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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-9

Act to amend the Criminal Code (conditional sentences of imprisonment)

The John Howard Society of Canada

September, 2006

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A. Executive Summary

In brief, it is our view that:

(a) The *Purpose and Principles of Sentencing* found within section 718 of the *Criminal Code* are substantially correct and should not be ignored or interfered with;

(b) 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; and

(c) Public confidence in conditional sentencing cannot be achieved over the longer term through measures that depend on arbitrary sentencing rules such as those proposed in Bill C-9.

Further, it is our view that:

(d) Research over many years has demonstrated that the deterrent effect of higher penalties is very unlikely to have a significant impact on crime rates in general and those subject to conditional sentences in particular;

(e) The impact will be disproportionally felt by vulnerable people based on their income, class, ethnicity, race and other factors beyond their control;

(f) The public perception of the justice system will be distorted by taking discretion from judges and placing it with crown prosectors as charges are changed to make people eligible, or not eligible, for a conditional sentence;

(g) Court proceedings and trials will become more expensive as a plea of guilty will be of no benefit in cases where the conditional sentence is no longer an option;

(h) The new expenditures associated with the proposed limits to conditional sentences will likely be substantial and produce no benefits in terms of crime reduction;

(i) Money wasted on this initiative will become a lost opportunity for other areas, such as prevention or treatment, where it could be spent much more effectively to reduce crime generally; and

(j) The considerable financial burden of trials and imprisonment that Bill C-9 will generate will fall entirely on provinces and territorial correctional systems which are already severely overcrowded and unable to operate at standards set by the United Nations.

It is our position that sentencing is an individual process that must reflect the

specifics of the offence and the offender. The courts must have a full range of options available and the discretion to chose those that are most appropriate.

Conditional sentences cannot be applied fairly or appropriately under the restrictions proposed in C-9. While some direction on the use of conditional sentences is appropriate, those limits should not undermine the good purposes of conditional sentences or unreasonably restrict the courts from using this option in appropriate situations in order to remain consistent with the *Fundamental Principles of Sentencing [s. 718.1]*.

We do not believe that inflexible sentencing provisions can make the system more appropriate, effective or principled.

It is our recommendation that Bill C-9 be withdrawn.

Measures intended to give greater guidance to the courts in the use of conditional sentences must be consistent with the *Fundamental Purpose of Sentencing* [s. 718.1 proportionality].

B. What is the John Howard Society?

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*."

C. What were conditional sentences intended to achieve?

Conditional sentences first came into effect in 1996 (C-41) and were subsequently amended in 1999 (C-51). The intent of Parliament in creating conditional sentences was:

> (a) to reduce the reliance upon incarceration by providing an alternative sentencing mechanism to the courts, and
> (b) to provide an opportunity to further restorative justice concepts into sentencing processes by encouraging those who have caused harm to acknowledge this fact and to make reparation. (MacKay 2005 pg. 1)

Both of these objectives are worthy ones. Canada relies on imprisonment heavily, the cost of incarceration is very high, the benefits of incarceration for many offenders is negative and community options are at least as effective at reducing most crime. It is noted that Bill C-9 was not intended to challenge these objectives

as a whole but to avoid the use of conditional sentences in cases that might appear to be inappropriate.

Canadian society has seen the need to create more opportunities for restorative justice approaches to crime. Restorative justice and reparation inevitably involves the community and must take place in the community. Conditional sentences are able to place a major emphasis on restorative and reparative responses in a way that would be impossible with sentences of imprisonment.

The force of the State can be mighty and brutal. Used against its own citizens, if unrestrained, it can become a tyranny. Democracies such as Canada have, therefore, held the notion of "least restrictive measure" as a fundamental value and principle that judges must comply with when sentencing. The John Howard Society of Canada supports the principle of "least restrictive measure" as being fundamental to a civilized justice system in a democratic state. This is a principle that must not be compromised by parliament through the use of arbitrary sentence enhancements.

Judicial discretion is of little value if there are no sentencing options available. Conditional sentences are an important option that should be available. With a conditional sentence the judge has many choices that can be used to craft an appropriate sentence that includes punishment, reparation and treatment.

It is because of Canada's principled approach to sentencing and, in particular, our commitment to the principle of *least restrictive measure* that Canada has benefited from a substantially lower rate of imprisonment than the US. This was not always the case. Looking back 30 years, the incarceration rates in Canada and the US were similar. Crime rates were also similar except for certain violent offences which were much higher in the US. Today the imprisonment rate in the US is *seven times* the rate in Canada while relative crime rates have remained similar over those years. Having benefited so much from this Canadian approach to sentencing, it would be foolish to now move towards the US approach to sentencing.

Parliament has long recognized the need to use the *least restrictive measure* and therefore crafted the *Principles of Sentencing* and such measures as conditional sentences in order to guide judges and provide non custody sentencing options to help ensure that incarceration is used "only when community sentencing alternatives are not adequate." (MacKay, 2005 pg. 11)

Studies have shown that conditional sentences have reduced the use of imprisonment amongst those who would otherwise be sentenced to terms of less than two years (Statistics Canada 2002). We are not aware of any evidence that the use of conditional sentences has placed the public at risk.

It is our view that Conditional sentences have achieved their intended purposes.

D. What restrictions currently apply for the use of Conditional Sentences?

Conditional Sentences were to meet their objectives by providing mechanisms that allowed for more punitive measures than would be available through probation while avoiding imprisonment. Conditional sentences could require degrees of home arrest and electronic monitoring and all require participation in treatment or reparative programs.

While judges have considerable discretion, they must sentence within statutory and judicially determined limitations. This applies to conditional sentences as much as any other form of sentencing. In particular the legislative limits of conditional sentences include:

(a) the offence must not be subject to a minimum penalty,
(b) the judge must have determined that the offence should be subject to a term of imprisonment of less than two years,
(c) serving the sentence in the community would not endanger the community, and
(d) it is consistent with the fundamental purpose and principles of sentencing as set out in the *Criminal Code*.

The existing legislated limitations, along with the substantial direction from the Supreme Court (MacKay 2005), are serious limitations. These limitations are reflected in the fact that only 6% of all cases receive one (Juristat v.24 n.12). The existing restrictions effectively avoid the use of conditional sentences in clearly inappropriate situations while avoiding rigid and arbitrary measures that conflict with the Principles of Sentencing.

E. The problems created by C-9

1. Maximum sentence terms are not an effective or appropriate criteria for conditional sentences.

> *...there are two quite separate problems with the current maximum penalties: they are **unrealistic**, and in most cases too high. Any serious guidance they might give the sentencing judge or the public is lost. Second, they are **disorderly**: the relationship between the seriousness of the offences and their maxima is inconsistent. Little guidance for anyone can be expected from these maxima.*
> [emphasis added]
> (The Canadian Sentencing Commission, 1987 p. 64)

There are many examples where maximum sentences defy any rational explanation. For instance, the following table sets out some offences where the current maxima would make the

10 year cut off for conditionals sentences unfair and irrational. Sentencing that is based on a system that the Canadian Sentencing Commission characterized as "unrealistic" and "disorderly" is tantamount to a complete disregard for fairness and proportionality.

Conditional Sentence Eligibility			
Eligible (maximum less than 10 years)	Max. (yrs)	**Not eligible** (maximum 10 years or greater)	Max. (yrs)
Failing to provide the necessaries of life to a child under 16 [215] (hybrid)	2	Theft over $5000 [322 & 334(a)]	10
Abandoning child [218] (hybrid)	2	Public servant failing to deliver property [337]	14
Infanticide [233/237]	5	Theft of computer services [342.1(1)]	10
Obtaining valuable security through fraud [363]	5	Theft of credit card [342(1)(e)] (hybrid)	10
Falsification of books and documents [397]	5	Break and enter - non dwelling (s. 348 (1) (e) - dwelling [348 (1) (d)]	 14 Life
Criminal breach of contract with probable consequences of endangering human life or causing serious bodily injury [422] (hybrid)	5	Possession of stolen property over $5000 [354/355]	10
Abduction of person under 16 [280 (1)]	5	Possession of break-in instruments [351 (1)]	10
Fraudulent sale of real property [387]	2	Uttering forged documents [368 (1)] (hybrid)	10
Using mails to defraud [381]	2	Theft from mail [356 (1) (b)]	10

As evidenced by the previous table, maximum penalties in Canada were never designed to be used in the fashion contemplated in Bill C-9. They are considered of little use to the courts and seldom influence sentencing because of their inconsistent nature (Sentencing Commission, 1987).

On its face alone, such limits to conditional sentencing are irrational, arbitrary and intuitively wrong. Few Canadians would agree that a person who abandons a child under the worst conceivable circumstances could be eligible for a conditional sentence while there would be no circumstances where a person convicted of possession of break-in instruments would be eligible.

2. C-9 will conflict with the most important *Principles of Sentencing*.

The proposal to restrict conditional sentences to offences with a maximum term of less than 10 years is clearly 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.*

The provisions proposed in Bill C-9 are also inconsistent with several other *Principles of Sentencing* contained in section 718.2 of the *Criminal Code* and in particular:

> *(a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender,*
>
> ...
>
> *(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.*

The best way to rationalize the use of sanctions, including conditional sentences, is by having the sentence set through a competent and informed judicial system. We have such a system in Canada and should not replace it with crude legislative barriers to good sense.

To be consistent with the *Principles of Sentencing,* any new measures enacted by Parliament to address the use of conditional sentencing must provide for judicial discretion.

3. C-9 distorts the principle 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.

While penalties will be greater or less than the penalties given for other crimes, they will almost never be "equal" to the harm done - if that is even possible to measure. For instance, at the lowest end of the spectrum, the public would not

consider a $1 fine for the theft of a $1 chocolate bar to be sufficient even though it could be considered to be "proportionate". We do not want proportionate penalties to the harm suffered in minor crimes because we feel that such penalties are too weak to be seen as a serious consequence.

At the other end of the crime spectrum, society is unwilling to accept a penalty that would result in an offender being paralysed when the crime involved a negligent driver who left another person paralysed. The reluctance to impose punishments that repeat the crime on the offender is what separates us morally from the act of the criminal.

Canadians do not want penalties proportionate to the harm suffered when such punishment is either brutal or banal. It is for these reasons that the *fundamental principle of sentencing* in 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 and principled sentencing where the individual circumstances of the offence and the offender are carefully considered on an individual case-by-case basis.

> *Absence of arbitrariness requires that punishment be tailored to the acts and circumstances of the individual offender.*
>
> (**McLachlin C.J.**, Chief Justice, Supreme Court of Canada. Sauvé v. Canada (Chief Electoral Officer) 2002 SCC 68.)

The John Howard Society of Canada believes that the Principles of Sentencing lead logically, and in practice, to sentences that become increasingly more punitive as the offence is more serious.

4. Confidence in the justice and political system may decline.

The few cases that appear, on the surface, to violate the existing restrictions on the use of conditional sentencing have been used to breed distrust in our judiciary. The Government of Canada should not take action that would confirm that unfounded distrust. If the judicial system of courts and appeals cannot be trusted to give conditional sentences within current criteria, then it would seem 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 reflect distrust. 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.

5. Discretion will shift from the open court to the Crown.

The ineligibility of individuals for conditional sentences where the circumstance would otherwise warrant such a sentence will lead, in some circumstances, to a reduction in the charge. In some cases this may occur by the Crown electing to proceed summarily, when this is an option. Alternatively, they might decide to reduce the charge to one that is eligible for a conditional sentence. 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. On the other hand, a crown might charge an individual with a more serious offence for which a conditional sentence is not available as a means to pressure the accused to enter a plea of guilty to the lesser charge.

Relying on crown discretion simply makes the process a crude and hidden one that serves to distort the evidence and sentencing process. This phenomenon has been well documented with mandatory minimum sentences and there is no reason why it would not occur in the case where imprisonment is the only option.

> *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.* (Gabor 2002 pg.31)

6. C-9 penalty inflexibility will ensure class bias.

The class bias is quite clear in the above table of eligible and ineligible offences. Aboriginal youth in Winnipeg or young blacks in Toronto do not turn to real estate fraud when they commit offences. On the other hand, middle class people never get charged with possession of break-in instruments. The fact that the latter charge is never eligible for a conditional sentence while the former charge is eligible demonstrates the problem with relying on maximum terms without judicial discretion being permitted.

The marginalised often turn to crimes as an alternative to grinding poverty and the perceived lack of opportunity. If we treat their offences harshly while turning a blind eye to the opportunistic crimes of the other classes then their respect for the law can only decline.

Mandatory imprisonment will fall most often on the most disadvantaged. We will see increased incarceration rates of the poor, visible minorities and in particular

Aboriginal and African-Canadians. The proposed limitations on access to conditional sentences, as set out in C-9, are in effect a class-biassed mandatory minima. This only intensifies the anger and alienation they feel.

7. Costs of provincial and territorial imprisonment will escalate while overcrowding will worsen.

Only those who were deserving of prison terms of less than two years could be given a conditional sentence. Eliminating this option for some offenders will result in them being sentenced to provincial prisons and the costs of that incarceration will, therefore, be borne entirely by provincial and territorial governments. In addition, disqualification for conditional sentences is likely to result in more and longer trials. Remand centres in Canada are often grossly overcrowded now and those held in custody awaiting trial are held for long terms under horrible circumstances.

Statistics Canada reports that a conditional sentence was passed in over 10,000 criminal code cases in 2003/04 (Statistics Canada 2004). Of these, 34% were crimes against the person. Many of these as well as many crimes against property (39% of Criminal Code offences) would be excluded from a conditional sentence under the provisions of Bill C-9.

If C-9 resulted in 3000 prison stays (including remand and sentence) of one year on average, provinces and territories would need to build six large 500-bed institutions just to hold the additional detainees. More likely, we may be forced to hold our prisoners in much more crowded circumstances than those that exist now. Either way, this is an enormous cost to pay to incarcerate those who are not a risk to the community and demonstrate the greatest likelihood of rehabilitation.

NOVA SCOTIA LOOKS INTO BUILDING BIGGER FACILITIES – Halifax Chronicle-Herald/Fredericton Daily Gleaner/Moncton Times & Transcript/CP/Broadcast News – 06/09/01

Nova Scotia Justice Minister Murray SCOTT said yesterday that the provincial government is looking to build bigger correctional facilities to handle a potential influx of inmates as a result of proposed federal legislation to crack down on crime. "We really believe in our province here that as a result of those initiatives, there are going to be a lot more remands, so that puts a lot of pressure on our provincial facilities," said Scott. The province is hiring a consultant to design and estimate costs of a 50-bed and a 100-bed facility.

Quennell pans crime measures
Ottawa not in synch with consensus reached by provincial ministers - Janet French, The StarPhoenix; with files from Canadian Press Published: Friday, May 05, 2006

...The result will likely be more prisoners on remand and serving sentences in provincial correctional centres while the Saskatchewan taxpayer foots the bill, he said.

... In response to the Commission on First Nations and Metis Peoples and Justice Reform report released in 2004, the Saskatchewan government committed to reducing the number of aboriginals in jail, Quennell said.

"Steps like this may push the other way," he said.

The proposed legislation comes as the Saskatoon Correctional Centre struggles to accommodate an overflow of prisoners. Last week, the correctional centre had 42 more inmates than it was built to house. Inmates were sleeping in the gym and some family visits had been cancelled.

F. Recommendation: Withdraw Bill C-9.

Bill C-9 should be withdrawn.

Measures intended to give greater guidance to the courts in the use of conditional sentences must be consistent with the *Fundamental Purpose of Sentencing* [s. 718.1 proportionality].

References

Canadian Sentencing Commission, Sentencing Reform in Canada: A Canadian Approach, Canada 1987 p. 64

Gabor, T and Crutcher, N *Mandatory Minimum Penalties:Their Effects on Crime, Sentencing Disparities, and Justice System Expenditures*, Carleton University, Research and Statistics Division, January 2002 pg. 31. http://www.justice.gc.ca/en/ps/rs/rep/2002/rr2002-1a.pdf#search=%22Gabor%20%22MANDATORY%20MINIMUM%20PENALTIES%22%22)

MacKay, Robin, Conditional Sentences, Library of Parliament, Parliamentary Information and Research Service, December 21, 2005.

Statistics Canada, Centre for Justice Statistics, *Adult Criminal Court Statistics, 2003/04*, Juristat, v.24 n.12, Catalogue no. 85-002-XPE, 2004

Statistics Canada, Centre for Justice Statistics, *Highlights of the Conditional Sentencing Special Study*, Catalogue No. 85F0027XIE, June 2002