essential component of community safety lies in social measures that serve to reintegrate those who have offended into the community as law-abiding citizens. We are located in 60 communities across Canada. Our Mission is *Effective, just and humane responses to the causes and consequences of crime.*

Crimes committed with guns are very serious. Even when no injury occurs, the potential for injury or death is high. The Criminal Code and the courts clearly take such offences seriously now.

It is not for the John Howard Society of Canada to propose *what* the sentences for gun crimes should be. Indeed, it is our position that sentencing is an individual process that must reflect the specifics of the offence and the offender. The John Howard Society of Canada is making this submission in order to express its view regarding *who* should set the nature and quantum of a sentence and identify the *principles* on which those sentences should be based. In particular, the John Howard Society believes that:

- the principles of sentencing found within the Criminal Code are substantially correct and give sufficient and appropriate guidance to the sentencing court,
- the sentencing courts, with reviews through appeal up to the Supreme Court of Canada are competent and the only bodies capable of establishing appropriate and just sentences within the principles established by Parliament,
- there is neither need nor benefit to be derived from imposing *particularly severe sanctions in every case* for gun crimes beyond those sanctions already imposed today,
- data do not support the notion that gun crime rates are growing at alarming rates except in very particular circumstances and locations,
- research over many years shows conclusively that neither the deterrent nor incapacitative intentions of higher penalties are likely to have a significant or cost-effective impact on gun crime rates,
- the new expenditures associated with the proposed mandatory minimum sentences could be spent much more effectively to reduce crime generally, including gun crime, if directed towards preventative initiatives.

II. Do we sentence the crime or sentence the person?

A sentencing regime such as mandatory minimums has the effect of passing a sentence based on the crime alone. In effect, we sentence the crime rather than the offender. The higher the tariff required by the mandatory minimum, the more

pronounced this shift from the person to the crime as the basis of the sentence becomes. We believe that movement towards mandatory minimum sentences undermines principled and effective sentencing and generates far more problems than they can address.

Mandatory minimum sentences, while not entirely new to the Canadian Justice system, are relatively rare and for good reason. Parliament should resist the pressure to distort sentencing through arbitrary minimums.

III. The problems with mandatory minimum sentences

1. Severe mandatory minimum sentences conflict with the most important principles of sentencing

Mandatory minimum sentences, particularly when they involve long periods of incarceration are incompatible with the *Fundamental Principle of Sentencing* as set out in section 718.1 of the *Criminal Code*, that being:

A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

Mandatory minima are also inconsistent with the other *Principles of Sentencing* contained in section 718.2 of the *Criminal Code*. In particular the following principles *could not* be applied under Bill C-10:

- (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender,
- (b) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;
- (c) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and
- (d) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

2. Mandatory minimum sentences distort the meaning of "proportionality"

Those who drafted the sentencing principles in the Criminal Code knew that proportionality can only work when we try to make one *sentence* proportional to the *sentences* given for other crimes - not to the actual harm done. If crime A is more

severe than crime B then it should attract a more severe sentence up to the limits considered acceptable in a civilized society.

The reluctance to impose punishments that repeat the crime on the offender is what separates us morally from the act of the criminal. We do not want penalties proportionate to the harm suffered when such punishment is either brutal or banal. It is for these reasons that the *Criminal Code* does not define proportion solely in relation to the harm suffered by the victim.

Proportionality is achieved when the gravity of the offence, *along with the degree of responsibility* of the offender, are used to establish where a sentence should fall in relation to the *relative severity of other sentences* .

In specifying principles that stress individualized sentencing, the provisions of the *Criminal Code* clearly anticipate that we can only have proportionate sentencing where the individual circumstances of the offence and the offender are carefully considered on an individual case-by-case basis. Proportionality, as contemplated in the *Criminal Code* is *not possible* with severe mandatory minimum sentences.

3. Penalties could be arbitrary and excessive

It is self evident that sentences focussed on the individual can not be specified by Parliament. Sentencing must be done by those who hear the case - judges. Parliament cannot consider individual circumstances and without such consideration the penalty becomes arbitrary and potentially unconstitutional - particularly as the severity of the mandatory penalty increases.

This point is reflected by the Chief Justice Beverly McLachlin when the Supreme Court of Canada ruled that:

Absence of arbitrariness requires that punishment be tailored to the acts and circumstances of the individual offender.¹

Mandatory minima affect most severely the *least serious* offenders in circumstances that have the greatest mitigating circumstances while having little or no effect on the most serious offenders who would attract such sentences anyway.

Some offences using a gun are less serious in their impact than others where bare hands or other weapons are used. We think it makes more sense to sentence on the basis of the outcome of the crime and the responsibility of the offender than on the basis of the weapon that was used.

4. Penalties will likely exacerbate racial bias

Aboriginal youth in Winnipeg or young blacks in Toronto do not turn to gun crimes as an alternative to medical school or operating their own businesses. They turn to gun

crimes as an alternative to grinding poverty and the perceived lack of opportunity. If we do not address those factors that contribute to racism, alienation and poverty, no criminal justice sanction will be sufficient to deter, and no number of prison cells will be sufficient to hold, the new offenders.

Mandatory penalties fall most often on the most disadvantaged. Mandatory minima lead to increased incarceration rates of poor visible minorities and in particular Aboriginal and African-Canadians. Such sentencing practices are viewed as racist by many of those from minority communities. This only intensifies the anger and alienation they feel.

5. Confidence in the justice and political systems will decline

The Government of Canada should not take action that would promote and reinforce unfounded distrust in our judiciary. If the judicial system of courts and appeals cannot be trusted to give appropriate sentences within current principles and precedence, then it would be difficult to explain why they should be trusted in any other circumstance.

Respect for the criminal justice system will never be achieved by measures that breed distrust in our judiciary. Measures that would eliminate the discretion of the court and replace it with one that is inherently arbitrary and irrational cannot generate public confidence in either the judicial or the political systems.

If ordinary people serving on juries and competent thoughtful judges would not give sentences required under Bill C-10, then it is likely that the justice system will lose credibility as it is viewed increasingly as being premised primarily on rigid political considerations rather than judicial ones. Different penalties based on the weapon used rather than the harm done and the degree of responsibility of the offender will not make sense to the public.

6. Harsh penalties encourage more recidivism

When the impact of C-10 runs its course, the same number of gun offenders will be released each year from prison than is the case today. Having served longer sentences, those being released from our prisons will likely be much more difficult to reintegrate into society, and we will have fewer resources to either prevent crime or rehabilitate offenders. They will be more likely to offend again.

7. The introduction of new mandatory penalties will be difficult to control

Bill C-10 may open a new door to mandatory sentencing that others will follow with similar measures for whatever crime is currently catching headlines. Thanks to the escalation in the use of mandatory minima in the United States, they now have 5 to 8 times the imprisonment rate of any other western industrialized country. Canada has created a just and peaceful society with an incarceration rate that is one-seventh that of the US. We should be reluctant to adopt their approach to sentencing now.

In fact, looking to Canada for solutions appears increasingly to be the case. Criminologist Julian Roberts notes that:

... countries with some of the most severe laws for MMPs are beginning to repeal them. For example, about 25 U.S. states in the past few years have passed laws eliminating or reducing some of the lengthy MMPs, given the distortion, increased costs, and high rates of incarceration that have resulted from rigid sentencing schemes...²

8. Discretion will shift from the judge to the crown or police

The difficulty of giving mandatory sentences to those with mitigating circumstances will lead, in some circumstances, to a reduction in the charge. To address the likely increased pressure to deal with a backlog of cases bound for trial, crowns might see plea reduction as their only option. This simply makes the criminal justice process a crude and hidden one that serves to distort the evidence and sentencing process. This hidden use of discretion has been well documented in other jurisdictions. In a research paper on the use of mandatory minimum Sentences prepared for the Department of Justice Canada, Tomas Gabor concludes:

There is no evidence that either discretion or disparities are reduced by MMS [mandatory minimum sentences]. While judicial discretion in the sentencing process is reduced (not removed), prosecutors play a more pivotal role as their charging decisions become critical.³

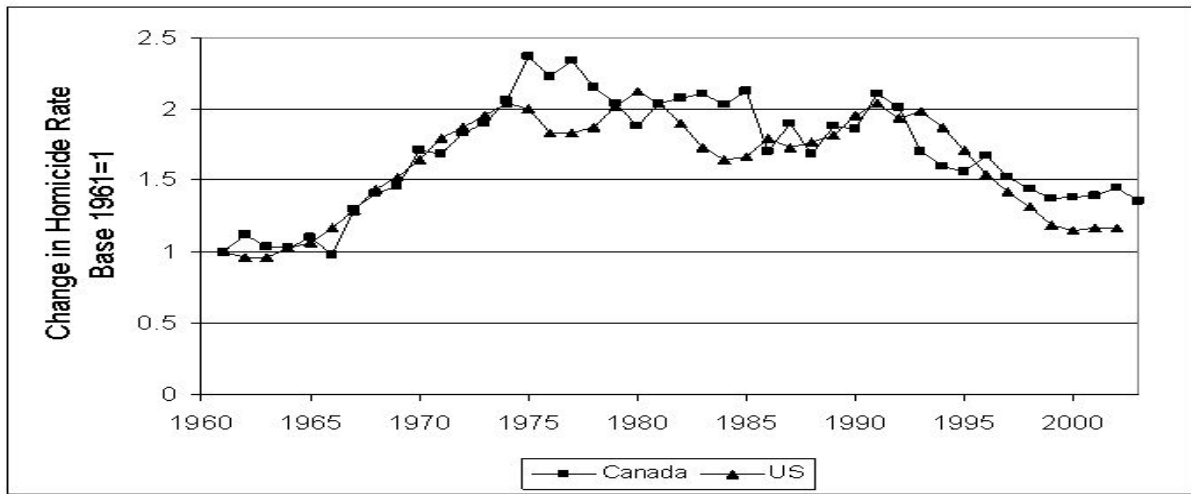
9. Canadian experience does not show that harsher penalties reduce crime

It is because of our *Principles of Sentencing* that Canada benefits from a substantially lower rate of imprisonment than the US where mandatory minima have become common. This was not always the case. Looking back 30 years, the incarceration rate in Canada at 90 (per 100,000 population) was close to that of the US at 149. Today the incarceration rate in Canada is 108 while the incarceration rate in the US has soared to 750. One might expect that if incarceration prevented crime either through deterrence or incapacitation these stark differences in incarceration rates would lead to very different crime patterns over time. In fact, this is not the case. Crime fluctuations in Canada and the US have remained surprisingly similar. Property crime is about the same between the countries while serious violent, and in particular gun crimes in the US have remained consistently much higher than the Canadian rate.

The following chart (Figure 1) shows the relative *trends* in homicide between 1961 and 2003 in Canada and the US. Please note that in order to allow for easier comparisons between the *trends* in the US and Canada the chart compensates for the fact that the actual *rate* of homicide in Canada has remained throughout this period at one-third that of the US. The similar trends suggest that:

- factors that influence homicide trends in the US and Canada are likely to have been the same, and
- The high rate of incarceration in the US appears not to have had a discernable incapacitating or deterrent impact on their homicide rates.⁴

Figure 4: Change in Homicide Rates: Canada (1961-2003) and U.S. (1961-2002)



Note: For each country, the figure plots changes from 1961. Each year's homicide rate (homicides per 100,000 residents) was divided by that country's 1961 rate (Canada, 1961 rate = 1.28; US = 4.8). Source of data: Dauvergne (2004) and Pastore and Maguire (2004).

Figure 1

Canada spends much less on incarceration per capita than the United States while maintaining a more humane society and criminal justice system.

The variation in gun crimes between cities in Canada is substantial. The fact that between and within cities there are often huge differences between neighbourhoods in rates of gun crimes cannot be explained by tougher sentencing in low crime neighbourhoods.

Figures 2 and 3 show important differences in crimes - both over time and location. The substantial differences in violent crime rates between cities across Canada can not be explained through different sentencing laws or regional practices.

The correlation between an important economic indicator like unemployment with robbery is compelling. Together, data such as these make a

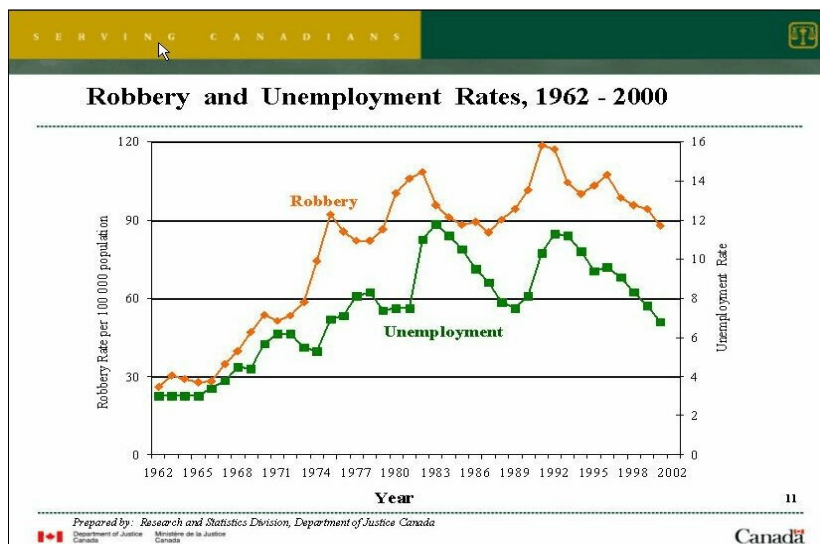


Figure 3

persuasive case for initiatives that address the strongest factors that determine crime rates - social conditions. If the intention of Bill C-10 is to reduce gun crime than it is clearly not addressing those factors that actually give rise to gun crimes and cannot be successful.

10. Most research does not support the effectiveness of mandatory minimum sentences

Academic studies that challenge the theory that harsh penalties reduce crime abound. A large scale review of the **United States** experience with enhanced sentences for gun crimes involving data from nearly all states over a 16 to 24 year period found that:

Several small-scale studies have suggested that the laws might reduce some types of gun crimes. We found that the laws produced such an impact in no more than a few states and that there is little evidence that the laws generally reduce crime or increase prison populations.⁵

In **Virginia**, state law amendments imposed mandatory minimum sentences for firearm offences as well as special grants to support the prosecution of these offences in certain participating localities. Data collected between 2000 and 2002 "indicated that levels of nearly all violent offences committed using a firearm increased in both the program localities and statewide following the program implementation".⁶

Florida State has put great effort into promoting the mandatory sentencing regime that they introduced in 1998, claiming that the decline in gun crime that followed the enactment of the legislation proved that such measures were effective. But Criminologist Alex Piquero of the University of Florida reviewed the data carefully and concluded:

Those who support the law credit it with a dramatic reduction in crime but our study shows that crime was already dropping in Florida, as it was in all states, before the law was passed.

An analysis of Florida's Index Crime statistics shows there was a greater drop in crime before the law went into effect. Between 1994 and 1998, the years before the 10-20-Life statute was passed, crime fell by 16 percent, compared with a 13 percent decline between 2000 and 2004, immediately after the law went into effect.⁷

In **California** crime trends have moved in opposite directions between young and adult offenders even though adults were subject to severe mandatory minimum sentencing provisions and much higher levels of incarceration.

According to incapacitation theory, California's enormous decline in youth imprisonment should have resulted in more criminal youth on the streets, and more juvenile offending and violence. Similarly, the rapid increase in adult incarceration following 1983 should have removed criminal adults from the public domain, resulting in lower rates of adult offending and violence.

In reality, the opposite has transpired. Compared to their respective levels 30 years ago, violent felony arrest rates for California's youth ages 10-17 are 37 percent lower as of the latest report released by the Criminal Justice Statistics Center in 2004. Over the same period, violent felony arrests for adults increased 18 percent. (Table 1.) Teen violence rates, higher than adult violence rates in 1975, are considerably lower than adult rates as of 2004. Overall, youth felony arrests have dropped 60 percent over the last three decades and now stand at their lowest level since 1955. Youth imprisonment rates, after moderate variation since 1970, have also reached an unprecedented low. Adult felony rates, on the other hand, have increased 24 percent during the period even while imprisonment rates reached consistent highs.⁸

In **Canada**, a large meta-analysis of all valid research conducted over 50 years in North America that tested the impact of sentence length and recidivism found that:

The results were as follows: type of sanction did not produce decreases in recidivism under any of the three conditions. Secondly, there were no differential effects of type of sanction on juveniles, females, or minority groups. Thirdly, there were tentative indications that increasing lengths of incarceration were associated with slightly greater increases in recidivism.⁹

Canadian criminologists Anthony Doob and Cheryl Webster published an exhaustive review of the international literature over several decades. They conclude that:

We propose acceptance of the null hypothesis that variation within the limits that are plausible in Western countries will not make a difference...Deterrence-based sentencing makes false promises to the community. As long as the public believes that crime can be deterred by legislatures or judges through harsh sentences, there is no need to consider other approaches to crime reduction.¹⁰

IV. Trends with gun crimes in Canada do not support the need for harsher punishments.

1. Homicide Trends

According to Statistics Canada:

Since 1961, when national homicide statistics were first collected, there have been two distinct trends. Following a period of stability between 1961 and 1966, the homicide rate more than doubled over the next ten years, reaching a peak of 3.03 homicide victims (per 100,000 population) in 1975. Since 1975, despite annual fluctuations, the rate has gradually declined.¹¹

2. Gun Crime Trends

By most measures, gun crime has subsided substantially in Canada over both the short and longer term. Data recently produced by Justice Canada in January 2006 show startling, and presumably reassuring trends including:

- The homicide rate in Canada dropped between 1974 and 2004 25% from 2.63 (per 100,000 of population) to 1.95 while firearm homicides dropped even further during the same period with a 54% drop from 47.2 to 27.7. (Table 10)
- Firearms used in robbery dropped between 1974 and 2004 from 26 to 12. (Table 14)
- Dramatic declines in virtually all violent crimes were recorded over the last 15 years with a combined drop from 6.5 to 2.6.¹² (Table 16)

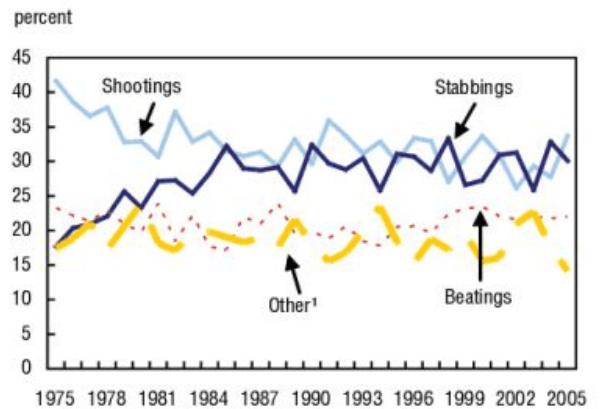
These changes are dramatic and positive. One area of concern identified in the data is that when a firearm is used, there has been a shift in recent years from rifles and shotguns to handguns. This does not suggest that crime is worse, only that handgun availability may have increased. Very recent data from Statistics Canada show that in the last two years there has been an increase in gun-related homicide in a few major centres. This change cannot be explained by different sentencing practices in those centres.

V. Conclusion

All of the above give rise to our conclusions articulated at the beginning of this brief that principled sentencing cannot be invoked through severe and arbitrary mandatory

Figure 3

Most common methods used to commit homicide, Canada, 1975 to 2005



1. Other includes strangulation, poisoning, deaths caused by fire (smoke inhalation), exposure/hypothermia, Shaken Baby Syndrome, deaths caused by vehicles, etc.

Source: Statistics Canada, Canadian Centre for Justice Statistics, Homicide Survey.

minima as proposed in Bill C-10. Neither does the evidence suggest that such measures will reduce gun-related criminal activity.

VI. Recommendation

Bill C-10 should be withdrawn and replaced with legislation that addresses those social factors that have the potential to influence rates of gun crimes.

VII. End Notes

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